(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by cracks on both sides of the airplane in the station (STA) 1640 frame web between stringer S–14 and S–15. The FAA is issuing this AD to address liner holes that could create a stress concentration around the holes and lead to cracks. The unsafe condition, if not addressed, could result in the inability of a structural element to sustain limit load and could adversely affect the structural integrity of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022. Actions identified as terminating action in Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, terminate the applicable required actions of this AD, provided the terminating action is done in accordance with the Accomplishment Instructions of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 757–53A0120, dated January 17, 2022, which is referred to in Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022.

(h) Exceptions to Service Information Specifications

(1) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, refer to the original issue date of Requirements Bulletin 757–53A0120 RB, this AD requires using the effective date of this AD.

(2) Where Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, specifies contacting Boeing for repair instructions: This AD requires doing the repair before further flight using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(3) For airplanes that have been modified in accordance with supplemental type certificate (STC) ST01518SE, with or without blended or scimitar blended winglets installed: This AD requires all compliance times and repetitive intervals required by this AD, as specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, to be divided by a factor of 2.

(4) For airplanes identified as Group 1 in Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, that have been converted from a passenger to freighter configuration with VT Mobile Aerospace Engineering (MAE) STC ST03562AT: This AD requires compliance with all applicable actions and compliance times specified for Group 3 airplanes.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to *AMOC@FAA.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520, Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Wayne Ha, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562–627–5238; email: *Wayne.Ha@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the address specified in paragraph (k)(3) of this AD.

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022.

(ii) [Reserved]

(3) For Boeing material, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.*

Issued on March 29, 2024.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2024–09338 Filed 4–30–24; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 23 and 37

RIN 3038–AF34

Swap Confirmation Requirements for Swap Execution Facilities

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

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

DATES: This rule is effective May 31, 2024.

FOR FURTHER INFORMATION CONTACT: Roger Smith, Associate Chief Counsel, (202) 418–5344, *rsmith@cftc.gov,* Division of Market Oversight, Commodity Futures Trading Commission, 77 West Jackson Blvd., Suite 800, Chicago, Illinois 60604.

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I. Background

A. Regulatory History: The Part 37 Rules

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the Commodity Exchange Act (CEA or Act) by adding section 5h, which establishes registration requirements and core principles for SEFs.[1] The Commission implemented CEA section 5h by adopting part 37 of its regulations, which, among other things, sets forth operational requirements for SEFs and establishes various requirements for the trading of swaps on SEFs.[2] As part of the implementing SEF regulations, the Commission adopted § 37.6(b), which requires a SEF to provide each counterparty to a swap transaction that is entered into on or pursuant to the rules of the SEF—whether cleared or uncleared—with a written record of all of the terms of the transaction, ''which shall legally supersede any previous agreement and serve as a confirmation of the transaction.'' [3] Pursuant to § 37.6(b), the confirmation of all terms of the transaction must take place at the same time as execution, subject to a limited exception for certain information related to accounts included in bunched orders.[4]

In November 2018, the Commission issued a comprehensive proposal to amend the SEF regulatory framework.[5] In the 2018 SEF Proposal, the Commission proposed to amend § 37.6(b) to establish separate swap transaction documentation requirements for cleared and uncleared swaps.[6] For uncleared swap transactions, the Commission proposed to amend § 37.6(b) to require a SEF to provide the counterparties to the transaction with a ''trade evidence record'' that would memorialize the terms of the transaction agreed upon between the counterparties on the SEF.[7] Under the 2018 SEF Proposal, a ''trade evidence record'' was defined as a legally binding written documentation (electronic or otherwise) that memorializes the terms of a swap transaction agreed upon by the counterparties and legally supersedes any conflicting term in any previous agreement (electronic or otherwise) that relates to the swap transaction between the counterparties.[8] In 2021, the Commission withdrew the unadopted portions of the 2018 SEF Proposal,[9] including the proposed amendments to § 37.6, from further consideration.[10]

Pursuant to section 731 of the Dodd-Frank Act, which added section 4s(i) to the CEA,[11] the Commission has adopted regulations to prescribe documentation standards for swap dealers (SDs) and major swap participants (MSPs) related to the timely and accurate confirmation, processing, netting, documentation, and valuation of swaps. The Commission adopted § 23.501 to specifically address swap confirmation requirements for SDs and MSPs, including for those swaps executed on a SEF or designated contract market (DCM).[12] Among other things, § 23.501 provides that any swap transaction executed on a SEF or DCM shall be deemed to satisfy the swap confirmation requirements set forth in § 23.501, provided that the rules of the SEF or DCM establish that confirmation of all terms of the transaction shall take place at the same time as execution.[13]

B. Summary of Amendments to § 37.6

During the implementation of part 37, SEFs informed the Commission that the confirmation requirement for uncleared swaps under § 37.6(b) was operationally and technologically difficult and impractical to implement. As discussed more fully below, Commission staff from the Division of Market Oversight (DMO) acknowledged these technological and operational challenges and provided no-action positions for SEFs with respect to certain provisions of the Commission's regulations related to uncleared swap confirmations.[14] In particular, DMO most recently issued CFTC No-Action Letter No. 17–17 (NAL No. 17–17), which provides a no-action position with respect to the obligation to obtain copies of underlying, previously negotiated agreements between the counterparties, as discussed in greater detail below, for a SEF that seeks for uncleared swaps to satisfy the confirmation requirement in § 37.6(b) by incorporating by reference terms of such underlying agreements.[15]

On August 25, 2023, the Commission released a proposal [16] to amend its SEF regulations related to uncleared swap confirmations to address issues which have been addressed in staff no-action letters, including most recently NAL No. 17–17. In particular, the Commission proposed to amend § 37.6(b) to enable SEFs to incorporate terms of underlying, previously negotiated agreements between the counterparties by reference in an uncleared swap confirmation without being required to obtain such underlying, previously negotiated agreements. Further, the Commission proposed to amend § 37.6(b), which currently requires confirmation of all terms of a swap transaction to ''take place at the same time as execution,'' to require such confirmation to take place ''as soon as technologically practicable'' after the execution of the swap transaction on the SEF for both cleared and uncleared swap transactions. The Commission also proposed to amend § 37.6(b) to make clear that the SEF-provided confirmation under § 37.6(b) shall legally supersede any *conflicting terms* in a previous agreement, rather than the entire agreement. In addition, the Commission proposed to make conforming amendments to

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[1] 7 U.S.C. 7b–3.

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

[3] 17 CFR 37.6(b).

[4] 17 CFR 37.6(b). Specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a SEF if the applicable requirements of 17 CFR 1.35(b)(5) are met.

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

[6] *Id.*

[7] *Id.* at 62096.

[8] *Id.* at 61973; 62067.

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

[10] *See* Swap Execution Facilities and Trade Execution Requirement, 86 FR 9304 (Feb. 12, 2021).

[11] 7 U.S.C. 6s(i).

[12] 17 CFR 23.501(a)(4)(i).

[13] *Id.*

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

[15] *See* NAL No. 17–17. Upon the effective date of the amendments set forth herein, NAL No. 17–17 will expire pursuant its terms. In particular, NAL No. 17–17 states that the no-action position ''shall expire on the effective date of any changes [to § 37.6(b)].'' *See Id.* at 5.

[16] Swap Confirmation Requirements for Swap Execution Facilities, 88 FR 58145 (Aug. 25, 2023) (the Proposal).

§ 23.501(a)(4)(i) to correspond with the proposed amendments to § 37.6(b). Finally, the Commission proposed to make certain non-substantive amendments to § 37.6(a) and (b) to enhance clarity.

The Commission received four relevant comment letters regarding the Proposal.[17] After considering the comments, the Commission is adopting the rule amendments described herein as proposed. The Commission believes the amendments will reduce administrative burdens for SEFs and market participants, address technological and operational challenges, reduce the cost of SEFs' compliance with the confirmation requirement in § 37.6(b), and lead to a more effective regulatory framework for SEF swap confirmations.

C. Consultation With Other U.S. Financial Regulators

In developing these rule amendments, the Commission has consulted with the Securities and Exchange Commission (SEC), pursuant to section 712(a)(1) of the Dodd-Frank Act.[18]

II. Amended Regulations

A. § 37.6—Enforceability

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

a. Proposed Regulations

Section 37.6(b) requires a SEF to provide each counterparty to a swap transaction that is entered into on or pursuant to the rules of the SEF, whether cleared or uncleared, with a ''confirmation''—a written record that contains all of the terms of the transaction—at the time of execution.[19] The terms of a swap transaction include economic terms that are specific to the transaction, *e.g.,* swap product, price, and notional amount, and can also include non-specific ''relationship terms'' that generally govern all transactions between two counterparties—including, for example, relationship-level default, margin, or governing law provisions.

For uncleared swap transactions,[20] the Commission is aware that many relationship terms that may govern certain aspects of the transaction are often negotiated and agreed upon in written documentation between the counterparties prior to execution.[21] The Commission previously stated that, for purposes of satisfying the requirements of § 37.6(b), a SEF's confirmation terms for uncleared swap transactions may incorporate by reference relevant terms set forth in such underlying agreements, as long as those agreements have been submitted to the SEF prior to execution.[22] As applied, § 37.6(b) requires that the SEF incorporate this documentation by reference into the issued confirmation, which is intended in part to provide SEF participants with legal certainty with respect to the terms of uncleared swap transactions.[23]

The requirement that the underlying agreements be submitted to the SEF prior to execution has, however, created impractical burdens for SEFs. Based upon feedback from SEFs, the Commission understands that SEFs have encountered many issues in trying to comply with the requirement, including high financial, administrative, and logistical burdens in order to collect and maintain bilateral transaction agreements from many individual counterparties. SEFs have stated that they are unable to develop a cost-effective method to request, accept, and maintain a library of every relevant previous agreement between counterparties.[24] SEFs have also noted that the potential number of previous agreements is considerable, given that SEF counterparties often enter into agreements with many other parties and may have multiple agreements for different asset classes.[25]

Commission staff from DMO has acknowledged these technological and operational challenges and has accordingly granted no-action positions, most recently in NAL No. 17–17.[26] Based on these no-action positions, many SEFs have incorporated by reference applicable relationship terms from previously negotiated underlying agreements between counterparties in confirmations for uncleared swaps, without obtaining copies of these agreements prior to the execution of a swap and without maintaining copies of such underlying agreements on an ongoing basis.[27]

Based on its experience with the part 37 implementation, in the Proposal the Commission acknowledged that cleared and uncleared swap transactions raise different issues with respect to

[17] The following entities submitted relevant comment letters: Bloomberg SEF LLC (BSEF); Cboe SEF, LLC (Cboe SEF); the International Swaps and Derivatives Association (ISDA); and the Wholesale Markets Brokers' Association, America (WMBAA).

[18] Dodd-Frank Act, Public Law 111–203, tit. VII, section 712(a)(1), 124 Stat. 1376 (2010). On November 2, 2023, the SEC adopted final rules for security-based swap execution facilities (SB SEFs). *See* Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities, 88 FR 87156 (December 15, 2023) (SEC SB SEF Final Rules). As part of the SEC SB SEF Final Rules, the SEC adopted SEC rule 242.812 (SB SEF Rule 812), which was modelled after existing § 37.6 with some modifications. In particular, SB SEF Rule 812 will require an SB SEF to as soon as technologically practicable after the time of execution of a transaction entered into on or pursuant to the rules of the facility, provide a written record to each counterparty of all of the terms of the transaction that were agreed to on the facility, which shall legally supersede any previous agreement regarding such terms. *Id.* at 87294. WMBAA in its comment letter on the Proposal encouraged the SEC to adopt the changes the Commission had proposed in the Proposal. WMBAA at 3. The Commission notes that the SEC SB SEF rules are outside of the scope of this rulemaking. As such, WMBAA's comment is not addressed further in this rulemaking.

[19] 17 CFR 37.6(b). *See also* 17 CFR 23.500(c) (providing a similar definition of ''confirmation'' that is applicable to SDs and MSPs).

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

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

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

[23] To ensure that the SEF confirmation provides legal certainty, the Commission has stated that counterparties choosing to execute a swap transaction on or pursuant to the rules of a SEF must have all terms, including possible long-term credit support arrangements, agreed to no later than execution, such that the SEF can provide a written confirmation inclusive of those terms. *See* SEF Core Principles Final Rule at 33491.

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

[25] *Id.*

[26] *See supra* note 14.

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

confirmation requirements[28] and that the current § 37.6(b) requirements create difficulties for the latter type of swap transaction. As such, the Commission proposed to amend § 37.6(b) by adding § 37.6(b)(1) to permit SEFs to incorporate relevant terms from underlying, previously negotiated agreements by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements.[29]

b. Public Comments

All of the relevant comments the Commission received supported the proposal to permit SEFs to incorporate relevant terms from underlying, previously negotiated agreements by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements.[30]

WMBAA commended the Commission for ''recognizing the practical complexities faced by market participants with respect to complying with'' the requirement that the underlying agreements be submitted to the SEF prior to execution.[31] WMBAA stated that it believes that codifying the relevant no-action position in NAL No. 17–17 ''into the regulatory framework through the [Proposal] is a prudent and necessary step forward.'' [32] Further, WMBAA stated that the Proposal ''will not only provide legal clarity but also maintain the integrity and efficiency of the uncleared swap market.'' [33] WMBAA also stated that ''codifying the no-action relief will align the regulatory framework with the industry's current practices, promoting consistency and reducing compliance burdens.'' [34]

ISDA stated that it ''strongly support[s] the Commission's proposal to codify its current no-action position that relieves [SEFs] of the obligation to obtain copies of underlying, previously negotiated agreements between trade counterparties, and that enables SEFs to incorporate such terms by reference when issuing swap confirmations.'' [35]

In support of the Proposal, Cboe SEF noted that ''[c]ollecting underlying, previously negotiated agreements is operationally and technologically difficult and impractical—nor is there any benefit to doing so when a SEF and the Commission may request those documents from SEF participants at any time.'' [36]

WMBAA specifically expressed support for not incorporating certain conditions of NAL No. 17–17 into § 37.6(b), in particular the conditions requiring ''(1) participants to provide copies of the underlying previously negotiated freestanding agreements to the SEF on request; and (2) the SEF to request from participants the underlying previously negotiated freestanding agreements on request from the CFTC and requiring the SEF to furnish such documents to the CFTC as soon as they are available.'' [37]

Question 1 of the Proposal asked whether the Commission should ''allow a SEF to issue a confirmation for an uncleared swap transaction that does not . . . include all the terms of the transaction, for example by only including in the confirmation the terms agreed to on the SEF?'' [38] In response to this question, Cboe SEF stated its belief ''that the Commission's current practice (as codified in the Proposal) is the best manner for providing confirmations for an uncleared swap transaction.'' [39] In particular, Cboe SEF explained that it lists foreign-exchange non-deliverable forwards [40] and that ''[g]iven the over-the-counter nature of the FX NDF market, it is critical to be able to incorporate by reference such industry definitions, templates, etc. as well as the

[28] *See supra* note 20.

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

[30] BSEF at 1, Cboe SEF at 1, ISDA at 1, and WMBAA at 2, 4.

[31] WMBAA at 2.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] ISDA at 1.

[36] Cboe SEF at 1.

[37] WMBAA at 2–3.

[38] The Proposal at 58149.

[39] Cboe SEF at 1.

[40] Cboe SEF explained that it issues confirmations that ''incorporate by reference the terms of the underlying previously-negotiated freestanding agreements (including, without limitation, master agreement, master confirmation agreement and incorporated industry definitions) between the parties governing the Transaction (Master Agreement).'' Further, Cboe SEF explained that the confirmations it issues ''incorporate by reference the terms set forth on the Template Terms for Non-Deliverable FX Transactions in respect of the relevant CCY Pair as recommended by the Emerging Markets Traders Association and in effect as of the Trade Date of the Transaction (NDF Template Terms).'' Finally, Cboe SE noted that its rulebook ''provides that in the event of any inconsistency between the NDF Template Terms and the terms of the Master Agreement, the terms of the Master Agreement will prevail.'' Cboe SEF at 1–2.

counterparties' separately negotiated underlying agreements.'' [41] Therefore, Cboe SEF stated its belief that ''it is best for the Commission to not permit uncleared swap confirmations to exclude terms from underlying, previously-negotiated freestanding agreements.'' [42]

c. Commission Determination

The Commission is adopting, as proposed and as supported by commenters, new § 37.6(b)(1) to permit SEFs to incorporate relevant terms from underlying, previously negotiated agreements by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements.[43] The Commission believes, following staff's observation of SEFs and market participants operating under the existing no-action position in NAL No. 17–17 and precursor no-action letters, that new § 37.6(b)(1) would not compromise the legal certainty of confirmations issued by SEFs for uncleared swap transactions, as the previously negotiated agreements that are referred to in the confirmation are in effect at the time of the trade. Therefore, § 37.6(b)(1) is an appropriate alternative for SEFs to comply with the confirmation requirement under § 37.6(b), as it applies to uncleared swaps.

The Commission believes that § 37.6(b)(1) will address technological and operational challenges that have prevented SEFs from fully complying with § 37.6(b), as it will permit SEFs to incorporate relevant terms from underlying, previously negotiated agreements by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements before execution. The Commission believes that § 37.6(b)(1) will reduce logistical, administrative, and financial burdens for SEFs, who will not be required to obtain and maintain a library of every relevant previously negotiated agreement between counterparties, and will also reduce such burdens for market participants themselves, who will not be required to submit to a SEF all of their relevant underlying documentation with other potential counterparties on the SEF.

The Commission agrees with WMBAA that adopting § 37.6(b)(1), which codifies the existing no-action position in NAL No. 17–17, will align the regulatory framework for swap confirmations with the market's current practices, promoting consistency and reducing compliance burdens.[44] As more fully discussed below, the Commission expects that § 37.6(b)(1) will reduce the cost of SEFs' compliance with the confirmation requirement in § 37.6(b).

The Commission agrees with Cboe SEF that uncleared swap confirmations should not exclude terms from underlying, previously-negotiated agreements.[45] As such, the Commission is not changing the existing standard in § 37.6(b) that the confirmation include all of the terms of the transaction, including the terms from underlying, previously-negotiated agreements that are incorporated by reference into the confirmation.

In order to avail themselves of the no-action position under NAL No. 17–17, SEFs must have rules in their rulebooks that, among other things, require: [46] (1) participants to provide copies of the underlying previously negotiated freestanding agreements to the SEF on request; and (2) the SEF to request from participants the underlying previously negotiated freestanding agreements on request from the Commission and the SEF to furnish such documents to the Commission as soon as they are available.[47] The Commission believes that the existing requirements for SEFs under the CEA and the Commission's part 37 regulations sufficiently account for these conditions of NAL No. 17–17, such that these conditions do not need to be incorporated as specific conditions of new § 37.6(b)(1).

In particular, SEF Core Principle 5 and the implementing part 37 regulations require, among other things, that a SEF establish and enforce rules that will allow the SEF to obtain any necessary information to perform any of the functions described in section 5h of the Act; establish and enforce rules that will allow the SEF to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under part 37; have rules that allow for its examination of books and records kept by the market participants on its facility; and provide information to the Commission on request.[48] The Commission believes that, pursuant to these requirements and as necessary to carry out its statutory and regulatory functions, a SEF has the ability and authority to request copies of the underlying agreements that are incorporated by reference into a confirmation for an uncleared swap transaction and to provide such agreements to the Commission upon request.[49] The Commission notes that this position is supported by public comment.[50]

Therefore, for the reasons stated above, the Commission is adopting as proposed new § 37.6(b)(1) to permit SEFs to incorporate underlying, previously negotiated agreements between counterparties by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements.[51]

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

a. Proposed Regulations

Section 37.6(b) requires that confirmation of all the terms of a swap transaction entered into on or pursuant to the rules of a SEF must take place at the same time as execution, except for a limited exception for certain information related to accounts included in bunched orders.[52] The Commission proposed to amend this timing requirement and instead require confirmation of all the terms of a swap transaction ''as soon as technologically practicable'' after the execution of the swap transaction on the SEF.

b. Public Comments

Commenters supported amending § 37.6(b) to require confirmation of all the terms of a swap a transaction ''as soon as technologically practicable'' after the execution of the swap transaction on the SEF.[53] WMBAA

[41] *Id.* at 2.

[42] *Id.*

[43] BSEF at 1, Cboe SEF at 1, ISDA at 1, and WMBAA at 2, 4.

[44] WMBAA at 2.

[45] Cboe SEF at 2.

[46] *See also* note 29, *supra.*

[47] *See* NAL No. 17–17 at 4.

[48] 7 U.S.C. 7b–3(f)(5); 17 CFR 37.500–503.

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

[50] *See* WMBAA at 2–3 and Cboe SEF at 1. For example, Cboe SEF notes that ''[c]ollecting underlying, previously negotiated agreements is operationally and technologically difficult and impractical—nor is there any benefit to doing so when a SEF and the Commission may request those documents from SEF participants at any time.''

[51] As noted above, upon the effective date of the rules contained herein, NAL No. 17–17 will expire per its terms. *See supra* note 15.

[52] 17 CFR 37.6(b). Specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a SEF if the applicable requirements of § 1.35(b)(5) are met. *See* 17 CFR 1.35(b)(5), which provides that specific customer identifiers for accounts included in bunched orders executed on DCMs or SEFs need not be recorded at time of order placement or upon report of execution if the requirements set forth in § 1.35(b)(5)(i)–(v) are met.

[53] ISDA at 2 and WMBAA at 2.

stated that it believed that this amendment ''acknowledges the need for flexibility in the uncleared swap confirmation process, while accommodating technological constraints.'' [54]

Similarly, ISDA noted that this amendment, as ''correctly pointed out by the Commission,'' is ''necessary to account for block trades that are executed outside of the SEF's trading system or platform, but pursuant to the rules of the SEF—and the SEF is therefore unaware of the execution until the counterparties report the trade of the SEF.'' [55]

BSEF stated that it supports the Commission clarifying the timing for confirmations of block trades.[56]

c. Commission Determination

The Commission agrees with commenters and, as proposed, is amending § 37.6(b) to require confirmation of all the terms of a swap transaction ''as soon as technologically practicable'' after the execution of the swap transaction on the SEF.[57] The Commission believes that the amended standard—''as soon as technologically practicable'' after execution—will continue to promote the Commission's goals of providing swap counterparties with legal certainty in a prompt manner, while also being consistent with other Commission requirements related to swap confirmations.[58]

For a block trade that is executed ''away from'' a SEF,—*i.e.,* outside of the SEF's trading system or platform, but still ''pursuant to the rules'' of the SEF for purposes of the § 37.6(b) confirmation requirement—a SEF would be unaware of the execution of the trade until the counterparties report the trade details to the SEF. From a temporal perspective, the SEF would consequently be unable to confirm all terms of the block trade at the same time as execution. The Commission agrees with ISDA that amending the timing standard in § 37.6(b) will account for block trades that are executed outside of the SEF's trading system or platform, but pursuant to the rules of the SEF.[59]

The Commission believes that the amended standard reflects existing SEF capabilities while maintaining the Commission's goal of providing swap counterparties with legal certainty for transactions. Given the Commission's understanding that SEFs are complying with the ''at the same time as execution'' timing standard in existing § 37.6(b) for non-block swap transactions or block transactions executed on the SEF, the Commission expects that the impact of the ''as soon as technologically practicable'' timing standard for confirmations for such swap transactions will not be substantive.[60] Rather, the amendment will take into account practical realities for confirming block trades executed away from the SEF but pursuant to the rules of the SEF, while ensuring that confirmation for all SEF-executed trades takes place in as prompt a manner as possible.

Therefore, the Commission is adopting, as proposed, amendments to the timing standard in § 37.6 to require a SEF to confirm the terms of a swap transaction ''as soon as technologically practicable'' after the execution of the swap transaction on the SEF.

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

a. Proposed Regulations

The Commission proposed to amend § 37.6(b) to make clear that the terms of a swap confirmation issued by a SEF shall legally supersede *any conflicting terms of* a previous agreement (*emphasis added*).[61]

b. Public Comments

Commenters generally supported amending § 37.6(b) to make clear that the terms of a swap confirmation issued by a SEF shall legally supersede *any conflicting terms* of a previous agreement (*emphasis added*).[62]

ISDA was ''supportive of the Commission's proposal to make clear that SEF-provided confirmations shall legally supersede any conflicting terms in a previous agreement, rather than the entire agreement.'' [63] ISDA stated that it believes that ''[s]uch an approach strikes the right balance between ensuring that the terms agreed to on the SEF are enforceable, while at the same time, also acknowledging the various documentation and agreements that underlie swap agreements.'' [64]

WMBAA stated that it ''supports the amendment to regulation 37.6(b) to clarify that the SEF-provided confirmation shall legally supersede any conflicting terms in a previous agreement. This clarification appears essential in maintaining certainty in swap transactions, reducing legal uncertainties, and streamlining the confirmation process.'' [65]

While BSEF stated that it believes that ''[t]he proposed amendment to 37.6(b) is sufficiently clear that the terms of a swap confirmation issued by a SEF shall legally supersede any conflicting terms of a previous agreement,'' BSEF stated that ''the Commission should also clarify that the rules of the SEF shall also legally supersede, with respect to the transaction, any conflicting terms of a previous agreement, whether or not specifically addressed in the confirmation.'' [66]

Specifically, BSEF stated that ''to the extent there is anything in the rules of the SEF that conflicts with the terms of any previous agreement, the SEF rulebook would govern the transaction and supersede the previous agreement.'' [67] BSEF stated that it believes that such an approach ''provides additional clarity that both the rules of the SEF and the specific terms stated in the swap confirmation issued by a SEF govern the terms of the trade and supersede any conflicting terms of a previous agreement.'' [68]

Finally, in response to Question 9 in the Proposal,[69] BSEF stated its belief

[54] WMBAA at 2.

[55] ISDA at 2.

[56] BSEF at 1.

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

[58] For example, § 23.501(a)(1) and (2) require that an SD or MSP issue a confirmation or acknowledgement for a swap transaction (as applicable) to its counterparty ''as soon as technologically practicable. . . .'' *See* 17 CFR 23.501(a)(1)–(2). Further, the Commission notes that the amended standard is consistent with the SEC's standard for SB SEFs in SB SEF Rule 812. *See* SEC SB SEF Final Rules at 87294.

[59] ISDA at 2.

[60] *See supra* note 57.

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

[62] BSEF at 1–2, Cboe SEF at 1, ISDA at 2, WMBAA at 2.

[63] ISDA at 2.

[64] *Id.*

[65] WMBAA at 2.

[66] BSEF at 2. BSEF's comment was specifically in response to Question 8 of the Proposal which asked, ''(1) Does the proposed amendment provide sufficient legal certainty with respect to any contradictory terms that may be contained within previous agreements that are incorporated into an uncleared swap confirmation by reference?''

[67] *Id.*

[68] *Id.*

[69] Question 9 of the Proposal asked whether, ''[f]or uncleared swaps, to avoid any conflict

''that the Commission should require that a SEF's confirmation specifically state that the terms of the confirmation legally supersede any conflicting terms in underlying previously negotiated agreements that have been incorporated by reference.'' [70] BSEF pointed out that a condition of relying on the no-action position in NAL No. 17–17 is that a SEF must have rules that require its confirmations to state that, in the event of any inconsistency between a SEF confirmation and the underlying previously-negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms.[71] BSEFs stated that the Commission should require the specified statement in the SEF's confirmation.[72]

c. Commission Determination

The Commission is adopting, as proposed, amendments to § 37.6(b), making it clear that the terms of a swap confirmation issued by a SEF shall legally supersede *any conflicting terms of* a previous agreement (*emphasis added*).

Under the rules adopted in this final rulemaking, SEFs will be able to incorporate underlying, previously negotiated agreements by reference into confirmations for uncleared swap transactions. This amendment will help ensure legal certainty with respect to the terms of such transactions, and will also clarify the continuing applicability of those terms in the underlying agreements that do not conflict with the confirmation and that may, for example, govern the counterparties' non-SEF transactions.[73] Taking into account comments received on the Proposal, the Commission agrees with ISDA that this approach strikes the right balance between ensuring that the terms agreed to on the SEF are enforceable, while at the same time, acknowledging the various documentation and agreements that underlie swap transactions.[74]

As a condition of relying on the no-action position in NAL No. 17–17, SEFs must have rules which require its confirmations to state that, in the event of any inconsistency between a SEF confirmation and the underlying previously negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms.[75] The amendment to § 37.6(b) reflects the substance of this condition, providing the benefit of continuing to allow SEFs that relied on NAL No. 17–17 to maintain market practices previously established under the no-action position in complying with amended § 37.6(b).[76] To this end, BSEF recommended that the Commission codify the condition of NAL No. 17–17.[77] The Commission notes that SEFs have reasonable discretion, subject to their obligations under the Act and Commission regulations, to establish rules and procedures for their markets. The Commission believes, and BSEF concedes, that the amendment to § 37.6(b) makes clear that in the event of any inconsistency between a SEF confirmation and underlying previously negotiated agreements, the terms of the SEF confirmation legally supersede any contradictory terms. Accordingly, the Commission does not believe that it needs to require the SEF's confirmation to state as such; however, the Commission believes that there is nothing that would preclude a SEF from having rules or procedures that include such a statement in the confirmations it issues.

The Commission acknowledges BSEF's comment recommending that the Commission also clarify that, to the extent that rules of the SEF conflict with the terms of a previous agreement, the rules of the SEF would govern the swap transaction and supersede the terms of the previous agreement.[78] This comment addresses matters that were not addressed in the Proposal. Therefore, the Commission declines to address BSEF's comment in the context of this rulemaking at this time.

For the reasons stated above, the Commission is adopting, as proposed, amendments to § 37.6(b), making it clear that the terms of a swap confirmation issued by a SEF shall legally supersede *any conflicting terms of* a previous agreement (*emphasis added*).

4. Clarification of § 37.6(b)

a. Proposed Regulations

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

The Commission proposed a non-substantive amendment to § 37.6(b) to change the phrase ''entered into'' to ''executed'' in order to provide greater consistency within § 37.6(b). Existing § 37.6(b) uses ''entered into'' and ''executed'' interchangeably.

b. Public Comments

The Commission received no comments regarding the proposed non-substantive amendment to § 37.6(b) to change the phrase ''entered into'' to ''executed''.

c. Commission Determination

The Commission received no comments regarding the proposed non-substantive amendment to change the phrase ''entered into'' to ''executed,'' and is adopting this amendment to § 37.6(b) as proposed. This non-substantive amendment will, in conjunction with the non-substantive amendment to § 37.6(a) discussed below, ensure consistent use of ''executed'' throughout § 37.6.

5. Clarification of § 37.6(a)

a. Proposed Regulations

Section 37.6(a) is intended to provide market participants with legal certainty with respect to swap transactions on a SEF and generally clarifies that a swap transaction entered into on or pursuant to the rules of the SEF cannot be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable due to a violation by the SEF of section 5h of the Act or part 37 of the Commission's regulations or any proceeding that alters or supplements a rule, term or condition that governs such swap or swap transaction.[79]

The Commission proposed a non-substantive amendment to § 37.6(a) to change the phrase ''entered into'' to ''executed'' in order to provide greater consistency within § 37.6. Currently § 37.6 uses ''entered into'' and ''executed'' interchangeably.

b. Public Comments

The Commission received no comments regarding the proposed non-

between the terms of the swap and the SEF's confirmation, . . . the Commission [should] require that the SEF's confirmation specifically state that the terms of the confirmation legally supersede any conflicting terms in underlying previously negotiated agreements that have been incorporated by reference''.

[70] BSEF at 2.

[71] *Id.*

[72] *Id.*

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

[74] ISDA at 2.

[75] *See* NAL No. 17–17 at 4. Further, as a condition of relying on NAL No. 17–17 the SEF must also have a rule that requires the SEF's confirmations to state ''that in the event of any inconsistency between a SEF confirmation and the underlying previously-negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms''.

[76] As noted above, upon the effective date of the rules contained herein, NAL No. 17–17 will expire per its terms. *See supra* note 15.

[77] BSEF at 2.

[78] *Id.*

[79] 17 CFR 37.6(a).

substantive amendment to § 37.6(a) to change the phrase ''entered into'' to ''executed''.

c. Commission Determination

The Commission received no comments regarding the proposed non-substantive amendment to change the phrase ''entered into'' to ''executed,'' and is adopting this amendment to § 37.6(a) as proposed. This non-substantive amendment will, in conjunction with the proposed non-substantive amendment to § 37.6(b) discussed above, ensure consistent use of ''executed'' throughout § 37.6.

B. Amendments to § 23.501(a)(4)(i)

a. Proposed Regulations

The Commission proposed two amendments to § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b). Section 23.501(a)(4)(i) provides that a swap transaction executed on a SEF or DCM will be deemed to satisfy the swap confirmation requirements set forth for SDs and MSPs in § 23.501(a), provided that the rules of the SEF or DCM establish that confirmation of all terms of the transaction shall take place at the same time as execution. The Commission proposed to clarify that the safe harbor for SDs and MSPs in § 23.501(a)(4)(i) also applies to swap transactions executed ''pursuant to the rules'' of a SEF or DCM, *i.e.,* block trades executed away from the SEF's or DCM's trading system or platform, but pursuant to the SEF's or DCM's rules. This clarification is consistent with the definition of ''block trade'' under § 43.2.[80] To further conform to the proposed amendments to § 37.6(b), the Commission also proposed to amend § 23.501(a)(4)(i) to require confirmation of all terms of a swap transaction as soon as technologically practicable following execution.[81]

b. Public Comments

The Commission received no comments regarding the two proposed amendments to § 23.501(a)(4)(i).

c. Commission Determination

The Commission received no comments regarding the two proposed amendments to § 23.501(a)(4)(i) to conform to § 37.6(b). Therefore, the Commission is adopting these amendments to § 23.501(a)(4)(i) as proposed.

III. Effective Date

The Commission proposed as an effective date, for the rule amendments in the Proposal, the date that is 30 days after publication of final regulations in the **Federal Register**. The Commission received no comments regarding the proposed effective date. Therefore, the Commission is adopting an effective date for these rule amendments that is 30 days after publication of final regulations in the **Federal Register**. The Commission believes that such an effective date will allow SEFs and market participants sufficient time to adapt to the amended confirmation rules in an efficient and orderly manner.[82]

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies to consider whether the regulations they promulgate will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis with respect to such impact.[83] The regulations finalized herein will affect SEFs and their market participants. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[84] The Commission previously concluded that SEFs are not small entities for the purpose of the RFA.[85] The Commission has also previously stated its belief in the context of relevant rulemakings that SEFs' market participants, which are all required to be eligible contract participants (ECPs) [86] as defined in section 1a(18) of the CEA,[87] are not small entities for purposes of the RFA.[88] Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that these final regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA), imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or sponsoring any ''collection of information,'' [89] as defined by the PRA. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). The PRA is intended, in part, to minimize the paperwork burden created for individuals, businesses, and other persons as a result of the collection of information by federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the federal government. The PRA applies to all information, ''regardless of form or format,'' whenever the government is ''obtaining, causing to be obtained, [or] soliciting'' information, and includes required ''disclosure to third parties or the public, of facts or opinions,'' when the information collection calls for ''answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.'' [90]

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

[80] § 43.2 defines a block trade as the following: Block trade means a publicly reportable swap transaction that: (1) Involves a swap that is listed on a swap execution facility or designated contract market; (2) Is executed on a swap execution facility's trading system or platform that is not an order book as defined in § 37.3(a)(3) of this chapter, or occurs away from the swap execution facility's or designated contract market's trading system or platform and is executed pursuant to the swap execution facility's or designated contract market's rules and procedures; (3) Has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and (4) Is reported subject to the rules and procedures of the swap execution facility or designated contract market and the rules described in this part, including the appropriate time delay requirements set forth in § 43.5. 17 CFR 43.2.

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

[82] As noted above, upon the effective date of the rules contained herein, NAL No. 17–17 will expire per its terms. *See supra* note 15.

[83] 5 U.S.C. 601 *et seq.*

[84] 47 FR at 18618–21 (Apr. 30, 1982).

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

[86] 17 CFR 37.703.

[87] 7 U.S.C. 1(a)(18).

[88] 66 FR 20740, 20743 (Apr. 25, 2001) (stating that ECPs by the nature of their definition in the CEA should not be considered small entities).

[89] *See* 44 U.S.C. 3502(3)(A).

[90] *See* 44 U.S.C. 3502(3).

PRA.[91] The Commission did not receive any comments regarding the PRA burden analysis contained in the Proposal.

1. OMB Collection 3038–0088—Swap Documentation

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

As explained in the Proposal, the Commission does not believe that these amendments will substantively or materially modify any existing information collection burdens. Accordingly, the Commission is retaining its existing estimates for the burden associated with the information collections under OMB Collection 3038–0088.[92]

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

Under existing § 37.6(b), a SEF is required to provide each counterparty to a swap transaction, whether cleared or uncleared, that is entered into on or pursuant to the rules of the SEF, with a written confirmation that contains all of the terms of the transaction. With respect to an uncleared swap transaction, a SEF may comply with the requirement to include in the confirmation all of the terms of the transaction, by incorporating by reference relevant terms set forth in underlying, previously negotiated agreements between the counterparties, as long as the SEF has obtained these agreements prior to execution of the transaction.[93]

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

The Commission believes that the final rulemaking will reduce administrative burdens for SEFs, who will not be required to request, accept, and maintain a library of every relevant previously negotiated agreement between counterparties.

As a result, the Commission believes that the final rulemaking will reduce a SEF's annual recurring information collection burden for uncleared swap transactions. In the Proposal, the Commission estimated that § 37.6(b)(1) would reduce annual recurring information collection burdens by one-third from 563 hours per SEF to 375 hours per SEF.[94] The Commission received no comments related to the PRA analysis or this determination.

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

Estimated number of respondents: 21.

Estimated average burden hours per respondent: 375 hours.

Estimated total annual burden on Respondents: 7,875 hours.

Frequency of collection: On occasion.

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

C. Cost-Benefit Considerations

1. Background

Section 15(a) of the CEA [95] requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation under the CEA or issuing certain orders. CEA section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the CEA section 15(a) factors.

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

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

In some instances, it is not reasonably feasible to quantify the costs and benefits to SEFs and certain market participants with respect to certain factors, for example, market integrity. Notwithstanding these types of limitations, however, the Commission otherwise identifies and considers the costs and benefits of these rule amendments in qualitative terms. The Commission did not receive any comments from commenters which quantified or attempted to quantify the costs and benefits of the Proposal.

In the following consideration of costs and benefits, the Commission first identifies and discusses the benefits and costs attributable to the rule amendments. The Commission, where applicable, then considers the costs and benefits of the rule amendments in light of the five public interest considerations set out in section 15(a) of the CEA.

The Commission notes that this consideration of costs and benefits is based on its understanding that the swaps market functions internationally with: (1) transactions that involve U.S. entities occurring across different international jurisdictions; (2) some entities organized outside of the United States that are registered with the Commission; and (3) some entities that

[91] *See* 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[92] For the previously approved estimates, *see* ICR Reference No: 202204–3038–005, *available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202210-3038-007.*

[93] SEF Core Principles Final Rule at 33491, n.195.

[94] The Commission previously estimated that the information collections related to § 37.6 would take SEFs approximately 1.5 hours per SEF participant and that on average, a SEF has about 375 participants. For purposes of estimating the number of burden hours that the final regulations would eliminate, however, the Commission is revising its previous estimate and will assume the relevant process would take SEFs approximately 1.0 hours per SEF participant. Accordingly, 375 participants × 1.0 hour per participant = 375 estimated burden hours. For information about the Commission's previous estimate, *see* ICR Reference No. 202104–3038–001, *available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202104-3038-001.*

[95] 7 U.S.C. 19(a).

typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the rule amendments on all relevant swaps activity, whether based on its actual occurrence in the United States or on its connection with activities in, or effect on, U.S. commerce.[96]

2. Amendments to § 37.6(b)

a. Benefits

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

Absent adoption of new § 37.6(b)(1), which will allow SEFs to incorporate relevant terms set forth in such underlying agreements without being required to obtain the agreements, SEFs would need to comply with the existing requirements under § 37.6(b) for uncleared swap confirmations, notwithstanding the significant burdens of doing so. The Commission understands that the financial, administrative, and logistical burdens to collect and maintain bilateral transaction agreements from individual counterparties would be high. SEFs have stated that they are unable to develop a cost-effective method to request, accept and maintain a library of every relevant previous agreement between counterparties.[97] SEFs have also noted that the potential number of previous agreements is considerable, given that SEF counterparties often enter into agreements with many other parties and may have multiple agreements for different asset classes.[98]

The Commission believes that the addition of § 37.6(b)(1) should benefit both SEFs and market participants by decreasing the financial, administrative, and logistical burdens to execute an uncleared swap on a SEF. Not only would a SEF not be required to expend time and resources to gather and maintain all of the underlying relationship documentation between all possible counterparties on the SEF, but market participants would also not be required to expend time and resources in gathering and submitting this documentation to the SEF, including any amendments or updates to that documentation.

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

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

Further, the rule amendments do not change the existing requirement for a SEF to issue a confirmation of all terms of an uncleared swap transaction that is executed on or pursuant to the rules of the SEF. If a SEF was not required to issue a confirmation that includes or incorporates by reference all of the terms of such a transaction, the counterparties to the swap might be subject to other Commission regulations that impose such obligations, and therefore, increased costs. For example, where one of the counterparties to an uncleared swap transaction is an SD or MSP, § 23.501 requires that the SD or MSP issue a confirmation for the transaction as soon as technologically practicable.[99]

SEFs should also benefit from the requirement to confirm transaction terms ''as soon as technologically'' practicable after execution, rather than at the same time as execution. As noted above, the Commission believes that this amendment to the timing standard in § 37.6(b) reflects existing SEF capabilities while continuing to promote the Commission's goals of providing swap counterparties with legal certainty in a prompt manner.

b. Costs

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

To the extent that SEFs are relying on the existing no-action position provided by Commission staff in NAL No. 17–17, they could continue to implement existing industry practice related to confirmations for uncleared swap transactions which should not impose costs on the SEFs. But to the extent that SEFs need to modify their rules or procedures in light of the rule amendments, such as by removing the SEF rules required as conditions under NAL No. 17–17, they may incur modest costs.

c. Consideration of Alternatives

The relevant no-action position set forth in NAL No. 17–17, upon which the rule amendments are based, is subject to withdrawal by Commission staff. In addressing alternatives to adopting the amendments to § 37.6(b), the Commission considered the costs and benefits associated with enforcing the requirements of existing § 37.6(b). The Commission believes that adopting the amendments to § 37.6(b), and the conforming amendments set forth in these final rules, would help to maintain the benefits previously articulated in the SEF Core Principles Final Rule, but also reduce related costs for SEFs with respect to confirmation requirements.[100]

[96] *See, e.g.,* 7 U.S.C. 2(i).

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

[98] *Id.*

[99] *See* 17 CFR 23.501(a). As discussed above, subject to specified conditions, § 23.501(a)(4)(i) provides a safe harbor from this requirement when a SEF issues a confirmation for the transaction.

[100] The Commission recognized the important benefits provided by the § 37.6(b) confirmation requirements in the cost-benefit considerations to the SEF Core Principles Final Rule. With respect to those benefits, the Commission stated that the

d. Section 15(a) Factors

(1) Protection of Market Participants and the Public

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

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

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

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

(3) Price Discovery

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

(4) Sound Risk Management Practices

The amendments to the confirmation requirements in § 37.6(b), and the conforming amendments set forth in these final rules, will maintain the promotion of sound risk management practices with respect to the requirement for SEFs to issue transaction confirmations, *i.e.,* by providing market participants with the certainty that transactions executed on or pursuant to the rules of a SEF will be legally enforceable with respect to all counterparties to the transaction.[101]

(5) Other Public Interest Considerations

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

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anti-competitive means of achieving the objectives of the CEA, in issuing any order or adopting any Commission rule or regulation.[102] The Commission does not anticipate that the amendments to parts 23 and 37 of its regulations would promote or result in anti-competitive consequences or behavior. The Commission did not receive any comments on any anti-competitive consequences or behavior.

List of Subjects

17 CFR Part 23

Confirmations, Swaps.

17 CFR Part 37

Swaps, Swap confirmations, Uncleared swap confirmations, Swap execution facilities.

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

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 1. The authority citation for part 23 continues 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. Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111–203, 124 Stat. 1641 (2010).

■ 2. In § 23.501, revise paragraph (a)(4)(i) to read as follows:

§ 23.501 Swap confirmation.

(a) * * *

(4) * * *

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

* * * * *

PART 37—SWAP EXECUTION FACILITIES

■ 3. The authority citation for part 37 continues to read as follows:

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

■ 4. Revise § 37.6 to read as follows:

§ 37.6 Enforceability.

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

(1) A violation by the swap execution facility of the provisions of section 5h of the Act or this part;

requirements would, among other things, (i) provide legal certainty to market participants; (ii) promote accuracy for counterparties regarding exposure levels with other counterparties; and (iii) reduce costs and risks involved with resolving error trade disputes between counterparties. *See* SEF Core Principles Final Rule at 33570.

[101] *See supra* note 100.

[102] 7 U.S.C. 19(b).

(2) Any Commission proceeding to alter or supplement a rule, term, or condition under section 8a(7) of the Act or to declare an emergency under section 8a(9) of the Act; or

(3) Any other proceeding the effect of which is to:

(i) Alter or supplement a specific term or condition or trading rule or procedure; or

(ii) Require a swap execution facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

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

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

(2) [Reserved]

Issued in Washington, DC, on April 25, 2024, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

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

Appendices to Swap Confirmation Requirements for Swap Execution Facilities—Voting Summary and Chairman's and Commissioners' Statements

Appendix 1—Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman Rostin Behnam

I am very pleased that the Commission voted to finalize necessary amendments to the Commission's regulations addressing longstanding issues with the uncleared swap confirmation requirements under Rule 37.6(b). During the initial implementation of part 37, SEFs informed the CFTC that the confirmation requirement for uncleared swaps was operationally and technologically difficult and impractical to implement. In light of these challenges, the Division of Market Oversight provided targeted no-action positions for SEFs with respect to certain provisions of Commission regulations throughout the last decade.[1]

As there was no workable solution that could effectuate the original language of the relevant rule, the Commission is has voted to amend Rule 37.6(b) to codify the longstanding staff no-action position. The amendment enables SEFs to incorporate terms by reference in an uncleared swap confirmation without being required to obtain the underlying, previously negotiated agreements between the counterparties. An amendment to Rule 23.501 will clarify the consistent treatment of trades executed away from a SEF or designated contract market (DCM) and permit confirmation of all terms of a swap transaction as soon as technologically practicable following execution, as opposed to requiring confirmation ''at the same time as execution.''[2]

This final rule is an example of my continuing focus on providing market participants with clarity and certainty by, where possible, codifying existing staff no-action positions.

I would like to thank Roger Smith in our Division of Market Oversight for his work on this important final rule.

[1] *See* CFTC Letter No. 13–58, Time Limited No-Action Relief to Temporarily Registered Swap Execution Facilities from Commission Regulation 37.6(b) for non-Cleared Swaps in All Asset Classes (Sept. 30, 2013), *https://www.cftc.gov/csl/13-58/download;* CFTC Letter No. 14–108, Staff No-Action Position Regarding SEF Confirmations and Recordkeeping Requirements under Certain Provisions Included in Regulations 37.6(b) and 45.2 (Aug. 18, 2014), *https://www.cftc.gov/csl/14-108/download;* CFTC Letter No. 15–25, Extension of No-Action Relief for SEF Confirmation and Recordkeeping Requirements under Commission Regulations 37.6(b), 37.1001, and 45.2, and Additional Relief for Confirmation Data Reporting Requirements under Commission Regulation 45.3(a) (Apr. 22, 2015), *https://www.cftc.gov/csl/15-25/download;* CFTC Letter No. 16–25, Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 14, 2016), *https://www.cftc.gov/csl/16-25/download;* and CFTC Letter no. 17–17, Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 24, 2017), *https://www.cftc.gov/csl/17-17/download.*

[2] Commission Rule 23.501(a)(4)(i), 17 CFR 23.501(a)(4)(i).

Appendix 3—Statement of Commissioner Kristin N. Johnson

An essential component of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) is its framework for the regulation of swaps, including central clearing and trade execution requirements, registration and comprehensive regulation of swap dealers, and recordkeeping and reporting requirements.

I vote to approve today's final rule on Swap Confirmation Requirements for Swap Execution Facilities (Final Rule), which facilitates predictability and consistency in swaps markets by codifying long-standing no-action relief into regulation, while maintaining a robust regulatory regime for swaps and swap execution facilities (SEFs).

The Dodd-Frank Act amended the Commodity Exchange Act (CEA) by adding Section 5h, which provides that a person may not operate ''a facility for the trading or processing of swaps unless the facility is registered as a [SEF] or as a designated contract market.''[1] A SEF allows multiple participants to execute or trade swaps. As such, SEFs facilitate swap transactions in our markets by facilitating the execution of swaps between market participants. Additionally, SEFs play a critical role in price discovery and transparency and policing and reporting swap transactions in an effort to monitor systemic risk.

In 2013, the Commission adopted new rules and principles for SEFs. Under CFTC Regulation 37.6(b), a SEF must provide each counterparty to cleared and uncleared swaps with ''a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction.''[2] This confirmation is required to ''take place at the same time as execution,'' subject to certain exceptions related to bunched orders involving swaps.[3]

In the adopting release, the Commission noted that a SEF may comply with the swap confirmation requirement for uncleared swaps by incorporating terms set forth in master agreements previously negotiated by counterparties, if such agreements had been submitted to the SEF prior to execution and the counterparties ensure that nothing in the confirmation terms contradict the terms incorporated from the master agreement.[4] SEFs and market participants voiced concerns that it was operationally and technologically difficult and impracticable to obtain and store the underlying, bespoke, highly-negotiated swap agreements of SEF members for purposes of satisfying the swap confirmation requirement.

Pursuant to a no-action letter issued in March 2017, which was the last extension of a no-action letter originally issued in August 2014,[5] SEFs were permitted to incorporate by

[1] 7 U.S.C. 7b–3(a).

[2] 17 CFR 37.6(b).

[3] *Id.*

[4] *See* Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33,476, 33,491 n.195 (June 4, 2013).

[5] CFTC No-Action Letter 17–17 (Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements

reference the terms of previously-negotiated agreements and were relieved of the obligation to: (1) obtain documents incorporated by reference in a swap confirmation and (2) report confirmation data contained in such agreements. SEFs were required to comply with certain additional conditions, including that their rulebooks require participants to provide copies of the underlying agreements to the SEF upon request.

On August 25, 2023, the Commission released a Notice of Proposed Rulemaking to codify this no-action relief (Proposed Rule) for uncleared swaps. The Commission did not incorporate the conditions in No-Action Letter 17–17 into new CFTC Regulation 37.6(b)(1). The Commission takes the view that, as noted below, the existing requirements for SEFs under the CEA, particularly Core Principle 5, and the Commission's Part 37 regulations sufficiently account for and obviate the need for these conditions.[6]

As I noted at that time, the Commission ''issued guidance and exemptive relief based on concerns that SEFs had been unable to develop a practicable and cost-effective method to request, accept, and maintain a library of the underlying previously-negotiated freestanding agreements between counterparties.'' [7]

The Final Rule approved today fully adopts the Proposed Rule. In addition to permitting SEFs to incorporate by reference terms of previously negotiated agreements between counterparties, without having to obtain a copy of such agreements, the Final Rule will amend CFTC Regulation 37.6(b) to permit confirmation of all terms of a swap transaction to take place ''as soon as technologically practicable'' after the execution of the swap transaction. Additionally, the Final Rule amends CFTC Regulation 37.6(b) to make clear that the confirmation a SEF provides under CFTC Regulation 37.6(b) legally supersedes *only conflicting terms* in a previous agreement.

Importantly, as noted above, both SEFs and the Commission will retain the ability to obtain essential information, including copies of the underlying agreements for uncleared swaps. Under SEF Core Principle 5, a SEF must ''[e]stablish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 5h of the [CEA].'' [8] The SEF must also ''[p]rovide [this] information to the Commission on request.'' [9] A SEF must also have ''the authority to examine books and records kept by [its] members and by persons under investigation.'' [10] As the Final Rule notes, given these requirements, a SEF should have ''the ability and authority to request copies of the underlying agreements that are incorporated by reference into a confirmation for an uncleared swap transaction and to provide such agreements to the Commission upon request.'' [11]

I support this Final Rule, which provides a practical approach to implementing our regulatory requirements, while maintaining robust oversight of SEFs and our markets.

Thank you to the staff of the Division of Market Oversight and Roger Smith as well as the Office of the General Counsel, the Market Participants Division, and the Office of the Chief Economist, for their hard work on this Final Rule.

under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a)) (Mar. 24, 2017), *https://www.cftc.gov/csl/17-17/download;* CFTC No-Action Letter 14–108 (Staff No-Action Position Regarding SEF Confirmations and Recordkeeping Requirements under Certain Provisions Included in Regulations 37.6(b) and 45.2) (Aug. 18, 2014), *https://www.cftc.gov/csl/14-108/download.*

[6] Final Rule, Swap Confirmation Requirements for Swap Execution Facilities, at 14.

[7] Kristin N. Johnson, Commissioner, CFTC, Statement in Support of the Notice of Proposed Rulemaking on Swap Confirmation Requirements for Swap Execution Facilities (July 26, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement072623c.*

[8] 17 CFR 37.500.

[9] *Id.*

[10] 17 CFR 37.203(b).

[11] Final Rule, Swap Confirmation Requirements for Swap Execution Facilities, at 14–15.

Appendix 4—Statement of Commissioner Summer K. Mersinger

Workable rules are essential to maintain the confidence of the American public in the integrity of our derivatives markets. So, when we become aware that our rules are not as workable as we thought, or impose substantial operational burdens with little corresponding regulatory benefit, we should address these shortcomings promptly. Unfortunately, though, the Commission sometimes chooses to ''kick the can down the road'' by relying on staff no-action letters instead—often for many years—without tackling the root cause of the problem in the rule itself.

I have not been shy about expressing my feelings related to no-action letters during my tenure as a Commissioner. Yes, there are appropriate reasons for staff to issue no-action letters, and I do see their utility in providing flexibility when needed. However, I believe there has at times been an over-reliance on this practice at the agency, and we must move forward in a manner that respects the role of the Commissioners in agency policy-making.

My point is perfectly illustrated by Commission Rule 37.6(b) regarding confirmations for swaps executed on or pursuant to the rules of a swap execution facility (''SEF''). The rule requires that a SEF provide each counterparty to a transaction with a written record of all the terms of the transaction.[1] But things get complicated with respect to uncleared swaps, since the terms of such swaps also may include previously-negotiated agreements between the counterparties (such as an ISDA Master Agreement, and related Schedule and Credit Support Annex).

Accordingly, when the Commission adopted Rule 37.6(b) in 2013, it stated that a SEF's written confirmation of an uncleared swap can incorporate the terms of such agreements by reference, but with a catch—namely, that such agreements must be submitted to the SEF prior to execution.[2] This approach imposed on each SEF the virtually impossible (and, frankly, needless) task of building and maintaining a library of every previous bilateral agreement from counterparties to uncleared swap transactions on its platform.

Recognizing the enormous operational problems posed by the Commission's approach to SEF swap confirmations for uncleared swaps, as well as the limited value of that approach, Commission staff issued four successive no-action letters beginning in 2014.[3] Although it has taken a full decade, I am pleased that the Commission is finally adopting a permanent and practicable SEF confirmation solution. These rule amendments, among other things, will codify the existing staff no-action position that permits SEFs, in an uncleared swap confirmation, to incorporate by reference the terms of previously-negotiated counterparty agreements without obtaining the underlying agreements themselves.

But there remains more work to be done in this regard. I will continue to push the agency to act through notice-and-comment rulemaking, rather than relying on perpetual staff no-action relief, with respect to other rules that are not workable for those who must comply with them—especially where, as here, their asserted benefits are largely illusory.

[1] Commission Rule 37.6(b), 17 CFR 37.6(b).

[2] *See* Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33491 n.195 (June 4, 2013).

[3] *See* (i) CFTC Letter No. 14–108 (Division of Market Oversight (''DMO'') August 18, 2014); (ii) CFTC Letter No. 15–25 (DMO April 22, 2015); (iii) CFTC Letter No. 16–25 (DMO March 14, 2016); and (iv) CFTC Letter No. 17–17 (DMO March 24, 2017). These no-action letters are available at *https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm?field_csl_letter_types_target_id%5B%5D=636.*

Appendix 5—Statement of Commissioner Caroline D. Pham

I support the Final Rule on Swap Confirmation Requirements for Swap Execution Facilities (SEF Confirmation Final Rule) because it resolves the temporal impossibility of requiring SEF confirmations at the time of execution for block trades, which are in fact executed away from the SEF and then submitted to the SEF afterwards. I would like to thank Roger Smith, Nora Flood, and Vince McGonagle in the Division of Market Oversight for their work on the SEF Confirmation Final Rule.

Conflicting or impossible regulatory requirements can make compliance with our rules nonsensical.[1] That is clear from the years of CFTC staff no-action relief that led to the rule amendments codified today in the SEF Confirmation Final Rule.[2] I am pleased

[1] *See* Statement of Commissioner Caroline D. Pham In Support of Swap Confirmation Requirements for Swap Execution Facilities Proposal (July 26, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072623c.*

[2] *See, e.g.,* CFTC Staff Letter No. 17–17, Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading

Continued

that the Commission has decided to fix an unworkable aspect of our existing rules, and encourage the Commission to continue to do so promptly when market participants identify these problems in the future. Continuous improvement of our regulatory frameworks, as appropriate, serves the public interest of well-functioning markets that are efficient and effective in providing risk management and price discovery.

[FR Doc. 2024–09368 Filed 4–30–24; 8:45 am]

BILLING CODE 6351–01–P

Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 24, 2017).

SELECTIVE SERVICE SYSTEM

32 CFR Part 1665

RIN 3240–AA05

Privacy Act Procedures

AGENCY: United States Selective Service System.

ACTION: Final rule.

SUMMARY: The Selective Service System (SSS) is finalizing revisions to its Privacy Act regulations to ensure processes and procedures for requesting access and amendments to records by electronic means and appeals from denials of request for access to or amendments of records is clearly spelled out within the SSS regulations.

DATES: This rule is effective May 31, 2024.

FOR FURTHER INFORMATION CONTACT: Daniel A. Lauretano, Sr., General Counsel, 703–605–4012, *dlauretano@sss.gov.*

SUPPLEMENTARY INFORMATION: SSS published a proposed rule on February 5, 2024 (89 FR 7655). No public comments were received and SSS is finalizing this rule without change.

A. Summary of New Regulatory Provisions and Their Impact

The revision to 32 CFR part 1665 adds clarity for how to make online inquiries, and how inquiries will be processed, allows for electronic requests, and makes several stylistic and grammatical changes.

B. Background and Legal Basis for This Rule

The Housekeeping Statute, 5 U.S.C. 301, authorizes agency heads to promulgate regulations governing ''the custody, use, and preservation of its records, papers, and property.'' The Privacy Act is a Federal statute that establishes a Code of Fair Information Practice that governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by Federal agencies. A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifier assigned to the individual. The Privacy Act requires that agencies give the public notice of their systems of records by publication in the **Federal Register**. The Privacy Act prohibits the disclosure of information from a system of records absent the written consent of the subject individual unless the disclosure is pursuant to one of 12 statutory exceptions. The Act also provides individuals with a means by which to seek access to and amendment of their records and sets forth various agency record-keeping requirements. Additionally, with people granted the right to review what was documented with their name, they are also able to find out if the ''records have been disclosed'' and are also given the right to make corrections. The Privacy Act also provides an avenue for appeal from denials of request for access to or amendment of records. This final rule amends part 1665 to ensure processes and procedures for appeals from denials of request for access to or amendments of records is clearly spelled out within the SSS regulations.

C. Expected Impact of the Final Rule

This final rule will not impose any new costs. These regulations will clarify and streamline appeals from denials of request for access to or amendment of records. This revision will produce efficiency and uniformity to the public's benefit.

D. Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' E.O. 13563, ''Improving Regulation and Regulatory Review,'' and Congressional Review Act (5 U.S.C. 801–08)

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Following the requirements of these E.O.s, the Office of Management and Budget (OMB) has determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866.

E. Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

SSS certifies that this final rule is not subject to the Regulatory Flexibility Act, 5 U.S.C. 601, because it would not have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require SSS to prepare a regulatory flexibility analysis.

F. Section 202 of Public Law 104–4, ''Unfunded Mandates Reform Act'' (2 U.S.C. 1532)

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require the expenditure of $100 million or more (in 1995 dollars, adjusted annually for inflation) in any one year. This final rule will not mandate any requirements for State, local, or Tribal governments, nor will it affect private sector costs.

G. Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 1665 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act.

H. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

E.O. 13132, ''Federalism''

E.O. 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This final rule will not have a substantial effect on State and local governments.

J. Compliance With Pay-As-You-Go Act of 2023 (Fiscal Responsibility Act of 2023, Pub. L. 118–5, Div. B, Title III).

In accordance with Compliance with Pay-As-You-Go Act of 2023 (Fiscal Responsibility Act of 2023, Pub. L. 118–5, div. B, title III) and OMB Memorandum (M–23–21) dated September 1, 2023, SSS has determined that this final rule is not subject to the Act because it will not increase direct spending beyond specified thresholds.