

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 45**

**Docket No. OCC-2019-0002**

**RIN: 1557-0061**

**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM**

**12 CFR Part 237**

**Docket No. R-1654**

**RIN: 7100-AF42**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 349**

**RIN: 3064-AF00**

**FARM CREDIT ADMINISTRATION**

**12 CFR Part 624**

**RIN: 3052-AD34**

**FEDERAL HOUSING FINANCE AGENCY**

**12 CFR Part 1221**

**RIN: 2590-AB02**

**MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES**

**AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC); Board of

Governors of the Federal Reserve System (Board); Federal Deposit Insurance

Corporation (FDIC); Farm Credit Administration (FCA); and the Federal Housing Finance Agency (FHFA).

**ACTION:** Interim final rule and request for comment.

**SUMMARY:** The OCC, Board, FDIC, FCA, and FHFA (each an Agency and, collectively, the Agencies) are adopting and invite comment on an interim final rule amending the Agencies' regulations that require swap dealers and security-based swap dealers under the Agencies' respective jurisdictions to exchange margin with their counterparties for swaps that are not centrally cleared (Swap Margin Rule). The Swap Margin Rule takes effect under a phased compliance schedule stretching from 2016 through 2020, and the dealers covered by the rule continue to hold swaps in their portfolios that were entered into before the effective dates of the rule. Those swaps are grandfathered from the Swap Margin Rule's requirements until they expire according to their terms.

There are currently financial services firms located within the United Kingdom (U.K.) that conduct swap dealing activities subject to the Swap Margin Rule. The U.K. has provided formal notice of its intention to withdraw from the European Union (E.U.) on March 29, 2019. If this transpires without a negotiated agreement between the U.K. and E.U., these entities located in the U.K. may not be authorized to provide full-scope financial services to swap counterparties located in the E.U.

The Agencies' policy objective in developing the interim final rule is to address one aspect of the scenario likely to ensue, whereby entities located in the U.K. might transfer their existing swap portfolios that face counterparties located in the E.U. over to an affiliate or other related establishment located within the E.U. or the United States (U.S.) The Agencies seek to address industry concerns about the status of grandfathered

swaps in this scenario, so the industry can focus on making preparations for swap transfers. These transfers, if carried out in accordance with the conditions of the interim final rule, will not trigger the application of the Swap Margin Rule to grandfathered swaps that were entered into before the compliance dates of the Swap Margin Rule.

**DATES:** The interim final rule is effective [**INSERT DATE OF PUBLICATION IN FEDERAL REGISTER**]. Comments should be received on or before [**INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER**].

**ADDRESSES:** Interested parties are encouraged to submit written comments jointly to all of the Agencies. Commenters are encouraged to use the title “**Margin and Capital Requirements for Covered Swap Entities**” to facilitate the organization and distribution of comments among the Agencies.

**OCC:** You may submit comments to the OCC by any of the methods set forth below. Commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Margin and Capital Requirements for Covered Swap Entities” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—“Regulations.gov”:* Go to *www.regulations.gov*. Enter “Docket ID OCC-2019-0002” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments. Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.

- *E-mail: [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).*

- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW., suite 3E-218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7<sup>th</sup> Street, SW., suite 3E-218, Washington, DC 20219.
- *Fax:* (571) 465-4326.

*Instructions:* You must include “OCC” as the agency name and “Docket ID OCC-2019-0002” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the Regulations.gov website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- *Viewing Comments Electronically:* Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC-2019-0002” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” and then using the filtering tools on the left side of the screen. Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

**Board:** You may submit comments, identified by [Docket No. R-1654 and RIN No. 7100-AF42, by any of the following methods:

- *Agency Web Site:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- *E-mail:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number and RIN number in the subject line of the message.
- *Fax:* (202) 452-3819 or (202) 452-3102.
- *Mail:* Address to Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's website at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue, NW, Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

**FDIC:** You may submit comments, identified by RIN 3064-AF00, by any of the following methods:

- *Agency Website:* <https://www.FDIC.gov/regulations/laws/federal>.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- *Hand Delivered/Courier:* The guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.
- *E-mail:* [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Comments submitted must include “FDIC” and “RIN 3064-AF00 - Brexit Amendment: Margin and Capital Requirements for Covered Swap Entities.” Comments received will be posted without change to <https://www.fdic.gov/regulations/laws/federal>, including any personal information provided.

**FHFA:** You may submit your written comments on the interim final rulemaking, identified by regulatory information number: RIN 2590-AB02, by any of the following methods:

- *Agency Website:* [www.fhfa.gov/open-for-comment-or-input](http://www.fhfa.gov/open-for-comment-or-input).
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov) to ensure timely receipt by the Agency. Please include “RIN 2590-AB02” in the subject line of the message.

- *Hand Delivery/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/ RIN 2590-AB02, Federal Housing Finance Agency, Constitution Center (OGC Eighth Floor), 400 7<sup>th</sup> St., SW, Washington, DC 20219. Deliver the package to the Seventh Street entrance Guard Desk, First Floor, on business days between 9:00 a.m. and 5:00 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/ RIN 2590-AB02, Federal Housing Finance Agency, Constitution Center (OGC Eighth Floor), 400 7th St., SW, Washington, DC 20219.

All comments received by the deadline will be posted for public inspection without change, including any personal information you provide, such as your name, address, email address and telephone number on the FHFA website at <http://www.fhfa.gov>.

Copies of all comments timely received will be available for public inspection and copying at the address above on government-business days between the hours of 10 a.m. and 3 p.m. To make an appointment to inspect comments please call the Office of General Counsel at (202) 649-3804.

**FCA:** We offer a variety of methods for you to submit your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by e-mail or through the FCA's Web site. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comments multiple times via different methods. You may submit comments by any of the following methods:

- *E-mail:* Send us an e-mail at [reg-comm@fca.gov](mailto:reg-comm@fca.gov).
- *FCA Web site:* <http://www.fca.gov>. Click inside the “I want to...” field near the top of the page; select “comment on a pending regulation” from the dropdown menu; and click “Go.” This takes you to an electronic public comment form.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Barry F. Mardock, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090.

You may review copies of all comments we receive at our office in McLean, Virginia or on our Web site at <http://www.fca.gov>. Once you are on the Web site, click inside the “I want to...” field near the top of the page; select “find comments on a pending regulation” from the dropdown menu; and click “Go.” This will take you to the Comment Letters page where you can select the regulation for which you would like to read the public comments. We will show your comments as submitted, including any supporting data provided, but for technical reasons we may omit items such as logos and special characters. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove e-mail addresses to help reduce Internet spam.

**FOR FURTHER INFORMATION CONTACT:**

*OCC:* Chris McBride, Director for Market Risk, Treasury and Market Risk Policy, (202) 649-6402, or Allison Hester-Haddad, Counsel, Chief Counsel’s Office, (202) 649-5490, for persons who are deaf or hearing impaired, TTY (202) 649-5597, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW, Washington, DC 20219.



*Board:* Constance Horsley, Deputy Associate Director, (202) 452-5239, Peter Clifford, Manager, (202) 785-6057, Lesley Chao, Lead Financial Institution Policy Analyst, (202) 974-7063, or John Feid, Principal Economist, (202) 452-2385, Division of Supervision and Regulation; Jason Shafer, Counsel, (202) 728-5811, or Justyna Bolter, Attorney, (202) 452-2686, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, D.C. 20551.

*FDIC:* Irina Leonova, Senior Policy Analyst, [ileonova@fdic.gov](mailto:ileonova@fdic.gov), Capital Markets Branch, Division of Risk Management Supervision, (202) 898-3843; Thomas F. Hearn, Counsel, [thohearn@fdic.gov](mailto:thohearn@fdic.gov), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.

*FCA:* Jeremy R. Edelstein, Associate Director, Finance & Capital Market Team, Timothy T. Nerdahl, Senior Policy Analyst, Office of Regulatory Policy, (703) 883-4414, TTY (703) 883-4056, or Richard A. Katz, Senior Counsel, Office of General Counsel, (703) 883-4020, TTY (703) 883-4056, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090.

*FHFA:* Ron Sugarman, Principal Policy Analyst, Office of Policy Analysis and Research, (202) 649-3208, [Ron.Sugarman@fhfa.gov](mailto:Ron.Sugarman@fhfa.gov), or James P. Jordan, Associate General Counsel, Office of General Counsel, (202) 649-3075, [James.Jordan@fhfa.gov](mailto:James.Jordan@fhfa.gov), Federal Housing Finance Agency, Constitution Center, 400 7<sup>th</sup> St., SW, Washington, DC

20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background.**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)<sup>1</sup> required the Agencies to adopt rules jointly that establish capital and margin requirements<sup>2</sup> for swap entities<sup>3</sup> that are prudentially regulated by one of the Agencies (covered swap entities).<sup>4</sup> These capital and margin requirements apply to swaps that are not cleared by a registered derivatives clearing organization or a registered clearing

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

<sup>2</sup> See 7 U.S.C. 6s(e)(3)(A); 15 U.S.C. 78o-10(e)(3)(A).

<sup>3</sup> See 7 U.S.C. 6s; 15 U.S.C. 78o–10. Sections 731 and 764 of the Dodd-Frank Act added a new section 4s to the Commodity Exchange Act of 1936, as amended, and a new section, section 15F, to the Securities Exchange Act of 1934, as amended, respectively, which require registration with the Commodity Futures Trading Commission (CFTC) of swap dealers and major swap participants and the U.S. Securities and Exchange Commission (SEC) of security-based swap dealers and major security-based swap participants (each a swap entity and, collectively, swap entities).

<sup>4</sup> Section 1a(39) of the Commodity Exchange Act of 1936, as amended, defines the term “prudential regulator” for purposes of the margin requirements applicable to swap dealers, major swap participants, security-based swap dealers and major security-based swap participants. The Board is the prudential regulator for any swap entity that is (i) a state-chartered bank that is a member of the Federal Reserve System, (ii) a state-chartered branch or agency of a foreign bank, (iii) a foreign bank which does not operate an insured branch, (iv) an organization operating under section 25A of the Federal Reserve Act of 1913, as amended, or having an agreement with the Board under section 25 of the Federal Reserve Act, or (v) a bank holding company, a foreign bank that is treated as a bank holding company under section 8(a) of the International Banking Act of 1978, as amended, or a savings and loan holding company (on or after the transfer date established under section 311 of the Dodd-Frank Act), or a subsidiary of such a company or foreign bank (other than a subsidiary for which the OCC or the FDIC is the prudential regulator or that is required to be registered with the CFTC or SEC as a swap dealer or major swap participant or a security-based swap dealer or major security-based swap participant, respectively). The OCC is the prudential regulator for any swap entity that is (i) a national bank, (ii) a federally chartered branch or agency of a foreign bank, or (iii) a Federal savings association. The FDIC is the prudential regulator for any swap entity that is (i) a State-chartered bank that is not a member of the Federal Reserve System, or (ii) a State savings association. The FCA is the prudential regulator for any swap entity that is an institution chartered under the Farm Credit Act of 1971, as amended. The FHFA is the prudential regulator for any swap entity that is a “regulated entity” under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (i.e., the Federal National Mortgage Association and its affiliates, the Federal Home Loan Mortgage Corporation and its affiliates, and the Federal Home Loan Banks). See 7 U.S.C. 1a(39).

agency (non-cleared swaps). Swaps are certain types of financial derivatives, such as interest rate swaps and commodity swaps, that the Dodd-Frank Act generally characterized as “swaps.”<sup>5</sup> On November 30, 2015, the Agencies published the Swap Margin Rule to establish the minimum margin and capital requirements for the non-cleared swap portfolios of covered swap entities.<sup>6</sup>

The Agencies are issuing this interim final rule in connection with efforts to assist covered swap entities as they prepare for the event commonly described as “Brexit.” In particular, this interim final rule is intended to address a covered swap entity’s ability to service its cross-border clients in the event that the U.K. withdraws from the E.U. without a Withdrawal Agreement.<sup>7</sup> Briefly stated, the interim final rule amends the Swap Margin Rule to make it clear that in such an event, financial entities located in the U.K. may transfer existing non-cleared swap portfolios over to a sister establishment of the U.K. financial entity that is located in an E.U. Member State or the U.S., without concerns of thereby triggering the application of the Swap Margin Rule’s margin requirements to

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<sup>5</sup> A “swap” is defined in section 721 of the Dodd-Frank Act to include, among other things, an interest rate swap, commodity swap, equity swap, and credit default swap, and a security-based swap is defined in section 761 of the Dodd-Frank Act to include a swap based on a single security or loan or on a narrow-based security index. *See* 7 U.S.C. 1a(47); 15 U.S.C. 78c(a)(68). For the remainder of this preamble, the term “non-cleared swaps” refers to non-cleared swaps and non-cleared security-based swaps unless the context requires otherwise.

<sup>6</sup> 80 FR 74840 (November 30, 2015). The Swap Margin Rule was amended to implement a statutory exemption for non-cleared swaps entered into for hedging by commercial end users and small financial institutions, *see* 80 FR 74916 (November 30, 2015), and to address treatment of qualified financial contracts, *see* 83 FR 50805 (October 10, 2018).

<sup>7</sup> *See*

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759019/25\\_November\\_Agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_and\\_the\\_European\\_Atomic\\_Energy\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf) (visited February 5, 2019).

non-cleared swaps that had been grandfathered at the financial entity in the U.K.<sup>8</sup> The Agencies are also requesting public comment whether additional provisions or clarifications are needed to achieve the Agencies' objectives and provide greater clarity.

In issuing the Swap Margin Rule in 2015, the Agencies established an effective date of April 1, 2016, with a phased in compliance schedule for the initial and variation margin requirements.<sup>9</sup> On or after March 1, 2017, all covered swap entities were required to comply with the variation margin requirements for transactions with other swap entities and financial end user counterparties. By September 1, 2020, all covered swap entities will be required to comply with the initial margin requirements for non-cleared swaps with all financial end users with a material swaps exposure and with all swap entities.

The Swap Margin Rule's requirements generally apply only to a non-cleared swap entered into on or after the applicable compliance date.<sup>10</sup> A non-cleared swap entered into *prior to* an entity's applicable compliance date is essentially "grandfathered" by this regulatory provision, in that the non-cleared swap is generally not

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<sup>8</sup> In this **Supplementary Information**, the Agencies' references to an establishment of a financial entity is intended to be flexible as to whether the relationship of the financial entity to the business unit in the U.K. or elsewhere is due to an affiliation between separately-incorporated entities, branching of a single business entity in different jurisdictions, or some other form of business establishment through which an arm of the financial entity may be legally authorized to conduct business in that location.

<sup>9</sup> The applicable compliance date for a covered swap entity is based on the average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps of the covered swap entity and its counterparty (accounting for their respective affiliates) for each business day in March, April and May of that year. The applicable compliance dates for initial margin requirements, and the corresponding average daily notional thresholds, are: September 1, 2016, \$3 trillion; September 1, 2017, \$2.25 trillion; September 1, 2018, \$1.5 trillion; September 1, 2019, \$0.75 trillion; and September 1, 2020, all swap entities and counterparties. See §\_\_.1(e) of the Swap Margin Rule.

<sup>10</sup> See §\_\_.1(e) of the Swap Margin Rule.

subject to the margin requirements in the Swap Margin Rule (legacy swap). However, the Agencies explained in the preamble of the Swap Margin Rule that a legacy swap that is later amended or novated on or after the applicable compliance date should be subject to the requirements of the Swap Margin Rule, in the interests of preventing evasion of the rule's margin requirements.<sup>11</sup>

The Swap Margin Rule has a broad territorial reach. It applies to swap dealers and security-based swap dealers that are registered with the CFTC or the SEC, respectively, and for which one of the Agencies is the prudential regulator, including, for example, certain foreign banks and foreign banking organizations, certain entities established abroad by U.S. banks, and certain foreign branches of U.S. banks. Typically, such firms are registered in the foreign jurisdiction in which they are located with the appropriate financial regulatory authorities, but the firms may also conduct swap activities with counterparties that have significant ties to the U.S. (or the dealer itself may be a branch of a U.S. bank) under circumstances that trigger dealer registration obligations with the CFTC or SEC. The Agencies included an exemption from the requirements of the Swap Margin Rule that applies whenever a foreign covered swap entity engages in a foreign non-cleared swap, but the rule's margin requirements still apply when the counterparty has certain connections to the U.S., such as when the counterparty is a foreign branch or office of an entity organized under U.S. federal or state law.<sup>12</sup>

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<sup>11</sup> 80 FR 74850-51. See also, 83 FR 50805 (October 10, 2018) (the Agencies added paragraph (7) to §\_\_.1(e), to clarify that a legacy swap would not lose its legacy status when the covered swap entity acceded to changes to the non-cleared swap as necessary to implement the QFC Receivership Stay regulations of the Board, the FDIC, and the OCC.)

<sup>12</sup> See §\_\_.9(a)-(c) of the Swap Margin Rule.

As a result, there are instances in which a covered swap entity engages in non-cleared swap activities out of establishments in the U.K. that are subject to the requirements of the Swap Margin Rule. The same is true in certain instances for a covered swap entity engaging in those activities out of an establishment in another E.U. Member State.

Financial entities, including covered swap entities, in the U.K. face uncertainty about the applicable regulatory framework they will operate within after a U.K. withdrawal from the E.U. In many instances, these firms made a strategic decision decades ago to use a U.K. establishment as their base of operations to provide financial services to customers across the E.U., consistent with the E.U.'s system of cross-border authorizations to engage in regulated financial activities (known as "passporting"). These firms have been mindful that one consequence of a U.K. exit from the E.U. absent a Withdrawal Agreement will be an inability of the firms to continue providing investment services in the E.U. under the current passporting regime. As a result, they might not be in a position to perform certain operations in relation to derivatives contracts they presently have with E.U. clients. In order to address this situation, these firms could transfer their derivatives to a related establishment in an E.U. Member State, which in turn would benefit from the passporting regime.

In addition, a covered swap entity that operates an establishment located outside the U.K. may be affected if the U.K. exits the E.U. without a Withdrawal Agreement. These covered swap entities may have entered into non-cleared swaps with financial entities located in the U.K. These U.K. counterparties of the covered swap entity may need to relocate certain operations, in order to continue providing financial services to

their own customers in the E.U. Accordingly, a covered swap entity's counterparties with establishments in the U.K. may seek to transfer their non-cleared swaps to related establishments of their own in an E.U. Member State.<sup>13</sup>

In recent months, some financial entities have initiated processes under which a U.K. court sanctions a bulk transfer of their business, including derivatives, from the balance sheets of their U.K. establishments to a different location established by the dealer in another E.U. Member State.<sup>14</sup> For many months before that, industry stakeholders urged E.U. regulators to provide certainty that these kinds of portfolio transfers of swaps, entered into before the E.U.'s swap margin rule, will not become subject to E.U. swap margin rules by virtue of the legal changes associated with novations or other legal transfer methods. The European Supervisory Authorities (ESAs)<sup>15</sup> published a final report in November to make a limited exemption in the

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<sup>13</sup> See §\_\_9(a)-(c) of the As discussed later in this **Supplementary Information**, the Agencies have designed the interim final rule to recognize the need for flexibility on the part of financial entities as they attempt to work through the unanticipated effects of a U.K. exit from the E.U. absent a Withdrawal Agreement. For example, while this discussion illustrates an E.U. establishment of a covered swap entity taking on the swap portfolios of the entity's related covered swap entity in the U.K., a different financial entity's current structure might mean the U.K. portfolio is currently held by the financial entity's CFTC-registered non-bank subsidiary in the U.K., which is subject to the CFTC's non-cleared swap margin rule. As a general matter, the CFTC's rule and the Agencies' Swap Margin Rule impose the same requirements and feature the same grandfathering. But the portfolio transfer over to the financial entity's covered swap entity in the E.U. will, as a legal matter, subject them to the Agencies' swap margin rule once they are transferred. Or some financial firms that operate a covered swap entity through an establishment in the U.S. may make strategic decisions to refrain from opening a new E.U. establishment post-withdrawal, and thus need to pull their U.K. non-cleared swap portfolios back to their U.S. covered swap entity.

<sup>14</sup> See, e.g., Barclays Bank plc Part VII Business transfer to Barclays Bank Ireland plc (2019) *EWHC 129 (Ch)*, at <http://www.bailii.org/ew/cases/EWHC/Ch/2019/129.pdf> (visited January 29, 2019); "Two Banks Begin Moving Swaps out of London, Pre-Brexit," Risk.net (November 30, 2018), at <https://www.risk.net/derivatives/6168671/banks-begin-moving-swaps-out-of-london-pre-brexit> (visited January 25, 2019); "UBS Wins Approval for €32bn Brexit Swaps Transfer," Risk.net (February 6, 2019), at <https://www.risk.net/derivatives/6367306/ubs-wins-approval-for-eu32bn-brexit-swaps-transfer>.

<sup>15</sup> The three ESAs are the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

Commission Delegated Regulation under the European Market Infrastructure Regulation (EMIR) for bilateral margining requirements. The exemption would facilitate novations of these non-cleared swaps by ensuring that the regulatory characteristics of the original contracts are preserved.<sup>16</sup>

The scheduled date of the U.K. withdrawal is March 29, 2019. The Agencies believe it is appropriate to provide clarity, in order to facilitate the work of covered swap entities and their counterparties to transfer non-cleared swaps in response to a U.K. exit from the E.U. absent a Withdrawal Agreement, without thereby converting their legacy swaps into covered swaps subject to the Swap Margin Rule. The conditions of eligibility for the transfers are described in the next section of this SUPPLEMENTARY INFORMATION.

## **II. Description of the Interim Final Rule.**

As discussed above, legacy swaps are generally grandfathered from the Swap Margin Rule's requirements. More specifically, §\_\_.1(e) states that covered swap entities shall comply with the Swap Margin Rule's minimum margin requirements for non-cleared swaps entered into on or after the compliance date that the rule establishes for separate classes of counterparties, depending on the size of their swaps portfolios.<sup>17</sup>

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<sup>16</sup> ESAs Propose to Amend Bilateral Margin Requirements to Assist Brexit Preparations for OTC Derivative Contracts (November 29, 2018), at <https://www.esma.europa.eu/press-news/esma-news/esas-propose-amend-bilateral-margin-requirements-assist-brexit-preparations-otc> (visited January 25, 2019).

<sup>17</sup> A legacy swap may still be subjected to margin requirements if the covered swap entity places the swap into a netting set that includes other non-cleared swaps that are entered into after the compliance date applicable to the covered swap entity. Swap Margin Rule §\_\_.5(a)(3). Covered swap entities use netting sets to calculate their margin requirements for multiple swaps with a single counterparty on a portfolio basis, offsetting asset and liability exposures in the portfolio to one net exposure, subject to conditions contained in the Swap Margin Rule, including an enforceable legal netting agreement with the counterparty. See §\_\_.5(a).



However, in the preamble to the Swap Margin Rule, in response to comments, the Agencies declined to include regulatory language that would extend legacy swap treatment to a swap if it is subsequently novated or amended after the applicable compliance date, expressing concerns about evasion and implementation.<sup>18</sup>

In the interim final rule, the Agencies are amending §\_\_.1 to add an additional provision, paragraph §\_\_.1(h). This new provision is designed to preserve the status quo for legacy swaps for a covered swap entity in the event of a “no-deal” U.K. withdrawal, regardless of whether that covered swap entity is the swap counterparty directly involved in the transfer out of the U.K. or the counterparty on the other side of the swap.

A covered swap entity may, for example, use its establishment in the E.U. to take on non-cleared swap portfolios from its swap dealing affiliate in the U.K. In a different case, the covered swap entity’s establishments in the E.U. and the U.K. may both be branches of the same swap dealing bank. Alternatively, there may be yet a different relationship due to the structure of the specific financial entity involved.

On the other hand, the covered swap entity may not move its operations in any way, but it may have existing portfolios of non-cleared swaps facing counterparties who are themselves relocating out of the U.K., to an affiliate, or a branch, or some other type of establishment outside of the U.K.

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<sup>18</sup> 80 FR 74850-51. The Agencies articulated concerns about the potential evasion of the Swap Margin Rule if legacy swaps could be materially amended and not become subject to the requirements of the Swap Margin Rule, as well as the Agencies’ concerns about the difficulty of administering a more complex regulatory approach that attempted to draw distinctions among the materiality of, or the intended purpose of, amendments to legacy swaps.

To be effective, the Agencies believe this interim final rule must cover the different scenarios that would trigger the need for a covered swap entity to participate in amending a non-cleared swap in order to “relocate” the swap, either on account of its own need to move non-cleared swaps out of the U.K., or its counterparty’s need to do so.<sup>19</sup>

Accordingly, the text of the interim final rule is intended to be flexible as to the nature of the financial entity’s establishment – covered swap entity or counterparty – maintained in the U.K., be it an entity organized under U.K. law, or a branch or other authorized office maintained in the U.K. by a firm that is legally organized elsewhere. This flexibility extends to the establishment to which the non-cleared swaps are transferred, so long as the transferring establishment in the U.K. is related to the receiving establishment outside the U.K.<sup>20</sup> The interim final rule is also intended to be flexible as to the manner in which that establishment in the U.K. held its non-cleared swaps, either because the financial entity booked the swap at the U.K. establishment, or as determined by other business or account criteria the financial entity consistently employs in assigning a particular non-cleared swap to a particular establishment.<sup>21</sup>

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<sup>19</sup> The Agencies note that, regardless whether the covered swap entity is driving the swap relocation, or the covered swap entity’s counterparty is driving the move, the covered swap entity will need to participate in whatever amendments or other legal steps are used to reflect the transfer of a bilateral non-cleared swap contract.

<sup>20</sup> See §\_\_\_.1(h)(2)(ii), referring to non-cleared swaps an entity in the U.K. arranges to amend in order to transfer it to one of its affiliates, or a branch or other authorized form of establishment, located in an E.U. Member State.

<sup>21</sup> See §\_\_\_.1(h)(2)(i), referring to non-cleared swap originally entered into before the relevant compliance date under the Swap Margin Rule, when one party to the swap booked it at, or otherwise held it at, an entity (including a branch or other authorized form of establishment) located in the U. K.

To benefit from the treatment of this new legacy swap provision, the financial entity located in the U.K. must arrange to make the amendments to the non-cleared swap solely for the purpose of transferring the non-cleared swap to an affiliate or other related establishment that is located in an E.U. Member State (once the U.K. has withdrawn from the E.U., as further discussed below). This purpose test also contains a requirement that the transfer be made in connection with the U.K. entity's planning for the possibility that the U.K. might exit the E.U. without a Withdrawal Agreement, or the U.K. entity's response to such event.<sup>22</sup>

The interim final rule is intended to be flexible as to whether the relationship aspect of the purpose test is due to affiliation between separately-incorporated entities, branching of a single business entity in different jurisdictions, or some other form of business establishment through which an arm of the financial entity may be legally authorized to conduct business in the E.U. Member State. The Agencies have similarly included transfers to an affiliate, or branch or other authorized form of establishment, that the financial entity maintains in the U.S. to provide additional flexibility for financial entities with U.S. headquarters or other U.S. establishments.

For compliance purposes, the interim final rule makes one distinction between a transfer initiated by the financial entity standing as the covered swap entity at the completion of the transaction, versus a transfer initiated by the covered swap entity's counterparty. For the latter, the counterparty must make a representation to the covered

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<sup>22</sup> See §\_\_\_.1(h)(2)(ii), requiring the amendments to be for the sole purpose of transferring the non-cleared it to one of its affiliates, or a branch or other authorized form of establishment, located in an E.U. Member State, in connection with the entity's planning for or response to U.K. withdrawal.

swap entity that the counterparty carried out the swap in accordance with both elements of the purpose test.

The interim final rule is designed to permit such amendments as financial entities find necessary to relocate non-cleared swap portfolios out of the U.K. under the purpose test. These changes may be carried out using any of the methods typically employed for effecting non-cleared swap transfers, including industry protocols, contractual amendments, or contractual tear-up and replacement. To the extent they would otherwise trigger margin requirements, judicially-supervised changes that result in a non-cleared swap being booked at or held by a related establishment in the E.U., including by means of the court-sanctioned process available under Part VII of the U.K.'s Financial Services and Markets Act of 2000, are similarly within the scope of the interim final rule.

However, the Agencies do not believe the relief being provided for relocation purposes should be expansively applied to encompass economic changes to a legacy swap. Accordingly, the rule text makes legacy swap status unavailable if the amendments to a non-cleared swap modify the payment amount calculation methods, the maturity date, or the notional amount of the non-cleared swap. Thus, for example, if the day count convention of a non-cleared swap changes as a consequence of re-locating a non-cleared interest rate swap several time zones away from the U.K., the parties to the swap would not be changing the payment amount calculation methods. On the other hand, a change to one of the payment amount calculation economic factors (e.g., an interest rate margin or base rate) would be a change outside the scope of the interim final rule and would trigger application of the margin requirements.

The Agencies also seek to establish a reasonable period of time for the necessary work to achieve the transfers to be performed. The interim final rule permits transfers for a period of one year after a U.K. withdrawal. The 1-year period commences at the point at which the law of the European Union ceases to apply in the U.K. pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a Withdrawal Agreement between the U.K. and E.U. pursuant to Article 50(2).<sup>23</sup> If the present withdrawal date is extended, and withdrawal later occurs at the end of that extension without a Withdrawal Agreement, the interim final rule's 1-year period would begin at that time. The Agencies contemplate that, if the withdrawal date is extended, financial entities may negotiate and document their desired transfers during the intervening period, under terms that delay consummation of any transfer until withdrawal takes place without an agreement and the interim final rule's substantive provisions are thereby triggered.

The Agencies believe that a provision enabling entities to transfer non-cleared swaps while retaining legacy status would be most effective if the timeframe allowed takes into account the timeframe under corresponding E.U. legislation. As noted above, the ESAs have submitted novation amendments for their margin rules in proposed form to the European Commission, but the relief that would be afforded thereby has not yet been finalized under the E.U. process.<sup>24</sup> The ESAs' draft Regulatory Technical Standards provides relief for one year after the amendments are finalized by official publication,

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<sup>23</sup> For an overview of the process by which an E.U. Member State may withdraw from the E.U., see the European Parliament Briefing, Article 50 TEU: Withdrawal of a Member State from the E.U. (February 2016), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS\\_BRI\(2016\)577971\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (visited January 25<sup>th</sup>, 2019).

<sup>24</sup> See Final Report on EMIR RTS on the novation of bilateral contracts not subject to bilateral margins, ESAs 2018 25 (November 27, 2018), at <https://eiopa.europa.eu/Publications/Reports/ESAs%202018%2025%20-%20Final%20Report%20-%20Bilateral%20margin%20%28novation%29.pdf> (visited January 25, 2019).

after parliamentary approval. If the E.U. amendments are not yet finalized at the time of a U.K. withdrawal, affected financial entities may delay consummation of their non-cleared swap transfers until the ESAs' proposed amendments apply. The Agencies anticipate some transferring financial entities will operate under both sets of regulations and will accordingly seek to coordinate their transfer operations for compliance purposes under both sets of amendments. To facilitate this, the Agencies' interim final rule has a "tacking" provision that will extend the Agencies' 1-year period by the amount of any additional time available under the ESAs' 1-year period.

The interim final rule differs from the ESAs' proposed amendments to the extent that the legacy status protection afforded under the ESAs' approach is unavailable to derivatives entered into after the official, final publication of the amendments (which establishes the legal effective date of the rule). The Agencies have provided legacy status protection to any swap entered into before the applicable compliance date – of which there are two still upcoming, on September 1, 2019 and September 1, 2020 – with no cutoff for swaps executed before those dates but after issuance of this interim final rule. The Agencies believe the marginal volume of additional legacy swaps that will be protected by the Agencies' approach is not likely to be substantial, and the additional time granted could facilitate a more organized transition for the affected counterparties.

### **III. Request for Comments.**

The Agencies request comment on all aspects of the interim final rule as well as on the following specific questions.

(1) The interim final rule permits amendments to non-cleared swaps in order to transfer swaps in response to the scenario in which the U.K. exits the E.U. in the absence of a Withdrawal Agreement. As explained above, the Agencies seek to encompass changes through a variety of methods, including industry protocols, contractual amendments, transfers permitted by judicial proceedings, and contractual tear-up and replacement. What, if any, additional clarification in the rule as to types of permissible amendments should the Agencies provide? What specifically should be added or clarified, and why is it necessary in order to achieve the Agencies' policy objectives in the context of a U.K. withdrawal from the E.U.?

(2) The relief provided by the interim final rule applies to the transfer of swaps from a financial entity's establishment in the U.K. to an establishment in the E.U. or the U.S. What, if any, other types of relief should be considered for swaps that are transferred from the E.U. to the U.K.? Please provide a description of the circumstances creating this need, including the frequency of its occurrence.

(3) The transfers that are accommodated by the interim final rule are available only between affiliates or other related establishments. The Agencies do not intend the relief provided by the interim final rule to provide an opportunity for financial entities to seek out a new dealer relationship and retain legacy swap treatment. However, the Agencies request comment on whether there may be financial entities that are unable to arrange a

transfer of legacy swaps unless the transfer is to an unrelated entity outside the U.K. and are thus not covered under the terms of the interim final rule. Commenters should provide descriptions of the factual circumstances, including the frequency of its occurrence.

#### **IV. Administrative Law Matters.**

##### *A. Administrative Procedure Act.*

The Agencies are issuing the interim final rule without prior notice and the opportunity for public comment and without the 30-day delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).<sup>25</sup> Pursuant to section 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>26</sup>

As discussed above, the interim final rule addresses a potential impact of the scenario in which the U.K. exits from the E.U. in the absence of a Withdrawal Agreement. The U.K.’s exit is expected to occur on March 29, 2019. The interim final rule facilitates the ability of a financial entity with non-cleared swaps located in the U.K. to relocate existing swap portfolios over to affiliates or other related entities located within the E.U. or U.S., without the “grandfathered” legacy swaps in the portfolios becoming subject to the Swap Margin Rule. As such, the interim final rule benefits covered swap entities subject to the Swap Margin Rule by removing an impediment to

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<sup>25</sup> 5 U.S.C. 553.

<sup>26</sup> 5 U.S.C. 553(b)(B).



the transfers and maintaining the status quo of a legacy swap. The interim final rule does not impose any requirements or mandatory burden on any covered swap entity.

The Agencies believe that the public interest is best served by making the interim final rule effective as soon as possible as a result of the expected timing of events in the U.K. The Agencies believe that issuing the interim final rule will provide the certainty necessary to facilitate the industry's efforts to begin arranging their transfers immediately upon the U.K.'s withdrawal. In addition, the Agencies believe that providing a notice and comment period prior to issuance of the interim final rule is impracticable given the need for relief to begin on March 29, 2019. For these reasons, the Agencies find there is good cause consistent with the public interest to issue the interim final rule without advance notice and comment.<sup>27</sup>

The APA also requires a 30-day delayed effective date, except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.<sup>28</sup> The Agencies find good cause to publish the interim final rule with an immediate effective date for the same reasons set forth above under the discussion of section 553(b)(B) of the APA.

While the Agencies believe there is good cause to issue the interim final rule without advance notice and comment and with an immediate effective date, the Agencies are requesting comment on all aspects of the interim final rule.

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<sup>27</sup> 5 U.S.C. 553(b)(B); 553(d)(3).

<sup>28</sup> 5 U.S.C. 553(d).

B. *Solicitation of Comments on Use of Plain Language.*

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OCC, Board and FDIC to use plain language in all proposed and final rules published after January 1, 2000. The OCC, Board and FDIC invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

C. *Paperwork Reduction Act Analysis.*

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501-3521, the Agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently-valid Office of Management and Budget (OMB) control number. The OCC, Board, and FDIC have reviewed this interim final rule and determined that it introduces a new collection of information pursuant to the PRA and the OCC and FDIC have submitted it to OMB for review under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320). The Board has reviewed the

information collection under its delegated authority. The OMB Control Numbers are: 1557-0251 (OCC), 3064-0204 (FDIC), and 7100-0364 (Board).<sup>29</sup> The FCA has determined the rule will not introduce any collection of information for Farm Credit System institutions because Farm Credit System institutions are Federally chartered instrumentalities of the United States and instrumentalities of the United States are specifically excepted from the definition of “collection of information” contained in 44 U.S.C. 3502(3). The FHFA has determined that the interim final rule does not contain any collection of information for which the agency must obtain clearance under the PRA.

Section \_\_.1(h) specifies that transfers of legacy swaps initiated by a covered swap entity’s counterparty require a representation to the covered swap entity that the counterparty carried out the swap in accordance with both elements of the purpose test<sup>30</sup> in order to remain outside the scope of the rule. The agencies estimate that the burden for this representation is *de minimis*. Therefore, they are estimating minimal burden for this requirement.

OCC:

Estimated Number of Respondents: 10.

Estimated Burden per Response: 1 hour.

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<sup>29</sup> The agencies may be required to request new control numbers.

<sup>30</sup> The purpose test requires that the financial entity located in the U.K. arrange to make the amendments to the non-cleared swap solely for the purpose of transferring the non-cleared swap to an affiliate or other related establishment that is located in an E.U. Member State. This purpose test also contains a requirement that the transfer be made in connection with the U.K. entity’s planning for the possibility that the U.K. might exit the E.U. without a Withdrawal Agreement, or the U.K. entity’s response to such an event.

Total Estimated Burden: 10 hour.

FRB:

Estimated Number of Respondents: 41.

Estimated Burden per Response: 1 hour.

Total Estimated Burden: 41 hours.

FDIC:

Estimated Number of Respondents: 1.<sup>31</sup>

Estimated Burden per Response: 1 hour.

Total Estimated Burden: 1 hour.

Comments are invited on:

- a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;
- b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;
- c. Ways to enhance the quality, utility, and clarity of the information to be collected;

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<sup>31</sup> The FDIC's estimates zero entities, but is estimating one here as a placeholder.

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the ADDRESSES section of this document. A copy of the comments may also be submitted to the OMB desk officer by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; facsimile to (202) 395-6974; or e-mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov), Attention, Federal Banking Agency Desk Officer.

*D. Regulatory Flexibility Act Analysis.*

*OCC:* The Regulatory Flexibility Act (RFA) does not apply to a rulemaking when a general notice of proposed rulemaking is not required. 5 U.S.C. 603 and 604. As noted previously, the Agencies have determined for good cause that it is impracticable and contrary to the public interest to publish a general notice of proposed rulemaking for this joint final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

*Board:* The Regulatory Flexibility Act (RFA) requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously,

consistent with section 553(b)(B) of the APA, the Board has determined for good cause that general notice and opportunity for public comment is impracticable and contrary to the public's interest, and therefore the Board is not issuing a notice of proposed rulemaking. Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply. Further, the Board notes that no small entities, as defined by the Small Business Administration's rules implementing the RFA, will be affected by the interim final rule.

*FDIC:* The Regulatory Flexibility Act (RFA)<sup>32</sup> requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.<sup>33</sup> The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed in the joint interim final rule, consistent with section 553(b)(B) of the APA, the FDIC determined for good cause that general notice and opportunity for public comment was unnecessary, and therefore the FDIC did not issue a notice of proposed rulemaking. Accordingly, the FDIC has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply. Further, the FDIC supervises 3,533 depository institutions,<sup>34</sup> of which 2,726 are defined as small banking entities by the terms of the

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<sup>32</sup> 5 U.S.C. 601 et seq.

<sup>33</sup> The SBA defines a small banking organization as having \$550 million or less in assets, where "a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." 13 CFR 121.201 n.8 (2018). "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates. . . ." 13 CFR 121.103(a)(6) (2018). Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

<sup>34</sup> FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

RFA.<sup>35</sup> This interim final rule directly applies to covered swap entities (which includes persons registered with the CFTC as swap dealers or major swap participants pursuant to the Commodity Exchange Act of 1936 and persons registered with the SEC as security-based swap dealers and major security-based swap participants under the Securities Exchange Act of 1934) that are subject to the requirements of the Swap Margin Rule. The FDIC has identified 104 swap dealers that, as of February 12, 2019, have registered as swap entities.<sup>36</sup> None of these institutions are supervised by the FDIC. Therefore, no small FDIC-supervised entities, as defined by the Small Business Administration's rules implementing the RFA, will be affected by the interim final rule.

*FCA:* Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the interim final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the Farm Credit System, considered together with its affiliated associations, has assets and annual income more than the amounts that would qualify them as small entities. Nor does the Federal Agricultural Mortgage Corporation meet the definition of a "small entity." Therefore,

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<sup>35</sup> FDIC Call Report, September 30, 2018.

<sup>36</sup> In identifying the 104 entities referred to in the text, the Agencies used the list of swap dealers set forth, on February 12, 2019 (providing data as of February 12, 2019) at <https://www.cftc.gov/LawRegulation/DoddFrankAct/registerwapdealer.html>. While the CFTC has adopted a registration requirement for entities that meet the definition of major swap participants, as of February 12, 2019, the CFTC's website does not indicate that any entities are currently registered as major swap participants. Major swap participants are required to apply for registration through a filing with the National Futures Association. Accordingly, the Agencies reviewed the National Futures Association <https://www.nfa.futures.org/members/sd/index.html> to determine whether there were registered major swap participants. As of February 11, 2019, there were no Major Swaps Participants listed on this link. The SEC has not yet imposed a registration requirement for security-based swap dealers or major security-based swap participants.

Farm Credit System institutions are not “small entities” as defined in the Regulatory Flexibility Act.

*FHFA*: The RFA applies only to rules for which an agency is required to publish a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed in the joint interim final rule, consistent with section 553(b)(B) of the APA, FHFA determined for good cause that general notice and opportunity for public comment was impracticable and contrary to the public interest, and therefore FHFA did not issue a notice of proposed rulemaking. Accordingly, FHFA has concluded that the RFA’s requirements relating to initial and final regulatory flexibility analysis do not apply. This interim final rule directly applies to covered swap entities (which includes persons registered with the CFTC as swap dealers or major swap participants pursuant to the Commodity Exchange Act of 1936 and persons registered with the SEC as security-based swap dealers and major security-based swap participants under the Securities Exchange Act of 1934) that are subject to the requirements of the Swap Margin Rule. No FHFA-regulated entity is a covered swap entity, nor is any FHFA-regulated entity a small entity, as defined by the Small Business Administration’s rules implementing the RFA. Therefore, no small FHFA-regulated entity will be affected by the interim final rule.

E. *Unfunded Mandates Reform Act of 1995.*

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), 2 U.S.C. 1532, requires the OCC to prepare a budgetary impact statement before promulgating any final rule for which a general notice of proposed rulemaking was published. As discussed above, the OCC has determined for good cause that the



publication of a general notice of proposed rulemaking is impracticable and contrary to the public interest. Accordingly, this joint final rule is not subject to section 202 of the Unfunded Mandates Act.

F. *Riegle Community Development and Regulatory Improvement Act of 1994.*

The Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.<sup>37</sup> Each Federal banking agency has determined that the final rule would not impose additional reporting, disclosure, or other requirements; therefore the requirements of the RCDRIA do not apply.

**List of Subjects**

**12 CFR Part 45**

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<sup>37</sup> 12 U.S.C. 4802.

Administrative practice and procedure, Capital, Margin requirements, National Banks, Federal Savings Associations, Reporting and recordkeeping requirements, Risk.

**12 CFR Part 237**

Administrative practice and procedure, Banks, banking, Foreign banking, Holding companies, Reporting and recordkeeping requirements, Swaps.

**12 CFR Part 349**

Administrative practice and procedure, Banks, banking , Holding companies, Capital, Margin Requirements, Reporting and recordkeeping requirements, Savings associations, Risk, Swaps.

**12 CFR Part 624:**

Accounting, Agriculture, Banks, Banking, Capital, Cooperatives, Credit, Margin requirements, Reporting and recordkeeping requirements, Risk, Rural areas, Swaps.

**12 CFR Part 1221**

Government-sponsored enterprises, Mortgages, Securities.

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

12 CFR Chapter I

**Authority and Issuance**

For the reasons set forth in the common preamble and under the authority of 12 U.S.C. 93a and 5412(b)(2)(B), the Office of the Comptroller of the Currency amends chapter I of Title 12, Code of Federal Regulations, as follows:

**PART 45—MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES**

1. The authority citation for Part 45 continues to read as follows:

**Authority:** 7 U.S.C. 6s(e), 12 U.S.C. 1 et seq., 12 U.S.C. 93a, 161, 481, 1818, 3907, 3909, 5412(b)(2)(B), and 15 U.S.C. 78o-10(e).

2. Section 45.1 is amended by adding a new paragraph (h) to read as follows:

**§ 45.1 Authority, purpose, scope, exemptions and compliance dates.**

\* \* \* \* \*

(h) Legacy swaps. Covered swaps entities are required to comply with the requirements of this part for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this part if changes are made to it as follows:

(1) [RESERVED]

(2) The non-cleared swap or non-cleared security based swap was amended under the following conditions:

(i) The swap was originally entered into before the relevant compliance date established in paragraph (e) of this section and one party to the swap booked it at, or

otherwise held it at, an entity (including a branch or other authorized form of establishment) located in the United Kingdom;

(ii) The entity in the United Kingdom subsequently arranged to amend the swap, solely for the purpose of transferring it to an affiliate, or a branch or other authorized form of establishment, located in any European Union member state or the United States, in connection with the entity's planning for or response to the event described in paragraph (h)(2)(iii), and the transferee is:

(A) A covered swap entity, or

(B) A covered swap entity's counterparty to the swap, and the counterparty represents to the covered swap entity that the counterparty performed the transfer in compliance with the requirements of paragraph (h)(2)(i)-(ii);

(iii) The law of the European Union ceases to apply to the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a Withdrawal Agreement between the United Kingdom and the European Union pursuant to Article 50(2);

(iv) The amendments do not modify any of the following: the payment amount calculation methods, the maturity date, or the notional amount of the swap;

(v) The amendments cause the transfer to take effect on or after the date of the event described in paragraph (h)(2)(iii) transpires; and

(iv) The amendments cause the transfer to take effect by the later of:

(A) The date that is one year after the date of the event described in paragraph (h)(2)(iii); or

(B) Such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (E.U.) No. 2016/2251, as amended.

**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM**

**12 CFR Chapter II**

**Authority and Issuance**

For the reasons set forth in the preamble, the Board of Governors of the Federal Reserve System amends 12 CFR part 237 to read as follows:

**PART 237—SWAPS MARGIN AND SWAPS PUSH-OUT**

3. The authority citation for part 237 continues to read as follows:

**Authority:** 7 U.S.C. 6s(e), 15 U.S.C. 78o–10(e), 15 U.S.C. 8305, 12 U.S.C. 221 *et seq.*, 12 U.S.C. 343–350, 12 U.S.C. 1818, 12 U.S.C. 1841 *et seq.*, 12 U.S.C. 3101 *et seq.*, and 12 U.S.C. 1461 *et seq.*

4. Section 237.1 is amended by adding paragraph (h) to read as follows:

**Subpart A— Margin and Capital Requirements for Covered Swap Entities (Regulation KK)**

**§237.1 Authority, purpose, scope, exemptions and compliance dates. (AMENDED)**

\* \* \* \* \*

(h) Legacy swaps. Covered swaps entities are required to comply with the requirements of this subpart for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this subpart if changes are made to it as follows:

(1) [RESERVED]

(2) The non-cleared swap or non-cleared security based swap was amended under the following conditions:

(i) The swap was originally entered into before the relevant compliance date established in paragraph (e) of this section and one party to the swap booked it at, or otherwise held it at, an entity (including a branch or other authorized form of establishment) located in the United Kingdom;

(ii) The entity in the United Kingdom subsequently arranged to amend the swap, solely for the purpose of transferring it to an affiliate, or a branch or other authorized form of establishment, located in any European Union member state or the United States, in connection with the entity's planning for or response to the event described in paragraph (h)(2)(iii), and the transferee is:

(A) A covered swap entity, or

(B) A covered swap entity's counterparty to the swap, and the counterparty represents to the covered swap entity that the counterparty performed the transfer in compliance with the requirements of paragraph (h)(2)(i)-(ii) of this section;

(iii) The law of the European Union ceases to apply to the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a Withdrawal Agreement between the United Kingdom and the European Union pursuant to Article 50(2);

(iv) The amendments do not modify any of the following: the payment amount calculation methods, the maturity date, or the notional amount of the swap;

(v) The amendments cause the transfer to take effect on or after the date of the event described in paragraph (h)(2)(iii) transpires; and

(vi) The amendments cause the transfer to take effect by the later of:

(A) The date that is one year after the date of the event described in paragraph (h)(2)(iii); or

(B) Such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (E.U.) No. 2016/2251, as amended.

## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **12 CFR Chapter III**

#### **Authority and Issuance**

For the reasons set forth in the Supplementary Information section, the Federal Deposit Insurance Corporation amends 12 CFR Chapter III as follows:

Part 349—DERIVATIVES, Subpart A

5. The authority citation for subpart A of part 349 continues to read as follows:

Authority: 7 U.S.C. 6s(e), 15 U.S.C. 78o-10(e), and 12 U.S.C. 1818 and 12 U.S.C. 1819(a)(Tenth), 12 U.S.C.1813(q), 1818, 1819, and 3108.

6. Section 349.1 is amended by adding a new paragraph (h) to read as follows:

§ 349.1 Authority, purpose, scope, exemptions and compliance dates.

\* \* \* \* \*

(h) Legacy swaps. Covered swaps entities are required to comply with the requirements of this part for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared

security-based swap entered into before such relevant date shall remain outside the scope of this part if changes are made to the non-cleared swap or non-cleared security-based swap it as follows:

(1) [RESERVED]

(2) The non-cleared swap or non-cleared security based swap was amended under the following conditions:

(i) The swap was originally entered into, booked at, or otherwise held at, an entity located in the United Kingdom before the relevant compliance date established in paragraph (e) of this section and one party to the swap booked it at, or otherwise held it at, an entity (including a branch or other authorized form of establishment) located in the United Kingdom;

(ii) The entity in the United Kingdom subsequently arranged to amend the swap, solely for the purpose of transferring it to an affiliate, or a branch or other authorized form of establishment, located in any European Union member state or the United States, in connection with the entity's planning for or response to the event described in paragraph (h)(2)(iii), and the transferee is:

(A) A covered swap entity, or

(B) A covered swap entity's counterparty to the swap, and the counterparty represents to the covered swap entity that the counterparty performed the transfer in compliance with the requirements of paragraph (h)(2)(i)-(ii);subject to the following conditions:

(iii) The law of the European Union ceases to apply [to] the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a



Withdrawal Agreement between the United Kingdom and the European Union pursuant to Article 50(2);

(iv) The amendments do not modify any of the following: the payment amount calculation methods, the maturity date, or the notional amount of the swap or non-cleared swap;

(v) The amendments cause the transfer to take effect on or after the date of the event described in paragraph (h)(2)(iii) transpires; and

(vi) The amendments cause the transfer to take effect by the later of:

(A) The date that is one year after the date of the event described in paragraph (h)(2)(iii); or

(B) Such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (E.U.) No. 2016/2251, as amended.

## **FARM CREDIT ADMINISTRATION**

### **Authority and Issuance**

For the reasons set forth in the preamble, the Farm Credit Administration amends chapter VI of title 12, Code of Federal Regulations, as follows:

### **PART 624 –MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES**

1. The authority citation for part 624 continues to read as follows:

**Authority:** 7 U.S.C 6s(e), 15 U.S.C. 78o-10(e), 12 U.S.C. 2154, 12 U.S.C. 2243, 12 U.S.C. 2252, 12 U.S.C. 2279bb-1.

2. Section 624.1 is amended by adding a new paragraph (h) to read as follows:

#### **§ 624.1 Authority, purpose, scope, exemptions and compliance dates.**

\* \* \* \* \*

(h) Legacy swaps. Covered swaps entities are required to comply with the requirements of this part for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this part if changes are made to it as follows:

(1) [RESERVED]

(2) The non-cleared swap or non-cleared security-based swap was amended under the following conditions:

(i) The swap was originally entered into before the relevant compliance date established in paragraph (e) of this section and one party to the swap booked it at, or otherwise held it at, an entity (including a branch or other authorized form of establishment) located in the United Kingdom;

(ii) The entity in the United Kingdom subsequently arranged to amend the swap, solely for the purpose of transferring it to an affiliate, or a branch or other authorized form of establishment, located in any European Union member state or the United States, in connection with the entity's planning for or response to the event described in paragraph (h)(2)(iii), and the transferee is:

(A) A covered swap entity, or

(B) A covered swap entity's counterparty to the swap, and the counterparty represents to the covered swap entity that the counterparty performed the transfer in compliance with the requirements of paragraph (h)(2)(i)-(ii);

(iii) The law of the European Union ceases to apply to the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a Withdrawal Agreement between the United Kingdom and the European Union pursuant to Article 50(2);

(iv) The amendments do not modify any of the following: the payment amount calculation methods, the maturity date, or the notional amount of the swap;

(v) The amendments cause the transfer to take effect on or after the date of the event described in paragraph (h)(2)(iii) transpires; and

(iv) The amendments cause the transfer to take effect by the later of:

(A) The date that is one year after the date of the event described in paragraph (h)(2)(iii); or

(B) Such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (E.U.) No. 2016/2251, as amended.

## **FEDERAL HOUSING FINANCE AGENCY**

### **Authority and Issuance**

For the reasons set forth in the preamble, the Federal Housing Finance Agency amends chapter XII of title 12, Code of Federal Regulations, as follows:

### **PART 1221 –MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES**

1. The authority citation for part 1221 continues to read as follows:

**Authority:** 7 U.S.C. 6s(e), 15 U.S.C. 78o-10(e), 12 U.S.C. 4513, and 12 U.S.C. 4526(a).

2. Section 1221.1 is amended by adding a new paragraph (h) to read as follows:

**§ 1221.1 Authority, purpose, scope, exemptions, and compliance dates.**

**(AMENDED)**

\* \* \* \* \*

(h) Legacy swaps. Covered swaps entities are required to comply with the requirements of this part for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this part if changes are made to it as follows:

(1) [RESERVED]

(2) The non-cleared swap or non-cleared security based swap was amended under the following conditions:

(i) The swap was originally entered into before the relevant compliance date established in paragraph (e) of this section and one party to the swap booked it at, or otherwise held it at, an entity (including a branch or other authorized form of establishment) located in the United Kingdom;

(ii) The entity in the United Kingdom subsequently arranged to amend the swap, solely for the purpose of transferring it to an affiliate, or a branch or other authorized form of establishment, located in any European Union member state or the United States, in connection with the entity's planning for or response to the event described in paragraph (h)(2)(iii) of this section, and the transferee is:

(A) A covered swap entity, or

(B) A covered swap entity's counterparty to the swap, and the counterparty represents to the covered swap entity that the counterparty performed the transfer in compliance with the requirements of paragraphs (h)(2)(i) through(ii) of this section;

(iii) The law of the European Union ceases to apply to the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a Withdrawal Agreement between the United Kingdom and the European Union pursuant to Article 50(2);

(iv) The amendments do not modify any of the following: the payment amount calculation methods, the maturity date, or the notional amount of the swap;

(v) The amendments cause the transfer to take effect on or after the date of the event described in paragraph (h)(2)(iii) of this section transpires; and

(vi) The amendments cause the transfer to take effect by the later of:

(A) The date that is one year after the date of the event described in paragraph (h)(2)(iii) of this section; or

(B) Such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (E.U.) No. 2016/2251, as amended.

**THIS SIGNATURE PAGE RELATES TO THE JOINT AGENCY INTERIM  
FINAL RULE TITLED “MARGIN AND CAPITAL REQUIREMENTS FOR  
COVERED SWAP ENTITIES”.**

Dated: March 7, 2019

(signed)

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Joseph M. Otting,  
*Comptroller of the Currency.*

**THIS SIGNATURE PAGE RELATES TO THE JOINT AGENCY INTERIM  
FINAL RULE TITLED “MARGIN AND CAPITAL REQUIREMENTS FOR  
COVERED SWAP ENTITIES”.**

By order of the Board of Governors of the Federal Reserve System, March 12, 2019.

(signed)

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**Margaret McCloskey Shanks,**  
*Deputy Secretary of the Board.*

**THIS SIGNATURE PAGE RELATES TO THE JOINT AGENCY INTERIM  
FINAL RULE TITLED “MARGIN AND CAPITAL REQUIREMENTS FOR  
COVERED SWAP ENTITIES”.**

Dated at Washington, D.C., on March 8, 2019.

Federal Deposit Insurance Corporation.

(signed)

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**Valerie J. Best,**  
*Assistant Executive Secretary.*



**THIS SIGNATURE PAGE RELATES TO THE JOINT AGENCY INTERIM  
FINAL RULE TITLED “MARGIN AND CAPITAL REQUIREMENTS FOR  
COVERED SWAP ENTITIES”.**

By order of the Board of the Farm Credit Administration.

Dated at McLean, VA, this 5th day of March 2019

(signed)

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Dale L. Aultman,  
*Secretary.*

**THIS SIGNATURE PAGE RELATES TO THE JOINT AGENCY INTERIM  
FINAL RULE TITLED “MARGIN AND CAPITAL REQUIREMENTS FOR  
COVERED SWAP ENTITIES”.**

Dated: 03/7/2019.

(signed)

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Joseph M. Otting,  
Acting Director, Federal Housing Finance Agency.