

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 45**

**Docket No. OCC-2018-0003**

**RIN 1557-AE29**

**FEDERAL RESERVE SYSTEM**

**12 CFR Part 237**

**Docket No. R-1596**

**RIN 7100-AE96**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 349**

**RIN 3064-AE70**

**FARM CREDIT ADMINISTRATION**

**12 CFR Part 624**

**RIN 3052-AD28**

**FEDERAL HOUSING FINANCE AGENCY**

**12 CFR Part 1221**

**RIN 2590-AA45**

**Margin and Capital Requirements for Covered Swap Entities; Proposed Rule**

**AGENCIES:** 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:** Notice of proposed rulemaking and request for comment.

**SUMMARY:** The Board, OCC, FDIC, FCA, and FHFA (each an Agency and, collectively, the Agencies) are seeking comment on proposed amendments to the minimum margin requirements for registered swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants for which one of the Agencies is the prudential regulator (Swap Margin Rule). The Agencies are proposing these amendments in light of the rules recently adopted by the Board, the OCC, and the FDIC that impose restrictions on certain non-cleared swaps and non-cleared security-based swaps and other financial contracts (Covered QFCs) (the QFC Rules). The QFC Rules amend the definition of “Qualifying Master Netting Agreement” in the Federal banking agencies’ regulatory capital and liquidity rules to ensure that a Covered QFC is not prevented from being part of a Qualifying Master Netting Agreement solely because the Covered QFC conforms to the new requirements in the QFC Rules. The FCA also plans to propose amendments to its capital rules, including potential revisions to its regulatory definition of “Qualifying Master Netting Agreement,” which is expected to be identical to the definition used in the Federal banking agencies’ regulatory capital and liquidity rules.

The Agencies are proposing to amend the definition of “Eligible Master Netting Agreement” in the Swap Margin Rule so that it remains harmonized with the amended definition of “Qualifying Master Netting Agreement” in the Federal banking agencies’ regulatory capital and liquidity rules, and amendments to the capital rules that the FCA separately plans to propose. This proposed rule would also ensure that netting

agreements of firms subject to the Swap Margin Rule are not excluded from the definition of “Eligible Master Netting Agreement” based solely on their compliance with the QFC Rules. The Agencies are also proposing that any legacy non-cleared swap or non-cleared security-based swap (*i.e.*, a non-cleared swap or non-cleared security-based swap entered into before the applicable compliance date) that is not subject to the margin requirements of the Swap Margin Rule would not become subject to the provisions of the Swap Margin Rule if the non-cleared swap or non-cleared security-based swap is amended solely to comply with the requirements of the QFC Rules.

**DATES:** Comments should be received by [60 days from date of publication in 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. Commenters are also encouraged to identify the number of the specific question for comment to which they are responding. Comments should be directed to:

**OCC:** You may submit comments to the OCC by any of the methods set forth below.

Because paper mail in the Washington, DC area and at the OCC is subject to delay, 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](http://www.regulations.gov). Enter “Docket ID OCC-2018-0003” 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 7th Street, SW, Suite 3E-218, Washington, DC 20219.
- *Hand Delivery/Courier*: 400 7th 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-2018-0003” in your comment. In general, the OCC will enter all comments received into the docket and publish them 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-2018-003” 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 and photocopy 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 and photocopy comments.

**Board:** You may submit comments, identified by Docket No. R-1596 and RIN 7100 AE-96, 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>.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket 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 will be made available on the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), between 9:00 a.m. and 5:00 p.m. on weekdays.

**FDIC:** You may submit comments, identified by RIN 3064-AE70, by any of the following methods:

- *Agency Web Site:* <http://www.fdic.gov/regulations/laws/federal>. Follow instructions for submitting comments on the Agency Web site.
- *E-mail:* [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include "RIN 3064-AE70" on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/RIN 3064-AE70, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- *Hand Delivery/Courier:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. All comments received must include the agency name (FDIC) and RIN 3064-AE70 and will be posted without change to <http://www.fdic.gov/regulations/laws/federal>, including any personal information provided.

**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 email 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>.

Select “Public Commenters,” then “Public Comments,” and follow the directions for “Submitting a Comment.”

- *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 in the Web site, select “Public Commenters,” then “Public Comments,” and follow the directions for “Reading Submitted 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 email addresses to help reduce Internet spam.

**FHFA:** You may submit your written comments on the proposed rulemaking, identified by regulatory information number (RIN) 2590–AA45, by any of the following methods:

- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail at [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov). Please include “RIN 2590–AA45” in the subject line of the

message. *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–AA45” in the subject line of the message.

- *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–AA45, Federal Housing Finance Agency, Eighth Floor, 400 7th St., SW, Washington, DC 20219.

- *Hand Delivery/Courier*: The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA45, Federal Housing Finance Agency, Eighth Floor, 400 7th St., SW, Washington, DC 20219. A hand-delivered package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m. All comments received by the deadline will be posted for public inspection without change, including any personal information you provide, such as your name and address, on the FHFA Web site 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.

**FOR FURTHER INFORMATION CONTACT:**

*OCC:* Allison Hester-Haddad, Counsel, Legislative and Regulatory Activities Division, (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:* Anna M. Harrington, Senior Supervisory Financial Analyst, (202) 452-6406, or Kelly Tomera, Financial Analyst, (202) 912-7861, Division of Supervision and Regulation; Adam Cohen, Counsel, (202) 912-4658, Victoria M. Szybillo, Counsel, (202) 475-6325, or Jason Shafer, Senior Attorney, (202) 728-5811, 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, Capital Markets Branch, Division of Risk Management Supervision, (202) 898-3843, ileonova@fdic.gov; Phillip E. Sloan, Counsel, Legal Division, psloan@fdic.gov, (703) 562-6137, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

*FCA:* J.C. Floyd, Associate Director, Finance & Capital Markets Team, Timothy T. Nerdahl, Senior Policy Analyst – Capital Markets, Jeremy R. Edelstein, 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, or James Jordan, Assistant General Counsel, Office of General Counsel, (202) 649-3075, James.Jordan@fhfa.gov, Federal

Housing Finance Agency, Constitution Center, 400 7th St., SW, Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

## **I. Background**

### **A. The Swap Margin Rule**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was enacted on July 21, 2010.<sup>1</sup> Title VII of the Dodd-Frank Act established a comprehensive new regulatory framework for derivatives, which the Dodd-Frank Act generally characterizes as “swaps” (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 “security-based swaps” (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).<sup>2</sup> For the remainder of this preamble, the term “swaps” refers to swaps and security-based swaps unless the context requires otherwise.

Sections 731 and 764 of the Dodd-Frank Act required the Office of the Comptroller of the Currency (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) (collectively, the Agencies) to

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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. 1a(47); 15 U.S.C. 78c(a)(68).

adopt rules jointly that establish capital and margin requirements for swap entities<sup>3</sup> that are prudentially regulated by one of the Agencies (covered swap entities),<sup>4</sup> to offset the

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<sup>3</sup> See 7 U.S.C. 6s; 15 U.S.C. 78o–10. Sections 731 and 764 of the Dodd-Frank Act add 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). The CFTC is vested with primary responsibility for the oversight of the swaps market under Title VII of the Dodd-Frank Act. The SEC is vested with primary responsibility for the oversight of the security-based swaps market under Title VII of the Dodd-Frank Act. Section 712(d)(1) of the Dodd-Frank Act requires the CFTC and SEC to issue joint rules further defining the terms swap, security-based swap, swap dealer, major swap participant, security-based swap dealer, and major security-based swap participant. The CFTC and SEC issued final joint rulemakings with respect to these definitions in May 2012 and August 2012, respectively. See 77 FR 30596 (May 23, 2012); 77 FR 39626 (July 5, 2012) (correction of footnote in the Supplementary Information accompanying the rule); and 77 FR 48207 (August 13, 2012). 17 CFR part 1; 17 CFR parts 230, 240 and 241.

<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

greater risk to the covered swap entity and the financial system arising from swaps that are not cleared by a registered derivatives clearing organization or a registered clearing agency (non-cleared swaps).<sup>5</sup> On November 30, 2015, the Agencies published a joint final rule (Swap Margin Rule) to establish minimum margin and capital requirements for covered swap entities.<sup>6</sup>

In the Swap Margin Rule, the Agencies adopted a risk-based approach for initial and variation margin requirements for covered swap entities.<sup>7</sup> To implement the risk-based approach, the Agencies established requirements for a covered swap entity to collect and post initial margin for non-cleared swaps with a counterparty that is either: (1) a financial end user with material swaps exposure,<sup>8</sup> or (2) a swap entity.<sup>9</sup> A covered swap entity must collect and post variation margin for non-cleared swaps with all swap entities and financial end user counterparties, even if such financial end users do not have material swaps exposure.<sup>10</sup> Other counterparties, including nonfinancial end users, are

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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).

<sup>5</sup> *See* 7 U.S.C. 6s(e)(3)(A); 15 U.S.C. 78o-10(e)(3)(A).

<sup>6</sup> 80 FR 74840 (November 30, 2015).

<sup>7</sup> 80 FR 74843.

<sup>8</sup> “Material swaps exposure” for an entity means that the entity and its affiliates have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July, and August of the previous calendar year that exceeds \$8 billion, where such amount is calculated only for business days. *See* §\_.2 of the Swap Margin Rule.

<sup>9</sup> *See* §§\_.3 and \_.4 of the Swap Margin Rule.

<sup>10</sup> *Id.*

not subject to specific, numerical minimum requirements for initial and variation margin.<sup>11</sup>

The effective date for the Swap Margin Rule was April 1, 2016, but the Agencies established a phase-in compliance schedule for the initial margin and variation margin requirements.<sup>12</sup> On or after March 1, 2017, all covered swap entities are 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 all swap entities.

The Swap Margin Rule's requirements apply only to a non-cleared swap entered into on or after the applicable compliance date (covered swap); a non-cleared swap entered into prior to a covered swap entity's applicable compliance date (legacy swap) is generally not subject to the margin requirements in the Swap Margin Rule.<sup>13</sup> However, a legacy swap that is later amended or novated on or after the applicable compliance date

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<sup>11</sup> *Id.*

<sup>12</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>13</sup> See §\_\_.1(e) of the Swap Margin Rule.

would be deemed to be a covered swap, and therefore would become subject to the requirements of the Swap Margin Rule.<sup>14</sup>

Whether a non-cleared swap is deemed to be a legacy swap or a covered swap also affects the treatment of a covered swap entity's netting portfolios. The Swap Margin Rule permits a covered swap entity to (1) calculate initial margin requirements for covered swaps under an eligible master netting agreement (EMNA) with a counterparty on a portfolio basis in certain circumstances, if it does so using an initial margin model; and (2) calculate variation margin on an aggregate net basis under an EMNA.<sup>15</sup> In addition, the Swap Margin Rule permits swap counterparties to identify one or more separate netting portfolios under an EMNA, including netting sets of covered swaps and netting sets of non-cleared swaps that are not subject to margin requirements.<sup>16</sup> Specifically, a netting portfolio that contains only legacy swaps is not subject to the margin requirements set out in the Swap Margin Rule.<sup>17</sup> However, if a netting portfolio contains any covered swaps, the entire netting portfolio is subject to the margin requirements of the Swap Margin Rule.<sup>18</sup>

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<sup>14</sup> 80 FR 74850-51.

<sup>15</sup> See §§\_.2 and \_.5 of the Swap Margin Rule.

<sup>16</sup> Typically, this is accomplished by using a separate Credit Support Annex for each netting set, subject to the terms of a single master netting agreement.

<sup>17</sup> See §§\_\_.2 and \_\_.5 of the Swap Margin Rule.

<sup>18</sup> *Id.*

## B. The QFC Rules

As part of the broader regulatory reform effort following the financial crisis to increase the resolvability and resiliency of U.S. global systemically important banking institutions<sup>19</sup> (U.S. GSIBs) and the U.S. operations of foreign GSIBs (together, GSIBs),<sup>20</sup> the Board, the OCC, and the FDIC adopted final rules that establish restrictions on and requirements for certain non-cleared swaps and other financial contracts (collectively, Covered QFCs) of GSIBs and their subsidiaries (the QFC Rules).<sup>21</sup>

Subject to certain exemptions, the QFC Rules require U.S. GSIBs, together with their subsidiaries, and the U.S. operations of foreign GSIBs (each a Covered QFC Entity and, collectively, Covered QFC Entities) to conform Covered QFCs to

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<sup>19</sup> See 12 CFR 217.402 (defining global systemically important banking institution). The eight firms currently identified as U.S. GSIBs are Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., Goldman Sachs Group, Inc., JP Morgan Chase & Co., Morgan Stanley Inc., State Street Corporation, and Wells Fargo & Company.

<sup>20</sup> The U.S. operations of 20 foreign GSIBs are currently subject to the Board's QFC Rule.

<sup>21</sup> See 12 CFR 252.82(c) (defining Covered QFC), 382.2(c) (same). See also 82 FR 56630 (November 29, 2017) (for OCC's QFC Rule). See also 82 FR 50228 (October 30, 2017) (for FDIC's QFC Rule). See also 82 FR 42882 (September 12, 2017) (for the Board's QFC Rule). The effective date of the Board's QFC Rule was November 13, 2017, and the effective date for the substance of the OCC's and FDIC's QFC Rules was January 1, 2018. The QFC Rules include a phased-in conformance period for a Covered QFC Entity that varies depending upon the counterparty type of the Covered QFC Entity. The first conformance date is January 1, 2019, and applies to Covered QFCs with GSIBs. The QFC Rules provide Covered QFC Entities an additional six months or one year to conform its Covered QFCs with other types of counterparties.

the requirements of the rules.<sup>22</sup> The QFC Rules generally require the Covered QFCs of Covered QFC Entities to contain contractual provisions that opt into the “temporary stay-and-transfer treatment” of the Federal Deposit Insurance Act (FDI Act)<sup>23</sup> and Title II of the Dodd-Frank Act, thereby reducing the risk that the stay-and-transfer treatment would be challenged by a Covered QFC Entity’s counterparty or a court in a foreign jurisdiction.<sup>24</sup> The temporary stay-and-transfer treatment is part of the special resolution framework for failed financial firms created by the FDI Act and Title II of the Dodd-Frank Act. The stay-and-transfer treatment provides that the rights of a failed insured depository institution’s or financial company’s counterparties to terminate, liquidate, or net certain qualified financial contracts on account of the appointment of the FDIC as receiver for the entity (or the insolvency or financial condition of the entity for which the FDIC has been appointed receiver) are temporarily stayed when the entity enters a resolution proceeding to allow for the transfer of the failed firm’s Covered QFCs to a solvent party.<sup>25</sup> The QFC Rules also generally prohibit Covered QFCs from allowing the

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<sup>22</sup> To the extent a U.S. GSIB, any of its subsidiaries, or the U.S. operations of a foreign GSIB include a swap entity for which one of the Agencies is a prudential regulator, a Covered QFC Entity may be a covered swap entity.

<sup>23</sup> 12 U.S.C. 1811 et. seq.

<sup>24</sup> 82 FR 42882 (September 12, 2017); 82 FR 50228 (October 30, 2017); 82 FR 56630 (November 29, 2017).

<sup>25</sup> 12 U.S.C. 1821(e)(10)(B), 5390(c)(10)(B). Title II of the Dodd-Frank Act also provides the FDIC with the power to enforce Covered QFCs (and other contracts) of subsidiaries and affiliates of the financial company for which the FDIC has been appointed receiver. 12 U.S.C. 5390(c)(16); 12 CFR 380.12.

exercise of default rights related, directly or indirectly, to the entry into resolution of an affiliate of the Covered QFC Entity (cross-default rights).<sup>26</sup>

The Board's QFC Rule applies to U.S. GSIBs and their subsidiaries, state branches, and state agencies, as well other U.S. operations of foreign GSIBs with the exception of banks regulated by the FDIC or OCC, Federal branches, or Federal agencies.<sup>27</sup> The FDIC's QFC Rule applies to GSIB subsidiaries that are state savings associations and state-chartered banks that are not members of the Federal Reserve System.<sup>28</sup> The OCC's QFC Rule applies to national bank subsidiaries and Federal savings association subsidiaries of GSIBs, and Federal branches and agencies of foreign GSIBs.<sup>29</sup>

### **C. The Definitions of Qualifying Master Netting Agreement**

As part of the QFC Rules, the Federal banking agencies amended the definition of qualifying master netting agreement (QMNA) in their capital and liquidity rules to prevent the QFC Rules from having disruptive effects on the treatment of netting sets of Board-regulated firms, OCC-regulated firms, and FDIC-regulated firms.<sup>30</sup> The FCA plans to propose several technical and clarifying amendments to its capital regulations, including a possible revision to the definition of QMNA so it continues to be identical to

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<sup>26</sup> 82 FR 42882 (September 12, 2017); 82 FR 50228 (October 30, 2017); 82 FR 56630 (November 29, 2017).

<sup>27</sup> 82 FR 42882 (September 12, 2017).

<sup>28</sup> 82 FR 50228 (October 30, 2017).

<sup>29</sup> 82 FR 56630 (November 29, 2017).

<sup>30</sup> 82 FR 42882, 42915; 82 FR 50228, 50258; 82 FR 56630, 56659.

the definition in the regulations of the Federal banking agencies' regulatory capital and liquidity rules.<sup>31</sup>

The amendments to the Federal banking agencies' capital and liquidity rules are necessary because the previous QMNA definition did not recognize some of the new close-out restrictions on Covered QFCs imposed by the QFC Rules.<sup>32</sup> Pursuant to the previous definition of QMNA, a banking organization's rights under a QMNA generally could not be stayed or avoided in the event of its counterparty's default. However, the definition of QMNA permitted certain exceptions to this general prohibition to accommodate certain restrictions on the exercise of default rights that are important to the prudent resolution of a banking organization, including a limited stay under a special resolution regime, such as Title II of the Dodd-Frank Act, the FDI Act, and comparable foreign resolution regimes. The previous QMNA definition did not explicitly recognize all the restrictions on the exercise of cross-default rights.<sup>33</sup> Therefore, a master netting agreement that complies with the QFC Rules by limiting the rights of a Covered QFC Entity's counterparty to close out against the Covered QFC Entity would not meet the previous QMNA definition. Thus, a failure to meet the definition of QMNA would result in a banking organization subject to one of the Federal banking agencies' capital and liquidity rules losing the ability to net offsetting exposures under its applicable capital

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<sup>31</sup> See FCA's Fall 2017 Unified Agenda ([www.RegInfo.gov](http://www.RegInfo.gov)). The FCA's Tier 1/Tier 2 Capital Framework's existing definition of QMNA is identical to the previous definition of QMNA used in the Federal banking agencies' capital and liquidity rules.

<sup>32</sup> 12 CFR 3.2 (2017); 12 CFR 50.3 (2017); 12 CFR 217.2 (2017); 12 CFR 249.3 (2017); 12 CFR 324.2; 12 CFR 329.3.

<sup>33</sup> See, e.g., 12 CFR 252.84(b)(1).

and liquidity requirements when its counterparty is a Covered QFC Entity. If netting were not permitted, the banking organization would be required to calculate its capital and liquidity requirements relating to certain Covered QFCs on a gross basis rather than on a net basis, which would typically result in higher capital and liquidity requirements. The Federal banking agencies do not believe that such an outcome would accurately reflect the risks posed by the affected Covered QFCs.

The amendments to the QMNA definition maintain the netting treatment for these contracts under the Federal banking agencies' capital and liquidity rules. The amendments permit a master netting agreement to meet the definition of QMNA even if it limits the banking organization's right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of a counterparty that is a Covered QFC Entity to the extent necessary for the Covered QFC Entity to comply fully with the QFC Rules. The amended definition of QMNA continues to recognize that default rights may be stayed if the defaulting counterparty is in resolution under the Dodd-Frank Act, the FDI Act, a substantially similar law applicable to government-sponsored enterprises, or a substantially similar foreign law, or where the agreement is subject by its terms to, or incorporates, any of those laws. By recognizing these required restrictions on the ability of a banking organization to exercise close-out rights when its counterparty is a Covered QFC Entity, the amended definition allows a master netting agreement that includes such restrictions to continue to meet the definition of QMNA under the Federal banking agencies' capital and liquidity rules.

## **II. Proposed Changes to the Swap Margin Rule**

### **A. Proposed Amendment to the Definition of Eligible Master Netting Agreement**

In the Swap Margin Rule, the Agencies explained that the current definition of EMNA was purposefully aligned with the Federal banking agencies' then-current definition of QMNA in the capital and liquidity rules. This was to "minimize operational burden for a covered swap entity, which otherwise would have to make a separate determination as to whether its netting agreements meet the requirements of this [Swap Margin Rule] as well as comply with the regulatory capital rules."<sup>34</sup> In addition, the Agencies' rationale for recognizing netting of non-cleared swap exposures pursuant to the Swap Margin Rule is quite similar to the Federal banking agencies' rationale for recognizing netting of various asset and liability exposures pursuant to their capital and liquidity rules. Therefore, it is appropriate that the corresponding conditions for recognizing a robust netting set under all three rules be the same.

Like the definition of QMNA, the definition of EMNA recognizes that default rights of the covered swap entity may be stayed pursuant to a special resolution regime such as Title II of the Dodd-Frank Act, the FDI Act, the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, the Farm Credit Act of 1971, and comparable foreign resolution regimes. However, as was the case with the previous definition of QMNA, the current EMNA definition does not explicitly recognize certain restrictions on the exercise of cross-default rights imposed under the QFC Rules.

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<sup>34</sup> 80 FR 74861. The Swap Margin Rule used the term EMNA rather than QMNA to avoid confusion with, and to distinguish from, the term used under the Federal banking agencies' capital and liquidity rules.

Therefore, a master netting agreement that is amended in order to address a Covered QFC Entity's compliance with the QFC Rules will not meet the current definition of EMNA from the standpoint of a Covered QFC Entity's counterparty that is a covered swap entity. Failure to meet the definition of EMNA would require that covered swap entity to measure its exposures from covered swaps on a gross, rather than net, basis for purposes of the Swap Margin Rule. This outcome would be an unintended consequence of the QFC Rules and would be contrary to the policy decisions expressed in the Swap Margin Rule to permit initial margin to be calculated on a net basis for covered swaps subject to netting agreements.

Accordingly, the Agencies are proposing to add a new paragraph to the definition of "eligible master netting agreement" to make clear that a master netting agreement meets the definition under the Swap Margin Rule when the agreement limits "the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable." This text is identical to the corresponding text used in the amended definition of QMNA in the Federal banking agencies' capital and liquidity rules.

#### **B. Proposed Amendment to the Meaning of "Swaps Entered Into"**

As discussed above, the Swap Margin Rule's requirements apply only to covered swaps.<sup>35</sup> Legacy swaps will generally not be subject to the Swap Margin Rule's initial

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<sup>35</sup> See *supra* note 13.

and variation margin requirements.<sup>36</sup> However, in the preamble to the Swap Margin Rule, the Agencies declined to include language extending legacy swap treatment to a swap if it is subsequently novated or amended after the applicable compliance date.<sup>37</sup> At the time, the Agencies did not contemplate that legacy swaps might be amended solely to meet other regulatory requirements imposed by one or more of the Agencies, such as the QFC Rules.

As discussed above, Covered QFC Entities must conform to the requirements of the QFC Rules Covered QFCs entered into on or after January 1, 2019 and, in some instances, Covered QFCs entered into before that date.<sup>38</sup> To comply with the requirements governing the restrictions on Covered QFCs, a Covered QFC Entity may directly amend the contractual provisions of its Covered QFCs, or alternatively, cause its Covered QFCs to be subject to the International Swaps and Derivatives Association 2015 Resolution Stay Protocol (“Universal Protocol”) or a yet-to-be-developed protocol that is

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<sup>36</sup> However, a legacy swap may be subject to margin requirements if it is part of a netting set that includes non-cleared swaps that are entered into after the compliance date applicable to the covered swap entity.

<sup>37</sup> 80 FR 74850-74851. The Agencies articulated concerns about potential evasion of the rule if legacy swaps could be materially amended and remain not subject to the requirements of the Swap Margin Rule, as well as the difficulty of administrating a more complex regulatory approach that attempted to draw distinctions among the materiality of, or the intended purpose of, amendments to legacy swaps.

<sup>38</sup> The QFC Rules require a Covered QFC Entity to conform Covered QFCs entered into, executed, or to which it otherwise became a party before January 1, 2019 (legacy QFCs), if the Covered QFC Entity or any affiliate that is a Covered QFC Entity also enters, executes, or otherwise becomes a party to a new Covered QFC with the counterparty to the preexisting Covered QFC or a consolidated affiliate of the counterparty on or after January 1, 2019. See, e.g., 12 CFR 252.82 (2017); 12 CFR 382.2 (2017).

expected to be similar to the Universal Protocol.<sup>39</sup> Therefore, in order to provide clarity to market participants as to the effects of an amendment that is required by the QFC Rules to a legacy QFC that is a legacy swap, the Agencies are proposing an amendment to the Swap Margin Rule that makes clear that a legacy swap will not be deemed a covered swap under the Swap Margin Rule if it is amended, either by a direct amendment or a modification causing the legacy swap to be governed by one of the aforementioned protocols, by either counterparty solely to conform to the QFC Rules.

This proposal is intended to provide certainty to a covered swap entity and its counterparties about the treatment of legacy swaps and any applicable netting arrangements in light of the QFC Rules. However, if in addition to amendments required to comply with the QFC Rules, any other amendments are contemporaneously entered into, the amended legacy swap will be treated as a covered swap in accordance with the application of the existing Swap Margin Rule.

### **III. Regulatory Analysis**

#### **A. Paperwork Reduction Act**

*OCC*: In accordance with 44 U.S.C. 3512, the OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a

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<sup>39</sup> The QFC Rules set forth requirements for the yet-to-be developed protocol to be an acceptable alternative protocol for purposes of the QFC Rules, which would cause the new protocol to differ from the Universal Protocol. The QFC Rules also permit the new protocol to include certain other differences from the Universal Protocol. For example, the yet-to-be developed protocol is permitted to allow Covered QFC counterparties to adhere only with respect to Covered QFC Entities.

currently valid OMB control number. The OCC reviewed the proposed rule and concluded that it contains no requirements subject to the PRA.

*Board:* In accordance with section 3512 of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. § 3501-3521), the Board 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 Board reviewed the proposed rule under the authority delegated to them by OMB. The proposed rule contains no requirements subject to the PRA.

*FDIC:* In accordance with the requirements of the PRA, the FDIC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The FDIC reviewed the proposed rule and concludes that it contains no requirements subject to the PRA. Therefore, no submission will be made to OMB for review.

*FCA:* The FCA has determined that the proposed rule does not involve a collection of information pursuant to the Paperwork Reduction Act 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).

*FHFA:* The proposed rule amendments do not contain any collections of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Therefore, FHFA has not submitted any information to the Office of Management and Budget for review.

## **B. Initial Regulatory Flexibility Act Analysis**

*OCC*: In general, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) requires that in connection with a rulemaking, an agency prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities. Under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a brief explanatory statement in the Federal Register along with its rule.

The OCC currently supervises approximately 956 small entities.<sup>40</sup> None of these entities is a covered swap entity. Moreover, because the OCC assumes that this proposal will be implemented before any OCC-supervised entities are required to comply with the QFC Rules, the OCC believes that the proposal will not result in savings—or more than de minimis costs—for OCC-supervised entities. Therefore, the OCC certifies that the proposed rule will not have a significant economic impact on a substantial number of small OCC-regulated entities.

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<sup>40</sup> The OCC bases its estimate of the number of small entities on the Small Business Association's size thresholds for commercial banks and savings institutions, and trust companies, which are \$550 million and \$38.5 million, respectively. Consistent with the General Principles of Affiliation 13 CFR §121.103(a), the OCC counts the assets of affiliated financial institutions when determining if we should classify an OCC-supervised institution a small entity. The OCC used December 31, 2016, to determine size because a "financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See footnote 8 of the U.S. Small Business Administration's Table of Size Standards.

*Board:* In accordance with section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), the Board is publishing an initial regulatory flexibility analysis for the proposed rule. The RFA requires an agency to provide an initial regulatory flexibility analysis with the proposed rule or to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The Board welcomes comment on all aspects of the initial regulatory flexibility analysis. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. *Description of the reasons why action by the Board is being considered and statement of the objectives of the proposal.* The Board is proposing to amend the definition of Eligible Master Netting Agreement in the Swap Margin Rule so that it remains harmonized with the amended definition of “Qualifying Master Netting Agreement” in the Federal banking agencies’ regulatory capital and liquidity rules. The Board is also proposing an amendment that will make clear that a legacy swap (a non-cleared swap entered into before the applicable compliance date) that is not subject to the requirements of the Swap Margin Rule will not be deemed a covered swap under the Swap Margin Rule if it is amended solely to conform to the QFC Rules.

2. *Small entities affected by the proposal.* This proposal would apply to financial institutions that are covered swap entities that are subject to the requirements of the Swap Margin Rule. Under Small Business Administration (SBA) regulations, the finance and insurance sector includes commercial banking, savings institutions, credit unions, other depository credit intermediation and credit card issuing entities (financial institutions). With respect to financial institutions that are covered swap entities under the Swap

Margin Rule, a financial institution generally is considered small if it has assets of \$550 million or less.<sup>41</sup> Covered swap entities would be considered financial institutions for purposes of the RFA in accordance with SBA regulations. The Board does not expect that any covered swap entity is likely to be a small financial institution, because a small financial institution is unlikely to engage in the level of swap activity that would require it to register as a swap dealer or a major swap participant with the CFTC and SEC, respectively.<sup>42</sup> None of the current covered swap entities are small entities.

3. *Reporting, recordkeeping and compliance requirements.* The proposed amendments apply to covered swap entities. As a result of the proposals, the economic impact on covered swap entities will be positive as they will continue to be able to enter into netting agreements that allow margin to be calculated on a net basis, rather than a gross basis. In addition, absent this proposal, legacy swaps that are not currently subject to the margin requirements of the Swap Margin Rule would be required to comply with the provisions of the Swap Margin Rule solely because of amendments made to conform to the requirements of the QFC Rules.

4. *Other Federal rules.* Absent this proposal, the definition of EMNA would conflict with the definition of QMNA in the Federal banking agencies' regulatory capital and

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<sup>41</sup> See 13 CFR 121.201 (effective December 2, 2014); see also 13 CFR 121.103(a)(6) (noting factors that the SBA considers in determining whether an entity qualifies as a small business, including receipts, employees, and other measures of its domestic and foreign affiliates).

<sup>42</sup> The CFTC has published a list of provisionally registered swap dealers as of November 20, 2017 that does not include any small financial institutions. See <http://www.cftc.gov/LawRegulation/DoddFrankAct/registerswapdealer>. The SEC has not yet imposed a registration requirement on entities that meet the definition of security-based swap dealer or major security-based swap participant.

liquidity rules. This would result in additional compliance costs for firms that are subject to both definitions. In addition, absent these amendments, there would be a conflict between what the QFC Rules require in Covered QFCs and the policy determination previously made by the Board about the application of the Swap Margin Rule to legacy swaps.

5. *Significant alternatives to the proposed rule.* As discussed above, the Agencies have requested comment on the scope of the proposed amendments and have solicited comment on any approaches that would reduce the burden on covered swap entities. The Board welcomes comment on any significant alternatives that would minimize the impact of the proposal on small entities.

*FDIC:* The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., requires an agency to provide an initial regulatory flexibility analysis with a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined by the Small Business Administration for purposes of the RFA to include banking entities with total assets of \$550 million or less).

According to the most recent data from the Consolidated Reports of Income and Condition (CALL Report), the FDIC supervised 3,674 institutions. Of those, 2,950 are considered “small,” according to the terms of the Regulatory Flexibility Act. The proposed rule primarily affects covered swap entities. The FDIC believes that FDIC-supervised small entities are unlikely to be a covered swap entity because such entities are unlikely to engage in the level of swap activity that would require them to register as a swap entity. The Swap Margin Rule implements sections 731 and 764 of the Dodd-Frank Act, as amended by the Terrorism Risk Insurance Program Reauthorization Act of

2015 (“TRIPRA”). Because TRIPRA excludes non-cleared swaps entered into for hedging purposes by a financial institution with total assets of \$10 billion or less from the requirements of the Swap Margin Rule, when a covered swap entity transacts non-cleared swaps with a small entity supervised by the FDIC, and such swaps are used to hedge a commercial risk of the small entity, those swaps will not be subject to the Swap Margin Rule. The FDIC believes that it is unlikely that any small entity it supervises will engage in non-cleared swaps for purposes other than hedging. Therefore, it is unlikely that the amendments included in the proposed rule would result in a significant economic impact on a substantial number of small entities under its supervisory jurisdiction.

For these reasons, the FDIC certifies that the Proposed Rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Accordingly, a regulatory flexibility analysis is not required.

*FCA:* Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., FCA hereby certifies that the proposed 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 in excess of the amounts that would qualify them as small entities; nor does the Federal Agricultural Mortgage Corporation meet the definition of “small entity.” Therefore, System institutions are not “small entities” as defined in the Regulatory Flexibility Act.

*FHFA:* The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small

businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis if the agency has certified the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act, and certifies that the proposed rule, if adopted as a final rule, would not have a significant economic impact on a substantial number of small entities because the proposed rule is applicable only FHFA's regulated entities, which are not small entities for purposes of the Regulatory Flexibility Act.

### **C. Solicitation of Comments on the Use of Plain Language**

Section 722 of the Gramm-Leach-Bliley Act requires the U.S. banking agencies to use plain language in proposed and final rulemakings.<sup>43</sup> The Agencies have sought to present the proposed rule in a simple and straightforward manner, and invite comment on the use of plain language in this proposal.

*Question 1: Have the Agencies organized the proposal in a clear way? If not, how could the proposal be organized more clearly?*

*Question 2: Are the requirements of the proposed rule clearly stated? If not, how could they be stated more clearly?*

*Question 3: Does the proposal contain unclear technical language or jargon? If so, which language requires clarification?*

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<sup>43</sup> 12 U.S.C. 4809(a).

*Question 4: Would a different format (such as a different grouping and ordering of sections, a different use of section headings, or a different organization of paragraphs) make the regulation easier to understand? If so, what changes would make the proposal clearer?*

*Question 5: What else could the Agencies do to make the proposal clearer and easier to understand?*

#### **D. OCC Unfunded Mandates Reform Act of 1995 Determination**

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) (2 U.S.C. 1532) requires that the OCC prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the OCC to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that the proposed rule does not impose any new mandates and will not result in expenditures by State, local, and Tribal governments, or by the private sector of \$100 million or more in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

#### **E. 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>44</sup> Each Federal banking agency has determined that the proposed 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*

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 and banking, Capital, Foreign banking, Holding companies, Margin requirements, Reporting and recordkeeping requirements, Risk.

#### *12 CFR Part 349*

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<sup>44</sup> 12 U.S.C. 4802.

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

*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 stated in the preamble, the Office of the Comptroller of the Currency proposes to amend part 45 of 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 paragraph (e)(7) to read as follows:

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

\* \* \* \* \*

(e) \* \* \*

(7) For purposes of determining the date on which a non-cleared swap or a non-cleared security-based swap was entered into, a Covered Swap Entity will not take into account amendments to the non-cleared swap or the non-cleared security-based swap that were entered into solely to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable.

\* \* \* \* \*

3. Section 45.2 is amended by revising paragraph (2) of the definition of *Eligible master netting agreement* to read as follows:

**§ 45.2 Definitions.**

\* \* \* \* \*

(2) The agreement provides the covered swap entity the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case:

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 *et seq.*), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4617), or the Farm

Credit Act of 1971, as amended (12 U.S.C. 2183 and 2279cc), or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph

(2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable;

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## **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 part 237 to 12 CFR chapter II as follows:

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

4. 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.*

5. Section 237.1(e)(7) is added 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.**

\* \* \* \* \*

(e) \* \* \*

(7) For purposes of determining the date on which a non-cleared swap or a non-cleared security-based swap was entered into, a Covered Swap Entity will not take into account amendments to the non-cleared swap or the non-cleared security-based swap that were entered into solely to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable.

\* \* \* \* \*

6. Section 237.2 is amended by revising paragraph (2) of the definition of “*Eligible Master Netting Agreement*” to read as follows:

**§ 237.2 Definitions**

\* \* \* \* \*

(2) The agreement provides the covered swap entity the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 *et seq.*), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4617), or the Farm Credit Act of 1971, as amended (12 U.S.C. 2183 and 2279cc), or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable;

\* \* \* \* \*

## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **12 CFR Chapter III**

#### Authority and Issuance

For the reasons set forth in the SUPPLEMENTARY INFORMATION, the Federal Deposit Insurance Corporation amends 12 CFR Chapter III as follows:

### **PART 349 – DERIVATIVES**

#### **Subpart A- Margin and Capital Requirements for Covered Swap Entities**

7. 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.

8. Section 349.1 is amended by adding paragraph (e)(7) as follows:

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

\* \* \* \* \*

(e) \* \* \*

(7) For purposes of determining the date on which a non-cleared swap or a non-cleared security-based swap was entered into, a Covered Swap Entity will not take into account amendments to the non-cleared swap or the non-cleared security-based swap that were entered into solely to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable.

9. Section 349.2 is amended by revising of the definition of “*Eligible Master Netting Agreement*” to read as follows:

§349.2 Definitions.

\* \* \* \* \*

*Eligible master netting agreement* means a written, legally enforceable agreement provided that:

- (1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;
- (2) The agreement provides the covered swap entity the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off

collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 *et seq.*), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4617), or the Farm Credit Act of 1971, as amended (12 U.S.C. 2183 and 2279cc), or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph

(2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement); and

(4) A covered swap entity that relies on the agreement for purposes of calculating the margin required by this part must:

(i) Conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that:

(A) The agreement meets the requirements of paragraph (2) of this definition; and

(B) In the event of a legal challenge (including one resulting from default or from receivership, conservatorship, insolvency, liquidation, or similar proceeding), the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions; and

(ii) Establish and maintain written procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition.

\* \* \* \* \*

## **FARM CREDIT ADMINISTRATION**

### **Authority and Issuance**

For the reasons set forth in the SUPPLEMENTARY INFORMATION, 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**

10. 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.

11. Section 624.1 is amended by adding paragraph (e)(7) to read as follow:

**§ 624.1 Authority, purpose, and scope**

\* \* \* \* \*

(e) \* \* \*

(7) For purposes of determining the date on which a non-cleared swap or a non-cleared security-based swap was entered into, a Covered Swap Entity will not take into account amendments to the non-cleared swap or the non-cleared security-based swap that were entered into solely to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable.

\* \* \* \* \*

12. Section 624.2 is amended by revising paragraph (2) of the definition of *Eligible Master Netting Agreement* to read as follows:

**§ 624.2 Definitions**

\* \* \* \* \*

(2) The agreement provides the covered swap entity the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), Title II of the Dodd-Frank Wall Street Reform

and Consumer Protection Act (12 U.S.C. 5381 *et seq.*), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4617), or the Farm Credit Act of 1971, as amended (12 U.S.C. 2183 and 2279cc), or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable;

\* \* \* \* \*

## **FEDERAL HOUSING FINANCE AGENCY**

### **Authority and Issuance**

For the reasons set forth in the SUPPLEMENTARY INFORMATION, 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**

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

**Authority:** This part is issued by FHFA under section 4s(e) of the Commodity Exchange Act (7 U.S.C. 6s(e)), section 15F(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(e)), 12 U.S.C. 4513, and 12 U.S.C. 4526(a).

14. Section 1221.1 is amended by adding paragraph (e)(7) to read as follows:

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

\* \* \* \* \*

(e) \* \* \*

(7) For purposes of determining the date on which a non-cleared swap or a non-cleared security-based swap was entered into, a Covered Swap Entity will not take into account amendments to the non-cleared swap or the non-cleared security-based swap that were entered into solely to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable.

\* \* \* \* \*

15. Section 1221.2 is amended by revising paragraph (2) of the definition of *Eligible Master Netting Agreement* to read as follows:

**§ 1221.2 Definitions.**

\* \* \* \* \*

(2) The agreement provides the covered swap entity the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 *et seq.*), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4617), or the Farm Credit Act of 1971, as amended (12 U.S.C. 2183 and 2279cc), or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable;

\* \* \* \* \*

**[THIS SIGNATURE PAGE RELATES TO THE DOCUMENT TITLED  
“MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP  
ENTITIES; PROPOSED RULE”]**

Dated: January 29, 2018

(signed)

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Joseph M. Otting,

*Comptroller of the Currency.*

**[THIS SIGNATURE PAGE RELATES TO THE DOCUMENT TITLED  
“MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP  
ENTITIES; PROPOSED RULE”]**

By order of the Board of Governors of the Federal Reserve System, January 24, 2018.

(signed)

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Ann E. Misback,  
Secretary of the Board.

**[THIS SIGNATURE PAGE RELATES TO THE DOCUMENT TITLED  
“MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP  
ENTITIES; PROPOSED RULE”]**

By order of the Board of Directors.

Dated at Washington, D.C., this 25th day of January 2018.

FEDERAL DEPOSIT INSURANCE CORPORATION

(signed)

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Robert E. Feldman,  
Executive Secretary.

**[THIS SIGNATURE PAGE RELATES TO THE DOCUMENT TITLED  
“MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP  
ENTITIES; PROPOSED RULE”]**

Dated: 1/26/2018 .

(signed)

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Melvin L. Watt,  
Director, Federal Housing Finance Agency.

**[THIS SIGNATURE PAGE RELATES TO THE DOCUMENT TITLED  
“MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP  
ENTITIES; PROPOSED RULE”]**

Dated: January 25, 2018

(signed)

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Dale L. Aultman, Secretary,  
Farm Credit Administration Board.