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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN Number 3038-AE77

Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission

ACTION: Final Rule

SUMMARY: The Commodity Futures Trading Commission (“Commission” or “CFTC”) is amending the margin requirements for uncleared swaps for swap dealers (“SD”) and major swap participants (“MSP”) for which there is no prudential regulator to add the European Stability Mechanism (“ESM”) to the list of entities that are expressly excluded from the definition of financial end user under Commission regulation 23.151 and to correct an erroneous cross-reference in Commission regulation 23.157 (“Final Rules”).

DATES: This Final Rule will become effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

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SUPPLEMENTARY INFORMATION:

I. Background

In January 2016, the Commission adopted regulations 23.150 through 23.161 (collectively, “CFTC Margin Rule”) to implement section 4s(e) of the Commodity Exchange Act (“CEA”),¹ which requires SDs and MSPs for which there is not a prudential regulator (“CSEs”) to meet minimum initial and variation margin requirements adopted by the Commission by rule or regulation.²

Since adopting the CFTC Margin Rule, the Commission’s Division of Swap Dealer and Intermediary Oversight (“DSIO”) has issued staff guidance, including no-action letters, addressing the application of the rule. In July 2017, DSIO issued CFTC Letter No. 17-34 in response to a request for relief submitted by the ESM.³ The ESM sought relief with respect to uncleared swaps transactions it entered into with SDs,

¹ See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016) (“Final Margin Rule”); Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants — Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016).

² See 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a “Prudential Regulator” must meet the margin requirements for uncleared swaps established by the applicable “Prudential Regulator.” 7 U.S.C. 6s(e)(1)(A). See also 7 U.S.C. 1a(39) (defining the term “Prudential Regulator” to include the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency, and specifying the entities for which these agencies act as Prudential Regulators). The Prudential Regulators published final margin requirements in November 2015. See Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015).

³ CFTC Letter No. 17-34, Commission regulations 23.150-159, 161; No-Action Position with Respect to Uncleared Swaps with the European Stability Mechanism (July 24, 2017) (“CFTC Letter No. 17-34”), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/17-34.pdf>.

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representing that it was similar to multilateral development banks, as the term is defined in Commission regulation 23.151, which are excluded from the definition of financial end user and whose swaps are exempt from the CFTC Margin Rule.

In October 2019, the Commission proposed to codify CFTC Letter No. 17-34 and amend Commission regulation 23.151 to exclude the ESM from the definition of financial end user and thus exempt from the CFTC Margin Rule uncleared swaps entered into by the ESM.⁴ The Commission also proposed to correct a typographical error in Commission regulation 23.157.⁵

II. Final Rules

The Commission is adopting the amendments to Commission regulations 23.151 and 23.157 as proposed. The Commission received three comments in the file for the Proposal,⁶ only one of which directly addressed the Proposal.⁷ The Futures Industry Association (“FIA”) indicated, among other things, that its commodities members generally support the Proposal.⁸

⁴ Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 FR 56392 (Oct. 22, 2019) (the “Proposal”), at 56393-4.

⁵*Id.* at 56394.

⁶ Comments for the Proposal are available on the Commission website at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3038>. Comment letter no. 62275 dated Dec. 23, 2019 from the Asset Management Group of the Securities Industry and Financial Markets Association, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62275&SearchText=>, discussed other margin issues outside the scope of the Proposal. In addition, an anonymous commenter submitted a comment addressing issues unrelated to margin. Comment no. 62220 dated Oct. 22, 2019, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62220&SearchText=>.

⁷ Comment letter no. 62272 dated Dec. 23, 2019 from FIA, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62272&SearchText=> (the “FIA letter”), discussed other margin issues outside the scope of the Proposal.

⁸ FIA letter at 2.

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A. Commission regulation 23.151 – Definition of financial end user

The CFTC Margin Rule applies to swap transactions between CSEs and counterparties that are SDs, MSPs or financial end users. Commission regulation 23.151 defines the term “financial end user,”⁹ excluding from the definition sovereign entities, multilateral development banks, the Bank for International Settlements, entities exempt from the definition of financial entity pursuant to section 2(h)(7)(C)(iii) of the Act and implementing regulations, affiliates that qualify for the exemption from clearing pursuant to section 2(h)(7)(D) of the Act, and eligible treasury affiliates that the Commission exempts from the requirements of Commission regulations 23.150 through 23.161 by rule.¹⁰

The Commission is adopting the proposed amendment to Commission regulation 23.151. As amended, Commission regulation 23.151 excludes the ESM from the definition of financial end user, effectively exempting uncleared swaps transactions entered into by the ESM from the CFTC Margin Rule. With respect to the proposed amendment, FIA stated that its commodity members generally support the Commission’s efforts to amend its rules to relieve burdens on market participants.

The amendment to Commission regulation 23.151 codifies the relief provided by CFTC Letter No. 17-34, which extends no-action relief from the CFTC Margin Rule with respect to uncleared swaps between SDs and the ESM. The no-action relief was granted based on the ESM’s representations concerning the nature of its operations. The no-action letter stated that the ESM is an intergovernmental financial institution that provides financial assistance for national or regional development to Euro area member

⁹ 17 CFR 23.151.

¹⁰ *See id.*

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states that are in or are threatened by severe financial distress, similar to multilateral development banks, which are excluded from the definition of financial end user in Commission regulation 23.151. To accomplish its policy goals, the ESM utilizes several financial assistance instruments, including loans in various forms which can be used for multiple purposes and are offered only subject to bespoke specified conditions, including economic reforms. The ESM enters into uncleared swaps with SDs to hedge the interest rate and currency risks it faces as a result of entering into and funding loans and to hedge risks associated with its invested capital. The ESM does not, and will not, enter into uncleared swaps for speculative purposes.

In granting no-action relief, DSIO noted that the ESM, like multilateral development banks excluded from the financial end user definition, has a lower risk profile, posing less counterparty risk to an SD and less systemic risk to the financial system. While not explicitly finding that the ESM was a multilateral development bank, DSIO recognized that its functions and credit profile justified relief.¹¹

Based on the aforementioned considerations, the Commission amends paragraph (2)(iii) of Commission regulation 23.151 by adding the ESM to the list of entities that are excluded from the definition of financial end user. As a result of the ESM's exclusion from the definition of financial end user, uncleared swaps entered into between the ESM and CSEs are exempt from the CFTC Margin Rule. The Commission believes that the amendment, as adopted, provides clarity and certainty to CSEs that are counterparties to the ESM that uncleared swaps entered into with the ESM are not subject to the CFTC

¹¹ The Basel Committee on Banking Supervision ascribes to the ESM a 0% risk weight. The ESM has been included in the list of entities that receive a 0% risk weight in the document entitled "Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework – Comprehensive Version, June 2006." See BIS, Risk Weight for the European Stability Mechanism (ESM) and European Financial Stability Facility (EFSF), https://www.bis.org/publ/bcbs_n117.htm.

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Margin Rule. The Commission is adopting the amendment because activities conducted by the ESM, like activities conducted by multilateral development banks that are excluded from the financial end user definition, generally have a different purpose in the financial system. These types of entities are established by governments and their financial activities are designed to further governmental purposes, posing less counterparty risk to CSEs and less systemic risk to the financial system.

Furthermore, the Commission believes that the amendment encourages international comity and continued cooperation between the Commission and the European Union (“EU”) authorities. In this regard, the Commission notes that the ESM is exempt from the European Market Infrastructure Regulation or EMIR’s margin rules for OTC derivatives contracts not cleared by a central counterparty.¹² By taking this action, the Commission acknowledges the unique interests of the EU authorities in the ESM and recognizes that the principles of international comity counsel mutual respect for the important interests of foreign sovereigns.¹³

B. Amendment of Commission regulation 23.157 – Correction of cross-reference

¹² See Regulation (EU) No 648/2012 of the European Parliament and the Council of the European Union of July 4, 2012.

¹³ See Restatement (Third) of Foreign Relations Law of the United States sec. 403 (Am. Law Inst. 2018) (the Restatement). The Restatement provides that even where a country has a basis for jurisdiction, it should not prescribe law with respect to a person or activity in another country when the exercise of such jurisdiction is unreasonable. See Restatement section 403(1). Notably, the Restatement recognizes that, in the exercise of international comity, reciprocity is an appropriate consideration in determining whether to exercise jurisdiction extraterritorially.

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The Commission is adopting a corrective amendment to Commission regulation 23.157. In its comment letter, FIA indicated that its commodities members generally support the Commission’s efforts to amend its rules when necessary to correct errors.¹⁴

Commission regulation 23.157 requires initial margin collected from or posted by a CSE to be held by one or more independent custodians. The CSE must enter into a custodial agreement with each custodian that holds the initial margin collateral. In particular, paragraph (c)(1) of Commission regulation 23.157 provides that the custodial agreement must prohibit the custodian from rehypothecating, repledging, reusing, or otherwise transferring the collateral except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset described in Commission regulation 23.156(a)(1)(iv) through (xii).

In administering the Commission’s regulations, DSIO staff noticed that the cross-reference to “§ 23.156(a)(1)(iv) through (xii)” in paragraph (c)(1) of Commission regulation 23.157 was erroneous. First, the existing cross-reference incorrectly refers to non-existing subsections. Second, the existing cross-reference excludes treasury securities and U.S. government agency securities, which are included in the list of eligible collateral set forth in Commission regulation 23.156(a)(1), and which the Commission intended to include as eligible assets into which cash collateral can be converted.¹⁵ To administer the CFTC Margin Rule and prevent confusion in its

¹⁴ FIA letter at 2.

¹⁵ In the Final Margin Rule, the Commission explained that its intent was to exclude “immediately available cash funds,” which is one form of eligible collateral in Commission regulation 23.156(a)(1), because allowing such eligible collateral to be held in the form of a deposit liability of the custodian bank would be incompatible with Commission regulation 23.157(c)’s prohibition against rehypothecation of collateral. *See* Final Margin Rule, 81 FR at 671. However, the Commission expressly stated that the custodian could use cash funds to purchase other forms of eligible collateral. *See id.*

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application, the Commission is hereby amending Commission regulation 23.157(c)(1) to remove the erroneous cross-reference to “§ 23.156(a)(1)(iv) through (xii)” and replace it with the corrected cross-reference “§ 23.156(a)(1)(ii) through (x).”

III. Administrative Compliance

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires Federal agencies, in promulgating regulations, to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.¹⁶ The Commission certified that the Proposal would not have a significant economic impact on a substantial number of small entities. The Commission requested comments with respect to the RFA and received no comments.

As discussed in the Proposal, the Final Rules only affect SDs and MSPs that are subject to the CFTC Margin Rule and their covered counterparties, all of which are required to be eligible contract participants (“ECPs”).¹⁷ The Commission has previously determined that SDs, MSPs, and ECPs are not small entities for purposes of the RFA.¹⁸ Therefore, the Commission believes that the Final Rules will not have a significant economic impact on a substantial number of small entities, as defined in the RFA.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies

¹⁶ 5 U.S.C. 601 *et seq.*

¹⁷ Each counterparty to an uncleared swap must be an ECP, as the term is defined in section 1a(18) of the CEA, 7 U.S.C. 1a(18) and Commission regulation 1.3, 17 CFR 1.3. *See* 7 U.S.C. 2(e).

¹⁸ *See* Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs) and Opting Out of Segregation, 66 FR 20740, 20743 (April 25, 2001) (ECPs).

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pursuant to 5 U.S.C. 605(b) that the Final Rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”)¹⁹ imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number. The Final Rules, as adopted, contain no requirements subject to the PRA.

C. Cost-benefit considerations

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

In addition, the Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some

¹⁹ 44 U.S.C. 3501 *et seq.*

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Commission registrants being organized outside of the United States; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of the Final Rules on all activities subject to the Proposal, whether by virtue of the activity's physical location in the United States or by virtue of the activities' connection with or effect on U.S. commerce under CEA section 2(i).²⁰

1. Baseline and Rule Summary

The baseline for the Commission's consideration of the costs and benefits of these Final Rules is the CFTC Margin Rule. The Commission recognizes that to the extent market participants have relied on CFTC Letter No. 17-34, the actual costs and benefits of the amendment to Commission regulation 23.151, as realized in the market, may not be as significant. The amendment, as adopted, revises the definition of financial end user in Commission regulation 23.151 to exclude the ESM from the definition. The amendment codifies CFTC Letter No. 17-34 and confirms that uncleared swaps with the ESM as a counterparty are not subject to the CFTC Margin Rule. As a result, CSEs facing the ESM will not be required to exchange margin with the ESM, resulting in the collection of lesser amounts of margin to mitigate the risk of uncleared swaps, which could increase the possibility of a systemic event. Nevertheless, after analyzing the swap data repository ("SDR") data, the Commission believes that by classifying the ESM as a

²⁰ See 7 U.S.C. 2(i).

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non-financial end-user and excluding it from the margin requirements, it is unlikely that the Final Rule will result in substantial systemic risk.²¹

The Commission notes that the ESM has a lower risk profile, maintaining high capital levels with ultimate financial backing from the EU, and thus poses less counterparty risk to CSEs and less systemic risk to the financial system. In addition, in the Commission’s view, relief from the margin requirements will enable the ESM to fulfill its mission of providing support to member states of the EU in financial distress, in particular, in times of tight liquidity, contributing to the stability of the EU financial system and the reduction of risk.

The Commission is also adopting an amendment to Commission regulation 23.157(c)(1) to remove the erroneous cross-reference to “§ 23.156(a)(1)(iv) through (xii)” and to replace it with the corrected cross-reference “§ 23.156(a)(1)(ii) through (x).” The Commission believes that custodial banks will benefit from being able to convert cash posted as initial margin into treasury and U.S. government agency securities as was originally intended by the Commission.

The Commission sought comment on all aspects of the cost and benefit considerations in the Proposal but received no substantive comments.

2. Section 15(a) Considerations

a. Protection of Market Participants and Public

The amendment to Commission regulation 23.151, as adopted, formalizes CFTC Letter No. 17-34 and confirms that uncleared swaps with the ESM as a counterparty are

²¹ Recent review of data from the SDRs indicates that the ESM engages in limited swap trading activity.

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not subject to the CFTC Margin Rule. As discussed in the Proposal, given the limited activity of the ESM in the swaps markets, the Commission believes that the unmargined exposure resulting from uncleared swaps between CSEs and the ESM is unlikely to result in significant risk to the financial system. Inasmuch as margin is posted to protect counterparties against credit risk, the creditworthiness of the ESM is critical to this analysis. The ESM has maintained high capital levels and has ultimate backing from the EU.²² Consequently, the Commission is of the view that the ESM does not pose substantial counterparty credit risk. Thus, the Commission believes that there will be no material impact on market participants and the general public relative to the status quo baseline.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

The Commission believes that the efficiency, competitiveness, and financial integrity of markets will not be significantly impacted by amending Commission regulation 23.151 to exclude the ESM from the definition of financial end user and therefore removing the requirement to post and collect margin in uncleared swap transactions with the ESM.

One of the main functions of the ESM is to provide emergency assistance to members states of the EU in financial distress.²³ The Commission believes that relief from the margin requirements will allow the ESM to meet its mission, in particular, in

²² CFTC Letter No. 17-34 states that “[w]ith respect to its credit risk, as part of its emergency procedure, the ESM’s member states have irrevocably agreed to contribute a total of approximately €24 billion in additional capital should the ESM face financial distress. Further, the ESM is subject to limits on its lending and borrowing, and the ESM’s property, funding, and assets in its member states are immune from search, requisition, confiscation, expropriation, or any other form of seizure, taking, or foreclosure. In addition, to the extent necessary to carry out its activities, all property, funding, and assets of the ESM are free from restrictions, regulations, controls, and moratoria of any nature. The combined application of these rules and limits is effective in keeping the ESM’s total liabilities well below its available capital.”

²³ See CFTC Letter No. 17-34.

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times of tight liquidity, contributing to the stability of the EU financial system and the reduction of risk. Moreover, given the nature of its operations, the ESM is motivated to choose sensible, creditworthy counterparties and to limit its credit risk exposure.

c. Price Discovery

The amendment to Commission regulation 23.151 codifies CFTC Letter No. 17-34, relieving the ESM and its counterparties from the CFTC Margin Rule. The codification of the no-action relief as a rule formalizes a no-action position held by DSIO and promotes transparency concerning the applicability of the CFTC Margin Rule. Because there will not be a legal requirement that margin be posted in uncleared swap transactions with the ESM, such transactions will likely be for prices that deviate from similar uncleared swap transactions with financial end users but be in line with swaps with non-financial entities. As a result, uncleared swaps entered into with the ESM could increase, which could enhance, or at least not harm, the price discovery process.

d. Sound Risk Management

The ESM is an intergovernmental financial institution established by the EU and its financial activities are designed to advance EU objectives. The ESM's purpose is to manage the potential for systemic risk by providing support to member states that are in distress. The exposures posed by the ESM are therefore relatively unique. Accordingly, the amendment to Commission regulation 23.151 to exclude the ESM from the definition of financial end user and thereby remove it from the purview of the CFTC Margin Rule may result in CSEs being more inclined to enter into uncleared swaps with the ESM, benefiting from the overall diversification of their swap portfolios, which is consistent with sound risk management. Also, while relief from the margin requirements will result

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in the ESM collecting lesser amounts of margin to mitigate the risk of uncleared swaps, increasing the possibility of systemic risk, the Commission believes that the ESM's uncleared swaps activity, as reflected in the SDR data, is unlikely to result in substantial systemic risk.²⁴

e. Other Public Interest Considerations

As discussed in the Proposal, the Commission believes that the amendment to Commission regulation 23.151 is also warranted based on the interests of comity and the Commission's continuing cross-border coordination with EU authorities, such as the 2016 EC-CFTC Agreement, which has fostered cooperation and mutual respect between the CFTC and EU authorities.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b) of the CEA), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.²⁵

The Commission believes that the public interest to be protected by the antitrust laws is generally fair competition. The Commission requested comments on whether the Proposal implicated any other specific public interest to be protected by the antitrust laws and received no comments.

²⁴ See *supra*, n. 21.

²⁵ 7 U.S.C. 19(b).

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The Commission has considered the Final Rules to determine whether they are anticompetitive and has identified no anticompetitive effects. The Commission requested comments on whether the Proposal was anticompetitive and, if it is, what the anticompetitive effects are, and received no comments.

Because the Commission has determined that the Final Rules are not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects

17 CFR Part 23

Swaps, Swap dealers, Major swap participants, Capital and margin requirements. For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR Part 23 as set forth below:

PART 23 – SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

Authority and Issuance

1. The authority citation for Part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b-1,6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

2. In section 23.151, revise the definition of “*Financial end user*” to read as follows:

§ 23.151 Definitions applicable to margin requirements.

* * * * *

Financial end user means –

* * * * *

(2) * * *

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(iii) The Bank for International Settlements and the European Stability Mechanism;

* * * * *

3. In section 23.157, revise paragraph (c)(1) to replace the cross-reference to §

23.156(a)(1)(iv) through (xii) with § 23.156(a)(1)(ii) through (x):

§ 23.157 Custodial arrangements.

* * * * *

(c) * * *

(1) Prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, securities borrowing, repurchase agreement, reverse repurchase agreement or other means) the collateral held by the custodian except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset described in § 23.156(a)(1)(ii) through (x), such asset is held in compliance with this section, and such purchase takes place within a time period reasonably necessary to consummate such purchase after the cash collateral is posted as initial margin; and

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Issued in Washington, DC on April __, 2020, by the Commission.

Christopher J. Kirkpatrick

Secretary of the Commission