SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93501; File No. S7-13-12)

November 1, 2021

Order Granting Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with the Portfolio Margining of Cleared Swaps and Security-based Swaps that are Credit Default Swaps

AGENCY: Securities and Exchange Commission ("SEC" or "Commission")

ACTION: Exemptive order.

SUMMARY: The Commission is granting exemptive relief, subject to certain conditions, from compliance with certain provisions of the Securities Exchange Act of 1934 in connection with a program to portfolio margin cleared swaps customer and affiliate positions in cleared credit default swaps that are swaps and security-based swaps in a segregated account established and maintained in accordance with Section 4d(f) of the Commodity Exchange Act (in the case of a cleared swaps customer) or a cleared swaps proprietary account (in the case of an affiliate). This exemptive relief supersedes and replaces the Commission's *Order Granting Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-based Swaps* issued in December 2012.

DATES: This order is effective November 1, 2021.

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I. Introduction

The Commission, by order, is granting conditional exemptive relief to SEC-registered clearing agencies also registered with the Commodity Futures Trading Commission ("CFTC") as derivative clearing organizations ("clearing agency/DCOs") and SEC-registered broker-dealers also registered with the CFTC as futures commission merchants ("BD/FCMs"). This order ("2021 Final Order") exempts these entities from compliance with certain provisions of the Securities Exchange Act of 1934 ("Exchange Act") in connection with a program to portfolio margin cleared swaps customer and affiliate positions in cleared security-based swaps and swaps that are credit default swaps ("CDS") in a segregated account established and maintained in accordance with Section 4d(f) of the Commodity Exchange Act ("CEA") in the case of a cleared swaps customer ("CFTC cleared swaps customer account") or a cleared swaps proprietary account in the case of an affiliate ("CFTC cleared swaps proprietary account") (each a "CFTC cleared swaps account"), and to calculate margin requirements on a portfolio basis.

The 2021 Final Order supersedes and replaces the Commission's December 2012 order providing similar relief ("2012 Order"), and modifies certain of its conditions, as discussed in more detail below.[1] In particular, the 2021 Final Order eliminates conditions (a)(1) and (a)(2) in the 2012 Order pertaining to the exemptions for clearing agency/DCOs.[2] The requirements to adhere to the 2012 Order's conditions were designed to be triggered on the compliance date for the final capital, margin, and segregation requirements for security-based swap dealers ("SBSDs"): October 6, 2021. Conditions (a)(1) and (a)(2) in the 2012 Order were intended to

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1 *Order Granting Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-based Swaps*, Exchange Act Release No. 68433 (Dec. 12, 2012) 77 FR 75211 (Dec. 19, 2012).

2 *See* 2012 Order, 77 FR at 75219-20.

provide an option for security-based swap customers to portfolio margin cleared security-based swaps and swaps that are CDS ("cleared CDS") in a security-based swap account in accordance with Section 3E of the Exchange Act ("SEC SBS account") as an alternative to a CFTC cleared swaps account.[3]

The 2021 Final Order also modifies the conditions in paragraphs (b)(1)(ii) and (2)(ii) of the 2012 Order requiring subordination agreements. The modifications provide that the scope of the subordination only extends to money, securities, or other property held in the subordinating person's CFTC cleared customer or proprietary account. The modifications also provide that the person need not subordinate claims to money, securities, or other property held in the subordinating person's CFTC cleared customer or proprietary account to the claims of general creditors.

In addition, the 2021 Final Order eliminates condition (b)(3) in the 2012 Order, which required approval of a BD/FCM's margin methodology by the Commission or Commission staff. Instead, under the 2021 Final Order, a BD/FCM must have an internal risk management program that has been approved in advance by the Commission or the Commission staff. Further, under the 2021 Final Order, the internal risk management program must have certain standards drawn from the letters the staff of the Division of Trading and Markets ("Division staff") issued to BD/FCMs to approve their margin methodologies pursuant to the 2012 Order.[4] These staff letters will be withdrawn. The 2021 Final Order provides that any BD/FCM that received a staff

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[3] The Commission has adopted capital, margin, and segregation requirements under the Exchange Act for security-based swaps dealers ("SBSDs"). *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers*, Exchange Act Release No. 86175 (June 21, 2019), 84 FR 43872, 43956-57 (Aug. 22, 2019) ("Capital, Margin, and Segregation Adopting Release").

[4] The staff letters are available at https://www.sec.gov/rules/exorders/exordersarchive/exorders2012.shtml.

letter approving its margin methodology prior to the issuance of the 2021 Final Order is deemed to have an approved internal risk management program for the purposes of the 2021 Final Order.

II. Background

A. 2012 Order

On December 14, 2012, the Commission issued the 2012 Order to provide relief so that clearing agency/DCOs and BD/FCMs could offer customers portfolio margining of cleared CDS in a CFTC cleared swaps account ("CDS portfolio margin program").[5] The 2012 Order exempts a clearing agency/DCO from Sections 3E(b), 3E(d) and 3E(e) of the Exchange Act and any rules thereunder, solely to perform the functions of a clearing agency/DCO under the CDS portfolio margin program, subject to five conditions.[6] It further exempts a BD/FCM from Sections 3E(b), 3E(d), 3E(e), and 15(c)(3) of the Exchange Act, and Rule 15c3-3, as well as from any requirement to treat an affiliate (as defined in association with the "cleared swaps proprietary account" definition in CFTC Rule 22.1) as a customer for purposes of Rules 8c-1 and 15c2-1, subject to six conditions.[7] The conditions applicable to clearing agency/DCOs and BD/FCMs

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5 The CFTC also issued a companion exemptive order on January 13, 2013 permitting ICE Clear Credit and its BD/FCM clearing members to provide for the portfolio margining of cleared swaps and security-based swaps that are CDS. *See* CFTC, *Order, Treatment of Funds Held in Connection with Clearing by ICE Clear Credit of Credit Default Swaps* (Jan. 13, 2013)("2013 CFTC Portfolio Margin Order"), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/icecreditclearorder011413.pdf. *See also* CFTC, *Order, Treatment of Funds Held in Connection with Clearing by ICE Clear Europe of Credit Default Swaps* (Apr. 9, 2013), *available at* https://www.cftc.gov/sites/default/files/stellent/groups/public/@requestsandactions/documents/ifdocs/iceclareurope4dfcds040913.pdf.

6 *See* 2012 Order, 77 FR at 75215-16 (discussing five clearing agency/DCO conditions).

7 *See* 2012 Order, 77 FR at 75213-14 (discussing these sections of the Exchange Act and the rules), 75216-19 (discussing the conditions), and 75220-21 (setting forth the conditions). *See also Order Granting Exemptions from Sections 8 and 15(a)(1) of the Securities Exchange Act of 1934 and Rules 3b-13(b)(2), 8c-1, 10b-10, 15a-1(c), 15a-1(d) and 15c2-1 Thereunder in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps and Determining the Expiration Date for a Temporary Exemption from Section 29(b) of the Securities Exchange Act of 1934 in Connection with Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,* Exchange Act Release No. 90308 (Nov. 2, 2020), 85 FR 70667 (Nov. 5, 2020) (providing exemptions from certain rules including

were designed to: (1) protect money, securities, and property of security-based swap customers; (2) address certain differences in the statutory requirements of the Exchange Act and the CEA; and (3) promote appropriate risk management and disclosure.[8]

B. Division Staff Letters

On March 8, 2013, the Division staff issued temporary conditional approval letters to seven BD/FCMs pursuant to condition (b)(3) in the 2012 Order[9] permitting them to participate in the CDS portfolio margin program, subject to certain conditions (the "March 8, 2013 letters").[10] The conditions included a requirement to collect initial margin based on a multiplier of the clearing agency/DCO margin requirement or to take a 100% capital charge for the difference.

On June 7, 2013, the Division staff issued updated temporary conditional letters to the seven BD/FCMs that received the March 8, 2013 letters, and to one additional BD/FCM, setting forth revised conditions for participation in the CDS portfolio margin program ("the June 7, 2013 letters"). The relief given by the June 7, 2013 letters was conditioned on the BD/FCMs implementing a margin regime and establishing minimum risk management standards by December 7, 2013. On December 6, 2013, the Division staff issued letters to the BD/FCMs extending the December 7, 2013 date to January 31, 2014. On January 31, 2014, the Division

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Rules 8c-1 and 15c-1 in connection with the revision of the Exchange Act definition of "security" to encompass security-based swaps).

8 *See* 2012 Order, 77 FR at 75214. The 2012 Order also sought comment on all aspects of the exemptions it provided. 77 FR at 75219. Letters responding to this request for comment are available at https://www.sec.gov/comments/s7-13-12/s71312.shtml.

9 *See* 2012 Order, 77 FR at 75220 (providing that BD/FCM must require minimum margin levels with respect to any customer transaction in a program to commingle and portfolio margin CDS at least equal to the amount determined using a margin methodology established and maintained by the BD/FCM that has been approved by the Commission or the Commission staff).

10 The March 8, 2013 letters and other staff letters to the BD/FCMs discussed in this 2021 Final Order are available at: https://www.sec.gov/rules/exorders/exordersarchive/exorders2012.shtml.

staff issued letters to the eight BD/FCMs permanently approving their margin methodologies, subject to the conditions in the June 7, 2013 letters ("January 31, 2014 letters"). Subsequent to the issuance of the January 31, 2014 letters, the Division staff approved the margin methodologies of two additional BD/FCMs, subject to the conditions in the June 7, 2013 letters.[11] All the letters referenced above will be withdrawn. The 2021 Final Order requires that the BD/FCMs have an approved internal risk management program. Pursuant to the 2021 Final Order, all BD/FCMs that received a letter approving their margin methodologies will be deemed to have an approved internal risk management program.

C. Previous Request for Comment

In October 2020, the Commission published a proposed order that would modify conditions in the 2012 Order and supersede and replace the 2012 Order ("2020 Proposed Order").[12] The Commission received comments on the 2020 Proposed Order.[13] Commenters generally supported the Commission's approach and offered some suggested modifications.[14] One commenter stated market participants have confidence in the current structure, including the 2012 Order, which has allowed increased innovation in the cleared CDS products and increased

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11 The Division staff also issued an additional letter relating to the transfer of a CDS portfolio margin program using the same internal risk model and same internal risk management system from one broker-dealer affiliate to another. The June 7, 2013 letters and subsequent staff letters are collectively referred to below as the "BD/FCM staff letters."

12 *See Proposed Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With the Portfolio Margining of Swaps and Security-Based Swaps That Are Credit Default Swaps*, Exchange Act Release No. 90276 (Oct. 28, 2020), 85 FR 70657 (Nov. 5, 2020).

13 The comments are available at https://www.sec.gov/comments/s7-13-12/s71312.htm.

14 *See* Letter from Chris Edmonds, Global Head of Clearing and Risk, Intercontinental Exchange, Inc. (Dec. 7, 2020) ("ICE Letter"); Letter from Allison Lurton, General Counsel and Chief Legal Officer, Futures Industry Association (Dec. 7, 2020) ("FIA Letter"); Letter from Jason Silverstein, Esq., Managing Director and Associate General Counsel, SIFMA Asset Management Group, Jennifer W. Han, Managing Director & Counsel, Regulatory Affairs, Managed Funds Association (Dec. 7, 2020) ("SIFMA AMG/MFA Letter"); and Letter from Sarah Bessin, Associate General Counsel, Investment Company Institute (Dec. 7, 2020) ("ICI Letter").

voluntary clearing of security-based swaps.[15] Further, commenters supported the Commission's approach of seeking to preserve the status quo while making changes to further enhance the efficient operation of the cleared CDS market.[16] The comments and the Commission's response to them are discussed in detail below.

III. Discussion

Since the issuance of the 2012 Order, the SEC staff has monitored the operations of the BD/FCMs participating in the CDS portfolio margin program as well as the market for cleared CDS. The Commission is issuing this 2021 Final Order with modified conditions in light of: (1) the experience gained from this monitoring; and (2) comment letters addressing portfolio margining received in response to the 2012 Order, the 2020 Proposed Order, and in the context of the SEC's recently finalized rulemaking adopting capital, margin and segregation requirements for SBSDs.[17] This 2021 Final Order also is in response to the CFTC initiating mandatory clearing of certain swaps, including broad-based index CDS.[18] The following discussion describes the conditions of the 2021 Final Order – many of which are largely consistent with conditions in the 2012 Order. Modifications to the conditions in the 2012 Order are discussed below.

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15 ICE Letter.

16 FIA Letter; SIFMA AMG/MFA Letter.

17 The comment letters received with respect to this rulemaking are available at https://www.sec.gov/comments/s7-08-12/s70812.shtml.

18 *See, e.g.*, *CFTC Announces that Mandatory Clearing Begins Today*, CFTC Press Release No. 6529-13 (Mar. 11, 2013) (announcing that swap dealers, major swap participants and private funds active in the swaps market are required to begin clearing certain index CDS); *CFTC Announces that Mandatory Clearing for Category 2 Entities Begins Today,* CFTC Press Release No. 6607-13 (June 13, 2013) (announcing the second phase of required clearing for certain CDS and interest rate swaps).

A. Conditions for Clearing Agency/DCOs

1. Elimination of Conditions Relating to Expanding the CDS Portfolio Margin Program to Securities Accounts

The conditions in paragraphs (a)(1) and (a)(2) of the 2012 Order were intended to provide customers the option to portfolio margin cleared CDS in an SEC SBS account once the SEC's margin and segregation rules for SBSDs are in place.[19] In particular, paragraph (a)(1) required that the clearing agency/DCO, by the later of six months after the adoption date of the final margin and segregation rules for security-based swaps or the compliance date of such rules, to take all necessary action within its control to *obtain any relief needed* to permit its BD/FCM clearing members to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS in an SEC SBS account for the purpose of the CDS portfolio margin program. Paragraph (a)(2) required the clearing agency/DCO, within the same timeframe, to take all necessary action within its control, to *establish rules and operational practices* to permit its BD/FCM clearing members to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS in an SEC SBS account for the purpose of the CDS portfolio margin program. Thus, the requirements to adhere to conditions in paragraphs (a)(1) and (2) of the 2012 Order were triggered on the compliance date for the final capital, margin, and segregation requirements for SBSDs: October 6, 2021.

In the 2012 Order, the Commission stated that it was important to ultimately provide market participants with the ability to select an account structure to manage their individual risks by taking into account the different regulatory provisions that may apply to different account

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[19] *See* 2012 Order, 77 FR at 75215-16 (discussing the conditions) and 75219-20 (setting forth the conditions).

types and any costs incurred.[20] Market participants have been clearing CDS under the CDS portfolio margin program since the initial BD/FCM staff letters were issued in 2013. The CDS portfolio margining program has allowed greater efficiencies in clearing, allowing the offset of positions and the ability to margin cleared CDS in a single account. Portfolio margining facilitates margin requirements that better reflect the overall risks presented by a CDS portfolio, which may result in decreased margin costs. Because of these greater efficiencies and potential cost reductions available under the current CDS portfolio margin program in a CFTC cleared swaps account, market participants have not expressed a desire to portfolio margin cleared CDS in an SEC SBS account. This lack of market interest in a securities account alternative also is consistent with: (1) the comments of ICE Clear Credit in 2011 that it received no indication in its discussions with market participants that they desired a securities account option with respect to its petition for rulemaking to portfolio margin cleared CDS; and (2) the Division staff's experience in monitoring the CDS portfolio margin program. In the 2020 Proposed Order, therefore, the Commission preliminarily believed that it may be appropriate to eliminate the SEC SBS account conditions.[21]

Commenters supported the Commission's proposal in the 2020 Proposed Order to eliminate the clearing agency/DCO conditions relating to expanding the CDS portfolio margin program to SEC SBS accounts and generally agreed there is a lack of market interest in a securities account alternative.[22] One commenter stated that the current cleared CDS portfolio margining structure is operating effectively and efficiently and that there has been no expressed

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20 *See* 77 FR at 75216.

21 *See* 2020 Proposed Order, 85 FR at 70659-60.

22 *See* ICE Letter; FIA Letter; SIFMA AMG/MFA Letter; ICI Letter.

interest by market participants to undertake the material additional costs and risky operational changes to expand the portfolio margining to SEC SBS accounts.[23] This commenter also stated that requiring a securities account alternative would lead to material modifications to existing systems and create unnecessary duplicative processes.[24] Another commenter stated that the program has been effective in accommodating the portfolio margining needs of market participants who must react quickly to dynamic market conditions, risk management and hedging requirements, and evolving portfolio compositions.[25] This commenter stated that it is critical the Commission remain cognizant of the significant time and expense BD/FCMs, their customers, and the clearinghouses have already invested towards creating a safe and attractive model for the clearing of all CDS.[26] Finally, one commenter in supporting the elimination of the securities account alternative stated that regulated funds typically do not engage in portfolio margining in a securities account or a security-based swap account.[27]

Portfolio margining cleared CDS in an SEC SBS account also would provide greater efficiencies and cost reductions. However, the Commission is eliminating these conditions because of the success of the current CDS portfolio margin program, the confirmed lack of market interest in a securities account alternative, and the comments supporting their elimination.[28] Their removal, however, will not prohibit a clearing agency/DCO from offering

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23 ICE Letter.

24 ICE Letter.

25 FIA Letter.

26 FIA Letter.

27 ICI Letter.

28 *See* 2021 Final Order, ¶ (a).

an SEC SBS account option in the future, if market conditions change and the demand arises, subject to applicable regulatory approvals and relief.

Further, in connection with the elimination of conditions related to the SEC SBS account alternative, commenters asked the Commission to clarify whether single-name CDS may always be cleared through a CFTC cleared swaps account subject to the margin and risk management regime in the 2020 Proposed Order.[29] One commenter stated that it is not aware of any clearing agency/DCO that offers a securities account option. Consequently, this commenter stated that the cleared swaps account is the only currently available option to clear single-name CDS.[30] In response to these comments, single-name CDS that are held in a CFTC cleared swaps account and not part of a CDS portfolio margin program (*i.e.*, an account at a BD/FCM that holds at all times only single-name CDS positions) would be outside the scope of this 2021 Final Order. The exemptive relief in 2021 Final Order is conditioned on the requirement that cleared CDS that are security-based swaps and included in a CFTC cleared swaps account must be part of a CDS portfolio margin program. Clearing solely single-name CDS in a cleared CFTC swaps account without the inclusion of cleared swaps that are CDS at any point in time would not be considered a CDS portfolio margin program. For example, a CFTC cleared swaps account that is part of a CDS portfolio margin program that holds at various times both single-name and index CDS positions is subject to the conditions of this 2021 Final Order. Consequently, the 2021 Final Order only applies to cleared CDS, including single-name and index CDS, that are part of a CDS portfolio margin program. Finally, in response to the comment that a cleared swaps account is the only currently available option to clear single-name CDS, under the Commission's

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29 FIA Letter; SIFMA AMG/MFA Letter.

30 SIFMA AMG/MFA Letter.

new segregation rules for security-based swap activities, a clearing agency/DCO could offer an SEC SBS account option to market participants to clear single-name CDS that are not part of a CDS portfolio margin program.[31]

2. Conditions

The three clearing agency/DCO conditions in the 2020 Proposed Order are largely consistent with the conditions in paragraphs (a)(3), (4), and (5) of the 2012 Order, respectively.[32] One commenter supported retaining these conditions and stated they largely maintain the well understood status quo with the 2012 Order.[33] This commenter also stated that the existing portfolio margining structure for cleared CDS instruments has operated safely, effectively and efficiently and, accordingly, it is in agreement with the Commission's efforts to uphold the current model.[34] The Commission agrees with the commenter and is adopting the three clearing agency/DCO conditions as proposed in the 2020 Proposed Order. [35]

The first condition requires the clearing agency/DCO to obtain any other relief needed to permit a BD/FCM to maintain cleared swaps customer or affiliate money, securities, and property received to margin, guarantee, or secure cleared swaps customer or affiliate positions in

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31 *See* paragraph (p) of Rule 15c3-3 (segregation requirements for security-based swaps). 17 CFR 240.15c3-3(p).

32 *See* 2020 Proposed Order, 85 FR at 70660 (discussing the conditions) and 70665 (setting forth the conditions); *see also* 2012 Order, 77 FR at 75216 (discussing the conditions) and 75220 (setting forth the conditions).

33 ICE Letter.

34 ICE Letter.

35 *See* 2021 Final Order, ¶¶ (a)(1), (2), and (3). The Commission made some technical changes to the DCO/clearing agency conditions in the 2021 Final Order to account for the elimination of conditions (a)(1) and (2) from the 2012 Order. These changes include re-numbering the remaining clearing agency/DCO conditions and moving the definition of "BD/FCM" from condition (a)(1) in the 2012 Order (which would be eliminated) to condition (a)(1) in the proposed order (which parallels condition (a)(3) in the 2012 Order). Finally, the Commission is replacing the term "shall" in two places with the term "will" and "must," respectively. No comments were received on these changes and the Commission is adopting them as proposed in the 2020 Proposed Order.

cleared CDS in a CFTC cleared swaps customer account or a CFTC cleared swaps proprietary account, respectively, for the purpose of clearing such cleared swaps customer or affiliate positions under the CDS portfolio margin program.[36] This condition is designed to help ensure that the exemption applies only in circumstances where the regulatory framework under the CEA and the CFTC's rules is applicable.

The second clearing agency/DCO condition requires the organization to have appropriate rules and operational practices to permit a BD/FCM to maintain cleared swaps customer or affiliate money, securities, and property received to margin, guarantee, or secure cleared swaps customer or affiliate positions in cleared CDS in a CFTC cleared swaps customer account or a cleared swaps proprietary account, respectively, for the purpose of clearing such cleared swaps customer or affiliate positions under the CDS portfolio margin program.[37] This condition also is designed to help ensure the exemption applies only in circumstances where the regulatory framework under the CEA and the CFTC's rules is applicable.

The third clearing agency/DCO condition requires the organization to have rules mandating that each cleared swaps customer and affiliate of the BD/FCM participating in the CDS portfolio margin program must be an "eligible contract participant" as defined in Section 1a(18) of the CEA.[38] Given that Congress determined it is appropriate to include these

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36 *See* 2021 Final Order, ¶ (a)(1). The 2021 Final Order also eliminates use of the generic term "customer" in the 2012 Order and instead use the more specific terms "cleared swaps customer," "affiliate," "security-based swap customer," and "securities customer". In addition, the 2021 Final Order adds specific language to clarify that cleared CDS positions of cleared swaps customers are held in CFTC cleared swaps customer accounts and affiliate positions are held in CFTC cleared swaps proprietary accounts. These changes reflect the different treatment each type of person and account would receive under the CEA and rules thereunder, and applicable bankruptcy laws. No comments were received on these changes and the Commission is adopting them as proposed in the 2020 Proposed Order.

37 *See* 2021 Final Order, ¶ (a)(2).

38 *See* 2021 Final Order, ¶ (a)(3). The 2012 Order provided that each "customer" must be an eligible contract participant. 77 FR 75220.

limitations in the Dodd-Frank Act with respect to eligible contract participants, it is appropriate to limit the exemptions in the 2021 Final Order to cleared CDS entered into with eligible contract participants.[39]

B. Conditions for BD/FCMs

The first, second, fourth, fifth, and sixth BD/FCM conditions in the 2020 Proposed Order were generally consistent with the conditions in paragraphs (b)(1), (2), (4), (5) and (6) of the 2012 Order, respectively.[40] As discussed below, the Commission is adopting them in the 2021 Final Order substantially as proposed in the 2020 Proposed Order.[41]

The first BD/FCM condition consists of two requirements and applies with respect to transactions involving persons that *are not affiliates* of the BD/FCM (*i.e.*, cleared swaps customers).[42] The Commission received no comments on the first requirement and is adopting it as proposed in the 2020 Proposed Order.[43] Under this requirement, the BD/FCM must maintain

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39 The Dodd-Frank Act limits the swaps and security-based swaps transactions that may be entered into by parties that are not eligible contract participants. For example, under Section 6(l) of the Exchange Act, only an eligible contract participant may enter into security-based swaps that are not effected on a national securities exchange. 15 U.S.C. 78f(l). In addition, security-based swaps that are not registered pursuant to the Securities Act of 1933 ("Securities Act") can only be sold to eligible contract participants. 15 U.S.C. 77e(e). Section 5(e) of the Securities Act specifically provides that it shall be unlawful to for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant, unless the transaction is registered under the Securities Act. *Id.* *See also* 2020 Proposed Order, 85 FR at 70660.

40 *See* 2020 Proposed Order at 85 FR 70660-64 (discussing the conditions) and 70665-66 (setting forth the conditions); *see also* 2012 Order, 77 FR at 75216-19 (discussing the conditions) and 75220-21 (setting forth the conditions). The Commission made some technical and stylistic changes to these conditions, including replacing the term "shall" with "must" and capitalizing the first letter in each of the conditions (and their subparagraphs). Finally, the Commission inserted the phrase "Section 8 of the Exchange Act and" before "Exchange Act Rules 8c-1 and 15c2-1" in paragraph (b) of the 2020 Proposed Order to be consistent with the other rule references in the order, which refer to the relevant statute. No comments were received on these changes and the Commission is adopting them as proposed in the 2020 Proposed Order.

41 *See* 2021 Final Order, ¶¶ (b)(1), (2), (4), (5), and (6).

42 *See* 2021 Final Order, ¶ (b)(1).

43 *See* 2021 Final Order, ¶ (b)(1)(i); *see also* 2020 Proposed Order, 85 FR at 70660.

cleared swaps customer money, securities, and property received to margin, guarantee or secure cleared swaps customer positions consisting of cleared CDS in a CFTC cleared swaps customer account established and maintained for the purpose of the CDS portfolio margin program. This condition is designed to help ensure that – in the absence of the security-based swap and securities customer protections afforded by the securities laws – collateral in the account is subject to the protections afforded by an alternative regulatory scheme (*i.e.*, the CEA and the CFTC's rules). The intent is to avoid having the assets in the account fall into a regulatory gap in which neither the federal securities laws nor the federal commodity futures laws apply. The condition also is designed to limit the relief to accounts that are established and maintained specifically for the purpose of the CDS portfolio margin program.

As discussed below, the Commission received comments on the second requirement in the 2020 Proposed Order and, in response, is modifying it.[44] Under this requirement in the 2020 Proposed Order, the BD/FCM needed to enter into a non-conforming subordination agreement with each non-affiliated cleared swaps customer that covers the customer's money, securities, or property held in a CFTC cleared swaps customer account.[45] As proposed, the non-conforming subordination agreement needed to contain: (1) a specific acknowledgment by the cleared swaps customer that money, securities or property held in a CFTC cleared swaps customer account will not receive customer treatment under the Exchange Act or Securities Investor Protection Act of 1970 ("SIPA") or be treated as "customer property" as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM ("stockbroker liquidation"), and that such money, securities or property will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United

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44 *See* 2020 Proposed Order, 85 FR at 70660-61 (discussing the condition) and 70666 (setting forth the condition).

45 *Id.*

States Code and rules and regulations thereunder ("commodity broker liquidation provisions"); and (2) an affirmation by the cleared swaps customer that claims to "customer property" as defined in SIPA or 11 U.S.C. 741 against the BD/FCM will be subordinated to the claims of securities customers and security-based swap customers.

The 2012 Order required an affirmation by the customer that all of its claims with respect to money, securities, or property held in the CDS portfolio margin account against the BD/FCM will be subordinated to the claims of other securities customers and security-based swap customers not participating in the CDS portfolio margin program.[46] To better clarify that the cleared swaps customer is not subordinating claims to general creditors, the Commission modified condition (b)(1)(ii) of the 2012 Order, as stated above, in the 2020 Proposed Order, to provide that the cleared swaps customer must affirm that claims to "customer property" as defined in SIPA or the stockbroker liquidation provisions against the BD/FCM will be subordinated to the claims of securities customers and security-based swap customers. This modification was designed to more narrowly tailor the subordination to the portion of the debtor BD/FCM's estate that comprises "customer property" under SIPA and the stockbroker liquidation schemes.[47] In other words, the intent was that the subordination not extend to the general estate.

This condition in the 2020 Proposed Order was designed to remove portfolio margin cleared swaps customers from the definitions of "customer" under Rule 15c3-3, SIPA, and the stockbroker liquidation provisions with respect to securities or cash held in CFTC cleared swaps customer accounts that otherwise would be subject to the segregation requirements of Rule

46 *See* 2012 Order, 77 FR at 75220.

47 *See* 2020 Proposed Order, 85 FR at 70661.

15c3-3 and the bankruptcy protections afforded by SIPA and the stockbroker liquidation provisions.[48] The objective was to avoid a situation where the portfolio margin cleared swaps customers would be entitled to a ratable share of "customer property" and other protections afforded by SIPA or the stockbroker liquidation provisions even though their assets were held in CFTC cleared swaps customer accounts that were not subject to the segregation requirements of Rule 15c3-3. Assets held in a CFTC cleared swaps customer account instead would be afforded the protections of the rules of the CFTC governing the treatment of customer margin held by BD/FCMS and DCOs as well as the protections of the CEA and commodity broker liquidation provisions. The modified condition in the 2020 Proposed Order was not intended to undermine these protections. The condition also was not intended to require portfolio margin cleared swaps customers to subordinate their claims, in the event that their claims as cleared swaps customers are not fully satisfied by the distribution of assets held in CFTC cleared swaps customer accounts, to assets that may be included in the debtor's general estate.

Commenters generally supported the Commission's proposed modification to the affirmation language to provide that a cleared swaps customer must affirm that claims to "customer property" as defined in SIPA or the stockbroker liquidation provisions against the BD/FCM will be subordinated to the claims of securities customers and security-based swap customers. One commenter, in supporting the modification, stated that there is no policy basis to disadvantage cleared swap customers as compared to other general creditors of a BD/FCM and, therefore, their claims to "customer property" should not be subordinated to claims of general creditors, but only to the claims of securities customers and security-based swap customers.[49]

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48 *See* 85 FR at 70661.

49 ICI Letter.

Two commenters supported the modifications but suggested that the Commission further tailor the language to ensure that it only requires the subordination of a customer's claims for assets subject to a portfolio margining arrangement and not to other claims the customer may have against the BD/FCM, such as, for example, separate claims the customer may have as a securities customer in relation to a securities account.[50]

The Commission agrees with these commenters that the subordination requirement can be further tailored to provide greater clarity that the subordination agreement is limited to money, securities or other property of the subordinating customer held in a CFTC cleared swaps customer account. If the subordinating customer has a separate securities account at the BD/FCM, the customer need not subordinate claims to cash or securities held in that account. To provide greater clarity on this point, the Commission is modifying the text of the subordination requirement in the 2021 Final Order. In particular, the requirement provides that cleared CDS swaps customer must agree that claims to "customer property" as defined in SIPA or the stockbroker liquidation provisions against the BD/FCM *with respect to the money, securities, or property identified in paragraph (b)(1)(i)* of the 2021 Final Order (*i.e.*, in the CFTC cleared swaps customer account) will be subordinated to the claims of securities customers and security-based swap customers.[51] Thus, the language of the subordination requirement explicitly links to

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50 FIA Letter; SIFMA AMG/MFA Letter. These commenters suggested that the affirmation language read: "as well as an affirmation by the cleared swaps customer that solely with respect to the distribution of "customer property" as defined in SIPA or 11 U.S.C. 741 and, for the avoidance of doubt, without prejudice to its entitlement to "customer property" as defined in 11 U.S.C. 761, its claims against the BD/FCM for such money, securities or property will be subordinated to the claims of securities customers and security-based swap customers."

51 *See* 2021 Final Order, ¶ (b)(1)(ii). In the second sentence of paragraph (b)(1)(ii) of the 2021 Final Order, the word "such" was replaced with "the" and the phrase "identified in paragraph (b)(1)(i) of this order" was inserted immediately following the phrase "money, securities or property".

money, securities or other property of the subordinating customer held in *a CFTC cleared swaps customer account*.

In connection with the proposed clarifications to the subordination requirement, several commenters requested that Commission confirm that current cleared swap customers would not need to amend their existing agreements to provide revised affirmations reflecting the new language prescribed by the 2020 Proposed Order.[52] Commenters suggested that the Commission clarify that affirmations provided pursuant to the 2012 Order were intended to, and should be read to, provide for subordination of claims solely to securities customers and security-based swap customers and not to general creditors.[53] One commenter stated the revised language should be required to be included in affirmations only on a going-forward basis for new cleared swap customers.[54] Another commenter stated that reviews and changes to existing documentation would be a costly and complex exercise since the documentation may form part of other clearing arrangements, and would be onerous to both BD/FCMs and their customers.[55] Another commenter stated that requiring re-documentation would place a significant burden on its member firms.[56] Commenters suggested that the Commission permit firms to notify customers of the clarification through disclosures or negative consents rather than re-documenting existing agreements.[57] Finally, one commenter requested that for BD/FCMs whose existing subordination arrangements are in compliance with the conditions under the 2020

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52 FIA Letter; ICI Letter; SIFMA AMG/MFA Letter.

53 ICI Letter.

54 ICI Letter; FIA Letter.

55 FIA Letter.

56 SIFMA AMG/MFA Letter.

57 FIA Letter; SIFMA AMG/MFA Letter.

Proposed Order but for reference to the 2012 Order, that the Commission clarify that no further documentation or amendments would be required in respect to such arrangements.[58]

In response to the comments regarding whether a BD/FCM would be required to re-document existing agreements, based on the description provided by commenters of varying documentation processes and clearing arrangements among firms, BD/FCMs that have entered into non-conforming subordination agreements and other documentation with counterparties under the 2012 Order will need to determine if their existing documentation is sufficient to meet the conditions of the 2021 Final Order or if any amendments of, or other clarifications to, existing agreements is warranted. It is important that the subordination agreement of a customer be limited so that it does not extend to the general estate or to securities and cash held in a separate securities account. In response to comments regarding the intent of the modifications to the subordination language, the intent of the modifications in the 2021 Final Order to the subordination requirements in the 2012 Order is to better clarify that a cleared swaps customer is not subordinating claims to general creditors. This clarification will preserve protections for customers that are not intended to be impacted or diminished by the subordination requirement in the 2021 Final Order. In addition, in response to the comment relating to BD/FCMs whose existing subordination arrangements meet the conditions under the 2020 Proposed Order but for reference to the 2012 Order, no further documentation or amendments would be required with respect to these existing subordination agreements that reference the 2012 Order if the agreements are in compliance with the conditions of the 2021 Final Order.

In response to comments that re-documentation of existing arrangements will increase costs and burdens on firms, BD/FCMs must individually determine if their current

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[58] SIFMA AMG/MFA Letter.

documentation meets the conditions of the 2021 Final Order. Accordingly, costs and burdens will depend on whether existing documentation is sufficient to meet the conditions of the 2021 Final Order. To the extent a BD/FCM must re-document existing arrangements, the Commission believes such costs and burdens associated with re-documentation are necessary to protect investors. As discussed above, the conditions of the 2021 Final Order are designed to preserve customer protection by limiting the scope of the subordination agreement. Finally, in response to a comment, BD/FCMs that enter into subordination agreements with new cleared swaps customers must ensure that the affirmation required by the 2021 Final Order is executed if they wish to take advantage of the conditional exemption provided by the 2021 Final Order.

As stated above, BD/FCMs that have entered into non-conforming subordination agreements and other documentation with counterparties under the 2012 Order will need to determine if their existing documentation is sufficient to meet the conditions of the 2021 Final Order or if any amendments of, or other clarifications to, existing agreements is warranted. The Commission recognizes that these determinations and any subsequent amendments or other clarifications to existing arrangements may take additional time to implement. Consequently, the Commission is, by order, extending the time for a BD/FCM to meet the conditions in paragraph (b)(1)(ii) of the 2021 Final Order until February 1, 2022, at which time BD/FCMs must satisfy all applicable conditions of the 2021 Final Order to continue to avail themselves of the conditional exemption.

The second BD/FCM condition in the Final 2020 Order applies with respect to transactions involving *affiliates* of the BD/FCM and consists of three requirements. The Commission did not receive any comments on the first requirement and is adopting it as

proposed.[59] Under the this requirement, the BD/FCM must maintain money, securities, and property of affiliates received to margin, guarantee, or secure positions consisting of cleared CDS in a "cleared swaps proprietary account" as defined in CFTC Rule 22.1 for the purpose of clearing such positions under the CDS portfolio margin program.[60] The purpose of this requirement is that under the CFTC regulatory framework certain affiliates are not treated as cleared swaps customers and their assets are held in proprietary accounts as distinct from CFTC cleared swaps customer accounts.[61]

The comments discussed above with respect to the scope of the subordination agreement apply to the second requirement, which the Commission is modifying consistent with changes to the customer subordination requirement discussed above. Under this requirement, the BD/FCM must enter into a non-conforming subordination agreement with an affiliate.[62] The non-conforming subordination agreement must contain: (1) a specific acknowledgment by the affiliate that the money, securities or property *identified in paragraph (b)(2)(i)* of the 2021 Final Order (*i.e.,* in the cleared swaps proprietary account) will not receive customer treatment under the Exchange Act or SIPA or be treated as customer property in a stockbroker liquidation of the BD/FCM, and that such money, securities or property will be held in a proprietary account in accordance with the CFTC requirements and will be subject to any applicable protections under the commodity broker liquidation provisions; and (2) an affirmation by the affiliate that claims to "customer property" as defined in SIPA or 11 U.S.C. 741 against the BD/FCM *with respect to*

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59 *See* 2021 Final Order, ¶ (b)(2); *see also* 2020 Proposed Order, 85 FR at 70661.

60 *See* 2021 Final Order, ¶ (b)(2)(i).

61 *See* 17 CFR 22.1. The Commission believes that this condition is appropriate because affiliates of a BD/FCM that are not otherwise excluded from the definition of "customer" in Exchange Act Rules 8c-1 and 15c2-1 are customers whose securities positions cannot be commingled with the broker-dealer's own proprietary securities positions and therefore could not be held in a cleared swaps account.

62 *See* 2021 Final Order, ¶ (b)(2)(ii).

the money, securities, or property identified in paragraph (b)(2)(i) of the 2021 Final Order will be subordinated to the claims of securities customers and security-based swap customers.

As discussed above, these modifications provide greater clarity that the scope of the subordination only extends to money, securities, or other property held in the subordinating person's CFTC cleared customer or proprietary account. The modifications also provide greater clarity that the person need not subordinate claims to money, securities, or other property held in the subordinating person's CFTC cleared customer or proprietary account to the claims of general creditors.

This requirement is designed to help ensure that affiliates clearly understand that any customer protection treatment otherwise available with respect to securities transactions under the Exchange Act, SIPA, or the stockbroker liquidation provisions will not be available and the account would be treated as a proprietary account (and not a CFTC cleared swaps customer account) under the CEA. Consistent with the condition above with respect to cleared swaps customers that are not affiliates, this condition is intended to remove affiliates from the definitions of "customer" under Rule 15c3-3, SIPA, and the stockbroker liquidation provisions with respect to securities or cash held in cleared swaps proprietary accounts that otherwise would be subject to the segregation requirements of Rule 15c3-3 and the bankruptcy protections afforded by SIPA and the stockbroker liquidation provisions.

The Commission did not receive any comments with respect to the third requirement of the second condition and is adopting it with a conforming modification.[63] As proposed, this condition required that the BD/FCM obtain from the affiliate an opinion of counsel that the

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63 *See* 2021 Final Order, ¶ (b)(2)(iii); *see also* 2020 Proposed Order, 85 FR at 70661-62.

affiliate is legally authorized *to subordinate all of its claims against the BD/FCM to those of securities customers and security-based swap customers*.[64] Consistent with the changes discussed above with respect to the scope of the subordination, the Commission modified this condition so that it requires the BD/FCM obtain from the affiliate an opinion of counsel that the affiliate is legally authorized to *enter into the subordination agreement required by paragraph (b)(2)(ii) of the order*. This conforms the condition to the modifications discussed above with respect to the scope of the subordination. This condition is designed to help ensure that affiliates of the BD/FCM do not place any assets in the proprietary account that the affiliate is not legally authorized to subordinate. Finally, consistent with the changes discussed above with respect to the scope of the subordination, the Commission is, by order, extending the time for a BD/FCM to meet the conditions in paragraph (b)(2)(ii) of the 2021 Final Order until February 1, 2022, at which time BD/FCMs must satisfy all applicable conditions of the 2021 Final Order to continue to avail themselves of the conditional exemption.

The condition in paragraph (b)(3) of the 2012 Order provides that the BD/FCM must require minimum margin levels with respect to any customer transaction in the CDS portfolio margin program at least equal to the amount determined using a margin methodology established and maintained by the BD/FCM that has been approved by the Commission or the Commission staff.[65] A commenter responding to the issuance of the 2012 Order supported the requirement for a BD/FCM to assess the credit risk of counterparties based on the BD/FCM's own risk management standards, but argued that requiring a unique margin model beyond the BD/FCM's

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64 *See* 2020 Proposed Order, 85 FR at 70661-62. The 2012 Order required that the BD/FCM obtain from the affiliate an opinion of counsel that the affiliate is legally authorized to subordinate all of its claims against the BD/FCM to those of customers. *See* 2012 Order, 77 FR at 75220.

65 *See* 2012 Order, 77 FR at 75220.

own credit risk assessment is unwarranted.[66] This commenter also stated that this condition "deters" efficiency, capital formation, and competition.[67] Another commenter responding to the issuance of the 2012 Order argued that the condition undermines a fundamental benefit of central clearing: the ability of market participants to rely on clearing agency/DCO margin requirements.[68] This commenter believes that this condition reduces transparency and the ability to anticipate and verify margin calls, and that it discourages entities from entering the cleared CDS market.[69]

In the context of the SEC's capital, margin and segregation rulemaking for SBSDs, another commenter expressed concern that the conditions in the 2012 Order have proven too restrictive to support a robust market for cleared CDS.[70] More specifically, this commenter recommended that both the CFTC and SEC recognize a harmonized portfolio margin approach

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66 *See* Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association; Carl B. Wilkerson, Vice President & Chief Counsel, Securities & Litigation, American Council of Life Insurers; and Jiří Krol, Director of Government and Regulatory Affairs, Alternative Investment Management Association (Dec. 27, 2013) ("MFA/ACLI/AIMA 12/27/2013 Letter") (comment to the 2012 Order), *available at* https://www.sec.gov/comments/s7-13-12/s71312.shtml; *see also* Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association; Carl B. Wilkerson, Vice President & Chief Counsel, Securities & Litigation, American Council of Life Insurers; and Jiří Krol, Director of Government and Regulatory Affairs, Alternative Investment Management Association (May 10, 2013) (comment to the 2012 Order), *available at* https://www.sec.gov/comments/s7-13-12/s71312.shtml. *See also* 2020 Proposed Order, 85 FR at 70662.

67 MFA/ACLI/AIMA 12/27/2013 Letter. *See also* 2020 Proposed Order, 85 FR at 70662.

68 *See* Letter from Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel LLC (Feb. 2, 2016) ("Citadel 2/2/16 Letter") (comment to the 2012 Order), *available at* https://www.sec.gov/comments/s7-13-12/s71312.shtml. *See also* 2020 Proposed Order, 85 FR at 70662.

69 Citadel 2/2/16 Letter; Letter from Laura Harper Powell, Associate General Counsel, Managed Funds Association, and Adam Jacobs-Dean, Managing Director, Global Head of Markets Regulation, Alternative Investment Management Association (Nov. 19, 2018) (comment to the Commission's capital, margin, and segregation rulemaking for SBSDs), *available at* https://www.sec.gov/comments/s7-08-12/s70812.shtml. *See also* 2020 Proposed Order, 85 FR at 70662.

70 *See* Letter from Walt L. Lukken, President and Chief Executive Office, Futures Industry Association (Nov. 29, 2018) ("FIA 11/29/18 Letter") (comment to the Commission's capital, margin, and segregation rulemaking for SBSDs), *available at* https://www.sec.gov/comments/s7-08-12/s70812.shtml. *See also* 2020 Proposed Order, 85 FR at 70662.

for cleared CDS that defers to the clearing agency/DCO margin methodologies.[71] Finally, a commenter expressed concern that the margin requirements imposed by the Commission have delayed voluntary buy-side clearing of single-name CDS, with resulting adverse effects on trading volume and liquidity.[72]

The vast majority of the BD/FCM clearing members of ICE Clear Credit have obtained approval of their margin methodologies from Commission staff.[73] Furthermore, each BD/FCM that has received approval of its margin methodology already had existing margin models in place prior to applying to the Commission. Therefore, the firms needed to make some adjustments to their models in order to meet the minimum qualitative and quantitative standards set forth in the BD/FCM staff letters, but did not need to develop new margin models. To date, all BD/FCMs that have submitted applications to Commission staff to approve their internal margin methodologies have received approval.

In response to these comments, the Commission believes that it can promote the prudent operation of the BD/FCMs through a process of approving their internal risk management programs (rather than their internal margin methodologies), as discussed below. This may increase transparency for market participants in terms of being able to anticipate margin requirements generated by their cleared CDS portfolios, as the clearing agency/DCO margin

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71 Letter from Walt L. Lukken, President and Chief Executive Office, Futures Industry Association (Nov. 19, 2018) (comment to the Commission's capital, margin, and segregation rulemaking for SBSDs), *available at* https://www.sec.gov/comments/s7-08-12/s70812.shtml; FIA 11/29/18 Letter. *See also* 2020 Proposed Order, 85 FR at 70662.

72 *See* Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association (May 18, 2017) (comment to the Commission's capital, margin, and segregation rulemaking for SBSDs), *available at* https://www.sec.gov/comments/s7-08-12/s70812.shtml. *See also* 2020 Proposed Order, 85 FR at 70662.

73 *See* ICC membership, *available at* https://www.theice.com/clear-credit/participants. Based on Division staff experience in monitoring the CDS portfolio margin program, the vast majority of positions are being cleared through ICE Clear Credit, and to a lesser extent, ICE Clear Europe.

methodology will generate the regulatory margin requirement across all the BD/FCMs. Accordingly, the Commission proposed modifying the condition in paragraph (b)(3) of the 2012 Order to eliminate the requirement that the Commission or Commission staff approve the BD/FCM's margin methodology.[74] Instead, the Proposed 2020 Order would have required the BD/FCM to adopt an internal risk management program that is reasonably designed to identify, measure, and manage the risks arising from its participation in the CDS portfolio margin program that has been approved in advance by the Commission or the Commission staff and that meets the standards described below ("internal risk management program").

An internal risk management program would facilitate the identification, measurement, and management of a broader range of risks than those covered by the clearing agency/DCO margin methodology and, consequently, help ensure that the BD/FCMs operate in a prudent manner with respect to the CDS portfolio margin program. Further, an internal risk management program entails a more comprehensive set of measures to mitigate risk than a margin methodology.[75] Consequently, based on the Commission staff's experience gained in monitoring the CDS portfolio margin program, approving a firm's internal risk management program (rather than its internal margin methodology) may foster a more robust approach to managing risk by BD/FCMs. This approach to managing risk also would promote consistency with the Commission's final capital rules for SBSDs, which include risk management requirements, as well as with the regulatory approach adopted by the CFTC with respect to the

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74 *See* 2020 Proposed Order, 85 FR at 70662.

75 *See, e.g.*, 17 CFR 240.15c3-1e(d)(1) ("The VaR model used to calculate market and credit risk for a position must be integrated into the daily internal risk management system of the broker or dealer[.]").

portfolio margining of cleared CDS.[76] The requirement to have an internal risk management program also is a condition in the BD/FCM staff letters and all the firms operating under the 2012 Order have implemented such programs.

The requirement that a BD/FCM independently measure risk by developing and using its own internal model is not designed to impose a margin collection requirement (or capital charge) or diminish the role of the clearing agency/DCO margin methodology. Rather, it is intended to require the BD/FCM to independently measure the potential future credit risk to cleared swaps customers and affiliates participating in the CDS portfolio margin program under a different stress scenario in order to better understand risks and address them as the firm deems appropriate (*e.g.*, through risk limits, threshold triggers, house margin, heightened monitoring, or other controls).

Commenters generally supported the Commission's proposed standards for an internal risk management program.[77] Two commenters requested that the Commission permit BD/FCMs to rely on the clearing agency/DCO's margin methodology, which is subject to supervision by the CFTC and Commission, unless one of its supervisors has a reasonable basis for concluding that the methodology underestimates the risk or is otherwise inconsistent with the internal risk management program.[78] This alternative, however, would not cover the broader range of risks included in an internal risk management program. Prudent firms establish and maintain

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76 *See* Capital, Margin, and Segregation Adopting Release, 84 FR at 43905 ("The Commission proposed that nonbank SBSDs be required to comply with Rule 15c3-4 to promote the establishment of effective risk management control systems by these firms."); and 2013 CFTC Portfolio Margin Order (requiring participants to "take appropriate measures to identify, measure, and monitor financial risk associated with carrying the Security-Based CDS in a cleared swaps account and implement risk management procedures to address those financial risks").

77 FIA Letter; SIFMA AMG/MFA Letter.

78 FIA Letter; SIFMA AMG/MFA Letter.

integrated internal risk management programs that include policies and procedures designed to help ensure an awareness of, and accountability for, the risks taken throughout the firm and to develop tools to address those risks. For example, there may be idiosyncratic risk factors with respect to a cleared swaps customer, an affiliate, or the BD/FCM's financial condition that are not covered by the margin methodology of the clearing agency/DCO.[79] For these reasons, relying solely on a clearing agency/DCO's margin methodology, as requested by commenters, would not be an adequate alternative to implementing a broader risk management program in terms of managing the risk of cleared CDS in a portfolio margin account.

For the foregoing reasons, the Commission is adopting the risk management condition as proposed in the 2020 Proposed Order.[80] In doing so, the Commission is eliminating the condition in the 2012 Order that the BD/FCM must require minimum margin levels with respect to any customer transaction in the CDS portfolio margin program at least equal to the amount determined using a margin methodology established and maintained by the BD/FCM that has been approved by the Commission or the Commission staff.[81] A BD/FCM seeking approval of its internal risk management program will need to submit sufficient information for the Commission or Commission staff to be able to make a determination whether its program meets

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79 *See* 2020 Proposed Order, 85 FR at 70662.

80 *See* 2021 Final Order, ¶ (b)(3). The 2021 Final Order contains a provision finding that the BD/FCMs that have received previous approval of their internal margin methodology from the Division staff are deemed to have approved internal risk management programs for purposes of paragraph (b)(3) of the order. These BD/FCMs will no longer be required to have minimum margin levels with respect to any customer transaction in a CDS portfolio margin program at least equal to the amount determined using a margin methodology approved by the Commission or the Commission staff, as required by the 2012 Order. They must instead comply with the internal risk management program standards under condition (b)(3) of the 2021 Final Order. One commenter supported this approach. FIA Letter.

81 Nothing in the 2021 Final Order precludes a BD/FCM from setting higher "house" margin requirements for some or all of its customers. *See* 17 CFR 39.13(g)(8).

the required standards described below.[82] In reviewing this information, the Commission or the Commission staff will be guided by these standards.[83] If a BD/FCM's internal risk management program is approved for purposes of the 2021 Final Order, the program will be subject to ongoing supervision and monitoring by the Commission.[84]

The Commission proposed three sets of standards for the internal risk management program in the 2020 Proposed Order.[85] The Commission did not receive any comments on the standards and is adopting them as proposed in the 2020 Proposed Order.

The first standard is that the BD/FCM must calculate a future credit exposure for each cleared swaps customer and affiliate (sometimes each a "counterparty") using a proprietary methodology that meets specified minimum quantitative and qualitative model standards ("internal risk model").[86] The quantitative standards are that the internal risk model:

- Estimates a potential future exposure over a minimum 10-day horizon and 99% confidence level and captures all material risk factors, including but not limited to general movements in credit spread term structure, basis risk between index and single name positions, and interest rate risk;
- Includes a concentration/liquidity requirement; and
- Includes a jump-to-default requirement for the sale of CDS protection equal to the largest loss of a single name exposure assuming a conservative recovery rate that may not exceed 40%.

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82 *See generally* 17 CFR 240.15c3-1e(a)(1). A BD/FCM must submit information only to the extent it is relevant to the portfolio margining of cleared CDS. The BD/FCM may seek confidential treatment for information submitted as part of such application. The Commission may approve a BD/FCM's internal risk management program that meets the standards of paragraph (c) of the 2021 Final Order through an order. The Commission staff may also approve a BD/FCM's internal risk management program that meets the standards of paragraph (c) of the 2021 Final Order through the same process used to issue the BD/FCM staff letters pursuant to the 2012 Order.

83 *See supra* note 81.

84 *See* 2021 Final Order, ¶ (c)(1)(ii)(D).

85 *See* 2020 Proposed Order, 85 FR at 70663-64.

86 *See* 2021 Final Order, ¶ (c)(1).

The qualitative standards are that:

- The internal risk model must be adequately documented and the model documentation must provide a description of the model assumptions, data inputs, parameters, and methodologies employed to measure risk;

- The internal risk model must be subject to an annual model review by a model group that is independent of the business function;

- The internal risk model must be subject to at least quarterly backtesting by counterparty or account; and

- The BD/FCM must provide written notice to the Commission or Commission staff prior to implementing any material change to its internal risk model.

These quantitative and qualitative requirements generally are consistent with the quantitative and qualitative requirements for internal risk models under Appendix E to Rule 15c3-1 and under new Rule 18a-1. These rules permit certain broker-dealers and SBSDs, respectively, to compute capital charges using internal models.[87] For example, the standards in the proposed order generally would require that the model cover a 10-day horizon, 99% confidence level, and material risks, and that the BD/FCM backtest the model and subject it to review.[88]

The second standard for the internal risk management program is that it must have the following minimum risk management elements:

- The BD/FCM must have standards to measure and manage risk exposure arising from counterparties' CDS portfolios that are independent of any central counterparty margin methodology;

- The BD/FCM must have an internal credit risk rating model that assesses the credit risk of each individual counterparty;

- The BD/FCM's monitoring of credit risk must include the prudent setting of an exposure limit for each individual counterparty, and the exposure limit must be reviewed if the counterparty's credit risk profile changes and at least quarterly;

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87 *See* 17 CFR 240.15c3-1e and 18a-1.

88 *See* 17 CFR 15c3-1e(d).

- The BD/FCM must have the ability to limit or reduce the exposure to a counterparty through the collection of additional margin;

- The BD/FCM must have documented procedures to value positions conservatively in view of current market prices and the amount that might be realized upon liquidation; and

- The BD/FCM must have well-defined procedures and systems in place for the daily collection and payment of initial and variation margin.[89]

The standards requirement is a condition in the BD/FCM staff letters. These risk management standards are designed to require a BD/FCM to take prudent steps to protect the firm from losses that can result from failing to account for and control risk with respect to its CDS portfolio margin program. Requiring a BD/FCM to incorporate these proposed standards is designed to promote the establishment of effective internal risk management programs to address the risks of portfolio margining cleared CDS.

The third standard for the internal risk management program is that the BD/FCM must report to the Commission and FINRA staffs on a monthly basis within 5 business days after month end or as otherwise requested details of its top 25 counterparties' portfolios as measured by net credit exposure as well as the top 25 counterparties' portfolios as measured by gross notional amount.[90] This requirement is a condition in the BD/FCM staff letters. Based on Commission staff's experience with the BD/FCM staff letter requirements, this monthly reporting requirement is appropriate as it will assist Commission staff in monitoring the risk to the BD/FCM arising from its portfolio margining of cleared CDS. Understanding the magnitude of this risk will assist the Commission staff in evaluating the appropriateness of a given firm's internal risk management program in terms of its procedures and controls to mitigate risk.

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89 *See* 2021 Final Order, ¶ (c)(2).

90 *See* 2021 Final Order, ¶ (c)(3).

The 2021 Final Order does not include other conditions in the BD/FCM staff letters, including the capital concentration charge. Based on Commission staff experience monitoring the BD/FCMs participating in the CDS portfolio margin program, the Commission believes that the capital concentration charge and other conditions in the BD/FCM staff letters are not necessary in light of the requirement to have a reasonably designed internal risk management program. A reasonably designed internal risk management program will provide a BD/FCM the tools to better understand the risks that arise from its portfolio margining of cleared CDS and address them as the firm deems appropriate (*e.g.*, through risk limits, threshold triggers, house margin, heightened monitoring, or other controls). Therefore, the Commission is not incorporating these conditions into the 2021 Final Order.

The Commission did not receive any comments on the fourth BD/FCM condition in the 2020 Proposed Order and is adopting it as proposed.[91] This condition requires that the BD/FCM be in compliance with applicable laws and regulations relating to risk management, capital, and liquidity, and be in compliance with applicable clearing agency/DCO rules and CFTC requirements (including margin, segregation, and related books and records provisions) with respect to CFTC cleared swaps customer accounts and cleared swaps proprietary accounts subject to the CDS portfolio margin program.[92] The purpose of this condition is to help ensure that the exemption is available only when the BD/FCM is in compliance with applicable regulatory requirements. The Commission received no comments on this condition and is adopting it as proposed in the 2020 Proposed Order.[93]

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91 *See* 2020 Proposed Order, 85 FR at 70664.

92 *See* 2021 Final Order, ¶ (b)(4).

93 *See* 2020 Proposed Order, 85 FR at 70664.

The Commission did not receive any comments on the fifth BD/FCM condition in the 2020 Proposed Order and is adopting it as proposed. [94] This condition requires that each cleared swaps customer and affiliate of the BD/FCM participating in the CDS portfolio margin program be an "eligible contract participant."[95] As with the third condition in the 2021 Final Order for clearing agency/DCOs, it would be appropriate to limit this exemption to cleared CDS entered into with eligible contract participants. Eligible contract participants should have the expertise or resources to effectively determine the risks associated with engaging in these types of transactions.

The Commission did not receive any comments on the sixth BD/FCM condition in the 2020 Proposed Order and is adopting it as proposed.[96] This condition requires that, before receiving any money, securities, or property of a cleared swaps customer or affiliate to margin, guarantee, or secure positions consisting of cleared CDS, the BD/FCM must furnish to the cleared swaps customer or affiliate a disclosure document containing: (1) a statement indicating that the cleared swaps customer's or affiliate's money, securities, and property will be held in a CFTC cleared swaps account, and that the cleared swaps customer or affiliate has elected to seek protections under the commodity broker liquidation provisions with respect to such money, securities, and property; and (2) a statement that the broker-dealer segregation requirements of Sections 15(c)(3) and 3E of the Exchange Act and the rules thereunder, and any customer protections under SIPA and the stockbroker liquidation provisions, will not apply to such cleared

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94 *See* 2020 Proposed Order, 85 FR at 70664.

95 *See* 2021 Final Order, ¶ (b)(5). The 2012 Order required that each customer of the BD/FCM participating in a program to commingle and portfolio margin CDS be an "eligible contract participant" as defined in Section 1a(18) of the CEA. 77 FR at 75220.

96 *See* 2020 Proposed Order, 85 FR at 70664.

swaps customer or affiliate money, securities, and property.[97] The disclosure document must be provided to the cleared swaps customer or affiliate at or prior to the time that the cleared swaps customer or affiliate opens the CFTC cleared swaps account and, in all cases, prior to the BD/FCM receiving any money, securities or property into the CFTC cleared swaps account of the cleared swaps customer or affiliate. This condition is designed to provide market participants that elect to participate in the CDS portfolio margin program with important disclosures regarding the legal framework that will govern their transactions.

For the reasons discussed above, the Commission finds it appropriate in the public interest and consistent with the protection of investors to exempt clearing agency/DCOs and BD/FCMs from compliance with certain provisions of the Exchange Act in connection with a program to portfolio margin cleared swaps customer and affiliate positions in cleared CDS that are swaps and security-based swaps in a segregated account established and maintained in accordance with Section 4d(f) of the CEA (in the case of a cleared swaps customer) or a cleared swaps proprietary account (in the case of an affiliate).

97 *See* 2021 Final Order, ¶ (b)(6).

IV. Conclusion

Pursuant to Sections 3E(c)(2)[98] and 36[99] of the Exchange Act:

It is hereby ordered that any broker-dealer also registered as a futures commission merchant that has received approval of its margin methodology by the Commission or Commission staff prior to the date of this order is deemed to have an internal risk management program that has been approved by the Commission or the Commission staff as required by paragraph (b)(3) of this order.*It is hereby further ordered* that the following exemptions from Exchange Act requirements will apply:

(a) *Exemption for dually-registered clearing agencies/derivatives clearing organizations*. A clearing agency registered pursuant to Section 17A of the Exchange Act and registered as a derivatives clearing organization pursuant to Section 5b of the CEA (a "clearing agency/DCO") will be exempt from Sections 3E(b), (d), and (e) of the Exchange Act and any rules thereunder, solely to perform the functions of a clearing agency for credit default swaps ("CDS") under a program to commingle and portfolio margin cleared CDS for cleared swaps customer and affiliate positions, subject to the following conditions:

(1) The clearing agency/DCO has obtained any other relief needed to permit its clearing members that are registered under Section 15(b) of the Exchange Act (other than paragraph (11)

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98 15 U.S.C. 78c-5(c)(2). Section 3E(c)(2) of the Exchange Act provides that the Commission may, notwithstanding Section 3E(b) of the Exchange Act, by rule, regulation, or order prescribe terms and conditions under which any money, securities, or property of a customer with respect to cleared security-based swaps may be commingled and deposited with any other money, securities, or property received by the broker-dealer or SBSD and required by the Commission to be separately accounted for and treated and dealt with as belonging to the security-based swap customer of the broker-dealer or SBSD.

99 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt, by rule, regulation, or order any person, security, or transaction (or any class or classes of persons, securities, or transactions) from any provision of the Exchange Act or any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

thereof) and also registered as a futures commission merchant pursuant to Section 4f(a)(1) of the CEA (a "BD/FCM") (at the BD/FCM's election), to maintain cleared swaps customer or affiliate money, securities, and property received by the BD/FCM to margin, guarantee, or secure cleared swaps customer or affiliate positions in cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder (in the case of a cleared swaps customer) or a cleared swaps proprietary account (in the case of an affiliate) for the purpose of clearing (as a clearing member of the clearing agency/DCO) such cleared swaps customer or affiliate positions under a program to commingle and portfolio margin CDS.

(2) The clearing agency/DCO has appropriate rules and operational practices to permit a BD/FCM that is a clearing member (at the BD/FCM's election) to maintain cleared swaps customer or affiliate money, securities, and property received by the BD/FCM to margin, guarantee, or secure cleared swaps customer or affiliate positions in cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder (in the case of a cleared swaps customer) or a cleared swaps proprietary account (in the case of an affiliate) for the purpose of clearing (as a clearing member of the clearing agency/DCO) such cleared swaps customer or affiliate positions under a program to commingle and portfolio margin CDS.

(3) The rules of the clearing agency/DCO require that each cleared swaps customer and affiliate of the BD/FCM participating in a program to commingle and portfolio margin CDS must be an "eligible contract participant" as defined in Section 1a(18) of the CEA.

(b) *Exemption for certain BD/FCMs that elect to offer a program to commingle and portfolio margin cleared swaps customer and affiliate positions in cleared CDS.* Solely to

perform the functions of a BD/FCM for cleared CDS, with respect to any cleared swaps customer or affiliate money, securities, and property received by the BD/FCM to margin, guarantee, or secure cleared swaps customer or affiliate positions in security-based swaps included in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder (in the case of a cleared swaps customer) or a cleared swaps proprietary account (in the case of an affiliate) under a program to commingle and portfolio margin cleared swaps customer or affiliate positions in CDS, a BD/FCM will be exempt from Exchange Act Sections 3E(b), (d), and (e), and Section 15(c)(3) and Rule 15c3-3 thereunder and any requirement to treat an affiliate (as defined in association with the definition of "cleared **s**waps proprietary account" pursuant to CFTC Rule 22.1) as a customer for purposes of Section 8 of the Exchange Act and Exchange Act Rules 8c-1 and 15c2-1 thereunder, subject to the following conditions:

(1) With respect to cleared swaps customers that are not affiliates of the BD/FCM,

(i) The BD/FCM must maintain cleared swaps customer money, securities, and property received to margin, guarantee or secure cleared swaps customer positions consisting of cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member or through a clearing member of a clearing agency/DCO operating pursuant to the exemption in paragraph (a) above) such cleared swaps customer positions under a program to commingle and portfolio margin CDS; and

(ii) The BD/FCM must enter into a non-conforming subordination agreement with each cleared swaps customer by no later than February 1, 2022. The agreement must contain a specific acknowledgment by the cleared swaps customer that the money, securities or property

identified in paragraph (b)(1)(i) of this order will not receive customer treatment under the Exchange Act or SIPA or be treated as "customer property" as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM and that such money, securities or property will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and rules and regulations thereunder; as well as an affirmation by the cleared swaps customer that claims to "customer property" as defined in SIPA or 11 U.S.C. 741 against the BD/FCM with respect to the money, securities, or property identified in paragraph (b)(1)(i) of this order will be subordinated to the claims of securities customers and security-based swap customers.

(2) With respect to affiliates of the BD/FCM,

(i) The BD/FCM maintains money, securities, and property of affiliates received to margin, guarantee, or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, in a cleared swaps proprietary account for the purpose of clearing (as a clearing member of a clearing agency/DCO operating pursuant to the exemption in paragraph (a) above) such positions under a program to commingle and portfolio margin CDS;

(ii) The BD/FCM enters into a non-conforming subordination agreement with each affiliate by no later than February 1, 2022. The agreement must contain a specific acknowledgment by the affiliate that the money, securities or property identified in paragraph (b)(2)(i) of this order will not receive customer treatment under the Exchange Act or SIPA or be treated as "customer property" as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM, and that such money, securities or property will be held in a proprietary account in accordance with the CFTC requirements and will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and rules and regulations thereunder; as well as an affirmation by the affiliate that claims to "customer property" as defined in SIPA or 11 U.S.C.

741 against the BD/FCM with respect the money, securities, or property identified in paragraph (b)(2)(i) of this order will be subordinated to the claims of securities customers and security-based swap customers; and

(iii) The BD/FCM obtains from the affiliate an opinion of counsel that the affiliate is legally authorized to enter into the subordination agreement required by paragraph (b)(2)(ii) of this order.

(3) The BD/FCM has adopted an internal risk management program that is reasonably designed to identify, measure, and manage the risks arising from its program to allow cleared swaps customers and affiliates to commingle and portfolio margin CDS that has been approved in advance by the Commission or the Commission staff and meets the standards in paragraph (c) of this order.

(4) The BD/FCM must be in compliance with applicable laws and regulations relating to risk management, capital, and liquidity, and must be in compliance with applicable clearing agency/DCO rules and CFTC requirements (including segregation and related books and records provisions) for accounts established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder (in the case of cleared swaps customers) and for cleared swaps proprietary accounts (in the case of affiliates), and subject to a program to commingle and portfolio margin CDS.

(5) Each cleared swaps customer and affiliate of the BD/FCM participating in a program to commingle and portfolio margin CDS is an "eligible contract participant" as defined in Section 1a(18) of the CEA.

(6) Before receiving any money, securities, or property of a cleared swaps customer or affiliate to margin, guarantee, or secure positions consisting of cleared CDS, which include both

swaps and security-based swaps, under a program to commingle and portfolio margin CDS, the BD/FCM must furnish to the cleared swaps customer or affiliate a disclosure document containing the following information:

(i) A statement indicating that the cleared swaps customer's or affiliate's money, securities, and property will be held in an account maintained in accordance with the segregation requirements of Section 4d(f) of the CEA (in the case of a cleared swaps customer) or a cleared swaps proprietary account (in the case of an affiliate), and that the cleared swaps customer or affiliate has elected to seek protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and the rules and regulations thereunder with respect to such money, securities, and property; and

(ii) A statement that the broker-dealer segregation requirements of Section 15(c)(3) and Section 3E of the Exchange Act and the rules thereunder, and any customer protections under SIPA and the stockbroker liquidation provisions, will not apply to such cleared swaps customer or affiliate money, securities, and property.

(c) *Standards for internal risk management program*. The internal risk management program required pursuant to paragraph (b)(3) of this order must have the following standards in place:

(1) *Internal Risk Model.* The BD/FCM must calculate a future credit exposure for each cleared swaps customer and affiliate (each a "counterparty") using its own proprietary methodology ("internal risk model") subject to the following minimum quantitative and qualitative model standards:

(i) *Quantitative Requirements*. (A) The internal risk model must estimate a potential future exposure over a minimum 10-day horizon and 99% confidence level and capture all

material risk factors, including but not limited to general movements in credit spread term structure, basis risk between index and single name positions, and interest rate risk;

(B) The internal risk model must include a concentration/liquidity requirement; and

(C) The internal risk model must include a jump-to-default requirement for the sale of CDS protection equal to the largest loss of a single name exposure assuming a conservative recovery rate that may not exceed 40%.

(ii) *Qualitative Requirements*. (A) The internal risk model must be adequately documented and the documentation must provide a description of the model assumptions, data inputs, parameters, and methodologies employed to measure risk;

(B) The internal risk model must be subject to an annual model review by a model group that is independent of the business function;

(C) The internal risk model must be subject to at least quarterly backtesting by counterparty or account; and

(D) The BD/FCM must provide written notice to the Commission or Commission staff prior to implementing any material change to its internal risk model.

(2) *Minimum Risk Management System Standards*. (A) The BD/FCM must maintain risk management system standards to measure and manage risk exposure arising from counterparties' CDS portfolios that are independent of any central counterparty margin methodology;

(B) The BD/FCM must have an internal credit risk rating model that assesses the credit risk of each individual counterparty;

(C) The BD/FCM's monitoring of credit risk must include the prudent setting of an exposure limit for each individual counterparty and the exposure limit must be reviewed if the counterparty's credit risk profile changes and at least quarterly;

(D) The BD/FCM must have the ability to limit or reduce the exposure to a counterparty through the collection of additional margin;

(E) The BD/FCM must have documented procedures to value positions conservatively in view of current market prices and the amount that might be realized upon liquidation; and

(F) The BD/FCM must have well-defined procedures and systems in place for the daily collection and payment of initial and variation margin.

(3) *Monthly Reporting*. The BD/FCM must report to the Commission and FINRA staffs on a monthly basis within 5 business days after month end or as otherwise requested details of its top 25 counterparties' portfolios as measured by net credit exposure as well as the top 25 counterparties' portfolios as measured by gross notional amount.

By the Commission.

J. Matthew DeLesDernier
Assistant Secretary