

## § 23.611

## 17 CFR Ch. I (4–1–13 Edition)

clearing organization for clearing by or for the clearing member as quickly as would be technologically practicable if fully automated systems were used; and

(b) Each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall accept or reject each trade submitted by or for it as quickly as would be technologically practicable if fully automated systems were used; a clearing member may meet this requirement by:

(1) Establishing systems to pre-screen orders for compliance with criteria specified by the clearing member;

(2) Establishing systems that authorize a derivatives clearing organization to accept or reject on its behalf trades that meet, or fail to meet, criteria specified by the clearing member; or

(3) Establishing systems that enable the clearing member to communicate to the derivatives clearing organization acceptance or rejection of each trade as quickly as would be technologically practicable if fully automated systems were used.

[77 FR 21308, Apr. 9, 2012]

### **§ 23.611 Delegation of authority to the Director of the Division of Clearing and Risk to establish an alternative compliance schedule to comply with clearing member acceptance for clearing.**

(a) The Commission hereby delegates to the Director of the Division of Clearing and Risk or such other employee or employees as the Director may designate from time to time, the authority to establish an alternative compliance schedule for requirements of § 23.610 for swaps that are found to be technologically or economically impracticable for an affected swap dealer or major swap participant that seeks, in good faith, to comply with the requirements of § 23.610 within a reasonable time period beyond the date on which compliance by such swap dealer or major swap participant is otherwise required.

(b) A request for an alternative compliance schedule under this section shall be acted upon by the Director of the Division of Clearing and Risk within 30 days from the time such a request

is received, or it shall be deemed approved.

(c) An exception granted under this section shall not cause a registrant to be out of compliance or deemed in violation of any registration requirements.

(d) Notwithstanding any other provision of this section, in any case in which a Commission employee delegated authority under this section believes it appropriate, he or she may submit to the Commission for its consideration the question of whether an alternative compliance schedule should be established. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section.

[77 FR 21308, Apr. 9, 2012]

### **APPENDIX A TO SUBPART H— GUIDANCE ON THE APPLICATION OF §§ 23.434 AND 23.440 FOR SWAP DEALERS THAT MAKE RECOMMENDATIONS TO COUNTERPARTIES OR SPECIAL ENTITIES**

The following provides guidance on the application of §§ 23.434 and 23.440 to swap dealers that make recommendations to counterparties or Special Entities.

#### *Section 23.434—Recommendations to Counterparties—Institutional Suitability*

A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant, must undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap—general suitability (§ 23.434(a)(1))—and have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty—specific suitability (§ 23.434(a)(2)). To satisfy the general suitability obligation, a swap dealer must undertake reasonable diligence that will vary depending on, among other things, the complexity of and risks associated with the swap or swap trading strategy and the swap dealer's familiarity with the swap or swap trading strategy. At a minimum, a swap dealer's reasonable diligence must provide it with an understanding of the potential risks and rewards associated with the recommended swap or swap trading strategy.

*Recommendation.* Whether a communication between a swap dealer and a

counterparty is a recommendation will turn on the facts and circumstances of the particular situation. There are, however, certain factors the Commission will consider in reaching such a determination. The facts and circumstances determination of whether a communication is a “recommendation” requires an analysis of the content, context, and presentation of the particular communication or set of communications. The determination of whether a “recommendation” has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether, given its content, context, and manner of presentation, a particular communication from a swap dealer to a counterparty reasonably would be viewed as a “call to action,” or suggestion that the counterparty enter into a swap. An analysis of the content, context, and manner of presentation of a communication requires examination of the underlying substantive information transmitted to the counterparty and consideration of any other facts and circumstances, such as any accompanying explanatory message from the swap dealer. Additionally, the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a “recommendation.”

*Safe harbor.* A swap dealer may satisfy the safe harbor requirements of § 23.434(b) to fulfill its counterparty-specific suitability duty under § 23.434(a)(2) if: (1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap; (2) the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer; (3) the swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the recommendation; and (4) in the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).

To reasonably determine that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks of a recommendation, the swap dealer can rely on the written representations of the counterparty, as provided in § 23.434(c). Section 23.434(c)(1) provides that a swap dealer will satisfy § 23.434(b)(1)’s requirement with respect to a counterparty other than a Special Entity if it receives rep-

resentations that the counterparty has complied in good faith with the counterparty’s policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so. Section § 23.434(c)(2) provides that a swap dealer will satisfy § 23.434(b)(1)’s requirement with respect to a Special Entity if it receives representations that satisfy the terms of § 23.450(d) regarding a Special Entity’s qualified independent representative.

Prong (4) of the safe harbor clarifies that § 23.434’s application is broader than § 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities. Section 23.434 is triggered when a swap dealer recommends any swap or trading strategy that involves a swap to any counterparty. However, § 23.440 is limited to a swap dealer’s recommendations (1) to a Special Entity (2) of swaps that are tailored to the particular needs or characteristics of the Special Entity. Thus, a swap dealer that recommends a swap to a Special Entity that is tailored to the particular needs or characteristics of the Special Entity may comply with its suitability obligation by satisfying the safe harbor in § 23.434(b); however, the swap dealer must also comply with § 23.440 in such circumstances.

*Section 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities*

A swap dealer “acts as an advisor to a Special Entity” under § 23.440 when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. A swap dealer that “acts as an advisor to a Special Entity” has a duty to make a reasonable determination that a recommendation is in the “best interests” of the Special Entities and must undertake “reasonable efforts” to obtain information necessary to make such a determination.

Whether a swap dealer “acts as an advisor to a Special Entity” will depend on: (1) Whether the swap dealer has made a recommendation to a Special Entity; and (2) whether the recommendation concerns a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. To determine whether a communication between a swap dealer and counterparty is a recommendation, the Commission will apply the same factors as under § 23.434, the suitability rule. However, unlike the suitability rule, which covers recommendations regarding any type of swap or trading strategy involving a swap, the “acts as an advisor rule” and “best interests” duty will be triggered only if the recommendation is of a swap or trading strategy involving a swap that is

“tailored to the particular needs or characteristics of the Special Entity.”

Whether a swap is tailored to the particular needs or characteristics of the Special Entity will depend on the facts and circumstances. Swaps with terms that are tailored or customized to a specific Special Entity’s needs or objectives, or swaps with terms that are designed for a targeted group of Special Entities that share common characteristics, *e.g.*, school districts, are likely to be viewed as tailored to the particular needs or characteristics of the Special Entity. Generally, however, the Commission would not view a swap that is “made available for trading” on a designated contract market or swap execution facility, as provided in Section 2(h)(8) of the Act, as tailored to the particular needs or characteristics of the Special Entity.

*Safe harbor.* Under §23.440(b)(2), when dealing with a Special Entity (including a Special Entity that is an employee benefit plan as defined in §23.401(c)(3)),<sup>1</sup> a swap dealer will not “act as an advisor to a Special Entity” if: (1) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or swap trading strategy that is tailored to the particular needs or characteristics of the Special Entity; (2) the Special Entity represents in writing, in accordance with §23.402(d), that it will not rely on the swap dealer’s recommendations and will rely on advice from a qualified independent representative within the meaning of §23.450; and (3) the swap dealer discloses that it is not undertaking to act in the best interests of the Special Entity.

A swap dealer that elects to communicate within the safe harbor to avoid triggering the “best interests” duty must appropriately manage its communications. To clarify the type of communications that they will make under the safe harbor, the Commission expects that swap dealers may specifically represent that they will not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy, and that for such advice the Special Entity should consult its own advisor. Nothing in the final rule would preclude such a representation from being included in counterparty relationship documentation. However, such a representation would not act as a safe harbor under the rule where, contrary to the representation, the swap

<sup>1</sup>The guidance in this appendix regarding the safe harbor to §23.440 is limited to the safe harbor for any Special Entity under §23.440(b)(2). A swap dealer may separately comply with the safe harbor under §23.440(b)(1) for its communications to a Special Entity that is an employee benefit plan as defined in §23.401(c)(3).

dealer does express an opinion to the Special Entity as to whether it should enter into a recommended swap or trading strategy.

If a swap dealer complies with the terms of the safe harbor, the following types of communications would not be subject to the “best interests” duty:<sup>2</sup> (1) Providing information that is general transaction, financial, educational, or market information; (2) offering a swap or trading strategy involving a swap, including swaps that are tailored to the needs or characteristics of a Special Entity; (3) providing a term sheet, including terms for swaps that are tailored to the needs or characteristics of a Special Entity; (4) responding to a request for a quote from a Special Entity; (5) providing trading ideas for swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity; and (6) providing marketing materials upon request or on an unsolicited basis about swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity. This list of communications is not exclusive and should not create a negative implication that other types of communications are subject to a “best interests” duty.

The safe harbor in §23.440(b)(2) allows a wide range of communications and interactions between swap dealers and Special Entities without invoking the “best interests” duty, including discussions of the advantages or disadvantages of different swaps or trading strategies. The Commission notes, however, that depending on the facts and circumstances, some of the examples on the list could be “recommendations” that would trigger a suitability obligation under §23.434. However, the Commission has determined that such activities would not, by themselves, prompt the “best interests” duty in §23.440, provided that the parties comply with the other requirements of §23.440(b)(2). All of the swap dealer’s communications, however, must be made in a fair and balanced manner based on principles of fair dealing and good faith in compliance with §23.433.

Swap dealers engage in a wide variety of communications with counterparties in the normal course of business, including but not

<sup>2</sup>Communications on the list that are not within the meaning of the term “acts as an advisor to a Special Entity” are outside the requirements of §23.440. By including such communications on the list, the Commission does not intend to suggest that they are “recommendations.” Thus, a swap dealer that does not “act as an advisor to a Special Entity” within the meaning of §23.440(a) is not required to comply with the safe harbor to avoid the “best interests” duty with respect to its communications.

limited to the six types of communications listed above. Whether any particular communication will be deemed to be a “recommendation” within the meaning of §§ 23.434 or 23.440 will depend on the facts and circumstances of the particular communication considered in light of the guidance in this appendix with respect to the meaning of the term “recommendation.” Swap dealers that choose to manage their communications to comply with the safe harbors provided in §§ 23.434 and 23.440 will be able to limit the duty they owe to counterparties, including Special Entities, provided that the parties exchange the appropriate representations.

## PART 30—FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

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AUTHORITY: 7 U.S.C. 1a, 2, 6, 6c, and 12a, unless otherwise noted.

SOURCE: 52 FR 28998, Aug. 5, 1987, unless otherwise noted.

### § 30.1 Definitions.

For the purposes of this part:

(a) *Foreign futures* means any contract for the purchase or sale of any commodity for future delivery made, or to be made, on or subject to the rules of any foreign board of trade.

(b) *Foreign option* means any transaction or agreement which is or is held out to be of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty” or “decline guaranty”, made or to be made on or subject to the rules of any foreign board of trade.

(c) *Foreign futures or foreign options customer* means any person located in the United States, its territories or possessions who trades in foreign futures or foreign options: *Provided*, That an owner or holder of a proprietary account as defined in paragraph (y) of § 1.3 of this chapter shall not be deemed to be a foreign futures or foreign options customer within the meaning of §§ 30.6 and 30.7 of this part.

(d) *Foreign futures and options customer omnibus account* is defined as an account in which the transactions of one or more foreign futures and foreign options customers are combined and carried in the name of the originating futures commission merchant rather than in the name of each individual foreign futures or foreign options customer.

(e) *Foreign futures and options broker (FFOB)* is defined as a non-U.S. person that is a member of a foreign board of trade, as defined in § 1.3(ss) of this chapter, licensed, authorized or otherwise subject to regulation in the jurisdiction in which the foreign board of trade is located; or a foreign affiliate of a U.S. futures commission merchant, licensed, authorized or otherwise subject to regulation in the jurisdiction in which the affiliate is located.

[52 FR 28998, Aug. 5, 1987, as amended at 65 FR 47280, Aug. 2, 2000]

### § 30.2 Applicability of the Act and rules.

(a) Except as specified in this part or unless the context otherwise requires, the provisions of sections 1a, 2, 4, 4c, 4f, 4g, 4k, 4l, 4m, 4n, 4o, 4p, 6, 6c, 8, 8a, 9, 12, 13, and 14 of the Act and parts 1, 3, 4, 10, 11, 12, 13, 14, 21, 155, 166 and 190 of this chapter shall apply to the persons and transactions that are subject to the requirements of this part as though they were set forth herein and included specific references to foreign board of trade, foreign futures, foreign options,