

the Commission Web site for a 30-day public comment period. A derivatives clearing organization that wishes to request confidential treatment for portions of its submission may do so in accordance with the procedures set out in § 145.9(d).

(5) The Commission will review the submission and determine whether the swap, or group, category, type, or class of swaps described in the submission is required to be cleared. The Commission will make its determination not later than 90 days after a complete submission has been received, unless the submitting derivatives clearing organization agrees to an extension. The determination of when such submission is complete shall be at the sole discretion of the Commission. In making a determination that a clearing requirement shall apply, the Commission may require such terms and conditions to the requirement as the Commission determines to be appropriate.

(c) *Commission-initiated reviews.* (1) The Commission on an ongoing basis will review swaps that have not been accepted for clearing by a derivatives clearing organization to make a determination as to whether the swaps should be required to be cleared. In undertaking such reviews, the Commission will use information obtained pursuant to Commission regulations from swap data repositories, swap dealers, and major swap participants, and any other available information.

(2) Notice regarding any determination made under paragraph (c)(1) of this section will be posted on the Commission Web site for a 30-day public comment period.

(3) If no derivatives clearing organization has accepted for clearing a particular swap, group, category, type, or class of swaps that the Commission finds would otherwise be subject to a clearing requirement, the Commission will:

- (i) Investigate the relevant facts and circumstances;
- (ii) Within 30 days of the completion of its investigation, issue a public report containing the results of the investigation; and
- (iii) Take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the swap, group, category, type, or class of swaps.

(d) *Stay of clearing requirement.* (1) After making a determination that a swap, or group, category, type, or class of swaps is required to be cleared, the

Commission, on application of a counterparty to a swap or on its own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the swap, or group, category, type, or class of swaps and the clearing arrangement.

(2) A counterparty to a swap that wishes to apply for a stay of the clearing requirement for that swap shall submit a written request to the Secretary of the Commission that includes:

- (i) The identity and contact information of the counterparty to the swap;
- (ii) The terms of the swap subject to the clearing requirement;
- (iii) The name of the derivatives clearing organization clearing the swap;
- (iv) A description of the clearing arrangement; and
- (v) A statement explaining why the swap should not be subject to a clearing requirement.

(3) A derivatives clearing organization that has accepted for clearing a swap, or group, category, type, or class of swaps that is subject to a stay of the clearing requirement shall provide any information requested by the Commission in the course of its review.

(4) The Commission will complete its review not later than 90 days after issuance of the stay, unless the derivatives clearing organization that clears the swap, or group, category, type, or class of swaps agrees to an extension.

(5) Upon completion of its review, the Commission may:

- (i) Determine, subject to any terms and conditions as the Commission determines to be appropriate, that the swap, or group, category, type, or class of swaps must be cleared; or
- (ii) Determine that the clearing requirement will not apply to the swap, or group, category, type, or class of swaps, but clearing may continue on a non-mandatory basis.

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

3. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2 and 12a.

4. In § 140.94, revise paragraph (a)(5) and add new paragraphs (a)(6) and (a)(7) to read as follows:

§ 140.94 Delegation of authority to the Director of the Division of Clearing and Intermediary Oversight.

(a) * * *

(5) All functions reserved to the Commission in § 5.14 of this chapter;

(6) All functions reserved to the Commission in §§ 39.5(b)(2) and (d)(3) of this chapter; and

(7) All functions reserved to the Commission in §§ 39.11 (b)(1)(vi), (b)(2)(ii), (c)(1), (c)(2), (f)(1), and (f)(4) of this chapter.

* * * * *

Issued in Washington, DC, on October 26, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

Note: The following attachment will not appear in the Code of Federal Regulations:

Statement of Chairman Gary Gensler Process for Review of Swaps for Mandatory Clearing October 26, 2010

I support the proposed rulemaking to establish a process for the review and designation of swaps for mandatory clearing. One of the primary goals of the Dodd-Frank Act was to lower risk by requiring standardized swaps to be centrally cleared. The process set out in the proposed rule is consistent with the Congressional requirement that derivatives clearing organizations (DCOs) be eligible to clear the swaps and that before a swap becomes subject to mandatory clearing the public get to provide input on the contract or class of contracts. Though we have until July to finalize this rulemaking, it is my hope that we can finish by April. This would allow us to begin reviewing the contracts that are already being cleared by DCOs and under Dodd-Frank have already been deemed submitted to the Commission for consideration.

[FR Doc. 2010-27532 Filed 11-1-10; 8:45 am]

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 40

RIN 3038-AD07

Provisions Common to Registered Entities

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing rules to implement new statutory provisions enacted under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") and amend existing rules affected by the passage of the Dodd-Frank Act. These proposed rules apply to designated contract markets ("DCMs"), derivatives

clearing organizations (“DCOs”), swap execution facilities (“SEFs”) and swap data repositories (“SDRs”). The proposed rules implement the new statutory framework for certification and approval for new products, new rules and rule amendments submitted to the Commission by registered entities. Furthermore, the proposed rules prohibit event contracts based on certain excluded commodities, establish special procedures for certain rule changes proposed by systemically important derivatives clearing organizations (“SIDCOs”), and provide for the tolling of review periods for certain novel derivative products pending the resolution of jurisdictional determinations.

DATES: Submit comments on or before January 3, 2011.

ADDRESSES: You may submit comments, identified by RIN number, by any of the following methods:

- Agency Web site, via its Comments Online process: <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.
- Mail: David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581
- Hand Delivery/Courier: Same as mail above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in CFTC Regulation 145.9.¹ The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other

applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT:

Bella Rozenberg, Special Counsel, Division of Market Oversight (“DMO”), at 202–418–5119 or brozenberg@cftc.gov, Riva Spear Adriance, Associate Director for Market Review, DMO at 202–418–5494 or radriance@cftc.gov, in each case, also at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

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I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act.² Title VII of the Dodd-Frank Act³ amended the Commodity Exchange Act (“Act”)⁴ to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-

time reporting regimes; and (4) enhancing the Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.

Section 745 of the Dodd-Frank Act amends Section 5c of the Act to provide for new rule, rule amendment and product certification and approval procedures, which are applicable to DCMs and DCOs, as well as new registered entities, SEFs and SDRs.⁵ Section 745 of the Dodd-Frank Act also authorizes the Commission to prohibit the listing of event contracts based on certain excluded commodities if such contracts involve one or more activities enumerated in the Dodd-Frank Act. Furthermore, Section 745 of the Dodd-Frank Act authorizes the Commission to prohibit contracts based on similar activities if they are determined by rule or regulation to be contrary to the public interest. Section 806(e)(1) of the Dodd-Frank Act requires that a SIDCO⁶ provide the Commission with 60 days advance notice of any proposed changes to rules, procedures or operations that could materially affect the nature or level of risk presented by a SIDCO. Finally, the Commission proposes to toll the review period of novel derivative products pending a determination as to whether the Commission or the Securities and Exchange Commission (“SEC”) has jurisdiction over novel derivative products.

The Commission proposes a number of changes in order to enhance its ability to administer the Act, as amended, ensure consistency with various new requirements of the Dodd-Frank Act and clarify the regulatory obligations imposed on market participants. Specifically, the Commission proposes to amend sections 40.1 through 40.8 and adopt new sections 40.10 through 40.12⁷ to amend the definitions, establish certification and approval procedures for the rules and products of registered entities, including SIDCOs, prohibit event contracts based on certain excluded commodities, and codify statutory requirements relating to tolling of the review period pending SEC and CFTC jurisdictional determinations.

⁵ The Dodd-Frank Act created new registered entities, including SEFs and SDRs. Issues related to the regulation of these entities will be addressed in other rulemakings issued by the Commission.

⁶ A SIDCO is a DCO that has been designated as a systemically important financial market utility by the Financial Stability Oversight Council pursuant to Section 804 of the Dodd-Frank Act.

⁷ Commission regulations referred to herein are found at 17 CFR 1.

¹ 17 CFR 145.9.

² See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

³ Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010.”

⁴ 7 U.S.C. 1 *et seq.*

Although Section 745 of the Dodd-Frank Act does not provide a statutory deadline for promulgation of final rules, Part 40 of the Commission's regulations currently is inconsistent with certain provisions of Section 745. In addition, since, as noted, the Dodd-Frank Act created new registered entities, SEFs and SDRs, the rule certification procedures for these new registered entities must be in place by the time these entities begin operating. Therefore, Part 40 should be amended by July 15, 2011, the date when relevant provisions of the Dodd-Frank Act become effective.

The Commission requests comment on all aspects of the proposed rules, as well as comment on the specific provisions and issues highlighted in the discussion below.

II. The Proposed Amendments to Part 40 of the Commission's Regulations

a. Section 40.1 Definitions

To implement the requirements of the Dodd-Frank Act and to ensure the Commission's ability to administer Part 40, the Commission proposes a number of amendments to the definitions found in § 40.1. The Commission proposes to add definitions for "dormant swap execution facilities" and "dormant swap data repositories" to provide consistency with the extant § 40.1 definitions for dormant DCMs and dormant DCOs. Also, the Commission proposes to delete the definition of a "dormant derivatives trading execution facility" since this entity was eliminated by the Dodd-Frank Act.

Further, the Commission proposes to revise the definition of "emergency" to include an occurrence or circumstance that threatens the timely collection and payment of funds in connection with clearing and settlement by a derivatives clearing organization. In addition, the Commission proposes to incorporate references to swap transactions where appropriate to ensure consistency in application of Part 40 to both current and new registered entities. The Commission also proposes to delete the existing restriction on Commission review of rules relating to margin levels currently included in the definition of rule.⁸ The restriction is no longer

⁸ The restriction in the current regulations reflects an ambiguity in the Act as modified by the Commodity Futures Modernization Act ("CFMA"). Prior to enactment of the CFMA in 2000, Section 5a(a)(12)(A) of the Act required that all changes to contract terms and conditions be submitted to the Commission for approval "except those rules relating to the setting of levels of margin." In Section 113 of the CFMA, Congress removed Section 5a(a)(12)(A), allowing registered entities to amend their rules by self-certification. The new

appropriate as Section 736 of the Dodd-Frank Act amends Section 8a(7) of the Act to permit the Commission to alter or supplement the rules of a registered entity by issuing rules, regulations or orders regarding margin requirements. By necessity, such action requires the Commission to be able to review a DCO's rules "relating to the setting of levels of margin" in the first instance, even though the Commission itself is not authorized to "set specific margin amounts" under Section 8(a)(7). Finally, the Commission proposes to revise the definition of "terms and conditions" to add a new paragraph (j)(15) to include specific information relating to swaps proposed to be cleared by a DCO. By supplementing other provisions of paragraph (j) that are relevant to swaps, the Commission seeks to clarify the types of information that may differentiate swaps from futures contracts. These include, for example, the following: notional value; relevant dates, tenor, and day count conventions; stub, premium, or initial cash flow components; and payment and reset frequency.

b. Section 40.2 Listing and accepting products for trading or clearing by certification

Section 5c(c) of the Act permits registered entities to list for trading or accept for clearing any new product by providing to the Commission a written certification that the new product, rule, or rule amendment complies with the Act and Commission regulations. Under current § 40.2, prior to listing or accepting products for trading or clearing by certification, the Commission requires, among other things, that registered entities provide the terms and conditions of their products and certify that submitted products comply with the Act and Commission regulations. The Commission also requires that registered

provision did not retain any reference to margin rules. However, Section 8(a)(7) was not amended by the CFMA, and retained a provision that allowed the Commission to alter or supplement the rules of a registered entity, except for rules relating to "the setting of levels of margin," thereby creating uncertainty as to whether registered entities could adopt or change margin rules without certifying those rules to the Commission. Because there was no indication that Congress intended to alter the special status of rules relating to the setting of margin levels, the Commission resolved this ambiguity by excluding the setting of margin levels from the definition of "rule." Section 8(a)(7)(D) now permits the Commission to require the changes with respect to margin requirements provided that the Commission's rules, regulations or orders (i) are limited to protecting the financial integrity of a DCO, (ii) are designed for risk management purposes to protect the financial integrity of transactions, and (iii) do not set specific margin amounts.

entities provide, only if requested by Commission staff, additional information relating to whether the contract meets the requirements of the Act or the Commission's regulations or policies thereunder.

Further, the Act permits registered entities to list for trading only those products that are not susceptible to manipulation and have appropriate position limitations or position accountability for speculators. To assist registered entities in demonstrating compliance with these Core Principles and to better ensure the integrity of certified products, the Commission proposes two amendments to § 40.2.

The Commission proposes to amend § 40.2 to require registered entities to include in their submission documentation relied on to establish the basis for compliance with the applicable provisions of the Act and the Commission's regulations thereunder, including the Core Principles for registered entities. The proposed amendments to § 40.2 will increase the timeliness and efficiency of Commission review. The Commission has always required that registered entities have evidence supporting their certification of compliance with the Act available for Commission review.⁹

Based on these experiences, the Commission proposes to amend § 40.2(a) to require a registered entity to include in its submission any documentation relied on to establish the basis for compliance with the Act and the Commission's regulations thereunder, including the applicable Core Principles. For DCM and SEF submissions of new products and product amendments, the Commission expects submissions to include documentation demonstrating that the product is not readily susceptible to manipulation (Core Principle 3 for

⁹ For instance, in January 2006, when the Commission issued Technical and Clarifying Amendments to Rules for Exempt Markets, Derivatives Transaction Execution Facilities and Designated Contract Markets, and Procedural Changes for Derivatives Clearing Organization Registration Applications, it required DCMs to provide documentation demonstrating compliance with the Act and the Commission's regulations. It expressly stated, "DCMs are responsible in the first instance, and the Commission is ultimately responsible in its oversight role, for assuring that DCM products and rules comply with applicable designation criteria and Core Principles. When a DCM self-certifies a product or rule, it is, in effect, pledging that the product or rule does meet those standards. Assuming the DCM is acting in good faith, it must have some reasonable basis for making that pledge * * * [and therefore] * * * when reasonable questions arise, it should not be burdensome for a DCM to share information regarding the reasonable basis underlying the new product or a rule with the Commission or its staff." See 71 FR 1956 (Jan. 12, 2006).

DCMs and SEFs) and that associated position limits or position accountability provisions are necessary and appropriate (Core Principle 5 for DCMs and Core Principle 4 for SEFs). Proposed §§ 40.3, 40.5, and 40.6 contain a similar requirement for submission of new products, rules and rule amendments.

The Commission believes that before self-certifying that a new contract complies with the Act and the Commission's regulations, a registered entity should conduct an appropriate due diligence review to support that assertion. Furthermore, the Commission believes that any such review should generate some form of documentation at the registered entity substantiating the review, including information used and sources consulted to reach the conclusion supporting self-certification. Therefore, the Commission believes that the inclusion of such information in the self-certified submission itself should not be burdensome for registered entities that are conducting appropriate due diligence reviews before making such submissions.

Further, the Commission proposes a new § 40.2 requirement that registered entities examine potential legal issues associated with the listing of products and include certain representations with their submissions. The reason for these requirements is that certain commodity futures and option products are based on measures or linked to information that may be subject to bona fide intellectual property rights claims. Commodity futures and option contracts, such as those based on emission credits, can also be based on underlying markets that are constructs of Federal or state regulations. In these and other circumstances, the Commission has an interest in verifying that registered entities have an adequate understanding of the legal conditions and constraints that may have a material impact on the trading of these types of products. Accordingly, the Commission proposes to add § 40.2(a)(3)(vi) to require that certified product submissions be accompanied by a written statement verifying that the registered entity has undertaken a due diligence review of the legal conditions, including conditions relating to contractual and intellectual property rights, that may affect the trading of the product underlying the contract. Finally, the Commission proposes in § 40.2(a)(3)(vii) to require a registered entity to certify that the registered entity has posted a copy of the pending product certification submission on the registered entity's Web site at the time of the filing. This will permit market

participants to receive prompt notice of new rules filed with the Commission.

c. Section 40.3 Voluntary submission of new products for Commission review and approval

Although the Dodd-Frank Act does not specifically require that the Commission amend § 40.3, the Commission believes that the amendments described below are necessary to enhance the Commission's ability to administer the Act. Similar to its proposed amendments to § 40.2, described above, the Commission proposes to amend § 40.3 to require DCMs, DCOs, and SEFs to include with their requests for new product approval all documentation relied upon to determine that the new product complies with applicable Core Principles.

In addition, similar to proposed § 40.2(a)(3)(vi), proposed § 40.3(a)(9) requires registered entities to submit a written statement that they have undertaken a due diligence review of the legal conditions, including conditions relating to contractual and intellectual property rights, that may affect the trading of the product. These additional requirements should expedite Commission review. Moreover, parallel to proposed §§ 40.2(a)(3)(vii) and 40.6(a)(2), proposed § 40.3(a)(10) requires a registered entity to certify that the registered entity has posted a copy of the pending product certification submission on the registered entity's Web site at the time of the filing. As mentioned above, this will allow market participants to receive prompt notice of pending requests for product approval. Also, to provide the overall consistency with the requirements of the Dodd-Frank Act, proposed § 40.3(d)(1) authorizes the Commission to extend the review period if the product raises novel or complex issues.

Finally, the Commission notes that the standard for review and approval for new products remains unchanged; that is, the Commission shall approve a new product unless the terms and conditions of such product would violate the Act or the Commission's regulations thereunder.

d. Section 40.4 Amendments to terms or conditions of enumerated agricultural products

The Commission proposes a number of technical amendments to clarify existing regulatory obligations imposed on the DCMs that trade contracts based on an agricultural commodity listed in Section 1a(9) of the Act.

Pursuant to Section 5c(c)(2)(B) of the Act, rules that materially change a term

or condition of a contract with open interest that is based on an agricultural commodity enumerated in Section 1a(9) of the Act, must be approved by the Commission prior to implementation. A finding of materiality is, by statute, at the reasonable discretion of the Commission. Through prior rulemaking, the Commission has enumerated several rule categories in § 40.4(b) that are deemed not to be material for purposes of Section 5c(c)(2)(B) of the Act and thus not subject to prior approval. The Commission has separately enumerated several categories of registered entities' rules in § 40.6(d) that need not be approved by, or certified with, the Commission prior to implementation. Exchange rules that come within these categories typically are limited in scope and are implemented under enabling rules that have already been approved by, or certified with, the Commission.

Since there is substantial overlap between the categories of rules deemed not to be material under § 40.4(b) and the categories of rules enumerated in § 40.6(d), the Commission proposes to amend § 40.4(b) to refer to § 40.6(d) for the purpose of identifying rules that are deemed by the Commission not to be material under Section 5c(c)(2)(B) of the Act. Such rules would qualify for implementation under § 40.6 without prior approval or certification.

In addition, the Commission proposes to clarify that changes in trading hours in § 40.4(b)(3) and changes required to comply with an order of an adjudicative or regulatory body in § 40.4(b)(4), while not material for purposes of Section 5c(c)(2)(B) of the Act, must be implemented through a prior certified submission under § 40.6(a) because of their potential effects on the operations of a DCM.

e. Section 40.5 Voluntary submission of rules for Commission review and approval

Section 745 of the Dodd-Frank Act establishes a new standard for the review of new rules or rule amendments. That standard, as codified in proposed § 40.5(b), requires the Commission to approve a new rule or rule amendment unless the rule or rule amendment is inconsistent with the Act or the Commission's regulations promulgated thereunder. In determining whether a rule is inconsistent with the Act, the Commission may also consider, for example, whether the new rule or rule amendment potentially disrupts market integrity, or increases systemic risk.

The Commission also proposes amendments to the information required to be submitted when requesting

approval of amendments to the terms and conditions of a product under § 40.5. Consistent with § 40.2 and § 40.3, the Commission proposes to amend § 40.5(a)(7) to require a registered entity submitting an amendment of a product's terms and conditions to include with its submission the documentation relied upon to establish the basis for compliance with the Act and the Commission's regulations thereunder, including the applicable Core Principles.

Additionally, similar to §§ 40.2(a)(3)(vii), 40.3(a)(10) and 40.6(a)(2), the Commission proposes in § 40.5(a)(6) to require registered entities to certify that the registered entity has posted a copy of the pending product certification submission on the registered entity's Web site at the time of the filing. This will permit market participants to receive prompt notice of new requests for approval filed with the Commission. The Commission intends to continue its current practice of publishing all requests for Commission review and approval on its Web site. Finally, proposed § 40.5(a)(11) requires registered entities, in connection with the submission of a request for changes to a product's terms or conditions, to submit a written statement that they have undertaken a due diligence review of the legal conditions, including conditions relating to contractual and intellectual property rights, that may affect the trading of the product, similar to the statement required in §§ 40.2 and 40.3.

f. Section 40.6 Self-certification of rules

Section 745 of the Dodd-Frank Act amended Section 5c(c) of the Act to include a new 10-day certification review period for all rules and rule amendments submitted to the Commission by registered entities and to permit the Commission to stay the certification of rules or rule amendments that, among other things, present novel or complex issues that require additional time to analyze. The Commission proposes to codify these new certification provisions in § 40.6, as follows.

To implement the amended procedures for self-certification of rules described in Section 745 of the Dodd-Frank Act, the Commission proposes in § 40.6(a)(3) to require registered entities to submit self-certifications at least ten business days before the projected effective date. A rule certification will become effective ten business days after the Commission receives the certification, unless the Commission notifies the registered entity, within 10

business days, that it is staying the certification pursuant to § 40.6(c).

Parallel to proposed § 40.5(a), proposed § 40.6(a) requires a registered entity to certify that the registered entity has posted a copy of the pending product certification submission on the registered entity's Web site at the time of the filing. This will permit market participants to receive prompt notice of new rules or rule amendments filed with the Commission. The Commission intends to continue its current practice of publishing the self-certified rules on its Web site.

Further, in proposed § 40.6(a)(6), the Commission clarifies the distinction between rules that establish standards and authorize appropriate parties to respond to an emergency—which must be submitted to the Commission prior to implementation—and rules that implement a response to a particular emergency—which, in certain circumstances, may be submitted to the Commission after implementation.

Similar to §§ 40.2, 40.3 and 40.5, proposed § 40.6(a)(7)(v) requires that amendments to the terms and conditions of a product be accompanied by documentation relied upon to establish the basis for compliance with the Act and the regulations thereunder, including the applicable Core Principles.

As is proposed for §§ 40.2, 40.3 and 40.5 and discussed above, the Commission proposes to amend § 40.6(a)(7)(viii) to require registered entities to include with their certification of any changes to a product's terms and conditions, a written statement that they have undertaken a due diligence review of legal conditions relating to futures or options trading based on the underlying product or instrument.

Under proposed § 40.6(b), a new rule or rule amendment will become effective ten business days after the certified rule or rule amendment is received by the Commission, unless the Commission notifies the registered entity that it is staying the certification. Generally, a DCM seeking to adopt a program (such as a program to address conflicts of interest), which is in substance the same as a program previously approved by the Commission, or an exchange seeking to change a rule establishing trading hours or seeking to modify the terms and conditions of a listed contract for which it has provided sufficient evidence of compliance with Core Principles, may self-certify and, without Commission action, implement the proposed rule or rule amendment after ten business days.

Proposed § 40.6(c)(1) stays the certification of a rule if the Commission determines that the new rule or rule amendment presents novel or complex issues, is certified with an inadequate explanation, or is potentially inconsistent with the Act or the Commission's regulations thereunder. Once the Commission issues a notification of stay to the registered entity, the Commission will have 90 days to conduct a review. The rule will be certified upon expiration of the 90-day review period unless the Commission objects to the certification. If the Commission decides to lift the stay prior to the expiration of the 90-day review period, the Commission will notify the registered entity of its action.

The Commission also notes that the new stay provision in proposed § 40.6(c)(1) is distinct from the stay provision presently in effect under current § 40.6(b), which the Commission proposes to move to § 40.6(c)(4). The latter provision, which implements Commission authority under section 8a(7) of the Act, permits the Commission to stay the *effectiveness* of a rule or rule amendment that already has been implemented pursuant to the self-certification procedures in § 40.6(a). Conversely, the new stay provision in proposed § 40.6(c)(1), pursuant to the Commission's new authority in Section 745 of the Dodd-Frank Act, authorizes a stay of the certification itself and would be issued during the review process, thereby possibly preventing the certified rule or rule amendment from ever becoming effective in the first instance.

A stay of a rule certification may be appropriate, for example, where a registered entity certifies a rule that raises unique issues not previously reviewed by Commission staff. In addition, the Commission believes that new rules or rule amendments may raise a number of complex issues if they appear to have a material impact on the futures market or the underlying cash market. Thus such rules are more likely to be subject to an extended review period to allow the Commission to adequately identify and address complex regulatory issues. For example, the Commission may need more than ten business days to determine whether a proposed market maker incentive program appropriately encourages market liquidity and does not have unnecessary anticompetitive effects. Staff might also need more than ten business days to analyze whether deliverable supplies of an underlying commodity are sufficient to support a proposed change to a spot month speculative position limit on a physical-delivery contract. The above mentioned

examples of submissions often raise a number of complex issues that may require an extended review period.

Proposed § 40.6(c)(2) provides for a 30-day public comment period, within the 90-day review period, whenever the Commission determines to stay a new rule or rule amendment and take it under further review. Under proposed § 40.6(c)(2), the Commission would provide notice of the comment period by posting the notice and the new rule or rule amendment submission on the Commission's Web site.¹⁰

The Commission believes that publication of the notice of the 30-day comment period on the Commission's Web site, www.cftc.gov, will provide the public and market participants with the timely opportunity to comment on new rules or rule amendment submissions. The Commission routinely uses its Web site to disseminate information regarding Commission activities and industry filings.¹¹ Web site publication would facilitate public comment while allowing Commission staff adequate time to assess comments and complete a substantive analysis within the statutory 90-day time frame. Finally, the Commission anticipates enhancements to its Web site publication procedures to promptly inform interested members of the public of stayed rules through email notifications on the Commission's Web site.

The Commission is also exploring the possibility of having registered entities file rule certifications, as well as other types of submissions, through a portal located at www.cftc.gov. The Commission believes that allowing registered entities to file rule certifications in this manner will simplify the filing process and also provide the public with close to real-time access to new rules and rule amendments submitted to the Commission for review. The Commission is determining the technological requirements necessary to implement this filing process. Once the Commission has formulated a process for submitting certifications through the Commission's Web site, the Commission

will notify the public and establish a timeline to implement new electronic filing procedures.

The Commission proposes several amendments to § 40.6(d). Specifically, the Commission proposes to permit registered entities to implement reductions to a contract's minimum tick size without approval by or certification to the Commission, in order to maintain consistency between §§ 40.4(b) and 40.6(d). The Commission in proposed § 40.6(d)(2)(v), requires that fee changes associated with market making or other incentive programs be submitted for Commission review under § 40.6(a). Finally, the Commission also proposes that changes to the terms of all options, including options on agricultural products, options on futures, and options on physicals, that relate to the strike price listing procedures, strike price intervals, and the listing of strike price on a discretionary basis, be implemented without certification or notice under § 40.6(d)(3).

g. Section 40.7 Delegations

To ensure that the review process is conducted in an efficient manner, the Commission proposes to amend § 40.7 to delegate to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, after consultation with the General Counsel or the General Counsel's designee, the authority to extend the review of new contracts, rules and rule amendments submitted to the Commission pursuant to § 40.3(d) and § 40.5(d) and the authority to stay the certification of new rules or rule amendments pursuant to § 40.6(c), when the submission raises novel or complex issues that require additional time to analyze, is of major economic significance or is potentially inconsistent with the Act or Commission Regulations.

Furthermore, the Commission proposes to delegate to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight the authority to stay or to extend the review of new products, new rules and rule amendments pursuant to § 40.3(d) or § 40.5(d) or § 40.6(c), when the submission is incomplete or accompanied by an inadequate explanation.

Finally, proposed § 40.7(a)(1)(iii) delegates to the Director of the Division of Clearing and Intermediary Oversight or the Director's designee, subject to the concurrence of the General Counsel or the General Counsel's designee, all determinations under proposed § 40.10

with respect to a SIDCO's proposed change in rules, procedures or operations that could materially affect the nature or level of risks presented by the SIDCO. This includes a determination that the proposed change is consistent with the Act and the Commission's regulations, and the purposes of the Dodd-Frank Act and any applicable rules, orders or standards prescribed under Section 805(a) of the Dodd-Frank Act.

h. Section 40.8 Availability of public information

This section describes information that the Commission will make public and provides for procedures for requesting confidential treatment of part 40 submissions to the Commission. The Commission proposes to retain reference to an electronic trading facility on which significant price discovery contracts are traded or executed in § 40.8 until July 20, 2012. Although the Dodd-Frank Act eliminated these entities, they are allowed to continue operation until July 20, 2012, pursuant to grandfather relief issued by the Commission.¹²

In addition, the Commission proposes to amend § 40.8 to include new registered entities, SEFs and SDRs. Confidential treatment requests will be considered pursuant to part 145 of the Commission's regulations.¹³

i. Section 40.10 Special certification procedures for submission of rules by systemically important derivatives clearing organizations

To implement the provisions of Section 806(e) of the Dodd-Frank Act, proposed § 40.10(a) would require a SIDCO to provide the Commission with advance notice of any proposed change to its rules, procedures or operations that could "materially affect the nature or level of risks" presented by the SIDCO. The SIDCO would be required to provide the notice not less than 60 days in advance of the proposed change. Submission of proposed changes would be subject to the filing requirements of § 40.6(a)(1), as well as the Web site publication requirements under § 40.6(a)(2). In addition to providing information required under § 40.6(a)(7), the notice would have to describe the nature of the change, the expected effects on risks to the SIDCO, its clearing members, and the market, and how the SIDCO planned to manage those risks. Under proposed 40.10(a)(2), concurrent with providing the Commission with the advance notice or

¹⁰ It is the Commission's intention to promptly post the notice and new rule or rule amendment in order to commence the public comment period as soon as possible within the 90-day review period. This will maximize the amount of time after the comment period closes for the submitter to respond to public comments and possibly revise its proposed rule or rule amendment and for the Commission to thoroughly consider the issues raised by the new rule or rule amendment.

¹¹ In addition, the Commission's Web site provides a link for signing up to receive press releases issued by the Office of Public Affairs. This service enables members of the public to be apprised of the opening of comment periods in a timely manner.

¹² See 75 FR 56513 (Sept. 16, 2010).

¹³ 17 CFR part 145.

any request or other information related to the advance notice, the SIDCO would be required to provide the Board of Governors of the Federal Reserve System with a copy of such notice, request or other information.

Under proposed § 40.10(b), changes that could materially affect the nature or level of risks would be defined as those as to which there is a reasonable possibility that the changes could substantially affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the SIDCO. Such changes could include, but would not be limited to, changes that materially affect financial resources, participant and product eligibility, risk management (including matters relating to margin and stress testing), daily or intraday settlement procedures, default procedures, system safeguards (business continuity and disaster recovery), and governance. Materiality would be determined on a case-by-case basis. If a SIDCO were to determine that a proposed change was not material and it did not file an advance notice, but the Commission determined that the change was material, the Commission could require the SIDCO to withdraw the proposed change and provide advance notice pursuant to § 40.10.

The Commission requests comment on the proposed materiality standard in general and, more specifically, whether another approach to defining materiality would be more effective. The Commission further requests comment on whether, as an alternative to the proposed approach, the standard in proposed paragraph (b) should set forth examples of changes that would be considered to be non-material and could be treated in accordance with the provisions of § 40.6. The Commission solicits recommendations regarding what types of changes might be identified as non-material. At a minimum, the Commission would consider deeming to be non-material changes those listed in § 40.6(c) (proposed to be redesignated as § 40.6(d)) and that are relevant to SIDCOs.¹⁴ The Commission notes that while this list of non-material changes is useful in the broader context of all rule changes that could be submitted under the certification procedures of § 40.6, the fact that the Dodd-Frank Act and § 40.10 already establish a

materiality threshold makes the existing list of non-material changes less meaningful for purposes of § 40.10. The Commission believes that any further refinement of what might be considered non-material for purposes of § 40.10 would have to be appropriately circumscribed so as to be specific enough to provide useful guidance for SIDCOs, while remaining broad enough so as not to inappropriately limit the types of changes that the Commission would consider material and subject to the procedures of § 40.10.

Under proposed § 40.10(c), the Commission may require a SIDCO to provide further information to assess the nature or level of any risks associated with the proposed change and the sufficiency of any proposed risk management technique.

Further, under proposed § 40.10(d), within 60 days from the date the Commission received a notice of a proposed change, the Commission would inform a SIDCO if it objects to the proposed change on the grounds that the change is not consistent with the Act or the Commission's regulations, or the purposes of the Dodd-Frank Act or any applicable rules, orders, or standards prescribed under Section 805(a) of the Dodd-Frank Act. If the Commission were to require further information, the Commission would have an additional 60 days after the date the Commission received the requested information, to inform the SIDCO of any objection to the proposed change. The Commission may ask for additional information more than once. In such case, the review period would be extended 60 days from the date that the information pertaining to the last request was received.

Proposed § 40.10(e) would allow a SIDCO to implement a proposed rule change if the review period lapsed without Commission action.

Proposed § 40.10(f) would allow the Commission, during the 60-day review period, to extend the review period for an additional 60 days if the proposed change raised novel or complex issues. For example, if the Commission does not request additional information but extends the review period 60 days upon receiving the advance notice, the maximum review period would be 120 days after receipt of the advance notice. On the other hand, if the Commission requests and obtains additional information 30 days after receiving the notice and then extends the review period 60 days in order to consider complex or novel issues, then the Commission would have a maximum of 150 days to reach a determination after receipt of the advance notice.

Proposed § 40.10(g) would permit a SIDCO to implement a proposed change prior to the expiration of the review period if it received a notification in writing from the Commission that the Commission does not object to the proposed change and authorizes the SIDCO to implement the change. Such authorization may be subject to conditions imposed by the Commission.

Proposed § 40.10(h) would permit a SIDCO to implement a change without providing 60 days advance notice to the Commission if the SIDCO determined that an emergency exists and immediate implementation of the change was necessary for the SIDCO to continue to provide its services in a safe and sound manner. The SIDCO would be required to notify the Commission of the emergency change as soon as practicable, but no later than 24 hours after implementation of the change. The notification must provide the information required in an advance notice, as well as describe the nature of the emergency and explain why the emergency change was necessary for the SIDCO to continue to provide its services in a safe and sound manner. Under the proposed regulation, the Commission could require modification or rescission of the emergency change if the Commission determined that the change was not consistent with the Act or the Commission's regulations or the purposes of the Dodd-Frank Act, or any applicable rules, orders, or standards prescribed under section 805(a) of the Dodd-Frank Act.

Finally, the Commission requests comment on whether there are any substantive changes to rules, procedures, or operations that should not be permitted to be adopted under emergency circumstances without prior notice to the Commission. For example, should there be restrictions on a SIDCO's ability to demand significantly higher assessments from clearing members on an emergency basis?

j. Section 40.11 Review of event contracts based on certain excluded commodities

Section 745(b) of the Dodd-Frank Act authorizes the Commission to prohibit the listing, trading, or clearing of agreements, contracts, transactions or swaps that are based upon an occurrence, extent of a concurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in Section 1a(19)(i) of the Act) that is beyond the control of the parties to the relevant contract, agreement, or transaction and associated with financial, commercial, or economic consequence, as defined in

¹⁴ Non-material changes include, for example, corrections of typographical errors, renumbering, periodic updates to identifying information about approved entities and other such non-substantive revisions of a product's terms and conditions that have no effect on the economic characteristics of the product. See § 40.6(c)(2)(i).

Section 1a(19)(iv) of the Act, if the contract involves terrorism, assassination, war, gaming, an activity that is unlawful under any Federal or State law, or any similar activity that the Commission determines, by rule or regulation, to be contrary to the public interest.

Pursuant to this authority, the Commission proposes new § 40.11(a)(1) to prohibit the listing, trading, or clearing of any above mentioned agreements, contracts, transactions or swaps. In addition, the Commission proposes new § 40.11(a)(2) to prohibit the listing, trading, or clearing of any agreements, contracts, transactions or swaps involving activities similar to those enumerated in § 40.11(a)(1) and that the Commission determines, by rule or regulation, to be contrary to the public interest.

If during the review process for a product submitted under § 40.2 or § 40.3, the Commission determines that such product may involve an activity that is enumerated in § 40.11(a), the Commission will request that the registered entity suspend the listing or trading of the contract and will conduct a 90-day review to determine whether the product violates § 40.11(a). Upon completion of its review, the Commission will issue an order, as required by Section 745(b) of the Dodd-Frank Act, finding either that the product violates or does not violate the prohibitions in proposed § 40.11(a).

k. Section 40.12 Tolling of review period pending jurisdictional determination

Under Section 718(a) of the Dodd-Frank Act, a registered entity certifying, submitting for approval, or otherwise filing a proposal to list a product having elements of both a security and a derivative may provide notice of its proposal both to the Commission and the Securities and Exchange Commission. However, under Section 718(a)(1)(B) of the Dodd-Frank Act, if the registered entity chooses not to provide such notice, then the Commission must notify the Securities and Exchange Commission of the submission and accompany such notice with a copy of the registered entity's complete filing if it determines that the proposal has elements of both securities and futures. If either Commission requests a jurisdictional determination pursuant to Section 718 of the Dodd-Frank Act, the Commission will toll the applicable product certification or approval review period until the issuance of a final determination order.

If the Commission or the Securities and Exchange Commission seeks

judicial review of a jurisdictional determination, proposed § 40.12 stays the challenged order, as well as the review period for the product, until the United States Court of Appeals for the District of Columbia Circuit issues a final determination pursuant to Section 718(b) of the Dodd-Frank Act, or until there is resolution of an appeal of that determination. The submission review period will resume only upon a finding that the Commission has jurisdiction over the submission.

l. Revision of Appendices to Part 40

The Commission proposes to revise the appendices to Part 40 to clarify the new regulatory requirements and to provide consistency with the overall requirements of the Act, as amended by the Dodd-Frank Act. The present content of Appendix A relates solely to the listing of certain futures contracts by DCMs and not to the listing of contracts by registered entities generally. Accordingly, the Commission proposes to delete the content of Appendix A, currently titled "Guideline No. 1," from part 40. The substance of the appendix will be incorporated into part 38 as part of a separate rulemaking.

In addition, the Commission proposes to move and incorporate the current language in Appendix B, currently titled, "Schedule of Fees," into Appendix A. The Commission proposes to reserve Appendix B for a future rulemaking. Appendix C remains reserved.

The Commission proposes minor amendments to the submission cover sheet and instructions provided in Appendix D to part 40. The proposed submission cover sheet has been modified to include SEFs and SDRs. The amended cover sheet will be posted on the Commission's Web site upon publication of the final rules. The Commission also proposes to amend the instructions in Appendix D to clarify that registered entities must describe the substance of the submission with enough specificity to characterize all material aspects of the filing. A description of the submission should allow a party reading it to ascertain the subject and effect of the submission. For example, a description of "Market Regulation Advisory" does not provide the reader with sufficient information to understand what the particular Advisory addresses or its effect, thereby rendering the description less useful. A clear and informative description will facilitate and expedite the posting of the submission on the Commission's Web site. As noted above, the Commission is exploring whether an electronic submission system can be established

and made available to registered entities in the near future. The Commission is seeking the public's view on whether automated submission of rules, rule amendments, and products might be facilitated by a Web site portal dedicated to this purpose.

III. Related Matters

a. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")¹⁵ requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.¹⁶ The proposed rules detailed in this release would require DCOs, DCMs, SEFs and SDRs to submit to the Commission, before they become effective, new products, new rules, and rule amendments, with a self-certification that the rules comply with the Act and Commission regulations. The requirements for the self-certification are not complex, and may be satisfied by the completion of a cover sheet with a detailed explanation of the filing. These self-certification rules will not impose a significant economic impact on any entity.

Moreover, the Commission previously determined that DCOs and DCMs are not "small entities" for purposes of the RFA.¹⁷ The Commission has not determined whether SEFs and SDRs, new registered entities created by the Dodd-Frank Act, are small entities. The Dodd-Frank Act defines an SDR to mean any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps. The Dodd-Frank Act defines a SEF to mean a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility that facilitates the execution of swaps between persons and is not a DCM.¹⁸

¹⁵ 5 U.S.C. 601 *et seq.*

¹⁶ 5 U.S.C. 601 *et seq.*

¹⁷ 47 FR 18618, 18619 (April 30, 1982) and 66 FR 45604, 45609 (August 29, 2001).

¹⁸ See Section 721 of the Dodd-Frank Act. The Commission anticipates proposing regulations that would further specify those entities that must register as a SEF. The Commission does not believe that such proposals would alter its determination that a SEF is not a "small entity" for purposes of the RFA.

The Commission previously determined that DCMs and DCOs are not “small entities” for purposes of the RFA. The Commission’s reasoning included the fact that the Commission designates a contract market or a DCO only when the entity meets specific criteria, including the expenditure of sufficient resources to establish and maintain adequate self-regulatory programs. Likewise, the Commission will register an entity such as a SEF or an SDR only after the entity has met a number of criteria, including the expenditure of sufficient resources to establish and maintain an adequate self-regulatory program.¹⁹ Because SEFs and SDRs will be required to demonstrate compliance with Core Principles, many of which are similar to those applicable to DCMs and DCOs, the Commission hereby determines that SEFs and SDRs are not “small entities” for the purposes of the RFA.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. § 605(b) that the proposed rules will not have a significant impact on a substantial number of small entities. The Commission invites the public to comment on all aspects of this Regulatory Flexibility Analysis.

b. Paperwork Reduction Act

The Commission may not conduct or sponsor, and a registered entity is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (“OMB”) control number. Proposed amendments to §§ 40.2, 40.3, 40.5 and 40.6 will impose new information collection requirements within the meaning of the Paperwork Reduction Act²⁰ on registered entities, as will new proposed §§ 40.10 and 40.12. Accordingly, the Commission has requested that OMB approve and assign a new control number for the proposed collections of information. In connection with its request, the Commission has submitted this notice of proposed rulemaking along with supporting documentation for OMB’s review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is Part 40, Provisions Common to Registered Entities, OMB control number 3038–D07. If adopted, responses to this new collection of information will be mandatory.

The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, “Commission Records and Information.” In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Information Provided by Reporting Entities/Persons

The proposed rules require DCMs, DCOs, and new registered entities, SEFs and SDRs, to collect and submit to the Commission new rules, amended rules and new products pursuant to the procedures outlined in proposed §§ 40.2, 40.3, 40.5, 40.6, 40.10, and 40.12. The Commission proposes these information collection requirements in order to give effect to various notice, rule certification, and rule approval provisions of the Dodd-Frank Act.

The Commission estimated the proposed information collection burdens on registered entities below. These estimates account for (1) the number of respondents; (2) the number of responses required of each respondent; (3) the average hours required to produce each response; and (4) the aggregate annual reporting burden. The Commission estimates that the aggregate effect of proposed §§ 40.2, 40.3, 40.5, 40.6, 40.10, and 40.12 will be to increase the overall information collection burden on registered entities by approximately 8,300 hours per year, resulting mostly from the preparation of materials to be filed with the Commission in connection with the listing of products or the certification or approval of rules and rule amendments. The Commission estimates that there will be 70 designated or registered entities that would be required to file documentation with the Commission on a periodic basis.

Proposed §§ 40.5 and 40.6 require each registered entity to comply with new certification and approval requirements when seeking to implement new rules or rule amendments, including changes to product terms or conditions. In addition, to ensure that market participants are promptly notified of product and rule submissions to the Commission, proposed §§ 40.2(a)(3)(vii), 40.3(a)(10), 40.5(a)(6), and 40.6(a)(2)

require registered entities to state that they posted a copy of the certification or request for approval on the registered entity’s Web site at the time of the filing with the Commission.

Estimated number of respondents: 45.
Annual responses by each respondent: 120.

Estimated average hours per response: 2.52.
Aggregate annual reporting burden: 13,608.

Proposed § 40.10 requires SIDCOs to provide to the Commission 60 days advance notice of proposed changes to rules, procedures or operations that could materially affect the nature or level of risks presented by the SIDCO.

Estimated number of respondents: 4.
Annual responses by each respondent: 2.

Estimated average hours per response: 5.
Aggregate annual reporting burden: 40.

Proposed § 40.12 requires registered entities to provide notice to the Commission and the Securities and Exchange Commission when certifying, submitting for approval, or otherwise filing a proposal to list a product having elements of both a security and a derivative.

Estimated number of respondents: 17.
Annual responses by each respondent: 34.

Estimated average hours per response: 2.52.
Aggregate annual reporting burden: 1,456.

The Commission invites public comment on the accuracy of its estimate of the collection requirements that would result from the proposed regulations.

2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on the information collection requirements proposed in this notice. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the estimated burden of the proposed information collection requirements, including the degree to which the methodology and the assumptions that the Commission employed were valid; (3) determine whether there are ways to enhance the quality, utility, or clarity of the

¹⁹ See Core Principle 2 applicable to SEFs under Section 733 of the Dodd-Frank Act and Core Principles 1–3 applicable to SDRs under Section 728 of the Dodd-Frank Act.

²⁰ 44 U.S.C. 3501 *et seq.*

information proposed to be collected; and (4) minimize the burden of the proposed collections of information on DCMs, SEFs, DCOs, and SDRs, for example through implementation of an electronic rule and product submission system.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by e-mail at OIRASubmissions@omb.eop.gov. Please provide the Commission with a copy of submitted comments so that they can be summarized and addressed in the final rule. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting RegInfo.gov. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of receiving full consideration only if received by OMB (and the Commission) within 30 days of publication of this notice of proposed rulemaking.

c. Cost-Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing new regulations or orders.²¹ By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, Section 15(a) requires the Commission to “consider the costs and benefits” of its proposed regulation. Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. In conducting its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas and it may determine that, notwithstanding its costs, a particular rule is necessary to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.²²

As discussed above, the proposed regulations require registered entities, including DCMs, SEFs, DCOs, and SDRs, to comply with new certification and approval procedures when submitting products and rules for Commission review. These procedures are mandatory pursuant to the Dodd-Frank Act. The Commission has determined that the costs associated with the self-certification and submission for Commission review of new products, new rules, and rule amendments will not negatively affect the efficiency, competitiveness, and financial integrity of the futures and swaps markets, particularly because of the time limits that Congress has imposed on Commission review. The Commission will have 10 days to review new products, new rules, and rule amendments, and only 90 days if it stays a rule to issue a rule approval or disapproval.

The Commission believes that the benefits of the rulemaking are significant. The Commission's certification and approval procedures ensure that registered entities do not enact rules that may be anticompetitive, unfair to market participants, or otherwise detrimental to the public interest. In addition, the special certification procedures for SIDCOs and certain event contracts implement Section 745 of the Dodd-Frank Act and ensure that the Commission has adequate time and information to analyze the registered entity's proposal and to consider the broader implications of permitting the entity to implement the rule or list the product. The SIDCO notice requirement, in particular, may be crucially important to the Commission's oversight of sound risk management practices and to its efforts to mitigate systemic risks, whereas the proposed event contract provisions, consistent with the intent of Congress, prevent individuals from speculating on activities that are harmful to national security and potentially detrimental to the stability of the futures markets and their price discovery function. Finally, the Commission's notice requirements with respect to the submission of novel derivative products promote cooperation between the Commission and the SEC and facilitate more effective and less duplicative regulation of registered entities.

For these reasons, the Commission believes that the certification and approval procedures proposed in this notice are needed to fulfill the

requirements of the Dodd-Frank Act in order to protect market participants and to ensure the continued competitiveness and financial integrity of the futures and derivative markets.

The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal with their comment letters.

List of Subjects in 17 CFR Part 40

Commodity futures, Contract markets, Designation application, Reporting and recordkeeping requirements, Swap execution facility, Swap data repository, Systemically important derivatives clearing organization, Rule approval, Rule certification, Review of certain event contracts.

In light of the foregoing, and pursuant to authority in the Act, and, in particular, Sections 3, 5, 5c(c) and 8a(5) of the Act, the Commission hereby proposes to revise Part 40 of Title 17 of the Code of Federal Regulations to read as follows:

PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES

Sec.

- 40.1 Definitions.
- 40.2 Listing and accepting products for trading or clearing by certification.
- 40.3 Voluntary submission of new products for Commission review and approval.
- 40.4 Amendments to terms or conditions of enumerated agricultural products.
- 40.5 Voluntary submission of rules for Commission review and approval.
- 40.6 Self-certification of rules.
- 40.7 Delegations.
- 40.8 Availability of public information.
- 40.9 Corporate governance [Reserved]
- 40.10 Special certification procedures for submission of rules by systemically important derivatives clearing organizations.
- 40.11 Review of event contracts based on certain excluded commodities.
- 40.12 Tolling of review period pending jurisdictional determination.
- Appendix A to Part 40—Schedule of Fees
- Appendix B to Part 40—[Reserved]
- Appendix C to Part 40—[Reserved]
- Appendix D to Part 40—Submission Cover Sheet and Instructions

Authority: 7 U.S.C. 1a, 2, 5, 6, 7, 7a, 8 and 12, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 40.1 Definitions.

As used in this part:

(a) *Business day* means the intraday period of time starting at the business hour of 8:15 a.m. and ending at the

²¹ 7 U.S.C. 19(a).

²² See, e.g., *Fisherman's Doc Co-op., Inc v. Brown*, 75 F.3d 164 (4th Cir. 1996); *Center for Auto Safety*

v. Peck, 751 F.2d 1336 (DC Cir. 1985) (noting that an agency has discretion to weigh factors in undertaking cost-benefit analysis).

business hour of 4:45 p.m.; *business hour* means any hour between 8:15 a.m. and 4:45 p.m.. Business day and business hour are Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect in Washington, DC, on all days except Saturdays, Sundays and federal holidays in Washington, DC.

(b) *Dormant contract or dormant product* means:

(1) Any agreement, contract, transaction, instrument, swap or any such commodity futures or option contract with respect to all future or option expiries, listed on a designated contract market, a swap execution facility or cleared by a registered derivatives clearing organization, that has no open interest and in which no trading has occurred for a period of twelve complete calendar months following a certification to, or approval by, the Commission; *provided, however*, that no contract or instrument under this paragraph (b)(1) initially and originally certified to, or approved by, the Commission within the preceding 36 complete calendar months shall be considered to be dormant; or

(2) Any commodity futures or option contract, swap or other agreement, contract, transaction or instrument of a dormant designated contract market, swap execution facility or a dormant derivatives clearing organization; or

(3) Any commodity futures or option contract or other agreement, contract, swap, transaction or instrument not otherwise dormant that a designated contract market, a swap execution facility or a derivatives clearing organization self-declares through certification to be dormant.

(c) *Dormant designated contract market* means any designated contract market on which no trading has occurred during the period of twelve consecutive calendar months, preceding the first day of the most recent calendar month; *provided, however*, no designated contract market shall be considered to be dormant if its initial and original Commission order of designation was issued within the preceding 36 consecutive calendar months.

(d) *Dormant derivatives clearing organization* means any derivatives clearing organization registered pursuant to Section 5b of the Act that has not accepted for clearing any agreement, contract or transaction that is required or permitted to be cleared by a derivatives clearing organization under Sections 5b(a) and 5b(b) of the Act, respectively, for a period of twelve complete calendar months; *provided, however*, no derivatives clearing

organization shall be considered to be dormant if its initial and original Commission order of registration was issued within the preceding 36 complete calendar months.

(e) *Dormant swap data repository* means any registered swap data repository on which no data has resided for a period of twelve consecutive calendar months, preceding the most recent calendar month.

(f) *Dormant swap execution facility* means any swap execution facility on which no trading has occurred for a period of twelve consecutive calendar months, preceding the first day of the most recent calendar month; *provided*, however, no swap execution facility shall be considered to be dormant if its initial and original Commission order of registration was issued within the preceding 36 consecutive calendar months.

(g) *Dormant rule* means:

(1) Any registered entity rule which remains unimplemented for twelve consecutive calendar months following a certification with, or an approval by, the Commission; or

(2) Any rule or rule amendment of a dormant designated contract market, dormant swap execution facility, dormant swap data repository or dormant derivatives clearing organization.

(h) *Emergency* means any occurrence or circumstance that, in the opinion of the governing board of a registered entity, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of a registered entity under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any agreements, contracts, swaps or transactions or the timely collection and payment of funds in connection with clearing and settlement by a derivatives clearing organization, including:

(1) Any manipulative or attempted manipulative activity;

(2) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions;

(3) Any circumstances which may materially affect the performance of agreements, contracts, swaps or transactions, including failure of the payment system or the bankruptcy or insolvency of any participant;

(4) Any action taken by any governmental body, or any other registered entity, board of trade, market or facility which may have a direct

impact on trading or clearing and settlement; and

(5) Any other circumstance which may have a severe, adverse effect upon the functioning of a registered entity.

(i) *Rule* means any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, in whatever form adopted, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof.

(j) *Terms and conditions* means any definition of the trading unit or the specific commodity underlying a swap or a contract for the future delivery of a commodity or commodity option contract, specification of cash settlement or delivery standards and procedures, and establishment of buyers' and sellers' rights and obligations under the swap or contract. Whenever possible, all proposed swap or contract terms and conditions should conform to industry standards or those terms and conditions adopted by comparable contracts. Terms and conditions include provisions relating to the following:

(1) Quality and other standards that define the commodity or instrument underlying the contract;

(2) Quantity standards or other provisions related to swap or contract size;

(3) Any applicable premiums or discounts for delivery of nonpar products;

(4) Trading hours, trading months and the listing of swaps or contracts;

(5) The pricing basis, minimum price fluctuations, and maximum price fluctuations;

(6) Any price limits, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;

(7) Position limits, position accountability standards, and position reporting requirements;

(8) Delivery points and locational price differentials;

(9) Delivery standards and procedures, including fees related to delivery or the delivery process; alternatives to delivery and applicable penalties or sanctions for failure to perform;

(10) If cash settled; the definition, composition, calculation and revision of the cash settlement price or index;

(11) Payment or collection of commodity option premiums or margins;

(12) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;

(13) Threshold prices for an option contract, the existence of which is contingent upon those prices;

(14) Any restrictions or requirements for exercising an option; and

(15) With respect to swaps cleared by a derivatives clearing organization, specifications including but not limited to:

(i) Notional values;

(ii) Relevant dates, tenor, and day count conventions;

(iii) Index;

(iv) Relevant prices, rates or coupons;

(v) Currency;

(vi) Stub, premium, or initial cash flow components along with subsequent life cycle events;

(vii) Payment and reset frequency;

(viii) Business calendars;

(ix) Accrual type; and

(x) Spread or points.

§ 40.2 Listing and accepting products for trading or clearing by certification.

(a) A designated contract market or a swap execution facility must comply with the submission requirements of this section prior to listing a product for trading that has not been approved under § 40.3 of this part or that remains dormant subsequent to being submitted under this section or approved under § 40.3 of this part. A derivatives clearing organization must comply with the submission requirements of this section prior to accepting for clearing a product that is not listed or traded on a designated contract market, derivatives clearing organization or a swap execution facility and has not been approved for clearing under § 40.3 or § 40.5 of this part or that remains dormant subsequent to being submitted under this section or approved under § 40.5 of this part. A submission shall comply with the following conditions:

(1) The designated contract market, or the swap execution facility, or the derivatives clearing organization has filed its submission electronically in a format specified by the Secretary of the Commission with the Secretary of the Commission at *submissions@cftc.gov*, and with the relevant branch chief at the regional office having local jurisdiction over the registered entity;

(2) The Commission has received the submission at its headquarters by the open of business on the business day preceding the product's listing or acceptance for clearing; and

(3) The submission includes:

(i) A copy of the submission cover sheet in accordance with the instructions in Appendix D to this part;

(ii) A copy of the product's rules, including all rules related to its terms and conditions, or the rules establishing the terms and conditions of the listed product that make it acceptable for clearing;

(iii) The intended listing date;

(iv) A certification by the designated contract market, the swap execution facility, or the derivatives clearing organization that the product to be listed complies with the Act and Commission regulations thereunder;

(v) The documentation relied on to establish the basis for compliance with the applicable provisions of the Act and the Commission's regulations thereunder, including the Core Principles;

(vi) A written statement verifying that the registered entity has undertaken a due diligence review of the legal conditions, including conditions that relate to contractual and intellectual property rights, which may materially affect the trading of the product;

(vii) Certification that the registered entity posted a notice of pending product certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity's Web site. Information which the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity's Web site, but must be republished consistent with any determination made pursuant to § 40.8(c)(4);

(viii) A request for confidential treatment, if appropriate, as permitted under § 40.8.

(b) *Additional information.* If requested by Commission staff, a registered entity shall provide any additional evidence, information or data that demonstrates that the contract meets, initially or on a continuing basis, all of the requirements of the Act and the Commission's regulations and policies thereunder.

(c) *Stay.* The Commission may stay the listing of a contract pursuant to paragraph (a) of this section during the pendency of Commission proceedings for filing a false certification or during the pendency of a petition to alter or amend the contract terms and conditions pursuant to Section 8a(7) of the Act. The decision to stay the listing of a contract in such circumstances shall not be delegable to any employee of the Commission.

§ 40.3 Voluntary submission of new products for Commission review and approval.

(a) *Request for approval.* Pursuant to Section 5c(c) of the Act, a designated contract market, a swap execution facility, or a derivatives clearing organization may request that the Commission approve a new or dormant product prior to listing the product for trading or clearing, or if a product was initially submitted under § 40.2 of this part, subsequent to listing the product for trading or clearing. A submission requesting approval shall:

(1) Be filed electronically with the Secretary of the Commission at *Submissions@cftc.gov*, and with the regional office of the Commission having local jurisdiction over the registered entity in a format specified by the Secretary of the Commission;

(2) Include a copy of the submission cover sheet in accordance with the instructions in Appendix D to this part;

(3) Include a copy of the rules that set forth the contract's terms and conditions;

(4) Include the documentation relied on to establish the basis for compliance with the applicable provisions of the Act and the Commission's regulations thereunder, including the Core Principles;

(5) Describe any agreements or contracts entered into with other parties that enable the registered entity to carry out its responsibilities;

(6) Include the certifications required in § 41.22 for product approval of a commodity that is a security future or a security futures product as defined in Sections 1a(44) or 1a(45) of the Act, respectively, and, if applicable, include the notice required in § 40.12(a) for the listing of novel derivative products;

(7) Include, if appropriate, a request for confidential treatment as permitted under § 40.8;

(8) Include the filing fee required under Appendix A to this part;

(9) Include a written statement verifying that the registered entity has undertaken a due diligence review of the legal conditions, including conditions relating to contractual and intellectual property rights, that may materially affect the trading of the product;

(10) Certify that the registered entity posted a notice of pending request for approval of new product with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity's Web site. Information which the registered entity seeks to keep confidential may be redacted from the documents published

on the registered entity's Web site, but must be republished consistent with any determination made pursuant to § 40.8(c)(4);

(11) Include, if requested by Commission staff, additional evidence, information or data demonstrating that the contract meets, initially or on a continuing basis, all of the requirements of the Act, or other requirements for designation or registration under the Act or the Commission's regulations or policies thereunder. The registered entity shall submit the requested information by the open of business on the date that is two business days from the date of request by Commission staff.

(b) *Standard for review and approval.* The Commission shall approve a new product unless the terms and conditions of the product violate the Act or the Commission's regulations.

(c) *Forty-five day review.* All products submitted for Commission approval under this paragraph shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of an extended period as provided under paragraph (d) of this section, unless notified otherwise within the applicable period, if:

(1) The submission complies with the requirements of paragraph (a) of this section; and

(2) The submitting entity does not amend the terms or conditions of the product or supplement the request for approval, except as requested by the Commission or for correction of typographical errors, renumbering or other non-substantive revisions, during that period. Any voluntary, substantive amendment by the submitting entity will be treated as a new submission under this section.

(d) *Extension of time.* The Commission may extend the 45 day review period in paragraph (c) of this section for:

(1) An additional 45 days, if the product raises novel or complex issues that require additional time for review in which case, the Commission shall notify the registered entity within the initial 45 day review period and shall briefly describe the nature of the specific issues for which additional time for review is required; or

(2) Any extended review period to which the registered entity agrees in writing.

(e) *Notice of non-approval.* The Commission at any time during its review under this section may notify the registered entity that it will not, or is unable to, approve the product. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the

Commission's regulations, including the form or content requirements of paragraph (a) of this section, that the product violates, appears to violate or potentially violates but which cannot be ascertained from the submission.

(f) *Effect of non-approval.* (1) Notification to a registered entity under paragraph (e) of this section of the Commission's determination not to approve a product does not prejudice the entity from subsequently submitting a revised version of the product for Commission approval or from submitting the product as initially proposed pursuant to a supplemented submission.

(2) Notification to a registered entity under paragraph (e) of this section of the Commission's refusal to approve a product shall be presumptive evidence that the entity may not truthfully certify under § 40.2 that the same, or substantially the same, product does not violate the Act or the Commission's regulations thereunder.

§ 40.4 Amendments to terms or conditions of enumerated agricultural products.

(a) Notwithstanding the provisions of this part, a designated contract market must submit for Commission approval under the procedures of § 40.5, prior to its implementation, any rule or dormant rule that, for a delivery month having open interest, would materially change a term or condition, as defined in § 40.1(j), of a contract for future delivery in an agricultural commodity enumerated in Section 1a(9) of the Act, or of an option on such a contract or commodity.

(b) The following rules or rule amendments are not material and should not be submitted under this section:

(1) Changes that are enumerated in § 40.6(d)(2) may be implemented without prior approval or certification if implemented pursuant to the notification procedures of § 40.6(d);

(2) Changes that are enumerated in § 40.6(d)(3)(ii) may be implemented without prior approval or certification or notification as permitted pursuant to § 40.6(d)(3);

(3) Changes in trading hours may be implemented without prior approval if implemented pursuant to the procedures of § 40.6(a);

(4) Changes required to comply with a binding order of a court of competent jurisdiction, or a rule, regulation or order of the Commission or of another federal regulatory authority, may be implemented without prior approval if implemented pursuant to the procedures of § 40.6(a); or

(5) Any other rule:

(i) The text of which has been submitted for review at least ten business days prior to its implementation and that has been labeled "Non-Material Agricultural Rule Change;"

(ii) For which the designated contract market has provided an explanation as to why it considers the rule "non-material," and any other information that may be beneficial to the Commission in analyzing the merits of the entity's claim of non-materiality; and

(iii) With respect to which the Commission has not notified the contract market during the review period that the rule appears to require or does require prior approval under this section, may be implemented without prior approval if implemented under the procedures of § 40.6(a).

§ 40.5 Voluntary submission of rules for Commission review and approval.

(a) *Request for approval of rules.* Pursuant to Section 5c(c) of the Act, a registered entity may request that the Commission approve a new rule, rule amendment or dormant rule prior to implementation of the rule, or if the request was initially submitted under §§ 40.2 or 40.6 of this part, subsequent to implementation of the rule. A request for approval shall:

(1) Be filed electronically with the Secretary of the Commission at Submissions@cftc.gov, and with the regional office of the Commission having local jurisdiction over the registered entity in a format specified by the Secretary of the Commission;

(2) Include a copy of the submission cover sheet in accordance with the instructions in Appendix D to this part;

(3) Set forth the text of the rule or rule amendment (in the case of a rule amendment, deletions and additions must be indicated);

(4) Describe the proposed effective date of the rule or rule amendment and any action taken or anticipated to be taken to adopt the proposed rule by the registered entity or by its governing board or by any committee thereof, and cite the rules of the entity that authorize the adoption of the proposed rule;

(5) Explain the operation, purpose, and effect of the proposed rule, including, as applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants or others, and how the rule fits into the registered entity's framework of self-regulation;

(6) Certify that the registered entity posted a notice of pending rule with the Commission and a copy of the

submission, concurrent with the filing of a submission with the Commission, on the registered entity's Web site. Information which the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity's Web site but must be republished consistent with any determination made pursuant to § 40.8(c)(4);

(7) Include the documentation relied on to establish the basis for compliance with the applicable provisions of the Act and the Commission's regulations thereunder, including the Core Principles;

(8) Provide additional information which may be beneficial to the Commission in analyzing the new rule or rule amendment. If a proposed rule affects, directly or indirectly, the application of any other rule of the registered entity, the pertinent text of any such rule must be set forth and the anticipated effect described;

(9) Describe briefly any substantive opposing views expressed to the registered entity by governing board or committee members, members of the entity or market participants with respect to the new rule or rule amendment that were not incorporated into the new rule or rule amendment;

(10) Identify any Commission regulation that the Commission may need to amend, or sections of the Act or the Commission's regulations that the Commission may need to interpret, in order to approve the new rule or rule amendment. To the extent that such an amendment or interpretation is necessary to accommodate a new rule or rule amendment, the submission should include a reasoned analysis supporting the amendment to the Commission's regulation or the interpretation;

(11) Include, for all products, a written statement verifying that the registered entity has undertaken a due diligence review of the legal conditions, including conditions relating to contractual and intellectual property rights, which may materially affect the trading of such product or products, if the proposed rule specifically relates to one or more listed products;

(12) As appropriate, include a request for confidential treatment as permitted under the procedures of § 40.8;

(b) *Standard for review and approval.* The Commission shall approve a new rule or rule amendment unless the rule or rule amendment is inconsistent with the Act or the Commission's regulations.

(c) *Forty-five day review.* (1) All rules submitted for Commission approval under paragraph (a) of this section shall be deemed approved by the Commission under section 5c(c) of the Act 45 days

after receipt by the Commission, or at the conclusion of such extended period as provided under paragraph (d) of this section, unless the registered entity is notified otherwise within the applicable period, if:

(i) The submission complies with the requirements of paragraph (a) of this section;

(ii) The registered entity does not amend the proposed rule or supplement the submission, except as requested by the Commission, during the pendency of the review period other than for correction of typographical errors, renumbering or other non-substantive revisions. Any amendment or supplementation not requested by the Commission will be treated as the submission of a new filing under this section.

(2) The Commission shall commence the review period in paragraph (c) of this section for a compliant submission under § 40.4(b)(5) ten business days after its receipt.

(d) *Commencement and extension of time for review.* The Commission may further extend the review period in paragraph (c) of this section for any approval request for:

(1) An additional 45 days, if the proposed rule raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner, in which case, the Commission shall notify the submitting registered entity within the initial forty-five day review period and shall briefly describe the nature of the specific issues for which additional time for review shall be required; or

(2) Any period, beyond the additional 45 days provided in § 40.5(d)(1), to which the registered entity agrees in writing.

(e) *Notice of non-approval.* Any time during its review under this section, the Commission may notify the registered entity that it will not, or is unable to, approve the new rule or rule amendment. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission's regulations, including the form or content requirements of this section, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the Act or the Commission's regulations.

(f) *Effect of non-approval.* (1) Notification to a registered entity under paragraph (e) of this section does not prevent the registered entity from subsequently submitting a revised

version of the proposed rule or rule amendment for Commission review and approval or from submitting the new rule or rule amendment as initially proposed in a supplemented submission; the revised submission will be reviewed without prejudice.

(2) Notification to a registered entity under paragraph (e) of this section of the Commission's determination not to approve a proposed rule or rule amendment of a registered entity shall be presumptive evidence that the entity may not truthfully certify that the same, or substantially the same, proposed rule or rule amendment under § 40.6(a) of this section.

(g) *Expedited approval.* Notwithstanding the provisions of paragraph (c) of this section, changes to a proposed rule or a rule amendment, including changes to terms and conditions of a product that are consistent with the Act and Commission regulations and with standards approved or established by the Commission may be approved by the Commission at such time and under such conditions as the Commission shall specify in the written notification, provided, however, that the Commission may, at any time, alter or revoke the applicability of such a notice to any particular product or rule amendment.

§ 40.6 Self-certification of rules.

(a) *Required certification.* A registered entity shall comply with the following conditions prior to implementing any rule that has not obtained Commission approval under § 40.5 of this part, that remains dormant subsequent to being submitted under this section or approved under § 40.5 of this part, or that is submitted under § 40.10 of this part, except as otherwise provided by § 40.10(a):

(1) The registered entity has filed its submission electronically in a format specified by the Secretary of the Commission with the Secretary of the Commission at submissions@cftc.gov and with the relevant branch chief at the regional office having local jurisdiction over the registered entity.

(2) The registered entity has provided a certification that the registered entity posted a notice of pending certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity's Web site. Information that the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity's Web site, but it must be republished consistent with

any determination made pursuant to § 40.8(c)(4).

(3) The Commission has received the submission at its headquarters not later than the open of business on the business day that is 10 business days prior to the registered entity's implementation of the rule or rule amendment.

(4) The Commission has not stayed the submission pursuant to § 40.6(c).

(5) The rule or rule amendment is not a rule or rule amendment of a designated contract market that materially changes a term or condition of a contract for future delivery of an agricultural commodity enumerated in section 1a(4) of the Act or an option on such a contract or commodity in a delivery month having open interest;

(6) *Emergency rule certifications.* (i) New rules or rule amendments that establish standards for responding to an emergency must be submitted pursuant to § 40.6(a);

(ii) Rules or rule amendments implemented under procedures of the governing board to respond to an emergency as defined in § 40.1, shall, if practicable, be filed with the Commission prior to the implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than twenty-four hours after implementation; and

(7) The rule submission shall include:

(i) A copy of the submission cover sheet in accordance with the instructions in Appendix D to this part (in the case of a rule or rule amendment that responds to an emergency, "Emergency Rule Certification" should be noted in the Description section of the submission coversheet);

(ii) The text of the rule (in the case of a rule amendment, deletions and additions must be indicated);

(iii) The date of intended implementation;

(iv) A certification by the registered entity that the rule complies with the Act and the Commission's regulations thereunder;

(v) The documentation relied on to establish the basis for compliance with the applicable provisions of the Act and the Commission's regulations thereunder, including the Core Principles;

(vi) A brief explanation of any substantive opposing views expressed to the registered entity by governing board or committee members, members of the entity or market participants, that were not incorporated into the rule, or a statement that no such opposing views were expressed;

(vii) As appropriate, a request for confidential treatment pursuant to the procedures provided in § 40.8;

(viii) For amendments to a product's terms or conditions, a written statement certifying that the registered entity has undertaken a due diligence review of the legal conditions, including conditions relating to contractual and intellectual property rights, that may materially affect the trading of the product.

(8) The registered entity shall provide, if requested by Commission staff, additional evidence, information or data that may be beneficial to the Commission in conducting a due diligence assessment of the filing and the registered entity's compliance with any of the requirements of the Act or the Commission's regulations or policies thereunder.

(b) *Review by the Commission.* The Commission shall have 10 business days to review the new rule or rule amendment before the new rule or rule amendment is deemed certified and can be made effective, unless the Commission notifies the registered entity during the 10-business day review period that it intends to issue a stay of the certification under paragraph (c) of this section.

(c) *Stay—(1) Stay of certification of new rule or rule amendment.* The Commission may stay the certification of a new rule or rule amendment submitted pursuant to paragraph (a) of this section by issuing a notification informing the registered entity that the Commission is staying the certification of the rule or rule amendment on the grounds that the new rule or rule amendment presents novel or complex issues that require additional time to analyze, the rule is accompanied by an inadequate explanation or the rule is potentially inconsistent with the Act or the Commission's regulations thereunder. The Commission will have 90 days from the date of the notification to conduct the review. The decision to stay the certification of a rule in such circumstances shall be delegable pursuant to § 40.7 of this part.

(2) *Public comment.* The Commission shall provide a 30-day comment period, within the 90-day period while the stay is in effect as described in paragraph (c)(1) of this section. The Commission shall publish a notice of the 30-day comment period on the Commission Web site. Comments from the public shall be submitted as specified in that notice.

(3) *Expiration of a stay of certification of new rule or rule amendment.* A new rule or rule amendment subject to a stay pursuant to paragraph (c) shall become

effective, pursuant to the certification, at the expiration of the 90-day review period described in paragraph (c)(1) of this section unless the Commission withdraws the stay prior to that time, or the Commission notifies the registered entity during the 90-day time period that it objects to the proposed certification on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's regulations.

(4) *Stay of effectiveness of rules or rule amendments already implemented.* The Commission may stay the effectiveness of an implemented rule during the pendency of Commission proceedings for filing a false certification or during the pendency of a petition to alter or amend the rule pursuant to section 8a(7) of the Act. The decision to stay the effectiveness of a rule in such circumstances shall not be delegable to any employee of the Commission.

(d) *Notification of rule amendments.* Notwithstanding the rule certification requirement of Section 5c(c)(1) of the Act and paragraph (a) of this section, a registered entity may place the following rules or rule amendments into effect on the following business day without certification to the Commission if the following conditions are met:

(1) The registered entity provides to the Commission at least weekly a summary notice of all rule amendments made effective pursuant to this paragraph during the preceding week. Such notice must be labeled "Weekly Notification of Rule Amendments" and need not be filed for weeks during which no such actions have been taken. One copy of each such submission shall be furnished electronically in a format specified by the Secretary of the Commission; and

(2) The rule governs:

(i) *Non-substantive revisions.* Corrections of typographical errors, renumbering, periodic routine updates to identifying information about approved entities and other such non-substantive revisions of a product's terms and conditions that have no effect on the economic characteristics of the product;

(ii) *Delivery standards set by third parties.* Changes to grades or standards of commodities deliverable on a product that are established by an independent third party and that are incorporated by reference as product terms, provided that the grade or standard is not established, selected or calculated solely for use in connection with futures or option trading and such changes do not affect deliverable supplies or the pricing basis for the product;

(iii) *Index products*. Routine changes in the composition, computation, or method of selection of component entities of an index (other than routine changes to securities indexes to the extent that such changes are not described in paragraph (d)(3)(ii)(F) of this section) referenced and defined in the product's terms, that do not affect the pricing basis of the index, which are made by an independent third party whose business relates to the collection or dissemination of price information and which was not formed solely for the purpose of compiling an index for use in connection with a futures or option product;

(iv) *Option contract terms*. Changes to option contract rules, which may qualify for implementation without notice pursuant to paragraph (d)(3)(ii)(G) of this section, relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis;

(v) *Fees*. Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(A) Total \$1.00 or more per contract, and

(B) Are established by an independent third party or are unrelated to delivery, trading, clearing or dispute resolution.

(vi) *Survey lists*. Changes to lists of banks, brokers, dealers, or other entities that provide price or cash market information to an independent third party and that are incorporated by reference as product terms;

(vii) *Approved brands*. Changes in lists of approved brands or markings pursuant to previously certified or Commission approved standards or criteria;

(viii) *Delivery facilities and delivery service providers*. Changes in lists of approved delivery facilities and delivery service providers (including weigh masters, assayers, and inspectors) at a delivery location, pursuant to previously certified or Commission approved standards or criteria;

(ix) *Trading months*. The initial listing of trading months, which may qualify for implementation without notice pursuant to (d)(3)(ii)(H) of this section, within the currently established cycle of trading months; or

(x) *Minimum tick*. Reductions in the minimum price fluctuation (or "tick").

(3) *Notification of rule amendments not required*. Notwithstanding the rule certification requirements of section 5c(c)(1) of the Act and paragraph (a) of this section, a registered entity may place the following rules or rule amendments into effect without certification or notice to the

Commission if the following conditions are met:

(i) The registered entity maintains documentation regarding all changes to rules; and

(ii) The rule governs:

(A) *Transfer of membership or ownership*. Procedures and forms for the purchase, sale or transfer of membership or ownership, but not including qualifications for membership or ownership, any right or obligation of membership or ownership or dues or assessments;

(B) *Administrative procedures*. The organization and administrative procedures of a registered entity governing bodies such as a Board of Directors, Officers and Committees, but not voting requirements, Board of Directors or Committee composition requirements or procedures, decision making procedures, use or disclosure of material non-public information gained through the performance of official duties, or requirements relating to conflicts of interest;

(C) *Administration*. The routine, daily administration, direction and control of employees, requirements relating to gratuity and similar funds, but not guaranty, reserves, or similar funds; declaration of holidays, and changes to facilities housing the market, trading floor or trading area;

(D) *Standards of decorum*. Standards of decorum or attire or similar provisions relating to admission to the floor, badges, or visitors, but not the establishment of penalties for violations of such rules; and

(E) *Fees*. Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(1) Are less than \$1.00; or

(2) Relate to matters such as dues, badges, telecommunication services, booth space, real time quotations, historical information, publications, software licenses or other matters that are administrative in nature.

(F) *Securities indexes*. Routine changes to the composition, computation or method of security selection of an index that is referenced and defined in the product's rules, and which is made by an independent third party.

(G) *Option contract terms*. For registered entities that are in compliance with the daily reporting requirements of § 16.01 of this chapter, changes to option contract rules relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis.

(H) *Trading months*. For registered entities that are in compliance with the

daily reporting requirements of § 16.01 of this chapter, the initial listing of trading months which are within the currently established cycle of trading months.

§ 40.7 Delegations.

(a) *Procedural matters*. (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, the following authorities, with the concurrence of the General Counsel or the General Counsel's delegate:

(i) To request, pursuant to § 40.3(c)(2) or § 40.5(c)(1)(B) of this part, that the registered entity requesting approval amend the proposed product, rule or rule amendment, or supplement the submission to the Commission;

(ii) To notify the registered entity, pursuant to § 40.3(e) or § 40.5(e) of this part, that the Commission is not approving, or is unable to approve, the proposed product, rule or rule amendment;

(iii) To make all determinations reserved to the Commission in § 40.10.

(2) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, the following authorities, after consultation with the Office of General Counsel or the General Counsel's delegate to notify a registered entity:

(i) Pursuant to § 40.3(d) of this part, that the time for review of the submission has been extended because the product raises novel or complex issues that require additional time for review;

(ii) Pursuant to § 40.5(d) of this part, that the time for review of the submission has been extended because the proposed rule or rule amendment raises novel or complex issues that require additional time for review or is of major economic significance;

(iii) Pursuant to § 40.6(c) of this part, that the proposed rule or rule amendment has been stayed because there exist novel or complex issues that require additional time to analyze, or there is potential inconsistency with the Act or the Commission's regulations.

(3) The Commission hereby delegates, until it orders otherwise, to the Director

of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, the authority to notify a registered entity, pursuant to § 40.3(d) or § 40.5(d) of this part, that the time for review of the submission has been extended, or that a rule certified pursuant to § 40.6(c) has been stayed, because the submission is incomplete or provides an inadequate explanation.

(4) *Emergency rules.* The Commission hereby delegates to the Director of the Division of Market Oversight and, separately, to the Director of the Division of Clearing and Intermediary Oversight, to be exercised by either Director, as appropriate, or by such other employee or employees of the Commission that either Director may designate from time to time, authority to receive notification of emergency rules under § 40.6(a)(6)(ii) of this part.

(5) The Commission hereby delegates to the Director of the Division of Market Oversight, to be exercised by the Director or by such employees of the Commission that the Director may designate from time to time, with the concurrence of the General Counsel or the General Counsel's delegate, the authority to determine whether a rule change submitted by a designated contract market for a materiality determination under § 40.4(b)(5) of this part is not material (in which case it may be reported pursuant to the provisions of § 40.6(d) of this part), or is material, in which case he or she shall notify the registered entity that the rule change must be submitted for the Commission's prior approval.

(b) *Approval authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, with the concurrence of the General Counsel or the General Counsel's delegate, the authority to approve, pursuant to section 5c(c)(3) of the Act and § 40.5 of this part, rules or rule amendments of a registered entity that:

(1) Relate to, but do not substantially change, the quantity, quality, or other delivery specifications, procedures, or obligations for delivery, cash settlement, or exercise under an agreement, contract or transaction approved for trading by

the Commission; daily settlement prices; clearing position limits; requirements or procedures for governance of a registered entity; procedures for transfer trades; trading hours; minimum price fluctuations; and maximum price limit and trading suspension provisions;

(2) Reflect routine modifications that are required or anticipated by the terms of the rule of a registered entity;

(3) Establish or amend speculative limits or position accountability provisions that are in compliance with the requirements of the Act and the Commission's regulations;

(4) Are in substance the same as a rule of the same or another registered entity which has been approved previously by the Commission pursuant to section 5c(c)(3) of the Act;

(5) Are consistent with a specific, stated policy or interpretation of the Commission; or

(6) Relate to the listing of additional trading months of approved contracts.

(c) Notwithstanding the provisions of this section, the Director of the Division of Clearing and Intermediary Oversight and, separately, the Director of the Division of Market Oversight may submit to the Commission for its consideration any matter that has been delegated pursuant to this section.

(d) Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising any of the authority delegated pursuant to this section.

§ 40.8 Availability of public information.

(a) The following sections of all applications to become a designated contract market, a swap execution facility, a derivatives clearing organization, or a swap data repository shall be made publicly available: Transmittal letter, proposed rules, the applicant's regulatory compliance narrative, documents establishing the applicant's legal status, documents setting forth the applicant's corporate and governance structure, and any other part of the application not covered by a request for confidential treatment.

(b) The following submissions provided by an electronic trading facility on which significant price discovery contracts are traded or executed will be public: Rulebook, the facility's regulatory compliance chart, documents establishing the facility's legal status, documents setting forth the facility's governance structure, and any other parts of the submissions not covered by a request for confidential treatment (§ 40.8(b) will be removed on July 20, 2012).

(c) A registered entity's filing of new products pursuant to the self-certification procedures of § 40.2 of this part, new products for Commission review and approval pursuant to § 40.3 of this part, new rules and rule amendments for Commission review and approval pursuant to § 40.4 or § 40.5 of this part, and new rules and rule amendments pursuant to the self-certification procedures of § 40.6 and § 40.10 of this part shall be treated as public information unless accompanied by a request for confidential treatment. If a registered entity files a request for confidential treatment, the following procedures shall apply:

(1) A detailed written justification of the confidential treatment request must be filed simultaneously with the request for confidential treatment. The form and content of the detailed written justification shall be governed by § 145.9 of this chapter;

(2) All material for which confidential treatment is requested must be segregated in an Appendix to the submission;

(3) The submission itself must indicate that material has been segregated and, as appropriate, an additional redacted version provided;

(4) Commission staff may make an initial determination with respect to the request for confidential treatment without regard to whether a request for the information has been sought under the Freedom of Information Act;

(5) All requests for confidential treatment shall be subject to the process provided by § 145.9 of this chapter.

(6) A submitter of information under this part may appeal an adverse decision by staff to the Commission's Office of General Counsel. The form and content of such appeal shall be governed by § 145.9(g) of this chapter.

(7) The grant of any part of a request for confidential treatment under this section may be reconsidered if a subsequent request under the Freedom of Information Act is made for the information

(d) Commission staff will not consider confidential treatment requests for information that is required to be made public under Section 5(d)(7) of the Act. The terms and conditions of a product submitted to the Commission pursuant to § 40.2, § 40.3 or § 40.5 of this part shall be made publicly available at the time of submission.

§ 40.9 Corporate Governance [Reserved]**§ 40.10 Special certification procedures for submission of rules by systemically important derivatives clearing organizations.**

(a) *Advance notice.* A registered derivatives clearing organization that has been designated by the Financial Stability Oversight Council as a systemically important derivatives clearing organization shall provide notice to the Commission not less than 60 days in advance of any proposed change to its rules, procedures, or operations that could materially affect the nature or level of risks presented by the systemically important derivatives clearing organization. A notice submitted under this section shall be subject to the filing requirements of § 40.6(a)(1) and the Web site publication requirements of § 40.6(a)(2).

(1) The notice of a proposed change shall provide the information required to be submitted under § 40.6(a)(7) and shall specifically describe:

(i) The nature of the change and expected effects on risks to the systemically important derivatives clearing organization, its clearing members, or the market; and

(ii) How the systemically important derivatives clearing organization plans to manage any identified risks.

(2) Concurrent with providing the Commission with the advance notice or any request or other information related to the advance notice, the systemically important derivatives clearing organization shall provide the Board of Governors of the Federal Reserve System with a copy of such notice, request or other information.

(b) *Materiality.* The term “materially affect the nature or level of risks presented,” when used to qualify determinations on a change to rules, procedures, or operations of a systemically important derivatives clearing organization, means matters as to which there is a reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the systemically important derivatives clearing organization. Such changes may include, but are not limited to, changes that materially affect financial resources, participant and product eligibility, risk management (including matters relating to margin and stress testing), daily or intraday settlement procedures, default procedures, system safeguards (business continuity and disaster recovery), and governance. If a systemically important derivatives clearing organization determines that a

proposed change is not material and therefore does not file an advance notice under this § 40.10, but the Commission determines that the change is material, the Commission may require the systemically important derivatives clearing organization to withdraw the proposed change and provide notice pursuant to this section.

(c) *Further information.* The Commission may require the systemically important derivatives clearing organization to provide any further information necessary to assess the effect the proposed change would have on the nature or level of risks associated with the systemically important derivatives clearing organization’s payment, clearing, or settlement activities and the sufficiency of any proposed risk management techniques.

(d) *Notice of objection.* A systemically important derivatives clearing organization shall not implement a change to which the Commission has an objection on the grounds that the proposed change is not consistent with the Act or the Commission’s regulations, or the purposes of the Dodd-Frank Act or any applicable rules, orders, or standards prescribed under Section 805(a) of the Dodd-Frank Act. The Commission will notify the systemically important derivatives clearing organization in writing of any objection regarding the proposed change within 60 days from the later of:

(1) The date that the notice of the proposed change was received; or

(2) The date the Commission received any further information it had requested for consideration of the notice.

(e) *Implementation of change absent Commission objection.* A systemically important derivatives clearing organization may implement a change if it has not received an objection to the proposed change within 60 days from the later of:

(1) The date that the Commission received the notice of proposed change; or

(2) The date the Commission received any further information it had requested for consideration of the notice.

(f) *Extended review.* The Commission may, during the 60-day review period, extend the review period if the proposed change raises novel or complex issues. A notification by the Commission pursuant to this paragraph will extend the review for an additional 60 days. Any extension under this paragraph will extend the time periods under paragraphs (d) and (e) of this section for an additional 60 days.

(g) *Change allowed earlier if notified of no objection.* A systemically

important derivatives clearing organization may implement a change in less than 60 days from the date the Commission receives the notice of proposed change or the date the Commission receives any further information it has requested, if the Commission notifies the systemically important derivatives clearing organization in writing that it does not object to the proposed change and authorizes implementation of the change on an earlier date, subject to any conditions imposed by the Commission.

(h) *Emergency changes.* A systemically important derivatives clearing organization may implement a change that would otherwise require advance notice under this section if it determines that an emergency exists and immediate implementation of the change is necessary for the systemically important derivatives clearing organization to continue to provide its services in a safe and sound manner.

(1) The systemically important derivatives clearing organization shall provide notice of any such emergency change to the Commission as soon as practicable, which shall be no later than 24 hours after implementation of the change.

(2) The notice of an emergency change shall:

(i) Provide the information required for advance notice as set forth in paragraph (a) of this section;

(ii) Describe the nature of the emergency; and

(iii) Describe the reason the change was necessary for the systemically important derivatives clearing organization to continue to provide its services in a safe and sound manner.

(3) The Commission may require modification or rescission of the emergency change if it finds that the change is not consistent with the Act or the Commission’s regulations, or the purposes of the Dodd-Frank Act or any applicable rules, orders, or standards prescribed under Section 805(a) of the Dodd-Frank Act.

§ 40.11 Review of event contracts based on certain excluded commodities.

(a) *Prohibition.* A registered entity shall not list for trading or clearing on or through the registered entity any of the following:

(1) An agreement, contract, transaction, or swap based on an excluded commodity, as defined in Section 1a(19)(iv) of the Act, that involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law; or

(2) An agreement, contract, transaction, or swap based on an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which involves, relates to, or references an activity that is similar to an activity enumerated in § 40.11(a)(1) of this part, and that the Commission determines, by rule or regulation, to be contrary to the public interest.

(b) [Reserved.]

(c) *90-day review and approval of certain event contracts.* The Commission may determine, based upon a review of the terms or conditions of a submission under § 40.2 or § 40.3, that an agreement, contract, transaction, or swap based on an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which may involve, relate to, or reference an activity enumerated in § 40.11(a)(1) or § 40.11(a)(2), be subject to a 90-day review. The 90-day review shall commence from the date the Commission notifies the registered entity of a potential violation of § 40.11(a).

(1) The Commission shall request that a registered entity suspend the listing or trading of any agreement, contract, transaction, or swap based on an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which may involve, relate to, or reference an activity enumerated in § 40.11(a)(1) or § 40.11(a)(2), during the Commission's 90-day review period. The Commission shall post on the Web site a notification of the intent to carry out a 90-day review.

(2) *Final determination.* The Commission shall issue an order approving or disapproving an agreement, contract, transaction, or swap that is subject to a 90-day review under § 40.11(c) no later than 90 days subsequent to the date that the Commission commences review, or if applicable, at the conclusion of such extended period agreed to or requested by the registered entity.

§ 40.12 Tolling of review period pending jurisdictional determination.

(a) *Notice of novel derivative products.* (1) A registered entity certifying, submitting for approval, or otherwise filing a proposal to list, trade, or clear an agreement, contract, transaction, or swap having elements of both a security and a derivative, including a contract for the sale of a commodity for future delivery, may provide notice of its proposal to the Commission and the Securities and Exchange Commission with a statement that written notice has been provided to both agencies through an appropriate

means provided in each Commission's regulations.

(2) If concurrent notice is not provided pursuant to § 40.12(a)(1), the Commission shall notify the Securities and Exchange Commission of the registered entity's submission of a novel derivative product and accompany such notice with a copy of the submission. The Commission shall determine whether a particular submission is a novel derivative product requiring notice to the Securities and Exchange Commission not later than five business days subsequent to the date that the registered entity submits the product for Commission review.

(b) *Tolling of review period.* Upon receipt of a request for a jurisdictional determination, pursuant to Section 718(a)(2) of the Dodd-Frank Act, by the Commission or the Securities and Exchange Commission, the product certification or the approval review period for the submitted agreement, contract, transaction, or swap shall be tolled until a final determination order is issued.

(1) The Commission will provide the registered entity with a written notice of stay pending issuance of a final determination order by the Commission or the Securities and Exchange Commission.

(2) The submission review period will resume upon the Commission's or the Securities and Exchange Commission's issuance of a final determination order finding that the Commission has jurisdiction over the submission.

(3) *Determination order.* A final determination, for purposes of § 40.12(b) of this part, shall be a determination order issued by the Commission or the Securities and Exchange Commission pursuant to Section 718(a)(3) of the Dodd-Frank Act.

(c) *Judicial review of determination order.* The filing of a petition by a complaining Commission, pursuant to Section 718(b) of the Dodd-Frank Act, shall operate as a stay of the agency order.

(1) The stay shall remain in effect until the date on which the United States Court of Appeals for the District of Columbia Circuit issues a final determination pursuant to Section 718(b)(4) of the Dodd-Frank Act, or until such date that there is a final disposition of an appeal of that determination.

(2) The submission review period shall resume upon issuance of a final determination, as described in § 40.12(c)(1), that the Commission has jurisdiction over the submission.

Appendix A to Part 40—Schedule of Fees

(a) *Applications for product approval.* Each application for product approval under § 40.3 must be accompanied by a check or money order made payable to the Commodity Futures Trading Commission in an amount to be determined annually by the Commission and published in the **Federal Register**.

(b) Checks and applications should be sent to the attention of the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. No checks or money orders may be accepted by personnel other than those in the Office of the Secretariat.

(c) Failure to submit the fee with an application for product approval will result in return of the application. Fees will not be returned after receipt.

Appendix B to Part 40—[Reserved]

Appendix C to Part 40—[Reserved]

Appendix D to Part 40—Submission Cover Sheet and Instructions

(a) A properly completed submission cover sheet shall accompany all rule and product submissions submitted electronically by a registered entity to the Secretary of the Commodity Futures Trading Commission, at submissions@cftc.gov in a format specified by the Secretary of the Commission. A properly completed submission cover sheet shall include all of the following:

1. *Identifier Code (optional)*—A registered entity Identifier Code at the top of the cover sheet, if applicable. Such codes are commonly generated by registered entities to provide an identifier that is unique to each filing (e.g., NYMEX Submission 03-116).

2. *Date*—The date of the filing.

3. *Organization*—The name of the organization filing the submission (e.g., CBOT).

4. *Filing as a*—Check in the appropriate box indicating that the rule or product is being submitted by a designated contract market (DCM), derivatives clearing organization (DCO), swap execution facility (SEF), or swap data repository (SDR), electronic trading facility with a significant price discovery contract (the term will be removed on July 20, 2012).¹

5. *Type of Filing*—An indication as to whether the filing is a new rule, rule amendment or new product. The registered entity should check the appropriate box to indicate the applicable category under that heading.

6. *Rule Numbers*—For rule filings, the rule number(s) being adopted or modified in the case of rule amendment filings.

7. *Description*—For rule or rule amendment filings a description of the new rule or rule amendment, including a discussion of its expected impact on the

¹ Even though ECM-SPDC was eliminated by the Dodd-Frank Act, the Commission proposes to retain references to this entity in the cover sheet since ECM may be allowed to operate until July 20, 2012, pursuant to grandfather relief issued by the Commission. See 75 FR 56513 (Sept. 16, 2010).

registered entity, market participants, and the overall market. The narrative should describe the substance of the submission with enough specificity to characterize all material aspects of the filing.

(b) *Other Requirements*—A submission shall comply with all applicable filing requirements for proposed rules, rule amendments, or products. The filing of the submission cover sheet does not obviate the registered entity's responsibility to comply with applicable filing requirements (e.g., rules submitted for Commission approval under § 40.5 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views).

(c) Checking the box marked "confidential treatment requested" on the Submission Cover Sheet does not obviate the submitter's responsibility to comply with all applicable requirements for requesting confidential treatment in § 40.8 and, where appropriate, § 145.9 of this chapter, and will not substitute for notice or full compliance with such requirements.

Issued in Washington, DC, on October 26, 2010, by the Commission.

David A. Stawick,
Secretary of the Commission.

Note: The following attachment will not appear in the Code of Federal Regulations.

**Statement of Chairman Gary Gensler
Provisions Common to Registered Entities
October 26, 2010**

I support the proposal to publish for comment the proposed rule on the Commission's process for certification and approval of rules and new products for designated contract markets (DCMs), derivatives clearing organizations (DCOs), swap execution facilities (SEFs) and swap data repositories (SDRs). The Dodd-Frank Act establishes enhanced procedures for Commission review and certification of new rules, rule amendments and products. Today's rule gives important procedural guidance to registered entities on how to comply with Congress's mandate for the Commission's review of new rules and products.

[FR Doc. 2010-27533 Filed 11-1-10; 8:45 am]

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**COMMODITY FUTURES TRADING
COMMISSION**

17 CFR Chapter I

RIN Number 3038-AD26

**Antidisruptive Practices Authority
Contained in the Dodd-Frank Wall
Street Reform and Consumer
Protection Act**

AGENCY: Commodity Futures Trading Commission.

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amends section 4c(a) of the Commodity Exchange Act ("CEA") in section 747 to expressly prohibit certain trading practices deemed disruptive of fair and equitable trading. The Commodity Futures Trading Commission ("Commission") is issuing this advance notice of proposed rulemaking and request for public comment to assist the Commission in promulgating such rules and regulations to meet the requirements of section 747.

DATES: Comments must be in writing and received by January 3, 2011.

ADDRESSES: You may submit comments, identified by RIN number AD26, by any of the following methods:

- *Agency Web site, via its Comments Online process:* Comments may be submitted to: <http://comments.cftc.gov>. Follow the instructions for submitting comments on the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in CFTC Regulation 145.9.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT:
Robert Pease, Counsel to the Director of Enforcement, 202-418-5863,

rpease@cftc.gov, or Mark D. Higgins, Counsel to the Director of Enforcement, 202-418-5864, mhiggins@cftc.gov, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").² Title VII of the Dodd-Frank Act³ amended the Commodity Exchange Act ("CEA")⁴ to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight. Section 747 of the Dodd-Frank Act amends section 4c(a) of the CEA to add a new section entitled "Disruptive Practices."

II. Solicitation for Comments About Disruptive Practices Pursuant to Dodd-Frank Act Section 747

In section 747 of the Dodd-Frank Act, Congress amended the CEA to expressly prohibit certain trading practices that it determined were disruptive of fair and equitable trading. Dodd-Frank section 747 amends section 4c(a) of the CEA to make it unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—

- (A) violates bids or offers;
- (B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or
- (C) is, is of the character of, or is commonly known to the trade as,

² See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

³ Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

⁴ 7 U.S.C. 1 *et seq.* (2006).

¹ 17 CFR 145.9.