

# **PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS**

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

## **§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, *Airspace Designations and Reporting Points*, signed August 18, 2010 and effective September 15, 2010, is to be amended as follows:

\* \* \* \* \*

*Paragraph 6005 Class E airspace extending upward from 700 feet or more above the surface of the earth.*

\* \* \* \* \*

## **AAL AK E5 Savoonga, AK [Revised]**

(Lat. 63° 41'10.56 " N., long. 170°29'35.39" W.)

That airspace extending upward from 700 feet above the surface within a 7.0-mile radius of the Savoonga Airport and within 4 miles either side of the 060° bearing from the Savoonga Airport extending from the 7.0-mile radius to 8.5 miles northeast of the Savoonga Airport and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the Savoonga Airport.

Issued in Anchorage, AK, on November 15, 2010.

**Michael A. Tarr,**

*Alaska Flight Services Information Area Group.*

[FR Doc. 2010–31184 Filed 12–10–10; 8:45 am]

**BILLING CODE 4910–13–P**

# **COMMODITY FUTURES TRADING COMMISSION**

## **17 CFR Parts 1 and 39**

**RIN 3038–AC98**

## **General Regulations and Derivatives Clearing Organizations**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is proposing regulations to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). These proposed amendments would establish the regulatory standards for compliance

with derivatives clearing organization (DCO) Core Principles A (Compliance), H (Rule Enforcement), N (Antitrust Considerations), and R (Legal Risk), as well as DCO chief compliance officer (CCO) requirements set forth in Section 5b of the Commodity Exchange Act (CEA). The proposed amendments also would revise procedures for DCO applications, clarify procedures for the transfer of a DCO registration, add requirements for approval of DCO rules establishing a portfolio margining program for customer accounts carried by a futures commission merchant (FCM) that is also registered as a securities broker-dealer (FCM/BD), and make certain technical amendments. The Commission also is proposing amendments to update the definitions of “clearing member” and “clearing organization,” and to add definitions for certain other terms.

**DATES:** Submit comments on or before February 11, 2011.

**ADDRESSES:** You may submit comments, identified by RIN 3038–AC98, 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 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 you believe 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 § 145.9 of the Commission's regulations, 17 CFR 145.9.<sup>1</sup>

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

<sup>1</sup> Commission regulations referred to herein are found at 17 CFR Ch. 1 (2010). They are accessible on the Commission's Web site at <http://www.cftc.gov>.

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:**

Phyllis P. Dietz, Associate Director, 202–418–5449, [pdietz@cftc.gov](mailto:pdietz@cftc.gov), or Jonathan M. Lave, Special Counsel, 202–418–5983, [jlave@cftc.gov](mailto:jlave@cftc.gov), Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

## **SUPPLEMENTARY INFORMATION:**

### **Table of Contents**

- I. Background
  - A. Proposed Definitional and Procedural Amendments
  - B. Proposed Regulations Implementing Statutory Requirements for CCOs
  - C. Proposed Regulations Implementing DCO Core Principles
- II. Discussion
  - A. Section 1.3 Definitions
  - B. Part 39 Scope and Definitions
    - 1. Scope of Part 39
    - 2. Definitions
  - C. Procedures for Registration as a DCO
    - 1. Procedures for DCO Applications
    - 2. Procedures for Transfer of a DCO Registration
  - D. Procedures for Submitting DCO Rules To Establish a Portfolio Margining Program
  - E. Compliance With Core Principles
  - F. Rule Enforcement Requirements
  - G. Antitrust Considerations
  - H. Legal Risk Requirements
- III. Technical Amendments
- IV. Effective Date
- V. Related Matters
  - A. Regulatory Flexibility Act
  - B. Paperwork Reduction Act
    - 1. Information Provided by Reporting Entities/Persons
    - 2. Information Collection Comments
  - C. Cost-Benefit Analysis

## **I. Background**

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>2</sup> Title VII of the Dodd-Frank Act<sup>3</sup> amended the CEA<sup>4</sup> to establish a comprehensive new regulatory

<sup>2</sup> 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>.

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

<sup>4</sup> 7 U.S.C. 1 *et seq.*

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 rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commission's oversight.

Section 725(c) of the Dodd-Frank Act amended Section 5b(c)(2) of the CEA, which sets forth core principles with which a DCO must comply in order to be registered and to maintain registration as a DCO. The core principles were added to the CEA by the Commodity Futures Modernization Act of 2000 (CFMA).<sup>5</sup> The Commission did not adopt implementing rules and regulations, but instead promulgated guidance for DCOs on compliance with the core principles.<sup>6</sup> Under Section 5b(c)(2), as amended by the Dodd-Frank Act, Congress expressly confirmed that the Commission may adopt implementing rules and regulations pursuant to its rulemaking authority under Section 8a(5) of the CEA.<sup>7</sup>

The Commission continues to believe that, where possible, each DCO should be afforded an appropriate level of discretion in determining how to operate its business within the statutory framework. At the same time, the Commission recognizes that specific, bright-line regulations may be necessary in order to facilitate DCO compliance with a given core principle and, ultimately, to protect the integrity of the U.S. clearing system. Accordingly, in developing the proposed regulations to update the Commission's regulations, streamline administrative procedures, and implement the DCO core principles as amended by the Dodd-Frank Act, the Commission has endeavored to strike an appropriate balance between establishing general prudential standards and prescriptive requirements.

In this notice of proposed rulemaking, the Commission is proposing to adopt:

(1) Certain definitional and procedural amendments to its regulations for DCOs; (2) regulations to implement statutory requirements for CCOs; and (3) requirements that would implement four DCO core principles.

#### *A. Proposed Definitional and Procedural Amendments*

The Commission is proposing to amend the definitions of "clearing member" and "clearing organization" in § 1.3 of its regulations to make the definitions consistent with terminology currently used in the CEA, as amended by the Dodd-Frank Act. It is also proposing to add to § 1.3 definitions for the terms "customer initial margin," "initial margin," "spread margin," "variation margin," and "margin call." In addition, the Commission is proposing to amend § 39.1 to add definitions of the following terms: "back test," "compliance policies and procedures," "key personnel," "stress test," and "systemically important derivatives clearing organization."

Based on its experience in reviewing DCO applications over the past nearly ten years, the Commission is proposing to amend § 39.3 to streamline the DCO application process by eliminating the 90-day expedited application review period. The proposed amendments also would clarify the procedures to be followed by a DCO when requesting a transfer of its DCO registration due to a corporate change and procedures for submission of DCO rules to establish a portfolio margining program.

#### *B. Proposed Regulations Implementing Statutory Requirements for CCOs*

Section 725(b) of the Dodd-Frank Act, codified as Section 5b(i) of the CEA,<sup>8</sup> requires each DCO to designate a CCO and further specifies the duties of the CCO.<sup>9</sup> Among the CCO's responsibilities are the preparation and submission to the Commission of an annual compliance report. Proposed § 30.10 codifies the statutory requirements for CCOs and sets forth additional provisions relating to CCOs.

#### *C. Proposed Regulations Implementing DCO Core Principles*

The Commission is proposing to codify the DCO core principles in Commission regulations and implement those statutory standards with regulatory requirements to the extent necessary to ensure that DCOs are

subject to a comprehensive, prudential regulatory regime. This rulemaking is one of a series that will, in its entirety, propose regulations to implement all 18 DCO core principles.<sup>10</sup> Section 725(c) of the Dodd-Frank Act amended Core Principle A, Compliance, to require a DCO to comply with each core principle set forth in Section 5b(c)(2) of the CEA and any requirement that the Commission may impose by rule or regulation pursuant to Section 8a(5) of the CEA.<sup>11</sup> Proposed § 39.10 would implement Core Principle A.

Section 725(c) also amended Core Principle H, Rule Enforcement, to require a DCO to report to the Commission rule enforcement activities and sanctions imposed against clearing members. Proposed § 39.17 would implement Core Principle H.

The Dodd-Frank Act amended Core Principle N, Antitrust Considerations, and Core Principle N now conforms to the amended antitrust core principle for designated contract markets (DCMs). Proposed § 39.23 would codify and implement Core Principle N.

Finally, Section 725(c) of the Dodd-Frank Act established a new Core Principle R, Legal Risk, which is consistent with the legal risk standard recommended by the Committee on Payment and Settlement Systems of the central banks of the Group of Ten countries (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO).<sup>12</sup> Proposed § 39.27 would implement Core Principle R.

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

<sup>10</sup> See 75 FR 63732 (Oct. 18, 2010) (proposing regulations to implement Core Principle P (Conflicts of Interest)); and 75 FR 63113 (Oct. 14, 2010) (proposing regulations to implement Core Principle B (Financial Resources)). Concurrent with issuing this notice, the Commission also is proposing regulations to implement Core Principles J (Reporting), K (Recordkeeping), L (Public Information), and M (Information Sharing). The Commission expects to issue two additional notices of proposed rulemaking to implement DCO core principles.

<sup>11</sup> Additionally, Section 805(a) of the Dodd-Frank Act allows the Commission to prescribe regulations for DCOs that the Financial Stability Oversight Council has determined are systemically important financial market utilities. In a future notice of proposed rulemaking, the Commission intends to propose a provision that would require all DCOs, including systemically important DCOs (SIDCOs), to comply with the core principles and the regulations thereunder, except to the extent that there are special requirements applicable to SIDCOs set forth in part 39 of the Commission's regulations.

<sup>12</sup> See *infra* n. 47.

<sup>5</sup> See Commodity Futures Modernization Act of 2000, Public Law 106-554, 114 Stat. 2763 (2000).

<sup>6</sup> See 17 CFR part 39, app. A.

<sup>7</sup> See 7 U.S.C. 7a-1(c)(2). Section 8a(5) of the CEA authorizes the Commission to promulgate such regulations "as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of [the CEA]." 7 U.S.C. 12a(5).

<sup>8</sup> 7 U.S.C. 7a-1(i).

<sup>9</sup> The Dodd-Frank Act established comparable CCO requirements for swap data repositories, swap dealers and major swap participants, FCMs, and swap execution facilities. See Sections 728, 731, 732, and 733, respectively, of the Dodd-Frank Act.

## II. Discussion

### A. Section 1.3 Definitions

The Commission proposes to amend the definitions of “clearing member,” “clearing organization,” and “customer” found in § 1.3 of its regulations to conform them to the concepts and terminology of the CEA, as amended. The Commission also is proposing to add to § 1.3, definitions for “clearing initial margin,” “customer initial margin,” “initial margin,” “margin call,” “spread margin,” and “variation margin.”

**Clearing member.** The term “clearing member” is currently defined in § 1.3(c) to mean “any person who is a member of, or enjoys the privilege of clearing trades in his own name through, the clearing organization of a designated contract market or registered derivatives transaction execution facility.”<sup>13</sup> The Commission proposes to amend § 1.3(c) to define a “clearing member” as “any person<sup>14</sup> that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others.” This revised definition reflects the fact that a clearing member could have clearing privileges in connection with contracts that are not traded on a DCM, and it further clarifies that the term “clearing member,” for purposes of the Commission’s regulations, is intended to refer to a person who is authorized to clear through a registered DCO, even if the DCO is not a membership organization.

**Clearing organization.** The term “clearing organization” is currently defined in § 1.3(d) as “the person or organization which acts as a medium for clearing transactions in commodities for future delivery or commodity option transactions, or for effecting settlements of contracts for future delivery or commodity option transactions, for and between members of any designated contract market or registered derivatives transaction execution facility.”<sup>15</sup> Recognizing that there may be CFTC regulations or other issuances that remain in effect and use the term “clearing organization” instead of “derivatives clearing organization,” the Commission proposes to include both terms as alternatives that have the same meaning. The definition would be the same as the definition of “derivatives clearing organization” in Section 1a(15)

of the CEA.<sup>16</sup> Accordingly, the definition would eliminate the references to DCMs and derivatives transaction execution facilities, thereby allowing the definition to encompass futures contracts and swaps, including swaps traded on a swap execution facility (SEF).

**Customer.** The Dodd-Frank Act expanded the Commission’s regulatory authority over swaps. The term “customer” in § 1.3(k) is currently defined to refer to a customer trading in any commodity.<sup>17</sup> The Commission proposes to define customer to refer to trading in any commodity or swap as defined in Section 1a(47) of the CEA.

The Commission also is proposing to amend § 1.3 to add definitions of terms that it expects will be used in future proposed regulations to implement Core Principle D, Risk Management, as well as other provisions of the CEA.

**Clearing initial margin.** Proposed § 1.3(jjj) would define the term “clearing initial margin” to mean initial margin posted by a clearing member with a DCO.

**Customer initial margin.** Proposed § 1.3(kkk) would define the term “customer initial margin” to mean initial margin posted by a customer with an FCM, or by a non-clearing member FCM with a clearing member.

**Initial margin.** Proposed § 1.3(lll) would define the term “initial margin” to mean money, securities, or property

<sup>16</sup> Section 1a(15) of the CEA; 7 U.S.C. 1a(15), defines a derivatives clearing organization as follows:

(A) IN GENERAL.—The term “derivatives clearing organization” means a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to an agreement, contract, or transaction—

(i) enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties;

(ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the derivatives clearing organization; or

(iii) otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the participants.

(B) EXCLUSIONS.—The term “derivatives clearing organization” does not include an entity, facility, system, or organization solely because it arranges or provides for—

(i) settlement, netting, or novation of obligations resulting from agreements, contracts, or transactions, on a bilateral basis and without a central counterparty;

(ii) settlement or netting of cash payments through an interbank payment system; or

(iii) settlement, netting, or novation of obligations resulting from a sale of a commodity in a transaction in the spot market for the commodity.

<sup>17</sup> 17 CFR 1.3(k).

posted by a party to a futures, option, or swap as performance bond to cover potential future exposures arising from changes in the market value of the position.

**Margin call.** Proposed § 1.3(mmm) would define the term “margin call” to mean a request from an FCM to a customer to post customer initial margin; or a request by a DCO to a clearing member to post clearing initial margin or variation margin. This would include margin calls for additional funds, sometimes referred to as “super margin” calls or “special margin” calls, both of which are effectively calls for initial margin.

**Spread margin.** Proposed § 1.3(nnn) would define the term “spread margin” to mean a reduced initial margin that takes into account correlations between certain related positions held in a single account.

**Variation margin.** Proposed § 1.3(ooo) would define the term “variation margin” to mean a payment made by a party to a futures, option, or swap to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

### B. Part 39 Scope and Definitions

The Commission proposes to revise the statement of the scope of part 39 and to add definitions that will appear elsewhere in part 39.

#### 1. Scope of Part 39

In a future rulemaking, the Commission intends to reorganize part 39 into three subparts, with one subpart containing provisions applicable only to SIDCOs. Accordingly, the Commission intends to revise the statement of scope in a future rulemaking to establish that the provisions of subparts A and B of part 39 will apply to all DCOs, except to the extent that there are superseding provisions that apply to SIDCOs in subpart C.<sup>18</sup> Because this reorganization is not being proposed in the current rulemaking, the Commission is not yet proposing any change to the text of § 39.1. However, as a technical matter in order to propose certain definitions, the Commission is proposing to redesignate the current text of § 39.1 as § 39.1(a) “Scope,” and to add a new paragraph (b) “Definitions.”

<sup>18</sup> In this future rulemaking, the Commission also expects to propose a technical amendment to update the § 39.1 citation to the definition of “derivatives clearing organization” in the CEA (term formerly defined in Section 1a(9) of the CEA; renumbered as Section 1a(15) by the Dodd-Frank Act).

<sup>13</sup> 17 CFR 1.3(c).

<sup>14</sup> The term “person” is defined as an individual, association, partnership, corporation, or trust. See Section 1a(38) of the CEA; 7 U.S.C. 1a(38); and 17 CFR 1.3(u).

<sup>15</sup> 17 CFR 1.3(d).

## 2. Definitions

Proposed § 39.1(b) would define certain terms, for purposes of part 39. Although some of these terms may be defined in § 1.3 or other sections of the Commission's regulations, the definitions set forth in § 39.1(b) would apply to provisions contained in part 39 and such other rules as may explicitly cross-reference these definitions.

**Back test.** The proposed rule would define the term "back test" to mean a test that compares a DCO's initial margin requirements with historical price changes to determine the extent of actual margin coverage. The Commission anticipates using this term in regulations relating to Core Principle D, Risk Management.<sup>19</sup>

**Compliance policies and procedures.** The proposed rule would define the term "compliance policies and procedures" to mean all policies, procedures, codes, including a code of ethics, safeguards, rules, programs, and internal controls that are required to be adopted or established by a DCO pursuant to the CEA, Commission regulations, or orders. Compliance policies and procedures would include those policies and procedures that are not explicitly required by law, such as those relating to customer record protection and procedures and safeguards for electronic signatures.

**Customer account or customer origin.** The proposed rule would define these terms to mean a clearing member's account held on behalf of customers, as defined in § 1.3(k) of the Commission's regulations. A customer account is also a futures account, as that term is defined by § 1.3(vv) of the Commission's regulations. The Commission proposes to define these terms as distinguishable from a "house account" or "house origin," in connection with proposed reporting and other requirements under part 39, which may make such a distinction.<sup>20</sup>

**House account or house origin.** The proposed rule would define "house account" or "house origin" to mean a clearing member's combined proprietary accounts, as defined in § 1.3(y).

**Key personnel.** The proposed rule would define the term "key personnel" to mean personnel who play a significant role in the operation of the DCO, provision of clearing and settlement services, risk management, or

oversight of compliance with the CEA and Commission regulations. Key personnel would include, but would not be limited to, those persons who are or perform the functions of any of the following: The chief executive officer; president; CCO; chief operating officer; chief risk officer; chief financial officer; chief technology officer; and emergency contacts or persons who are responsible for business continuity or disaster recovery planning or program execution.

**Stress test.** The proposed rule would define the term "stress test" to mean a test that compares the impact of a potential price move, change in option volatility, or change in other inputs that affect the value of a position, to the financial resources of a DCO, clearing member, or large trader to determine the adequacy of such financial resources.

**Systemically important derivatives clearing organization.** The proposed rule would define the term "systemically important derivatives clearing organization" to mean a financial market utility that is a DCO registered under Section 5b of the CEA, and which has been designated by the Financial Stability Oversight Council to be systemically important. As noted above, the Commission intends that certain proposed rules would apply only to SIDCOs.

## C. Procedures for Registration as a DCO

### 1. Procedures for DCO Applications

The proposed rules would remove the 90-day expedited review provision. In 2001, the Commission adopted § 39.3 to implement the CFMA's core principle regime and to establish registration standards and procedures for DCOs, which were then a new category of registrant.<sup>21</sup> Although the CEA does not require the Commission to review DCO applications within a prescribed time period or subject to any prescribed procedures, the Commission nonetheless adopted the time period and procedures specified in Section 6(a) of the CEA for review of applications for designation of a contract market or registration of a derivatives transaction execution facility.<sup>22</sup> The Commission initially provided for an expedited 60-day review process, which it changed to a 90-day review process in 2006.<sup>23</sup>

Since 2006, the Commission has learned that a 90-day expedited review period is not practicable in most instances, particularly in cases where the margin methodology to be applied or the products to be cleared are novel or complex. The proposed amendments to § 39.3 would therefore eliminate the 90-day expedited review period provided under § 39.3(a)(3) and remove related provisions for termination of the 90-day review under § 39.3(b). The Commission notes that the 180-day review period does not preclude it from rendering a decision in less than 180 days.

### 2. Procedures for Transfer of a DCO Registration

The Commission is proposing to add a new paragraph (h) to § 39.3 to formalize the procedures that a DCO must follow when requesting the transfer of its DCO registration and positions comprising open interest for clearing and settlement, in anticipation of a corporate change (e.g., a merger, corporate reorganization, or change in corporate domicile), which results in the transfer of all or substantially all of the DCO's assets to another legal entity. Under proposed § 39.3(h), the DCO would submit to the Commission a request for transfer no later than three months prior to the anticipated corporate change, in accordance with the reporting requirements of proposed § 39.19.<sup>24</sup> The request would include: (1) The underlying agreement that governs the corporate change; (2) a narrative description of the corporate change, including the reason for the change, its impact on the DCO's financial resources, governance, and operations, and its impact on the rights and obligations of clearing members and market participants holding the positions that comprise the DCO's open interest; (3) a discussion of the transferee's ability to comply with the CEA, including the core principles applicable to DCOs, and the Commission's regulations thereunder; (4) the governing documents of the transferee, including but not limited to articles of incorporation and bylaws; (5) the transferee's rules marked to show changes from the current rules of the

<sup>24</sup> In a separate notice of proposed rulemaking, the Commission is proposing to require a DCO to notify the Commission of various corporate events, all of which would require three months advance notice. The Commission is proposing to allow an exception to the three-month prior reporting requirement if the DCO does not know and reasonably could have not have known of the anticipated change three months prior to that change. In such event, the DCO would be required to promptly report such change to the Commission as soon as it knows of the change.

<sup>19</sup> See Section 5b(c)(2)(D) of the CEA; 7 U.S.C. 7a-1(c)(2)(D).

<sup>20</sup> For example, in a separate notice of proposed rulemaking, the Commission proposes to require DCOs to provide the Commission with a daily report of initial margin requirements and margin on deposit for each clearing member, by customer origin and house origin.

<sup>21</sup> See 66 FR 45604 (Aug. 29, 2001).

<sup>22</sup> See 17 CFR 39.3(a) (providing that the Commission will review the application for registration as a DCO pursuant to the 180-day time frame and procedures specified in Section 6(a) of the CEA).

<sup>23</sup> See 71 FR 1953 (Jan. 12, 2006) (extending the 60-day review period to 90 days based on the Commission's experience in processing applications).

DCO; and (6) a list of contracts, agreements, transactions, or swaps for which the DCO requests transfer of open interest.

Proposed § 39.3(h) also would require, as a condition of approval, that the DCO submit a representation that it is in compliance with the CEA, including the DCO core principles, and the Commission's regulations. In addition, the DCO would have to submit a representation by the transferee that the transferee understands that a DCO is a regulated entity that must comply with the CEA, including the DCO core principles and the Commission's regulations, in order to maintain its registration as a DCO; and further, that the transferee will continue to comply with all self-regulatory requirements applicable to a DCO under the CEA and the Commission's regulations.

The Commission would review any requests for transfer of registration and open interest as soon as practicable and determine whether the transferee would be able to continue to operate the DCO in compliance with the CEA and the Commission's regulations. The request would be approved or denied pursuant to a Commission order.

The Commission notes that there are differences in the proposed procedures for registration/designation transfer requests for DCOs, DCMs, swap execution facilities, and swap data repositories. The Commission requests comment on the proposed requirements for registration transfer requests under § 39.3(h), generally, and, more specifically, solicits comment on the extent to which there should be uniformity or differentiation in procedures applied to different types of registrants.

#### *D. Procedures for Submitting DCO Rules To Establish a Portfolio Margining Program*

Section 713(a) of the Dodd-Frank Act amended Section 15(c)(3) of the Securities Exchange Act of 1934<sup>25</sup> to require the SEC to adopt rules that permit securities to be held in a portfolio margining account that is regulated as a futures account pursuant to a portfolio margining program approved by the Commission. Similarly, Section 713(b) of the Dodd-Frank Act amended Section 4d of the CEA<sup>26</sup> to require the Commission to adopt rules that permit futures and options on futures to be held in a portfolio margining account regulated as a securities account pursuant to a portfolio margining program approved

by the SEC. In both cases, the SEC and the Commission are required to consult with each other in the adoption of such rules in order to ensure that the relevant transactions and accounts are subject to comparable requirements to the extent practicable for similar products.

As a first step towards meeting this goal, the Commission is proposing to amend part 39 to include procedural requirements for a DCO that intends to offer a portfolio margining program. Under proposed § 39.4(e), a DCO seeking to provide clearing and settlement services for a futures portfolio margining account that holds securities would have to submit its proposed portfolio margining rules for Commission approval under § 40.5 of the Commission's regulations. This will enable the DCO to satisfy the statutory requirement that the futures portfolio margining program be approved by the Commission, as a pre-condition to the SEC permitting securities to be held in the account. Concurrent with its request for rule approval, the DCO also would be required to submit a petition for a related order under Section 4d of the CEA.<sup>27</sup>

The Commission is proposing only procedural requirements as part of this notice. It anticipates consulting with the SEC in the future to determine the substantive requirements it would impose in approving a futures portfolio margining program and, additionally, in granting an exemption under Section 4(c) of the CEA and an order under Section 4d of the CEA to permit futures and options on futures to be held in a securities portfolio margining account. The Dodd-Frank Act does not set a deadline for these actions, and the Commission believes that it is important to give this matter due consideration, both in terms of consultation with the SEC and, more broadly, in obtaining industry views on the topic before proposing substantive regulations or other guidance. The Commission requests comment on possible strategies for the Commission and the SEC to address issues raised by portfolio margining and to facilitate the availability of portfolio margining programs for qualified participants.

#### *E. Compliance With Core Principles*

As noted above, Section 725(c) of the Dodd-Frank Act amended Core Principle A to require a registered DCO to comply with each core principle set forth in Section 5b(c)(2) of the CEA and any requirement that the Commission

may impose by rule or regulation pursuant to Section 8a(5) of the CEA.<sup>28</sup> The Dodd-Frank Act also provides a DCO with reasonable discretion to establish the manner by which it complies with each core principle.<sup>29</sup> Proposed §§ 39.10(a) and 39.10(b) would codify these provisions, respectively.

Section 725(b) of the Dodd-Frank Act amended Section 5b of the CEA to require each DCO to designate an individual as its CCO, responsible for the DCO's compliance with Commission regulations and filing an annual compliance report.<sup>30</sup> Proposed § 39.10(c)(1) would require each DCO to establish the position of CCO and to designate a CCO. The proposed provision also would require that the DCO provide the CCO with the responsibility and authority to develop and enforce appropriate compliance policies and procedures to fulfill his or her duties.

Proposed § 39.10(c)(1)(i) would require a DCO to designate an individual with the background and skills appropriate for fulfilling the responsibilities of the position. The rule also would require the person to meet minimum ethical requirements, and prohibit from serving as a CCO any person who would be disqualified from registration under Sections 8a(2) or 8a(3) of the CEA.<sup>31</sup>

The Dodd-Frank Act requires that a CCO report directly to the board of directors or the senior officer of the DCO.<sup>32</sup> This requirement is codified as proposed § 39.10(c)(1)(ii). The proposed rule also would require the board of directors or the senior officer to approve the compensation of the CCO.

Proposed § 39.10(c)(1)(iii) would require a CCO to meet with the board of directors or the senior officer at least once a year to discuss the effectiveness of the DCO's compliance policies and

<sup>28</sup> Core Principle A provides that "To be registered and to maintain registration as a derivatives clearing organization, a derivatives clearing organization shall comply with each core principle described in this paragraph and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5)." 7 U.S.C. 7a-1(c)(2)(A)(i).

<sup>29</sup> Core Principle A provides that "Subject to any rule or regulation prescribed by the Commission, a derivatives clearing organization shall have reasonable discretion in establishing the manner by which the derivatives clearing organization complies with each core principle described in this paragraph." 7 U.S.C. 7a-1(c)(2)(A)(ii).

<sup>30</sup> See Section 5b(i) of the CEA; 7 U.S.C. 7a-1(i).

<sup>31</sup> 7 U.S.C. 12a(2) and (3).

<sup>32</sup> See Section 5b(i)(2)(A) of the CEA; 7 U.S.C. 7a-1(i)(2)(A). Proposed § 1.3(zz) defines the term "Board of Directors" to mean "the Board of Directors or Board of Governors of a company or organization, or equivalent governing body." See 75 FR at 63747.

<sup>25</sup> 15 U.S.C. 78o(c)(3).

<sup>26</sup> 7 U.S.C. 6d.

<sup>27</sup> An order under Section 4d of the CEA would permit the commingling of exchange-traded futures and options on futures with securities.

procedures, as well as the administration of those policies and procedures by the CCO. The meeting would afford an opportunity for the CCO and the board of directors or the senior officer to speak freely about any compliance issues of concern, and would further the Commission's goal of promoting self-assessment and internal oversight of compliance matters. The Commission notes that the requirement for an annual discussion would not preclude the board of directors or the senior officer from meeting with the CCO more frequently.<sup>33</sup>

Proposed § 39.10(c)(1)(iv) would require that a change in the designation of the individual serving as the CCO be reported to the Commission, in accordance with the requirements of proposed § 39.19(c)(4)(xi).<sup>34</sup>

The Dodd-Frank Act sets forth the duties of a CCO,<sup>35</sup> and proposed § 39.10(c)(2) codifies those duties in paragraphs (i)–(vi).<sup>36</sup> The Commission believes the statutory duties are largely self-explanatory, but in the interest of clarity, those duties are briefly discussed.

Proposed § 39.10(c)(2)(i) would require the CCO to review the DCO's compliance with each core principle.

Under proposed § 39.10(c)(2)(ii), in consultation with the board of directors or the senior officer, the CCO also would be required to resolve any conflicts of interest that may arise. These conflicts would include: Conflicts between business considerations and compliance requirements; conflicts between the consideration to restrict clearing membership to certain types of clearing members and the requirement that a DCO provide fair and open access; conflicts between and among different categories of clearing members of the DCO; conflicts between a DCO's clearing members and its management; and conflicts between a DCO's management and members of the board of directors.

Proposed §§ 39.10(c)(2)(iii) and (iv) would require the CCO to administer each policy and procedure that is required under Section 5b of the CEA,

and ensure compliance with the CEA and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations under Section 5b of the CEA, respectively. Under proposed § 39.10(c)(2)(v), the CCO also would establish procedures for the remediation of noncompliance issues identified by the CCO through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint. Finally, under proposed § 39.10(c)(2)(vi), a CCO would establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

In addition to the duties set forth in the Dodd-Frank Act, proposed § 39.10(c)(2)(vii) would require a CCO to develop a compliance manual designed to promote compliance with the applicable laws, rules, and regulations, and a code of ethics designed to prevent ethical violations and to promote ethical conduct. The Commission believes that these tools are essential to a CCO's ability to fulfill the duties imposed by the CEA and the Commission's regulations.

Section 725(b) of the Dodd-Frank Act requires a CCO to prepare an annual report that describes the DCO's compliance with the CEA, regulations promulgated under the CEA, and each policy and procedure of the DCO, including the code of ethics and conflicts of interest policies.<sup>37</sup> Proposed § 39.10(c)(3) would codify these requirements.

Proposed § 39.10(c)(4) would establish requirements for submission of the annual report to the Commission. The rule would require the CCO to provide the annual report to the board or the senior officer for review prior to submitting the annual report to the Commission, and it would require the DCO to record such action in board minutes or otherwise, as evidence of compliance with this requirement. The proposed rule would further specify that the annual report be electronically provided to the Commission not more than 90 days after the end of the DCO's fiscal year,<sup>38</sup> and that it be submitted concurrently with the fiscal year-end audited financial statement that is required to be furnished to the Commission pursuant to proposed § 39.19(c)(3)(ii).<sup>39</sup>

The Dodd-Frank Act requires the CCO's annual report to include a certification that, under penalty of law, the compliance report is accurate and complete.<sup>40</sup> Proposed § 39.10(c)(4)(ii) would codify this certification requirement.

Proposed § 39.10(c)(4)(iii) would require a DCO to promptly submit an amended annual report if material errors or omissions in the report are identified after the report is submitted to the Commission. If a DCO is unable to submit an annual report within 90 days after the end of the DCO's fiscal year, proposed § 39.10(c)(4)(iv) would permit the DCO to request that the Commission extend the deadline, provided the DCO's failure to submit the report in a timely manner could not be avoided without unreasonable effort or expense. Extensions of the deadline would be granted at the discretion of the Commission.

Proposed § 39.10(c)(5) would require a DCO to maintain: (i) A copy of the policies and procedures adopted in furtherance of compliance with the CEA and Commission regulations; (ii) copies of materials, including written reports provided to the board of directors or the senior officer in connection with review of the annual report; and (iii) any records relevant to the DCO's annual report, including work papers and financial data. These records are designed to provide Commission staff with a basis upon which to determine whether the DCO has complied with the applicable Commission regulations and DCO rules and policies. The DCO would be required to maintain these records in accordance with § 1.31 and proposed § 39.20 of the Commission's regulations.

The Commission specifically seeks comment on the degree of flexibility in the reporting structure for CCOs that should be afforded under the proposed rules. Specifically, the Commission requests comment on: (i) Whether it would be more appropriate for a CCO to report to the senior officer or the board of directors; (ii) whether the senior officer or board of directors generally is a stronger advocate of compliance matters within an organization; and (iii) whether the proposed rules allow for sufficient flexibility with regard to a DCO's business structure.

The Commission also is seeking comment on whether additional limitations should be placed on the persons who may be designated as a CCO. For example, should the

Commission in a separate notice of proposed rulemaking.

<sup>40</sup> See Section 5b(i)(3)(B)(ii) of the CEA; 7 U.S.C. 7a-1(i)(3)(B)(ii).

<sup>33</sup> In addition to the board of directors or the senior officer, under the Commission's proposed § 39.13(g), a DCO's Risk Management Committee would be required to review the performance of the CCO and make recommendations to the board. See 75 FR at 63750.

<sup>34</sup> The notification requirement is being proposed by the Commission in a separate notice of proposed rulemaking.

<sup>35</sup> See Section 5b(i)(2) of the CEA; 7 U.S.C. 7a-1(i)(2).

<sup>36</sup> The Commission notes, however, that the first statutory requirement identified under the heading "duties," *i.e.*, that the CCO report to the board of directors or the senior officer, is codified in proposed § 39.10(c)(1)(ii).

<sup>37</sup> See Section 5b(i)(3) of the CEA; 7 U.S.C. 7a-1(i)(3).

<sup>38</sup> See also § 1.10(b)(2)(ii) (90-day time period for an FCM to submit the Form 1-FR-FCM to the Commission).

<sup>39</sup> The annual reporting requirement of proposed § 39.19(c)(3)(ii) is being proposed by the

Commission restrict the CCO position from being held by an attorney who represents the DCO or its board of directors, such as an in-house or general counsel? The rationale for such a restriction is based on the concern that the interests of defending the DCO would be in conflict with the duties of the CCO.

The Commission specifically seeks comment on whether there is a need for a regulation requiring the DCO to insulate a CCO from undue pressure and coercion. Is it necessary to adopt rules to address the potential conflict between and among compliance interests, commercial interests, and ownership interests of a DCO? If there is no need for such a provision, how would such potential conflicts be addressed?

The Commission additionally requests comment on an appropriate effective date for the CCO requirements. In particular, for a DCO that does not currently have an employee designated to perform the function of a CCO, what is a reasonable time frame for hiring a CCO and for implementing the required compliance policies and procedures set forth in § 39.10?

#### F. Rule Enforcement Requirements

Section 725(c) of the Dodd-Frank Act amended Core Principle H, Rule Enforcement, to require a DCO to maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with its rules and resolution of disputes.<sup>41</sup> Proposed § 39.17(a)(1) would codify these requirements. Section 725(c) of the Dodd-Frank Act also required a DCO to have the authority and ability to discipline, limit, suspend, or terminate the activities of a member or participant due to a violation by the member or participant of any rule of the derivatives clearing organization.<sup>42</sup> Proposed § 39.17(a)(2) would codify this requirement. Additionally, pursuant to the reporting requirement of Core

Principle H, proposed § 39.17(a)(3) would cross-reference the proposed rule enforcement reporting requirements of proposed § 39.19(c)(4)(xiii).<sup>43</sup>

Under proposed § 39.17(b), the board of directors of a DCO may delegate to the DCO's Risk Management Committee responsibility for compliance with the requirements of paragraph (a) of § 39.17, unless the responsibilities are otherwise required to be carried out by the CCO.

Finally, proposed § 39.17(c) would cross-reference proposed § 39.10(c)(2)(ii), which provides the CCO with the duty to resolve conflicts of interest.<sup>44</sup>

#### G. Antitrust Considerations

Section 725(c) of the Dodd-Frank Act amended Core Principle N, Antitrust Considerations, conforming the standard for DCOs to the standard applied to DCMs under Core Principle 19.<sup>45</sup> Proposed § 39.23 would codify Core Principle N as amended by the Dodd-Frank Act. The Commission is taking the same approach with respect to DCM Core Principle 19, but requests comment on whether there are additional standards or requirements that should be imposed to more effectively implement the purposes of DCO Core Principle N.

#### H. Legal Risk Requirements

Section 725(c) of the Dodd-Frank Act set forth a new Core Principle R, Legal Risk. Pursuant to Core Principle R, "[e]ach derivatives clearing organization shall have a well-founded, transparent, and enforceable legal framework for each aspect of the activities of the derivatives clearing organization."<sup>46</sup> This core principle is consistent with the recommendations of CPSS-IOSCO, which conclude that "if the legal framework [of a central counterparty (CCP), in this case, a DCO] is underdeveloped, opaque or inconsistent, the resulting legal risk could undermine the [CCP]'s ability to operate effectively," and increase the likelihood that market participants may

suffer a loss because the CCP's rules, procedures, and contracts that support its activities, property rights, and other interests are not supported by relevant laws and regulations.<sup>47</sup>

Proposed § 39.27(a) would address these concerns, in part, by requiring a DCO to be duly organized, legally authorized to conduct clearing business in the relevant jurisdiction, and to remain in good standing at all times. The proposed rule also would require a DCO that provides clearing services outside the United States to be duly organized to conduct business in the relevant jurisdiction, to remain in good standing at all times, and to be authorized by the appropriate foreign licensing authority.

Proposed § 39.27 would set forth requirements for various activities of a DCO, as applicable. Proposed § 39.27(b)(1) would require the legal framework of a DCO to provide for the DCO to act as a counterparty, including novation. Through novation, the DCO is substituted as the counterparty to both the buyer and the seller of the original contract.

Proposed § 39.27(b)(2) would require the legal framework of a DCO to address netting arrangements. Netting reduces the number and value of deliveries and payments needed to settle a set of transactions and reduces the potential losses to a DCO in the event of a clearing member's default.

Proposed § 39.27(b)(3) would require the legal framework to provide for the DCO's interest in collateral. Generally, collateral arrangements involve either a pledge or a title transfer. In either case, a DCO should have a high degree of assurance that its interest has been validly created in the relevant jurisdiction, validly perfected, if necessary, and is enforceable under applicable law.

Proposed § 39.27(b)(4) would require the legal framework to provide for the steps that the DCO would take to address the default of a clearing member, including but not limited to, the unimpeded ability to liquidate

<sup>41</sup> Core Principle H provides that:

Each derivatives clearing organization shall—  
(i) maintain adequate arrangements and resources for—

(I) the effective monitoring and enforcement of compliance with the rules of the derivatives clearing organization; and

(II) the resolution of disputes;

(iii) have the authority and ability to discipline, limit, suspend, or terminate the activities of a member or participant due to a violation by the member or participant of any rule of the derivatives clearing organization; and

(iii) report to the Commission regarding rule enforcement activities and sanctions imposed against members and participants as provided in clause (ii).

See Section 5b(c)(2)(H) of the CEA; 7 U.S.C. 7a–1(c)(2)(H).

<sup>42</sup> *Id.*

<sup>43</sup> The Commission is proposing reporting requirements in a separate notice of proposed rulemaking.

<sup>44</sup> See *supra* Section II.E. of this notice.

<sup>45</sup> Core Principle N provides as follows: "Unless necessary or appropriate to achieve the purposes of this Act, a derivatives clearing organization shall not—(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or (ii) impose any material anticompetitive burden." See Section 5b(c)(2)(N) of the CEA; 7 U.S.C. 7a–1(c)(2)(N). See also Section 5(d)(19) of the CEA; 7 U.S.C. 7(d)(19) (DCM Core Principle 19); and proposed § 38.100 of the Commission's regulations, which is being proposed by the Commission in a separate notice of proposed rulemaking.

<sup>46</sup> Section 5b(c)(2)(R) of the CEA; 7 U.S.C. 7a–1(c)(2)(R).

<sup>47</sup> See Comm. on Payment & Settlement Sys. & Technical Comm. of the Int'l Org. of the Sec. Comm'n's CPSS-IOSCO, *Recommendations for Central Counterparties*, at 13, CPSS Publication No. 64 (Nov. 2004). In November 2004, the CPSS-IOSCO Task Force on Securities Settlement Systems issued Recommendations for Central Counterparties. The CPSS-IOSCO recommendations identify legal risk as the risk that a CCP's rules, procedures, and contracts are not supported by relevant laws and regulations. *Id.* at 9. Under CPSS-IOSCO Recommendation 1, a CCP should mitigate legal risk through the development of a sound, legal framework. *Id.* at 4, 13. The Commission notes that CPSS and IOSCO are currently reviewing this standard and it may be revised.



collateral and close out or transfer positions in a timely manner. A DCO must act quickly in the event of a clearing member's default, and ambiguity over the enforceability of its procedures could delay, and possibly prevent altogether, a DCO from taking actions that fulfill its obligations to non-defaulting clearing members or minimize its potential losses.

A critical issue in a DCO's settlement arrangements is the timing of the finality of funds transfers between the DCO's settlement accounts and the accounts of its clearing members. To address this, proposed § 39.27(b)(5) would require the legal framework of a DCO to ensure that its settlement bank arrangements provide that funds transfers are final, *i.e.*, irrevocable and unconditional, when the DCO's accounts are debited and credited.

In circumstances where a DCO crosses borders through linkages, remote clearing members, or the taking of collateral, the rules governing the DCO's activities should clearly indicate the law that is intended to apply to each aspect of a DCO's operations. Potential conflicts of law should be identified and the DCO should address conflict of law issues when there is a difference in the substantive laws of the jurisdictions that have potential interests in a DCO's activities. Proposed § 39.27(c)(1) would require the legal framework of a DCO that provides clearing services outside the United States to identify and address any conflict of law issues and, in entering into cross-border agreements, to specify a choice of law.

Proposed § 39.27(c)(2) would require a DCO to be able to demonstrate the enforceability of its choice of law in relevant jurisdictions and that its rules, procedures and contracts are enforceable in all relevant jurisdictions. This could be accomplished, for example, by means of a legal opinion.

The Commission solicits comment as to the legal risks addressed in proposed § 39.27 and whether the rule should address additional legal risks.

### III. Technical Amendments

Section 39.3(a) currently requires that an organization applying for DCO registration must "file electronically an application for registration with the Secretary of the Commission at its Washington, DC, headquarters." The Commission is proposing to revise this provision and §§ 39.3(c) (withdrawal of an application for registration) and 39.3(f) (request for vacation of registration) by instructing applicants to file electronically an application for registration with the Secretary in the form and manner provided by the

Commission. Given the shift from paper-based to electronic submissions, it is no longer necessary to specify the location of the Secretary. Moreover, because the Commission may modify procedures for electronic submissions from time to time, the proposed rule would not specify filing instructions. The Commission's filing procedures will be posted on its Web site and any further questions can be addressed to the Office of the Secretary.

The Commission also is proposing conforming amendments to paragraphs (a)(1), (c), (e), and (g) of § 39.3, to reflect the deletion of current paragraphs (a)(3) and (b) related to the elimination of the 90-day expedited review period for DCO applications.

In addition, the Commission is proposing amendments to the delegation provision of current paragraph (g), to correct the reference to "delegates," by substituting the word "designee," in reference to action taken by the Director of the Division of Clearing and Intermediary Oversight or the Director's designee with the concurrence of the General Counsel or the General Counsel's designee.

The Commission is proposing to revise § 39.4(c)(2) to remove the reference to accepting for clearing a new product that is not traded on a "derivatives transaction execution facility" and inserting in its place a reference to a "swap execution facility."

### IV. Effective Date

The Commission is proposing that the effective date for the proposed regulations, except those relating to the CCO under proposed § 39.3(c), be 30 days after publication of final rules in the **Federal Register**. The Commission is proposing that the requirements for CCOs become effective not more than 180 days from the date the final rules are published in the **Federal Register**. The Commission believes that this would give DCOs adequate time to implement the CCO regulations which, depending on the DCO, might include hiring a CCO and putting into place a compliance program. The Commission requests comment on whether the proposed effective dates are appropriate and, if not, the Commission further requests comment on possible alternative effective dates and the basis for any such alternative dates.

### V. Related Matters

#### A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")<sup>48</sup> requires Federal agencies, in promulgating regulations, to consider

the impact of those regulations on small businesses. The regulations adopted herein will affect DCOs. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA,<sup>49</sup> and it has previously determined that DCOs are not small entities for the purpose of the RFA.<sup>50</sup> Accordingly, pursuant to 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

#### B. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA")<sup>51</sup> imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. OMB has not yet assigned a control number to the new collection.

This proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget ("OMB") for review. If adopted, responses to this collection of information would 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

Section 725 of the Dodd-Frank Act and proposed regulations require each

<sup>48</sup> "Policy Statement and Establishment of Definitions of 'Small Entities' for Purposes of the Regulatory Flexibility Act," 47 FR 18618 (Apr. 30, 1982).

<sup>50</sup> See "A New Regulatory Framework for Clearing Organizations," 66 FR 45604, 45609 (Aug. 29, 2001).

<sup>51</sup> 44 U.S.C. 3501 *et seq.*

<sup>48</sup> 5 U.S.C. 601 *et seq.*



respondent to file an annual report with the Commission. Commission staff estimates that each respondent would expend 40–80 hours to prepare each annual report, depending on the size of the DCO. Commission staff estimates that respondents could expend \$4,000 to \$8,000 annually, based on an hourly cost of \$100, to comply with the proposed regulations.

The proposed regulations also require each respondent to retain certain records. Each respondent must retain: (1) A copy of the policies and procedures adopted in furtherance of compliance with the CEA; (2) copies of materials, including written reports provided to the board of directors in connection with the board's review of the annual report; and (3) any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are (a) created, sent or received in connection with the annual report and (b) contain conclusions, opinions, analyses, or financial data related to the annual report. Staff believes the cost of keeping these electronic documents will not exceed more than \$1000 annually.

## 2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

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](mailto: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](http://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 most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

## C. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>52</sup> requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its action. Section 15(a) further specifies that the 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. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

## Summary of Proposed Requirements

Proposed amendments to part 39 of the Commission's regulations would establish the regulatory standards for compliance with DCO core principles regarding compliance, rule enforcement, antitrust, and legal risk, as well as CCO requirements set forth in Section 5b of the CEA. The proposed amendments to part 39 also would revise procedures for DCO applications, clarify procedures for the transfer of a DCO registration, and add requirements for approval of DCO rules establishing a portfolio margining program for customer accounts carried by an FCM/BD.

## Costs

The Commission has determined that the cost to market participants and the

public if these rules are not adopted could be substantial. Significantly, without these rules to promote a culture of institutional ethics and compliance, sound risk management and the financial integrity of the futures markets would not be strengthened, to the detriment of market participants and the public. Moreover, competitiveness would be affected without the prohibition against DCO rules and other actions that would result in unreasonable restraints of trade or material, anticompetitive burdens.

## Benefits

With respect to benefits, the Commission has determined that the benefits of the proposed rules are many and substantial. DCO registration applications will be processed transparently and efficiently, making clearing services available to the futures and swap markets, in order to protect the integrity of these markets through the sound risk management practices associated with clearing and the efficiency that competition between clearinghouses will foster. The protection of market participants, financial integrity of the markets, and sound risk management will further be promoted by the compliance of each DCO with the rules and standards that are being adopted to implement the core principles, notably those associated with conflicts of interest, portfolio margining, financial safeguards, and legal certainty regarding margin, member defaults, settlement and funds transfers, and conflicts of law.

*Public Comment.* 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

### 17 CFR Part 1

Definitions, Commodity futures, and Swaps.

### 17 CFR Part 39

Definitions, Commodity futures, Reporting and recordkeeping requirements, and Swaps.

In light of the foregoing, the Commission hereby proposes to amend parts 1 and 39 of Title 17 of the Code of Federal Regulations as follows:

<sup>52</sup> 7 U.S.C. 19(a).

## PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

### Authority and Issuance

1. The authority for part 1 is revised to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

2. Amend § 1.3 by revising paragraphs (c), (d), and (k), and adding paragraphs (jjj), (kkk), (lll), (mmm), (nnn), and (ooo) to read as follows:

### § 1.3 Definitions.

\* \* \* \* \*

(c) *Clearing member*. This term means any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization.

(d) *Clearing organization or derivatives clearing organization*. This term means a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to an agreement, contract, or transaction—

(1) Enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties;

(2) Arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the derivatives clearing organization; or

(3) Otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the participants.

(4) Exclusions. The terms *clearing organization* and *derivatives clearing organization* do not include an entity, facility, system, or organization solely because it arranges or provides for—

(i) Settlement, netting, or novation of obligations resulting from agreements, contracts or transactions, on a bilateral basis and without a central counterparty;

(ii) Settlement or netting of cash payments through an interbank payment system; or

(iii) Settlement, netting, or novation of obligations resulting from a sale of a commodity in a transaction in the spot market for the commodity.

\* \* \* \* \*

(k) *Customer; commodity customer; swap customer*. These terms have the same meaning and refer to a customer trading in any commodity named in the definition of commodity herein, or in any swap as defined in section 1a(47) of the Act: *Provided, however*, an owner or holder of a proprietary account as defined in paragraph (y) of this section shall not be deemed to be a customer within the meaning of section 4d of the Act, the regulations that implement sections 4d and 4f of the Act and § 1.35, and such an owner or holder of such a proprietary account shall otherwise be deemed to be a customer within the meaning of the Act and §§ 1.37 and 1.46 and all other sections of these rules, regulations, and orders which do not implement sections 4d and 4f of the Act.

\* \* \* \* \*

(jjj) *Clearing initial margin*. This term means initial margin posted by a clearing member with a derivatives clearing organization.

(kkk) *Customer initial margin*. This term means initial margin posted by a customer with a futures commission merchant, or by a non-clearing member futures commission merchant with a clearing member.

(lll) *Initial margin*. This term means money, securities, or property posted by a party to a futures, option, or swap as performance bond to cover potential future exposures arising from changes in the market value of the position.

(mmm) *Margin call*. This term means a request from a futures commission merchant to a customer to post customer initial margin; or a request by a derivatives clearing organization to a clearing member to post clearing initial margin or variation margin.

(nnn) *Spread margin*. This term means reduced initial margin that takes into account correlations between certain related positions held in a single account.

(ooo) *Variation margin*. This term means a payment made by a party to a futures, option, or swap to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

## PART 39—DERIVATIVES CLEARING ORGANIZATIONS

### Authority and Issuance

3. The authority for part 39 is revised to read as follows:

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

4. Amend § 39.1 by:

a. Redesignating the existing text as paragraph (a);

b. Adding a new heading to newly designated paragraph (a); and

c. Adding a new paragraph (b) to read as follows:

### § 39.1 Scope and Definitions.

(a) *Scope*. \* \* \*

(b) *Definitions*. For the purposes of this part,

*Back test* means a test that compares a derivatives clearing organization's initial margin requirements with historical price changes to determine the extent of actual margin coverage.

*Compliance policies and procedures* means all policies, procedures, codes, including a code of ethics, safeguards, rules, programs, and internal controls that are required to be adopted or established by a derivatives clearing organization pursuant to the Act, Commission regulations, or orders, or that otherwise facilitate compliance with the Act and Commission regulations.

*Customer account or customer origin* means a clearing member's account held on behalf of customers, as defined in § 1.3(k) of this chapter. A customer account is also a futures account, as that term is defined by § 1.3(vv) of this chapter.

*House account or house origin* means a clearing member's combined proprietary accounts, as defined in § 1.3(y) of this chapter.

*Key personnel* means derivatives clearing organization personnel who play a significant role in the operations of the derivatives clearing organization, the provision of clearing and settlement services, risk management, or oversight of compliance with the Act and Commission regulations and orders. Key personnel include, but are not limited to, those persons who are or perform the functions of any of the following: chief executive officer; president; chief compliance officer; chief operating officer; chief risk officer; chief financial officer; chief technology officer; and emergency contacts or persons who are responsible for business continuity or disaster recovery planning or program execution.

*Stress test* means a test that compares the impact of a potential price move, change in option volatility, or change in other inputs that affect the value of a position, to the financial resources of a derivatives clearing organization, clearing member, or large trader, to

determine the adequacy of such financial resources.

*Systemically important derivatives clearing organization* means a financial market utility that is a derivatives clearing organization registered under section 5b of the Act (7 U.S.C. 7a-1), which has been designated by the Financial Stability Oversight Council to be systemically important.

5. Amend § 39.3 by revising paragraph (a)(1), removing paragraph (a)(3), removing and reserving paragraph (b), revising paragraphs (c), (e), (f), and (g)(1), and adding paragraph (h) to read as follows:

**§ 39.3 Procedures for registration.**

(a) \* \* \*

(1) An organization desiring to be registered as a derivatives clearing organization shall file electronically an application for registration with the Secretary of the Commission in the form and manner provided by the Commission. The Commission will review the application for registration as a derivatives clearing organization pursuant to the 180-day timeframe and procedures specified in section 6(a) of the Act. The Commission may approve or deny the application or, if deemed appropriate, register the applicant as a derivatives clearing organization subject to conditions.

\* \* \*

(b) [Reserved].

(c) *Withdrawal of application for registration.* An applicant for registration may withdraw its application submitted pursuant to paragraph (a) of this section by filing electronically such a request with the Secretary of the Commission in the form and manner provided by the Commission. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application for registration was pending with the Commission.

\* \* \* \* \*

(e) *Reinstatement of dormant registration.* Before listing or relisting contracts for clearing, a dormant registered derivatives clearing organization as defined in § 40.1 of this chapter must reinstate its registration under the procedures of paragraph (a) of this section; *provided, however*, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(f) *Request for vacation of registration.* A registered derivatives clearing organization may vacate its registration under section 7 of the Act by filing

electronically such a request with the Secretary of the Commission in the form and manner provided by the Commission. Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the facility was registered by the Commission.

(g) \* \* \*

(1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight or the Director's designee, with the concurrence of the General Counsel or the General Counsel's designee, the authority to notify an applicant seeking designation under section 6(a) of the Act that the application is materially incomplete and the running of the 180-day period is stayed.

\* \* \* \* \*

(h) *Request for transfer of registration and open interest.* (1) In anticipation of a corporate change that will result in the transfer of all or substantially all of a derivatives clearing organization's assets to another legal entity, the derivatives clearing organization shall submit a request for approval to transfer the derivatives clearing organization's registration and positions comprising open interest for clearing and settlement.

(2) *Timing of submission and other procedural requirements.* (i) The request shall be submitted no later than three months prior to the anticipated corporate change, or as otherwise permitted under § 39.19(c)(4)(x)(C) of this part.

(ii) The derivatives clearing organization shall submit a request for transfer by filing electronically such a request with the Secretary of the Commission in the form and manner provided by the Commission.

(iii) The derivatives clearing organization shall submit a confirmation of change report pursuant to § 39.19(c)(4)(x)(D) of this part.

(3) *Required information.* The request shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A narrative description of the corporate change, including the reason for the change and its impact on the derivatives clearing organization's financial resources, governance, and operations, and its impact on the rights and obligations of clearing members and market participants holding the positions that comprise the derivatives clearing organization's open interest;

(iii) A discussion of the transferee's ability to comply with the Act,

including the core principles applicable to derivatives clearing organizations, and the Commission's regulations thereunder;

(iv) The governing documents of the transferee, including but not limited to articles of incorporation and bylaws;

(v) The transferee's rules marked to show changes from the current rules of the derivatives clearing organization;

(vi) A list of contracts, agreements, transactions or swaps for which the DCO requests transfer of open interest;

(vii) A representation by the derivatives clearing organization that it is in compliance with the Act, including the core principles applicable to derivatives clearing organizations, and the Commission's regulations thereunder; and

(viii) A representation by the transferee that it understands that the derivatives clearing organization is a regulated entity that must comply with the Act, including the core principles applicable to derivatives clearing organizations, and the Commission's regulations thereunder, in order to maintain its registration as a derivatives clearing organization; *and further*, that the transferee will continue to comply with all self-regulatory requirements applicable to a derivatives clearing organization under the Act and the Commission's regulations thereunder.

(4) *Commission determination.* The Commission will review a request as soon as practicable, and based on the Commission's determination as to the transferee's ability to continue to operate the DCO in compliance with the Act and the Commission's regulations thereunder, such request will be approved or denied pursuant to a Commission order.

6. Amend § 39.4 by revising paragraph (c)(2) and adding paragraph (e) to read as follows:

**§ 39.4 Procedures for implementing derivatives clearing organization rules and clearing new products.**

\* \* \* \* \*

(c) \* \* \*

(2) *Acceptance of certain new products for clearing.* A derivatives clearing organization that accepts for clearing a new product that is not traded on a designated contract market or a registered swap execution facility must submit to the Commission any rules establishing the terms and conditions of the product that make it acceptable for clearing with a certification that the clearing of the product and the rules and terms and conditions comply with the Act and the rules thereunder

pursuant to the procedures of § 40.2 of this chapter.

\* \* \* \* \*

(e) *Holding securities in a futures portfolio margining account.* A derivatives clearing organization seeking to provide a portfolio margining program under which securities would be held in a futures account as defined in § 1.3(vv) of this chapter, shall submit rules to implement such portfolio margining program for Commission approval in accordance with § 40.5 of this chapter. Concurrent with the submission of such rules for Commission approval, the derivatives clearing organization shall petition the Commission for an order under section 4d of the Act.

7. Add § 39.10 to read as follows:

**§ 39.10 Compliance with Core Principles.**

(a) To be registered and to maintain registration as a derivatives clearing organization, a derivatives clearing organization shall comply with each core principle set forth in section 5b(c)(2) of the Act and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act; and

(b) Subject to any rule or regulation prescribed by the Commission, a registered derivatives clearing organization shall have reasonable discretion in establishing the manner by which it complies with each core principle.

(c) *Chief Compliance Officer.* (1) *Designation.* Each derivatives clearing organization shall establish the position of chief compliance officer, designate an individual to serve as the chief compliance officer, and provide the chief compliance officer with the full responsibility and authority to develop and enforce, in consultation with the board of directors or the senior officer, appropriate compliance policies and procedures, as defined in § 39.1(b), to fulfill the duties set forth in the Act and Commission regulations.

(i) The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual who would be disqualified from registration under sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(ii) The chief compliance officer shall report to the board of directors or the senior officer of the derivatives clearing organization. The board of directors or the senior officer shall approve the compensation of the chief compliance officer.

(iii) The chief compliance officer shall meet with the board of directors or the

senior officer at least once a year to discuss the effectiveness of the compliance policies and procedures, as well as the administration of those policies and procedures by the chief compliance officer.

(iv) A change in the designation of the individual serving as the chief compliance officer of the derivatives clearing organization shall be reported to the Commission in accordance with the requirements of § 39.19(c)(4)(xi) of this part.

(2) *Chief Compliance Officer Duties.* The chief compliance officer's duties shall include, but are not limited to:

(i) Reviewing the derivatives clearing organization's compliance with the core principles set forth in section 5b of the Act (7 U.S.C. 7a–1), and the Commission's regulations thereunder;

(ii) In consultation with the board of directors or the senior officer, resolving any conflicts of interest that may arise;

(iii) Administering each policy and procedure that is required under section 5b of the Act (7 U.S.C. 7a–1);

(iv) Ensuring compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations prescribed under section 5b of the Act (7 U.S.C. 7a–1);

(v) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through any compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(vi) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues; and

(vii) Establishing a compliance manual designed to promote compliance with the applicable laws, rules, and regulations and a code of ethics designed to prevent ethical violations and to promote ethical conduct.

(3) *Annual report.* The chief compliance officer shall, not less than annually, prepare and sign a written report that covers the most recently completed fiscal year of the derivatives clearing organization, and provide the annual report to the board of directors or the senior officer. The annual report shall, at a minimum:

(i) Contain a description of the derivatives clearing organization's compliance with respect to the Act and Commission regulations, and each of the derivative clearing organization's compliance policies and procedures, including the code of ethics and conflict of interest policies;

(ii) Review each core principle, and with respect to each:

(A) Identify the compliance policies and procedures that ensure compliance with the core principle;

(B) Provide an assessment as to the effectiveness of these policies and procedures;

(C) Discuss areas for improvement, and recommend potential or prospective changes or improvements to the DCO's compliance program and resources allocated to compliance;

(iii) List any material changes to compliance policies and procedures since the last annual report;

(iv) Describe the financial, managerial, and operational resources set aside for compliance with the Act and Commission regulations;

(v) Describe any material compliance matters, including incidents of noncompliance, since the date of the last annual report and describe the corresponding action taken; and

(vi) Delineate the roles and responsibilities of the DCO's board of directors, relevant board committees, and staff in addressing any conflict of interest, including any necessary coordination with, or notification of, other entities, including regulators.

(4) *Submission of Annual Report to the Commission.* (i) Prior to submitting the annual report to the Commission, the chief compliance officer shall provide the annual report to the board of directors or the senior officer of the derivatives clearing organization for review. Submission of the report to the board of directors or the senior officer shall be recorded in the board minutes or otherwise, as evidence of compliance with this requirement.

(ii) The annual report shall be submitted electronically to the Commission not more than 90 days after the end of the derivatives clearing organization's fiscal year, concurrently with submission of the fiscal year-end audited financial statement that is required to be furnished to the Commission pursuant to § 39.19(c)(3)(ii) of this part. The report shall include a certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual report is accurate and complete.

(iii) The derivatives clearing organization shall promptly submit an amended annual report if material errors or omissions in the report are identified after submission. An amendment must contain the certification required under subparagraph (c)(4)(ii) of this section.

(iv) A derivatives clearing organization may request from the Commission an extension of time to

submit its annual report in accordance with § 39.19(c)(3) of this part.

(5) *Recordkeeping.* (i) The derivatives clearing organization shall maintain:

(A) A copy of the compliance policies and procedures, as defined in § 39.1(b), and all other policies and procedures adopted in furtherance of compliance with the Act and Commission regulations;

(B) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (c)(4)(i) of this section; and

(C) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are created, sent, or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report.

(ii) The derivatives clearing organization shall maintain records in accordance with § 1.31 of this chapter and § 39.20 of this part.

8. Add § 39.17 to read as follows:

**§ 39.17 Rule enforcement requirements.**

(a) *In general.* Each derivatives clearing organization shall: (1) Maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with the rules of the derivatives clearing organization and the resolution of disputes;

(2) Have the authority and ability to discipline, limit, suspend, or terminate the activities of a clearing member due to a violation by the clearing member of any rule of the derivatives clearing organization; and

(3) Report to the Commission regarding rule enforcement activities and sanctions imposed against clearing members as provided in paragraph (a) (2) of this section, in accordance with § 39.19(c)(4)(xiii) of this part.

(b) *Authority to enforce rules.* The board of directors of the derivatives clearing organization may delegate responsibility for compliance with the requirements of paragraph (a) of this section to the Risk Management Committee, unless the responsibilities are otherwise required to be carried out by the chief compliance officer pursuant to the Act or this part.

9. Add § 39.23 to read as follows:

**§ 39.23 Antitrust considerations.**

Unless necessary or appropriate to achieve the purposes of the Act, a derivatives clearing organization shall

not adopt any rule or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden.

10. Add § 39.27 to read as follows:

**§ 39.27 Legal risk considerations.**

(a) *Legal Authorization.* A derivatives clearing organization shall be duly organized, legally authorized to conduct business, and remain in good standing at all times in the relevant jurisdictions. If the derivatives clearing organization provides clearing services outside the United States, it shall be duly organized to conduct business and remain in good standing at all times in the relevant jurisdictions, and be authorized by the appropriate foreign licensing authority.

(b) *Legal framework.* A derivatives clearing organization shall operate pursuant to a well-founded, transparent, and enforceable legal framework that addresses each aspect of the activities of the derivatives clearing organization. As applicable, the framework shall provide for:

(1) The derivatives clearing organization to act as a counterparty, including novation;

(2) Netting arrangements;

(3) The derivatives clearing organization's interest in collateral;

(4) The steps that a derivatives clearing organization would take to address a default of a clearing member, including but not limited to, the unimpeded ability to liquidate collateral and close out or transfer positions in a timely manner;

(5) Finality of settlement and funds transfers that are irrevocable and unconditional when effected (when a derivatives clearing organization's accounts are debited and credited); and

(6) Other significant aspects of the derivatives clearing organization's operations, risk management procedures, and related requirements.

(c) *Conflict of Laws.* If a derivatives clearing organization provides clearing services outside the United States:

(1) The derivatives clearing organization shall identify and address any conflict of law issues. The derivatives clearing organization's contractual agreements shall specify a choice of law.

(2) The derivatives clearing organization shall be able to demonstrate the enforceability of its choice of law in relevant jurisdictions and that its rules, procedures, and contracts are enforceable in all relevant jurisdictions.

Issued in Washington, DC, on December 1, 2010 by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

**Appendices to General Regulations and Derivatives Clearing Organizations—Commission Voting Summary and Statement of Chairman Gary Gensler**

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

**Appendix 1—Commission Voting Summary**

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2—Statement of Chairman Gary Gensler**

I support the proposed rule on legal and compliance matters for clearinghouses, which would revise procedures for derivatives clearing organization (DCO) applications, clarify procedures for the transfer of a DCO registration and add requirements for approval of DCO rules for portfolio margining of futures and securities in a futures account.

The rule is intended to ensure that sufficient resources are devoted to compliance with laws and regulations, which is a core component of sound risk management practices. It would fulfill the Dodd-Frank Act's requirement that each DCO have a chief compliance officer who is responsible for establishing and administering compliance policies, as well as resolving certain conflicts of interest.

Finally, the proposed rulemaking would implement DCO Core Principles for compliance, rule enforcement, antitrust consideration and legal risk, which would promote compliance with the CEA and would enhance the integrity of the clearing and settlement process.

[FR Doc. 2010-31029 Filed 12-10-10; 8:45 am]

**BILLING CODE 6351-01-P**

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Part 30**

**RIN 3038-AC54**

**Foreign Futures and Options Contracts on a Non-Narrow-Based Security Index; Commission Certification Procedures**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Currently, a security index futures contract traded on, or subject to the rules of, a foreign board of trade may be offered or sold to persons located within the United States pursuant to a