

(Lat. 43°34'56" N., long. 71°12'06" W.)

Point in Space Coordinates

(Lat. 43°35'15" N., long. 71°11'19" W.)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of the Point in Space Coordinates (lat. 43°35'15" N., long. 71°11'19" W.) serving the Huggins Hospital.

Issued in College Park, Georgia, on July 13, 2010.

**Mark D. Ward,**

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

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**BILLING CODE 4910-13-P**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Parts 38, 39, and 40

RIN 3038-AC91

### Business Continuity and Disaster Recovery

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission ("CFTC" or "Commission") is proposing a rule that would establish standards for recovery and resumption of trading and clearing operations by designated contract markets ("DCMs") and registered derivatives clearing organizations ("DCOs") that the Commission determines to be critical financial markets or core clearing and settlement organizations in the event of a wide-scale disruption affecting such entities' trading or clearing operations. These proposed standards would require such entities to maintain business continuity and disaster recovery resources sufficient to meet a same-day recovery time objective for trading and clearing, and maintain geographic dispersal of infrastructure and personnel sufficient to enable achievement of a same-day recovery time objective, in the event of a wide-scale disruption. The proposed amendments also revise application guidance and acceptable practices under the Core Principles for DCMs relating to business continuity and disaster recovery matters that would harmonize acceptable practices for DCMs and DCOs.

**DATES:** Comments must be received on or before August 23, 2010.

**ADDRESSES:** Comments should be sent to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments may

be submitted via e-mail at [BCDR@cftc.gov](mailto:BCDR@cftc.gov). "Business Continuity and Disaster Recovery" must be in the subject field of responses submitted via e-mail, and clearly indicated on written submissions. Comments may also be submitted at <http://www.regulations.gov>. All comments must be submitted in English, or if not, accompanied by an English translation.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### A. Introduction

While the experience of the Commission is that DCMs and DCOs registered with it maintain adequate business continuity and disaster recovery ("BC-DR") programs, the Commission believes that additional regulatory steps should be taken to further improve the resiliency and recovery capabilities of registered entities, particularly those organizations which meet the financial sector's accepted definitions of "critical financial markets" and "core clearing and settlement organizations."<sup>1</sup> These accepted definitions come from the *Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System*, commonly known as the "White Paper," that was issued by the Board of Governors of the Federal Reserve System ("Fed"), the Department of the Treasury ("Treasury"), and the Securities and Exchange Commission ("SEC") in 2003.<sup>2</sup> Although the Commission did not participate in the issuance of the White Paper, the Commission has determined that it would be appropriate to apply standards

<sup>1</sup> See *infra* note 2.

<sup>2</sup> 68 FR 17809 (April 11, 2003). The White Paper considers new risks present in the post-September 11 environment, addresses steps needed to strengthen the overall resilience of the U.S. financial system in the event of a wide-scale disruption, and is the principal source of common business continuity and disaster recovery standards applicable across the U.S. financial sector.

analogous to those set forth in the White Paper to DCMs and DCOs.<sup>3</sup>

#### B. Standards Established by Regulators of Comparable Financial Entities

The White Paper explained that critical financial markets are those markets that provide the means for financial institutions to adjust their cash and securities positions and those of their customers in order to manage liquidity, market, and other risks to their organizations, and provide support for the provision of a wide range of financial services to U.S. businesses and consumers. The White Paper defined "critical financial markets" as "markets for [(1)] federal funds, foreign exchange, and commercial paper; [(2)] U.S. government and agency securities; and [(3)] corporate debt and equity securities."<sup>4</sup> "Core clearing and settlement organizations" are those that (a) provide clearing and settlement services for critical financial markets, or (b) act as large-value payment systems operators and present systemic risk should they be unable to perform.<sup>5</sup> This proposal would apply these White Paper standards to futures markets related to the aforementioned instruments and extend it to futures markets for essential physical commodities.

The Commission believes that some of the registered entities regulated by the Commission may be "critical financial markets" or "core clearing and settlement organizations." They provide the means for financial institutions to adjust their financial positions and those of their customers in order to manage liquidity, market, and other risks, and provide support for provision of a wide range of financial services to U.S. businesses and consumers. Their products include futures on U.S. government and agency securities, equity indexes, foreign exchange and physical commodities that comprise critical components of the world financial system. For these reasons, it might present unacceptable risks to the U.S. financial system if these entities were to become inoperative and unavailable for an extended period of time for any reason up to and including a wide-scale disruption. The ability of critical financial markets and core clearing and settlement organizations to recover and resume trading and clearing promptly in the event of a wide-scale

<sup>3</sup> Because there are no Derivatives Transaction Facilities ("DTEFs") currently registered with the Commission, the Commission has chosen to refrain from similarly modifying any regulations or guidance applicable to DTEFs at this time.

<sup>4</sup> See 68 FR at 17811.

<sup>5</sup> See *id.* at 17811.

disruption is important to the U.S. economy.

The White Paper calls for core clearing and settlement organizations to have the capacity to meet a same-day recovery time objective ("RTO"); that is, the capacity to recover and resume clearing and settlement activities within the business day on which the disruption occurs.<sup>6</sup> Further, the White Paper recognizes that the ability to meet a same-day RTO during a wide-scale disruption requires an appropriate level of geographic diversity between primary and backup sites, with the latter as far away as necessary to avoid being subject to the same set of risks as the primary site. Backup sites should not rely on the same transportation, telecommunications, power, water, or other critical infrastructure components as the primary location. In addition, operation of the backup site should not be impaired by a wide-scale evacuation at, or the inaccessibility of staff that service, the primary site. Therefore, the White Paper calls for core clearing and settlement organizations to maintain backup facilities that are a significant distance away from their primary facilities, a distance sufficient to address the risk that a wide-scale disruption could make the organization's labor pool across the entire metropolitan or other geographic area of the primary site (including adjacent communities economically integrated with it) unavailable to support achievement of the organization's RTO.<sup>7</sup>

While the White Paper defines critical financial markets, it establishes an RTO only for core clearing and settlement organizations. The *Policy Statement: Business Continuity Planning for Trading Markets* issued by the Securities and Exchange Commission ("SEC Policy Statement") establishes an RTO and a geographic dispersal of disaster recovery resources requirement for U.S. securities markets.<sup>8</sup> The SEC Policy Statement recognizes that U.S. securities markets collectively constitute critical financial markets. It establishes a next-day, rather than same-day, RTO for securities markets because securities trading is "relatively fungible across markets," since most securities are traded on more than one market.<sup>9</sup> As a result, if trading on one securities

market were incapacitated, that trading could be shifted to one or more of the other securities markets. By contrast, trading of futures is generally not fungible across markets. The geographic dispersal requirement for securities markets set in the SEC Policy Statement is the same as that set forth in the White Paper for core clearing and settlement organizations.

### C. Applicable Provisions of the Commodity Exchange Act

The Commodity Exchange Act ("CEA" or "Act") provides for the protection of the "public interest" through a system of effective self-regulation of trading facilities, clearing systems and markets participants under Commission oversight. As specifically set forth in the Act, ensuring the integrity of the futures markets and the avoidance of systemic risk are critical functions of the Commission.<sup>10</sup> Accordingly, the Commission believes that this proposal relating to BC-DR standards is essential for the proper functioning of the futures markets and the U.S. financial system.

The BC-DR requirements currently applicable to DCMs are set forth in Core Principle 6, *Emergency Authority* ("Core Principle 6"),<sup>11</sup> Core Principle 9, *Execution of Transactions* ("Core Principle 9"),<sup>12</sup> and Part 38 of the Commission's Regulations. The BC-DR requirements currently applicable to DCOs are set forth in Core Principle I, *System Safeguards* ("Core Principle I")<sup>13</sup> and Part 39 of the Commission's Regulations. Pursuant to these provisions, DCMs and DCOs are required to have appropriate emergency authority, emergency procedures, backup facilities, and disaster recovery plans. Such entities must also ensure the proper functioning, adequate capacity, and security of their automated trading and clearing systems, and conduct adequate testing and review of those systems.

With respect to DCMs, Core Principle 6, *Emergency Authority*, requires DCMs to adopt rules providing for the exercise of emergency authority. The Application Guidance set forth in Appendix B to Part 38 of the Commission's Regulations relating to Core Principle 6 notes that this authority should allow the DCM to

"intervene as necessary to maintain markets with fair and orderly trading as well as procedures for carrying out the intervention."<sup>14</sup> Core Principle 9, *Execution of Transactions*, also requires DCMs to "provide a competitive, open, and efficient market and mechanism for executing transactions." Consistent with Core Principle 9, DCMs are required to periodically test and review automated systems to ensure proper system functioning, adequate capacity, and security.<sup>15</sup>

With respect to DCOs, Core Principle I, *System Safeguards*, requires DCOs to maintain "a program of oversight and risk analysis to ensure that the automated systems of the [DCO] function properly and have adequate capacity and security." It also requires DCOs to "maintain emergency procedures and a plan for disaster recovery, and to periodically test backup facilities sufficient to ensure daily processing, clearing, and settlement of transactions."<sup>16</sup>

In the near-decade that has passed since the Act's Core Principles were established by the Commodity Futures Modernization Act of 2000 ("CFMA"),<sup>17</sup> historical events have resulted in substantial and important changes in BC-DR standards for financial sector organizations. The events of September 11, 2001, the Northeast regional power outages of 2003, the economic events of 2008-2009, and the current rise in cyber threats have resulted in important lessons learned, and in changed thinking about how normal financial institution operations could be disrupted, and the preparedness principles that should be followed to ensure the financial sector's ability to recover and resume operations promptly after a disruption. In light of these developments, and of the vital importance of critical financial markets and core clearing and settlement organizations to the national economy, the Commission believes that the additional, new standards proposed for those DCMs and DCOs that the Commission may determine to be critical financial markets or core clearing and settlement organizations are essential to ensure the capacity of such entities to recover and resume operations promptly in the event they are affected by a wide-scale disruption.

<sup>6</sup> The White Paper also mentions, as an aspirational "overall goal," an RTO of two hours for core clearing and settlement organizations.

<sup>7</sup> See generally, White Paper, 68 FR at 17813.

<sup>8</sup> See 68 FR 56656 (October 1, 2003) (Release No. 34-48545; File No. S7-17-03).

<sup>9</sup> We understand that an exception to this general observation is the listing and trading of certain index option products that may be subject to exclusive licensing arrangements.

<sup>10</sup> Section 3(b), 7 U.S.C. 5(c). Congress gave the Commission broad authority in Section 8a(5) of the Act, 7 U.S.C. 12a(5), to make and promulgate rules, such as those contained in this Proposal, that are reasonably necessary to prevent disruptions to market integrity, ensure the financial integrity of futures and options transactions and promote the avoidance of systemic risk.

<sup>11</sup> 7 U.S.C. 7(d)(6).

<sup>12</sup> 7 U.S.C. 7(d)(9).

<sup>13</sup> 7 U.S.C. 7a-1(c)(2)(I).

<sup>14</sup> See Application Guidance set forth in Appendix B to Part 38 of the Commission's Regulations relating to Core Principle 6.

<sup>15</sup> See Application Guidance set forth in Appendix B to Part 38 of the Commission's Regulations relating to Core Principle 9.

<sup>16</sup> See Section 5b(c)(2)(I) of the Act, 7 U.S.C. 7a-1(c)(2)(I).

<sup>17</sup> See Public Law 106-554 (December 21, 2000).

The Commission also believes that, to better ensure the resiliency of futures and options trading and the ability of the industry to respond to current threats to its operations, the application guidance and acceptable practices language concerning BC-DR standards applicable to all DCMs should be updated and harmonized with the BC-DR standards applicable to DCOs. The proposed amendments to the existing BC-DR standards for all DCMs also seek to better explain those standards through the use of current terms of art with respect to BC-DR matters. The Commission believes the approach to BC-DR standards taken by the White Paper and the SEC Policy Statement, particularly with respect to the recovery time objective and geographic dispersal requirements needed to provide resiliency in the event of a wide-scale disruption, is appropriate for the Commission to take in adopting requirements applicable to registered entities that are critical financial markets or core clearing and settlement organizations.

The Commission believes that certain DCMs and DCOs may be critical financial markets or core clearing and settlement organizations. Some DCMs and DCOs provide the means for financial institutions to adjust their financial positions and those of their customers in order to manage liquidity, market, and other risks, and provide support for provision of a wide range of financial services to U.S. businesses and consumers. The available products include futures contracts and related options on U.S. government and agency securities, equity indexes, foreign exchange and physical commodities that comprise critical components of the world financial system. For these reasons, it might present unacceptable risks to the U.S. financial system if such DCMs or DCOs were to become inoperative and unavailable for an extended period of time for any reason up to and including a wide-scale disruption, and their ability to recover and resume trading and clearing promptly in the event of a wide-scale disruption may be critically important to the U.S. economy. Mitigating systemic risk through the application of consistent, same-day RTOs for clearing and settlement activities across the nation's critical financial markets in the event of a wide-scale disruption may be important to financial sector resiliency. Sufficient geographic dispersal of BC-DR resources, including both technology and personnel, is an essential means of ensuring that critical financial markets and core clearing and settlement

organizations have the ability to recover and resume trading and clearing within a same-day RTO.

## II. Proposed New Regulation 40.9

The Commission proposes amendments to Part 40 of its Regulations as follows: (1) The addition of new definitions in Regulation 40.1; (2) adoption of new Regulation 40.9 setting forth same-day RTO and geographic dispersal requirements for critical financial markets and core clearing and settlement organizations; and (3) the adoption of new Appendix E providing guidance regarding the Commission's determination of critical financial markets and core clearing and settlement organizations. The Commission also proposes to amend the application guidance provided in Appendix B to Part 38 and Appendix A to Part 39 of the Commission's regulations to incorporate the new Part 40 requirements.

Five new definitions are proposed to be added to Regulation 40.1. The terms defined include "critical financial market," "core clearing and settlement organization," "relevant area," "recovery time objective," and "wide-scale disruption."

Proposed Regulation 40.1(j) would define "critical financial market" to mean a DCM that provides the means for financial institutions to adjust their financial positions and those of their customers in order to manage liquidity, market, and other risks to their organizations, and provides support for the provision of a wide range of financial services to businesses and consumers in the United States, particularly including markets whose trading impacts federal funds, foreign exchange, commercial paper, U.S. government and agency securities, corporate debt, equity securities, or physical commodities of broad, major importance to the national or international economy.

Proposed Regulation 40.1(k) would define "core clearing and settlement organization" as a DCO that provides clearing and settlement services integral to a critical financial market (or to multiple DCMs that are critical financial markets on a collective rather than individual basis).

Proposed Regulation 40.1(l) would define "relevant area," for the purposes of Part 40, as the metropolitan or other geographic area within which a critical financial market or core clearing and settlement organization has physical infrastructure or personnel necessary for it to, as appropriate, (a) conduct electronic trading, (b) disseminate market data and provide price reporting,

(c) conduct electronic surveillance and maintain access to audit trail information, or (d) conduct activities necessary to the clearance and settlement of existing and new contracts, including communities economically integrated with, adjacent to, or within normal commuting distance of that metropolitan or other geographic area.

Proposed Regulation 40.1(m) would define "recovery time objective" as the time period within which an entity should be able to achieve recovery and resumption of, as appropriate, (a) electronic trading, (b) market data dissemination and price reporting, (c) access to audit trail information and electronic surveillance tools, or (d) clearing and settlement of existing and new contracts, after those capabilities become temporarily inoperable for any reason up to or including a wide-scale disruption.

Proposed Regulation 40.1(n) would define "wide-scale disruption" to mean an event that causes a severe disruption or destruction of transportation, telecommunications, power, water, or other critical infrastructure components in a relevant area, or an event that results in the evacuation or unavailability of the population in a relevant area.

Proposed Regulation 40.9(a) would require any registered entity that the Commission determines is a critical financial market or core clearing and settlement organization to maintain a disaster recovery plan and BC-DR resources, including infrastructure and personnel, sufficient to enable it to achieve a same-day RTO in the event of a wide-scale disruption affecting the relevant area of any of its normal-use trading or clearing operations.

Proposed Regulation 40.9(b) would provide that a same-day RTO is one calling for recovery and resumption of trading and clearing within the business day on which the disruption occurs.<sup>18</sup>

Proposed Regulation 40.9(c) would set forth the minimal requirements for geographic dispersal of infrastructure and personnel needed to meet a same-day RTO. It would provide that infrastructure sufficient to enable a critical financial market or core clearing

<sup>18</sup> The same-day RTO is not intended to mandate the specific response of a particular entity to a particular disaster. Rather, the objective is intended to establish the recovery goal that the BC-DR plans of certain registrants must be designed to meet and, in turn, the resources that such registrants are expected to allocate to ensure that they are capable of achieving the objective. The Commission recognizes that a wide-scale disruption could occur near the close of a business day, and would interpret this requirement in a practical manner in such an event.

and settlement organization to meet a same-day recovery time objective after interruption of normal trading and clearing by a wide-scale disruption must be located outside the relevant area of the infrastructure the entity normally relies upon to (a) conduct electronic trading, (b) disseminate market data and provide price reporting, (c) conduct electronic surveillance and maintain access to audit trail information, or (d) conduct activities necessary to the clearance and settlement of existing and new contracts, and may not rely on the same critical transportation, telecommunications, power, water, or other critical infrastructure components as the infrastructure the entity normally relies upon for such activities. It would also provide that personnel sufficient to enable the critical financial market or core clearing and settlement organization to meet a same-day recovery time objective, after interruption of normal trading or clearing by a wide-scale disruption affecting the relevant area in which the personnel the entity normally relies upon to engage in such activities are located, must live and work outside that relevant area, so that they will not be made unavailable by a wide-scale evacuation or unavailability of personnel who live or work in that relevant area.

Proposed Regulation 40.9(d) would require every registered entity that the Commission determines is a critical financial market or core clearing and settlement organization to conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve a same-day RTO in the event of a wide-scale disruption.

New Appendix E to Part 40 would provide guidance on the process the Commission will follow, and the factors it will consider, to determine that a registered entity is a critical financial market or a core clearing and settlement organization. Appendix E would also describe the notice and opportunity for comment that the Commission would provide in this connection.

In connection with its proposal to adopt new Regulation 40.9, the Commission has also proposed conforming amendments to certain application guidance provisions of Commission Regulations relating to various Core Principles. Specifically, Appendix B to Part 38 and Appendix A to Part 39 are proposed to be amended to revise acceptable practices provisions under Core Principle 6 and Core Principle 9 in Part 38 and application guidance under Core Principle I in Part 39, to note that Proposed Regulation

40.9 would govern the obligations of registered entities that the Commission determines to be critical financial markets or core clearing and settlement organizations, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day RTO in the event of a wide-scale disruption. These proposed revisions would further note that, therefore, Proposed Regulation 40.9 itself would establish the application guidance and acceptable practices for core principle compliance relating to those matters set forth in Regulation 40.9.

As previously discussed, the Commission in this proposal would amend the acceptable practices provisions for Core Principle 9 set forth in Appendix B to Part 38, to harmonize the language of those provisions regarding BC-DR matters with the language of the parallel application guidance provisions for Core Principle I in Part 39. Moreover, the proposed revisions would also better explain the BC-DR standards currently applicable to DCMs. DCMs that have not been determined to be critical financial markets would be subject to the generally applicable BC-DR requirements set forth in these revisions, but would not be required to comply with the additional obligations imposed on critical markets by new Regulation 40.9. The Commission is aware that proposed legislation pending before Congress would amend the Act,<sup>19</sup> including certain portions that govern DCMs and DCOs.<sup>20</sup> At the time the Commission approved this proposed rulemaking, that legislation contained provisions that would create a new Core Principle 20, *System Safeguards*, explicitly setting forth BC-DR requirements for all DCMs. In the event that this pending legislation is enacted into law, the proposed application guidance and acceptable practices provisions relating to Core Principle 9 set forth below may be considered by the Commission in connection with creation of application guidance and acceptable practices provisions relating to Core Principle 20.

### III. Proposed Effective Date

The Commission requests comment on a reasonable date for the proposed amendments to become effective.

### IV. Solicitation of Comments

The Commission requests comments on all aspects of the proposed rule

amendments, including the question of what RTO (e.g., the proposed same-day RTO or the aspirational two-hour RTO also mentioned in the White Paper) is appropriate. As noted above, at the time that the Commission approved this proposal, legislation was pending before Congress that would amend the CEA. The Commission specifically requests comment on the effect, if any, the legislation would have on this proposal.

## V. Related Matters

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that Federal agencies, in proposing rules, consider the impact of those rules on small businesses.<sup>21</sup> New requirements related to the proposed rule amendments would fall on DCMs and DCOs which the Commission may determine to be critical financial markets or core clearing and settlement organizations. The Commission has previously determined that DCMs and DCOs are not small entities for purposes of the RFA.<sup>22</sup> Accordingly, the Commission does not expect the rules proposed herein to have a significant economic impact on any small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the actions proposed to be taken herein will not have a significant economic impact on a substantial number of small entities.

### B. Paperwork Reduction Act

These proposed rule amendments will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the Paperwork Reduction Act.<sup>23</sup> All recordkeeping or information collection requirements relevant to the subject of this proposed rulemaking, or discussed herein, already exist under current law. Accordingly, the Paperwork Reduction Act does not apply. The Commission invites public comment on the accuracy of its estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements would result from the amendments proposed herein.

### C. Cost-Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing a

<sup>21</sup> 5 U.S.C. 601 *et seq.*

<sup>22</sup> See 47 FR 18618 at 18619 (April 30, 1982) with respect to DCMs, and 66 FR 45604 at 45609 (August 29, 2001) with respect to DCOs.

<sup>23</sup> 44 U.S.C. 3501 *et seq.*

<sup>19</sup> 11 U.S.C. 1 *et seq.*

<sup>20</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

new regulation or order under the Act.<sup>24</sup> By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new rule or to determine whether the benefits of the adopted rule outweigh its costs. Rather, section 15(a) requires the Commission to “consider the costs and benefits” of a subject rule. Section 15(a) further specifies that the costs and benefits of proposed rules shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. In conducting its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may 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 to accomplish any of the purposes of the Act.<sup>25</sup>

As discussed above, the proposed rule amendments would require DCMs and DCOs that the Commission determines to be critical financial markets or core clearing and settlement organizations to (1) maintain business continuity and disaster recovery resources sufficient to meet a same-day RTO for trading and clearing, and (2) maintain geographic dispersal of infrastructure and personnel sufficient to enable achievement of a same-day RTO in the event of a wide-scale disruption. The Commission cannot fully quantify the costs that would be borne by such entities in complying with the proposed rule amendments, as the Commission has not yet determined which entities are critical financial markets or core clearing or settlement organizations. Moreover, the cost to comply with the proposed rule amendments would be likely to vary depending on the nature and location of infrastructure and personnel available to enable achievement of a same-day RTO that are presently maintained by each such entity.

Notwithstanding the potential costs that could be incurred by DCMs or DCOs that the Commission determines to be critical financial markets or core clearing and settlement organizations in complying with the proposed rule

amendments, the Commission believes the benefits of the proposed rule amendments are significant and important. The ability of critical financial markets and core clearing and settlement organizations to recover and resume trading and clearing promptly in the event of a wide-scale disruption is significant to the U.S. economy. Therefore, the proposed rule amendments may be crucially important to sound risk management practices for such markets, an area of concern that may deserve great weight in this connection. As such, they may be needed to protect market participants and ensure the continued efficiency, competitiveness, financial integrity, and price discovery function of such markets in the event of a wide-scale disruption. Accordingly, the Commission believes that the proposal is consistent with the Act and would serve to protect the public interest by promoting market integrity and the avoidance of systemic risk.

After considering the costs and benefits noted above, the Commission has determined to issue the proposed rule amendments. The Commission invites public comment on its application of the cost-benefit provision. Commenters are also invited to submit any data that they may have quantifying the costs and benefits of the proposed rule amendments with their comment letter.

## VI. Text of Proposed Amendments

### List of Subjects

#### 17 CFR Part 38

Commodity futures, Reporting and recordkeeping requirements.

#### 17 CFR Part 39

Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

#### 17 CFR Part 40

Commodity futures, Reporting and recordkeeping requirements.

In light of the foregoing, and pursuant to the authority in the Act, and in particular Sections 3, 5, 5c(a) and 8a(5) of the Act, the Commission hereby proposes to amend Parts 38, 39, and 40 of Title 17 of the Code of Federal Regulations as follows:

## PART 38—DESIGNATED CONTRACT MARKETS

1. The authority citation for part 38 continues to read as follows:

**Authority:** 7 U.S.C. 2, 5, 6, 6c, 7, 7a–2 and 12a, as amended by Appendix E of Pub. L. 106–554, 114 Stat. 2763A–365.

2. Amend Appendix B to Part 38 by revising paragraph (b) of Core Principle 6; and paragraph (a)(2) and paragraph (b) of Core Principle 9, to read as follows:

### Appendix B to Part 38—Guidance on, and Acceptable Practices in, Compliance With Core Principles

\* \* \* \* \*

Core Principle 6 of section 5(d) of the Act:  
*EMERGENCY AUTHORITY* \* \* \*

\* \* \* \* \*

(b) *Acceptable practices.* Commission Regulation 40.9 governs the obligations of designated contract markets that the Commission has determined to be critical financial markets with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Therefore, Regulation 40.9 itself establishes the guidance and acceptable practices for core principle compliance in that respect.

\* \* \* \* \*

Core Principle 9 of section 5(d) of the Act:  
*EXECUTION OF TRANSACTIONS* \* \* \*

\* \* \* \* \*

(a) \* \* \*

(2) The board of trade shall:

(i) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures;

(ii) Establish and maintain a program of regular, periodic testing to ensure that all automated systems used by the board of trade function properly and have adequate security and capacity; and

(iii) Establish and maintain emergency procedures, backup facilities, a disaster recovery plan, and regular, periodic testing to ensure timely recovery and resumption of order processing and trade matching, market data dissemination and price reporting, market and trade practice surveillance, and maintenance of a comprehensive and accurate audit trail.

\* \* \* \* \*

(b) *Acceptable practices.* (1) Testing and review of automated systems should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the board of trade, but should not be persons responsible for development or operation of the systems being tested. Pursuant to the provisions of Commission Regulations Sections 1.31 and 1.35, the board of trade must keep records of all such tests, and make all test results available to the Commission upon request.

(2) In fulfilling its obligations set forth in the Application Guidance above with respect to its automated systems, the board of trade should follow the guidelines issued by the International Organization of Securities Commissions (“IOSCO”) in 1990 (the “IOSCO Principles”), and adopted by the Commission on November 21, 1990 (55 FR 48670), as supplemented and amended, and any similar guidelines issued by the Commission or its staff.

<sup>24</sup> 7 U.S.C. 19(a).

<sup>25</sup> E.g., *Fishermen’s Dock Co-op., Inc. v. Brown*, 75 F.3d 164 (4th Cir. 1996); *Center for Auto Safety v. Peck*, 751 F.2d 1336 (DC Cir. 1985) (agency has discretion to weigh factors in undertaking cost-benefit analyses).

(3) Commission Regulation 40.9 governs the obligations of registered entities that the Commission has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Therefore, Regulation 40.9 itself establishes the guidance and acceptable practices for core principle compliance in that respect.

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**PART 39—DERIVATIVES CLEARING ORGANIZATIONS**

3. The authority citation for part 39 continues to read as follows:

**Authority:** 7 U.S.C. 7b as added by Appendix E of Pub. L. 106–554, 114 Stat. 2763A–365.

4. Amend Appendix A to Part 39 by adding a new paragraph 3 after paragraph 2.b. of the guidance under Core Principle I, as follows:

**Appendix A to Part 39—Application Guidance and Compliance With Core Principles**

\* \* \* \* \*

Core Principle I: SYSTEM SAFEGUARDS

\* \* \* \* \*

2. \* \* \*

b. \* \* \*

3. Commission Regulation 40.9 governs the obligations of derivatives clearing organizations that the Commission determines to be core clearing and settlement organizations, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Therefore, Regulation 40.9 itself establishes the guidance for core principle compliance in that respect.

\* \* \* \* \*

**PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES**

5. The authority citation for part 40 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a, 8 and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110–246, 122 Stat. 1624 (June 18, 2008).

6. Amend § 40.1 by adding paragraphs (j) through (n) to read as follows:

**§ 40.1 Definitions.**

\* \* \* \* \*

(j) *Critical financial market* means a designated contract market that provides the means for financial institutions to adjust their financial positions and those of their customers in order to manage liquidity, market, and other risks to their organizations, and provides support for the provision

of a wide range of financial services to businesses and consumers in the United States, particularly including markets whose trading impacts federal funds, foreign exchange, commercial paper, U.S. government and agency securities, corporate debt, equity securities, or physical commodities of broad, major importance to the national and international economy. Guidance as to how the Commission will determine whether a registered entity is a critical financial market is set forth in Appendix E to Part 40.

(k) *Core clearing and settlement organization* means a derivatives clearing organization that provides clearing and settlement services integral to a critical financial market (or to multiple designated contract markets that are critical financial markets on a collective rather than individual basis). Guidance as to how the Commission will determine whether a derivatives clearing organization is a core clearing and settlement organization is set forth in Appendix E to Part 40.

(l) *Relevant area* means the metropolitan or other geographic area within which a critical financial market or core clearing and settlement organization has physical infrastructure or personnel necessary for it to, as appropriate, conduct electronic trading, disseminate market data and provide price reporting, conduct electronic surveillance and maintain access to audit trail information, or conduct activities necessary to the clearance and settlement of existing and new contracts; including communities economically integrated with, adjacent to, or within normal commuting distance of that metropolitan or other geographic area.

(m) *Recovery time objective* means the time period within which an entity should be able to achieve recovery and resumption of, as appropriate, electronic trading, market data dissemination and price reporting, access to audit trail information and electronic surveillance tools, or clearing and settlement of existing and new contracts, after those capabilities become temporarily inoperable for any reason up to or including a wide-scale disruption.

(n) *Wide-scale disruption* means an event that causes a severe disruption or destruction of transportation, telecommunications, power, water, or other critical infrastructure components in a relevant area, or an event that results in an evacuation or unavailability of the population in a relevant area.

7. Add § 40.9 to read as follows:

**§ 40.9 Disaster recovery requirements for critical financial markets and core clearing and settlement organizations.**

(a) Each designated contract market or derivatives clearing organization that the Commission determines is a critical financial market or a core clearing and settlement organization must maintain a disaster recovery plan and business continuity and disaster recovery resources, including infrastructure and personnel, sufficient to enable it to achieve a same-day recovery time objective in the event that its normal trading or clearing and settlement capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

(b) A same-day recovery time objective is a recovery time objective within the same business day on which normal trading or clearing and settlement capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

(c) To ensure its ability to achieve a same-day recovery time objective in the event of a wide-scale disruption, each designated contract market or derivatives clearing organization that the Commission determines is a critical financial market or a core clearing and settlement organization must maintain a degree of geographic dispersal of both infrastructure and personnel such that:

(1) Infrastructure sufficient to enable the entity to meet a same-day recovery time objective after interruption of normal trading and clearing by a wide-scale disruption is located outside the relevant area of the infrastructure the entity normally relies upon to conduct electronic trading, disseminate market data and provide price reporting, conduct electronic surveillance and maintain access to audit trail information, or conduct activities necessary to the clearance and settlement of existing and new contracts, and does not rely on the same critical transportation, telecommunications, power, water, or other critical infrastructure components the entity normally relies upon for such activities; and

(2) Personnel sufficient to enable the entity to meet a same-day recovery time objective, after interruption of normal trading or clearing by a wide-scale disruption affecting the relevant area in which the personnel the entity normally relies upon to engage in such activities are located, live and work outside that relevant area.

(d) Each registered entity that the Commission determines is a critical financial market or core clearing and settlement organization must conduct

regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve a same-day recovery time objective in the event of a wide-scale disruption.

\* \* \* \* \*

8. Add Appendix E to Part 40 to read as follows:

**Appendix E to Part 40—Guidance on Critical Financial Market and Core Clearing and Settlement Organization Determination**

(a) *Critical financial market determination.* (1) The Commission may determine, in its discretion, whether a designated contract market is a critical financial market. In making such a determination, the Commission will evaluate each such entity on a case-by-case basis, giving consideration to whether the entity provides the means for financial institutions to adjust their financial positions and those of their customers in order to manage liquidity, market, and other risks to their organizations, and provides support for the provision of a wide range of financial services to businesses and consumers in the United States; or whether the entity conducts trading that impacts Federal funds, foreign exchange, commercial paper, U.S. government and agency securities, corporate debt, equity securities, or physical commodities of broad, major importance to the national and international economy. The Commission may also consider other relevant factors that it finds important.

(2) The Commission will notify the designated contract market that it intends to undertake a determination with respect to whether it is a critical financial market. The entity may provide written data, views, and arguments relevant to the Commission's determination. Any such written data, views, and arguments shall be filed with the Secretary of the Commission, in the form and manner specified by the Commission, within 30 calendar days of receiving notice or within such other time specified by the Commission. After prompt consideration of all relevant information, the Commission will issue an order directly to the designated contract market explaining the Commission's determination of whether it is a critical financial market as defined by § 40.1(j).

(b) *Core clearing and settlement organization determination.* (1) The Commission may determine, in its discretion, whether a derivatives clearing organization is a core clearing and settlement organization. In making such a determination, the Commission will evaluate each such entity on a case-by-case basis, giving consideration to whether the entity provides clearing and settlement services integral to a critical financial market (or to multiple designated contract markets that are critical financial markets on a collective rather than individual basis). The Commission may also consider other relevant factors that it finds important.

(2) The Commission will notify the derivatives clearing organization that it intends to undertake a determination with

respect to whether it is a core clearing and settlement organization. The entity may provide written data, views, and arguments relevant to the Commission's determination. Any such written data, views, and arguments shall be filed with the Secretary of the Commission, in the form and manner specified by the Commission, within 30 calendar days of receiving notice or within such other time specified by the Commission. After prompt consideration of all relevant information, the Commission will issue an order directly to the derivatives clearing organization explaining the Commission's determination of whether it is a core clearing and settlement organization as defined by § 40.1(k).

Issued in Washington, DC, on July 14, 2010, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010-17606 Filed 7-21-10; 8:45 am]

**BILLING CODE P**

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**SOCIAL SECURITY ADMINISTRATION**

**20 CFR Parts 404 and 416**

[Docket No. SSA-2007-0092]

RIN 0960-AG72

**Amendments to Procedures for Certain Determinations and Decisions**

**AGENCY:** Social Security Administration.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** We propose to revise the procedures for how claimants who request hearings before administrative law judges (ALJs) may seek further review of their fully favorable revised determinations based on prehearing case reviews or fully favorable attorney advisor decisions. We also propose to notify claimants who receive partially favorable determinations based on prehearing case reviews that an ALJ will still hold a hearing unless all parties to the hearing tell us in writing that we should dismiss the hearing requests. We expect that these changes will simplify the process and free up scarce administrative resources that we can better use to reduce the hearings level case backlog.

**DATES:** To ensure that your comments are considered, we must receive them no later than September 20, 2010.

**ADDRESSES:** You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA-2007-0092 so that we can associate your comments with the correct regulation:

*Caution:* You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend this method for submitting your comments. Visit the Federal eRulemaking portal at <http://www.regulations.gov>. Use the *Search* function of the Web page to find docket number SSA-2007-0092 and then submit your comment. Once you submit your comment, the system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately as we must manually post each comment. It may take up to a week for your comment to be viewable.

2. *Fax:* Fax comments to (410) 966-2830.

3. *Mail:* Address your comments to the Office of Regulations, Social Security Administration, 137 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235-6401.

Comments are available for public viewing on the Federal eRulemaking portal at <http://www.regulations.gov> or in person, during regular business hours, by arranging with the contact person identified below.

**FOR FURTHER INFORMATION CONTACT:** Joshua Silverman, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 594-2128. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

**SUPPLEMENTARY INFORMATION:**

**Electronic Version**

The electronic file of this document is available on the date of publication in the **Federal Register** at <http://www.gpoaccess.gov/fr/index.html>.

**Background**

In most cases, we decide claims for benefits using an administrative review process that consists of four levels: Initial determination, reconsideration, hearing, and appeal. 20 CFR 404.900 and 416.1400. We make an initial determination at the first level. A claimant who is dissatisfied with the initial determination may request