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Part III

## Commodity Futures Trading Commission

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17 CFR Parts 1, 4, 5, et al.

Adaptation of Regulations to Incorporate Swaps; Final Rule

## COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 4, 5, 7, 8, 15, 16, 18, 21, 22, 36, 38, 41, 140, 145, 155, and 166

RIN Number 3038-AD53

### Adaptation of Regulations To Incorporate Swaps

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rules.

**SUMMARY:** The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “DFA”) established a comprehensive new statutory framework for swaps and security-based swaps. The Dodd-Frank Act repeals some sections of the Commodity Exchange Act (“CEA” or “Act”), amends others, and adds a number of new provisions. The DFA also requires the Commodity Futures Trading Commission (“CFTC” or “Commission”) to promulgate a number of rules to implement the new framework. The Commission has proposed and finalized numerous rules to satisfy its obligations under the DFA. This rulemaking makes a number of conforming amendments to integrate the CFTC’s regulations more fully with the new framework created by the Dodd-Frank Act.

**DATES:** Effective January 2, 2013.

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## I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.<sup>1</sup> Title VII of the Dodd-Frank Act<sup>2</sup> (“Title

<sup>1</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 is available at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>2</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.”

VII”) amended the CEA<sup>3</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted, among other reasons, 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 (“SDs”), security-based swap dealers, major swap participants (“MSPs”), and major security-based swap participants; (2) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commissions with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.

To apply its regulatory regime to the swap activity of intermediaries, the Commission must make a number of changes to its regulations to conform them to the Dodd-Frank Act. On June 7, 2011, the Commission published in the **Federal Register** a proposal to make such changes (“the Proposal”).<sup>4</sup> There was a 60-day period for the public to comment on the Proposal, which ended on August 8, 2011. The Commission received 39 comment letters from a variety of institutions, including designated contract markets (“DCMs”), agricultural trade associations, and agricultural cooperatives.<sup>5</sup> The Commission has determined to adopt the proposed rules primarily in the form proposed with certain modifications, discussed below, to address the comments the Commission received. With respect to certain of the proposed changes to regulation 1.35<sup>6</sup> (regarding recording of oral communications and the scope of written communications) and related amendments to regulation 1.31, the Commission has determined to address those changes in a final rule in a separate release.

The Commission is mindful of, and continues to consider, the comments received on the Proposal’s amendments to regulation 1.35 (records of commodity interest and cash commodity transactions). Those comments were submitted by various groups, including DCMs, representatives of the FCM and IB communities, energy

<sup>3</sup> 7 U.S.C. 1 *et seq.* (2006).

<sup>4</sup> Adaptation of Regulations to Incorporate Swaps, 76 FR 33066 (June 7, 2011) (“Proposing Release”).

<sup>5</sup> Comment letters are available in the comment file on [www.cftc.gov](http://www.cftc.gov).

<sup>6</sup> All Commission regulations are in Chapter I of Title 17 of the CFR.

end-users, and agricultural trade associations and cooperatives.<sup>7</sup> These commenters focused primarily on: the proposed oral communications recordkeeping requirement, in general; the proposed requirement that all members of a DCM or SEF, including unregistered commercial end-users and non-intermediaries, keep records of the oral communications that lead to the execution of a cash commodity transaction; and the proposed requirement that each record be maintained in a separately identifiable electronic file identifiable by transaction and counterparty. Many of the comments were directed specifically toward narrowing the scope of the proposed changes to regulation 1.35 regarding recording of oral communications and written communications (and related amendments to regulation 1.31).

The amendments adopted by this rulemaking primarily affect part 1 of the Commission's regulations, but also affect parts 4, 5, 7, 8, 15, 16, 18, 21, 22, 36, 41, 140, 145, 155, and 166. This rulemaking contains amendments of three different types: ministerial, accommodating, and substantive. Many of the amendments are purely ministerial—for instance, several changes update definitions to conform them to the CEA as amended by the Dodd-Frank Act; add to the Commission's regulations new terms created by the Dodd-Frank Act; remove all regulations and references pertaining to derivatives transaction execution facilities ("DTEFs"), a category of trading facility added to the CEA by section 111 of the Commodity Futures Modernization Act of 2000 ("CFMA"),<sup>8</sup> which the DFA eliminated; correct various statutory cross-references to the CEA in the regulations; and remove

regulations in whole or in part that were rendered moot by the CFMA.

The accommodating amendments are essential to the implementation of the DFA in that they propose to add swaps, swap markets, and swap entities to numerous definitions and regulations, but are more than ministerial because they require some judgment in drafting. Accommodating amendments include, among other things, amending numerous definitions in regulation 1.3 to reference or include swaps; creating new definitions as necessary in regulation 1.3; amending recordkeeping requirements to include information on swap transactions; adding references to swaps and swap execution facilities ("SEFs") in various part 1 regulations; and amending parts 15, 18, 21, and 36 to implement the DFA's grandfathering and phase-out of exempt boards of trade and exempt commercial markets.

The substantive amendments are changes that align requirements or procedures across futures and swap markets. They consist of amendments to regulation 1.31 that harmonize some of the current part 1 recordkeeping requirements with some of those applicable to SDs and MSPs under part 23 regulations<sup>9</sup> and amend procedures pertaining to the post-execution allocation of bunched orders (regulation 1.35(a)). Under the amendments to the bunched orders provisions, "eligible account managers" can allocate such orders post-execution similarly to how they currently do so with futures.

To aid the public in understanding the numerous changes to different parts of the CFTC's regulations adopted by this release, the Commission will also publish on its Web site a "redline" of the affected regulations which will clearly reflect the additions and deletions.<sup>10</sup>

## II. Comments Received and Amended Regulations

### A. General Comments

Several commenters argued that the Proposal was premature because many other rules remained to be proposed and finalized,<sup>11</sup> and subsequent final

rulemakings may dictate which conforming amendments will be necessary. A joint letter by certain Electric Utility Trade Associations ("the ETA") contended that the incomplete nature of the swap regulatory regime renders it unable to "effectively comment," because it lacks a full understanding of the entire swap regulatory landscape. In the ETA's view, the "premature" nature of the Proposal rises to the level of a violation of the Administrative Procedures Act ("APA").<sup>12</sup> The ETA commented further that because the Proposal updated certain regulations by treating swaps equivalently to futures, the Proposal "represents a fundamental misunderstanding" of the executing electric industry swap market, and, consequently, should be withdrawn. The ETA also noted that, "[f]rom time to time, the Commission's staff has declined to consider whether nonfinancial commodity and related swap markets are indeed different in any meaningful way from other markets," and that the ETA "continues to urge the Commission to engage in a considered analysis of such differences and the implications of such differences for its rulemaking process." The CME Group ("CME") argued that the Commission should have waited to propose the voice and electronic recordkeeping requirements in regulation 1.35(a) until SEFs register, the Dodd-Frank Act clearing and exchange trading requirements take effect, and Dodd-Frank Act recordkeeping and reporting requirements take effect. The Electric Power Supply Association ("EPSA") commented that final rules defining swap, SD, and MSP must be published prior to proposing a rule conforming the Commission's regulations to the Dodd-Frank Act and related regulations. Therefore, EPSA argued, the Proposal should be withdrawn. Mr. Chris Barnard generally supported the Proposal, commenting that the proposed changes were either common sense or required by the DFA.

The Commission believes it was appropriate to have published the Proposal when it did. The purpose of this rulemaking is to conform the Commission's regulations to the CEA as

Electric Power Supply Association; certain Electric Utility Trade Associations; and the Working Group of Commercial Energy Firms ("Working Group").

<sup>12</sup> See ETA Letter (claiming that "[t]he [Proposal] cannot fairly apprise interested persons of the nature of the Commission's rulemaking, nor can it provide notice of 'the terms of substance of the proposed rule or a description of the subjects and issues involved,' as required by the [APA], when the proposed rules purport to adapt to a moving target.").

<sup>7</sup> Commenters on this issue include: American Cotton Shippers Association; Agribusiness Association of Iowa; Agribusiness Association of Ohio; Agribusiness Council of Indiana; Trade Association of American Cotton Cooperatives; Commodity Markets Council; Falmouth Farm Supply; American Feed Industry Association; Grain and Feed Association of Illinois; Minnesota Grain and Feed Association; National Grain and Feed Association; Oklahoma Grain and Feed Association; Rocky Mountain Agribusiness Association; South Dakota Grain and Feed Association; Land O'Lakes; National Council of Farmer Cooperatives; American Gas Association; National Gas Supply Association; Fertilizer Institute; American Petroleum Institute; Electric Power Supply Association; National Rural Electric Cooperative Association; American Public Power Association; Large Public Power Council; Edison Electric Institute; Working Group of Commercial Energy Firms;

IntercontinentalExchange Inc.; Kansas City Board of Trade; Minneapolis Grain Exchange; CME Group; Futures Industry Association; Barclays Capital; Henderson & Lyman; National Introducing Brokers Association; and National Futures Association.

<sup>8</sup> Public Law 106-554, 114 Stat. 2763 (2000).

<sup>9</sup> See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012) (adopting for SDs and MSPs reporting and recordkeeping standards now found in 17 CFR 23.201-23.203).

<sup>10</sup> The redline does not, in and of itself, have any legal authority.

<sup>11</sup> A joint letter by the American Gas Association, Commodity Markets Council, National Gas Supply Association, and the Fertilizer Institute ("AGA et al."); Commodity Markets Council ("CMC");

revised by the DFA where necessary (to avoid conflicting statutory and regulatory definitions of the same term, for example) or desirable (e.g., to make retention periods for records of all swap transactions consistent with those recently adopted for the records of swap transactions of SDs). The Commission viewed many of these changes to be non-controversial. For example, the DFA amended the definition of FCM in section 1a of the CEA to permit FCMs to execute and clear swaps for customers in addition to futures. Accordingly, the Proposal updated regulation 1.3's definition of FCM, as well as recordkeeping requirements in regulations 1.31, 1.33, and 1.35, so that an FCM's duties with respect to swaps would mirror its duties with respect to futures. Because IBs and FCMs can execute or clear cleared swaps analogously to futures, the Commission believes that certain of the requirements in regulations 1.31, 1.33, and 1.35, which describe recordkeeping requirements for FCMs and IBs, can and should apply equivalently to an FCM's futures and cleared swaps business. In response to the ETA's comment that the Proposal inappropriately equated swaps with futures, the Commission notes that part 23 of the Commission's regulations addresses issues unique to the swap market by describing recordkeeping and other "business conduct" requirements for SDs and MSPs.

The Commission believes it is appropriate to make these conforming changes at this time. In adopting this final rule, the Commission is incorporating any changes necessitated by other final Dodd-Frank Act rulemakings.

#### B. Part 1

##### 1. Regulation 1.3: Definitions

###### a. General Changes

The Commission is revising regulation 1.3 so that its definitions, which are used throughout the Commission's regulations, incorporate relevant provisions of the DFA. For instance, amended regulation 1.3 updates current definitions to conform them to the Dodd-Frank Act's amendments of the same terms in the CEA's definitions section,<sup>13</sup> and also includes definitions specifically added by the Dodd-Frank Act to the CEA. This is the case for many of the definitions in proposed regulation 1.3, including "commodity pool operator," "commodity trading advisor," "futures commission merchant," "introducing broker," "floor broker," "floor trader,"

"swap data repository," and "swap execution facility." For example, section 721(a)(5) of the DFA amended the definition of "commodity pool operator" ("CPO") in CEA section 1a to add swaps to those contracts for which soliciting funds for a collective investment renders a person a CPO. Consequently, today's final rulemaking updates the definition of CPO in regulation 1.3 to match the DFA's new definition of that term. The Commission did not receive comments about the Proposal's revised definitions of "commodity pool operator," "commodity trading advisor," "futures commission merchant," "floor broker," "floor trader," "swap data repository," and "swap execution facility." The Commission is adopting these definitions as proposed.

In response to the proposed conforming amendments to the definition of "introducing broker," Financial Services Roundtable ("FSR") commented that a small commercial lender facilitating a swap transaction between a borrower and a third party, solely in connection with the lender's loan origination or syndication, should not have to register as an introducing broker ("IB"), but could possibly be required to do so under the amended definition. FSR commented further that such a result would be inconsistent with a 2004 staff no-action letter,<sup>14</sup> in which the Commission's Division of Clearing and Intermediary Oversight explained that the purpose of registering and regulating IBs is to protect the public from sales abuses—according to FSR, such a concern does not exist in the situation FSR described. Specifically, FSR recommended that the Commission further define the term "introducing broker" to specifically exclude the lenders it described, or in the alternative, that the Commission issue interpretative guidance addressing this issue.

The Commission declines to further define the term "introducing broker" as FSR requested, and is adopting the term as proposed. However, the Commission believes that in the situation described by FSR, the small commercial lender would not be required to register as an IB, as long as it did not receive compensation from the third party with whom the lender arranges the borrower's swap. This analysis is based solely on the facts as presented by FSR in its comment letter and is consistent with previously issued staff no-action or

interpretative letters.<sup>15</sup> Staff can issue further guidance, as appropriate, on a case-by-case basis under regulation 140.99.<sup>16</sup>

Additionally, the Proposal revised the definition of "self-regulatory organization" ("SRO") (regulation 1.3(ee)) to include SEFs, a new category of regulated markets under the DFA, and derivatives clearing organizations ("DCOs"). The Commission did not receive any comments concerning its proposal to amend this definition. Today's final rulemaking amends the definition of SRO by including SEFs. However, it does not amend the definition of SRO to include DCOs. Upon further reflection, the Commission has determined that the part 1 regulations applicable to SROs need not apply to DCOs in light of recently finalized regulations in part 39 implementing the Act's Core Principles for DCOs.<sup>17</sup> For example, paragraph (6) of regulation 39.12(a) ("Participant and product eligibility") requires a DCO to have the ability to enforce compliance

<sup>15</sup> FSR stated that the lenders it described receive compensation "in connection with lending and retaining risk and not in connection with introducing a [swap provider]." A key element of both the previous and amended definitions of IB is that the person engages in the described conduct "for compensation or profit, whether direct or indirect." 17 CFR 1.3(mm). This analysis is consistent with past Commission guidance requiring an individual to register as an IB based on referring customers to a commodity trading advisor and receiving compensation in return. CFTC Interp. Letter No. 86-27 (Introducing Broker Registration Requirements), Comm. Fut. L. Rep. (CCH) ¶ 23,364, CFTC (Nov. 24, 1986). This letter emphasized that "the presence or absence or[sic] per-trade compensation is not determinative of whether one falls within the definition of an introducing broker. The Commission's final rule expressly eliminated the form and manner of compensation as the principal measure of whether registration as an introducing broker would be required \* \* \* [P]ursuant to the express terms of the introducing broker definition in rule 1.3(mm), any compensation (without regard to whether such compensation is per-trade or otherwise) for the solicitation or acceptance of orders \* \* \* brings one within the definition." *Id.* (footnotes omitted). Therefore, if the lenders FSR described receive compensation from the swap providers for their customer referrals, then the lenders would fall within the definition and be required to register as IBs.

<sup>16</sup> Separately, the Commission notes that the activity of an associated person "AP" of an SD may resemble the swap activity of an IB. The definition of IB in regulation 1.3(mm), as amended by today's final rule, excludes an AP, including an AP of an SD. Pursuant to paragraph (6) of the definition of AP in regulation 1.3(aa), an AP of an SD could be an agent of the SD while not an employee of the SD. This may be the case, for example, where an employee of an affiliate of the SD is authorized to negotiate swap transactions on behalf of the SD. Where such an agency relationship is present, the Commission would not consider the employer of such an AP of an SD to be an IB due to the activities of that AP of the SD.

<sup>17</sup> DCO General Provisions and Core Principles, 76 FR 69334 (Nov. 8, 2011).

<sup>13</sup> CEA section 1a, 7 U.S.C. 1a.

<sup>14</sup> CFTC No-Action Letter No. 04-34 at 3 (Sept. 16, 2004).

with its participation requirements and to establish procedures for the suspension and orderly removal of clearing members that no longer meet the requirements. Moreover, the Commission is in the midst of other rulemakings pertaining to the responsibilities of SROs and DCOs, *e.g.*, proposed regulations regarding the governance of DCOs.<sup>18</sup>

#### b. Various Amended and New Definitions (Regulation 1.3)

The Commission is (1) simplifying or clarifying certain existing regulation 1.3 definitions, and (2) adding several new definitions to regulation 1.3, pursuant to amendments to the CEA by the Dodd-Frank Act, existing regulations, and other amendments in the Proposal.

The term “contract market,” for instance, is not defined under the CEA, and is currently defined under regulation 1.3(h) as “a board of trade designated by the Commission as a contract market under the Commodity Exchange Act or in accordance with the provisions of part 33 of this chapter.” In certain provisions throughout the Commission’s regulations, contract markets are also referred to as “designated contract markets.” Because both terms are used interchangeably within the regulations, the Commission has decided to revise the definition to mean contract market and designated contract market (“DCM”). Proposed regulation 1.3(h) contained one definition identified by the title “Contract market; designated contract market.” The proposed definition also corrected an erroneous cross-reference to part 33 as the regulations applicable to DCMs, which the Commission is correcting by changing it to a reference to part 38 of the Commission’s regulations. No commenters addressed these changes. The Commission is adopting the definition in regulation 1.3(h) as proposed with one modification to reflect the fact that the Commission designates a board of trade as a contract market “under the Act and in accordance with part 38” as opposed to “under the Act or in accordance with part 38.”

The Proposal contained a similar clarification regarding the definition of “customer.” It simplified the definition of “customer” by combining two existing definitions, “customer; commodity customer” in regulation 1.3(k) and “option customer” in

regulation 1.3(jj), and by adding swaps to the proposed definition. Therefore, the proposed definition included swap customers, commodity customers, and option customers, referring to them all with the single term, “customer.” Furthermore, the Commission proposed to revise all references to “commodity customer” and “option customer” throughout the Commission’s regulations, but particularly in part 1, to simply refer to “customer.”<sup>19</sup> The proposed revisions retained references to requirements specific to certain contracts.<sup>20</sup> Today’s final rulemaking revises the definition of “customer” (regulation 1.3(k)), as proposed, and deletes the definition of “option customer” (regulation 1.3(jj)), as proposed. The Commission did not receive comments about the proposed deletion of the term “option customer.”

ETA commented that counterparties to electricity swap contracts are not customers analogous to futures customers, and, therefore, by expanding the “customer” concept to include entities that execute swaps, the Commission would impose “significant and inappropriate obligations” on swap counterparties. The Commission has decided to finalize the definition of customer, as proposed. ETA is correct that counterparties to bilaterally-executed swaps are principals, which is unlike trading futures, where FCMs are agents of their customers. However, FCMs will execute and clear swap transactions, as agents, equivalently to the manner in which they currently execute and clear futures transactions.

The Commission proposed to define the term “confirmation” to reflect its differing use in various regulations depending on whether a transaction is executed by an FCM, IB or CTA on the one hand, or by an SD or MSP on the other hand. In the first case, the registrant is acting as an agent. In the second, it is acting as a principal.<sup>21</sup> No commenters addressed the proposed

<sup>19</sup> The Commission proposed to remove references to commodity customers and option customers, replacing them with references to simply “customer,” in the following regulations: 17 CFR 1.3, 1.20–1.24, 1.26, 1.27, 1.30, 1.32–1.34, 1.35–1.37, 1.46, 1.57, 1.59, 155.3, 155.4, and 166.5.

<sup>20</sup> For example, proposed regulation 1.33 (Monthly and confirmation statements) required an FCM to document a customer’s positions in futures contracts differently from its option or swap positions. Proposed regulation 1.33 preserved these distinctions, even though it referred only to “customers” as opposed to “commodity customers,” “option customers,” and “swap customers.”

<sup>21</sup> A single entity could be registered in more than one capacity, for example, as both an SD and a CTA. Which rules were applicable would depend on the capacity in which such an entity was performing a particular function.

definition of “confirmation,” and the Commission has decided to adopt it as proposed.

The Commission proposed to add to regulation 1.3 a definition of the term “registered entity,” currently provided in CEA section 1a(40), as revised by the Dodd-Frank Act. The proposed definition of “registered entity” is identical to its CEA counterpart and would include DCOs, DCMs, SEFs, swap data repositories (“SDRs”) and certain electronic trading facilities. To correspond with this new definition, the Commission also proposed to replace the current “Member of a contract market” definition with a new definition of “Member,” in regulation 1.3(q), which would be nearly identical to the “Member of a registered entity” definition provided in CEA section 1a(34), also as revised by the Dodd-Frank Act.<sup>22</sup> The proposed “Member” definition was broadened to accommodate newly established SEFs, and it includes those “owning or holding membership in, or admitted to membership representation on, the registered entity; or having trading privileges on the registered entity.” Additionally, for ease of reference, proposed regulation 1.3 added several terms defined under the CEA, using identical definitions, including “electronic trading facility,” “organized exchange,” and “trading facility.”

The ETA commented that the Commission should wait to define “registered entity,” “organized exchange,” “electronic trading facility,” and “trading facility” until the Commission enters into an MOU with FERC and publishes rules defining the scope of its jurisdiction over nonfinancial energy commodity swaps. According to the ETA, a SEF should not be deemed a registered entity. In addition, the ETA does not believe SEF participants should fall within the Commission’s proposed definition of “member,” suggesting that it is inappropriate or premature to require SEF participants to have the same recordkeeping requirements as DCM members under regulation 1.35.

The Commission disagrees with the ETA’s comment that it should wait to define the terms “registered entity,” “organized exchange,” “electronic trading facility” and “trading facility” until the Commission enters into an MOU with FERC and publishes rules defining the scope of its jurisdiction

<sup>22</sup> In accordance with the removal of DTEF references from many other Commission regulations, the proposed “Member” definition would not include DTEF references currently in the definition of “Member of a registered entity” found in CEA section 1a(34). See 7 U.S.C. 1a(34).

<sup>18</sup> Requirements for DCOs, DCMs, and SEFs Regarding the Mitigation of Conflicts of Interest, 75 FR 63732 (Oct. 18, 2010); and Governance Requirements for DCOs, DCMs, and SEFs; Additional Requirements Regarding the Mitigation of Conflicts of Interest, 76 FR 722 (Jan. 6, 2011).

over nonfinancial energy commodity swaps. As explained in the Proposal, the definitions proposed for each of those terms are identical to their statutory definitions under the CEA. The Commission may further define these terms in the future if necessitated by an MOU with FERC or by Commission rules defining the scope of its jurisdiction over nonfinancial energy commodity swaps.

With respect to the ETA's assertion that SEFs should not be deemed "registered entities," the Commission notes that SEFs are already deemed "registered entities" under section 1a(40) of the CEA. Lastly, the term "member," as defined under the CEA, includes "with respect to a registered entity \* \* \* an individual, association, partnership, corporation or trust \* \* \* having trading privileges on the registered entity."<sup>23</sup> Accordingly, the CEA considers participants on a SEF "members" by virtue of their having trading privileges on the SEF. For the foregoing reasons, the Commission is adopting the definitions of "registered entity," "organized exchange," "electronic trading facility," "trading facility," and "member" as proposed.

The Commission also proposed to add a definition of the term "order." This term had not previously been defined by Commission regulations, although it is used in several of them, *e.g.*, 17 CFR 1.35, 155.3, and 155.4. In light of this, and with the addition of new categories of registrants (SDs and MSPs) who act as principals rather than agents, clarification of this term is appropriate. No commenters addressed the proposed definition, and the Commission is adopting it as proposed.

Because proposed amendments to regulation 1.31 incorporated the term "prudential regulator," as added to the CEA by the Dodd-Frank Act, the Commission proposed to define the term in regulation 1.3.<sup>24</sup> The proposed definition of "prudential regulator" in regulation 1.3 is coextensive with the definition in section 1a(39) of the Act and lists the various prudential regulators. No commenters addressed this proposed definition, but the amendments to regulation 1.31 adopted today no longer reference the term "prudential regulator." Nonetheless, the Commission has determined to adopt the definition as proposed, in anticipation of future rulemakings and

regulations possibly using the term "prudential regulator."

The Commission also proposed to add the term "registrant" to regulation 1.3 so that certain regulations in part 1 could refer to various intermediaries (*e.g.*, FCMs, IBs, CPOs), their employees (associated persons), and other registrants (MSPs). Because the DFA created a definition of and several Commission regulations refer to "associated persons of swap dealers or major swap participants," the Commission proposed to add that term to regulation 1.3 as well. No commenters addressed these changes, but the Commission will only be adopting the definition of "registrant" as proposed. Since the Proposal's publication, a separate final rulemaking establishing the registration process for SDs and MSPs amended the existing definition of "associated person" found in regulation 1.3(aa) to incorporate associated persons of SDs and MSPs in a manner consistent with CEA section 1a, as amended by the Dodd-Frank Act.<sup>25</sup> In light of that rulemaking, the Commission is not adopting a separate definition of "associated person of swap dealers and major swap participants" in regulation 1.3.

The Commission also proposed, and is hereby adopting, a definition of the term "retail forex customer" in regulation 1.3 because it appears in several regulations in part 1 and currently is only defined in part 5. The definition is identical in all material respects to the definition of this term as it currently appears in regulation 5.1(k).<sup>26</sup> The Commission did not receive any comments to the Proposal's addition of a definition of "retail forex customer" to regulation 1.3.

The Commission is also finalizing the revised definition of "strike price" (regulation 1.3(kk)) as proposed so that this definition encompasses swaps in addition to futures. The Commission received no comments about this proposal.

#### c. Regulation 1.3(t): Open Contract

The Proposal changed the defined term from "open contract" to "open

position" and added provisions for commodity option transactions and swaps. CME commented that it is unclear whether the proposed definition is intended to cover options on swaps. If so, then the word "commodity" should be deleted from the phrase, "commodity option transaction." According to CME's comment letter to the Proposal, the Commission should also clarify whether, or which, options are covered by proposed paragraph (t)(3) (swaps). CME also argues that proposed paragraph (t)(3) does not adequately characterize open positions in cleared swaps. Proposed paragraph (t)(1)'s terminology, CME believes, more appropriately characterizes cleared swaps because, like futures, cleared swaps may be fulfilled by delivery or they may be offset.

The Commission has decided to finalize the definition with a few modifications. The final definition retains the original title of the term, "open contract." It also narrows its applicability from all swaps to only Cleared Swaps, as regulation 22.1 defines that term.<sup>27</sup>

The Commission notes that the option component of the definition (paragraph (t)(2)) covers all options: *i.e.*, options on futures; options on swaps ("swaptions"); and options on commodities.<sup>28</sup> In response to CME's comment, the Commission notes that although, pursuant to the Dodd-Frank Act, swaptions and options on commodities (other than options on futures) are swaps, it is nevertheless appropriate for the definition of "open contract" to describe them with language suitable only to options and not to other swaps. In other words, the definition of "open contract" merely describes types of contracts; it is not intended to classify these contracts for regulatory purposes or to elaborate on the definition of "swap," which the Commission recently published in final form.<sup>29</sup>

Because the only references in the regulations to the term "open contracts" apply to cleared contracts, *i.e.* futures contracts and Cleared Swaps, the final definition only includes Cleared Swaps in paragraph (t)(3). The final rule also

<sup>25</sup> Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2615 and 2625 (Jan. 19, 2012).

<sup>26</sup> 17 CFR 5.1(k) currently defines "retail forex customer" as "a person, other than an eligible contract participant as defined in section 1a(12) of the Act, acting on its own behalf and trading in any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act." This final rulemaking amends the definition in part 5 only to reflect the renumbering of section 1a of the CEA by the Dodd-Frank Act, and adds an identically amended definition to regulation 1.3. See *infra* Part II.G.2.

<sup>27</sup> Regulation 22.1 was promulgated as part of Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336 (Feb. 7, 2012).

<sup>28</sup> Section 4c of the CEA grants the Commission authority over all three of these categories of options.

<sup>29</sup> See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207 (Aug. 13, 2012).

<sup>23</sup> CEA section 1a(34), 7 U.S.C. 1a(34).

<sup>24</sup> Proposing Release, 76 FR at 33068 and 33070. Pursuant to proposed regulation 1.31, records of swap transactions must be presented, upon request, to "any applicable prudential regulator as that term is defined in section 1a(39) of the Act." *Id.* at 33088.

modifies paragraph (t)(3) to reflect the fact that Cleared Swaps can be fulfilled by delivery or by offset against other Cleared Swaps, as is the case with futures. Thus, paragraph (t)(3) states in final form, “swaps that have not been fulfilled by delivery; not offset; not expired; and not been terminated.”

In the Proposal, pursuant to the revision of the definition of “open contract” in regulation 1.3(t), the Commission proposed to change “open contract” to “open position” in regulations 1.33 (“Monthly and confirmation statements”) and 1.34 (“Monthly record, ‘point balance’”). The Commission did not receive comments about these changes. In light of the fact that the Commission is retaining the title “open contract,” in the final revisions to regulation 1.3(t), the Commission is preserving those references to “open contract” in regulations 1.33 and 1.34.<sup>30</sup>

#### d. Regulation 1.3(ll): Physical

##### i. Proposal

As part of the Proposal, the Commission explained that current regulation 1.3(ll) defines “physical” as “any good, article, service, right or interest upon which a commodity option may be traded in accordance with the Act and these regulations.”<sup>31</sup> The Commission noted that, other than the reference to options, the term “physical” was similar to the definition of “commodity” in regulation 1.3(e), which includes, in relevant part “all \* \* \* goods and articles \* \* \* and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in.” The quoted portions of the “physical” and “commodity” definitions are effectively the same, differing only in the potential overlying instrument with respect to which the respective terms are defined. In addition, the Commission noted that the introductory language in regulation 1.3 provides that “[t]he following terms, as used in the rules and regulations of this chapter, shall have the meaning hereby assigned to them, unless the context otherwise requires.”<sup>32</sup>

In the Proposal, the Commission also traced the history of the term “physical” in its regulations, noting that the definition of “physical” was first added to its regulations “to enable trading, on DCMs, in options to buy or sell an underlying commodity” and that the definition had not been substantively

amended.<sup>33</sup> The Commission added that, in 1982, when the Commission proposed to add the definition of “physical” to its regulations, “cash-settled futures on non-physical commodities had just been introduced in the form of the Chicago Mercantile Exchange’s Eurodollar futures” and that, “[i]n that context \* \* \* it made sense to name such options based on physical commodities, which constituted the vast majority of commodities covered by then-existing futures contracts.”<sup>34</sup> While options may have primarily been written on physical commodities in 1982, the Commission noted in the Proposal that “[a]t present \* \* \* options may be traded on both physically deliverable and non-physically deliverable commodities, such as interest rates and temperatures” and that, given that change, using the term “physical” to refer to an option on both physically deliverable and non-physically deliverable commodities may be confusing.<sup>35</sup> The Commission added that the intended-to-be-physically-settled element of the forward exclusion from the swap definition “would be meaningless if ‘physical’ included non-physical.”<sup>36</sup>

In light of (1) The overlapping definitions of “commodity” and “physical” in Commission regulation 1.3, (2) the fact that options now are written on a wide range of non-physical commodities, and (3) the Commission’s desire that the term “physical” not be interpreted to permit cash settled transactions to rely on the forward exclusion from the swap definition (unless otherwise permitted by Commission interpretations with respect to such exclusion, such as those discussed in the Commission’s rulemaking jointly (with the Securities and Exchange Commission) further defining “swap”), the Commission, in the Proposal, requested comment on various possible approaches to the definition of “physical” in regulation 1.3(ll). One possible approach on which the Commission requested comment was whether it should eliminate the definition, on the theory that its meaning is self-evident, and rely on the ability of interested parties to interpret the term “physical.” The Commission also requested comment on not amending the definition in reliance upon the introductory language in regulation 1.3, which applies the regulation 1.3(ll) definition of

“physical” unless the context otherwise requires.

##### ii. Comments

Three commenters addressed the definition of physical in regulation 1.3(ll). The ETA commented that the proposed definition of “physical” should be withdrawn because addressing it in terms of swaps is premature prior to the Commission publishing the further definition of “swap,” including, in particular, defining the term “nonfinancial commodity,” which the ETA characterized as a key component of the forward exclusion from the swap definition. The ETA stated that, in proposing such a substantive rule, the Commission must explain how defining “physical” would affect all of its regulations and requested that the Commission re-propose any revised definition of “physical” with a “comprehensive analysis of the way such word, whether used as an adjective or an adverb, interrelates with the Dodd-Frank statutory term ‘nonfinancial commodity,’ as well as the concepts of ‘cash market,’ ‘physical market channels’ and the ‘bona fide hedging exemption’.”

The Environmental Markets Association (“EMA”) believes that the “very broad” definition of the word “physical” in current Commission regulations “certainly” encompasses environmental commodities, which the EMA states are subject to the forward exclusion from the definition of swap. The EMA requested that the CFTC issue a final rule clarifying that environmental commodities are not swaps even though intangible, that they are nonfinancial commodities that can rely on the forward exclusion, and that intangibility of a commodity does not prevent it from being “physically settled.” The Coalition for Emission Reduction Policy (“CERP”) similarly argued that environmental and other intangible commodity transactions that result in actual delivery of a commodity, intangible or not, as opposed to transactions that settle in cash, can be subject to the forward exclusion because such transactions can be physically settled. CERP also claimed that the Commission’s proposed interpretation of forward contracts in nonfinancial commodities in the definition of “swap” supports its interpretation of “physically settled” in that forward sales of environmental commodities are commercial merchandising transactions because both buyer and seller ultimately need and intend the transfer of ownership of the emission allowances or offset credits.

<sup>30</sup> See *infra* section II.A.4. (discussing amendments to regulation 1.33).

<sup>31</sup> Proposing Release, 76 FR at 33068–69.

<sup>32</sup> *Id.* at 33069.

<sup>33</sup> *Id.* at 33069.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

EMA also expressed that the Commission's request for comment with regard to whether the definition of "physical" should rely on the "common sense meaning" of the word was unclear. In particular, EMA argued that environmental commodities traded in the spot or forward markets are physically delivered via a registry or an exchange of paperwork and eventually consumed through retirement. Further, according to EMA, environmental commodities are goods because Uniform Commercial Code ("UCC") section 2105(1) defines "good" as "anything that can be moved other than money."

### iii. Final Rules

The Commission is removing from regulation 1.3(ll) the definition of "physical," which term will therefore have the meaning dictated by the context of the individual Commission regulations in which it appears. In addition, the Commission is adopting conforming changes to other regulations to address the deletion of the definition. The Commission is adopting these changes for ease of reference for market participants and to reduce confusion in interpreting the Commission's regulations, consistent with the spirit of Executive Order 13563, which seeks, among other goals, to eliminate agency regulations that have outlived their usefulness.<sup>37</sup> As explained further below, these modifications are not intended to alter the substantive provisions of the Commission's regulations.

When the Commission added the definition of "physical" to regulation 1.3 in 1982, the intent was to distinguish between options on futures contracts and other options subject to the Commission's jurisdiction; the Commission termed such other options "options on physicals." The Commission added the "physical" definition because, while the 1982 rulemaking including provisions applicable both to DCM-listed options on futures and DCM-listed options on commodities, it also contained regulations applicable solely to options on futures. Thus, the purpose of the definition was "principally to enable the Commission to differentiate, where necessary, between references to options on physicals and options on futures

contracts."<sup>38</sup> Although the intent of Commission regulation 1.3(ll) was only to address the distinction between options on futures and other options, the Commission believes that the use of such a broad term to apply to a narrow circumstance can create confusion because the definition is not expressly so limited. While the introduction to regulation 1.3 says that the definitions therein have the meanings set forth therein unless the context otherwise requires, determining when regulation 1.3(ll) applies as drafted and when the context dictates a different meaning can be subjective and result in confusion.

The Commission did not intend, when it promulgated the definition in regulation 1.3(ll), to apply it to circumstances such as the definition of "physically" settled. Given the intent of the definition of the term "physical" (to distinguish options on futures from other options) and the introductory language in regulation 1.3 regarding contextual interpretations of the defined terms therein, in regulations where it is not necessary to distinguish between different types of options, the definition of "physical" in Commission regulation 1.3(ll) is not useful and can be overbroad. For example, the definition of "physical" is not useful with respect to the term "physical safeguards" in regulation 160.30, which pertains to procedures to safeguard customer records and information. Because the scope of the definition of "physical" essentially includes options on any commodity, which would include non-physical commodities such as temperatures and interest rates, effectively, the restriction that "physical" in regulation 1.3(ll) is limited to any goods, article, service, right or interest upon which a commodity may be traded in accordance with the CEA and the Commission's regulations is not much of a restriction at all.

The Commission also notes that it recently promulgated final and interim final rules amending parts 32 and 33 of the Commission's regulations.<sup>39</sup> While part 33 continues to address options on futures contracts, the other options subject to the Commission's jurisdiction that also were previously addressed in part 33 now are addressed in part 32 rather than in part 33. Further, the Commission no longer refers to such other options as "options on physicals." Instead, the Commission generally uses

the term "commodity option" as a reference to both options on futures and other CFTC-jurisdictional options. Where the Commission distinguishes the regulatory treatment for options on futures from the regulatory treatment of other options, it specifically identifies options on futures as "commodity option transactions on a contract of sale of a commodity for future delivery." With these recent amendments, the definition of "physical" in regulation 1.3(ll) will not help to distinguish between options on futures and other commodity options because the rules generally addressing the regulatory treatment of other commodity options no longer use the term "physical" to refer to such transactions.

In light of these considerations, the Commission believes that deleting the definition of physical will reduce the potential for confusion on the part of market participants, as the appropriate definition of that term will be based on the context of the individual rules in which the term is utilized. These amendments will also serve the goals of Executive Order 13563 by amending the Commission's regulations because they no longer are "effective[] in achieving the objectives for which they were adopted."<sup>40</sup>

Further, various Commission regulations relating to options also refer to a "physical" when discussing an option on a commodity. In order to conform those regulations with the adapting changes discussed above, the Commission is adopting a number of non-substantive changes including, but not limited to, replacing certain references to "physical" with references to "commodity." Where appropriate, the Commission is also replacing references to "underlying physical" with references to "underlying commodity."

For the reasons discussed above, these conforming amendments will not result in substantive changes. Therefore, the Commission is amending the following regulations as described above: Regulations 1.3(kk); 1.3(ll); 1.17(c)(1)(iii), (c)(5)(ii)(A), and (c)(5)(xiii)(C); 1.33; 1.34(b); 1.35(b)(2)(iii), (b)(3), (d) and (e); 1.39(a) and (a)(3); 1.46(a)(1)(iii) and (iv); 4.23(a) and (b); 4.33(b)(1); 15.00(p)(1)(ii); 16.00(a); and 16.01(a)(1)(ii) and (iv), and (b)(1)(ii) and (iv). The Commission is leaving unchanged other references to "physical" in its existing definitions because, given the context in which the term is used in those rules, such

<sup>37</sup> See Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, at section 6(a), 76 FR 3821, 3822 (Jan. 21, 2011) (stating "To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.").

<sup>38</sup> Domestic Exchange-Traded Commodity Options; Expansion of Pilot Program To Include Options on Physicals, 47 FR 56996, 56998 (Dec. 22, 1982).

<sup>39</sup> Commodity Options, 77 FR 25320 (Apr. 27, 2012).

<sup>40</sup> Reducing Regulatory Burden; Retrospective Review Under E.O. 13563, 76 FR 38328 (June 30, 2011).



references are limited to physical commodities.

The Commission is replacing the word “physical” in regulations 1.17(c)(1)(iii) and 1.17(c)(5)(xi) with the word “commodity,” and is replacing the word “physical” in regulation 1.17(c)(5)(ii)(A) with the term “physical commodity.” In so doing, the Commission does not intend to change the meaning of any of these paragraphs. Thus, final regulations 1.17(c)(1)(iii) and 1.17(c)(5)(xi) will continue to apply to options that overly any commodity, not just a tangible commodity. By contrast, final regulation 1.17(c)(5)(ii)(A) will continue to apply to the options described therein, which cover tangible commodities only.

While some commenters requested that the Commission interpret “physical” for purposes of the term “physically settled” within the forward exclusion for swaps, or generally address the definition of “physical” as it relates to other terms, the Commission declines to do so for purposes of this release. The conforming amendments to the definition of physical are non-substantive changes that are designed to increase clarity for market participants. As noted above, rather than have a definition of physical that applies unless the context “otherwise requires,” the Commission will apply the definition based on the particular context of the applicable regulation. Because the current definition already applies in this manner, the modifications addressed herein do not amount to a substantive change in the regulations.

#### e. Regulation 1.3(ss): Foreign Board of Trade

The Commission proposed to amend the definition of foreign board of trade to mean “any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated where foreign futures, foreign options, or foreign swap transactions are entered into.” The Commission received no comments regarding the proposed definition of “foreign board of trade” and is modifying the proposed definition to make it consistent with the definition provided in the final rulemaking for Registration of Foreign Boards of Trade.<sup>41</sup> Accordingly, new regulation 1.3(ss) defines the term “foreign board of trade” as “any board of trade, exchange or market located outside the United States, its territories

or possessions, whether incorporated or unincorporated.”

#### f. Regulation 1.3(yy): Commodity Interest

The Commission proposed adding “swap” to the definition of “commodity interest” in regulation 1.3(yy).<sup>42</sup> Currently, commodity interest is defined as: “(1) Any contract for the purchase or sale of a commodity for future delivery; (2) Any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act; and (3) Any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act.” At the time of the proposal, the term was cross-referenced by 33 other Commission regulations and appendices to parts of Commission regulations.<sup>43</sup> Generally, the term “commodity interest” is meant to encompass all agreements, contracts and transactions within the Commission’s jurisdiction, though not all such agreements, contracts and transactions are expressly set forth therein.<sup>44</sup>

The Dodd-Frank Act added a definition of the term “swap” to the CEA.<sup>45</sup> DFA section 712(d)(1) requires the Commission to further define the term “swap” jointly with the Securities and Exchange Commission (“SEC”), and the Commission has recently adopted regulations further defining the term “swap,” among other terms, jointly with the SEC.<sup>46</sup>

In their comment letter, the ETA objected to the Proposal’s addition of the term “swap” to the definition of commodity interest because, as discussed on page 6, above, the ETA objected to the manner in which the Proposal analogized swaps to futures. The Commission believes it is appropriate to add “swap” to the

definition of commodity interest because the Dodd-Frank Act amended various intermediary definitions in section 1a of the Act (the Dodd-Frank Act updated the definitions of CPO, CTA, FCM, IB, Floor Trader and Floor Broker) to include their use of swaps. For example, the Act’s present definition of FCM, as amended by the Dodd-Frank Act, authorizes this intermediary to accept customer orders for “swaps” in addition to accepting customer orders for “the purchase or sale of any commodity for future delivery.” If the Commission did not update the definition of “commodity interest” to include swaps, then various regulations applicable to intermediaries using the term “commodity interest” would not apply to intermediaries’ swap activities. The Commission has reviewed all uses of the term “commodity interest” throughout the regulations and believes they appropriately refer to both futures and swaps.

Thus, the Commission has decided to finalize a revised definition of “commodity interest” by adding paragraph (yy)(4) to include swaps. The final version adopted today makes only minor changes to the proposed paragraph. Whereas the proposed paragraph referenced “any swap as defined in the Act, the Commission’s regulations, a Commission order or interpretation, or a joint interpretation or order issued by the Commission and the [SEC],” amended regulation 1.3(yy)(4) now states “any swap as defined in the Act, by the Commission, or jointly by the Commission and the Securities and Exchange Commission.” The Commission is making this change because, for the purposes of the definition of “commodity interest,” it does not matter whether the Commission defines a swap pursuant to an order, interpretation, or joint interpretation.

#### g. Regulation 1.3(z): Bona Fide Hedging Transactions and Positions

The Proposal made technical amendments to this definition by omitting references to regulations 1.47 and 1.48 because the proposed rule on Position Limits deleted those regulations<sup>47</sup> and omitting references to “option customers” on account of this rulemaking’s deletion of that term. The Commission is not promulgating these amendments in this rulemaking because the final rule on Position Limits has already extensively revised regulation

<sup>42</sup> Proposing Release, 76 FR at 33069.

<sup>43</sup> See 17 CFR 1.12, 1.56, 1.59, 3.10, 3.12, 3.21, 4.6, 4.7, 4.10, 4.12–4.14, 4.22–4.25, 4.30–4.34, 4.36, 4.41, 30.3, 160.3–160.5, and 166.1–166.3; 17 CFR pt. 3 app. B, 17 CFR pt. 4 app. A, and 17 CFR pt. 190 app. B.

<sup>44</sup> For example, the term “contract for the purchase or sale of a commodity for future delivery” in current regulation 1.3(yy)(1) encompasses security futures products. Similarly, the term “swap” would include mixed swaps (though mixed swaps are swaps, they also are security-based swaps, so the Commission shares authority over mixed swaps with the SEC). Of course, the impact of the scope of proposed regulation 1.3(yy) is only as extensive as the other regulations referencing it.

<sup>45</sup> DFA section 721(a)(21); codified at 7 U.S.C. 1a(47).

<sup>46</sup> Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207 (August 13, 2012) (adopting 17 CFR 1.3(xxx), which defines the term “Swap”).

<sup>41</sup> Registration of Foreign Boards of Trade, 76 FR 80674 (Dec. 23, 2011).

<sup>47</sup> Position Limits for Derivatives, 76 FR 4752 (Jan. 26, 2011).

1.3(z).<sup>48</sup> Mr. Chris Barnard commented that the definition of “bona fide hedging transactions and positions” should be amended to state that such transactions “are not held for a purpose that is in the nature of speculation or trading” and “not held to hedge or mitigate the risk of another position, unless that other position itself is held for the purpose of reducing risk.” Mr. Barnard commented further that the determination of whether a transaction meets the definition should be made at the time the transaction is entered into, considering the circumstances existing at that time. The Commission has decided not to amend regulation 1.3(z) pursuant to these comments, which address substantive issues that are beyond the scope of this rulemaking.

#### h. Lack of a Definition of “End-User” in Regulation 1.3

The ETA requested that the Commission, the SEC, and prudential regulators agree on a definition of “end-user” because the DFA does not define this term and regulators have used the term inconsistently. The Proposal did not add a definition of “end-user” to regulation 1.3 because the DFA did not add a definition of that term to CEA section 1a. The Proposal’s intention was to conform the Commission’s regulations to the DFA’s revisions to the CEA.

The Commission has decided not to add a definition of “end-user.” The Commission has no reason to define “end-user” because the Commission’s regulations do not use this term, and even the recently adopted Commission regulations implementing the CEA’s end-user exception to clearing do not define it.<sup>49</sup> The issue of whether the Commission’s regulations should use the term “end-user” is beyond the scope of this final rulemaking.

#### 2. Regulation 1.4: Use of Electronic Signatures

The Commission proposed to revise regulation 1.4 to extend the benefit of electronic signatures and other electronic actions to SDs and MSPs. Section 731 of the Dodd-Frank Act amended the CEA by adding new section 4s(i)(1), requiring SDs and MSPs to “conform with such standards as may be prescribed by the Commission by

<sup>48</sup> Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011).

<sup>49</sup> Recently adopted regulation 39.6 establishes the end-user exception to clearing by defining which parties are eligible to opt out of the clearing requirement pursuant to section 2(h)(7) of the CEA, as amended by the DFA. *See* End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (July 19, 2012).

rule or regulation that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps,”<sup>50</sup> and adding new section 4s(i)(2), requiring the Commission to adopt rules “governing documentation standards for swap dealers and major swap participants.”<sup>51</sup>

Pursuant to the foregoing authority, the Commission has adopted new regulation 23.501(a)(1), which requires “[e]ach swap dealer and major swap participant entering into a swap transaction with a counterparty that is a swap dealer or major swap participant [to] execute a confirmation for the swap transaction,” according to a specified schedule.<sup>52</sup> Also pursuant to the foregoing authority, the Commission has adopted a new regulation 23.501(a)(2), which requires “[e]ach swap dealer and major swap participant entering into a swap transaction with a counterparty that is not a swap dealer or a major swap participant [to] send an acknowledgment of such swap transaction” according to a specified schedule.<sup>53</sup> Regulation 23.500(a) defines such an “acknowledgment” as “a written or electronic record of all of the terms of a swap signed and sent by one counterparty to the other.”<sup>54</sup> In proposing the confirmation and acknowledgment rules, the Commission explained that “[w]hen one party acknowledges the terms of a swap and its counterparty verifies it, the result is the issuance of a confirmation.”<sup>55</sup>

Regulation 1.4 currently provides that an FCM, IB, CPO and CTA receiving an electronically signed document is in compliance with Commission regulations requiring signed documents, provided that such entity generally accepts electronic signatures.<sup>56</sup> The rationale for allowing the existing entities listed in regulation 1.4 to use electronic signatures (*i.e.*, “[a]s part of [the Commission’s] ongoing efforts to facilitate the use of electronic

<sup>50</sup> 7 U.S.C. 6s(i)(1).

<sup>51</sup> 7 U.S.C. 6s(i)(2).

<sup>52</sup> Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55961 (September 11, 2012).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519, 81522 (Dec. 28, 2010).

<sup>56</sup> 17 CFR 1.4. The regulation also requires that the signatures in question comply with applicable Federal laws and Commission regulations, and requires the relevant entity to employ reasonable safeguards regarding the use of electronic signatures, including safeguards against alteration of the record of the electronic signature. *Id.*

technology and media”)<sup>57</sup> applies equally to SDs and MSPs. No commenters addressed the amendments to regulation 1.4, and the Commission is adopting them as proposed. Therefore, the Commission is hereby adding SDs and MSPs to the list of entities covered by regulation 1.4 and amending its structure to account for the provisions of the Commission’s confirmation and acknowledgement obligations discussed above.<sup>58</sup>

#### 3. Regulation 1.31: Books and Records; Keeping and Inspection

##### a. Record Retention Period and Inspection

To conform the existing recordkeeping requirements under regulation 1.31 to the recordkeeping requirements under proposed regulation 23.203(b) for SDs and MSPs relating to their swap transactions, the Commission proposed to amend regulation 1.31 to require that records of a swap transaction or related cash or forward transaction, including records of oral communications, be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for five years after such date.<sup>59</sup>

CME suggested that conversations should only have to be retained for six months after the execution of a transaction. FIA commented that the Commission failed to provide a justification for requiring that a swap record be maintained for the life of the swap plus five years. Encana requested clarification that regulation 1.31 does not apply to a non-financial end-user who enters into swaps, but is not an FCM, IB, or member of a DCM or SEF. Encana also made a general request that the Commission specify in its final rules which recordkeeping and reporting rules apply to non-financial end-users.

In contrast to other commenters, Mr. Chris Barnard asserted that all records should be kept indefinitely and scanned after two years, arguing that there is no technological or practical reason to limit the record retention period. Mr. Barnard specifically commented that records of voice communications also should be

<sup>57</sup> Use of Electronic Signatures by Customers, Participants and Clients of Registrants, 64 FR 47151 (Aug. 30, 1999).

<sup>58</sup> This includes revision to the title of regulation 1.4 to reflect these changes. Regulation 1.4, as amended by this release, is entitled “Use of electronic signatures, acknowledgments and verifications.”

<sup>59</sup> Certain proposed amendments to § 1.35 (regarding recording of communications), and related amendments to § 1.31, are not addressed in this final rule. The Commission intends to address these amendments in a final rule in a separate **Federal Register** release.

kept indefinitely. To support the asserted usefulness of such records, Mr. Barnard cited a 2009 IOSCO report stating that telephone records could benefit enforcement investigations.<sup>60</sup>

The Commission also proposed to amend regulation 1.31 to conform to the proposed regulation 23.203(b)(2) requirement for SDs and MSPs and their swap transactions by proposing to require that all records kept pursuant to the Act or the Commission's regulations be made available for inspection to any applicable prudential regulator, as that term is defined in section 1a(39) of the Act, or, in connection with security-based swap agreements described in section 1a(47)(A)(v) of the Act, the SEC. By contrast, existing regulation 1.31, which pertains to "all books and records required to be kept by the Act or by these regulations," requires that records be kept for five years and be made available only to the Commission and the Department of Justice.<sup>61</sup> The Commission did not receive comment on this proposed revision.

#### b. Final Rule

The Commission has determined to adopt the proposed revision to regulation 1.31 regarding record retention periods with two modifications. First, in final regulation 1.31, the retention period for records of oral communications leading to the execution of a swap or related cash or forward transaction, as required of SDs and MSPs under regulation 23.202(a)(1) and (b)1), respectively, will be one year (rather than five years after the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, as proposed). This modification is consistent with the final provision for an SD's or MSP's oral communications under new regulation 23.203(b)(2) in the Reporting, Recordkeeping, and Daily Trading Record Requirements final rulemaking.<sup>62</sup> The Commission believes that this retention period for SDs and MSPs with respect to records of oral communications leading to the execution of a swap or related cash or

forward transaction will enable it to adequately execute its enforcement responsibilities under the Act and these regulations while minimizing the storage costs imposed on these affected entities.<sup>63</sup>

With respect to Encana's request for clarification concerning the applicability of regulation 1.31 to commercial end-users, regulation 1.31 applies to all records required to be kept by the Act or the Commission's regulations, for example, records required to be kept under regulations 1.35, 18.05 and 23.202. If these rules require end-users to keep records (e.g., regulation 18.05, Maintenance of Books and Records), then those records must be kept in accordance with regulation 1.31.

In response to CME's comment that although the Commission suggests that the retention period for swaps applies only to SDs and MSPs, as addressed in proposed regulation 23.203(b), the proposed amendment to regulation 1.31 is ambiguous in that it could be read to apply to all entities, the Commission clarifies that the final provision in regulation 1.31 regarding the retention period for records of swap transactions is triggered by the type of record and not the entity that is required to keep the record. Therefore, although regulation 23.203(b) only applies to SDs and MSPs with regard to their swap transactions, the final corresponding provision in regulation 1.31 applies to anyone who is required by the Act or by these regulations to keep records of, among other things, swap transactions.<sup>64</sup>

Second, the Commission also has determined not to adopt the proposed revisions to regulation 1.31(a)(1), (b)(2)(ii), (b)(2)(v)(B), (b)(3)(i), (b)(3)(ii)(C), (b)(3)(iii)(A), and (b)(4)(i) regarding the parties to whom documents must be made available for inspection. The proposed revisions were intended to require only SDs and MSPs to make the records that the CEA or the

Commission's regulations require them to maintain available for inspection to, in addition to the Commission and DOJ, any applicable prudential regulator (and, in the case of security-based swap agreement records, to the SEC). However, as drafted, the proposed regulation text would have applied to all persons covered by regulation 1.31, not just to SDs and MSPs. The Commission's final swap recordkeeping rules require SDs and MSPs to make the records that the CEA or the Commission's regulations require them to maintain available for inspection to, in addition to the Commission and DOJ, any applicable prudential regulator or, in the case of security-based swap agreements, to the SEC, capturing the intent of the proposed revisions to regulation 1.31(a)(1), (b)(2)(ii), (b)(2)(v)(B), (b)(3)(i), (b)(3)(ii)(C), (b)(3)(iii)(A), and (b)(4)(i).<sup>65</sup> Therefore, those proposed revisions have become superfluous. Consequently, the final rule provides that, instead of having to make records available for inspection to the Commission, the Department of Justice, any applicable prudential regulator or, in the case of security-based swap agreements, to the Securities and Exchange Commission, persons covered by regulation 1.31 will continue to be required to make records available for inspection only to the Commission and the Department of Justice.

#### c. Format of Retained Records

The Commission also proposed revising regulation 1.31(a)(1), (a)(2), and (b) to require that: all books and records required to be kept by the Act or by the Commission's regulations be kept in their original form (for paper records) or native file format (for electronic records); and production of such records be made in a form specified by the Commission.

CME believes that the native file format requirement should not require the retention of raw, unprocessed data generated or transmitted by an electronic trading or clearing system. Otherwise, CME argued, DCOs and DCMs would have to change the way they retain records. CME stated that its recommendation is not intended to alter the type or format of data that DCOs and DCMs currently capture and store for both business and regulatory purposes. Rather, it asked the Commission to clarify that the "native file format" provision does not impose a new or additional recordkeeping requirement on DCOs and DCMs as it relates to their electronic trading or clearing systems.

<sup>60</sup> <http://www.iosco.org/news/pdf/IOSCONEW137.pdf>.

<sup>61</sup> 17 CFR 1.31(a) (emphasis added).

<sup>62</sup> See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128, 20204 (Apr. 3, 2012) ("Provided, however, that records of oral communications communicated by telephone, voicemail, mobile device, or other digital or electronic media pursuant to § 23.202(a)(1) and (b)(1) shall be kept for a period of one year.").

<sup>63</sup> As noted above, the proposed amendments to regulation 1.35 that would require the recording of certain oral communications by certain entities in addition to SDs and MSPs will be the subject of a separate final release. The Commission will consider any related amendments to regulation 1.31 at that same time.

<sup>64</sup> Until such time as the Commission adopts amendments to regulation 1.35 regarding the recording of oral communications, only SDs and MSPs are required, pursuant to regulation 23.202, to record certain oral communications relating to swap transactions and related cash and forward transactions. However, regulation 1.35, as amended herein, requires certain other entities, in addition to SDs and MSPs, to keep certain records of all transactions relating to their business of dealing in, among other things, swap transactions. As noted in text, regulation 1.31 as amended herein, applies to these records.

<sup>65</sup> 17 CFR 23.203(b).

CME also asked for clarification as to which proposed revisions to regulation 1.31 apply only to swaps. MGEX sought clarification that proposed regulation 1.31 does not require a firm to keep both paper and electronic records concerning the same communications.

CME commented that the original form requirement is confusing and superfluous in light of current regulation 1.31(b), which permits the storage of paper records on microfilm, microfiche, or a similar medium, and that it is not clear what the Commission means by “native file format.”

Similarly, NFA requested clarification that regulation 1.31(b) would continue to permit firms to retain paper records on micrographic or electronic storage media in lieu of maintaining paper records in their original format. NFA commented that the proposed revisions fail to provide a reason for requiring that electronic records be kept in their native file format.

FIA and NFA believe that existing regulation 1.31 complies with Federal Rule of Civil Procedure 34. Therefore, they asserted, there is no reason for the Commission to require that records be kept in their original form for paper records and native file format for electronic records. FIA and NFA further asserted that there is no reason for the Commission to depart from a rule that was designed, in 1999, to harmonize with the SEC’s recordkeeping rules. Similarly, ACSA commented that requiring paper records to be maintained in their original form for five years and be readily accessible for the first two would conflict with SEC rules. FIA commented that firms currently rely on regulation 1.31(b) to transfer electronic records from their original format to new forms of electronic media. CME similarly commented that electronic files often must be migrated, upgraded or converted in order to meet ever-evolving technology standards. Therefore, CME argued that, because some swaps could exist for 30 to 50 years, the technology used to generate or store electronic records related to such swap transactions may become outdated or obsolete in a much shorter period of time. Therefore, CME recommended that the Commission eliminate the requirement to retain swap records in their native file format for the life of the swap.

CME argued that the Commission should re-propose other rules referencing regulation 1.31 (*e.g.*, DCO Core Principles, DCM Core Principles, SEF Core Principles, and SD and MSP Recordkeeping) because the proposed revisions to the form a record must take

under regulation 1.31 substantially change the requirements proposed by those rulemakings. In contrast to other comments, the Working Group, in response to the proposed regulation 23.203(b) requiring SDs and MSPs to maintain records in accordance with existing regulation 1.31, asserted that, to be made workable for purposes of complying with the Commission’s proposed requirements under regulation 23.203(b), regulation 1.31 should be revised to reflect current technologies and industry practices relating to digitized data storage.<sup>66</sup>

Having considered these comments, the Commission is adopting the revisions to regulation 1.31 regarding the form in which records must be kept as proposed. In 1999, as commenters highlighted, the Commission adopted amendments to the recordkeeping obligations established in regulation 1.31 by, among other things, allowing most categories of records to be stored on either micrographic or electronic storage media for the full five-year maintenance period.<sup>67</sup> The Commission reasserts one of its intentions in undertaking the 1999 update, which was to “provide recordkeepers with opportunities to reduce costs and improve both the efficiency and security of their recordkeeping systems.” Thus, the Commission clarifies that recordkeepers will be in compliance with the new requirement to keep paper records in their original form if they continue to store paper records “on either ‘micrographic media’ \* \* \* or ‘electronic storage media’ for the required time period,” as provided under regulation 1.31(b). However, one of the Commission’s other stated goals in amending regulation 1.31 in 1999 was to further the Commission’s need for access to complete and accurate

<sup>66</sup> See Letter of Working Group of Commercial Energy Firms, dated February 7, 2011, in response to Notice of Proposed Rulemaking for Reporting, Recordkeeping, and Daily Trading Requirements for Swap Dealers and Major Swap Participants (75 FR 76666, Dec. 9, 2010). The Commission addressed the Working Group’s comment in the final rule for SD and MSP recordkeeping requirements stating, “[t]he Commission believes that The Working Group’s concerns about § 1.31 have been addressed by a subsequent rule proposal to amend § 1.31 to reflect current technologies and industry practices related to digitized data storage. If these amendments are finalized, the Commission believes that § 1.31 will be compatible with electronic records in a trading system and other records that do not originate from a written document.” See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128, 20134 (Apr. 3, 2012).

<sup>67</sup> See 64 FR 28735 (May 27, 1999).

records when necessary in a format that the Commission can process, *i.e.*, a usable format.<sup>68</sup> Thus, the Commission is now making clear that paper records are not usable by the Commission as a substitute for the underlying financial data used to create that paper.

Therefore, it is necessary that electronic records be maintained in their native file format and not reduced to paper.

Accordingly, for records that include data stored in a database, the “native file format” is the format in which the data is maintained in that database, not a format reduced to paper or imaged format, which is essentially the equivalent of paper. This is true regardless of the imaged format, such as portable document format (“PDF”), whether machine-readable through optical character recognition (“OCR”) or any other process. Thus, the underlying financial data from which an FCM creates PDF versions of customer account statements must be kept in its “native file format” because, if and when the Commission requests those financial records, it will not be sufficient for the recordkeeper to produce the paper and/or PDF statements. Where the data is used to generate a paper document (including, but not limited to a PDF), such as a customer account statement, the paper document must be maintained in its original form, while the data must be maintained in its native file format.

Specifically regarding records of swap transactions, the Commission has decided to keep the requirement that these records be maintained in their native file format for the life of the swap plus five years. In response to CME’s specific concerns about the need to migrate, update or convert electronic files over the potentially long life of a swap to meet evolving technology standards, the Commission confirms that maintaining data in native file format (*i.e.*, the format in which it was originally created or maintained) does not prohibit a recordkeeper from migrating that data from an obsolete or legacy system or database to a new system or database, where it will then be maintained in the native file format of the new system or database. If due to the proprietary nature of the system, it is impossible or impracticable to provide the Commission with the data in its native file format because, for

<sup>68</sup> In 1999, the Commission stated that, “[t]he requirement that recordkeepers provide documents to the Commission in one of the many identified formats arises out of practical limitations on the Commission’s ability to process data stored in the full range of available formats and coding structures on the full range of storage media available to recordkeepers.” 64 FR 28735, 28740 (May 27, 1999).

example, the native file format would not be accessible by the Commission, as it may not otherwise have that proprietary system, or the system does not readily export the requested data in native file format, then a recordkeeper may provide the data in a commonly accessible, non-proprietary format.

In the proposed changes to regulation 1.31, the Commission proposed to amend regulation 1.31(b)(3)(i) by replacing “approved machine-readable media as defined in regulation 15.00(l)” with “compatible data processing media as defined in regulation 15.00(d).” The proposed change was intended to update this paragraph of regulation 1.31 to reflect that regulation 15.00(l) no longer exists and, when it existed, was a definition of “compatible data processing media” and not “machine-readable media.”<sup>69</sup> Having received no comments on this proposed ministerial change, the Commission has determined to adopt the changes to regulation 1.31(b)(3)(i) as proposed.

In response to CME’s request for clarification of the scope of “native file format,” the Commission confirms that the definition of “native file format” excludes raw, unprocessed data generated or transmitted by an electronic trading or clearing system.

#### 4. Regulation 1.33: Monthly and Confirmation Statements

Regulation 1.33 requires FCMs to maintain certain records and to regularly furnish monthly and confirmation statements to customers regarding commodity futures and option transactions they have entered into on behalf of customers. The DFA amended the definition of FCM in section 1a of the CEA to authorize an FCM to solicit or accept orders for swaps in addition to commodity futures and option transactions.<sup>70</sup> Therefore, the Commission proposed adding requirements for monthly and confirmation statements applicable to swaps. The Commission did not receive comments concerning these

<sup>69</sup> Under current § 15.00(d), “Compatible data processing media” means “data processing media approved by the Commission or its designee.” This term has existed under § 15.00 since as early as 1986. See 17 CFR 15.01 (1986). At that time, the definition included a list of what the Commission considered to be compatible data processing media, but deleted those references to specific media in 1997 in response to comments suggesting that a regulatory definition was impractical given the fast pace of evolving technology. See 64 FR 28735, 28739 (May 27, 1999) (citing 62 FR 24026, 24028 (May 2, 1997)).

<sup>70</sup> DFA section 721(a)(13). Today’s rulemaking similarly incorporates those changes into the corresponding definition of “futures commission merchant” in regulation 1.3.

amendments and is adopting these provisions mostly as proposed.

The Commission has decided to replace a reference to “open positions” in the existing paragraph (a) introductory text with “open contracts.” This amendment makes the regulation 1.33(a) introductory text consistent with the Commission’s revised definition of “open contracts” in regulation 1.3(t).

In finalizing paragraphs (a)(3) and (b)(2), the Commission is replacing proposed references to “swaps” with “Cleared Swaps,” as regulation 22.1 defines that term. Since the publication of the Proposal, the Commission has finalized part 22 concerning the segregation of “Cleared Swaps Customer Collateral.”<sup>71</sup> Because an FCM will only clear those swaps that are “Cleared Swaps,” regulation 1.33 should only refer to “Cleared Swaps.” For the same reason, the Commission is using the terms “Cleared Swaps Customer” and “Cleared Swaps Customer Collateral,” as now defined in regulation 1.3. These corrections are being made in conjunction with technical corrections described below, in section II.A.14 (Technical corrections to parts 1 and 22).

Finally, in paragraph (a)(3) of regulation 1.33, the Commission is replacing the phrase “caused to be executed by” with “carried by.” The reason is that an FCM might not provide a trade execution function for every swap that it clears.

#### 5. Regulation 1.35: Records of Cash Commodity, Futures and Option Transactions<sup>72</sup>

As part of the ministerial amendments contained in this release, the Commission is renumbering portions of regulation 1.35 so that paragraphs currently numbered 1.35(a–1) and 1.35(a–2) will be renumbered 1.35(b) and 1.35(c), respectively. As a result, paragraphs currently numbered 1.35(b), (c), (d) and (e) have been renumbered as 1.35(d), (e), (f) and (g), respectively.

<sup>71</sup> Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336 (Feb. 7, 2012). See *infra* pt. II.A.14 (discussing technical changes to parts 1 and 22).

<sup>72</sup> The Commission proposed to amend regulation 1.35(a) so that FCMs, RFEDs, IBs, and members of a DCM or SEF would be required to record all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of transactions in a commodity interest or cash commodity, however communicated. The proposed amendments to regulation 1.35(a) also included a requirement that each transaction record be maintained in a separate electronic file identifiably by transaction and counterparty. As noted above, the Commission will consider these proposed amendments to regulation 1.35(a) in a separate release.

Because amended regulation 1.35 extends recordkeeping obligations to swaps, the Commission has created special language for swaps, where appropriate. In regulation 1.35(d)(2) (formerly (b)(2)) (records of futures, commodity options, and retail forex exchange transactions for each account), the Commission has added paragraph (iv), as proposed. The Commission did not receive comments about this amendment and is adopting it as proposed. Amended regulation 1.35(d)(2)(iv) requires FCMs, IBs, and any clearing members clearing swaps executed on a DCM or SEF to maintain records describing the date, price, quantity, market, commodity, and, if cleared, DCO of each swap.

#### a. Bunched Orders

The Commission recognizes that investment managers currently execute bunched swap orders on behalf of clients and allocate the trades to individual clients post-execution. The Commission believes that the bunched order procedures currently applicable to futures can be adapted for use in swap trading. Therefore, the Commission proposed amending regulation 1.35(a–1)(5) (redesignated as (b)(5) pursuant to this rulemaking), addressing post-execution allocation of bunched orders.<sup>73</sup> The Commission received one comment letter concerning this topic. The Swaps and Derivatives Market Association (“SDMA”) strongly supported the proposed amendment on the grounds that it would promote operational and execution efficiency in both the cleared and uncleared swaps markets. Specifically, SDMA noted that industry precedent supports the proposed post-execution time limits (for cleared swaps, no later than a time sufficiently before the end of the calendar day the order is executed to ensure that clearing records identify the ultimate customer for each trade; for uncleared swaps, no later than the end of the day the swap was executed). SDMA also noted that regulation 1.35(a–1)(5)’s bunched order provisions for futures provide an appropriate model for swaps and that FCMs generally have sufficient risk control capability (technologically speaking) to allocate swap orders post-execution.

In its final rulemaking concerning Customer Clearing Documentation, Time of Acceptance for Clearing, and Clearing Member Risk Management, the Commission adopted the Proposal’s

<sup>73</sup> In the Proposal, the Commission requested comment as to whether it would be appropriate to add FCMs and IBs to the list of eligible account managers. Proposing Release, 76 FR at 33073.

amendments to regulation 1.35(a-1)(5) concerning the post-execution time limits referred to above.<sup>74</sup>

In this rulemaking, the Commission is adding FCMs and IBs to the list of eligible account managers in regulation 1.35(a-1)(5) (redesignated as (b)(5)), as proposed, in order to have a single standard for all intermediaries that might have discretion over customer accounts. Unlike other account managers, however, under regulations 155.3 and 155.4, FCMs and IBs are prohibited from including proprietary trades in a bunched order with customer trades. Accordingly, as proposed, the Commission has added a cross-reference in regulation 1.35(a-1)(5) (re-designated herein as (b)(5)) to those regulations. The Commission did not receive comments to this segment of the Proposal.

The Commission is further amending regulation 1.35(a-1) (redesignated herein as (b)) in order to provide that specific customer account identifiers need not be included in confirmations or acknowledgments provided pursuant to regulation 23.501(a), if the requirements of regulation 1.35(a-1)(5) (redesignated herein as (b)(5)) are met. This will enable account managers to bunch orders for trades executed bilaterally with SDs or MSPs. This will require that, similar to the current procedure for futures, the allocation be completed by the end of the day of execution and provided to the counterparty. The Commission is making this revision as proposed; it did not receive comments to this revision.

Also as proposed, the Commission is deleting appendix C to part 1, which predated regulation 1.35(a-1)(5) (redesignated herein as (b)(5)) and also addresses bunched orders. Appendix C consists of a Commission Interpretation regarding certain account identification requirements pertaining to the practice of combining orders for different accounts into a single order book, referred to as bunched orders. The procedures for bunched orders are set forth in regulation 1.35(a-1)(5) (redesignated herein as (b)(5)).

Accordingly, the procedures under appendix C to part 1 are duplicative and no longer necessary. The Commission received no comments concerning its proposal to delete appendix C to part 1 and is hereby deleting that appendix.

#### b. Other Changes to Regulation 1.35

The Commission has deleted paragraphs (f)–(l) of regulation 1.35, as

proposed. To implement the CFMA, regulation 38.2 required DCMs to comply with an enumerated list of Commission regulations, and exempted them from all remaining Commission regulations that were no longer applicable post-CFMA.<sup>75</sup> The DCM Core Principles final rulemaking substantially revised part 38, but did not revoke regulation 38.2.<sup>76</sup> Instead, it updated the list of Commission regulations that are applicable to DCMs. Unlike its predecessor, regulation 38.2, as revised by the DCM Core Principles final rulemaking, only enumerates the Commission regulations from which DCMs are exempt.

As part of the ministerial amendments contained in this rulemaking, the Commission has eliminated from the Commission's regulations any provisions that have been inapplicable to DCMs since the passage of the CFMA, and that remain inapplicable after the passage of the DFA. Paragraphs (f)–(l) of regulation 1.35 are among those provisions. Pursuant to the deletion paragraph (j) of regulation 1.35, the Commission has copied most of that provision into new subsection (d)(7)(i) (formerly (b)(7)(i)). The Commission made these changes as proposed; it did not receive any comments on these provisions.

Also as part of the ministerial amendments contained in this rulemaking, the Commission proposed to eliminate regulations 1.35(a-1)(3)(ii) and 1.35(a-2)(3). However, regulation 38.2, as revised by the DCM Core Principles final rule, no longer exempts DCMs from these provisions. Accordingly, these provisions will not be eliminated in this rulemaking, and they are redesignated as regulations 1.35(b)(3)(ii) and 1.35(c)(3), respectively.

Regulation 1.35, as revised by this rulemaking, no longer agrees with regulation 38.2. As this rulemaking eliminates the provisions of regulation 1.35 that remain inapplicable to DCMs, the Commission is revising regulation 38.2 to remove references to those provisions of regulation 1.35 with which DCMs are not required to comply. The Commission considers this revision to regulation 38.2 technical in nature as it merely cleans up the discrepancy created by the revisions to regulation 1.35.

Finally, the Commission has made a technical correction to regulation 1.35(b)(3)(v) (redesignated herein as

(d)(3)(v)) so that the final sentence references “commodity futures, retail forex, commodity option, or swap books and records” instead of “commodity retail forex or commodity option books and records.” The Commission has made this change as proposed; it did not receive any comments on this provision.

#### 6. Regulation 1.37: Customer's or Option Customer's Name, Address, and Occupation Recorded; Record of Guarantor or Controller of Account

Dodd-Frank Act section 723(a)(3) added a new section 2(h)(8) to the CEA to require, among other things, that swaps subject to the clearing requirement of CEA section 2(h)(1) be executed either on a DCM or on a SEF. The DFA established SEFs as a new category of regulated markets for the purpose of trading and executing swaps. Because SEFs are now regulated markets under the CEA, many of the Commission's existing regulatory provisions that currently are applicable to DCMs also will become applicable to SEFs.

Accordingly, the Commission, as proposed, has amended paragraphs (c) and (d) of regulation 1.37, pertaining to recording foreign traders' and guarantors' names, addresses, and business information. Currently, these provisions apply to DCMs and futures and options contracts executed on those facilities. This revision amends the provisions to also include SEFs and swap transactions. Additionally, the Commission is amending the title and remaining text of regulation 1.37 to reflect the removal of the term “option customer.”<sup>77</sup> The Commission received no comments on these provisions.

#### 7. Regulation 1.39: Simultaneous Buying and Selling Orders of Different Principals; Execution of, for and Between Principals

Like regulation 1.37, the Commission is amending regulation 1.39 to apply it to SEFs and swaps. Regulation 1.39, which has applied to members of contract markets, governs the simultaneous execution of buy and sell orders of different principals for the same commodity for future delivery by a member and permits the execution of such orders between such principals on a contract market. The Commission is amending this provision to include members of SEFs, and to include swap transactions. The Commission is also amending paragraph (c) to eliminate the reference to “cross trades,” as they are

<sup>74</sup> Customer Clearing Documentation, Time of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278, 21306 (Apr. 9, 2012).

<sup>75</sup> See 71 FR 1964 (Jan. 12, 2006).

<sup>76</sup> Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612 (June 19, 2012).

<sup>77</sup> See *supra*, section II.A.b. for a discussion of the deletion of the defined term “option customer” (1.3(j)).

no longer defined under section 4c(a) of the Act, as amended by the DFA. The Commission received no comments and is making these revisions as proposed, with a slight modification to further clarify that the rule applies to SEFs in the same manner that it applies to DCMs.

**8. Regulation 1.40: Crop, Market Information Letters, Reports; Copies Required**

Regulation 1.40 requires FCMs, RFEDs, IBs and members of contract markets to furnish to the Commission certain information they publish or circulate concerning crop or market information affecting prices of commodities. The Commission is amending regulation 1.40 to apply it to trading on a SEF, to the extent that persons have trading privileges on the SEF. Persons without trading privileges on a SEF will not be subject to regulation 1.40. The amendments also update the forms of communication covered by the regulation by replacing the word “telegram” with “telecommunication.” The Commission is making these revisions as proposed; the Commission received no comments on these provisions.

**9. Regulation 1.59: Activities of Self-Regulatory Employees, Governing Board Members, Committee Members and Consultants**

The Commission proposed to amend regulation 1.59 to include SEFs and swaps. The Commission also proposed to amend regulation 1.59(b) to correct certain cross-references to the Act and Commission regulations. Regulation 1.59(c) has been revised to apply only to registered futures associations, as the prohibitions contained therein applicable to the other SROs already are addressed in proposed regulation 40.9.<sup>78</sup> The Commission is making these revisions as proposed; the Commission received no comments.

**10. Regulation 1.63: Service on Self-Regulatory Organization Governing Boards or Committees by Persons With Disciplinary Histories**

The Commission proposed to amend regulation 1.63 to correct certain cross-references to the Act and its regulations. The Commission also proposed to amend paragraph (d) to incorporate the posting of notices required under that paragraph on each SRO’s Web site. The Commission received no comments regarding the proposed amendments to

regulation 1.63 and is adopting the amendments without modification.

**11. Regulation 1.67: Notification of Final Disciplinary Action Involving Financial Harm to a Customer**

Regulation 1.67 requires contract markets, upon taking any final disciplinary action involving a member causing financial harm to a non-member, to provide notice to the FCM that cleared the transaction. FCMs and other registrants on SEFs should also be notified of any disciplinary action involving transactions on a SEF they executed for ECPs. Accordingly, the Commission proposed to amend regulation 1.67 to include SEFs, registrants and ECPs on such facilities. The Commission received no comments regarding proposed regulation 1.67 and is adopting the rule without modification.

**12. Regulation 1.68: Customer Election Not To Have Funds, Carried by a Futures Commission Merchant for Trading on a Registered Derivatives Transaction Execution Facility, Separately Accounted for and Segregated**

The Commission is hereby removing and reserving regulation 1.68. Regulation 1.68 had permitted a customer of an FCM to allow the FCM to not separately account for and segregate such customer’s funds if, among other things, such funds are being carried by the FCM to trade on or through the facilities of a DTEF. No DTEF has ever registered with the Commission. Furthermore, section 734 of the Dodd-Frank Act repealed the DTEF provisions in the CEA, effective July 15, 2011. Therefore, because the statutory provisions underpinning regulation 1.68 have been repealed, the Commission is removing it from the Commission’s regulations.<sup>79</sup>

**13. Regulations 1.44, 1.53, and 1.62—Deletion of Regulations Inapplicable to Designated Contract Markets**

The CFMA adopted core principles for DCMs.<sup>80</sup> On August 10, 2001, the Commission published final rules implementing provisions of the CFMA, in which it concluded that the CFMA’s framework effectively constituted a broad exemption from many of the existing regulations applicable to

DCMs.<sup>81</sup> Accordingly, the final rules included regulation 38.2, which required DCMs to comply with an enumerated list of Commission regulations, and exempted them from all remaining Commission regulations no longer applicable post-CFMA. As part of the ministerial amendments contained in the Proposal, the Commission proposed to eliminate from the Commission’s regulations any provisions that have been inapplicable to DCMs since the CFMA was enacted and that remain inapplicable after enactment of the DFA. Accordingly, the Commission proposed to eliminate the following regulations: regulation 1.44 (Records and reports of warehouses, depositories, and other similar entities; visitation of premises), regulation 1.53 (Enforcement of contract market bylaws, rules, regulations, and resolutions), and regulation 1.62 (Contract market requirement for floor broker and floor trader registration). The Commission received no comments regarding the proposed deletion of these provisions and is hereby deleting such provisions as proposed.

**14. Technical Changes to Part 1 and Part 22 in Order To Accommodate Recently Finalized Part 22**

On February 7, 2012, the Commission finalized regulations in part 22 regarding the Protection of Cleared Swaps Customer Contracts and Collateral (“Cleared Swaps Customer Final Rule”).<sup>82</sup> The Cleared Swaps Customer Final Rule took effect on April 9, 2012, although the compliance date for the rule is November 8, 2012. The Cleared Swaps Customer Final Rule established a segregation regime applicable to FCMs and DCOs for “Cleared Swaps Customer Collateral,” as regulation 22.1 defines that term.<sup>83</sup> The rulemaking process involved extensive public comment, including through both an advanced notice of proposed rulemaking and a notice of proposed rulemaking.

The Cleared Swaps Customer Final Rule carefully established the basic architecture for protecting Cleared Swaps Customer Collateral. Both the Cleared Swaps Customer Final Rule and

<sup>81</sup> A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, 66 FR 42256 (Aug. 10, 2001).

<sup>82</sup> Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336 (Feb. 7, 2012) (“Cleared Swaps Customer Final Rule”).

<sup>83</sup> Part 22 capitalizes definitions, but part 1 does not. Hence, in this rulemaking, terms defined in regulation 22.1 are capitalized, and terms defined in regulation 1.3 are not.

<sup>78</sup> Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732 (Oct. 18, 2010).

<sup>79</sup> The Commission is also hereby deleting all other references to DTEFs, except those already removed by other Commission rulemakings, throughout its regulations. See *infra* Part II.G.

<sup>80</sup> Public Law 106–554, 114 Stat. 2763 (2000).



the related proposed rule<sup>84</sup> described how and to what extent the part 22 regulations for cleared swaps parallel and deviate from the part 1 regulations applicable to FCMs and DCOs relating to Customers' Money, Securities, and Property for exchange-traded contracts (referred to herein as the "Part 1 Segregation Regulations"). In today's final rulemaking, the Commission is making technical corrections to certain of the Part 1 Segregation Regulations to make unambiguous that certain parallel Part 1 Segregation Regulations do not apply to Cleared Swaps Customer Collateral. These Part 1 Segregation Regulations only apply to the segregation of customer funds used to margin, guarantee, or secure contracts for future delivery on or subject to the rules of a contract market, and all money accruing to such customers as a result of such contracts (referred to herein as "futures contracts"), as well as to customer funds used to margin commodity option transactions on or subject to the rules of a contract market or DCO (referred to herein as "options on futures contracts").<sup>85</sup>

For the reasons stated above, the Commission is hereby making the following technical corrections:

In regulation 1.3, the Commission has added a definition of "futures customer funds" to reference only those funds used to margin futures contracts or commodity option transactions on or subject to the rules of a contract market, or DCO, as the case may be. This definition matches the existing definition of customer funds (regulation 1.3(gg)). The Commission is also adding a definition of "Cleared Swaps Customer Collateral," which cross-references regulation 22.1's definition of this term. Regulation 1.3(gg) ("customer funds") applies to both "futures customer funds" and "Cleared Swaps Customer Collateral." The Proposal's definition in regulation 1.3(gg) had already applied to customer funds used to margin both futures and swaps.

Relatedly, the Commission is adding a definition of "futures customer" to regulation 1.3 and a definition of "Cleared Swaps Customer," which cross-references regulation 22.1's definition of that term. As discussed

above in section II.A.1.b. of this preamble, the definition of "customer" in regulation 1.3(k) will be finalized as proposed, to reference "any person who uses a futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any commodity interest."<sup>86</sup> The definition of "customer" refers to both a "futures customer" and a "Cleared Swaps Customer" because, as described in section II.A.1.f. of this preamble, this rulemaking is adopting a revised definition of "commodity interest" (regulation 1.3(yy)), largely as proposed, to reference futures, swaps, and contracts subject to Commission sections 2(c)(2), 4c or 19 of the Act.

The Proposal included an amendment to the definition of "futures account" in regulation 1.3(vv) to reference a related futures segregation provision of section 4 of the Act, as amended by the Dodd-Frank Act, *i.e.*, section 4d(a). The Proposal neglected to reference subsection (b) of section 4d, so today's final definition of "futures account" references sections 4d(a) and 4d(b) of the Act. The Commission did not receive comments about its proposed revisions to this definition. As a technical correction, the Commission is adding a definition of "Cleared Swaps Customer Account," which references regulation 22.1's definition of that term. Relatedly, the Commission is adding a definition of "customer account" in regulation 1.3 to connote both a "futures account" and a "Cleared Swaps Customer Account," as regulation 1.3 defines each of those terms.

The Commission is making a technical correction to paragraph (c)(5)(xiii)(C) of regulation 1.17 ("Minimum financial requirements for futures commission merchants and introducing brokers") to restrict a provision pertaining to a foreign broker granted relief pursuant to regulation 30.10 to "the foreign futures or foreign options secured amount, as § 1.3(rr) of this part defines such term." This provision has always referenced the foreign futures or foreign options secured amount. Thus, because "customer funds" includes both "futures customer funds" and "Cleared Swaps Customer Collateral," the Commission is making a technical correction to replace the term "customer funds" in paragraph (c)(5)(xiii)(C) of regulation 1.17 with the term "foreign futures or foreign options secured amount."

<sup>86</sup> As finalized, the definition of customer in regulation 1.3(k) preserves existing treatment of proprietary accounts.

The Commission is making technical corrections to regulation 1.20 ("Customer funds to be segregated and separately accounted for") by: changing the title to "Futures customer funds to be segregated and separately account for"; replacing references to "customer funds" and "customers" to "futures customer funds" and "futures customers"; and linking the regulation to those provisions of section 4d of the Act, as amended by the Dodd-Frank Act, pertaining to the segregation of futures customer funds (*i.e.*, sections 4d(a) and (b)).

The Commission is making technical corrections to regulation 1.21 ("Care of money and equities accruing to customers") by changing the title to "Care of money and equities accruing to futures customer" and replacing references to "customer" with references to "futures customer." The Cleared Swaps Customer Final Rule did not create a parallel regulation in part 22 on the grounds that such parallels were not necessary because: (1) Regulation 22.1 broadly includes "accruals" in the definition of Cleared Swaps Customer Collateral, and (2) regulation 22.2(e) permits an FCM to commingle the Cleared Swaps Customer Collateral of multiple Cleared Swaps Customers. Thus, although revised regulation 1.21 is limited to futures customers and there is no parallel regulation in part 22, part 22 captures the substance of regulation 1.21 with respect to Cleared Swaps Customers and Cleared Swaps Customer Collateral.

The Commission is making technical corrections to regulation 1.22 ("Use of customer funds restricted") by changing the title to "Use of futures customer funds restricted" and replacing references to "customer funds" and "customer" with references to "futures customer funds" and "futures customer." The Cleared Swaps Customer Final Rule incorporated these requirements into part 22 with respect to Cleared Swaps Customer Collateral and Cleared Swaps Customers.

The Commission is making technical corrections to regulation 1.23 ("Interest of futures commission merchant in funds; additions and withdrawals") by changing the title to "Interest of futures commission merchant in segregated futures customer funds; additions and withdrawals;" replacing references to "customer funds" and "customer" with references to "futures customer funds" and "futures customer;" and linking the regulation to sections 4d(a) and (b) of the Act.<sup>87</sup>

<sup>87</sup> The Cleared Swaps Customer Final Rule created analogous requirements in part 22 with

<sup>84</sup> Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 76 FR 33818 (June 9, 2011).

<sup>85</sup> See generally Cleared Swaps Customer Final Rule, 77 FR at 6363 ("Sections 22.2 through 22.10 implement the basic architecture of a system of segregation for swaps customer funds roughly comparable to the system used for customer funds for futures contracts under CEA sections 4d(a)(2) and 4d(b) and Commission regulations 1.20 through 1.30 and 1.49.").



The Commission is making technical corrections to regulation 1.24 (“Segregated funds; exclusions therefrom”) by replacing a reference to “customers” with “futures customers.”<sup>88</sup>

The Commission is making technical corrections to regulation 1.26 (“Deposit of instruments purchased with customer funds”) by: changing the title to “Deposit of instruments purchased with futures customer funds”; replacing references to “customer funds” and “customer” with references to “futures customer funds” and “futures customer;” and linking the regulation to sections 4d(a) and (b) of the Act.<sup>89</sup>

The Commission is making technical corrections to regulation 1.32 (“Segregated account; daily computation and record”) by replacing references to “customer funds,” “customer,” and “customer account” with references to “futures customer funds,” “futures customer,” and “futures customer account.”<sup>90</sup>

The Commission is making a technical correction to regulations 1.21, 1.23, 1.24, 1.26, 1.29, 140.735–2a, and 140.735–3 by replacing the term “clearing organization” or “clearinghouse” with “derivatives clearing organization.” Since Congress’ enactment of the CFMA in 2000,<sup>91</sup> which added “derivatives clearing organization” as a new defined term to section 1a of the Act, the intent of these regulations has been to refer to “derivatives clearing organizations.”

The Commission is making technical changes to subsection (1)(iii) of regulation 1.33 (“Monthly and Confirmation statements”) to specifically reference “futures customer funds” and the “foreign futures and foreign options secured amount.” This subsection presently refers to these classes of customer funds; the intention of this technical amendment is to clarify that meaning.

Proposed amended regulation 1.33(a)(3) described what “swap positions” information an FCM must provide in monthly statements to its customers. The Commission did not

receive comments on this proposal and is publishing it as proposed, except for the following. In line with the aforementioned technical corrections, today’s final version of regulation 1.33 replaces “swap position” with “Cleared Swaps Customer.” Today’s final rulemaking also makes a technical correction to regulation 1.33 by combining subsections (a)(1)(iv), (a)(2)(v), and proposed (a)(3)(iv) into a new paragraph (a)(4).

Unlike the aforementioned Part 1 Segregation Regulations, Regulation 1.25 (“Investment of customer funds”), on the other hand, now properly applies to both futures customer funds and Cleared Swaps Customer Collateral. Thus, its title will continue to refer to “customer funds,” which, as defined by revised regulation 1.3(gg), includes both futures customer funds and Cleared Swaps Customer Collateral. However, the Commission is making technical corrections to regulation 1.25 as part of today’s final rulemaking by adding references to regulation 22.5 (“Futures commission merchants and derivatives clearing organizations: Written acknowledgment”) alongside current references to regulation 1.26 (“Deposit of instruments purchased with customer funds”) (to be amended herein as “Deposit of instruments purchased with futures customer funds”). The Commission explains this reference to regulation 22.5 in a new provision at the end of paragraph (d)(13) of regulation 1.25.

The foregoing technical corrections to the Part 1 Segregation Regulations are designed to ensure that, when taken together with the Cleared Swaps Customer Final Rule, they do not create redundant, and potentially conflicting, duties for FCMs and DCOs. For similar reasons, the Commission is making certain equivalent technical corrections to part 22. As mentioned above, none of these technical changes alter the meaning of any regulation of part 22. First, the Commission is deleting the definition of “Customer” from regulation 22.1 (“Definitions”). Because of the aforementioned addition of the definition of “futures customer” in regulation 1.3, regulation 22.1’s definition of “Customer” is no longer needed or correct. Consequently, in regulation 22.2 (“Futures Commission Merchants: Treatment of Cleared Swaps and Associated Cleared Swaps Customer Collateral”), the Commission is replacing references to “Customers” with references to “futures customers” or “foreign futures or foreign options customers,” as regulation 30.1(c) defines that term. For the same reason, in regulation 22.3(b)(2)(iii) (“Derivatives

clearing organizations: Treatment of Cleared Swaps Customer Collateral”); paragraphs (a) and (b) of regulation 22.5 (“Futures commission merchants and derivatives clearing organizations: Written acknowledgement”); and paragraph (a) of regulation 22.9 (“Denomination of Cleared Swaps Customer Collateral and location of depositories”), the Commission is replacing references to funds belonging to “Customers” with references to “futures customer funds.”

In addition, since, as described above, regulation 1.25 (“Investment of customer funds”) applies to both futures customer funds and Cleared Swaps Customer Collateral, the Commission is making a technical correction to paragraph (e)(1) of regulation 22.2 and paragraph (d) of regulation 22.3 by omitting, “which section shall apply to such money, securities, or other property as if they comprised customer funds or customer money subject to segregation pursuant to section 4d(a) of the Act and the regulations thereunder.”

Similarly, the Commission is making a technical correction to regulation 22.9 (“Denomination of Cleared Swaps Customer Collateral and location of depositories”) by omitting a reference to Cleared Swaps Customer Collateral. Regulation 22.9 cross-references regulation 1.49 (“Denomination of customer funds and location of depositories”). Because the new revised definition of “customer funds” in regulation 1.3 references both futures customer funds and Cleared Swaps Customer Collateral, regulation 1.49 references to both classes of funds. Therefore, regulation 22.9 can reference regulation 1.49 without making a specific reference to Cleared Swaps Customer Collateral, which the Commission has always intended.

Moreover, as a result of the corrections to the definition described above, the Commission is making (1) a technical correction to regulation 22.10 (“Application of other regulatory provisions”) to avoid confusion as to the applicability of regulations 1.27, 1.28, 1.29, and 1.30 to Cleared Swaps, Cleared Swaps Customers, and Cleared Swaps Customer Collateral, and (2) technical corrections to regulations 22.13(a)(2) and 22.15 to incorporate the new “Futures Customer” and “Foreign Futures or Foreign Options Customer” terms.

The Commission is also making technical corrections to regulation 22.11, regulation 22.13(a)(1), the title of regulation 22.14, regulation 22.14(a)(2), regulation 22.14(c)(2), regulation 22.15, and the title of regulation of 22.16 by replacing references to “Customer” with

respect to Cleared Swaps Customer Collateral and Cleared Swaps Customers. See 17 CFR 22.2(e)(3).

<sup>88</sup> The Cleared Swaps Customer Final Rule created analogous provisions in part 22 with respect to Cleared Swaps Customers. See 17 CFR 22.2(d)(3).

<sup>89</sup> The Cleared Swaps Customer Final Rule created analogous requirements in regulation 22.5 17 CFR 22.5.

<sup>90</sup> The Cleared Swaps Customer Final Rule mirrored some of regulation 1.32’s requirements in part 22 with respect to Cleared Swaps Customer Collateral and Cleared Swaps Customers. See 17 CFR 22.2(g).

<sup>91</sup> Public Law 106–55, 114 Stat. 2763 (Effective December 21, 2000).

the correct term “Cleared Swaps Customer.” Since its publication, regulation 22.11 has always intended to reference only Cleared Swaps Customers.

In addition, the Commission is making technical corrections to regulation 22.12 (“Information to be maintained regarding Cleared Swaps Customer Collateral”) by replacing the term “Cleared Swaps Customer Funds,” with the correct term, “Cleared Swaps Customer Collateral.”

The Commission notes that its regulations refer to “customer funds” in the following regulations: 3.10, 3.21, 5.5, 39.15, 39.16, and 170.5, as well as in Appendices to part 190. “Customer funds” also appears in the following regulations recently amended by the Commission’s final rulemaking concerning Core Principles and Other Requirements for Designated Contract Markets:<sup>92</sup> 1.52, 38.603, 38.604, and Appendix B to part 38. The Commission believes that these provisions properly refer to “customer funds” as revised regulation 1.3(gg) now defines that term, *i.e.*, to connote both “futures customer funds” and “Cleared Swaps Customer Collateral.”

#### B. Part 7

The Commission proposed to rename part 7 of the Commission’s regulations “Registered Entity Rules Altered or Supplemented by the Commission,” thus reflecting the language in section 8a(7) of the Act, as amended by the Dodd-Frank Act, which provides the basis for part 7. The Commission also proposed to make a similar change in regulation 7.1, replacing contract market rules with registered entity rules. Finally, the Commission proposed to remove and reserve subparts B (Chicago Mercantile Exchange Rules) and C (Board of Trade of the City of Chicago Rules) and their associated sections. The Commission received no comments regarding the proposed amendments to part 7 and is adopting these amendments as proposed.

#### C. Part 8

The Commission proposed to remove part 8 of its regulations. Regulation 38.2 enumerates the provisions with which DCMs are not required to comply. The part 8 regulations are among those provisions.<sup>93</sup> In the DCM Core Principles final rules, the Commission adopted regulations in “Subpart N—Disciplinary Procedures” of part 38 to amend the disciplinary procedure

requirements applicable to DCMs.<sup>94</sup> Several of the regulations adopted in subpart N of part 38 are similar to the text of the disciplinary procedures found in part 8 of the Commission’s regulations.<sup>95</sup> The Commission proposed to remove part 8 from its regulations to avoid any confusion that could result from those regulations containing two sets of exchange disciplinary procedures. The Commission received no comments regarding the proposed deletion of part 8 and is therefore deleting those regulations as proposed.

#### D. Parts 15, 18, 21, and 36

The Commission also proposed to incorporate changes into parts 15, 18, 21, and 36 of its regulations to account for (1) the DFA’s elimination of two categories of exempt markets, exempt commercial markets (“ECMs”) and electronic boards of trade (“EBOTs”); and (2) the DFA’s grandfather relief provisions for such entities.

Section 723 of the DFA repealed CEA section 2(h), thus eliminating the ECM category. Section 734 of the DFA repealed CEA section 5d, thus eliminating the EBOT category. Section 734 also repealed CEA section 5a, thus eliminating the DTEF category of regulated markets effective July 15, 2011, as discussed above.

Both sections 723 and 734 of the Dodd-Frank Act contain grandfather provisions allowing ECMs and EBOTs to petition the Commission to continue to operate as ECMs and EBOTs. Pursuant to the grandfather provisions, in September 2010, the Commission issued orders regarding the treatment of such grandfather petitions (the “Grandfather Relief Orders”).<sup>96</sup> Under the Grandfather Relief Orders, the Commission may, subject to certain conditions, provide relief to ECMs and EBOTs for up to one year from the general effective date of the DFA’s amendments to the CEA. On July 13,

<sup>94</sup> 77 FR at 36649. The DCM Core Principles final rules take effect on August 20, 2012. Section 735 of the Dodd-Frank Act eliminates all DCM designation criteria, including Designation Criterion 6 (Disciplinary Procedures). Section 735 of the Dodd-Frank Act creates a new Core Principle 13 (Disciplinary Procedures) that is devoted exclusively to exchange disciplinary proceedings, and captures disciplinary concepts inherent in both Designation Criterion 6 and in current DCM Core Principle 2.

<sup>95</sup> Paragraph (b)(4) of the acceptable practices for former Core Principle 2 referenced part 8 of the Commission’s regulations as an example that DCMs could follow to comply with Core Principle 2. 17 CFR pt. 38, app. B, Acceptable Practices for Core Principle 2 at (b)(4). In its experience, the Commission has found that many DCMs’ disciplinary programs do in fact model their disciplinary structures and processes on part 8.

<sup>96</sup> 75 FR 56513 (Sept. 16, 2010).

2012, the Commission amended for the second time a Commission order dated July 14, 2011, by, among other things, allowing ECMs and EBOTs, as well as markets that rely on pre-DFA CEA section 2(d)(2), to rely only on the amended order (“Second Amended July 14 Order”) after July 16, 2012.<sup>97</sup>

Pursuant to the DFA and the Grandfather Relief Orders, the Commission proposed to remove from parts 15, 18, 21 and 36<sup>98</sup> references to CEA sections 2(h) and 5d and to replace those references, where appropriate, with references to the Grandfather Relief Orders as the authority under which ECMs and EBOTs can continue to operate. The Commission also proposed to remove from parts 15, 18, 21, and 36 of its regulations references to CEA sections 2(d), 2(g), and 5a, as well as references to DTEFs. The Commission received no comments regarding the amendments to parts 15, 18, 21, and 36. The Commission is revising regulation 36.1 in order to account for the expiration of the Grandfather Relief Orders on July 16, 2012, as well as reliance by ECMs and EBOTs on the Second Amended July 14 Order. Otherwise, the Commission is adopting the amendments to parts 15, 18, 21, and 36 as proposed.

#### E. Parts 41, 140, and 145

The Commission also proposed to incorporate changes into its regulations to account for other new categories of registered entities and to include new products now subject to Commission jurisdiction. Section 733 of the Dodd-Frank Act added new section 5h to the CEA and created SEFs. Section 728 of the Dodd-Frank Act added new section 21 to the CEA and created SDRs. SEFs will allow for the trading of swap transactions between ECPs, as that term is defined in CEA section 1a(18).<sup>99</sup> In addition to the amendments contained in proposed part 37, the Commission proposed additional amendments throughout the regulations to include SEFs and SDRs where necessary. The Commission also proposed to delete from part 41 references to DTEFs as that term was deleted from CEA section 5b by the Dodd-Frank Act, effective July 15, 2011.<sup>100</sup> The Commission received

<sup>97</sup> 77 FR 41260 (July 13, 2012).

<sup>98</sup> Part 36 provisions apply to ECMs and EBOTs. The Commission is not deleting part 36 in its entirety because part 36 provisions will continue to apply to ECMs and EBOTs that continue to operate under the Grandfather Relief Orders.

<sup>99</sup> For a detailed discussion of the proposed rules as they directly relate to SEFs, see 76 FR 1214 (Jan. 7, 2011).

<sup>100</sup> Section 5b of the CEA provided for the registration of DTEFs. Although secondary references to DTEFs remain in the CEA, none of the

<sup>92</sup> 77 FR 3661 (June 19, 2012) (Effective date: August 20, 2012).

<sup>93</sup> 17 CFR 38.2.

no comments to its deletion of the term DTEF from part 41 and is adopting this change as proposed. In addition, as part of today's final rulemaking, the Commission is making a technical change to part 41 so that references to the definition of "narrow-based security index" is cited as section 1a(35) of the Act instead of section 1a(25) of the Act.

The proposed changes throughout parts 140 (Organization, Functions and Procedures of the Commission) and 145 (Commission Records and Information) reflect the need to incorporate SEFs and SDRs into the Commission's regulations dealing with the rights and obligations of other registered entities. The Commission proposed amending regulation 140.72 to provide the Commission with the authority to disclose confidential information to SEFs and SDRs. This provision allows the Commission, or specifically identified Commission personnel, to disclose information necessary to effectuate the purposes of the CEA, including such matters as transactions or market operations. The Commission proposed amending regulation 140.96 to authorize the Commission to publish in the **Federal Register** information pertaining to the applications for registration of DCMs, SEFs and SDRs, as well as new rules and rule amendments which present novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with the Act, or regulations under the Act. The Proposal included an amendment to regulation 140.99 to include SEFs and SDRs to the categories of registered entities that may petition the Commission for exemptive relief and no-action and interpretative letters.

The Commission proposed amending regulation 140.735-2 by adding swap and retail forex transactions, as regulation 5.1(m) defines the latter term, to those agreements, contracts or transactions Commission staff may not trade. The Commission proposed amending regulation 140.735-3 to add SEFs and SDRs to the list of entities from which Commission members and employees may not accept employment or compensation.

The Commission received no comments about these proposed amendments to part 140 and is adopting them as proposed, except for two technical corrections to regulation 140.735-2. The Proposal added "swap

those would enable an entity to commence operations as a DTEF. The proposed deletions are in regulations 41.2, 41.12, 41.13, 41.21-41.25, 41.27, 41.43 and 41.49.

transaction" to the text of paragraph (c) but inadvertently omitted updating a cross-reference to paragraph (b) that references "swaps." Today's final rulemaking updates that cross-reference accordingly. Similarly, the Proposal added "swap transaction" to one sentence of paragraph (c)'s footnote three but, inadvertently, did not add "swap transaction" to another sentence of that paragraph. Thus, today's rulemaking makes a technical correction by adding "swap transaction" to that other sentence.

The Commission proposed amending regulation 145.9 to expand the definition of "submitter" by adding SEFs and SDRs to the list of registered entities to which a person's confidential information has been submitted, and which, in turn, submit that information to the Commission. This amendment allows individuals who have submitted information to a SEF or SDR to request confidential treatment under regulation 145.9. The Commission received no comments about this proposed amendment and is adopting it as proposed.

Appendix A to Part 145 discusses those portions of Commission records made available to the public. Section (b) discusses information made available in the public reading area of the Commission's Office of the Secretariat. The Proposal amended subsection (b)(13) by adding "application form" to the list of publicly available portions of applications for becoming a registered entity. One month following the publication of the Proposal, *i.e.* in July 2011, the Commission published final amendments to Regulation 40.8(a) ("Availability of public information").<sup>101</sup> Regulation 40.8(a) is consistent with proposed (b)(13) of Appendix A except for the fact that Regulation 40.8(a) references a "first page of the application cover sheet" instead of an "application form." Thus, as part of today's final rulemaking, the Commission is making a technical correction by deleting the proposed language, "application form," and replacing it with "first page of the application cover sheet" so that it is consistent with regulation 40.8(a).<sup>102</sup>

<sup>101</sup> Provisions Common to Registered Entities, 76 FR 44776, 44797 (July 27, 2011).

<sup>102</sup> In November 2011, the Commission published a final version of Regulation 39.3 ("Procedures for [DCO] registration"). To be consistent with Regulation 40.8(a), subsection (a)(5) of Regulation 39.3 ("Public information") references the "first page of the Form DCO cover sheet." See Derivatives Clearing Organization General Provisions and Core Principles Regarding Rulemaking, 76 FR 69334, 69431 (Nov. 8, 2011). Form DCO is the application for registration to become a DCO. Thus, today's technical correction to subsection (b)(13) of

#### F. Parts 155 and 166

##### 1. Regulation 155.2: Trading Standards for Floor Brokers

The Commission is removing the references to regulation 1.41 within regulation 155.2 because the Commission removed and reserved regulation 1.41 in 2001<sup>103</sup> pursuant to the CFMA. The Commission is also removing the related reference to former section 5a(a)(12)(A) of the Act. The Commission did not receive any comments on these changes in the Proposal and is finalizing them as proposed.

##### 2. Regulation 155.3: Trading Standards for Futures Commission Merchants and Regulation 155.4: Trading Standards for Introducing Brokers

The Commission is removing references to "option customer" in these two regulations pursuant to this final rulemaking's deletion of that term from regulation 1.3, described above. The Commission did not receive comments about this change following publication of the Proposal and is amending regulations 155.3 and 155.4 as proposed.

##### 3. Regulation 166.2: Authorization To Trade

The Commission is revising this regulation by incorporating the revised definition of "commodity interest" (regulation 1.3(yy)), discussed above. The Commission believes that paragraph (a) of regulation 166.2 should refer to futures, options, or swaps and that paragraph (b) should refer only to futures or options. The Commission did not receive comments about these changes and is adopting them as proposed.

##### 4. Regulation 166.5: Dispute Settlement Procedures

The Commission is revising this regulation by deleting a reference to "option customer" because, as described above, today's rulemaking deletes that term from regulation 1.3. The Commission is also making a conforming, technical change to regulation 166.5, described in section G.2., below.

#### G. Other General Changes to CFTC Regulations

##### 1. Removal of References to DTEFs

The Commission is removing references to DTEFs and regulations pertaining to DTEFs in parts 1, 5, 15, 36,

Appendix A is consistent with both Regulation 40.8(a) and Regulation 39.3(a)(5).

<sup>103</sup> 66 FR 42256.

41, 140, and 155 because section 734 of the DFA abolished DTEFs, effective July 15, 2011.<sup>104</sup>

## 2. Other Conforming Changes

The Commission is also making changes to various parts of its regulations to update cross-references to CEA provisions, now renumbered after the passage of the DFA. An example of one such change is amended regulation 166.5, in which the Commission has updated the reference to the statutory definition of the term “eligible contract participant,” to reflect the Dodd-Frank Act’s renumbering of CEA section 1a. Additionally, where typographical errors or other minor inconsistencies were discovered while reviewing CFTC regulations, this rulemaking includes instructions and amended regulations to correct them.

## III. Administrative Compliance

### A. Paperwork Reduction Act

Sections 1.31, 1.33, 1.35, 1.37, and 1.39 of the Commission’s regulations are being amended to provide that records of swap transactions be kept in a similar manner to records of futures transactions. These amended provisions impose new information recordkeeping requirements that constitute the collection of information within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>105</sup> Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it has been approved by the Office of Management and Budget (“OMB”) and displays a currently valid control number.<sup>106</sup> This rulemaking contains new collections of information for which the Commission must seek a valid control number. The Commission therefore has requested that OMB assign a control number for this collection of information. The Commission has also submitted the proposed rulemaking, this final rule release, and supporting documentation to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for these new collections of information is “Adaptation of Regulations to Incorporate Swaps,” OMB Control Number 3038–0090. Responses to these information collections will be mandatory.

With respect to all of the Commission’s collections, the

<sup>104</sup> This rulemaking is not deleting those DTEF references that other rulemakings have deleted or will delete from the Commission’s regulations (*e.g.*, some references in part 3 and all references in part 40).

<sup>105</sup> 44 U.S.C. 3501 *et seq.*

<sup>106</sup> *Id.*

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 To Be Provided by Reporting Entities/Persons

#### a. Amendments to Regulation 1.31 (Books and Records; Keeping and Inspection)

Regulation 1.31 describes the manner in which “all books and records required to be kept by the Act” must be maintained. Most of the requirements of regulation 1.31 are applicable to FCMs, IBs, RFEDs, CTAs, CPOs, and members of DCMs and SEFs in conjunction with other part 1 regulations, and the PRA burdens either have been or will be covered by the OMB control numbers associated with the other part 1 regulations. Examples of these other part 1 regulations are regulation 1.33, which requires certain registrants to produce monthly confirmation statements, and regulation 1.35, which requires the maintenance of records of cash commodity, futures, and option transactions (as finalized, Records of commodity interest and cash commodity transactions). Regulation 1.31 is applicable to SDs and MSPs by way of the part 23 regulations.<sup>107</sup>

#### i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

Regulation 1.31 additionally contains discrete stand-alone collections for which a control number must be sought. Subsection (b)(3)(ii) requires persons keeping records using electronic storage media to “develop and maintain written operational procedures and controls (an ‘audit system’) designed to provide accountability over [the entry of records into the electronic storage media].” This provision is already applicable to FCMs, RFEDs, IBs, CTAs, CPOs, and members of DCMs, and would be applicable to SDs and MSPs pursuant to the part 23 regulations. As members of SEFs will be newly subject to the part 1 regulations,

<sup>107</sup> Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 FR 20128 (Apr. 3, 2012).

the Commission must estimate the burden of subsection (b)(3)(ii) on these entities and seek OMB approval for this new application of the subsection.

The Commission anticipates that members of SEFs may incur certain one-time start-up costs in connection with establishing the audit system. This will include drafting and adopting procedures and controls and may include updates to existing recordkeeping systems. The Commission estimates the burden hours associated with these one-time start-up costs to be 100 hours per SEF member.

As there are not any SEFs operating at the present, in light of the fact that the Commission has not yet finalized regulations concerning SEF Core Principles, it is not possible for the Commission to estimate with precision how many SEF members there will be or how many of those SEF members will be FCMs, SDs, or MSPs that are being covered by already pending existing information collections. Nonetheless, the Commission has estimated that 35 SEFs will register with it after the Dodd-Frank Act becomes effective, and now is estimating that there may be on average 100 members of a SEF that will not fall under one of the other collections. Accordingly, the aggregate new burden of subsection (b)(3)(ii) is estimated to be 100 one-time burden hours to approximately 3,500 SEF members.

The Commission expects that compliance and operations managers will be employed in the establishment of the written procedures and controls under subsection (b)(3)(ii). According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, “Financial Managers,” that is employed by the “Securities and Commodity Contracts Intermediation and Brokerage” industry is \$80.90.<sup>108</sup> Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of \$100 per hour. Accordingly, the burden associated with developing written procedures and controls will total approximately \$10,000 for each applicable member of a SEF on a one-time basis.

#### ii. Representation to the Commission Prior to Initial Use of System

Members of SEFs will also have to comply with regulation 1.31(c), which requires persons employing an

<sup>108</sup> Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, <http://www.bls.gov/oes/current/oes113031.htm> (May 2011).

electronic storage system to provide a representation to the Commission prior to the initial use of the system.<sup>109</sup> The Commission estimates the burden of drafting this representation in accordance with regulation 1.31(c) and submitting it to the Commission to be one hour.

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11-3031, "Financial Managers," (which includes operations managers) that is employed by the "Securities and Commodity Contracts Intermediation and Brokerage" industry is \$80.90.<sup>110</sup> Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of \$100 per hour. Accordingly, the burden associated with drafting and submitting the representation prior to using an electronic storage system will be \$100 (\$100 x 1 hour) per affected member of a SEF.

### iii. Comments Received

The Commission did not receive any comments concerning the cost for SEF members to comply with the recordkeeping requirements contained in regulation 1.31.

### b. Amendments to Regulation 1.33 (Monthly and Confirmation Statements)

The Commission is amending regulation 1.33 by requiring FCMs to include in their monthly and confirmation statements sent to customers certain specified information related to a customer's Cleared Swap positions. The information required to be summarized in respect of swap transactions will be analogous to information currently required to be kept in respect of futures and commodity option transactions. The Commission estimates the burden of complying with regulation 1.33 in respect of swap transactions to be 1 hour for each Cleared Swap confirmation and 1 hour for each monthly statement.

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11-3031, "Financial Managers," (which includes operations managers) that is employed by the "Securities and

Commodity Contracts Intermediation and Brokerage" industry is \$80.90.<sup>111</sup> Accordingly the burden associated with complying with regulation 1.33 in respect of each Cleared Swap confirmation will be \$80.90 (\$80.90 x 1 hour), and the burden will be \$80.90 (\$80.90 x 1 hour) for each monthly statement regarding Cleared Swaps.

### i. Comments Received

The Commission did not receive any comments concerning the cost for FCMs to comply with the recordkeeping requirements contained in regulation 1.33 with respect to their swap transactions.

### c. Amendments to Regulation 1.35 (Records of Commodity Interest and Cash Commodity Transactions)

#### i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

The amendments will require members of SEFs to comply with the regulation 1.35 recordkeeping requirements that are currently followed by FCMs, IBs, RFEDs, and members of DCMs. The Commission anticipates that members of SEFs will spend approximately eight hours per trading day (or 2,016 hours per year based on 252 trading days) compiling and maintaining transaction records.

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11-3031, "Financial Managers," (which includes operations managers) that is employed by the "Securities and Commodity Contracts Intermediation and Brokerage" industry is \$80.90.<sup>112</sup> Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of \$100 per hour. Thus, each SEF member will have a burden of \$201,600 per year (2,016 hours x \$100/hour).

The amendments to regulation 1.35 will also require FCMs, RFEDs, IBs, and members of DCMs to comply with the regulation 1.35 recordkeeping requirements for any swap transactions into which they enter. Because the proposed recordkeeping requirements for swaps would be equivalent to the recordkeeping requirements they must currently follow in respect of futures and commodity option transactions, the

additional burden for any swap transaction would be the same for any additional futures and commodity option transaction for which they keep records pursuant to regulation 1.35 in its current form. The Commission estimates that the recordkeeping burden associated with each swap transaction would be 0.5 hours, for a total burden of \$50 per transaction.

### ii. Comments Received

The Commission did not receive any comments concerning the excepted cost of complying with the aforementioned revisions to regulation 1.35.

### d. Amendments to Regulation 1.37 (Customer's Name, Address, and Occupation Recorded; Record of Guarantor or Controller of Account)

#### i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

The Commission is amending regulation 1.37(a) by requiring each FCM, IB, and member of a DCM to keep the same kind of record (showing the customer's name, address, occupation or business, and name of any other person guaranteeing the account or exercising any trading control over it) for any swap transactions it "carries or introduces" for another person. The Commission estimates that it will take each of these entities an average of 0.4 hours to gather the information and file it or key it into the entity's customer recordkeeping programs.

The Commission also is amending regulation 1.37(b) by requiring each FCM carrying an omnibus account for another FCM, a foreign broker, a member of a DCM or any other person to maintain a daily record for such account of the total open long contracts and the total open short contracts in each swap. FCMs presently have an equivalent obligation with respect to futures and commodity option transactions. These daily records typically are maintained in electronic form. Therefore, once a position is entered into the entity's systems, the daily record will be automatically available. The Commission estimates that entering the position into the system, commencing with the placement of an order and ending with execution will take each of these entities an average of 0.4 hours.

The Commission additionally is amending regulation 1.37(c) by requiring SEFs to comply with a provision that DCMs must currently follow: Keep a record showing the true name, address, and principal occupation or business of any foreign trader executing transactions on the

<sup>109</sup> As with subsection (b)(3)(ii), regulation 1.31(c) is already applicable or will be made applicable by other actions to FCMs, IBs, DCM members, as well as SDs or MSPs pursuant to the part 23 regulations.

<sup>110</sup> Occupational Employment Statistics, Occupation Employment and Wages: 11-3031 Financial Managers, <http://www.bls.gov/oes/current/oes113031.htm> (May 2011).

<sup>111</sup> Occupational Employment Statistics, Occupation Employment and Wages: 11-3031 Financial Managers, <http://www.bls.gov/oes/current/oes113031.htm> (May 2011).

<sup>112</sup> Occupational Employment Statistics, Occupation Employment and Wages: 11-3031 Financial Managers, <http://www.bls.gov/oes/current/oes113031.htm> (May 2011).

facility or exchange. According to regulation 1.37(d), this provision does not apply in respect of futures/options/swaps that foreign traders execute through FCMs or IBs.

The Commission estimates that it would take a SEF a total of 0.4 hours to prepare each record in accordance with regulation 1.37(c). According to the Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 43–9021, “Data Entry Keyer,” is \$13.95.<sup>113</sup> Because SEFs may be large entities employing persons at wages higher than the average, the Commission conservatively estimates the mean hourly wage to be \$19.03 per hour. Thus, the burden associated with preparing a record with regulation 1.37(c) would be \$7.61 (\$19.03/hour × 0.4 hours).

#### ii. Comments Received

The Commission did not receive any comments concerning the extension of regulation 1.37 to swap transactions executed by FCMs, IBs, and other DCM members.

#### e. Amendments to Regulation 1.39 (Simultaneous Buying and Selling Orders of Different Principals; Execution of, for and Between Principals)

#### i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

The Commission is amending regulation 1.39, which currently applies to DCMs, by enabling members of SEFs to execute simultaneous buying and selling orders of different principals pursuant to rules of the SEF if certain conditions are met. Among those conditions, a SEF would have to record these transactions in a manner that “shows all transaction details required to be captured by the Act, Commission rule, or regulation.” The Commission anticipates that the data to be captured would already exist in the SEF’s trading system. The Commission estimates that it will take the SEF an average of 0.1 hours to capture this data, and storage costs of less than \$1 per record.

According to the recent Bureau of Labor Statistics, the mean hourly wage of computer programmers under occupation code 15–1131 and computer software developers under program codes 15–1132 are between \$36.54 and \$44.27.<sup>114</sup> Because SEFs may be large

entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly programming wage of \$50 per hour for each of the categories of persons who will have to establish the system for maintaining oral records.

Accordingly, the start-up burden associated with the data capture requirements would be an average of \$5.

#### ii. Comments Received

The Commission did not receive any comments concerning the extension of regulation 1.39 to transactions executed on a SEF.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>115</sup> The rules adopted by the Commission are for the most part technical amendments to conform the affected parts to provisions of the Dodd-Frank Act and, as such, are non-substantive and will not have a significant economic impact on a substantial number of any types of entities, whether or not they are small entities. In order to conform the Commission’s existing records regulations to its new recordkeeping requirements for SDs and MSPs (Regulation 23.202 (“Daily Trading Records”)),<sup>116</sup> the Commission also is amending its regulation 1.35 records requirements (as finalized, Records of commodity interest and cash commodity transactions) to require FCMs, IBs, RFEDs, and members of DCMs to observe recordkeeping requirements for swaps that they currently observe with respect to their futures and commodity option transactions.

Additionally, the Commission is applying certain of those books and records regulations to members of SEFs, mirroring obligations that apply to members of DCMs.

Computer Programmers, <http://www.bls.gov/oes/current/oes151131.htm> (May 2011); Occupational Employment Statistics, Occupational Employment and Wages: 15–1132, Computer Software Developers, <http://www.bls.gov/oes/current/oes151132.htm> (May 2011).

<sup>115</sup> 5 U.S.C. 601 *et seq.*

<sup>116</sup> See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012) (adopting for SDs and MSPs reporting and recordkeeping standards now found in 17 CFR 23.201–23.203).

Accordingly, the Commission is hereby determining that most of the entities affected by this rulemaking will not be significantly economically impacted by the conforming and technical rules being adopted. As discussed below, the Commission is also determining that most of the entities that will be subject to compliance with this rulemaking are not small entities for the purposes of the RFA. Therefore, pursuant to 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies by category of market participant below that the final rules will not have a significant economic effect on a substantial number of small entities.

#### 1. FCMs, RFEDs, DCMs, ECPs, SEFs and Large Traders

The Commission has previously determined that registered FCMs, RFEDs, DCMs, ECPs, SEFs and large traders are not small entities for purposes of the RFA.<sup>117</sup> The Commission has been informed, in the context of other rulemakings, that there are some entities that are both ECPs as defined in the CEA and also are small entities as defined by the Small Business Administration (“SBA”). In particular, the SBA has defined as small entities those entities that are engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding year did not exceed four million megawatt hours. As noted previously, however, this rulemaking involves primarily technical conforming amendments that alone do not impose significant economic impacts on any group of entities, and that overlap with substantive rulemakings in which the Commission has assessed or will assess the economic impact on small entities to the extent required under the RFA. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the final rules will not have a significant economic impact on a substantial number of small entities with respect to these entities.

<sup>117</sup> See Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619, Apr. 30, 1982 (DCMs, FCMs, and large traders) (“RFA Small Entities Definitions”); Opting Out of Segregation, 66 FR 20740, 20743, Apr. 25, 2001 (ECPs); Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 55410, 55416, Sept. 19, 2010 (RFEDs) (“Retail Forex Final Rules”); and Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680, Nov. 18, 2011 (SEFs).

<sup>113</sup> Occupational Employment Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 523100—Securities and Commodity Contracts Intermediation and Brokerage, <http://www.bls.gov/oes/current/oes439021.htm> (May 2011).

<sup>114</sup> Occupational Employment Statistics, Occupational Employment and Wages: 15–1131,

## 2. IBs

As discussed above, most of the provisions of this rulemaking are technical and conforming in nature, and overlap with substantive rulemakings in which the Commission has conducted RFA analyses to the extent such are required.

The Commission provided an initial regulatory flexibility analysis for IBs in the its proposing release, as required by 5 U.S.C. 603, because the oral recordkeeping requirement under regulation 1.35(a), as proposed, may have had a significant economic impact on a significant number of small IBs.<sup>118</sup> As discussed above, the Commission has decided not to adopt the proposed oral communications recordkeeping requirement under regulation 1.35(a) as part of today's final rule. Instead, the Commission intends to adopt that requirement in a future final rulemaking.

### C. Consideration of Costs and Benefits

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following 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 considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

In July 2010, Congress passed the Dodd-Frank Act which, among other things, establishes a comprehensive regime for the regulation of swaps. The Dodd-Frank Act brings swaps under the Commission's jurisdiction and obligates the Commission to adopt new regulations related to registration and regulation of SDs and MSPs, trade execution and clearing requirements, and swap data recordkeeping and real time reporting. In section 721 of the Dodd-Frank Act, Congress added CEA section 1a(47) to add a definition of the term "swap."

In response to Congress's act of placing swaps under the Commission's authority, the Commission is exercising its discretion to amend its regulations to ensure that SDs, MSPs, SEFs, and swaps are subject to the Commission's

comprehensive regulatory regime, and in June 2011, proposed to amend parts 1, 5, 7, 8, 15, 18, 21, 36, 41, 140, 145, 155, and 166 to update its regulations accordingly.<sup>119</sup>

As described in the Background, above (section I. of this preamble), some of the amendments contained in this release are technical in nature; for example, they amend various definitions in regulation 1.3 to track the DFA's amendments to the CEA's definitions of the same term, such as futures commission merchants. Another example of a technical change is the deletion of references to derivatives transaction execution facilities, a category of exchange that the DFA eliminated. Other revisions contained in this rulemaking amend recordkeeping and reporting requirements, which presently apply to futures, so that they cover swap transactions as well. An example of this type of change is the revision to parts 15, 18, 21, and 36 to implement DFA's grandfathering and phase-out of exempt boards of trade and exempt commercial markets. Certain amendments in this release are designed to harmonize recordkeeping requirements for various registered entities transacting in swaps. For example, the amendments to §§ 1.31 harmonize part 1 recordkeeping requirements with those applicable to SDs and MSPs under part 23 regulations. Lastly, this rulemaking amends procedures pertaining to the post-execution allocation of bunched orders so that they can be used in respect of swap transactions similarly to how they are currently used for futures transactions.

The benefits and costs that the Commission considers below are those attributable to its amendments of the rules discussed compared to a scenario in which these rules were not amended.

#### Section 1.31 Books and Records; Keeping and Information Summary Description

Prior to the amendments made in this final rule, § 1.31 specified the conditions under which records required by the Act of any applicable entity shall be maintained. The section stated that these records shall be kept for a period of five years from the transaction date, must be "readily accessible" for the first two years, and stipulated a number of further conditions pertaining to the auditing of record storage systems, storing duplicate copies of records, and other items. As described above in II.A.3, the

amendments in this final rule specify that: (1) Required books and records must be kept in their original form (for paper records) or in their native file formats (for electronic records); (2) when books and records are requested by the Commission, they must be produced in a form and on any media specified by the Commission; (3) required records of any swap or related cash or forward transaction must be kept until the "termination, maturity, expiration, transfer, assignment, or novation date of the transaction" and then for an additional five-year period; and (4) records of oral communications required to be maintained pursuant to regulation 23.202(a)(1) and (b)(1) must be kept until the "termination, maturity, expiration, transfer, assignment, or novation date of the transaction" and then for an additional one-year period.

#### Benefits

The public and the financial integrity of the markets benefit from this amendment because it promotes retention of metadata (*i.e.*, data about data). This amendment enhances the Commission's forensic capabilities, including the ability to trace communications and transactions. Moreover, requiring entities to retain data in its native file format reduces the likelihood that data could be manipulated or corrupted, either intentionally or unintentionally, which makes it more reliable.

In addition, if entities are not required to store data in its native file format, some entities may choose to store some of their data on paper records or in electronic image formats (such as PDF) which cannot be easily converted into a form that allows it to be read by programs that the Commission sometimes uses for purposes of investigation and analysis. For example, market participants have sometimes submitted large amounts of financial data to the Commission on printed pages arguing that OCR technology makes such pages "machine readable" and therefore is compliant with the existing requirements under § 1.31(b)(3)(i). While OCR technology is useful in converting printed text into an electronic form, it has not been similarly helpful in converting financial data provided to the Commission. When market participants have submitted large data sets to the Commission on printed pages, it has been problematic, forcing the Commission to either enter extraordinary amounts of data into its systems manually, an expensive process that introduces the possibility of data entry errors, or to abandon the use of programs that are often helpful in the

<sup>118</sup> See 76 FR 33066, 33079–80, June 7, 2011.

<sup>119</sup> 76 FR 33066.



course of investigation, which severely limits the usefulness of that data for investigation purposes.

Requiring all entities subject to regulation 1.31 to retain data in its native file format mitigates the potential that market participants could discard records in an effort to thwart Commission investigations, or that they could do so unintentionally but with similar effect and increases the likelihood that the data will exist in a form that can be converted to meet the Commission's needs. The requirement that entities present that data to the Commission in a format and on a medium requested by the Commission will help to ensure that the Commission is able to obtain data from market participants in a form that it can use effectively for detecting and prosecuting prohibited market activities. And by improving the efficiency and effectiveness of the Commission's enforcement efforts, these requirements help deter fraud and manipulation, and promote the integrity of the markets subject to the jurisdiction of the Commission.

By providing that required written records pertaining to swaps and related cash or forward transactions must be retained for the life of the swap plus five years, the Commission will have the ability to create a sufficient audit trail from which to ascertain and, if necessary recreate, the facts and circumstances giving rise to the transaction, even if the need to do so arises several months or even a few years after the relevant transactions occurred.

#### Costs

The amended requirement to store electronic records in their native format will likely create additional data storage costs for market participants. The incremental cost of storage depends on whether or not the entity in question was previously storing data in its native format and the number and size of records that must be stored in their native format. The Commission requested but received no data from commenters quantifying such costs. In order to quantify these costs the Commission would need data sufficient to estimate the number of entities that do not store data in its native file format, and the amount of additional data that they would, on average, have to retain in order to store it in its native file format. The Commission does not have that information.

In addition, market participants will have additional storage costs because the rule provides that required swap and related cash and forward

transaction data must be retained for the life of the swap plus five years. These costs will depend on the number and tenor of swaps and related cash and forward transactions that an entity enters into. These factors are likely to vary widely among market participants. The Commission does not have adequate information to estimate how many firms are currently storing data in its native format, the number of swap transactions that will be affected by the timelines implemented here, or to estimate their tenor and the storage space required to store related data. Therefore it is not possible to estimate the additional storage space or cost of additional storage.

The requirement that entities submit information to the Commission in a format and on a medium determined by the Commission will create some costs for market participants. Entities that keep data in proprietary systems or in formats that are not read by programs that the Commission uses to aid in its investigations would need to adapt their systems in order to develop this capability. And when requested to do so by the Commission, such entities would have to convert their data into the format requested by the Commission, which creates some incremental costs as well. The Commission cannot estimate these additional costs because it does not have adequate information to estimate the number of entities that would need to adapt their systems in order to allow for data conversion that meets the Commission's needs. Moreover, it does not have information regarding the number of inquiries that will require data conversion, or the amount of time that entities would need to spend converting data when necessary. The latter is likely to vary widely, depending on the data formats currently used by market participants and the presence or absence of standard data conversion software that might assist with such needs.

The rules provides that required swap and related cash and forward transaction data must be retained for the life of the swap plus five years also creates some data migration costs. Entities engaging in long-dated swaps will likely upgrade their recordkeeping systems during the period of time that they are required to keep data related to those swaps and related cash or forward transactions. Such entities will have to implement backward-compatible systems, or will have to reformat older data so that it can be retained and retrieved using newer systems. Either of these approaches will create some cost, however, it is not possible to determine which approach entities are likely to

take or the cost that would likely result in either case. Therefore, the Commission is not able to estimate the cost at this time.

Some commenters noted costs that would result from not being allowed to convert paper records to electronic media for storage.<sup>120</sup> In response, the Commission notes that regulation 1.31(b) still provides that paper records stored on micrographic media or electronic storage media (e.g. scanned copies) is sufficient to fulfill the requirements of regulation 1.31(a)(1), and therefore the cost that these commenters noted will not occur. Similarly, the Minneapolis Grain Exchange expressed a concern that amendments to regulations 1.31 and 1.35, taken together, could "require an electronic and paper copy of the same information," leading to unnecessary costs on the part of firms. As stated above, the Commission is not requiring that entities retain both paper and electronic copies of the same information.

The amendments to the requirements for keeping and inspection of records, mandated in this section, create certain costs. It is likely that some SEF members will not have not been subject to regulation 1.31 previously and therefore will need to design written procedures and controls for maintaining their recordkeeping system.<sup>121</sup> For entities that need to develop such procedures and controls for the first time, the Commission estimates a one-time cost of approximately \$13,000 to \$28,000.<sup>122</sup>

<sup>120</sup> See e.g., FIA and NFA.

<sup>121</sup> § 1.31(b)(3)(ii).

<sup>122</sup> Calculations in the PRA section rely calculations rely on wage estimates from the Bureau of Labor Statistics. However, for the purposes of the Cost Benefit Considerations section, we have used wage estimates that are taken from the SIFMA "Report on Management and Professional Earnings in the Securities Industry 2011" because industry participants are likely to be more familiar with them. Hourly costs are calculated assuming 2,000 hours per year and a multiplier of 5.35 to account for overhead and bonuses. All totals calculated on the basis of cost estimates are rounded to two significant digits.

This estimate assumes 20–40 hours of a compliance attorney's time, 20–40 hours of an intermediate compliance specialist's time, 5–15 hours of a senior database administrator's time, and 5–15 hours of an office manager's time in order to design and implement the written procedures and controls. The average cost for a compliance attorney is \$351.24/hour [(\$131,303 per year)/(2000 hours per year) \* 5.35 = \$351.24 per hour]. The average cost for an intermediate compliance specialist is \$351.24/hour [(\$58,303 per year)/(2000 hours per year) \* 5.35 = \$351.24 per hour]. The average cost for a senior database administrator's time is \$280.22/hour [(\$104,755 per year)/(2000 hours per year) \* 5.35 = \$280.22 per hour]. The average cost for an office manager's time is \$229.72/hour [(\$85,875 per year)/(2000 hours per year) \* 5.35 = \$229.72 per hour].



In addition, the members of SEFs that have not previously been subject to regulation 1.31 will have to provide a representation to the Commission prior to their initial use of the system.<sup>123</sup> The Commission estimates that such entities will spend approximately 0.5 hours providing the submission, and therefore the estimated cost for the submission is \$78.<sup>124</sup>

#### Consideration of Alternatives

One commenter suggested that the Commission require records to be kept indefinitely.<sup>125</sup> In the Proposal, the Commission did not propose to alter the requirements regarding the length of time during which written records must be retained by relevant entities for any of the transactions that were previously covered by the requirement, and continues to believe that the existing requirements ensure access to relevant records for a reasonable period of time while also limiting costs to market participants. However, the amendments to regulation 1.31 added swaps and related cash and forward transactions to the types of transactions that are covered, and as described above, established a longer recordkeeping requirement for required books and records regarding those transactions. The Commission believes that the long product life of some swaps necessitates longer recordkeeping requirements for related documents and data. However, the Commission anticipates that data related to such transactions will not be needed for enforcement purposes more than five years beyond the time when the swap has been terminated, novated, etc. Therefore, providing that market participants must retain required data more than five years beyond that date would, in the Commission's view, impose unnecessary cost upon market participants without significant added benefit.

The Proposal would have required oral records to be retained by SDs and MSPs until the swap has been terminated, novated, etc., and for five years thereafter, whereas the final rule requires these entities to retain such records until the swap has been terminated, novated, etc., and for a period of one year thereafter. This may create some cost by limiting the Commission's ability to obtain from SDs and MSPs recordings related to events that occurred more than one year ago, which could reduce the Commission's

effectiveness in identifying and prosecuting certain violations. However, the Commission anticipates that in most cases, the one year requirement after the life of the swap, will be sufficient, and notes that the reduced retention requirement reduces storage costs to market participants.

#### Section 1.35 Records of Commodity Interest and Cash Commodity Transactions Introduction

Prior to this amendment, § 1.35 specified which parties are required to keep records related to commodity futures, commodity options, and cash commodities. The requirements of § 1.35 applied to FCMs, RFEDs, IBs, and members of contract markets. The amendments to regulation 1.35 extend these recordkeeping requirements to swap transactions and to members of SEFs.

As described above in II.A.5, the amended rule also applies the bunched order procedures for futures transactions to swaps, and adds FCMs and IBs to the list of eligible account managers for orders executed on a DCM or SEF, and also adds CTAs, FCMs, and IBs as eligible account managers for orders executed bilaterally.

#### Benefits

As it explained when adopting similar transactional level recordkeeping requirements for SDs and MSPs, the Commission believes these recordkeeping requirements for swap transactions will contribute to important, though unquantifiable, benefits.<sup>126</sup> More specifically, complete, rigorous transactional recordkeeping is a necessary element to promote market integrity, as well as customer protection, by providing an audit trail of past swap transactions. For, a strong audit trail, among other things:

- Provides a basis for efficiently resolving transactional disputes.
- Facilitates a firm's ability to recognize and manage its risk, thereby enhancing the risk management of the market as a whole.
- Acts as a disincentive to engage in unduly risky, injurious, or illegal conduct in that the conduct will be traceable.
- And, in the event such conduct does occur, provides a mechanism for policing such conduct, both internally as part of a firm's compliance efforts

<sup>126</sup> See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128, 20172 (Apr. 3, 2012).

and externally by regulators enforcing applicable laws and regulations.

The rule also applies the procedures for handling bunched orders of futures, to swaps, which enables account managers to reduce transaction costs to customers by executing a single, large transaction on behalf of multiple customers at the same time, and then allocating the positions that were component parts of that transaction to specific customers after the transaction has been executed. In addition, bunched orders provide additional protection to customers against favoritism. In the absence of bunched orders, when an account manager has several customers that each need to take out positions in the same swap, the manager would place several sequential orders for that swap. The series of orders may move the price for that swap, in which case the last customer order would receive a less favorable price than the first customer order. By combining the orders, the manager is more likely to find a single counterparty and a single price for the orders, in which case the account manager can distribute the appropriate number of shares to each account at a constant price per share. No customer is favored over another in such a distribution. This promotes customer protection and the integrity of the financial markets.

In addition, by adding FCMs and IBs to the list of eligible account managers for orders executed on a DCM or SEF, and also adding CTAs, FCMs, and IBs as eligible account managers for orders executed bilaterally, the rule promotes competition among entities that are permitted to execute bunched orders, which in turn, promotes competitive pricing for account managers who want to execute bunched orders. And by promoting competitive pricing, the amendment promotes market efficiency. In addition, by permitting FCMs, IBs, and CTAs to engage in bunched order transactions, the amendment creates benefits for those entities because it allows them to provide an additional service to clients, giving them an additional source of revenue.

#### Costs

Amendments in this final rule will require SEF members to comply with regulation 1.35, and it is likely that some of those members will not have been subject to § 1.35 previously. The Commission estimates that SEF members that are newly subject to § 1.35 will spend additional time each day compiling and maintaining transaction records. The Commission estimates that the cost of that additional time is

<sup>123</sup> See § 1.31(c).

<sup>124</sup> The average wage for an intermediate compliance specialist is \$155.96 [(\$58,303 per year)/(2,000 hours per year) \* 5.35 = \$155.96]

<sup>125</sup> Mr. Chris Barnard.

\$236,000 to \$393,000 per entity per year.<sup>127</sup>

Also, the amendments in this final rule will require FCMs, RFEDs, IBs, and members of DCMs to comply with the regulation § 1.35 recordkeeping requirements for any swap transactions into which they enter. The Commission estimates that such entities will spend an additional 0.5 hours per swap capturing and maintaining the records required under § 1.35, and therefore estimates that the per-swap cost will be \$83.00.<sup>128</sup>

### Section 1.3 Definitions

#### Introduction

As discussed in II.A.1, the Commission is amending and adding several definitions in order to incorporate swaps within the Commission's regulatory framework. Included among them are definitions for "customer," "futures commission merchant," "member," "net deficit," "proprietary account," "commodity trading advisor," "commodity pool operator," "designated self-regulatory organization," "customer funds," "strike price," "introducing broker," "registered entity," "registrant," "open contract," "physical," and "commodity interest."

As discussed throughout this release, Congress amended the CEA to address swaps. The amendments to regulation 1.3 ("Definitions") help effectuate that mandate and do not, in and of themselves, implicate any costs or benefits. Any costs and benefits are associated with substantive regulations that rely upon the revised definitions contained in regulation 1.3.

### Section 1.4 Electronic Signatures

#### Introduction

In its original form, § 1.4 allowed a customer of an FCM or IB, a retail forex customer of an RFED or FCM, and a pool participant or a client of a CTA to use an electronic signature to provide any required signatures under the CEA, as long as the FCM, RFED, IB, CPO, or CTA elects generally to accept electronic signatures for such purposes and "reasonable safeguards" are in place. The amended rule published as

<sup>127</sup> This is estimated to take 6–10 hours per day (assuming 252 days per year) of the time of an office services supervisor. The average wage for an office services supervisor is \$155.96 [(\$58,303 per year)/(2,000 hours per year) \* 5.35 = \$155.96]. \$155.95 \* 6 \* 252 = 235,812.31. \$155.95 \* 10 \* 252 = 393,020.52.

<sup>128</sup> This estimates 0.5 hours of time from an office services supervisor. The average salary for an office services supervisor is \$165.25/hour [(\$61,776 per year)/(2,000 hours per year) \* 5.35 = \$165.25 per hour]. \$165.25 \* 0.5 = \$82.63

part of today's final rulemaking extends the benefit of electronic signatures by including SDs, MSPs, and counterparties of SDs and MSPs in the list of entities that may use electronic signatures for acknowledgement of swap transactions.

#### Benefits

With respect to the protection of market participants and the public, permitting FCMs, IBs, CPOs, CTAs, SDs, and MSPs to utilize electronic signatures when executing swap transactions enables more rapid processing of steps in the transaction process that requires signatures than would be possible if using faxed copies or hard copies for such purposes. This, in turn, reduces costs to market participants by reducing the amount of time they spend handling paperwork and enhances market efficiency by allowing transactions to be confirmed more rapidly. In addition, this facilitates straight through processing of swaps, which provides numerous efficiency and risk reduction benefits.

#### Costs

The amendment to § 1.4 is permissive, allowing SDs, MSPs, and their counterparties to use electronic signatures if they choose, and also allowing FCM's, IBs, CPOs, and CTAs to use electronic signatures when engaging in swap transactions. The rule does not create any affirmative obligations for market participants, and therefore does not create direct costs to entities subject to § 1.4. Costs to other market participants and the public would only occur if electronic signatures were somehow more susceptible to be falsified or corrupted than non-electronic signatures. The Commission is not aware of any such risk, and believes that it is unlikely, given that electronic signatures are already widely used among market participants, including other registered entities.

### Sections 1.33 and 1.37

#### Introduction

These amended regulations require FCMs, IBs, RFEDs, SEFs, DCMs and members of DCMs to comply with the same recordkeeping functions for swaps that they currently adhere to with respect to futures and commodity option transactions. Regulation 1.33 deals with monthly confirmation statements, and regulation 1.37 deals with customers' names and addresses as well as daily records showing total open long and short contracts.

#### Benefits

By incorporating swaps into FCM, IB, RFED, DCM, and DCM members' reporting requirements, the rule extends the benefits of such reporting requirements to a new range of transactions, and to additional customers of such entities. The benefits are likely to be increased awareness among market participants of any losses or gains due to their swap transactions, which may contribute to sound risk management. Moreover, the monthly statements and the confirmation statements required by § 1.33 provide customers with additional opportunities to identify potential mistakes made over the course of their transaction that could result in an undesirable outcome, providing further protection to customers of such entities that are clearing swaps. Participants would also be able to view a list of fees charged to their accounts and verify that all are valid charges and would thus be better protected against accidental or fraudulent fees and charges.

The requirements of § 1.37 will ensure that proper records are maintained to identify the rightful owners of customer funds, and that are kept on an omnibus basis, as well as to identify parties who own, guarantee, or exercise control over any customer cleared swap accounts. Proper records regarding the name of individuals or entities that own customer funds, and daily reconciliation of balances in the omnibus account, promote protection of customer funds held by entities that place customer funds in such accounts. Furthermore, by requiring each FCM carrying an omnibus account for any other person to maintain a daily record of the total open long contracts and total open short contracts in each swap, the final rule provides protection for the customers that hold funds in such accounts. The daily records may be used by the FCM to reconcile the omnibus accounts to their individual customer obligations, thus helping to ensure that the omnibus accounts have sufficient funds to meet their customer obligations.

#### Costs

Costs of this proposal include the cost of compliance on the part of FCMs to compile and deliver monthly statements and confirmations after every transaction. FCMs will bear a one-time cost to design the confirmation statements, swap section of the monthly reports, and to set up automated systems to produce them. The amendment is not likely to necessitate new technology since FCMs can use the systems that produce existing monthly

statements and confirmations to produce statements pertaining to swaps. FCMs, however, will bear some costs designing and setting up their systems to produce swap transaction confirmations and the swap section of monthly statements. The Commission estimates that the per-entity set-up cost will be between \$4,900 and \$17,000.<sup>129</sup> The reports are likely to be highly automated, which mitigates ongoing costs. Such costs are also likely to be similar in magnitude to those incurred through compliance with § 1.33 as it pertains to futures positions. The Commission estimates that it will cost FCMs approximately \$1.40 per swap transaction for the FCM to input the data that is required.<sup>130</sup> The Commission estimates that entities are likely to spend \$3,700 to \$7,300 monthly in order to maintain the systems and to produce the relevant statements.<sup>131</sup>

Adding the requirement that certain entities maintain records of the name, address, and occupation of customers that have deposited funds with them will not create any set-up costs. The Commission assumes that entities subject to § 1.37 already have systems that incorporate such information.<sup>132</sup> The Commission estimates that the ongoing cost to capture such information is \$1,650 to \$3,300 per year.<sup>133</sup> The Commission expects that creating the daily report that provides the daily total of open long and short

<sup>129</sup> Estimate assumes 10–30 hours of IT professional time and 2–10 hours of a regulatory attorney's time in order to create and automate the report. The average salary for a senior programmer is \$306.86/hour [(\$114,714 per year)/(2000 hours per year) \* 5.35 = \$306.86 per hour]. The average salary for a compliance attorney is \$351.24/hour [(\$131,303 per year)/(2000 hours per year) \* 5.35 = \$351.24 per hour].

<sup>130</sup> The estimates assume an office services supervisor spends 5 minutes per transaction. The average salary for an office services supervisor is \$165.25/hour [(\$61,776 per year)/(2,000 hours per year) \* 5.35 = \$165.25 per hour]. 5/60 \* \$165.25 = \$1.38.

<sup>131</sup> Estimate assumes 2–10 hours monthly of IT personnel time and 2–16 hours of middle office personnel time. The average salary for a programmer is \$220.74/hour [(\$82,518 per year)/(2,000 hours per year) \* 5.35 = \$220.74 per hour], and the average salary for an office services supervisor is \$165.25/hour [(\$61,776 per year)/(2,000 hours per year) \* 5.35 = \$165.25 per hour]. The Commission anticipates that most monthly reports will be sent to clients electronically, but includes an additional \$1,000 monthly for paper, postage, and printing costs.

<sup>132</sup> This is estimated to take 1–10 hours of time from IT personnel. The average salary for a programmer is \$220.74/hour [(\$82,518 per year)/(2,000 hours per year) \* 5.35 = \$220.74 per hour].

<sup>133</sup> The Commission assumes 10–20 hours per year will be required. The average salary for an office services supervisor is \$165.25/hour [(\$61,776 per year)/(2,000 hours per year) \* 5.35 = \$165.25 per hour]. 10 hours \* \$165.25/hour = \$1,652.50; and 20 hours \* \$165.25/hour = \$3,305.00.

positions in each omnibus account will require some modifications to existing systems. The Commission estimates that this cost will be approximately \$2,600 to \$9,900.<sup>134</sup> Producing the daily report is likely to be a process that is automated and therefore the Commission does not believe that there will be incremental daily costs to produce the report. In addition, the Commission recognizes that the requirements will obligate FCMs to enter position data into their systems and estimates that this will require approximately 0.2 hours of personnel time per swap transaction, which results in a cost of approximately \$33.00 per transaction.<sup>135</sup> In addition, the Commission estimates that for a SEF that will have to keep records of foreign traders' names, addresses, and occupations executing transactions on an exchange, the SEF will spend between \$17.00 and \$83.00.<sup>136</sup>

#### Section 1.39 Simultaneous Buying and Selling Orders of Different Principals; Execution of, for and Between Principals

##### Introduction

As described above in II.A.7, regulation 1.39 permits the member of a contract market to execute simultaneous buy and sell orders for the same contract on behalf of different principals if the orders are executed on the exchange and subject to certain procedures. The amendments to this rule incorporate SEFs and swaps.

The amendments also delete language barring cross trades; such trades are no longer defined under 4c(a) as amended by DFA. This latter amendment is made pursuant to the DFA without the exercise of Commission discretion and therefore is beyond the scope of consideration in this section.

<sup>134</sup> This estimates 1–3 hours of time from a compliance attorney and 10–40 hours of time from IT personnel. The average compensation for a compliance attorney is \$351.24/hour [(\$131,303 per year)/(2,000 hours per year) \* 5.35 is \$351.24 per hour]. The average compensation for a programmer is \$220.74/hour [(\$82,518 per year)/(2,000 hours per year) \* 5.35 = \$220.74 per hour]. 1 \* \$351.24 = \$351.24. 3 \* \$351.24 = \$1,053.71. \$351.24 \* 10 = \$2,207.36. \$351.24 \* 40 = \$8,829.43.

<sup>135</sup> The estimate assumes 0.2 hours of labor per transaction from an office services supervisor. The average salary for an office services supervisor is \$165.25/hour [(\$61,776 per year)/(2,000 hours per year) \* 5.35 = \$165.25 per hour]. 0.2 \* \$165.25 = \$33.05.

<sup>136</sup> The estimates assume an office services supervisor spends between 0.1 and 0.5 hours per transaction. The average salary for an office services supervisor is \$165.25/hour [(\$61,776 per year)/(2,000 hours per year) \* 5.35 = \$165.25 per hour]. 0.1 \* \$165.25 = \$16.52; 0.5 \* \$165.25 = 82.63.

##### Benefits

Under CEA Section 5(d)(9), DCMs have an obligation to provide a competitive, open, and efficient market. If a member were to match two orders of its own customers without first making it available to the broader market through the steps required in regulation 1.39, the trade would be neither open nor competitive. The trade would, thus, be open to the risk of non-competitive pricing, which could harm one of the two customers involved in the trade and would, at least minimally, detract from price discovery. By requiring that bids or offers related to the member's customer positions are made available to other parties, the rule ensures that they are open and that a member only matches one customer against another in a trade if the terms of that trade are competitive. This protects each customer and also promotes effective price discovery. Incorporating SEFs into regulation § 1.39 extends the same benefits to SEF members, providing improved price discovery, protection for SEF members' customers, and promoting integrity of the financial markets.

##### Costs

In order to comply with the rules, a SEF member will be required to take certain steps before executing one customer's order against another customer's order. Those additional steps include first offering its customers' bid and offer to the other members of the SEF through open outcry or submission to an electronic platform. Whether its customers' orders are filled against others in the market or against one another, by offering the trade through the exchange the member will be subject to some fees imposed by the exchange that they would not have otherwise experienced. The fees vary significantly based on the market and product. In addition, the requirement that a SEF record these transactions in a manner that "shows all transaction details required to be captured by the Act, Commission rule, or regulation" will create additional data capture costs for the SEF. The Commission estimates that the cost will be approximately \$17.00 per transaction and storage costs of less than \$1 per record.<sup>137</sup>

<sup>137</sup> The estimates assume an office services supervisor spends between 0.1 per transaction. The average salary for an office services supervisor is \$165.25/hour [(\$61,776 per year)/(2,000 hours per year) \* 5.35 = \$165.25 per hour]. 0.1 \* \$165.25 = \$16.52.

## Section 1.40 Crop, Market Information Letters, Reports

### Introduction

As described above in II.A.8, the changes to § 1.40 incorporate members of a SEF into the requirement that such entities provide to the Commission copies of any circular, telecommunication, or report that they publish or circulate through other entities concerning crop conditions, or market conditions that would tend to affect the price of any commodity.

### Benefits

Regulation 1.40 addresses the need for the Commission to have access to any published or circulated information about market-affecting commodity prices for the prevention and/or identification of manipulative behavior such as false reporting. The benefit of extending regulation 1.40 to members of a SEF is that it will give the Commission the same ability to prevent and/or identify similar manipulative activities in connection with any commodity prices underlying the swap transactions that will be executed on a SEF.

### Costs

The requirement will create *de minimis* costs for members of a SEF related to printing and postage costs for one copy of such communications when the Commission requests a copy. Such requests are infrequent on a per entity basis and therefore the Commission does not expect most entities to bear such costs frequently.

## Section 1.59 Activities of Self-Regulatory Organizations Employees, etc.

### Introduction

Regulation 1.59 imposes restrictions on employees and governing board members of SROs that prevent them from disclosing or trading in any contracts traded or cleared by the employing contract market, or in any related commodity interest. Moreover, it prevents such persons from trading on the basis of material non-public information. As discussed above in II.A.9, the Commission is amending regulation 1.59 to include SEFs and swaps.

### Benefits

By preventing employees and governing board members from trading in contracts traded or cleared by their employing exchange or other related commodity interests, the rule helps to prevent conflicts of interest that might otherwise incent employees of an exchange to perform their duties in a

way that benefits their own investments rather than benefiting the members of the exchange and the public more generally. In doing so, the rule promotes the integrity of financial markets. Moreover, the rule prevents employees and governing board members from trading to their own advantage, using material non-public information. In doing so, the rule protects other market participants that would be on the opposite side of such trades, and would be disadvantaged by not having access to the same material non-public information.

### Costs

The amendments adding SEFs and swaps to the entities and instruments referenced in this rule will, as stated above, prevent employees and governing board members of SROs from investing in certain instruments. There will, therefore, be opportunity costs to those employees. The Commission cannot quantify those opportunity costs because it does not have data adequate to determine what investments employees might have made without such restrictions, what return they would expect on those investments compared to their existing investments, or the amount of money such employees have invested. However, the Commission believes that guarding against conflicts of interest at the SROs is an important step to maintaining integrity in the financial markets.

## Section 1.63 Service on Self-Regulatory Organization Governing Boards or Committees by Persons With Disciplinary Histories

### Introduction

Prior to the amendments adopted in this rule, regulation 1.63 required SROs to maintain a schedule listing all rule violations which constitute disciplinary offences, to submit that schedule to the Commission and to post it in a public place. This final rule amends the rule to specify that the public place in which the SROs must post the schedule is the SRO's Web site.<sup>138</sup>

### Benefits

The amendments to regulation 1.63 promote integrity in the financial markets by ensuring that the information contained in the schedule is posted in a public place that fulfills the intent of the obligation, namely, that the SRO can provide notice to members and the general public.

<sup>138</sup> § 1.63(d).

### Costs

Many SROs likely already post the schedules on their Web sites. To the extent that SROs were not previously posting the schedule to their Web sites, they will bear the costs associated with posting schedules on their Web sites. However, this cost will be offset by eliminating the need to post the schedule in whatever alternative public place the SRO was previously using. The Commission estimates that the incremental cost is between \$18.00 and \$220.00.<sup>139</sup>

## Section 1.67 Notification of Final Disciplinary Action Involving Financial Harm to a Customer

### Introduction

This rule adds that upon any final disciplinary action in which a SEF finds that a member has committed a rule violation, which involved a transaction for a customer that resulted in financial harm to the customer, a SEF, like a DCM, must provide written notice to such member of the disciplinary action taken against that member. This rule additionally requires members of SEFs, like members of DCMs, to provide written notice of the disciplinary action to the customer upon receipt of such notice from the SEF.

### Benefits

By requiring members of a SEF to communicate disciplinary actions taken against them to the customers that were impacted by the activities leading to such disciplinary action, the rule promotes integrity in the financial markets. Customers harmed by a member's actions will, if they choose, have an opportunity to bring legal action against the member that has caused financial harm to them and may also choose to take their business to another member. Both consequences are enabled by the rule, and both serve as an incentive to SEF members to avoid any activity that would harm their customers.

### Costs

This amendment is an extension of previously existing regulations that now apply to SEFs as well as DCMs. The costs to SEFs will likely be on par with those to DCMs and will be minimal, covering only the cost of communicating disciplinary actions to members. The Commission estimates

<sup>139</sup> Calculations assume that posting the notice will require 5 to 60 minutes of work by non-senior IT personnel. The average salary for a programmer is \$220.74/hour [(\$82,518 per year)/(2,000 hours per year) \* 5.35 = \$220.74 per hour]. 5/60 \* \$220.74 = \$18.40; 60/60 \* \$220.74 = \$220.74.

that such notification will cost the SEF approximately \$350.00 per notification because appropriate personnel will have to draft and send the required communication.

Sections 15.05, 18.05, 21.03, 36.1, 36.2, 36.3, Appendix A to Part 36, and Appendix B to Part 36

#### Introduction

As described in II.A.15.D, DFA eliminated ECMs and EBOTs and provided a grandfather relief provision for such entities. The amendments here remove references to the sections of the CEA that were deleted by DFA and insert reference to the Grandfather Relief Orders issued by the Commission.

ECMs and EBOTs are allowed to continue operating as such during the period provided by the Grandfather Relief Orders, creating benefits for those entities that intend to register with the Commission as SEFs, and that wish to continue operating as ECMs or EBOTs until they are able to make such registration. However, those benefits are conferred by the Act and the Grandfather Relief Order. The changes here are merely technical edits to ensure that the regulations reflect the changes to the CEA that were made by DFA. Therefore, there are no costs or benefits associated with these changes.

#### Parts 140 and 145

##### Introduction

As discussed above in II.A.15.E, the changes to parts 140 and 145 incorporate SEFs and SDRs into existing Commission regulations. The proposed changes would: (1) Facilitate the disclosure of confidential information to SEFs and SDRs in order to effectuate the purposes of the CEA; (2) facilitate publication of information in the **Federal Register** related to the applications for registration of SEFs and SDRs as well as new rules and rule amendments that require additional time to analyze; (3) include SEFs and SDRs in the category of registered entities that may petition the Commission for exemptive relief and no-action interpretive letters; (4) add SEFs and SDRs to the list of entities from which Commission members and employees may not accept employment or compensation; and (5) expand the definition of "submitter" by adding SEFs and SDRs to the list of registered entities to which a person's confidential information has been submitted and which, in turn, submit that information to the Commission, and also allows such individuals to request confidential treatment under § 145.9.

#### Benefits

The amendments described above create the following benefits: (1) By facilitating disclosure of confidential information to SEFs and SDRs, they assist the Commission in performing its regulatory role with respect to swaps, thus providing additional protection to swap market participants, promoting the integrity of financial markets, and promoting protection for the public. (2) Facilitating publication of information in the **Federal Register** related to registration applications for prospective SEFs and SDRs as well as new rule amendments, will assist the Commission when obtaining additional information from the public in order to ensure that its determinations regarding such applications and rules are well-informed. (3) Including SEFs and SDRs in the category of entities that may petition for exemptive relief and no-action interpretive letters gives these entities the opportunity to pursue individualized treatment with respect to Commission regulations in circumstances where they believe such treatment is appropriate, which in turn, gives the Commission the opportunity to grant such relief or to issue a no-action interpretive letter if it believes doing so is not contrary to the public interest or the intent of the regulations for which such relief is sought.

(4) Adding SEFs and SDRs to the list of registered entities from which Commission members and employees may not accept employment or compensation prevents conflicts of interest and in so doing promotes the Commission's ability to protect market participants and the public as well as to promote the integrity of the financial markets. (5) The changes ensure that personal information submitted to SEFs and SDRs is subject to the same protections under the Commission's regulations as personal information submitted to other registered entities.

#### Costs

SEFs and SDRs may bear some cost due to their obligation to submit personal information that they receive to the Commission. Such submissions will likely be automated and therefore the SEFs and SDRs will bear an initial cost that is necessary to modify their systems to submit the required information, and an ongoing cost to submit it when required. The Commission estimates that the initial cost is between \$2,100 and \$10,000,<sup>140</sup>

<sup>140</sup>This estimates 2–4 hours from a compliance attorney and 10–40 hours from IT personnel. The average salary for a compliance attorney is \$351.24/hour [(\$131,303 per year)/(2000 hours per year) \* 5.35 = \$351.24 per hour].

and the ongoing cost is between \$230 and \$460 per month.<sup>141</sup>

The other amendments do not impose affirmative obligations on market participants and therefore do not create costs for them or the public.

#### List of Subjects

##### 17 CFR Part 1

Agricultural commodity, Agriculture, Brokers, Committees, Commodity futures, Conflicts of interest, Consumer protection, Definitions, Designated contract markets, Directors, Major swap participants, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements, Swap dealers, Swaps.

##### 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements, Swaps.

##### 17 CFR Part 5

Bulk transfers, Commodity pool operators, Commodity trading advisors, Consumer protection, Customer's money, Securities and property, Definitions, Foreign exchange, Minimum financial and reporting requirements, Prohibited transactions in retail foreign exchange, Recordkeeping requirements, Retail foreign exchange dealers, Risk assessment, Special calls, Trading practices.

##### 17 CFR Part 7

Commodity futures, Consumer protection, Registered entity.

##### 17 CFR Part 8

Commodity futures, Reporting and recordkeeping requirements.

##### 17 CFR Part 15

Brokers, Commodity futures, Reporting and recordkeeping requirements, Electronic trading facility.

##### 17 CFR Part 16

Commodity futures, Reporting and recordkeeping requirements.

##### 17 CFR Part 18

Commodity futures, Reporting and recordkeeping requirements, Grandfather relief order.

5.35 = \$351.24 per hour]. The average salary for a programmer is \$220.74/hour [(\$82,518 per year)/(2,000 hours per year) \* 5.35 = \$220.74 per hour].

<sup>141</sup>This estimates 2–4 hours from a compliance attorney and 10–40 hours from IT personnel. The average salary for a compliance attorney is \$351.24/hour [(\$131,303 per year)/(2000 hours per year) \* 5.35 = \$351.24 per hour]. The average salary for a programmer is \$220.74/hour [(\$82,518 per year)/(2,000 hours per year) \* 5.35 = \$220.74 per hour].

17 CFR Part 21

Brokers, Commodity futures, Reporting and recordkeeping requirements, Grandfather relief order.

17 CFR Part 22

Brokers, Clearing, Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 36

Commodity futures, Electronic trading facility, Eligible commercial entities, Eligible contract participants, Federal financial regulatory authority, Principal-to-principal, Special calls, Systemic market event.

17 CFR Part 38

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 41

Brokers, Reporting and recordkeeping requirements, Security futures products.

17 CFR Part 140

Authority delegations (Government agencies), Conflict of interests, Organizations and functions (Government agencies).

17 CFR Part 145

Confidential business information, Freedom of information.

17 CFR Part 155

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 166

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements, Swaps.

For the reasons stated in the preamble, under the authority of 7 U.S.C. 1 et seq., the Commodity Futures Trading Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as set forth below:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 2a, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a-1, 7a-2, 7b, 7b-3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a-1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

■ 2. Amend § 1.3 by:

■ a. Revising paragraphs (a), (b), (e), (g), (h), (k), (n), (p), (q), (r), (s), (t), (x), (y)

introductory text, (y)(1), (y)(2) introductory text, (y)(2)(iii)(B), (y)(2)(iii)(C), (y)(2)(v)(B), (y)(2)(v)(C), (y)(2)(vii), (y)(2)(viii), (aa)(1)(i), (aa)(2)(i), (aa)(5), (bb), (cc), (ee), (ff), (gg), (ii), (kk), (mm)(1), (mm)(2) introductory text, (mm)(2)(i), (nn), (oo), (pp), (rr)(2), (ss), (tt), (vv), (xx), and (yy);

■ b. Removing and reserving paragraphs (j), (ll) and (uu); and

■ c. Adding paragraphs (k), (cccc), (dddd), (eeee), (ffff), (gggg), (hhhh), (iiii), (jjjj), (kkkk), (llll), (mmmm), (nnnn), (oooo), (pppp), (qqqq), (rrrr), and (ssss) to read as follows:

§ 1.3 Definitions.

\* \* \* \* \*

(a) Board of Trade. This term means an organized exchange or other trading facility.

(b) Business day. This term means any day other than a Sunday or holiday. In all notices required by the Act or by the rules and regulations in this chapter to be given in terms of business days the rule for computing time shall be to exclude the day on which notice is given and include the day on which shall take place the act of which notice is given.

\* \* \* \* \*

(c) Commodity. This term means and includes wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, millfeeds, butter, eggs, Irish potatoes, wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by the first section of Pub. L. 85-839) and motion picture box office receipts (or any index, measure, value or data related to such receipts), and all services, rights and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.

\* \* \* \* \*

(g) Institutional customer. This term has the same meaning as “eligible contract participant” as defined in section 1a(18) of the Act.

(h) Contract market; designated contract market. These terms mean a board of trade designated by the Commission as a contract market under the Act and in accordance with the provisions of part 38 of this chapter.

\* \* \* \* \*

(k) Customer. This term means any person who uses a futures commission

merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any commodity interest; 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.

\* \* \* \* \*

(n) Floor broker. This term means any person:

(1) Who, in or surrounding any pit, ring, post or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person—

(i) Any commodity for future delivery, security futures product, or swap; or

(ii) Any commodity option authorized under section 4c of the Act; or

(2) Who is registered with the Commission as a floor broker.

\* \* \* \* \*

(p) Futures commission merchant.

This term means:

(1) Any individual, association, partnership, corporation, or trust—

(i) Who is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery; a security futures product; a swap; any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; a commodity option authorized under section 4c of the Act; a leverage transaction authorized under section 19 of the Act; or acting as a counterparty in any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; and

(ii) Who, in connection with any of these activities accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; and

(2) Any person that is registered as a futures commission merchant.

(q) Member. This term means:

(1) An individual, association, partnership, corporation, or trust—

(i) Owning or holding membership in, or admitted to membership representation on, a registered entity; or

(ii) Having trading privileges on a registered entity.

(2) A participant in an alternative trading system that is designated as a contract market pursuant to section 5f of the Act is deemed a member of the contract market for purposes of transactions in security futures products through the contract market.

(r) *Net equity.* (1) For futures and commodity option positions, this term means the credit balance which would be obtained by combining the margin balance of any person with the net profit or loss, if any, accruing on the open futures or commodity option positions of such person.

(2) For swap positions other than commodity option positions, this term means the credit balance which would be obtained by combining the margin balance of any person with the net profit or loss, if any, accruing on the open swap positions of such person.

(s) *Net deficit.* (1) For futures and commodity option positions, this term means the debit balance which would be obtained by combining the margin balance of any person with the net profit or loss, if any, accruing on the open futures or commodity option positions of such person.

(2) For swap positions other than commodity option positions, this term means the debit balance which would be obtained by combining the margin balance of any person with the net profit or loss, if any, accruing on the open swap positions of such person.

(t) *Open contracts.* This term means:

(1) Positions in contracts of purchase or sale of any commodity made by or for any person on or subject to the rules of a board of trade for future delivery during a specified month or delivery period that have neither been fulfilled by delivery nor been offset by other contracts of purchase or sale in the same commodity and delivery month;

(2) Positions in commodity option transactions that have not expired, been exercised, or offset; and

(3) Positions in Cleared Swaps, as § 22.1 of this chapter defines that term, that have not been fulfilled by delivery; not been offset; not expired; and not been terminated.

\* \* \* \* \*

(x) *Floor trader.* This term means any person:

(1) Who, in or surrounding any pit, ring, post or other place provided by a contract market for the meeting of persons similarly engaged, purchases, or sells solely for such person's own account—

(i) Any commodity for future delivery, security futures product, or swap; or

(ii) Any commodity option authorized under section 4c of the Act; or

(2) Who is registered with the Commission as a floor trader.

(y) *Proprietary account.* This term means a commodity futures, commodity option, or swap trading account carried on the books and records of an individual, a partnership, corporation or other type of association:

(1) For one of the following persons, or

(2) Of which ten percent or more is owned by one of the following persons, or an aggregate of ten percent or more of which is owned by more than one of the following persons:

\* \* \* \* \*

(iii) \* \* \*

(B) The handling of the trades of customers or customer funds of such partnership,

(C) The keeping of records pertaining to the trades of customers or customer funds of such partnership, or

\* \* \* \* \*

(v) \* \* \*

(B) The handling of the trades of customers or customer funds of such individual, partnership, corporation or association,

(C) The keeping of records pertaining to the trades of customers or customer funds of such individual, partnership, corporation or association, or

\* \* \* \* \*

(vii) A business affiliate that directly or indirectly controls such individual, partnership, corporation or association; or

(viii) A business affiliate that, directly or indirectly is controlled by or is under common control with, such individual, partnership, corporation or association. *Provided, however,* That an account owned by any shareholder or member of a cooperative association of producers, within the meaning of section 6a of the Act, which association is registered as a futures commission merchant and carries such account on its records, shall be deemed to be an account of a customer and not a proprietary account of such association, unless the shareholder or member is an officer, director or manager of the association.

\* \* \* \* \*

(aa) \* \* \*

(1) \* \* \*

(i) The solicitation or acceptance of customers' orders (other than in a clerical capacity) or

\* \* \* \* \*

(2) \* \* \*

(i) The solicitation or acceptance of customers' orders (other than in a clerical capacity) or

\* \* \* \* \*

(5) A leverage transaction merchant as a partner, officer, employee, consultant,

or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(i) The solicitation or acceptance of leverage customers' orders (other than in a clerical capacity) for leverage transactions as defined in § 31.4(x) of this chapter, or

(ii) The supervision of any person or persons so engaged.

\* \* \* \* \*

(bb)(1) *Commodity trading advisor.* This term means any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option authorized under section 4c of the Act; any leverage transaction authorized under section 19 of the Act; any person registered with the Commission as a commodity trading advisor; or any person, who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing. The term does not include:

(i) Any bank or trust company or any person acting as an employee thereof;

(ii) Any news reporter, news columnist, or news editor of the print or electronic media or any lawyer, accountant, or teacher;

(iii) Any floor broker or futures commission merchant;

(iv) The publisher or producer of any print or electronic data of general and regular dissemination, including its employees;

(v) The named fiduciary, or trustee, of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, or any fiduciary whose sole business is to advise that plan;

(vi) Any contract market; and

(vii) Such other persons not within the intent of this definition as the Commission may specify by rule, regulation or order: *Provided,* That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession:

*Provided further,* That the Commission, by rule or regulation, may include within this definition, any person advising as to the value of commodities or issuing reports or



analyses concerning commodities, if the Commission determines that such rule or regulation will effectuate the purposes of this provision.

(2) *Client*. This term, as it relates to a commodity trading advisor, means any person:

(i) To whom a commodity trading advisor provides advice, for compensation or profit, either directly or through publications, writings, or electronic media, as to the value of, or the advisability of trading in, any contract of sale of a commodity for future delivery, security futures product or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option authorized under section 4c of the Act; any leverage transaction authorized under section 19 of the Act; or

(ii) To whom, for compensation or profit, and as part of a regular business, the commodity trading advisor issues or promulgates analyses or reports concerning any of the activities referred to in paragraph (bb)(2)(i) of this section. The term "client" includes, without limitation, any subscriber of a commodity trading advisor.

(cc) *Commodity pool operator*. This term means any person engaged in a business which is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option authorized under section 4c of the Act; any leverage transaction authorized under section 19 of the Act; or any person who is registered with the Commission as a commodity pool operator, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

(ee) *Self-regulatory organization*. This term means a contract market (as defined in § 1.3(h)), a swap execution facility (as defined in § 1.3(rrrr)), or a registered futures association under section 17 of the Act.

(ff) *Designated self-regulatory organization*. This term means:

(1) Self-regulatory organization of which a futures commission merchant,

an introducing broker, a leverage transaction merchant, a retail foreign exchange dealer, a swap dealer, or a major swap participant is a member; or

(2) If a Commission registrant other than a leverage transaction merchant is a member of more than one self-regulatory organization and such registrant is the subject of an approved plan under § 1.52, then a self-regulatory organization delegated the responsibility by such a plan for monitoring and auditing such registrant for compliance with the minimum financial and related reporting requirements of the self-regulatory organizations of which the registrant is a member, and for receiving the financial reports necessitated by such minimum financial and related reporting requirements from such registrant; or

(3) If a leverage transaction merchant is a member of more than one self-regulatory organization and such leverage transaction merchant is the subject of an approved plan under § 31.28 of this chapter, then a self-regulatory organization delegated the responsibility by such a plan for monitoring and auditing such leverage transaction merchant for compliance with the minimum financial, cover, segregation and sales practice, and related reporting requirements of the self-regulatory organizations of which the leverage transaction merchant is a member, and for receiving the reports necessitated by such minimum financial, cover, segregation and sales practice, and related reporting requirements from such leverage transaction merchant.

(gg) *Customer funds*. This term means, collectively, Cleared Swaps Customer Collateral and futures customer funds.

(ii) *Premium*. This term means the amount agreed upon between the purchaser and seller, or their agents, for the purchase or sale of a commodity option.

(jj) [Reserved]

(kk) *Strike price*. This term means the price, per unit, at which a person may purchase or sell the commodity, swap, or contract of sale of a commodity for future delivery that is the subject of a commodity option: *Provided*, That for purposes of § 1.17, the term strike price means the total price at which a person may purchase or sell the commodity, swap, or contract of sale of a commodity for future delivery that is the subject of a commodity option (*i.e.*, price per unit times the number of units).

(ll) [Reserved]

(mm) \* \* \*

(1) Any person who, for compensation or profit, whether direct or indirect:

(i) Is engaged in soliciting or in accepting orders (other than in a clerical capacity) for the purchase or sale of any commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option transaction authorized under section 4c; or any leverage transaction authorized under section 19; or who is registered with the Commission as an introducing broker; and

(ii) Does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

(2) The term introducing broker shall not include:

(i) Any futures commission merchant, floor broker, associated person, or associated person of a swap dealer or major swap participant acting in its capacity as such, regardless of whether that futures commission merchant, floor broker, or associated person is registered or exempt from registration in such capacity;

(nn) *Guarantee agreement*. This term means an agreement of guarantee in the form set forth in part B or C of Form 1-FR, executed by a registered futures commission merchant or retail foreign exchange dealer, as appropriate, and by an introducing broker or applicant for registration as an introducing broker on behalf of an introducing broker or applicant for registration as an introducing broker in satisfaction of the alternative adjusted net capital requirement set forth in § 1.17(a)(1)(iii).

(oo) *Leverage transaction merchant*. This term means and includes any individual, association, partnership, corporation, trust or other person that is engaged in the business of offering to enter into, entering into or confirming the execution of leverage contracts, or soliciting or accepting orders for leverage contracts, and who accepts leverage customer funds (or extends credit in lieu thereof) in connection therewith.

(pp) *Leverage customer funds*. This term means all money, securities and property received, directly or indirectly by a leverage transaction merchant from, for, or on behalf of leverage customers to margin, guarantee or secure leverage contracts and all money, securities and property accruing to such customers as the result of such contracts, or the



customers' leverage equity. In the case of a long leverage transaction, profit or loss accruing to a leverage customer is the difference between the leverage transaction merchant's current bid price for the leverage contract and the ask price of the leverage contract when entered into. In the case of a short leverage transaction, profit or loss accruing to a leverage customer is the difference between the bid price of the leverage contract when entered into and the leverage transaction merchant's current ask price for the leverage contract.

\* \* \* \* \*

(rr) \* \* \*

(2) In the case of foreign options customers in connection with open foreign options transactions, money, securities and property representing premiums paid or received, plus any other funds required to guarantee or secure open transactions plus or minus any unrealized gain or loss on such transactions.

(ss) *Foreign board of trade*. This term means any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated.

(tt) *Electronic signature*. This term means an electronic sounds, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(uu) [Reserved]

(vv) *Futures account*. This term means an account that is maintained in accordance with the segregation requirements of sections 4d(a) and 4d(b) of the Act and the rules thereunder.

\* \* \* \* \*

(xx) *Foreign broker*. This term means any person located outside the United States, its territories or possessions who is engaged in soliciting or in accepting orders only from persons located outside the United States, its territories or possessions for the purchase or sale of any commodity interest transaction on or subject to the rules of any designated contract market or swap execution facility and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

(yy) *Commodity interest*. This term means:

(1) Any contract for the purchase or sale of a commodity for future delivery;

(2) Any contract, agreement or transaction subject to a Commission

regulation under section 4c or 19 of the Act;

(3) Any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act; and

(4) Any swap as defined in the Act, by the Commission, or jointly by the Commission and the Securities and Exchange Commission.

\* \* \* \* \*

(ccc) *Cleared Swaps Customer*. This term has the meaning provided in § 22.1 of this chapter.

(ddd) *Cleared Swaps Customer Account*. This term has the meaning provided in § 22.1 of this chapter.

(eee) *Cleared Swaps Customer Collateral*. This term has the meaning provided in § 22.1 of this chapter.

(fff) *Confirmation*. When used in reference to a futures commission merchant, introducing broker, or commodity trading advisor, this term means documentation (electronic or otherwise) that memorializes specified terms of a transaction executed on behalf of a customer. When used in reference to a swap dealer or major swap participant, this term has the meaning set forth in § 23.500 of this chapter.

(ggg) *Customer Account*. This term references both a Cleared Swaps Customer Account and a Futures Account, as defined by paragraphs (ddd) and (vv) of this section.

(hhh) *Electronic trading facility*. This term means a trading facility that—

(1) Operates by means of an electronic or telecommunications network; and

(2) Maintains an automated audit trail of bids, offers, and the matching of orders or the execution of transactions on the facility.

(iii) *Futures customer*. This term means any person who uses a futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any contract for the purchase of sale of a commodity for future delivery or any option on such contract; *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 futures customer within the meaning of sections 4d(a) and 4d(b) 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 futures 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) *Futures customer funds*. This term means all money, securities, and property received by a futures commission merchant or by a derivatives clearing organization from, for, or on behalf of, futures customers:

(1) To margin, guarantee, or secure contracts for future delivery on or subject to the rules of a contract market or derivatives clearing organization, as the case may be, and all money accruing to such futures customers as the result of such contracts; and

(2) In connection with a commodity option transaction on or subject to the rules of a contract market, or derivatives clearing organization, as the case may be:

(i) To be used as a premium for the purchase of a commodity option transaction for a futures customer;

(ii) As a premium payable to a futures customer;

(iii) To guarantee or secure performance of a commodity option by a futures customer; or

(iv) Representing accruals (including, for purchasers of a commodity option for which the full premium has been paid, the market value of such commodity option) to a futures customer.

(3) Notwithstanding paragraphs (1) and (2) of this definition, the term "futures customer funds" shall exclude money, securities or property held to margin, guarantee or secure security futures products held in a securities account, and all money accruing as the result of such security futures products.

(kkk) *Order*. This term means an instruction or authorization provided by a customer to a futures commission merchant, introducing broker or commodity trading advisor regarding trading in a commodity interest on behalf of the customer.

(lll) *Organized exchange*. This term means a trading facility that—

(1) Permits trading—

(i) By or on behalf of a person that is not an eligible contract participant; or

(ii) By persons other than on a principal-to-principal basis; or

(2) Has adopted (directly or through another nongovernmental entity) rules that—

(i) Govern the conduct of participants, other than rules that govern the submission of orders or execution of transactions on the trading facility; and

(ii) Include disciplinary sanctions other than the exclusion of participants from trading.

(mmm) *Prudential regulator*. This term has the meaning given to the term in section 1a(39) of the Commodity Exchange Act and includes the Board of Governors of the Federal Reserve

System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant. The term also includes the Federal Deposit Insurance Corporation, with respect to any financial company as defined in section 201 of the Dodd-Frank Wall Street Reform and Consumer Protection Act or any insured depository institution under the Federal Deposit Insurance Act, and with respect to each affiliate of any such company or institution.

(nnnn) *Registered entity.* This term means:

(1) A board of trade designated as a contract market under section 5 of the Act;

(2) A derivatives clearing organization registered under section 5b of the Act;

(3) A board of trade designated as a contract market under section 5f of the Act;

(4) A swap execution facility registered under section 5h of the Act;

(5) A swap data repository registered under section 21 of the Act; and

(6) With respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded.

(oooo) *Registrant.* This term means: a commodity pool operator; commodity trading advisor; futures commission merchant; introducing broker; leverage transaction merchant; floor broker; floor trader; major swap participant; retail foreign exchange dealer; or swap dealer that is subject to these regulations; or an associated person of any of the foregoing other than an associated person of a swap dealer or major swap participant.

(pppp) *Retail forex customer.* This term means a person, other than an eligible contract participant as defined in section 1a(18) of the Act, acting on its own behalf and trading in any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act.

(qqqq) *Swap data repository.* This term means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.

(rrrr) *Swap execution facility.* This term means a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate

commerce, including any trading facility, that—

(1) Facilitates the execution of swaps between persons; and

(2) Is not a designated contract market.

(ssss) *Trading facility.* This term has the meaning set forth in section 1a(51) of the Act.

■ 3. Revise § 1.4 to read as follows:

**§ 1.4 Electronic signatures, acknowledgments and verifications.**

For purposes of complying with any provision in the Commodity Exchange Act or the rules or regulations in this Chapter I that requires a swap transaction to be acknowledged by a swap dealer or major swap participant or a document to be signed or verified by a customer of a futures commission merchant or introducing broker, a retail forex customer of a retail foreign exchange dealer or futures commission merchant, a pool participant or a client of a commodity trading advisor, or a counterparty of a swap dealer or major swap participant, an electronic signature executed by the customer, retail forex customer, participant, client, counterparty, swap dealer, or major swap participant will be sufficient, if the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, swap dealer, or major swap participant elects generally to accept electronic signatures, acknowledgments or verifications or another Commission rule permits the use of electronic signatures for the purposes listed above; *Provided, however,* That the electronic signature must comply with applicable Federal laws and other Commission rules; And, *Provided further,* That the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, swap dealer, or major swap participant must adopt and use reasonable safeguards regarding the use of electronic signatures, including at a minimum safeguards employed to prevent alteration of the electronic record with which the electronic signature is associated, after such record has been electronically signed.

■ 4. Revise paragraph (a)(4) of § 1.16 to read as follows:

**§ 1.16 Qualifications and reports of accountants.**

(a) \* \* \*

(4) *Customer.* The term “customer” means customer (as defined in § 1.3(k)) and includes a foreign futures or foreign

options customer (as defined in § 30.1(c) of this chapter).

\* \* \* \* \*

■ 5. Amend § 1.17 by:

■ a. Removing and reserving paragraph (a)(1)(ii);

■ b. Removing from paragraph (c)(1)(iii) the term “physical” in all places it appears and adding in its place the term “commodity”;

■ c. Revising paragraph (c)(5)(ii)(A);

■ d. Removing from paragraph (c)(5)(xi) the term “physical” and adding in its place the term “commodity”; and

■ e. Revising paragraph (c)(5)(xiii)(C).

The revisions read as follows:

**§ 1.17 Minimum financial requirements for futures commission merchants and introducing brokers.**

(a)(1)(i) \* \* \*

(ii) [Reserved]

\* \* \* \* \*

(c) \* \* \*

(5) \* \* \*

(ii) \* \* \*

(A) Inventory which is currently registered as deliverable on a contract market and covered by an open futures contract or by a commodity option on a physical commodity—No charge.

\* \* \* \* \*

(xiii) \* \* \*

(C) A foreign broker that has been granted comparability relief pursuant to § 30.10 of this chapter, *Provided, however,* that the amount of the unsecured receivable not subject to the five percent capital charge is no greater than 150 percent of the current amount required to maintain futures and options positions in accounts with the foreign broker, or 100 percent of such greater amount required to maintain futures and option positions in the accounts at any time during the previous six-month period, and *Provided, that,* in the case of the foreign futures or foreign options secured amount, as § 1.3(rr) defines such term, such account is treated in accordance with the special requirements of the applicable Commission order issued under § 30.10 of this chapter.

\* \* \* \* \*

■ 6. Revise § 1.20 to read as follows:

**§ 1.20 Futures customer funds to be segregated and separately accounted for.**

(a) All futures customer funds shall be separately accounted for and segregated as belonging to futures customers. Such futures customer funds when deposited with any bank, trust company, derivatives clearing organization or another futures commission merchant shall be deposited under an account name which clearly identifies them as

such and shows that they are segregated as required by sections 4d(a) and 4d(b) of the Act and this part. Each registrant shall obtain and retain in its files for the period provided in § 1.31 a written acknowledgment from such bank, trust company, derivatives clearing organization, or futures commission merchant, that it was informed that the futures customer funds deposited therein are those of futures customers and are being held in accordance with the provisions of the Act and this part: *Provided, however*, that an acknowledgment need not be obtained from a derivatives clearing organization that has adopted and submitted to the Commission rules that provide for the segregation as futures customer funds, in accordance with all relevant provisions of the Act and the rules and orders promulgated thereunder, of all funds held on behalf of futures customers. Under no circumstances shall any portion of futures customer funds be obligated to a derivatives clearing organization, any member of a contract market, a futures commission merchant, or any depository except to purchase, margin, guarantee, secure, transfer, adjust or settle trades, contracts or commodity option transactions of futures customers. No person, including any derivatives clearing organization or any depository, that has received futures customer funds for deposit in a segregated account, as provided in this section, may hold, dispose of, or use any such funds as belonging to any person other than the futures customers of the futures commission merchant which deposited such funds.

(b) All futures customer funds received by a derivatives clearing organization from a member of the derivatives clearing organization to purchase, margin, guarantee, secure or settle the trades, contracts or commodity options of the clearing member's futures customers and all money accruing to such futures customers as the result of trades, contracts or commodity options so carried shall be separately accounted for and segregated as belonging to such futures customers, and a derivatives clearing organization shall not hold, use or dispose of such futures customer funds except as belonging to such futures customers. Such futures customer funds when deposited in a bank or trust company shall be deposited under an account name which clearly shows that they are the futures customer funds of the futures customers of clearing members, segregated as required by sections 4d(a) and 4d(b) of the Act and these regulations. The derivatives clearing

organization shall obtain and retain in its files for the period provided by § 1.31 an acknowledgment from such bank or trust company that it was informed that the futures customer funds deposited therein are those of futures customers of its clearing members and are being held in accordance with the provisions of the Act and these regulations.

(c) Each futures commission merchant shall treat and deal with the futures customer funds of a futures customer as belonging to such futures customer. All futures customer funds shall be separately accounted for, and shall not be commingled with the money, securities or property of a futures commission merchant or of any other person, or be used to secure or guarantee the trades, contracts or commodity options, or to secure or extend the credit, of any person other than the one for whom the same are held: *Provided, however*, That futures customer funds treated as belonging to the futures customers of a futures commission merchant may for convenience be commingled and deposited in the same account or accounts with any bank or trust company, with another person registered as a futures commission merchant, or with a derivatives clearing organization, and that such share thereof as in the normal course of business is necessary to purchase, margin, guarantee, secure, transfer, adjust, or settle the trades, contracts or commodity options of such futures customers or resulting market positions, with the derivatives clearing organization or with any other person registered as a futures commission merchant, may be withdrawn and applied to such purposes, including the payment of premiums to option grantors, commissions, brokerage, interest, taxes, storage and other fees and charges, lawfully accruing in connection with such trades, contracts or commodity options: *Provided further*, That futures customer funds may be invested in instruments described in § 1.25.

■ 7. Revise § 1.21 to read as follows:

**§ 1.21 Care of money and equities accruing to futures customers.**

All money received directly or indirectly by, and all money and equities accruing to, a futures commission merchant from any derivatives clearing organization or from any clearing member or from any member of a contract market incident to or resulting from any trade, contract or commodity option made by or through such futures commission merchant on behalf of any futures customer shall be

considered as accruing to such futures customer within the meaning of the Act and these regulations. Such money and equities shall be treated and dealt with as belonging to such futures customer in accordance with the provisions of the Act and these regulations. Money and equities accruing in connection with futures customers' open trades, contracts, or commodity options need not be separately credited to individual accounts but may be treated and dealt with as belonging undivided to all futures customers having open trades, contracts, or commodity option positions which if closed would result in a credit to such futures customers.

■ 8. Revise § 1.22 to read as follows:

**§ 1.22 Use of futures customer funds restricted.**

No futures commission merchant shall use, or permit the use of, the futures customer funds of one futures customer to purchase, margin, or settle the trades, contracts, or commodity options of, or to secure or extend the credit of, any person other than such futures customer. Futures customer funds shall not be used to carry trades or positions of the same futures customer other than in commodities or commodity options traded through the facilities of a contract market.

■ 9. Revise § 1.23 to read as follows:

**§ 1.23 Interest of futures commission merchant in segregated futures customer funds; additions and withdrawals.**

The provisions in section 4d(a) and 4d(b) of the Act and the provision in § 1.20(c), which prohibit the commingling of futures customer funds with the funds of a futures commission merchant, shall not be construed to prevent a futures commission merchant from having a residual financial interest in the futures customer funds, segregated as required by the Act and the rules in this part and set apart for the benefit of futures customers; nor shall such provisions be construed to prevent a futures commission merchant from adding to such segregated futures customer funds such amount or amounts of money, from its own funds or unencumbered securities from its own inventory, of the type set forth in § 1.25, as it may deem necessary to ensure any and all futures customers' accounts from becoming undersegregated at any time. The books and records of a futures commission merchant shall at all times accurately reflect its interest in the segregated funds. A futures commission merchant may draw upon such segregated funds to its own order, to the extent of its actual interest therein, including the

withdrawal of securities held in segregated safekeeping accounts held by a bank, trust company, contract market, derivatives clearing organization or other futures commission merchant. Such withdrawal shall not result in the funds of one futures customer being used to purchase, margin or carry the trades, contracts or commodity options, or extend the credit of any other futures customer or other person.

■ 10. Revise § 1.24 to read as follows:

**§ 1.24 Segregated funds; exclusions therefrom.**

Money held in a segregated account by a futures commission merchant shall not include: (a) Money invested in obligations or stocks of any derivatives clearing organization or in memberships in or obligations of any contract market; or

(b) Money held by any derivatives clearing organization which it may use for any purpose other than to purchase, margin, guarantee, secure, transfer, adjust, or settle the contracts, trades, or commodity options of the futures customers of such futures commission merchant.

■ 11. Revise paragraphs (c)(3) and (e) of § 1.25 to read as follows:

**§ 1.25 Investment of customer funds.**

\* \* \* \* \*

(c) \* \* \*

(3) A futures commission merchant or derivatives clearing organization shall maintain the confirmation relating to the purchase in its records in accordance with § 1.31 and note the ownership of fund shares (by book-entry or otherwise) in a custody account of the futures commission merchant or derivatives clearing organization in accordance with §§ 1.26 and 22.5 of this chapter. The futures commission merchant or the derivatives clearing organization shall obtain the acknowledgment letter required by §§ 1.26 and 22.5 of this chapter from an entity that has substantial control over the fund shares purchased with customer funds and has the knowledge and authority to facilitate redemption and payment or transfer of the customer funds. Such entity may include the fund sponsor or depository acting as custodian for fund shares.

\* \* \* \* \*

(e) *Deposit of firm-owned securities into segregation.* A futures commission merchant shall not be prohibited from directly depositing unencumbered securities of the type specified in this section, which it owns for its own account, into a segregated safekeeping account or from transferring any such securities from a segregated account to

its own account, up to the extent of its residual financial interest in customers' segregated funds; *provided, however,* that such investments, transfers of securities, and disposition of proceeds from the sale or maturity of such securities are recorded in the record of investments required to be maintained by § 1.27. All such securities may be segregated in safekeeping only with a bank, trust company, derivatives clearing organization, or other registered futures commission merchant. Furthermore, for purposes of §§ 1.25, 1.27, 1.28, and 1.29, investments permitted by § 1.25 that are owned by the futures commission merchant and deposited into such segregated account shall be considered customer funds until such investments are withdrawn from segregation. Investments permitted by § 1.25 that are owned by the futures commission merchant and deposited into a segregated account pursuant to § 1.26 shall be considered futures customer funds until such investments are withdrawn from segregation. Investments permitted by § 1.25 that are owned by the futures commission merchant and deposited into a segregated account pursuant to § 22.5 of this chapter shall be considered Cleared Swaps Customer Collateral until such investments are withdrawn from segregation.

\* \* \* \* \*

■ 12. Revise § 1.26 to read as follows:

**§ 1.26 Deposit of instruments purchased with futures customer funds.**

(a) Each futures commission merchant who invests futures customer funds in instruments described in § 1.25 shall separately account for such instruments and segregate such instruments as belonging to such futures customers. Such instruments, when deposited with a bank, trust company, derivatives clearing organization or another futures commission merchant, shall be deposited under an account name which clearly shows that they belong to futures customers and are segregated as required by the Act and this part. Each futures commission merchant upon opening such an account shall obtain and retain in its files an acknowledgment from such bank, trust company, derivatives clearing organization or other futures commission merchant that it was informed that the instruments belong to futures customers and are being held in accordance with the provisions of the Act and this part. *Provided, however,* that an acknowledgment need not be obtained from a derivatives clearing organization that has adopted and

submitted to the Commission rules that provide for the segregation as futures customer funds, in accordance with all relevant provisions of the Act and the rules and orders promulgated thereunder, of all funds held on behalf of futures customers and all instruments purchased with futures customer funds. Such acknowledgment shall be retained in accordance with § 1.31. Such bank, trust company, derivatives clearing organization or other futures commission merchant shall allow inspection of such obligations at any reasonable time by representatives of the Commission.

(b) Each derivatives clearing organization which invests money belonging or accruing to futures customers of its clearing members in instruments described in § 1.25 shall separately account for such instruments and segregate such instruments as belonging to such futures customers. Such instruments, when deposited with a bank or trust company, shall be deposited under an account name which will clearly show that they belong to futures customers and are segregated as required by the Act and this part. Each derivatives clearing organization upon opening such an account shall obtain and retain in its files a written acknowledgment from such bank or trust company that it was informed that the instruments belong to futures customers of clearing members and are being held in accordance with the provisions of the Act and this part. Such acknowledgment shall be retained in accordance with § 1.31. Such bank or trust company shall allow inspection of such instruments at any reasonable time by representatives of the Commission.

■ 13. Revise paragraph (a) introductory text and paragraph (a)(6) of § 1.27 to read as follows:

**§ 1.27 Record of investments.**

(a) Each futures commission merchant which invests customer funds, and each derivatives clearing organization which invests customer funds of its clearing members' customers, shall keep a record showing the following:

\* \* \* \* \*

(6) The date on which such investments were liquidated or otherwise disposed of and the amount of money or current market value of securities received on such disposition, if any; and

\* \* \* \* \*

■ 14. Revise § 1.29 to read as follows:

**§ 1.29 Increment or interest resulting from investment of customer funds.**

The investment of customer funds in instruments described in § 1.25 shall not

prevent the futures commission merchant or derivatives clearing organization so investing such funds from receiving and retaining as its own any increment or interest resulting therefrom.

■ 15. Revise § 1.30 to read as follows:

**§ 1.30 Loans by futures commission merchants; treatment of proceeds.**

Nothing in the regulations in this chapter shall prevent a futures commission merchant from lending its own funds to customers on securities and property pledged by such customers, or from repledging or selling such securities and property pursuant to specific written agreement with such customers. The proceeds of such loans used to purchase, margin, guarantee, or secure the trades, contracts, or commodity options of customers shall be treated and dealt with by a futures commission merchant as belonging to such customers, in accordance with and subject to the provisions of the Act and these regulations.

■ 16. Amend § 1.31 by revising paragraphs (a), (b) introductory text, (b)(2)(iii), and (b)(3)(i), to read as follows:

**§ 1.31 Books and records; keeping and inspection.**

(a)(1) All books and records required to be kept by the Act or by these regulations shall be kept in their original form (for paper records) or native file format (for electronic records) for a period of five years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period; *Provided, however*, That records of any swap or related cash or forward transaction shall be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for a period of five years after such date. Records of oral communications kept pursuant to § 23.202(a)(1) and (b)(1) of this chapter shall be kept for a period of one year. All such books and records shall be open to inspection by any representative of the Commission or the United States Department of Justice. For purposes of this section, native file format means an electronic file that exists in the format in which it was originally created.

(2) Persons required to keep books and records by the Act or by these regulations shall produce such records in a form specified by any representative of the Commission. Such production shall be made, at the expense of the person required to keep the book or record, to a Commission representative upon the representative's request. Instead of furnishing a copy,

such person may provide the original book or record for reproduction, which the representative may temporarily remove from such person's premises for this purpose. All copies or originals shall be provided promptly. Upon request, the Commission representative shall issue a receipt provided by such person for any copy or original book or record received. At the request of the Commission representative, such person shall, upon the return thereof, issue a receipt for any copy or original book or record returned by the representative.

(b) Except as provided in paragraph (d) of this section, books and records required to be kept by the Act or by these regulations may be stored on either "micrographic media" (as defined in paragraph (b)(1)(i) of this section) or "electronic storage media" (as defined in paragraph (b)(1)(ii) of this section) for the required time period under the conditions set forth in this paragraph (b); *Provided, however*, For electronic records, such storage media must preserve the native file format of the electronic records as required by paragraph (a)(1) of this section.

\* \* \* \* \*

(2) \* \* \*

(iii) Keep only Commission-required records on the individual medium employed (e.g., a disk or sheets of microfiche);

\* \* \* \* \*

(3) \* \* \*

(i) Be ready at all times to provide, and immediately provide at the expense of the person required to keep such records, copies of such records on such compatible data processing media as defined in § 15.00(d) of this chapter which any representative of the Commission or the Department of Justice may request. Records must use a format and coding structure specified in the request.

\* \* \* \* \*

■ 17. Revise paragraphs (a)(1), (a)(2), (a)(3), and (b) of § 1.32 to read as follows:

**§ 1.32 Segregated account; daily computation and record.**

(a) \* \* \*

(1) The total amount of futures customer funds on deposit in segregated accounts on behalf of futures customers;

(2) The amount of such futures customer funds required by the Act and these regulations to be on deposit in segregated accounts on behalf of such futures customers; and

(3) The amount of the futures commission merchant's residual interest in such futures customer funds.

(b) In computing the amount of futures customer funds required to be in

segregated accounts, a futures commission merchant may offset any net deficit in a particular futures customer's account against the current market value of readily marketable securities, less applicable percentage deductions (i.e., "securities haircuts") as set forth in Rule 15c3-1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3-1(c)(2)(vi)), held for the same futures customer's account. The futures commission merchant must maintain a security interest in the securities, including a written authorization to liquidate the securities at the futures commission merchant's discretion, and must segregate the securities in a safekeeping account with a bank, trust company, derivatives clearing organization, or another futures commission merchant. For purposes of this section, a security will be considered readily marketable if it is traded on a "ready market" as defined in Rule 15c3-1(c)(11)(i) of the Securities and Exchange Commission (17 CFR 240.15c3-1(c)(11)(i)).

\* \* \* \* \*

■ 18. Amend § 1.33 by:

■ a. Revising paragraphs (a) introductory text, (a)(1) introductory text, and (a)(1)(iii);

■ b. Removing paragraph (a)(1)(iv);

■ c. Revising paragraphs (a)(2) introductory text, (a)(2)(i), (a)(2)(ii), and (a)(2)(iv);

■ d. Adding paragraphs (a)(3) and (a)(4);

■ e. Revising paragraph (b) introductory text, and (b)(1);

■ f. Redesignating paragraphs (b)(2) through (b)(4) as paragraphs (b)(3) through (b)(5);

■ g. Adding a new paragraph (b)(2);

■ h. Revising newly designated paragraphs (b)(3)(i), (b)(3)(iv), (b)(4), and (b)(5); and

■ i. Revising paragraph (d) introductory text.

The revisions and additions read as follows:

**§ 1.33 Monthly and confirmation statements.**

(a) *Monthly statements.* Each futures commission merchant must promptly furnish in writing to each customer, and to each foreign futures or foreign options customer, as defined by § 30.1 of this chapter, as of the close of the last business day of each month or as of any regular monthly date selected, except for accounts in which there are neither open contracts at the end of the statement period nor any changes to the account balance since the prior statement period, but in any event not less frequently than once every three

months, a statement which clearly shows:

(1) For each commodity futures customer and foreign futures or foreign options customer position—

\* \* \* \* \*

(iii) Any futures customer funds or foreign futures or foreign options secured amount, as defined by § 1.3(rr), carried with the futures commission merchant.

(2) For each commodity option position and foreign option position—

(i) All commodity options and foreign options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying futures contract or underlying commodity, strike price, transaction date, and expiration date;

(ii) The open commodity option and foreign option positions carried for such customer or foreign futures or foreign options customer as of the end of the monthly reporting period, identified by underlying futures contract or underlying commodity, strike price, transaction date, and expiration date;

\* \* \* \* \*

(iv) Any related customer funds carried in such customer's account(s) or any related foreign futures or foreign options secured amount carried in the account(s) of a foreign futures or foreign options customer.

(3) For each Cleared Swaps Customer position—

(i) The Cleared Swaps, as § 22.1 of this chapter defines that term, carried by the futures commission merchant for the Cleared Swaps Customer;

(ii) The net unrealized profits or losses in all Cleared Swaps marked to the market;

(iii) Any Cleared Swaps Customer Collateral carried with the futures commission merchant; and

(4) A detailed accounting of all financial charges and credits to customers and foreign futures or foreign options customers, during the monthly reporting period, including all customer funds and any foreign futures or foreign options secured amount, received from or disbursed to customers or foreign futures or foreign options customers, as well as realized profits and losses.

(b) *Confirmation statement.* Each futures commission merchant must, not later than the next business day after any commodity interest or commodity option transaction, including any foreign futures or foreign options transactions, furnish to each customer or foreign futures or foreign options customer:

(1) A written confirmation of each commodity futures transaction caused to be executed by it for the customer.

(2) A written confirmation of each Cleared Swap carried by the futures commission merchant, containing at least the following information:

(i) The unique swap identifier, as required by § 45.4(a) of this chapter, for each Cleared Swap and the date each Cleared Swap was executed;

(ii) The product name of each Cleared Swap;

(iii) The price at which the Cleared Swap was executed;

(iv) The date of maturity for each Cleared Swap; and

(v) The derivatives clearing organization through which it is cleared.

(3) A written confirmation of each commodity option transaction, containing at least the following information:

(i) The customer's account identification number;

\* \* \* \* \*

(iv) The underlying futures contract or underlying commodity;

\* \* \* \* \*

(4) Upon the expiration or exercise of any commodity option, a written confirmation statement thereof, which statement shall include the date of such occurrence, a description of the option involved, and, in the case of exercise, the details of the futures or physical position which resulted therefrom including, if applicable, the final trading date of the contract for future delivery underlying the option.

(5) Notwithstanding the provisions of paragraphs (b)(1) through (b)(4) of this section, a commodity interest transaction that is caused to be executed for a commodity pool need be confirmed only to the operator of the commodity pool.

\* \* \* \* \*

(d) *Controlled accounts.* With respect to any account controlled by any person other than the customer for whom such account is carried, each futures commission merchant shall:

\* \* \* \* \*

■ 19. Revise § 1.34 to read as follows:

**§ 1.34 Monthly record, "point balance".**

(a) With respect to commodity futures transactions, each futures commission merchant shall prepare, and retain in accordance with the requirements of § 1.31, a statement commonly known as a "point balance," which accrues or brings to the official closing price, or settlement price fixed by the clearing organization, all open contracts of customers as of the last business day of each month or of any regular monthly date selected: *Provided, however,* That a futures commission merchant who carries part or all of customers' open

contracts with other futures commission merchants on an "instruct basis" will be deemed to have met the requirements of this section as to open contracts so carried if a monthly statement is prepared which shows that the prices and amounts of such contracts long and short in the customers' accounts are in balance with those in the carrying futures commission merchants' accounts, and such statements are retained in accordance with the requirements of § 1.31.

(b) With respect to commodity option transactions, each futures commission merchant shall prepare, and retain in accordance with the requirements of § 1.31, a listing in which all open commodity option positions carried for customers are marked to the market. Such listing shall be prepared as of the last business day of each month, or as of any regular monthly date selected, and shall be by put or by call, by underlying contract for future delivery (by delivery month) or underlying commodity (by option expiration date), and by strike price.

■ 20. Section 1.35 is revised to read as follows:

**§ 1.35 Records of commodity interest and cash commodity transactions.**

(a) *Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets or swap execution facilities.* Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity interests and cash commodities. Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall retain the required records, in accordance with the requirements of § 1.31, and produce them for inspection and furnish true and correct information and reports as to the contents or the meaning thereof, when and as requested by an authorized representative of the Commission or the United States Department of Justice. Included among such records shall be all orders (filled, unfilled, or canceled), trading cards, signature cards, street books, journals, ledgers, canceled checks, copies of confirmations, copies of statements of purchase and sale, and all other records, which have been prepared in the course of its business of dealing in commodity interests and cash

commodities. Among such records each member of a designated contract market or swap execution facility must retain and produce for inspection are all documents on which trade information is originally recorded, whether or not such documents must be prepared pursuant to the rules or regulations of either the Commission, the designated contract market or the swap execution facility. For purposes of this section, such documents are referred to as "original source documents."

(b) *Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets and swap execution facilities: Recording of customers' orders.* (1) Each futures commission merchant, each retail foreign exchange dealer, each introducing broker, and each member of a designated contract market or swap execution facility receiving a customer's order that cannot immediately be entered into a trade matching engine shall immediately upon receipt thereof prepare a written record of the order including the account identification, except as provided in paragraph (b)(5) of this section, and order number, and shall record thereon, by timestamp or other timing device, the date and time, to the nearest minute, the order is received, and in addition, for commodity option orders, the time, to the nearest minute, the order is transmitted for execution.

(2)(i) Each member of a designated contract market who on the floor of such designated contract market receives a customer's order which is not in the form of a written record including the account identification, order number, and the date and time, to the nearest minute, the order was transmitted or received on the floor of such designated contract market, shall immediately upon receipt thereof prepare a written record of the order in non-erasable ink, including the account identification, except as provided in paragraph (b)(5) of this section, and order number and shall record thereon, by timestamp or other timing device, the date and time, to the nearest minute, the order is received.

(ii) Except as provided in paragraph (b)(3) of this section:

(A) Each member of a designated contract market who on the floor of such designated contract market receives an order from another member present on the floor which is not in the form of a written record shall, immediately upon receipt of such order, prepare a written record of the order or obtain from the member who placed the order a written record of the order, in non-erasable ink including the account identification and

order number and shall record thereon, by time-stamp or other timing device, the date and time, to the nearest minute, the order is received; or

(B) When a member of a designated contract market present on the floor places an order, which is not in the form of a written record, for his own account or an account over which he has control, with another member of such designated contract market for execution:

(1) The member placing such order immediately upon placement of the order shall record the order and time of placement to the nearest minute on a sequentially-numbered trading card maintained in accordance with the requirements of paragraph (f) of this section;

(2) The member receiving and executing such order immediately upon execution of the order shall record the time of execution to the nearest minute on a trading card or other record maintained pursuant to the requirements of paragraph (f) of this section; and

(3) The member receiving and executing the order shall return such trading card or other record to the member placing the order. The member placing the order then must submit together both of the trading cards or other records documenting such trade to designated contract market personnel or the clearing member.

(3)(i) The requirements of paragraph (b)(2)(ii) of this section will not apply if a designated contract market maintains in effect rules which provide for an exemption where:

(A) A member of a designated contract market places with another member of such designated contract market an order that is part of a spread transaction;

(B) The member placing the order personally executes one or more legs of the spread; and

(C) The member receiving and executing such order immediately upon execution of the order records the time of execution to the nearest minute on his trading card or other record maintained in accordance with the requirements of paragraph (f) of this section.

(ii) Each contract market shall, as part of its trade practice surveillance program, conduct surveillance for compliance with the recordkeeping and other requirements under paragraphs (b)(2) and (3) of this section, and for trading abuses related to the execution of orders for members present on the floor of the contract market.

(4) Each member of a designated contract market reporting the execution from the floor of the designated contract

market of a customer's order or the order of another member of the designated contract market received in accordance with paragraphs (b)(2)(i) or (b)(2)(ii)(A) of this section, shall record on a written record of the order, including the account identification, except as provided in paragraph (b)(5) of this section, and order number, by time-stamp or other timing device, the date and time to the nearest minute such report of execution is made. Each member of a designated contract market shall submit the written records of customer orders or orders from other designated contract market members to designated contract market personnel or to the clearing member responsible for the collection of orders prepared pursuant to this paragraph. The execution price and other information reported on the order tickets must be written in non-erasable ink.

(5) *Post-execution allocation of bunched orders.* Specific customer account identifiers for accounts included in bunched orders executed on designated contract markets or swap execution facilities need not be recorded at time of order placement or upon report of execution if the requirements of paragraphs (b)(5)(i) through (v) of this section are met. Specific customer account identifiers for accounts included in bunched orders involving swaps need not be included in confirmations or acknowledgments provided by swap dealers or major swap participants pursuant to § 23.501(a) of this chapter if the requirements of paragraphs (b)(5)(i) through (v) of this section are met.

(i) *Eligible account managers for orders executed on designated contract markets or swap execution facilities.*

The person placing and directing the allocation of an order eligible for post-execution allocation must have been granted written investment discretion with regard to participating customer accounts. The following persons shall qualify as eligible account managers for trades executed on designated contract markets or swap execution facilities:

(A) A commodity trading advisor registered with the Commission pursuant to the Act or excluded or exempt from registration under the Act or the Commission's rules, except for entities exempt under § 4.14(a)(3) of this chapter;

(B) An investment adviser registered with the Securities and Exchange Commission pursuant to the Investment Advisers Act of 1940 or with a state pursuant to applicable state law or excluded or exempt from registration under such Act or applicable state law or rule;



(C) A bank, insurance company, trust company, or savings and loan association subject to federal or state regulation;

(D) A foreign adviser that exercises discretionary trading authority solely over the accounts of non-U.S. persons, as defined in § 4.7(a)(1)(iv) of this chapter;

(E) A futures commission merchant registered with the Commission pursuant to the Act; or

(F) An introducing broker registered with the Commission pursuant to the Act.

(ii) *Eligible account managers for orders executed bilaterally.* The person placing and directing the allocation of an order eligible for post-execution allocation must have been granted written investment discretion with regard to participating customer accounts. The following persons shall qualify as eligible account managers for trades executed bilaterally:

(A) A commodity trading advisor registered with the Commission pursuant to the Act or excluded or exempt from registration under the Act or the Commission's rules, except for entities exempt under § 4.14(a)(3) of this chapter;

(B) A futures commission merchant registered with the Commission pursuant to the Act; or

(C) An introducing broker registered with the Commission pursuant to the Act.

(iii) *Information.* Eligible account managers shall make the following information available to customers upon request:

(A) The general nature of the allocation methodology the account manager will use;

(B) Whether accounts in which the account manager may have any interest may be included with customer accounts in bunched orders eligible for post-execution allocation; and

(C) Summary or composite data sufficient for that customer to compare its results with those of other comparable customers and, if applicable and consistent with § 155.3(a)(1) and § 155.4(a)(1) of this chapter, any account in which the account manager has an interest.

(iv) *Allocation.* Orders eligible for post-execution allocation must be allocated by an eligible account manager in accordance with the following:

(A) Allocations must be made as soon as practicable after the entire transaction is executed, but in any event no later than the following times: For cleared trades, account managers must provide allocation information to futures commission merchants no later than a

time sufficiently before the end of the day the order is executed to ensure that clearing records identify the ultimate customer for each trade. For uncleared trades, account managers must provide allocation information to the counterparty no later than the end of the calendar day that the swap was executed.

(B) Allocations must be fair and equitable. No account or group of accounts may receive consistently favorable or unfavorable treatment.

(C) The allocation methodology must be sufficiently objective and specific to permit independent verification of the fairness of the allocations using that methodology by appropriate regulatory and self-regulatory authorities and by outside auditors.

(v) *Records.* (A) Eligible account managers shall keep and must make available upon request of any representative of the Commission, the United States Department of Justice, or other appropriate regulatory agency, the information specified in paragraph (b)(5)(iii) of this section.

(B) Eligible account managers shall keep and must make available upon request of any representative of the Commission, the United States Department of Justice, or other appropriate regulatory agency, records sufficient to demonstrate that all allocations meet the standards of paragraph (b)(5)(iv) of this section and to permit the reconstruction of the handling of the order from the time of placement by the account manager to the allocation to individual accounts.

(C) Futures commission merchants, introducing brokers, or commodity trading advisors that execute orders or that carry accounts eligible for post-execution allocation, and members of designated contract markets or swap execution facilities that execute such orders, must maintain records that, as applicable, identify each order subject to post-execution allocation and the accounts to which contracts executed for such order are allocated.

(D) In addition to any other remedies that may be available under the Act or otherwise, if the Commission has reason to believe that an account manager has failed to provide information requested pursuant to paragraph (b)(5)(v)(A) or (b)(5)(v)(B) of this section, the Commission may inform in writing any designated contract market, swap execution facility, swap dealer, or major swap participant, and that designated contract market, swap execution facility, swap dealer, or major swap participant shall prohibit the account manager from submitting orders for execution except for liquidation of open positions and no

futures commission merchant shall accept orders for execution on any designated contract market, swap execution facility, or bilaterally from the account manager except for liquidation of open positions.

(E) Any account manager that believes he or she is or may be adversely affected or aggrieved by action taken by the Commission under paragraph (b)(5)(v)(D) of this section shall have the opportunity for a prompt hearing in accordance with the provisions of § 21.03(g) of this chapter.

(c)(1) *Futures commission merchants, introducing brokers, and members of designated contract markets and swap execution facilities.* Upon request of the designated contract market or swap execution facility, the Commission, or the United States Department of Justice, each futures commission merchant, introducing broker, and member of a designated contract market or swap execution facility shall request from its customers and, upon receipt thereof, provide to the requesting body documentation of cash transactions underlying exchanges of futures or swaps for cash commodities or exchanges of futures or swaps in connection with cash commodity transactions.

(2) *Customers.* Each customer of a futures commission merchant, introducing broker, or member of a designated contract market or swap execution facility shall create, retain, and produce upon request of the designated contract market or swap execution facility, the Commission, or the United States Department of Justice documentation of cash transactions underlying exchanges of futures or swaps for cash commodities or exchanges of futures or swaps in connection with cash commodity transactions.

(3) *Contract markets.* Every contract market shall adopt rules which require its members to provide documentation of cash transactions underlying exchanges of futures for cash commodities or exchanges of futures in connection with cash commodity transactions upon request of the contract market.

(4) *Documentation.* For the purposes of this paragraph (c), documentation means those documents customarily generated in accordance with cash market practices which demonstrate the existence and nature of the underlying cash transactions, including, but not limited to, contracts, confirmation statements, telex printouts, invoices, and warehouse receipts or other documents of title.



(d) *Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of derivatives clearing organizations clearing trades executed on designated contract markets and swap execution facilities.* Each futures commission merchant, each retail foreign exchange dealer, and each member of a derivatives clearing organization clearing trades executed on a designated contract market or swap execution facility and, for purposes of paragraph (d)(3) of this section, each introducing broker, shall, as a minimum requirement, prepare regularly and promptly, and keep systematically and in permanent form, the following:

(1) A financial ledger record which will show separately for each customer all charges against and credits to such customer's account, including but not limited to customer funds deposited, withdrawn, or transferred, and charges or credits resulting from losses or gains on closed transactions;

(2) A record of transactions which will show separately for each account (including proprietary accounts):

(i) All commodity futures transactions executed for such account, including the date, price, quantity, market, commodity and future;

(ii) All retail forex transactions executed for such account, including the date, price, quantity, and currency;

(iii) All commodity option transactions executed for such account, including the date, whether the transaction involved a put or call, expiration date, quantity, underlying contract for future delivery or underlying commodity, strike price, and details of the purchase price of the option, including premium, mark-up, commission and fees; and

(iv) All swap transactions executed for such account, including the date, price, quantity, market, commodity, swap, and, if cleared, the derivatives clearing organization; and

(3) A record or journal which will separately show for each business day complete details of:

(i) All commodity futures transactions executed on that day, including the date, price, quantity, market, commodity, future and the person for whom such transaction was made;

(ii) All retail forex transactions executed on that day for such account, including the date, price, quantity, currency and the person who whom such transaction was made;

(iii) All commodity option transactions executed on that day, including the date, whether the transaction involved a put or call, the expiration date, quantity, underlying

contract for future delivery or underlying commodity, strike price, details of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made;

(iv) All swap transactions executed on that day, including the date, price, quantity, market, commodity, swap, the person for whom such transaction was made, and, if cleared, the derivatives clearing organization; and

(v) In the case of an introducing broker, the record or journal required by this paragraph (d)(3) shall also include the futures commission merchant or retail foreign exchange dealer carrying the account for which each commodity futures, retail forex, commodity option, and swap transaction was executed on that day. *Provided, however,* that where reproductions on microfilm, microfiche or optical disk are substituted for hard copy in accordance with the provisions of § 1.31(b), the requirements of paragraphs (d)(1) and (d)(2) of this section will be considered met if the person required to keep such records is ready at all times to provide, and immediately provides in the same city as that in which such person's commodity futures, retail forex, commodity option, or swap books and records are maintained, at the expense of such person, reproduced copies which show the records as specified in paragraphs (d)(1) and (d)(2) of this section, on request of any representatives of the Commission or the U.S. Department of Justice.

(e) *Members of derivatives clearing organizations clearing trades executed on designated contract markets and swap execution facilities.* In the daily record or journal required to be kept under paragraph (d)(3) of this section, each member of a derivatives clearing organization clearing trades executed on a designated contract market or swap execution facility shall also show the floor broker or floor trader executing each transaction, the opposite floor broker or floor trader, and the opposite clearing member with whom it was made.

(f) *Members of designated contract markets.* (1) Each member of a designated contract market who, in the place provided by the designated contract market for the meeting of persons similarly engaged, executes purchases or sales of any commodity for future delivery, commodity option, or swap on or subject to the rules of such designated contract market, shall prepare regularly and promptly a trading card or other record showing such purchases and sales. Such trading card or record shall show the member's

name, the name of the clearing member, transaction date, time, quantity, and, as applicable, underlying commodity, contract for future delivery, or swap, price or premium, delivery month or expiration date, whether the transaction involved a put or a call, and strike price. Such trading card or other record shall also clearly identify the opposite floor broker or floor trader with whom the transaction was executed, and the opposite clearing member (if such opposite clearing member is made known to the member).

(2) Each member of a designated contract market recording purchases and sales on trading cards must record such purchases and sales in exact chronological order of execution on sequential lines of the trading card without skipping lines between trades; *Provided, however,* That if lines remain after the last execution recorded on a trading card, the remaining lines must be marked through.

(3) Each member of a designated contract market must identify on his or her trading cards the purchases and sales executed during the opening and closing periods designated by the designated contract market.

(4) Trading cards prepared by a member of a designated contract market must contain:

(i) Pre-printed member identification or other unique identifying information which would permit the trading cards of one member to be distinguished from those of all other members;

(ii) Pre-printed sequence numbers to permit the intra-day sequencing of the cards; and

(iii) Unique and pre-printed identifying information which would distinguish each of the trading cards prepared by the member from other such trading cards for no less than a one-week period.

(5) Trading cards prepared by a member of a designated contract market and submitted pursuant to paragraph (f)(7)(i) of this section must be time-stamped promptly to the nearest minute upon collection by either the designated contract market or the relevant clearing member.

(6) Each member of a designated contract market shall be accountable for all trading cards prepared in exact numerical sequence, whether or not such trading cards are relied on as original source documents.

(7) Trading records prepared by a member of a designated contract market must:

(i) Be submitted to designated contract market personnel or the clearing member within 15 minutes of designated intervals not to exceed 30

minutes, commencing with the beginning of each trading session. The time period for submission of trading records after the close of trading in each market shall not exceed 15 minutes from the close. Such documents should nevertheless be submitted as often as is practicable to the designated contract market or relevant clearing member; and

(ii) Be completed in non-erasable ink. A member may correct any errors by crossing out erroneous information without obliterating or otherwise making illegible any of the originally recorded information. With regard to trading cards only, a member may correct erroneous information by rewriting the trading card; *Provided, however,* that the member must submit a copy of the trading card, or in the absence of a copy the original trading card, that is subsequently rewritten in accordance with the collection schedule for trading cards and *provided further,* that the member is accountable for any trading card that subsequently is rewritten pursuant to paragraph (f)(6) of this section.

(8) Each member of a designated contract market must use a new trading card at the beginning of each designated 30-minute interval (or such lesser interval as may be determined appropriate) or as may be required pursuant hereto.

(g) *Members of derivatives clearing organizations clearing trades executed on designated contract markets and swap execution facilities.* (1) Each member of a derivatives clearing organization clearing trades executed on a designated contract market or swap execution facility shall maintain a single record which shall show for each futures, option, or swap trade: the transaction date, time, quantity, and, as applicable, underlying commodity, contract for future delivery, or swap, price or premium, delivery month or expiration date, whether the transaction involved a put or a call, strike price, floor broker or floor trader buying, clearing member buying, floor broker or floor trader selling, clearing member selling, and symbols indicating the buying and selling customer types. The customer type indicator shall show, with respect to each person executing the trade, whether such person:

(i) Was trading for his or her own account, or an account for which he or she has discretion;

(ii) Was trading for his or her clearing member's house account;

(iii) Was trading for another member present on the exchange floor, or an account controlled by such other member; or

(iv) Was trading for any other type of customer.

(2) The record required by this paragraph (g) shall also show, by appropriate and uniform symbols, any transaction which is made non-competitively in accordance with the provisions of subpart J of part 38 of this chapter, and trades cleared on dates other than the date of execution. Except as otherwise approved by the Commission for good cause shown, the record required by this paragraph (g) shall be maintained in a format and coding structure approved by the Commission—

(i) In hard copy or on microfilm as specified in § 1.31, and

(ii) For 60 days in computer-readable form on compatible magnetic tapes or discs.

■ 21. Revise § 1.36 to read as follows:

**§ 1.36 Record of securities and property received from customers.**

(a) Each futures commission merchant and each retail foreign exchange dealer shall maintain, as provided in § 1.31, a record of all securities and property received from customers or retail forex customers in lieu of money to margin, purchase, guarantee, or secure the commodity interests of such customers or retail forex customers. Such record shall show separately for each customer or retail forex customer: A description of the securities or property received; the name and address of such customer or retail forex customer; the dates when the securities or property were received; the identity of the depositories or other places where such securities or property are segregated or held; the dates of deposits and withdrawals from such depositories; and the dates of return of such securities or property to such customer or retail forex customer, or other disposition thereof, together with the facts and circumstances of such other disposition. In the event any futures commission merchant deposits with a derivatives clearing organization, directly or with a bank or trust company acting as custodian for such derivatives clearing organization, securities and/or property which belong to a particular customer, such futures commission merchant shall obtain written acknowledgment from such derivatives clearing organization that it was informed that such securities or property belong to customers of the futures commission merchant making the deposit. Such acknowledgment shall be retained as provided in § 1.31.

(b) Each derivatives clearing organization which receives from members securities or property belonging to particular customers of

such members in lieu of money to margin, purchase, guarantee, or secure the commodity interests of such customers, or receives notice that any such securities or property have been received by a bank or trust company acting as custodian for such derivatives clearing organization, shall maintain, as provided in § 1.31, a record which will show separately for each member, the dates when such securities or property were received, the identity of the depositories or other places where such securities or property are segregated, the dates such securities or property were returned to the member, or otherwise disposed of, together with the facts and circumstances of such other disposition including the authorization therefor.

■ 22. Revise § 1.37 to read as follows:

**§ 1.37 Customer's name, address, and occupation recorded; record of guarantor or controller of account.**

(a) Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a contract market shall keep a record in permanent form which shall show for each commodity interest account carried or introduced by it the true name and address of the person for whom such account is carried or introduced and the principal occupation or business of such person as well as the name of any other person guaranteeing such account or exercising any trading control with respect to such account. For each such commodity option account, the records kept by such futures commission merchant, introducing broker, and member of a contract market must also show the name of the person who has solicited and is responsible for each customer's account or assign account numbers in such a manner to identify that person.

(b) As of the close of the market each day, each futures commission merchant which carries an account for another futures commission merchant, foreign broker (as defined in § 15.00 of this chapter), member of a contract market, or other person, on an omnibus basis shall maintain a daily record for each such omnibus account of the total open long contracts and the total open short contracts in each future and in each swap and, for commodity option transactions, the total open put options purchased, the total open put options granted, the total open call options purchased, and the total open call options granted for each commodity option expiration date.

(c) Each designated contract market and swap execution facility shall keep a record in permanent form, which shall show the true name, address, and

principal occupation or business of any foreign trader executing transactions on the facility or exchange. In addition, upon request, a designated contract market or swap execution facility shall provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such foreign trader.

(d) Paragraph (c) of this section shall not apply to a designated contract market or swap execution facility on which transactions in futures, swaps or options (other than swaps) contracts of foreign traders are executed through, or the resulting transactions are maintained in, accounts carried by a registered futures commission merchant or introduced by a registered introducing broker subject to the provisions of paragraph (a) of this section.

■ 23. Amend § 1.39 by revising paragraph (a) introductory text and paragraphs (a)(1)(ii), (a)(2), (a)(3), (a)(4), (b), and (c), to read as follows:

**§ 1.39 Simultaneous buying and selling orders of different principals; execution of, for and between principals.**

(a) *Conditions and requirements.* A member of a contract market or a swap execution facility who shall have at the same time both buying and selling orders of different principals for the same swap, commodity for future delivery in the same delivery month or the same option (both puts or both calls, with the same underlying contract for future delivery or the same underlying commodity, expiration date and strike price) may execute such orders for and directly between such principals at the market price, if in conformity with written rules of such contract market or swap execution facility which have been approved by or self-certified to the Commission, and:

(1) \* \* \*

(ii) When in non-pit trading in swaps or contracts of sale for future delivery, bids and offers are posted on a board, such member:

(A) Pursuant to such buying order posts a bid on the board and, incident to the execution of such selling order, accepts such bid and all other bids posted at equal to or higher than the bid posted by him; or

(B) Pursuant to such selling order posts an offer on the board and, incident to the execution of such buying order, accepts such offer and all other offers posted at prices equal to or lower than the offer posted by him;

(2) Such member executes such orders in the presence of an official representative of such contract market

or swap execution facility designated to observe such transactions and, by appropriate descriptive words or symbol, clearly identifies all such transactions on his trading card or other record, made at the time of execution, and notes thereon the exact time of execution and promptly presents or makes available said record to such official representative for verification and initialing, as appropriate;

(3) Such swap execution facility or contract market keeps a record in permanent form of each such transaction showing all transaction details required to be captured by the Act, Commission rule or regulation; and

(4) Neither the futures commission merchant, other registrant receiving nor the member executing such orders has any interest therein, directly or indirectly, except as a fiduciary.

(b) *Large order execution procedures.*

(1) A member of a contract market or a swap execution facility may execute simultaneous buying and selling orders of different principals directly between the principals in compliance with Commission regulations and large order execution procedures established by written rules of the contract market or swap execution facility that have been approved by or self-certified to the Commission: *Provided*, That, to the extent such large order execution procedures do not meet the conditions and requirements of paragraph (a) of this section, the contract market or swap execution facility has petitioned the Commission for, and the Commission has granted, an exemption from the conditions and requirements of paragraph (a) of this section. Any such petition must be accompanied by proposed contract market or swap execution facility rules to implement the large order execution procedures. The petition shall include:

(i) An explanation of why the proposed large order execution rules do not comply with paragraph (a) of this section; and

(ii) A description of a special surveillance program that would be followed by the contract market or swap execution facility in monitoring the large order execution procedures.

(2) The Commission may, in its discretion and upon such terms and conditions as it deems appropriate, grant such petition for exemption if it finds that the exemption is not contrary to the public interest and the purpose of the provision from which explanation is sought. The petition shall be considered concurrently with the proposed large order execution rules.

(c) *Not deemed filling orders by offset.* The execution of orders in compliance

with the conditions herein set forth will not be deemed to constitute the filling of orders by offset within the meaning of section 4b(a) of the Act.

■ 24. Revise § 1.40 to read as follows:

**§ 1.40 Crop, market information letters, reports; copies required.**

Each futures commission merchant, each retail foreign exchange dealer, each introducing broker, and each member of a contract market or a swap execution facility shall, upon request, furnish or cause to be furnished to the Commission a true copy of any letter, circular, telecommunication, or report published or given general circulation by such futures commission merchant, retail foreign exchange dealer, introducing broker, member or eligible contract participant which concerns crop or market information or conditions that affect or tend to affect the price of any commodity, including any exchange rate, and the true source of or authority for the information contained therein.

**§ 1.44 [Removed and Reserved]**

■ 25. Remove and reserve § 1.44.

■ 26. Amend § 1.46 by revising paragraph (a)(1) introductory text and paragraphs (a)(1)(iii), (a)(1)(iv), (a)(2)(iii), (a)(2)(iv), and (b), to read as follows:

**§ 1.46 Application and closing out of offsetting long and short positions.**

(a) *Application of purchases and sales.* (1) Except with respect to purchases or sales which are for omnibus accounts, or where the customer or account controller has instructed otherwise, any futures commission merchant who, on or subject to the rules of a designated contract market:

\* \* \* \* \*

(iii) Purchases a put or call option for the account of any customer when the account of such customer at the time of such purchase has a short put or call option position with the same underlying futures contract or same underlying commodity, strike price, expiration date and contract market as that purchased; or

(iv) Sells a put or call option for the account of any customer when the account of such customer at the time of such sale has a long put or call option position with the same underlying futures contract or same underlying commodity, strike price, expiration date and contract market as that sold—shall on the same day apply such purchase or sale against such previously held short or long futures or option position, as the case may be, and shall, for futures transactions, promptly furnish such

customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant by an introducing broker and the names of the futures commission merchant and introducing broker.

(2) \* \* \*

(iii) Purchases a put or call option involving foreign currency for the account of any customer when the account of such customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(iv) Sells a put or call option involving foreign currency for the account of any customer when the account of such customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold—shall immediately apply such purchase or sale against such previously held opposite transaction, and shall promptly furnish such retail forex customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant or retail foreign exchange dealer by an introducing broker and the names of the futures commission merchant or retail foreign exchange dealer, and the introducing broker.

(b) *Close-out against oldest open position.* In all instances wherein the short or long futures, retail forex transaction or option position in such customer's or retail forex customer's account immediately prior to such offsetting purchase or sale is greater than the quantity purchased or sold, the futures commission merchant or retail foreign exchange dealer shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position: *Provided*, That upon specific instructions from the customer the offsetting transaction shall be applied as specified by the customer without regard to the date of acquisition of the previously held position; and *Provided, further*, that a futures commission merchant or retail foreign exchange dealer, if permitted by the rules of a registered futures association, may offset, at the customer's request, retail forex transactions of the same size, even if the customer holds other transactions of a different size, but in each case must offset the transaction against the oldest transaction of the same size. Such instructions may also be accepted from any person who, by power of attorney or otherwise, actually

directs trading in the customer's or retail forex customer's account unless the person directing the trading is the futures commission merchant or retail foreign exchange dealer (including any partner thereof), or is an officer, employee, or agent of the futures commission merchant or retail foreign exchange dealer. With respect to every such offsetting transaction that, in accordance with such specific instructions, is not applied to the oldest portion of the previously held position, the futures commission merchant or retail foreign exchange dealer shall clearly show on the statement issued to the customer or retail forex customer in connection with the transaction, that because of the specific instructions given by or on behalf of the customer or retail forex customer the transaction was not applied in the usual manner, *i.e.*, against the oldest portion of the previously held position. However, no such showing need be made if the futures commission merchant or retail foreign exchange dealer has received such specific instructions in writing from the customer or retail forex customer for whom such account is carried.

\* \* \* \* \*

■ 27. Revise paragraph (b)(1)(iii) of § 1.49 to read as follows:

**§ 1.49 Denomination of customer funds and location of depositories.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iii) In a currency in which funds have accrued to the customer as a result of trading conducted on a designated contract market, to the extent of such accruals.

\* \* \* \* \*

**§ 1.53 [Removed and Reserved]**

■ 28. Remove and reserve § 1.53.

■ 29. Amend § 1.57 by revising paragraph (a)(1), (a)(2) introductory text, (a)(2)(ii), (c) introductory text, (c)(1), (c)(2), (c)(4)(i), and (c)(4)(iv), to read as follows:

**§ 1.57 Operations and activities of introducing brokers.**

(a) \* \* \*

(1) Open and carry each customer's account with a carrying futures commission merchant on a fully-disclosed basis: *Provided, however*, That an introducing broker which has entered into a guarantee agreement with a futures commission merchant in accordance with the provisions of § 1.10(j) must open and carry such customer's account with such guarantor

futures commission merchant on a fully-disclosed basis; and

(2) Transmit promptly for execution all customer orders to:

\* \* \* \* \*

(ii) A floor broker, if the introducing broker identifies its carrying futures commission merchant and that carrying futures commission merchant is also the clearing member with respect to the customer's order.

\* \* \* \* \*

(c) An introducing broker may not accept any money, securities or property (or extend credit in lieu thereof) to margin, guarantee or secure any trades or contracts of customers, or any money, securities or property accruing as a result of such trades or contracts: *Provided, however*, That an introducing broker may deposit a check in a qualifying account or forward a check drawn by a customer if:

(1) The futures commission merchant carrying the customer's account authorizes the introducing broker, in writing, to receive a check in the name of the futures commission merchant, and the introducing broker retains such written authorization in its files in accordance with § 1.31;

(2) The check is payable to the futures commission merchant carrying the customer's account;

\* \* \* \* \*

(4) \* \* \*

(i) Which is maintained in an account name which clearly identifies the funds therein as belonging to customers of the futures commission merchant carrying the customer's account;

\* \* \* \* \*

(iv) For which the bank or trust company provides the futures commission merchant carrying the customer's account with a written acknowledgment, which the futures commission merchant must retain in its files in accordance with § 1.31, that it was informed that the funds deposited therein are those of customers and are being held in accordance with the provisions of the Act and the regulations in this chapter.

■ 30. Amend § 1.59 by revising paragraphs (a)(1), (a)(4)(i), (a)(5), (a)(7), (a)(8), (a)(9) introductory text, (a)(10), (b)(1) introductory text, (b)(1)(i)(A), (b)(1)(i)(C), and (c), to read as follows:

**§ 1.59 Activities of self-regulatory organization employees, governing board members, committee members and consultants.**

(a) \* \* \*

(1) *Self-regulatory organization* means "self-regulatory organization," as defined in § 1.3(ee), and includes the

term “clearing organization,” as defined in § 1.3(d).

(4) \* \* \*

(i) Any governing board member compensated by a self-regulatory organization solely for governing board activities; or

\* \* \* \* \*

(5) *Material information* means information which, if such information were publicly known, would be considered important by a reasonable person in deciding whether to trade a particular commodity interest on a contract market or a swap execution facility, or to clear a swap contract through a derivatives clearing organization. As used in this section, “material information” includes, but is not limited to, information relating to present or anticipated cash positions, commodity interests, trading strategies, the financial condition of members of self-regulatory organizations or members of linked exchanges or their customers, or the regulatory actions or proposed regulatory actions of a self-regulatory organization or a linked exchange.

\* \* \* \* \*

(7) *Linked exchange* means:

(i) Any board of trade, exchange or market outside the United States, its territories or possessions, which has an agreement with a contract market or swap execution facility in the United States that permits positions in a commodity interest which have been established on one of the two markets to be liquidated on the other market;

(ii) Any board of trade, exchange or market outside the United States, its territories or possessions, the products of which are listed on a United States contract market, swap execution facility, or a trading facility thereof;

(iii) Any securities exchange, the products of which are held as margin in a commodity account or cleared by a securities clearing organization pursuant to a cross-margining arrangement with a futures clearing organization; or

(iv) Any clearing organization which clears the products of any of the foregoing markets.

(8) *Commodity interest* means any commodity futures, commodity option or swap contract traded on or subject to the rules of a contract market, a swap execution facility or linked exchange, or cleared by a derivatives clearing organization, or cash commodities traded on or subject to the rules of a board of trade which has been designated as a contract market.

(9) *Related commodity interest* means any commodity interest which is traded

on or subject to the rules of a contract market, swap execution facility, linked exchange, or other board of trade, exchange, or market, or cleared by a derivatives clearing organization, other than the self-regulatory organization by which a person is employed, and with respect to which:

\* \* \* \* \*

(10) *Pooled investment vehicle* means a trading vehicle organized and operated as a commodity pool within the meaning of § 4.10(d) of this chapter, and whose units of participation have been registered under the Securities Act of 1933, or a trading vehicle for which § 4.5 of this chapter makes available relief from regulation as a commodity pool operator, *i.e.*, registered investment companies, insurance company separate accounts, bank trust funds, and certain pension plans.

(b) *Employees of self-regulatory organizations; Self-regulatory organization rules.* (1) Each self-regulatory organization must maintain in effect rules which have been submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of this chapter (or, pursuant to section 17(j) of the Act in the case of a registered futures association) that, at a minimum, prohibit:

(i) \* \* \*

(A) Trading, directly or indirectly, in any commodity interest traded on or cleared by the employing contract market, swap execution facility, or clearing organization;

\* \* \* \* \*

(C) Trading, directly or indirectly, in a commodity interest traded on contract markets or swap execution facilities or cleared by derivatives clearing organizations other than the employing self-regulatory organization if the employee has access to material, non-public information concerning such commodity interest;

\* \* \* \* \*

(c) *Governing board members, committee members, and consultants; Registered futures association rules.* Each registered futures association must maintain in effect rules which have been submitted to the Commission pursuant to section 17(j) of the Act which provide that no governing board member, committee member, or consultant shall use or disclose—for any purpose other than the performance of official duties as a governing board member, committee member, or consultant—material, non-public information obtained as a result of the performance of such person’s official duties.

\* \* \* \* \*

## § 1.62 [Removed and Reserved]

■ 31. Remove and reserve § 1.62.

■ 32. Amend § 1.63 by revising paragraphs (a)(1), (b) introductory text and (d) to read as follows:

### § 1.63 Service on self-regulatory organization governing boards or committees by persons with disciplinary histories.

(a) \* \* \*

(1) *Self-regulatory organization* means a “self-regulatory organization” as defined in § 1.3(ee), and includes a “clearing organization” as defined in § 1.3(d), except as defined in paragraph (b)(6) of this section.

\* \* \* \* \*

(b) Each self-regulatory organization must maintain in effect rules which have been submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of this chapter or, in the case of a registered futures association, pursuant to section 17(j) of the Act, that render a person ineligible to serve on its disciplinary committees, arbitration panels, oversight panels or governing board who:

\* \* \* \* \*

(d) Each self-regulatory organization shall submit to the Commission a schedule listing all those rule violations which constitute disciplinary offenses as defined in paragraph (a)(6)(i) of this section and to the extent necessary to reflect revisions shall submit an amended schedule within thirty days of the end of each calendar year. Each self-regulatory organization must maintain and keep current the schedule required by this section, and post the schedule on the self-regulatory organization’s Web site so that it is in a public place designed to provide notice to members and otherwise ensure its availability to the general public.

\* \* \* \* \*

■ 33. Revise § 1.67 to read as follows:

### § 1.67 Notification of final disciplinary action involving financial harm to a customer.

(a) *Definitions.* For purposes of this section:

*Final disciplinary action* means any decision by or settlement with a contract market or swap execution facility in a disciplinary matter which cannot be further appealed at the contract market or swap execution facility, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction.

(b) Upon any final disciplinary action in which a contract market or swap

execution facility finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer:

(1)(i) The contract market or swap execution facility shall promptly provide written notice of the disciplinary action to the futures commission merchant or other registrant; and

(ii) A futures commission merchant or other registrant that receives a notice, under paragraph (b)(1)(i) of this section shall promptly provide written notice of the disciplinary action to the customer as disclosed on its books and records. If the customer is another futures commission merchant or other registrant, such futures commission merchant or other registrant shall promptly provide notice to the customer.

(2) A written notice required by paragraph (b)(1) of this section must include the principal facts of the disciplinary action and a statement that the contract market or swap execution facility has found that the member has committed a rule violation that involved a transaction for the customer, whether executed or not, and that resulted in financial harm to the customer. For the purposes of this paragraph, a notice which includes the information listed in § 9.11(b) of this chapter shall be deemed to include the principal facts of the disciplinary action thereof.

§ 1.68 [Removed and Reserved]

- 34. Remove and reserve § 1.68.
■ 35. Amend Appendix B to part 1 by revising paragraph (b) to read as follows:

Appendix B—Fees for Contract Market Rule Enforcement Reviews and Financial Reviews

\* \* \* \* \*

(b) The Commission determines fees charged to exchanges based upon a formula that considers both actual costs and trading volume.

\* \* \* \* \*

Appendix C to Part 1—[Removed and Reserved]

- 36. Remove and reserve Appendix C to Part 1.

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

- 37. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a and 23, as amended by the Dodd-Frank Wall Street Reform and

Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 4.23 [Amended]

- 38. Amend § 4.23 by removing the term “physical” in paragraphs (a)(1) and (b)(1) and adding in its place the term “commodity”.

§ 4.33 [Amended]

- 39. Amend § 4.33 by removing the word “physical” in paragraph (b)(1) and adding in its place the word “commodity”.

PART 5—OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS

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

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, and 23, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (Jul. 21, 2010).

- 41. Revise paragraphs (k) and (m) of § 5.1 to read as follows:

§ 5.1 Definitions.

\* \* \* \* \*

(k) Retail forex customer means a person, other than an eligible contract participant as defined in section 1a(18) of the Act, acting on its own behalf and trading in any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act.

\* \* \* \* \*

(m) Retail forex transaction means any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act. A retail forex transaction does not include an account, agreement, contract or transaction in foreign currency that is a contract of sale of a commodity for future delivery (or an option thereon) that is executed, traded on or otherwise subject to the rules of a contract market designated pursuant to section 5(a) of the Act.

- 42. Revise Part 7 to read as follows:

PART 7—REGISTERED ENTITY RULES ALTERED OR SUPPLEMENTED BY THE COMMISSION

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

Subpart A—General Provisions

§ 7.1 Scope of rules.

This part sets forth registered entity rules altered or supplemented by the

Commission pursuant to section 8a(7) of the Act.

Subpart B—[Reserved]

Subpart C—[Reserved]

PART 8—[REMOVED AND RESERVED]

- 43. Remove and reserve part 8.

PART 15—REPORTS—GENERAL PROVISIONS

- 44. The authority citation for part 15 continues to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

- 45. Revise paragraph (p)(1)(ii) of § 15.00 to read as follows:

§ 15.00 Definitions of terms used in parts 15 to 19, and 21 of this chapter.

\* \* \* \* \*

(p) \* \* \*

(1) \* \* \*

(ii) Long or short put or call options that exercise into the same future of any commodity, or other long or short put or call commodity options that have identical expirations and exercise into the same commodity, on any one reporting market.

\* \* \* \* \*

- 46. Revise paragraphs (a), (e), (f), (g) and (h) of § 15.05 to read as follows:

§ 15.05 Designation of agent for foreign persons.

(a) For purposes of this section, the term “futures contract” means any contract for the purchase or sale of any commodity for future delivery, or a contract identified under § 36.3(c)(1)(i) traded on an electronic trading facility operating in reliance on the exemption set forth in § 36.3 of this chapter, traded or executed on or subject to the rules of any designated contract market, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term “option contract” means any contract for the purchase or sale of a commodity option, or as applicable, any other instrument subject to the Act, traded or executed on or subject to the rules of any designated contract market, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term

“customer” means any person for whose benefit a foreign broker makes or causes to be made any futures contract or option contract; and the term “communication” means any summons, complaint, order, subpoena, special call, request for information, or notice, as well as any other written document or correspondence.

\* \* \* \* \*

(e) Any designated contract market that permits a foreign broker to intermediate contracts, agreements or transactions, or permits a foreign trader to effect contracts, agreements or transactions on the facility or exchange, shall be deemed to be the agent of the foreign broker and any of its customers for whom the transactions were executed, or the foreign trader, for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission to the foreign broker, any of its customers or the foreign trader with respect to any contracts, agreements or transactions executed by the foreign broker or the foreign trader on the designated contract market. Service or delivery of any communication issued by or on behalf of the Commission to a designated contract market shall constitute valid and effective service upon the foreign broker, any of its customers, or the foreign trader. A designated contract market which has been served with, or to which there has been delivered, a communication issued by or on behalf of the Commission to a foreign broker, any of its customers, or a foreign trader shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the foreign broker, any of its customers or the foreign trader.

(f) It shall be unlawful for any designated contract market to permit a foreign broker, any of its customers or a foreign trader to effect contracts, agreements or transactions on the facility unless the designated contract market prior thereto informs the foreign broker, any of its customers or the foreign trader, in any reasonable manner the facility deems to be appropriate, of the requirements of this section.

(g) The requirements of paragraphs (e) and (f) of this section shall not apply to any contracts, transactions or agreements traded on any designated contract market if the foreign broker, any of its customers or the foreign trader has duly executed and maintains in effect a written agency agreement in compliance with this paragraph with a person domiciled in the United States

and has provided a copy of the agreement to the designated contract market prior to effecting any contract, agreement or transaction on the facility. This agreement must authorize the person domiciled in the United States to serve as the agent of the foreign broker, any of its customers or the foreign trader for purposes of accepting delivery and service of all communications issued by or on behalf of the Commission to the foreign broker, any of its customers or the foreign trader and must provide an address in the United States where the agent will accept delivery and service of communications from the Commission. This agreement must be filed with the Commission by the designated contract market prior to permitting the foreign broker, any of its customers or the foreign trader to effect any transactions in futures or option contracts. Unless otherwise specified by the Commission, the agreements required to be filed with the Commission shall be filed with the Secretary of the Commission at Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. A foreign broker, any of its customers or a foreign trader shall notify the Commission immediately if the written agency agreement is terminated, revoked, or is otherwise no longer in effect. If the designated contract market knows or should know that the agreement has expired, been terminated, or is no longer in effect, the designated contract market shall notify the Secretary of the Commission immediately. If the written agency agreement expires, terminates, or is not in effect, the designated contract market and the foreign broker, any of its customers or the foreign trader are subject to the provisions of paragraphs (e) and (f) of this section.

(h) The provisions of paragraphs (e), (f) and (g) of this section shall not apply to a designated contract market on which all transactions of foreign brokers, their customers or foreign traders in futures or option contracts are executed through, or the resulting transactions are maintained in, accounts carried by a registered futures commission merchant or introduced by a registered introducing broker subject to the provisions of paragraphs (a), (b), (c) and (d) of this section.

\* \* \* \* \*

#### PART 16—REPORTS BY REPORTING MARKETS

■ 47. The authority citation for part 16 continues to read as follows:

**Authority:** 7 U.S.C. 2, 6a, 6c, 6g, 6i, 7, 7a and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008,

Pub. L. 110–246, 122 Stat. 1624 (June 18, 2008), unless otherwise noted.

■ 48. Revise paragraph (a) introductory text of § 16.00 to read as follows:

#### § 16.00 Clearing member reports.

(a) *Information to be provided.* Each reporting market shall submit to the Commission, in accordance with paragraph (b) of this section, a report for each business day, showing for each clearing member, by proprietary and customer account, the following information separately for futures by commodity and by future, and, for options, by underlying futures contract (for options on futures contracts) or by underlying commodity (for other commodity options), and by put, by call, by expiration date and by strike price:

\* \* \* \* \*

■ 49. Amend § 16.01 by revising the section heading and paragraphs (a)(1)(ii), (a)(1)(iv), (b)(1)(ii), and (b)(1)(iv) to read as follows:

#### § 16.01 Publication of market data on futures, swaps and options thereon: trading volume, open contracts, prices, and critical dates.

(a) \* \* \*  
(1) \* \* \*

(ii) For options, by underlying futures contracts for options on futures contracts or by underlying commodity for options on commodities, and by put, by call, by expiration date and by strike price:

\* \* \* \* \*

(iv) For options on swaps or classes of options on swaps, by underlying swap contracts for options on swap contracts or by underlying commodity for options on swaps on commodities, and by put, by call, by expiration date and by strike price.

\* \* \* \* \*

(b) \* \* \*  
(1) \* \* \*

(ii) For options, by underlying futures contracts for options on futures contracts or by underlying commodity for options on commodities, and by put, by call, by expiration date and by strike price;

\* \* \* \* \*

(iv) For options on swaps or classes of options on swaps, by underlying swap contracts for options on swap contracts or by underlying commodity for options on swaps on commodities, and by put, by call, by expiration date and by strike price.

\* \* \* \* \*

#### PART 18—REPORTS BY TRADERS

■ 50. The authority citation for part 18 continues to read as follows:



Authority: 7 U.S.C. 2, 4, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 12a and 19, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 1624 (June 18, 2008); 5 U.S.C. 552 and 552(b), unless otherwise noted.

■ 51. Revise paragraphs (a)(2), (a)(3), and (a)(4) of § 18.05 to read as follows:

§ 18.05 Maintenance of books and records.

- (a) \* \* \*
(2) Executed over the counter or pursuant to part 35 of this chapter;
(3) On exempt commercial markets operating under a Commission grandfather relief order issued pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, 124 Stat. 1376 (2010));
(4) On exempt boards of trade operating under a Commission grandfather relief order issued pursuant to Section 734(c)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, 124 Stat. 1376 (2010)); and

\* \* \* \* \*

PART 21—SPECIAL CALLS

■ 52. The authority citation for part 21 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 4, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 12a, 19 and 21, as amended by Pub. L. 111-203, 124 Stat. 1376; 5 U.S.C. 552 and 552(b), unless otherwise noted.

■ 53. Revise paragraph (b) of § 21.03 to read as follows:

§ 21.03 Selected special calls—duties of foreign brokers, domestic and foreign traders, futures commission merchants, clearing members, introducing brokers, and reporting markets.

\* \* \* \* \*

(b) It shall be unlawful for a futures commission merchant to open a futures or options account or to effect transactions in futures or options contracts for an existing account, or for an introducing broker to introduce such an account, for any customer for whom the futures commission merchant or introducing broker is required to provide the explanation provided for in § 15.05(c) of this chapter, or for a reporting market that is a registered entity under section 1a(40)(F) of the Act, to cause to open an account, or to cause transactions to be effected, in a contract traded in reliance on a Commission grandfather relief order issued pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, 124 Stat. 1376 (2010)), for an existing account for any person that is a foreign

clearing member or foreign trader, until the futures commission merchant, introducing broker, clearing member or reporting market has explained fully to the customer, in any manner that such person deems appropriate, the provisions of this section.

\* \* \* \* \*

PART 22—CLEARED SWAPS

■ 54. The authority citation for part 22 continues to read as follows:

Authority: 7 U.S.C. 1a, 6d, 7a-1 as amended by Pub. L. 111-203, 124 Stat. 1376.

§ 22.1 [Amended]

■ 55. Amend § 22.1 by removing the definition of “Customer.”

■ 56. Amend § 22.2 by revising paragraphs (c)(2)(ii) and (e)(1) to read as follows:

§ 22.2 Futures Commission Merchants: Treatment of Cleared Swaps and Associated Cleared Swaps Customer Collateral.

\* \* \* \* \*

- (c) \* \* \*
(2) \* \* \*

(ii) Other categories of funds belonging to Futures Customers (as § 1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customers (as § 30.1 of this chapter defines that term) of the futures commission merchant, including Futures Customer Funds (as § 1.3 of this chapter defines such term) or the foreign futures or foreign options secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation, or order, or by a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter.

\* \* \* \* \*

- (e) \* \* \*

(1) Permitted investments. A futures commission merchant may invest money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter.

\* \* \* \* \*

■ 57. Amend § 22.3 by revising paragraphs (c)(2)(iii) and (d) to read as follows:

§ 22.3 Derivatives clearing organizations: Treatment of cleared swaps customer collateral.

\* \* \* \* \*

- (c) \* \* \*
(2) \* \* \*

(iii) Futures Customer Funds (as § 1.3 of this chapter defines such term) or the foreign futures or foreign options

secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation, or order, (or by a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter).

(d) Exceptions; Permitted Investments.

Notwithstanding the foregoing and § 22.15, a derivatives clearing organization may invest the money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter.

■ 58. Amend § 22.5 by revising paragraphs (a) and (b) to read as follows:

§ 22.5 Futures commission merchants and derivatives clearing organizations: Written acknowledgement.

(a) Before depositing Cleared Swaps Customer Collateral, the futures commission merchant or derivatives clearing organization shall obtain and retain in its files a separate written acknowledgement letter from each depository in accordance with §§ 1.20 and 1.26 of this chapter, with all references to “Futures Customer Funds” modified to apply to Cleared Swaps Customer Collateral, and with all references to section 4d(a) or 4d(b) of the Act and the regulations thereunder modified to apply to section 4d(f) of the Act and the regulations thereunder.

(b) The futures commission merchant or derivatives clearing organization shall adhere to all requirements specified in §§ 1.20 and 1.26 of this chapter regarding retaining, permitting access to, filing, or amending the written acknowledgement letter, in all cases as if the Cleared Swaps Customer Collateral comprised Futures Customer Funds subject to segregation pursuant to section 4d(a) or 4d(b) of the Act and the regulations thereunder.

\* \* \* \* \*

■ 59. Amend § 22.9 by revising paragraphs (a) and (b) to read as follows:

§ 22.9 Denomination of Cleared Swaps Customer Collateral and location of depositories.

(a) Subject to paragraph (b) of this section, futures commission merchants and derivatives clearing organizations may hold Cleared Swaps Customer Collateral in the denominations, at the locations and depositories, and subject to the segregation requirements specified in § 1.49 of this chapter.

(b) Notwithstanding the requirements in § 1.49 of this chapter, a futures commission merchant’s obligations to a Cleared Swaps Customer may be denominated in a currency in which funds have accrued to the Cleared

Swaps Customer as a result of a Cleared Swap carried through such futures commission merchant, to the extent of such accruals.

\* \* \* \* \*

■ 60. Revise § 22.10 to read as follows:

**§ 22.10 Application of other regulatory provisions.**

Sections 1.27, 1.28, 1.29, and 1.30 of this chapter shall apply to the Cleared Swaps Customer Collateral in accordance with the terms therein.

■ 61. Amend § 22.11 by revising the section heading and paragraphs (a)(1), (a)(2), (b)(2), (c)(1), (c)(2), and (d)(2), to read as follows:

**§ 22.11 Information to be provided regarding Cleared Swaps Customers and their Cleared Swaps.**

(a) \* \* \*

(1) The first time that the Depositing Futures Commission Merchant intermediates a Cleared Swap for a Cleared Swaps Customer with a Collecting Futures Commission Merchant, provide information sufficient to identify such Cleared Swaps Customer to the relevant Collection Futures Commission Merchant; and

(2) At least once each business day thereafter, provide information to the relevant Collecting Futures Commission Merchant sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that the Depositing Futures Commission Merchant intermediates for such Cleared Swaps Customer.

(b) \* \* \*

(2) The information that such entity must provide to its Collecting Futures Commission Merchant pursuant to paragraph (a)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (b)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that such entity intermediates as a Collecting Futures Commission Merchant, on behalf of its Depositing Futures Commission Merchant, for such Cleared Swaps Customer.

(c) \* \* \*

(1) The first time that such futures commission merchant intermediates a Cleared Swap for a Cleared Swaps Customer, provide information to the relevant derivatives clearing organization sufficient to identify such Cleared Swaps Customer; and

(2) At least once each business day thereafter, provide information to the relevant derivatives clearing organization sufficient to identify, for

each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that such futures commission merchant intermediates for such Cleared Swaps Customer.

(d) \* \* \*

(2) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (d)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for such Cleared Swaps Customer.

\* \* \* \* \*

■ 62. Amend § 22.12 by revising paragraph (a) introductory text and paragraph (c) introductory text to read as follows:

**§ 22.12 Information to be maintained regarding Cleared Swaps Customer Collateral.**

(a) Each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from an entity serving as a Depositing Futures Commission Merchant shall, no less frequently than once each business day, calculate and record:

\* \* \* \* \*

(c) Each derivatives clearing organization receiving Cleared Swaps Customer Collateral from a futures commission merchant shall, no less frequently than once each business day, calculate and record:

\* \* \* \* \*

■ 63. Amend § 22.13 by revising paragraph (a) to read as follows:

**§ 22.13 Additions to Cleared Swaps Customer Collateral.**

(a)(1) At the election of the derivatives clearing organization or Collecting Futures Commission Merchant, the collateral requirement referred to in § 22.12(a), (c), and (d) applicable to a particular Cleared Swaps Customer or group of Cleared Swaps Customers may be increased based on an evaluation of the credit risk posed by such Cleared Swaps Customer or group, in which case the derivatives clearing organization or Collecting Futures Commission Merchant shall collect and record such higher amount as provided in § 22.12.

(2) Nothing in paragraph (a)(1) of this section is intended to interfere with the right of a futures commission merchant

to increase the collateral requirements at such futures commission merchant with respect to any of its Cleared Swaps Customers, Futures Customers (as § 1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customers (as § 30.1 of this chapter defines that term).

\* \* \* \* \*

■ 64. Amend § 22.14 by revising the section heading and paragraphs (a)(2) and (c)(2) to read as follows:

**§ 22.14 Futures Commission Merchant failure to meet a Cleared Swaps Customer Margin Call in full.**

(a) \* \* \*

(2) Advise the Collecting Futures Commission Merchant of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such Cleared Swaps Customer.

\* \* \* \* \*

(c) \* \* \*

(2) Advise the derivatives clearing organization of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such Cleared Swaps Customer.

\* \* \* \* \*

■ 65. Section 22.15 is revised to read as follows:

**§ 22.15 Treatment of Cleared Swaps Customer Collateral on an individual basis.**

Subject to § 22.3(d), each derivatives clearing organization and each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from a futures commission merchant shall treat the value of collateral required with respect to the portfolio of rights and obligations arising out of the Cleared Swaps intermediated for each Cleared Swaps Customer, and collected from the futures commission merchant, as belonging to such Cleared Swaps Customer, and such amount shall not be used to margin, guarantee, or secure the Cleared Swaps or other obligations of the futures commission merchant, or of any other Cleared Swaps Customer, Futures Customer (as § 1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customer (as § 30.1 of this chapter defines that term). Nothing contained herein shall be construed to limit, in any way, the right of a derivatives clearing organization or Collecting Futures Commission Merchant to liquidate any or all positions in a Cleared Swaps Customer Account in the event of a default of a clearing member or Depositing Futures Commission Merchant.

■ 66. Amend § 22.16 by revising the section heading to read as follows:

§ 22.16 Disclosures to Cleared Swaps Customers.

\* \* \* \* \*

PART 36—EXEMPT MARKETS

■ 67. The authority citation for part 36 continues to read as follows:

Authority: 7 U.S.C. 2, 2(h)(7), 6, 6c and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. 110–246, 122 Stat. 1624 (June 18, 2008).

■ 68. Section 36.1 is revised to read as follows:

§ 36.1 Scope.

The provisions of this part apply to any board of trade or electronic trading facility that operates as:

(a) An exempt commercial market operating under:

(1) Until July 16, 2012, a grandfather relief order issued by the Commission pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), or

(2) Any other applicable relief granted by the Commission; or

(b) An exempt board of trade operating under:

(1) Until July 16, 2012, a grandfather relief order issued by the Commission pursuant to Section 734(c)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), or

(2) Any other applicable relief granted by the Commission.

■ 69. Amend § 36.2 by:

■ a. Revising paragraph (a) introductory text and (a)(2)(i);

■ b. Adding paragraph (a)(3); and

■ c. Revising paragraph (b) introductory text, (c)(1), (c)(2)(i) introductory text, (c)(2)(ii) introductory text, (c)(2)(iii), (c)(2)(iv)(A) introductory text, and (c)(3), to read as follows:

§ 36.2 Exempt boards of trade.

(a) Eligible commodities.

Commodities eligible to be traded by an exempt board of trade are:

\* \* \* \* \*

(2) \* \* \*

(i) The commodities defined in section 1a(19) of the Act as “excluded commodities” (other than a security, including any group or index thereof or any interest in, or based on the value of, any security or group or index of securities); and

\* \* \* \* \*

(3) Such contracts must be entered into only between persons that are eligible contract participants, as defined in section 1a(18) of the Act and as further defined by the Commission, at the time at which the persons entered into the contract.

(b) Notification. Boards of trade operating as exempt boards of trade shall maintain on file with the Secretary of the Commission at the Commission’s Washington, DC headquarters, in electronic form, a “Notification of Operation as an Exempt Board of Trade,” and it shall include:

\* \* \* \* \*

(c) Additional requirements—(1)

Prohibited representation. A board of trade that meets the criteria set forth in this section and operates as an exempt board of trade shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(2) Market data dissemination. (i)

Criteria for price discovery determination. An exempt board of trade performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract, or transaction executed or traded on the facility when:

\* \* \* \* \*

(ii) Notification. An exempt board of trade operating a market in reliance on the criteria set forth in this section shall notify the Commission when:

\* \* \* \* \*

(iii) Price discovery determination.

Following receipt of notice under paragraph (c)(2)(ii) of this section, or on its own initiative, the Commission may notify an exempt board of trade that the facility appears to meet the criteria for performing a significant price discovery function under paragraph (c)(2)(i)(A) or (B) of this section. Before making a final price discovery determination under this paragraph, the Commission shall provide the exempt board of trade with an opportunity for a hearing through the submission of written data, views and arguments. Any such written data, views and arguments shall be filed with the Secretary of the Commission in the form and manner and within the time specified by the Commission. After consideration of all relevant matters, the Commission shall issue an order containing its determination whether the facility performs a significant price discovery function under the criteria of paragraph (c)(2)(i)(A) or (B) of this section.

(iv) Price dissemination. (A) An exempt board of trade that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section shall disseminate publicly, and on a daily basis, all of the following information with respect to transactions

executed in reliance on the criteria set forth in this section:

\* \* \* \* \*

(3) Annual certification. A board of trade operating as an exempt board of trade shall file with the Commission annually, no later than the end of each calendar year, a notice that includes:

(i) A statement that it continues to operate under the exemption; and

(ii) A certification that the information contained in the previous Notification of Operation as an Exempt Board of Trade is still correct.

■ 70. Section 36.3 is revised to read as follows:

§ 36.3 Exempt commercial markets.

(a) Eligible transactions. Agreements, contracts or transactions in an exempt commodity eligible to be entered into on an exempt commercial market must be:

(1) Entered into on a principal-to-principal basis solely between persons that are eligible commercial entities, as that term is defined in section 1a(17) of the Act, at the time the persons enter into the agreement, contract or transaction; and

(2) Executed or traded on an electronic trading facility.

(b) Notification. An electronic trading facility relying upon the exemption set forth in this section shall maintain on file with the Secretary of the Commission at the Commission’s Washington, DC headquarters, in electronic form, a “Notification of Operation as an Exempt Commercial Market,” and it shall include the information and certifications specified in this section.

(c) Required information—(1) All electronic trading facilities. A facility operating in reliance on the exemption set forth in this section on an on-going basis, must:

(i) Provide the Commission with the terms and conditions, as defined in § 40.1(i) of this chapter and product descriptions for each agreement, contract or transaction listed by the facility in reliance on the exemption set forth in this section, as well as trading conventions, mechanisms and practices;

(ii) Provide the Commission with information explaining how the facility meets the definition of “trading facility” contained in section 1a(51) of the Act and provide the Commission with access to the electronic trading facility’s trading protocols, in a format specified by the Commission;

(iii) Demonstrate to the Commission that the facility requires, and will require, with respect to all current and future agreements, contracts and transactions, that each participant

agrees to comply with all applicable laws; that the authorized participants are “eligible commercial entities” as defined in section 1a(17) of the Act; that all agreements, contracts and transactions are and will be entered into solely on a principal-to-principal basis; and that the facility has in place a program to routinely monitor participants’ compliance with these requirements;

(iv) At the request of the Commission, provide any other information that the Commission, in its discretion, deems relevant to its determination whether an agreement, contract, or transaction performs a significant price discovery function; and

(v) File with the Commission annually, no later than the end of each calendar year, a completed copy of CFTC Form 205—Exempt Commercial Market Annual Certification. The information submitted in Form 205 shall include:

(A) A statement indicating whether the electronic trading facility continues to operate under the exemption; and

(B) A certification that affirms the accuracy of and/or updates the information contained in the previous Notification of Operation as an Exempt Commercial Market.

(2) *Electronic trading facilities trading or executing agreements, contracts or transactions other than significant price discovery contracts.* In addition to the requirements of paragraph (c)(1) of this section, a facility operating in reliance on the exemption set forth in this section, with respect to agreements, contracts or transactions that have not been determined to perform significant price discovery function, on an on-going basis must:

(i) Identify to the Commission those agreements, contracts and transactions conducted on the electronic trading facility with respect to which it intends, in good faith, to rely on the exemption set forth in this section, and which averaged five trades per day or more over the most recent calendar quarter; and, with respect to such agreements, contracts and transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day. Each such report shall be electronically transmitted weekly, within such time period as is acceptable to the Commission after the end of the week to which the data applies, and shall show for each agreement, contract or transaction executed the following information:

(1) The underlying commodity, the delivery or price-basing location specified in the agreement, contract or

transaction maturity date, whether it is a financially settled or physically delivered instrument, and the date of execution, time of execution, price, and quantity;

(2) Total daily volume and, if cleared, open interest;

(3) For an option instrument, in addition to the foregoing information, the type of option (*i.e.*, call or put) and strike prices; and

(4) Such other information as the Commission may determine; or

(B) Provide to the Commission, in a form and manner acceptable to the Commission, electronic access to those transactions conducted on the electronic trading facility in reliance on the exemption set forth in this section, and meeting the average five trades per day or more threshold test of this section, which would allow the Commission to compile the information set forth in paragraph (c)(2)(i)(A) of this section and create a permanent record thereof.

(ii) Maintain a record of allegations or complaints received by the electronic trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in this section. The record shall contain the name of the complainant, if provided, date of the complaint, market instrument, substance of the allegations, and name of the person at the electronic trading facility who received the complaint;

(iii) Provide to the Commission, in the form and manner prescribed by the Commission, a copy of the record of each complaint received pursuant to paragraph (c)(2)(ii) of this section that alleges, or relates to, facts that would constitute a violation of the Act or Commission regulations. Such copy shall be provided to the Commission no later than 30 calendar days after the complaint is received; *Provided, however,* that in the case of a complaint alleging, or relating to, facts that would constitute an ongoing fraud or market manipulation under the Act or Commission rules, such copy shall be provided to the Commission within three business days after the complaint is received; and

(iv) Provide to the Commission on a quarterly basis, within 15 calendar days of the close of each quarter, a list of each agreement, contract or transaction executed on the electronic trading facility in reliance on the exemption set forth in this section and indicate for each such agreement, contract or transaction the contract terms and conditions, the contract’s average daily trading volume, and the most recent open interest figures.

(3) *Electronic trading facilities trading or executing significant price discovery contracts.* In addition to the requirements of paragraph (c)(1) of this section, if the Commission determines that a facility operating in reliance on the exemption set forth in this section trades or executes an agreement, contract or transaction that performs a significant price discovery function, the facility must, with respect to any significant price discovery contract, publish and provide to the Commission the information required by § 16.01 of this chapter.

(4) *Delegation of authority.* The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting the required information under paragraphs (c)(1) through (3) of this section, to the Director of the Division of Market Oversight and such members of the Commission’s staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph (c)(4).

(5) *Special calls.* (i) All information required upon special call of the Commission shall be transmitted at the same time and to the office of the Commission as may be specified in the call.

(ii) Such information shall include information related to the facility’s business as an exempt electronic trading facility in reliance on the exemption set forth in this section, including information relating to data entry and transaction details in respect of transactions entered into in reliance on the exemption, as the Commission may determine appropriate—

(A) To enforce the antifraud and anti-manipulation provisions in the Act and Commission regulations, and

(B) To evaluate a systemic market event; or

(C) To obtain information requested by a Federal financial regulatory authority in order to enable the regulator to fulfill its regulatory or supervisory responsibilities.

(iii) The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls to the Directors of the Division of Market Oversight, the Division of Clearing and Risk, the Division of Swap Dealer and Intermediary Oversight, and the Division of Enforcement to be exercised by each such Director or by such other employee or employees as

the Director may designate. The Directors may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph (c)(5).

(6) *Subpoenas to foreign persons.* A foreign person whose access to an electronic trading facility is limited or denied at the direction of the Commission based on the Commission's belief that the foreign person has failed timely to comply with a subpoena shall have an opportunity for a prompt hearing under the procedures provided in § 21.03(b) and (h) of this chapter.

(7) *Prohibited representation.* An electronic trading facility relying upon the exemption set forth in this section, with respect to agreements, contracts or transactions that are not significant price discovery contracts, shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(d) *Significant price discovery contracts—(1) Criteria for significant price discovery determination.* The Commission may determine, in its discretion, that an electronic trading facility operating a market in reliance on the exemption set forth in this section performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract or transaction executed or traded on the facility. In making such a determination, the Commission shall consider, as appropriate:

(i) *Price linkage.* The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position;

(ii) *Arbitrage.* The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the

contracts on a frequent and recurring basis;

(iii) *Material price reference.* The extent to which, on a frequent and recurring basis, bids, offers, or transactions in a commodity are directly based on, or are determined by referencing, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility;

(iv) *Material liquidity.* The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market or an electronic trading facility operating in reliance on the exemption set forth in this section;

(v) *Other material factors.* [Reserved]

(2) *Notification of possible significant price discovery contract conditions.* An electronic trading facility operating in reliance on the exemption set forth in this section shall promptly notify the Commission, and such notification shall be accompanied by supporting information or data concerning any contract that:

(i) Averaged five trades per day or more over the most recent calendar quarter; and

(ii)(A) For which the exchange sells its price information regarding the contract to market participants or industry publications; or

(B) Whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another agreement, contract or transaction.

(3) *Procedure for significant price discovery determination.* Before making a final price discovery determination under this paragraph, the Commission shall publish notice in the **Federal Register** that it intends to undertake a determination with respect to whether a particular agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. 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 publication of notice in the **Federal Register** or within such other time specified by the Commission. After prompt consideration of all relevant

information, the Commission shall, within a reasonable period of time after the close of the comment period, issue an order explaining its determination whether the agreement, contract or transaction executed or traded by the electronic trading facility performs a significant price discovery function under the criteria specified in paragraph (d)(1)(i) through (v) of this section.

(4) *Compliance with core principles.*

(i) Following the issuance of an order by the Commission that the electronic trading facility executes or trades an agreement, contract or transaction that performs a significant price discovery function, the electronic trading facility must demonstrate, with respect to that agreement, contract or transaction, compliance with the Core Principles set forth in this section and the applicable provisions of this part. If the Commission's order represents the first time it has determined that one of the electronic trading facility's agreements, contracts or transactions performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the electronic trading facility has an additional agreement, contract or transaction that performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of the Commission's order. Attention is directed to Appendix B of this part for guidance on and acceptable practices for complying with the Core Principles. Submissions demonstrating how the electronic trading facility complies with the Core Principles with respect to its significant price discovery contract must be filed with the Secretary of the Commission at its Washington, DC headquarters. Submissions must include the following:

(A) A written certification that the significant price discovery contract(s) complies with the Act and regulations thereunder;

(B) A copy of the electronic trading facility's rules (as defined in § 40.1 of this chapter) and any technical manuals, other guides or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Subsequent rule changes must be certified by the electronic trading facility pursuant to section 5c(c) of the Act and § 40.6 of this chapter. The electronic trading facility also may request Commission approval of any

rule changes pursuant to section 5c(c) of the Act and § 40.5 of this chapter;

(C) A description of the trading system, algorithm, security and access limitation procedures with a timeline for an order from input through settlement, and a copy of any system test procedures, tests conducted, test results and contingency or disaster recovery plans;

(D) A copy of any documents pertaining to or describing the electronic trading system's legal status and governance structure, including governance fitness information;

(E) An executed or executable copy of any agreements or contracts entered into or to be entered into by the electronic trading facility, including partnership or limited liability company, third-party regulatory service, or member or user agreements, that enable or empower the electronic trading facility to comply with a Core Principle;

(F) A copy of any manual or other document describing, with specificity, the manner in which the trading facility will conduct trade practice, market and financial surveillance;

(G) To the extent that any of the items in paragraphs (d)(4)(i)(A) through (F) of this section raise issues that are novel, or for which compliance with a Core Principle is not self-evident, an explanation of how that item satisfies the applicable Core Principle or Principles.

(ii) The electronic trading facility must identify with particularity information in the submission that will be subject to a request for confidential treatment pursuant to § 145.09 of this chapter. The electronic trading facility must follow the procedures specified in § 40.8 of this chapter with respect to any information in its submission for which confidential treatment is requested.

(5) *Determination of compliance with core principles.* The Commission shall take into consideration differences between cleared and uncleared significant price discovery contracts when reviewing the implementation of the Core Principles by an electronic trading facility. The electronic facility has reasonable discretion in accounting for differences between cleared and uncleared significant price discovery contracts when establishing the manner in which it complies with the Core Principles.

(6) *Information relating to compliance with core principles.* Upon request by the Commission, an electronic trading facility trading a significant price discovery contract shall file with the Commission a written demonstration, containing such supporting data, information and documents, in the form

and manner and within such time as the Commission may specify, that the electronic trading facility is in compliance with one or more Core Principles as specified in the request, or that is otherwise requested by the Commission to enable the Commission to satisfy its obligations under the Act.

(7) *Enforceability.* An agreement, contract or transaction entered into on or pursuant to the rules of an electronic trading facility trading or executing a significant price discovery contract shall not be void, voidable, subject to rescission or otherwise invalidated or rendered unenforceable as a result of:

(i) A violation by the electronic trading facility of the provisions set forth in this section; or

(ii) Any Commission proceeding to alter or supplement a rule, term or condition under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to alter, supplement or require an electronic trading facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(8) *Procedures for vacating a determination of a significant price discovery function—(i) By the electronic trading facility.* An electronic trading facility that executes or trades an agreement, contract or transaction that the Commission has determined performs a significant price discovery function under paragraph (d)(3) of this section may petition the Commission to vacate that determination. The petition shall demonstrate that the agreement, contract or transaction no longer performs a significant price discovery function under the criteria specified in paragraph (d)(1), and has not done so for at least the prior 12 months. An electronic trading facility shall not petition for a vacation of a significant price discovery determination more frequently than once every 12 months for any individual contract.

(ii) *By the Commission.* The Commission may, on its own initiative, begin vacation proceedings if it believes that an agreement, contract or transaction has not performed a significant price discovery function for at least the prior 12 months.

(iii) *Procedure.* Before making a final determination whether an agreement, contract or transaction has ceased to perform a significant price discovery function, the Commission shall publish notice in the **Federal Register** that it intends to undertake such a determination and to receive written data, views and arguments relevant to its determination from the electronic

trading facility and other interested persons. Written submissions shall be filed with the Secretary of the Commission in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the **Federal Register**, or within such other time specified by the Commission. After consideration of all relevant information, the Commission shall issue an order explaining its determination whether the agreement, contract or transaction has ceased to perform a significant price discovery function and, if so, vacating its prior order. If such an order issues, and the Commission subsequently determines, on its own initiative or after notification by the electronic trading facility, that the agreement, contract or transaction that was subject to the vacation order again performs a significant price discovery function, the electronic trading facility must comply with the Core Principles within 30 calendar days of the date of the Commission's order.

(iv) *Automatic vacation of significant price discovery determination.*

Regardless of whether a proceeding to vacate has been initiated, any significant price discovery contract that has no open interest and in which no trading has occurred for a period of 12 complete and consecutive calendar months shall, without further proceedings, no longer be considered to be a significant price discovery contract.

(e) *Commission review.* The Commission shall, at least annually, evaluate as appropriate agreements, contracts or transactions conducted on an electronic trading facility in reliance on the exemption set forth in this section to determine whether they serve a significant price discovery function as set forth in paragraph (d)(1) of this section.

■ 71. Amend Appendix A to part 36 by revising introductory paragraph 1, the headings to paragraphs (A), (B), and (C), and paragraphs (D)2. and (D)4., to read as follows:

#### **Appendix A to Part 36—Guidance on Specific Price Discovery Contracts**

1. There are four factors that the Commission must consider, as appropriate, in making a determination that a contract is performing a significant price discovery function. The four factors prescribed by the statute are: Price Linkage; Arbitrage; Material Price Reference; and Material Liquidity.

\* \* \* \* \*

(A) *MATERIAL LIQUIDITY—The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a designated*

contract market, or an electronic trading facility operating in reliance on the exemption set forth in this section.

\* \* \* \* \*

(B) **PRICE LINKAGE**—The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.

\* \* \* \* \*

(C) **ARBITRAGE CONTRACTS**—The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated contract market or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.

\* \* \* \* \*

(D) \* \* \*

2. In evaluating a contract's price discovery role as a directly referenced price source, the Commission will perform an analysis to determine whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract. Cash market prices are set explicitly at a differential to the contract being traded on the electronic trading facility when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a contract being traded on the electronic trading facility when, for instance, they are arrived at after adding to, or subtracting from the contract being traded on the electronic trading facility, but then quoted or reported at a flat price. The Commission will also consider whether cash market entities are quoting cash prices based on a contract being traded on the electronic trading facility on a frequent and recurring basis.

\* \* \* \* \*

4. In applying this criterion, consideration will be given to whether prices established by a contract being traded on the electronic trading facility are reported in a widely distributed industry publication. In making this determination, the Commission will consider the reputation of the publication within the industry, how frequently it is published, and whether the information contained in the publication is routinely consulted by industry participants in pricing cash market transactions.

\* \* \* \* \*

■ 72. Revise Appendix B to part 36 to read as follows:

### Appendix B to Part 36—Guidance on, and Acceptable Practices in, Compliance With Core Principles

1. This Appendix provides guidance on complying with the core principles set forth in this part, both initially and on an ongoing basis. The guidance is provided in paragraph (a) following each core principle and can be used to demonstrate to the Commission core principle compliance under § 36.3(d)(4). The guidance for each core principle is illustrative only of the types of matters an electronic trading facility may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues and questions set forth in this guidance will help the Commission in its consideration of whether the electronic trading facility is in compliance with the core principles. A submission pursuant to § 36.3(d)(4) should include an explanation or other form of documentation demonstrating that the electronic trading facility complies with the core principles.

2. Acceptable practices meeting selected requirements of the core principles are set forth in paragraph (b) following each core principle. Electronic trading facilities on which significant price discovery contracts are traded or executed that follow the specific practices outlined under paragraph (b) for any core principle in this appendix will meet the selected requirements of the applicable core principle. Paragraph (b) is for illustrative purposes only, and does not state the exclusive means for satisfying a core principle.

**CORE PRINCIPLE I—CONTRACTS NOT READILY SUSCEPTIBLE TO MANIPULATION.** *The electronic trading facility shall list only significant price discovery contracts that are not readily susceptible to manipulation.*

(a) *Guidance.* Upon determination by the Commission that a contract listed for trading on an electronic trading facility is a significant price discovery contract, the electronic trading facility must self-certify the terms and conditions of the significant price discovery contract under § 36.3(d)(4) within 90 calendar days of the date of the Commission's order if the contract is the electronic trading facility's first significant price discovery contract; or 30 days from the date of the Commission's order if the contract is not the electronic trading facility's first significant price discovery contract. Once the Commission determines that a contract performs a significant price discovery function, subsequent rule changes must be self-certified to the Commission by the electronic trading facility pursuant to § 40.6 of this chapter or submitted to the Commission for review and approval pursuant to § 40.5 of this chapter.

(b) *Acceptable practices.* Guideline No. 1, 17 CFR part 40, Appendix A may be used as guidance in meeting this core principle for significant price discovery contracts.

**CORE PRINCIPLE II—MONITORING OF TRADING.** *The electronic trading facility shall monitor trading in significant price discovery contracts to prevent market manipulation, price distortion, and disruptions of the delivery of cash-settlement*

*process through market surveillance, compliance and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.*

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, demonstrate a capacity to prevent market manipulation and have trading and participation rules to detect and deter abuses. The facility should seek to prevent market manipulation and other trading abuses through a dedicated regulatory department or by delegation of that function to an appropriate third party. An electronic trading facility also should have the authority to intervene as necessary to maintain an orderly market.

(b) *Acceptable practices—(1) An acceptable trade monitoring program.* An acceptable trade monitoring program should facilitate, on both a routine and non-routine basis, arrangements and resources to detect and deter abuses through direct surveillance of each significant price discovery contract. Direct surveillance of each significant price discovery contract will generally involve the collection of various market data, including information on participants' market activity. Those data should be evaluated on an ongoing basis in order to make an appropriate regulatory response to potential market disruptions or abusive practices. For contracts with a substantial number of participants, an effective surveillance program should employ a much more comprehensive large trader reporting system.

(2) *Authority to collect information and documents.* The electronic trading facility should have the authority to collect information and documents in order to reconstruct trading for appropriate market analysis. Appropriate market analysis should enable the electronic trading facility to assess whether each significant price discovery contract is responding to the forces of supply and demand. Appropriate data usually include various fundamental data about the underlying commodity, its supply, its demand, and its movement through market channels. Especially important are data related to the size and ownership of deliverable supplies—the existing supply and the future or potential supply—and to the pricing of the deliverable commodity relative to the futures price and relative to the similar, but non-deliverable, kinds of the commodity. For cash-settled contracts, it is more appropriate to pay attention to the availability and pricing of the commodity making up the index to which the contract will be settled, as well as monitoring the continued suitability of the methodology for deriving the index.

(3) *Ability to assess participants' market activity and power.* To assess participants' activity and potential power in a market, electronic trading facilities, with respect to significant price discovery contracts, at a minimum should have routine access to the positions and trading of its participants and, if applicable, should provide for such access through its agreements with its third-party provider of clearing services.



**CORE PRINCIPLE III—ABILITY TO OBTAIN INFORMATION.** *The electronic trading facility shall establish and enforce rules that allow the electronic trading facility to obtain any necessary information to perform any of the functions set forth in this subparagraph, provide the information to the Commission upon request, and have the capacity to carry out such international information-sharing agreements as the Commission may require.*

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, have the ability and authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by participants. This includes having arrangements and resources for recording full data entry and trade details and safely storing audit trail data. An electronic trading facility should have systems sufficient to enable it to use the information for purposes of assisting in the prevention of participant and market abuses through reconstruction of any violations and providing evidence of any violations of the electronic trading facility's rules.

(b) *Acceptable practices*—(1) The goal of an audit trail is to detect and deter market abuse. An effective contract audit trail should capture and retain sufficient trade-related information to permit electronic trading facility staff to detect trading abuses and to reconstruct all transactions within a reasonable period of time. An audit trail should include specialized electronic surveillance programs that identify potentially abusive trades and trade patterns. An acceptable audit trail must be able to track an order from time of entry into the trading system through its fill. The electronic trading facility must create and maintain an electronic transaction history database that contains information with respect to transactions executed on each significant price discovery contract.

(2) An acceptable audit trail should include the following: original source documents, transaction history, electronic analysis capability, and safe storage capability. An acceptable audit trail system would satisfy the following practices.

(i) *Original source documents.* Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded. For each order (whether filled, unfilled or cancelled, each of which should be retained or electronically captured), such records reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry.

(ii) *Transaction history.* A transaction history consists of an electronic history of each transaction, including:

(A) All the data that are input into the trade entry or matching system for the transaction to match and clear;

(B) Timing and sequencing data adequate to reconstruct trading; and

(C) The identification of each account to which fills are allocated.

(iii) *Electronic analysis capability.* An electronic analysis capability permits sorting

and presenting data included in the transaction history so as to reconstruct trading and to identify possible trading violations with respect to market abuse.

(iv) *Safe storage capability.* Safe storage capability provides for a method of storing the data included in the transaction history in a manner that protects the data from unauthorized alteration, as well as from accidental erasure or other loss. Data should be retained in the form and manner specified by the Commission or, where no acceptable manner of retention is specified, in accordance with the recordkeeping standards of § 1.31 of this chapter.

(3) Arrangements and resources for the disclosure of the obtained information and documents to the Commission upon request. The electronic trading facility should maintain records of all information and documents related to each significant price discovery contract in a form and manner acceptable to the Commission. Where no acceptable manner of maintenance is specified, records should be maintained in accordance with the recordkeeping standards of § 1.31 of this chapter.

(4) The capacity to carry out appropriate information-sharing agreements as the Commission may require. Appropriate information-sharing agreements could be established with other markets or the Commission can act in conjunction with the electronic trading facility to carry out such information sharing.

**CORE PRINCIPLE IV—POSITION LIMITATIONS OR ACCOUNTABILITY.** *The electronic trading facility shall adopt, where necessary and appropriate, position limitations or position accountability for speculators in significant price discovery contracts, taking into account positions in other agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contracts to reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month.*

(a) *Guidance.* [Reserved]

(b) *Acceptable practices for uncleared trades.* [Reserved]

(c) *Acceptable practices for cleared trades*—(1) *Introduction.* In order to diminish potential problems arising from excessively large speculative positions, and to facilitate orderly liquidation of expiring contracts, an electronic trading facility relying on the exemption set forth in this section should adopt rules that set position limits or accountability levels on traders' cleared positions in significant price discovery contracts. These position limit rules specifically may exempt bona fide hedging; permit other exemptions; or set limits differently by market, delivery month or time period. For the purpose of evaluating a significant price discovery contract's speculative-limit program for cleared positions, the Commission will consider the specified position limits or accountability levels, aggregation policies, types of exemptions allowed, methods for monitoring compliance with the specified limits or levels, and procedures for dealing with violations.

(2) *Accounting for cleared trades*—(i) Speculative-limit levels typically should be set in terms of a trader's combined position involving cleared trades in a significant price discovery contract, plus positions in agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contract. (This circumstance typically exists where an exempt commercial market lists a particular contract for trading but also allows for positions in that contract to be cleared together with positions established through bilateral or off-exchange transactions, such as block trades, in the same contract. Essentially, both the on-facility and off-facility transactions are considered fungible with each other.) In this connection, the electronic trading facility should make arrangements to ensure that it is able to ascertain accurate position data for the market.

(ii) For significant price discovery contracts that are traded on a cleared basis, the electronic trading facility should apply position limits to cleared transactions in the contract.

(3) *Limitations on spot-month positions.* Spot-month limits should be adopted for significant price discovery contracts to minimize the susceptibility of the market to manipulation or price distortions, including squeezes and corners or other abusive trading practices.

(i) *Contracts economically equivalent to an existing contract.* An electronic trading facility that lists a significant price discovery contract that is economically-equivalent to another significant price discovery contract or to a contract traded on a designated contract market should set the spot-month limit for its significant price discovery contract at the same level as that specified for the economically-equivalent contract.

(ii) *Contracts that are not economically equivalent to an existing contract.* There may not be an economically-equivalent significant price discovery contract or economically-equivalent contract traded on a designated contract market. In this case, the spot-month speculative position limit should be established in the following manner. The spot-month limit for a physical delivery market should be based upon an analysis of deliverable supplies and the history of spot-month liquidations. The spot-month limit for a physical-delivery market is appropriately set at no more than 25 percent of the estimated deliverable supply. In the case where a significant price discovery contract has a cash settlement provision, the spot-month limit should be set at a level that minimizes the potential for price manipulation or distortion in the significant price discovery contract itself; in related futures and options contracts traded on a designated contract market; in other significant price discovery contracts; in other fungible agreements, contracts and transactions; and in the underlying commodity.

(4) *Position accountability for non-spot-month positions.* The electronic trading facility should establish for its significant price discovery contracts non-spot individual

month position accountability levels and all-months-combined position accountability levels. An electronic trading facility may establish non-spot individual month position limits and all-months-combined position limits for its significant price discovery contracts in lieu of position accountability levels.

(i) *Definition.* Position accountability provisions provide a means for an exchange to monitor traders' positions that may threaten orderly trading. An acceptable accountability provision sets target accountability threshold levels that may be exceeded, but once a trader breaches such accountability levels, the electronic trading facility should initiate an inquiry to determine whether the individual's trading activity is justified and is not intended to manipulate the market. As part of its investigation, the electronic trading facility may inquire about the trader's rationale for holding a position in excess of the accountability levels. An acceptable accountability provision should provide the electronic trading facility with the authority to order the trader not to further increase positions. If a trader fails to comply with a request for information about positions held, provides information that does not sufficiently justify the position, or continues to increase contract positions after a request not to do so is issued by the facility, then the accountability provision should enable the electronic trading facility to require the trader to reduce positions.

(ii) *Contracts economically equivalent to an existing contract.* When an electronic trading facility lists a significant price discovery contract that is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market, the electronic trading facility should set the non-spot individual month position accountability level and all-months-combined position accountability level for its significant price discovery contract at the same levels, or lower, as those specified for the economically-equivalent contract.

(iii) *Contracts that are not economically equivalent to an existing contract.* For significant price discovery contracts that are not economically equivalent to an existing contract, the trading facility shall adopt non-spot individual month and all-months-combined position accountability levels that are no greater than 10 percent of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year. For electronic trading facilities that choose to adopt non-spot individual month and all-months-combined position limits in lieu of position accountability levels for their significant price discovery contracts, the limits should be set in the same manner as the accountability levels.

(iv) *Contracts economically equivalent to an existing contract with position limits.* If a significant price discovery contract is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market that has adopted non-spot or all-months-combined position limits, the electronic trading facility should set non-spot

month position limits and all-months-combined position limits for its significant price discovery contract at the same (or lower) levels as those specified for the economically-equivalent contract.

(5) *Account aggregation.* An electronic trading facility should have aggregation rules for significant price discovery contracts that apply to accounts under common control, those with common ownership, *i.e.*, where there is a ten percent or greater financial interest, and those traded according to an express or implied agreement. Such aggregation rules should apply to cleared transactions with respect to applicable speculative position limits. An electronic trading facility will be permitted to set more stringent aggregation policies. An electronic trading facility may grant exemptions to its price discovery contracts' position limits for bona fide hedging (as defined in § 1.3(z) of this chapter) and may grant exemptions for reduced risk positions, such as spreads, straddles and arbitrage positions.

(6) *Implementation deadlines.* An electronic trading facility with a significant price discovery contract is required to comply with Core Principle IV within 90 calendar days of the date of the Commission's order determining that the contract performs a significant price discovery function if such contract is the electronic trading facility's first significant price discovery contract, or within 30 days of the date of the Commission's order if such contract is not the electronic trading facility's first significant price discovery contract. For the purpose of applying limits on speculative positions in newly-determined significant price discovery contracts, the Commission will permit a grace period following issuance of its order for traders with cleared positions in such contracts to become compliant with applicable position limit rules. Traders who hold cleared positions on a net basis in the electronic trading facility's significant price discovery contract must be at or below the specified position limit level no later than 90 calendar days from the date of the electronic trading facility's implementation of position limit rules, unless a hedge exemption is granted by the electronic trading facility. This grace period applies to both initial and subsequent price discovery contracts. Electronic trading facilities should notify traders of this requirement promptly upon implementation of such rules.

(7) *Enforcement provisions.* The electronic trading facility should have appropriate procedures in place to monitor its position limit and accountability provisions and to address violations.

(i) An electronic trading facility with significant price discovery contracts should use an automated means of detecting traders' violations of speculative limits or exemptions, particularly if the significant price discovery contracts have large numbers of traders. An electronic trading facility should monitor the continuing appropriateness of approved exemptions by periodically reviewing each trader's basis for exemption or requiring a reapplication. An automated system also should be used to determine whether a trader has exceeded applicable non-spot individual month

position accountability levels and all-months-combined position accountability levels.

(ii) An electronic trading facility should establish a program for effective enforcement of position limits for significant price discovery contracts. Electronic trading facilities should use a large trader reporting system to monitor and enforce daily compliance with position limit rules. The Commission notes that an electronic trading facility may allow traders to periodically apply to the electronic trading facility for an exemption and, if appropriate, be granted a position level higher than the applicable speculative limit. The electronic trading facility should establish a program to monitor approved exemptions from the limits. The position levels granted under such hedge exemptions generally should be based upon the trader's commercial activity in related markets including, but not limited to, positions held in related futures and options contracts listed for trading on designated contract markets, fungible agreements, contracts and transactions, as determined by a derivatives clearing organization. Electronic trading facilities may allow a brief grace period where a qualifying trader may exceed speculative limits or an existing exemption level pending the submission and approval of appropriate justification. An electronic trading facility should consider whether it wants to restrict exemptions during the last several days of trading in a delivery month. Acceptable procedures for obtaining and granting exemptions include a requirement that the electronic trading facility approve a specific maximum higher level.

(iii) An acceptable speculative limit program should have specific policies for taking regulatory action once a violation of a position limit or exemption is detected. The electronic trading facility policies should consider appropriate actions.

(8) *Violation of Commission rules.* A violation of position limits for significant price discovery contracts that have been self-certified by an electronic trading facility is also a violation of section 4a(e) of the Act.

**CORE PRINCIPLE V—EMERGENCY AUTHORITY.** *The electronic trading facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, where necessary and appropriate, including the authority to liquidate open positions in significant price discovery contracts and to suspend or curtail trading in a significant price discovery contract.*

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded should have clear procedures and guidelines for decision-making regarding emergency intervention in the market, including procedures and guidelines to avoid conflicts of interest while carrying out such decision-making. An electronic trading facility on which significant price discovery contracts are executed or traded should also have the authority to intervene as necessary to maintain markets with fair and orderly trading as well as procedures for carrying out the intervention. Procedures and guidelines should include notifying the Commission of

the exercise of the electronic trading facility's regulatory emergency authority, explaining how conflicts of interest are minimized, and documenting the electronic trading facility's decision-making process and the reasons for using its emergency action authority. Information on steps taken under such procedures should be included in a submission of a certified rule and any related submissions for rule approval pursuant to part 40 of this chapter, when carried out pursuant to an electronic trading facility's emergency authority. To address perceived market threats, the electronic trading facility on which significant price discovery contracts are executed or traded should, among other things, be able to impose position limits in the delivery month, impose or modify price limits, modify circuit breakers, call for additional margin either from market participants or clearing members (for contracts that are cleared through a clearinghouse), order the liquidation or transfer of open positions, order the fixing of a settlement price, order a reduction in positions, extend or shorten the expiration date or the trading hours, suspend or curtail trading on the electronic trading facility, order the transfer of contracts and the margin for such contracts from one market participant to another, or alter the delivery terms or conditions or, if applicable, should provide for such actions through its agreements with its third-party provider of clearing services.

(b) *Acceptable practices.* [Reserved]

**CORE PRINCIPLE VI—DAILY**

**PUBLICATION OF TRADING**

**INFORMATION.** *The electronic trading facility shall make public daily information on price, trading volume, and other trading data to the extent appropriate for significant price discovery contracts.*

(a) *Guidance.* An electronic trading facility, with respect to significant price discovery contracts, should provide to the public information regarding settlement prices, price range, volume, open interest, and other related market information for all applicable contracts as determined by the Commission on a fair, equitable and timely basis. Provision of information for any applicable contract can be through such means as provision of the information to a financial information service or by timely placement of the information on the electronic trading facility's public Web site.

(b) *Acceptable practices.* Compliance with § 16.01 of this chapter, which is mandatory, is an acceptable practice that satisfies the requirements of Core Principle VI.

**CORE PRINCIPLE VII—COMPLIANCE WITH RULES.** *The electronic trading facility shall monitor and enforce compliance with the rules of the electronic trading facility, including the terms and conditions of any contracts to be traded and any limitations on access to the electronic trading facility.*

(a) *Guidance—*(1) An electronic trading facility on which significant price discovery contracts are executed or traded should have appropriate arrangements and resources for effective trade practice surveillance programs, with the authority to collect information and documents on both a routine and non-routine basis, including the

examination of books and records kept by its market participants. The arrangements and resources should facilitate the direct supervision of the market and the analysis of data collected. Trade practice surveillance programs may be carried out by the electronic trading facility itself or through delegation or contracting-out to a third party. If the electronic trading facility on which significant price discovery contracts are executed or traded delegates or contracts-out the trade practice surveillance responsibility to a third party, such third party should have the capacity and authority to carry out such programs, and the electronic trading facility should retain appropriate supervisory authority over the third party.

(2) An electronic trading facility on which significant price discovery contracts are executed or traded should have arrangements, resources and authority for effective rule enforcement. The Commission believes that this should include the authority and ability to discipline and limit or suspend the activities of a market participant as well as the authority and ability to terminate the activities of a market participant pursuant to clear and fair standards. The electronic trading facility can satisfy this criterion for market participants by expelling or denying such person's future access upon a determination that such a person has violated the electronic trading facility's rules.

(b) *Acceptable practices.* An acceptable trade practice surveillance program generally would include:

(1) Maintenance of data reflecting the details of each transaction executed on the electronic trading facility;

(2) Electronic analysis of this data routinely to detect potential trading violations;

(3) Appropriate and thorough investigative analysis of these and other potential trading violations brought to the electronic trading facility's attention; and

(4) Prompt and effective disciplinary action for any violation that is found to have been committed. The Commission believes that the latter element should include the authority and ability to discipline and limit or suspend the activities of a market participant pursuant to clear and fair standards that are available to market participants. *See, e.g.,* 17 CFR part 8.

**CORE PRINCIPLE VIII—CONFLICTS OF INTEREST.** *The electronic trading facility on which significant price discovery contracts are executed or traded shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the electronic trading facility and establish a process for resolving such conflicts of interest.*

(a) *Guidance.* (1) The means to address conflicts of interest in the decision-making of an electronic trading facility on which significant price discovery contracts are executed or traded should include methods to ascertain the presence of conflicts of interest and to make decisions in the event of such a conflict. In addition, the Commission believes that the electronic trading facility on which significant price discovery contracts are executed or traded

should provide for appropriate limitations on the use or disclosure of material non-public information gained through the performance of official duties by board members, committee members and electronic trading facility employees or gained through an ownership interest in the electronic trading facility or its parent organization(s).

(2) All electronic trading facilities on which significant price discovery contracts are traded bear special responsibility to regulate effectively, impartially, and with due consideration of the public interest, as provided in section 3 of the Act. Under Core Principle VIII, they are also required to minimize conflicts of interest in their decision-making processes. To comply with this core principle, electronic trading facilities on which significant price discovery contracts are traded should be particularly vigilant for such conflicts between and among any of their self-regulatory responsibilities, their commercial interests, and the several interests of their management, members, owners, market participants, other industry participants and other constituencies.

(b) *Acceptable practices.* [Reserved]

**CORE PRINCIPLE IX—ANTITRUST**

**CONSIDERATIONS.** *Unless necessary or appropriate to achieve the purposes of this Act, the electronic trading facility, with respect to any significant price discovery contracts, shall endeavor to avoid adopting any rules or taking any actions that result in any unreasonable restraints of trade or imposing any material anticompetitive burden on trading on the electronic trading facility.*

(a) *Guidance.* An electronic trading facility, with respect to a significant price discovery contract, may at any time request that the Commission consider under the provisions of section 15(b) of the Act any of the electronic trading facility's rules, which may be trading protocols or policies, operational rules, or terms or conditions of any significant price discovery contract. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable practices.* [Reserved]

**PART 38—DESIGNATED CONTRACT MARKETS**

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

**Authority:** 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a-2, 7b, 7b-1, 7b-3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

■ 74. Revise § 38.2 to read as follows:

**§ 38.2 Exempt provisions.**

A designated contract market, the designated contract market's operator and transactions traded on or through a designated contract market under section 5 of the Act shall comply with all applicable regulations under Title 17

of the Code of Federal Regulations, except for the requirements of § 1.39(b), § 1.44, § 1.53, § 1.54, § 1.59(b) and (c), § 1.62, § 1.63(a) and (b) and (d) through (f), § 1.64, § 1.69, part 8, § 100.1, § 155.2, and part 156.

**PART 41—SECURITY FUTURES PRODUCTS**

■ 75. The authority citation for part 41 continues to read as follows:

**Authority:** Sections 206, 251 and 252, Pub. L. 106–554, 114 Stat. 2763, 7 U.S.C. 1a, 2, 6f, 6j, 7a–2, 12a; 15 U.S.C. 78g(c)(2).

■ 76. Revise paragraph (e) of § 41.1 to read as follows:

**§ 41.1 Definitions**

\* \* \* \* \*

(e) *Narrow-based security index* has the same meaning as in section 1a(35) of the Commodity Exchange Act.

\* \* \* \* \*

■ 77. Revise § 41.2 to read as follows:

**§ 41.2 Required records.**

A designated contract market that trades a security index or security futures product shall maintain in accordance with the requirements of § 1.31 of this chapter books and records of all activities related to the trading of such products, including: Records related to any determination under subpart B of this part whether or not a futures contract on a security index is a narrow-based security index or a broad-based security index.

■ 78. Amend § 41.11 by revising paragraphs (a) introductory text, (b)(1) introductory text, (b)(2) introductory text, (c), and (d)(5) introductory text to read as follows:

**§ 41.11 Method for determining market capitalization and dollar value of average daily trading volume; application of the definition of narrow-based security index.**

(a) *Market capitalization.* For purposes of section 1a(35)(B) of the Act (7 U.S.C. 1a(35)(B)):

\* \* \* \* \*

(b) \* \* \*

(1) For purposes of section 1a(35)(A) and (B) of the Act (7 U.S.C. 1a(35)(A) and (B)):

\* \* \* \* \*

(2) For purposes of section 1a(35)(B)(III)(cc) of the Act (7 U.S.C. 1a(35)(B)(III)(cc)):

\* \* \* \* \*

(c) *Depository Shares and Section 12 Registration.* For purposes of section 1a(35)(B)(III)(aa) of the Act (7 U.S.C. 1a(35)(B)(III)(aa)), the requirement that each component security of an index be registered pursuant to section 12 of the

Securities Exchange Act of 1934 (15 U.S.C. 78l) shall be satisfied with respect to any security that is a depository share if the deposited securities underlying the depository share are registered pursuant to section 12 of the Securities Exchange Act of 1934 and the depository share is registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) on Form F–6 (17 CFR 239.36).

(d) \* \* \*

(5) *Lowest weighted 25% of an index.* With respect to any particular day, the lowest weighted component securities comprising, in the aggregate, 25% of an index’s weighting for purposes of section 1a(35)(A)(iv) of the Act (7 U.S.C. 1a(35)(A)(iv)) (“lowest weighted 25% of an index”) means those securities:

\* \* \* \* \*

■ 79. Revise paragraph (a) introductory text of § 41.12 to read as follows:

**§ 41.12 Indexes underlying futures contracts trading for fewer than 30 days.**

(a) An index on which a contract of sale for future delivery is trading on a designated contract market or foreign board of trade is not a narrow-based security index under section 1a(35) of the Act (7 U.S.C. 1a(35)) for the first 30 days of trading, if:

\* \* \* \* \*

■ 80. Revise § 41.13 to read as follows:

**§ 41.13 Futures contracts on security indexes trading on or subject to the rules of a foreign board of trade.**

When a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market.

■ 81. Revise paragraphs (a)(1), (a)(3), (b)(1), (b)(2), and (b)(4) of § 41.21 to read as follows:

**§ 41.21 Requirements for underlying securities.**

(a) \* \* \*

(1) The underlying security is registered pursuant to section 12 of the Securities Exchange Act of 1934;

\* \* \* \* \*

(3) The underlying security conforms with the listing standards for the security futures product that the designated contract market has filed with the SEC under section 19(b) of the Securities Exchange Act of 1934.

(b) \* \* \*

(1) The index is a narrow-based security index as defined in section 1a(35) of the Act;

(2) The securities in the index are registered pursuant to section 12 of the Securities Exchange Act of 1934;

\* \* \* \* \*

(4) The index conforms with the listing standards for the security futures product that the designated contract market has filed with the SEC under section 19(b) of the Securities Exchange Act of 1934.

■ 82. Revise the introductory text and paragraph (e) of § 41.22 to read as follows:

**§ 41.22 Required certifications.**

It shall be unlawful for a designated contract market to list for trading or execution a security futures product unless the designated contract market has provided the Commission with a certification that the specific security futures product or products and the designated contract market meet, as applicable, the following criteria:

\* \* \* \* \*

(e) If the board of trade is a designated contract market pursuant to section 5 of the Act, dual trading in these security futures products is restricted in accordance with § 41.27;

\* \* \* \* \*

■ 83. Revise paragraph (a) introductory text, paragraph (a)(5), and paragraph (b) of § 41.23 to read as follows:

**§ 41.23 Listing of security futures products for trading.**

(a) *Initial listing of products for trading.* To list new security futures products for trading, a designated contract market shall submit to the Commission at its Washington, DC headquarters, either in electronic or hard-copy form, to be received by the Commission no later than the day prior to the initiation of trading, a filing that:

\* \* \* \* \*

(5) If the board of trade is a designated contract market pursuant to section 5 of the Act, it includes a certification that the security futures product complies with the Act and rules thereunder; and

\* \* \* \* \*

(b) *Voluntary submission of security futures products for Commission approval.* A designated contract market may request that the Commission approve any security futures product under the procedures of § 40.5 of this chapter, *provided however*, that the registered entity shall include the certification required by § 41.22 with its submission under § 40.5 of this chapter. Notice designated contract markets may not request Commission approval of security futures products.

■ 84. Amend § 41.24 by removing paragraph (b), redesignating paragraph

(c) as paragraph (b), and revising redesignated paragraph (b), to read as follows:

**§ 41.24 Rule amendments to security futures products.**

\* \* \* \* \*

(b) *Voluntary submission of rules for Commission review and approval.* A designated contract market or a registered derivatives clearing organization clearing security futures products may request that the Commission approve any rule or proposed rule or rule amendment relating to a security futures product under the procedures of § 40.5 of this chapter, *provided however*, that the registered entity shall include the certifications required by § 41.22 with its submission under § 40.5 of this chapter. Notice designated contract markets may not request Commission approval of rules.

■ 85. Revise paragraphs (a)(1), (a)(2) introductory text, (a)(3) introductory text, (a)(3)(i)(A), (a)(3)(i)(B), (a)(3)(iv), and (d) of § 41.25 to read as follows:

**§ 41.25 Additional conditions for trading for security futures products.**

(a) *Common provisions*—(1) *Reporting of data.* The designated contract market shall comply with part 16 of this chapter requiring the daily reporting of market data.

(2) *Regulatory trading halts.* The rules of a designated contract market that lists or trades one or more security futures products must include the following provisions:

(3) *Speculative position limits.* The designated contract market shall have rules in place establishing position limits or position accountability procedures for the expiring futures contract month. The designated contract market shall:

(i) \* \* \*

(A) For security futures products where the average daily trading volume in the underlying security exceeds 20 million shares, or exceeds 15 million shares and there are more than 40 million shares of the underlying security outstanding, the designated contract market may adopt a net position limit no greater than 22,500 (100-share) contracts applicable to positions held during the last five trading days of an expiring contract month; or

(B) For security futures products where the average daily trading volume in the underlying security exceeds 20 million shares and there are more than 40 million shares of the underlying security outstanding, the designated

contract market may adopt a position accountability rule. Upon request by the designated contract market, traders who hold net positions greater than 22,500 (100-share) contracts, or such lower level specified by exchange rules, must provide information to the exchange and consent to halt increasing their positions when so ordered by the exchange.

(iv) For purposes of this section, average daily trading volume shall be calculated monthly, using data for the most recent six-month period. If the data justify a higher or lower speculative limit for a security future, the designated contract market may raise or lower the position limit for that security future effective no earlier than the day after it has provided notification to the Commission and to the public under the submission requirements of § 41.24. If the data require imposition of a reduced position limit for a security future, the designated contract market may permit any trader holding a position in compliance with the previous position limit, but in excess of the reduced limit, to maintain such position through the expiration of the security futures contract; *provided*, that the designated contract market does not find that the position poses a threat to the orderly expiration of such contract.

(d) The Commission may exempt a designated contract market from the provisions of paragraphs (a)(2) and (b) of this section, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the public interest and the protection of customers. An exemption granted pursuant to this paragraph shall not operate as an exemption from any Securities and Exchange Commission rules. Any exemption that may be required from such rules must be obtained separately from the Securities and Exchange Commission.

■ 86. Amend § 41.27 by:

■ a. Revising paragraphs (a)(1), (a)(3) introductory text, (a)(4)(v), (a)(5), (b), (d) introductory text, (d)(1), (d)(4), and (f); and

■ b. Removing and reserving paragraphs (c)(2) and (e)(2), to read as follows:

**§ 41.27 Prohibition of dual trading in security futures products by floor brokers.**

(a) \* \* \*

(1) Trading session means hours during which a designated contract market is scheduled to trade continuously during a trading day, as set forth in its rules, including any

related post settlement trading session. A designated contract market may have more than one trading session during a trading day.

\* \* \* \* \*

(3) Broker association includes two or more designated contract market members with floor trading privileges of whom at least one is acting as a floor broker who:

\* \* \* \* \*

(4) \* \* \*

(v) An account for another member present on the floor of a designated contract market or an account controlled by such other member.

(5) Dual trading means the execution of customer orders by a floor broker through open outcry during the same trading session in which the floor broker executes directly or by initiating and passing to another member, either through open outcry or through a trading system that electronically matches bids and offers pursuant to a predetermined algorithm, a transaction for the same security futures product on the same designated contract market for an account described in paragraphs (a)(4)(i) through (v) of this section.

(b) *Dual Trading Prohibition.* (1) No floor broker shall engage in dual trading in a security futures product on a designated contract market, except as otherwise provided under paragraphs (d), (e), and (f) of this section.

(2) A designated contract market operating an electronic market or electronic trading system that provides market participants with a time or place advantage or the ability to override a predetermined algorithm must submit an appropriate rule proposal to the Commission consistent with the procedures set forth in § 40.5. The proposed rule must prohibit electronic market participants with a time or place advantage or the ability to override a predetermined algorithm from trading a security futures product for accounts in which these same participants have any interest during the same trading session that they also trade the same security futures product for other accounts. This paragraph, however, is not applicable with respect to execution priorities or quantity guarantees granted to market makers who perform that function, or to market participants who receive execution priorities based on price improvement activity, in accordance with the rules governing the designated contract market.

(c) \* \* \*

(2) [Reserved]

(d) *Specific Permitted Exceptions.* Notwithstanding the applicability of a dual trading prohibition under

paragraph (b) of this section, dual trading may be permitted on a designated contract market pursuant to one or more of the following specific exceptions:

(1) *Correction of errors.* To offset trading errors resulting from the execution of customer orders, provided, that the floor broker must liquidate the position in his or her personal error account resulting from that error through open outcry or through a trading system that electronically matches bids and offers as soon as practicable, but, except as provided herein, not later than the close of business on the business day following the discovery of error. In the event that a floor broker is unable to offset the error trade because the daily price fluctuation limit is reached, a trading halt is imposed by the designated contract market, or an emergency is declared pursuant to the rules of the designated contract market, the floor broker must liquidate the position in his or her personal error account resulting from that error as soon as practicable thereafter.

\* \* \* \* \*

(4) *Market emergencies.* To address emergency market conditions resulting in a temporary emergency action as determined by a designated contract market.

(e) \* \* \*

(2) [Reserved]

(f) *Unique or Special Characteristics of Agreements, Contracts or Transactions, or of Designated Contract Markets.* Notwithstanding the applicability of a dual trading prohibition under paragraph (b) of this section, dual trading may be permitted on a designated contract market to address unique or special characteristics of agreements, contracts, or transactions, or of the designated contract market as provided herein. Any rule of a designated contract market that would permit dual trading when it would otherwise be prohibited, based on a unique or special characteristic of agreements, contracts, or transactions, or of the designated contract market must be submitted to the Commission for prior approval under the procedures set forth in § 40.5. The rule submission must include a detailed demonstration of why an exception is warranted.

■ 87. Revise paragraphs (a)(4)(i)(B) and (a)(30) of § 41.43 to read as follows:

§ 41.43 Definitions.

- (a) \* \* \*
(4) \* \* \*
(i) \* \* \*

(B) If the instrument underlying such security future is a narrow-based

security index, as defined in section 1a(35)(A) of the Act, the product of the daily settlement price of such security future as shown by any regularly published reporting or quotation service, and the applicable contract multiplier.

\* \* \* \* \*

(30) *Self-regulatory authority* means a national securities exchange registered under section 6 of the Exchange Act, a national securities association registered under section 15A of the Exchange Act, or a contract market registered under section 5 of the Act or section 5f of the Act.

\* \* \* \* \*

■ 88. Revise paragraph (b) introductory text of § 41.49 to read as follows:

§ 41.49 Filing proposed margin rule changes with the Commission.

\* \* \* \* \*

(b) *Filing requirements under the Act.* Any self-regulatory authority that is registered with the Commission as a designated contract market under section 5 of the Act shall, when filing a proposed rule change regarding customer margin for security futures with the SEC for approval in accordance with section 19(b)(2) of the Exchange Act, submit such proposed rule change to the Commission as follows:

\* \* \* \* \*

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

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

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

■ 90. Amend § 140.72 by revising the section heading and paragraphs (a), (b), (d) and (f), to read as follows:

§ 140.72 Delegation of authority to disclose confidential information to a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization.

(a) Pursuant to the authority granted under sections 2(a)(11), 8a(5) and 8a(6) of the Act, the Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director, the Deputy Executive Director, the Special Assistant to the Executive Director, the Director of the Division of Clearing and Intermediary Oversight, each Deputy Director of the Division of Clearing and Intermediary Oversight, the Chief Accountant, the General Counsel, each Deputy General Counsel, the Director of the Division of Market Oversight, each Deputy Director of the Division of Market Oversight, the Deputy Director

of the Market and Trade Practice Surveillance Branch, the Director of the Division of Enforcement, each Deputy Director of the Division of Enforcement, each Associate Director of the Division of Enforcement, the Chief Counsel of the Division of Enforcement, each Regional Counsel of the Division of Enforcement, each of the Regional Administrators, the Chief Economist of the Office of the Chief Economist, the Deputy Chief Economist of the Office of the Chief Economist, the Director of the Office of International Affairs, and the Deputy Director of the Office of International Affairs, the authority to disclose to an official of any contract market, swap execution facility, swap data repository, registered futures association, or self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934, any information necessary or appropriate to effectuate the purposes of the Act, including, but not limited to, the full facts concerning any transaction or market operation, including the names of the parties thereto. This authority to disclose shall be based on a determination that the transaction or market operation disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors or that disclosure is necessary or appropriate to effectuate the purposes of the Act. The authority to make such a determination is also delegated by the Commission to the Commission employees identified in this section. A Commission employee delegated authority under this section may exercise that authority on his or her own initiative or in response to a request by an official of a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization.

(b) Disclosure under this section shall only be made to a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization official who is named in a list filed with the Commission by the chief executive officer of the contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization, which sets forth the official's name, business address and telephone number. The chief executive officer shall thereafter notify the Commission of any deletions or additions to the list of officials authorized to receive disclosures under this section. The original list and any supplemental list required by this paragraph shall be filed with the Secretary of the Commission, and a

copy thereof shall also be filed with the Regional Coordinator for the region in which the contract market, swap execution facility, or swap data repository is located or in which the registered futures association or self-regulatory organization has its principal office.

\* \* \* \* \*

(d) For purposes of this section, the term “official” shall mean any officer or member of a committee of a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization who is specifically charged with market surveillance or audit or investigative responsibilities, or their duly authorized representative or agent, who is named on the list filed pursuant to paragraph (b) of this section or any supplement thereto.

\* \* \* \* \*

(f) Any contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization receiving information from the Commission under these provisions shall not disclose such information except that disclosure may be made in any self-regulatory action or proceeding.

■ 91. Amend § 140.77 by revising the section heading and paragraph (a) to read as follows:

**§ 140.77 Delegation of authority to determine that applications for contract market designation, swap execution facility registration, or swap data repository registration are materially incomplete.**

(a) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director’s designees, the authority to determine that an application for contract market designation, swap execution facility registration, or swap data repository registration is materially incomplete under section 6 of the Commodity Exchange Act and to so notify the applicant.

\* \* \* \* \*

■ 92. Revise paragraphs (a) and (b) of § 140.96 to read as follows:

**§ 140.96 Delegation of authority to publish in the Federal Register.**

(a) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director’s designee, with the concurrence of the General Counsel or the General Counsel’s designee, the authority to publish in the **Federal**

**Register** notice of the availability for comment of the proposed terms and conditions of applications for contract market designation, swap execution facility and swap data repository registration, and to determine to publish, and to publish, requests for public comment on proposed exchange, swap execution facility, or swap data repository rules, and rule amendments, when there exists novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with the Act, including regulations under the Act.

(b) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director’s designee, and 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 determine to publish, and to publish, in the **Federal Register**, requests for public comment on proposed exchange and self-regulatory organization rule amendments when publication of the proposed rule amendment is in the public interest and will assist the Commission in considering the views of interested persons.

\* \* \* \* \*

■ 93. Revise paragraph (d)(2) of § 140.99 to read as follows:

**§ 140.99 Requests for exemptive, no-action and interpretative letters.**

\* \* \* \* \*

(d) \* \* \*

(2) A request for a Letter relating to the provisions of the Act or the Commission’s rules, regulations or orders governing designated contract markets, registered swap execution facilities, registered swap data repositories, exempt commercial markets, exempt boards of trade, the nature of particular transactions and whether they are exempt or excluded from being required to be traded on one of the foregoing entities, foreign trading terminals, hedging exemptions, and the reporting of market positions shall be filed with the Director, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. A request for a Letter relating to all other provisions of the Act or Commission rules shall be filed with the Director, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre,

1155 21st Street NW., Washington, DC 20581. The request must be submitted electronically using the email address *dmoletters@cftc.gov* (for requests filed with the Division of Market Oversight), or *dcioletters@cftc.gov* (for requests filed with the Division of Clearing and Intermediary Oversight), as appropriate, and a properly signed paper copy of the request must be provided to the Division of Market Oversight or the Division of Clearing and Intermediary Oversight, as appropriate, within ten days for purposes of verification of the electronic submission.

\* \* \* \* \*

■ 94. Amend § 140.735–2 by:

■ a. Redesignating paragraphs (b)(1)(i), (b)(1)(ii), and (b)(1)(iii) as (b)(1)(ii), (b)(1)(iv), and (b)(1)(v), respectively;

■ b. Adding paragraphs (b)(1)(i) and (b)(1)(iii); and

■ c. Revising paragraphs (b)(2) and (c), to read as follows:

**§ 140.735–2 Prohibited transactions.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) In swaps;

\* \* \* \* \*

(iii) In retail forex transactions, as that term is defined in § 5.1(m) of this chapter;

\* \* \* \* \*

(2) Effect any purchase or sale of a commodity option, futures contract, or swap involving a security or group of securities;

\* \* \* \* \*

(c) *Exception for farming, ranching, and natural resource operations.* The prohibitions in paragraphs (b)(1)(i), (ii), and (iv) of this section shall not apply to a transaction in connection with any farming, ranching, oil and gas, mineral rights, or other natural resource operation in which the member or employee has a financial interest, if he or she is not involved in the decision to engage in, and does not have prior knowledge of, the actual futures, commodity option, or swap transaction and has previously notified the General Counsel<sup>2</sup> in writing of the nature of the operation, the extent of the member’s or employee’s interest, the types of transactions in which the operation may engage, and the identity of the person or

<sup>2</sup> As used in this subpart, “General Counsel” refers to the General Counsel in his or her capacity as counselor for the Commission and designated agency ethics official for the Commission, and includes his or her designee and the alternate designated agency ethics official appointed by the agency head pursuant to 5 CFR 2638.202.



persons who will make trading decisions for the operation; <sup>3</sup> or

\* \* \* \* \*

■ 95. Revise paragraph (b)(1) of § 140.735–2a to read as follows:

§ 140.735–2a Prohibited interests.

\* \* \* \* \*

(b) \* \* \*

(1) Have a financial interest, through ownership of securities or otherwise, in any person <sup>5</sup> registered with the Commission (including futures commission merchants, associated persons and agents of futures commission merchants, floor brokers, commodity trading advisors and commodity pool operators, and any other persons required to be registered in a fashion similar to any of the above under the Commodity Exchange Act or pursuant to any rule or regulation promulgated by the Commission), or any contract market, swap execution facility, swap data repository, board of trade, or other trading facility, or any derivatives clearing organization subject to regulation or oversight by the Commission; <sup>6</sup>

\* \* \* \* \*

■ 96. Revise § 140.735–3 to read as follows:

§ 140.735–3 Non-governmental employment and other outside activity.

A Commission member or employee shall not accept employment or compensation from any person, exchange, swap execution facility, swap data repository or derivatives clearing organization subject to regulation by the Commission. For purposes of this section, a person subject to regulation by the Commission includes but is not limited to a contract market, swap execution facility, swap data repository

<sup>3</sup> Although not required, if they choose to do so, members or employees may use powers of attorney or other arrangements in order to meet the notice requirements of, and to assure that they have no control or knowledge of, futures, commodity option, or swap transactions permitted under paragraph (c) of this section. A member or employee considering such arrangements should consult with the Office of General Counsel in advance for approval. Should a member or employee gain knowledge of an actual futures, commodity option, or swap transaction entered into by an operation described in paragraph (c) of this section that has already taken place and the market position represented by that transaction remains open, he or she should promptly report that fact and all other details to the General Counsel and seek advice as to what action, including recusal from any particular matter that will have a direct and predictable effect on the financial interest in question, may be appropriate.

<sup>5</sup> As defined in section 1a(38) of the Commodity Exchange Act and 17 CFR 1.3(u) thereunder, a “person” includes an individual, association, partnership, corporation and a trust.

<sup>6</sup> Attention is directed to 18 U.S.C. 208.

or derivatives clearing organization or member thereof, a registered futures commission merchant, any person associated with a futures commission merchant or with any agent of a futures commission merchant, floor broker, commodity trading advisor, commodity pool operator or any person required to be registered in a fashion similar to any of the above or file reports under the Act or pursuant to any rule or regulation promulgated by the Commission.<sup>11</sup>

PART 145—COMMISSION RECORDS AND INFORMATION

■ 97. The authority citation for part 145 continues to read as follows:

Authority: Pub. L. 99–570, 100 Stat. 3207; Pub. L. 89–554, 80 Stat. 383; Pub. L. 90–23, 81 Stat. 54; Pub. L. 98–502, 88 Stat. 1561–1564 (5 U.S.C. 552); Sec. 101(a), Pub. L. 93–463, 88 Stat. 1389 (5 U.S.C. 4a(j)); unless otherwise noted.

■ 98. Revise paragraphs (c)(1), (d)(1) introductory text, and (d)(1)(vi) of § 145.9 to read as follows:

§ 145.9 Petition for confidential treatment of information submitted to the Commission.

\* \* \* \* \*

(c) \* \* \*

(1) *Submitter*. A “submitter” is any person who submits any information or material to the Commission or who permits any information or material to be submitted to the Commission. For purposes of paragraph (d)(1)(ii) of this section only, “submitter” includes any person whose information has been submitted to a designated contract market, derivatives clearing organization, swap execution facility, swap data repository or registered futures association that in turn has submitted the information to the Commission.

\* \* \* \* \*

(d) *Written request for confidential treatment*. (1) Any submitter may request in writing that the Commission afford confidential treatment under the Freedom of Information Act to any information that he or she submits to the Commission. Except as provided in paragraph (d)(4) of this section, no oral requests for confidential treatment will be accepted by the Commission. The submitter shall specify the grounds on

<sup>11</sup> Attention is directed to section 2(a)(8) of the Commodity Exchange Act, which provides, among other things, that no Commission member or employee shall accept employment or compensation from any person, exchange or derivatives clearing organization (“clearinghouse”) subject to regulation by the Commission, or participate, directly or indirectly, in any contract market operations or transactions of a character subject to regulation by the Commission.

which confidential treatment is being requested but need not provide a detailed written justification of the request unless required to do so under paragraph (e) of this section. Confidential treatment may be requested only on the grounds that disclosure:

\* \* \* \* \*

(vi) Would reveal investigatory records compiled for law enforcement purposes when disclosure would interfere with enforcement proceedings or disclose investigative techniques and procedures, *provided*, that the claim may be made only by a designated contract market, derivatives clearing organization, swap execution facility, swap data repository or registered futures association with regard to its own investigatory records.

\* \* \* \* \*

■ 99. Revise paragraphs (a)(6), (a)(8), and (b)(13) of Appendix A to part 145 to read as follows:

Appendix A to Part 145—Compilation of Commission Records Available to the Public

\* \* \* \* \*

(a) \* \* \*

(6) Rule enforcement and financial reviews (public version).

\* \* \* \* \*

(8) Commission rules and regulations, **Federal Register** notices, interpretative letters.

\* \* \* \* \*

(b) \* \* \*

(13) Publicly available portions of applications to become a registered entity including the transmittal letter, first page of the application cover sheet, proposed rules, proposed bylaws, corporate documents, any overview or similar summary provided by the applicant, any documents pertaining to the applicant’s legal status and governance structure, including governance fitness information, and any other part of the application not covered by a request for confidential treatment.

\* \* \* \* \*

PART 155—TRADING STANDARDS

■ 100. The authority citation for part 155 continues to read as follows:

Authority: 7 U.S.C. 6b, 6c, 6g, 6j, and 12a, unless otherwise noted.

■ 101. Revise the introductory text of § 155.2 to read as follows:

§ 155.2 Trading standards for floor brokers.

Each contract market shall adopt rules which shall, at a minimum, with respect to each member of the contract market acting as a floor broker:

\* \* \* \* \*

■ 102. Revise paragraphs (a)(1), (b)(2)(ii), and (c)(1) of § 155.3 to read as follows:

**§ 155.3 Trading standards for futures commission merchants.**

(a) \* \* \*

(1) Insure, to the extent possible, that each order received from a customer which is executable at or near the market price is transmitted to the floor of the appropriate contract market before any order in any future or in any commodity option in the same commodity for any proprietary account, any other account in which an affiliated person has an interest, or any account for which an affiliated person may originate orders without the prior specific consent of the account owner, if the affiliated person has gained knowledge of the customer's order prior to the transmission to the floor of the appropriate contract market of the order for a proprietary account, an account in which the affiliated person has an interest, or an account in which the affiliated person may originate orders without the prior specific consent of the account owner; and

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) In the case of a customer who does not qualify as an "institutional customer" as defined in § 1.3(g) of this chapter, a futures commission merchant must obtain the customer's prior consent through a signed acknowledgment, which may be accomplished in accordance with § 1.55(d) of this chapter.

(c) \* \* \*

(1) Receives written authorization from a person designated by such other futures commission merchant or introducing broker with responsibility for the surveillance over such account pursuant to paragraph (a)(2) of this section or § 155.4(a)(2), respectively;

\* \* \* \* \*

■ 103. Revise paragraphs (a)(1), (b)(2)(ii), and (c)(2) of § 155.4 to read as follows:

**§ 155.4 Trading standards for introducing brokers.**

(a) \* \* \*

(1) Insure, to the extent possible, that each order received from a customer which is executable at or near the market price is transmitted to the futures commission merchant carrying the account of the customer before any order in any future or in any commodity option in the same commodity for any proprietary account, any other account in which an affiliated person has an interest, or any account for which an

affiliated person may originate orders without the prior specific consent of the account owner, if the affiliated person has gained knowledge of the customer's order prior to the transmission to the floor of the appropriate contract market of the order for a proprietary account, an account in which the affiliated person has an interest, or an account in which the affiliated person may originate orders without the prior specific consent of the account owner; and

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) In the case of a customer who does not qualify as an "institutional customer" as defined in § 1.3(g) of this chapter, an introducing broker must obtain the customer's prior consent through a signed acknowledgment, which may be accomplished in accordance with § 1.55(d) of this chapter.

\* \* \* \* \*

(c) \* \* \*

(2) Copies of all statements for such account and of all written records prepared by such futures commission merchant upon receipt of orders for such account pursuant to § 155.3(c)(2) are transmitted on a regular basis to the introducing broker with which such person is affiliated.

**§ 155.6 [Removed and Reserved]**

■ 104. Remove and reserve § 155.6.

**PART 166—CUSTOMER PROTECTION RULES**

■ 105. The authority citation for part 155 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 6b, 6c, 6d, 6g, 6h, 6k, 6l, 6o, 7, 12a, 21, and 23, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 106. Revise paragraph (a) introductory text and paragraph (b) of § 166.2 to read as follows:

**§ 166.2 Authorization to trade.**

\* \* \* \* \*

(a) With respect to a commodity interest as defined in any paragraph of the commodity interest definition in § 1.3(yy) of this chapter, specifically authorized the futures commission merchant, retail foreign exchange dealer, introducing broker or any of their associated persons to effect the transaction (a transaction is "specifically authorized" if the customer or person designated by the customer to control the account specifies—

\* \* \* \* \*

(b) With respect to a commodity interest as defined in paragraph (1) or (2) of the commodity interest definition in § 1.3(yy) of this chapter, authorized in writing the futures commission merchant, introducing broker or any of their associated persons to effect transactions in commodity interests for the account without the customer's specific authorization; *Provided, however,* That if any such futures commission merchant, introducing broker or any of their associated persons is also authorized to effect transactions in foreign futures or foreign options without the customer's specific authorization, such authorization must be expressly documented.

■ 107. Revise paragraph (a)(2) of § 166.5 to read as follows:

**§ 166.5 Dispute settlement procedures.**

(a) \* \* \*

(2) The term *customer* as used in this section includes any person for or on behalf of whom a member of a designated contract market, or a participant transacting on or through such designated contract market, effects a transaction on such contract market, except another member of or participant in such designated contract market. *Provided, however,* a person who is an "eligible contract participant" as defined in section 1a(18) of the Act shall not be deemed to be a customer within the meaning of this section.

\* \* \* \* \*

Issued in Washington, DC on October 16, 2012, by the Commission.

**Sauntia S. Warfield,**

*Assistant Secretary of the Commission.*

**Appendices to Adaptation of Regulations To Incorporate Swaps—Commission Voting Summary and Statements of Commissioners**

**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 Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

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

I support the final rule to amend and conform certain provisions of the Commodity Futures Trading Commission's (CFTC) regulations to incorporate swaps. These final conforming amendments are crucial to integrating the CFTC's regulations with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which expanded the scope of the Commodity Exchange Act to cover swaps.

Specifically, this final rule updates the CFTC's definitions of futures commission merchant (FCM) and introducing broker (IB) to fulfill the Dodd-Frank Act's requirement to permit these entities to trade swaps on behalf of their customers. This final rule also updates the definitions of commodity

interest, customer, and customer funds to incorporate swaps. In addition, the final rule adds swap execution facilities (SEFs) to the list of CFTC-regulated trading venues.

The final rule amends existing recordkeeping requirements for FCMs and IBs to ensure that similar records are kept for

swaps as are currently kept for futures. In addition, SEF members will be obligated to comply with the same recordkeeping duties as are required of designated contract market (DCM) members.

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