## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 73

**[Docket No. FAA–2001–10285; Airspace Docket No. 01–ASO–8]**

**RIN 2120–AA66**

## Change of Using Agency for Restricted Areas R–3008A, R–3008B, R–3008C, and R–3008D; Grand Bay Weapons Range, GA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action changes the name of the using agency for Restricted Areas R–3008A, R–3008B, R–3008C, and R–3008D, Grand Bay Weapons Range, GA, from the ''347th Fighter Wing'' to the ''347th Rescue Wing.'' This change is required due to the U.S. Air Force's realignment of missions at Moody Air Force Base (AFB), GA, which is the sponsor of the Grand Bay Weapons Range. This change is administrative only to reflect the proper host unit at the base. The change will not affect the current restricted area boundaries, altitudes, time of designation, or the activities conducted within the areas.

**EFFECTIVE DATE:** 0901 UTC, November 1, 2001.

**FOR FURTHER INFORMATION CONTACT:** Paul Gallant, Airspace and Rules Division, ATA–400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8783.

**SUPPLEMENTARY INFORMATION:**

### Background

The U.S. Air Force is realigning the missions at Moody AFB, GA. In conjunction with this change, the Air Force has redesignated host unit for the base as the 347th Rescue Wing. The 347th Rescue Wing serves as the sponsoring unit and scheduling activity for Restricted Areas R–3008A, R–3008B, R–3008C, and R–3008D.

### The Rule

This action amends 14 CFR part 73 by changing the name of the using agency for Restricted Areas R–3008A, R–3008B, R–3008C, and R–3008D, Grand Bay Weapons Range, GA, from ''U.S. Air Force, 347th Fighter Wing, Moody AFB, GA,'' to ''U.S. Air Force, 347th Rescue Wing, Moody AFB, GA.'' This administrative change will not alter the boundaries, altitudes, time of designation, or activities conducted within the restricted areas; therefore, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary.

Section 73.30 of part 73 was republished in FAA Order 7400.8H, dated September 1, 2000.

This regulation is limited to an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. It has been determined that this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### Environmental Review

This action is a minor administrative change to amend the designated using agency of existing restricted areas. There are no changes to air traffic control procedures or routes as a result of this action. Therefore, this action is not subject to environmental assessments and procedures in accordance with FAA Order 1050.1D, ''Policies and Procedures for Considering Environmental Impacts,'' and the National Environmental Policy Act of 1969.

### List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

### Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73, as follows:

## PART 73—SPECIAL USE AIRSPACE

1. The authority citation for part 73 continues to read as follows:

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

**§ 73.30 [Amended]**

2. § 73.30 is amended as follows:

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**R–3008A Grand Bay Weapons Range, GA [Amended]**

By removing ''Using agency. U.S. Air Force, 347th Fighter Wing, Moody AFB, GA'' and substituting ''Using agency. U.S. Air Force, 347th Rescue Wing, Moody AFB, GA'' in its place.

**R–3008B Grand Bay Weapons Range, GA [Amended]**

By removing ''Using agency. U.S. Air Force, 347th Fighter Wing, Moody AFB, GA'' and substituting ''Using agency. U.S. Air Force, 347th Rescue Wing, Moody AFB, GA'' in its place.

**R–3008C Grand Bay Weapons Range, GA [Amended]**

By removing ''Using agency. U.S. Air Force, 347th Fighter Wing, Moody AFB, GA'' and substituting ''Using agency. U.S. Air Force, 347th Rescue Wing, Moody AFB, GA'' in its place.

**R–3008D Grand Bay Weapons Range, GA [Amended]**

By removing ''Using agency. U.S. Air Force, 347th Fighter Wing, Moody AFB, GA'' and substituting ''Using agency. U.S. Air Force, 347th Rescue Wing, Moody AFB, GA'' in its place.

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Issued in Washington, DC, on August 23, 2001.

**Reginald C. Matthews,**

*Manager, Airspace and Rules Division.*

[FR Doc. 01–21816 Filed 8–28–01; 8:45 am]

**BILLING CODE 4910–13–P**

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Part 39

**RIN 3038–AB66**

## A New Regulatory Framework for Clearing Organizations

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is promulgating final rules to implement provisions of the Commodity Futures Modernization Act of 2000 governing derivatives clearing organizations. The rules apply to derivatives clearing organizations that are required to be registered, or which voluntarily apply to register, with the Commission.

**EFFECTIVE DATE:** October 29, 2001.

**FOR FURTHER INFORMATION CONTACT:** Alan L. Seifert, Deputy Director, Division of Trading and Markets or Lois J. Gregory, Special Counsel, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone (202) 418–5260 or e-mail ASeifert@cftc.gov. or LGregory@cftc.gov.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On May 14, 2001, the Commission published for comment proposed part 39 of its regulations to implement Section 5b of the Commodity Exchange Act (''Act''), as added by the Commodity Futures Modernization Act of 2000 (''CFMA''),[1] governing derivatives clearing organizations.[2] Section 5b(a) requires that contracts of sale of a commodity for future delivery, options on such contracts, and options on a commodity be cleared only by a derivatives clearing organization (''DCO'') registered with the Commission,[3] unless the contracts or options are in: (i) commodities excluded under the Act, (ii) commodities exempted under the Act, or (iii) security futures products cleared by a securities clearing agency. With the exception of security futures products, which may be cleared by a securities clearing agency,[4] contracts traded on a designated contract market, if cleared, must be cleared by a DCO.[5] Agreements, contracts and transactions in excluded or exempted commodities that are traded on a derivatives transaction execution facility, if cleared, may be cleared through clearing organizations other than DCOs.[6] However, a clearing organization that clears these contracts may voluntarily apply, pursuant to section 5b(b) of the Act, to register with the Commission as a DCO. A DCO may clear other contracts, agreements, or transactions, including, but not limited to, certain over-the-counter (''OTC'') derivative instruments referenced in section 5b(b) of the Act, and others, such as transactions in spot and forward contracts.

To be registered as a DCO, an applicant must demonstrate that it complies with fourteen core principles set forth in the CFMA. Part 39 stipulates the form and provides guidance for what should be included in applications for DCO registration, and sets forth procedures for processing such applications. It also addresses ongoing compliance by DCOs with the core principles and other provisions of the Act and regulations, the enforceability of contracts cleared on DCOs, and fraud. Part 39 does not apply to the execution of transactions cleared by DCOs; its provisions apply only to the clearing of transactions by DCOs.

The Commission received three comment letters on proposed part 39.[7] Although the Commission has made various changes in response to the comments as discussed below, the final rules do not differ significantly from those that were proposed.

## II. Final Part 39

### *A. Application and Approval Procedures*

As did the proposed rule, final rule 39.1 provides that part 39 applies to any DCO that is registered, is required to be registered, or which voluntarily applies to be registered with the Commission. The Commission agrees with comments suggesting that grandfathered DCOs also be specifically included in this scope provision and has accordingly amended it to include DCOs that are ''deemed to be registered,'' which is the language used in the CFMA to refer to grandfathered DCOs.[8] Thus, the final part 39 rules apply to any DCO, as defined under section 1a(9) of the Act,[9] which is registered or deemed to be registered with the Commission, is required to become so registered, or which voluntarily seeks to become so registered. Final rule 39.3 provides that an organization meeting all requirements is ''deemed registered'' sixty days after receipt of an application unless notified otherwise.[10]

Rule 39.3 also sets forth the requirements for registration. As proposed, the rule required that an applicant meet the definition of a DCO provided by section 1a(9) of the Act, which in turn, requires that the entity perform certain functions. As noted by BOTCC, however, an applicant that has not been grandfathered pursuant to section 5b(d) of the Act will not have performed the activities envisioned by that definition. The Commission has modified the rule, therefore, to state that an applicant need only represent that it will operate in accordance with the definition of a DCO contained in section 1a(9) of the Act.[11]

Other requirements of rule 39.3 include submission by an applicant of its rules and a demonstration that the applicant is able to satisfy the core principles of the Act to the extent that its ability to do so is not self evident from the applicant's rules. As proposed, rule 39.3 also would have required applicants to submit ''any'' agreements with third parties that would enable the applicant to comply with the core principles and descriptions of ''any'' system test procedures, tests conducted or test results. BOTCC commented that ''[t]hese materials can be voluminous. More importantly, these materials frequently will contain trade secrets of the submitting party or be subject to detailed confidentiality procedures established by third-party system providers and other vendors.'' [12] BOTCC therefore recommended that the rule ''be amended to require an applicant only to submit such information as is necessary to demonstrate the applicant's compliance with core principles.'' [13] The Commission has modified the rule to clarify that the agreements and descriptions of system tests referred to in rule 39.3 that must be submitted are those that will enable the applicant to comply, or demonstrate the applicant's ability to comply, with the core principles.[14]

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[1] *See* Appendix E of Pub.L. 106–554, 114 Stat. 2763 (2000).

[2] 66 FR 24308.

[3] For purposes of this release, use of the term ''derivatives clearing organization'' means a DCO registered, deemed to be registered, or required to be registered, with the Commission pursuant to section 5b of the Act.

[4] Security futures products traded on a national securities exchange that is notice-registered with the CFTC as a designated contract market must be cleared by a securities clearing agency registered under the Securities Exchange Act of 1934. Securities Exchange Act section 17A(b)(1). Security futures products traded on a contract market that is notice-registered with the SEC may be cleared by either a DCO or a securities clearing agency. *See* section 5b of the Act.

[5] However, the Commission will consider requests for other types of clearing arrangements pursuant to its exemptive authority under section 4(c) of the Act.

[6] This includes excluded or exempted contracts traded on a derivatives transaction execution facility pursuant to any of the sub-provisions of section 5a of the Act.

[7] Comment letters (CL) were received from the Board of Trade Clearing Corporation (''BOTCC''), the Chicago Mercantile Exchange (''CME''), and the International Swaps and Derivatives Association (''ISDA'').

[8] Section 5b(d) provides that a DCO ''shall be deemed to be registered'' if it acts as the clearing organization for a board of trade that was designated as a contract market prior to the date of enactment of the CFMA. *See* BOTCC CL at 2.

[9] As noted in the proposing release, an organization need not perform a direct credit enhancement function in order to be a DCO under the Act. *See* section 1a(9)(ii) (providing that the term DCO includes entities that provide for the settlement or netting of agreements, contracts, or transactions executed by participants in the DCO). Accordingly, and in response to BOTCC's request for clarification, the term ''clear'' (and all forms of the verb) is meant to include these other services. *See* BOTCC CL at 6. An organization that intends to provide settlement or other clearing-type services without accompanying credit enhancement must still demonstrate compliance with all section 5b core principles to obtain unconditional registration as a DCO. The Commission may grant DCO registration with conditions when and as appropriate.

[10] The Act does not include an express time limit for Commission consideration of applications to become registered DCOs.

[11] An applicant's representation of how it will operate refers to the information the applicant must include in its application describing the operations and functions the applicant will undertake as a registered DCO.

[12] BOTCC CL at 3.

[13] *Id.*

[14] This information is essential to the Commission's oversight of DCOs. However, trade secrets and other proprietary information may be

Continued

If an applicant does not meet the registration requirements, Commission staff will inform the applicant of the shortcomings and notify it that review is being terminated under part 39 and will continue under section 6 of the Act. Within ten days of being notified, the applicant may ask the Commission either to register it or to commence registration denial proceedings. An applicant also may withdraw its application.

An applicant may request that the Commission approve any of its rules pursuant to the procedures and timeframes for approval provided by rule 40.5. An applicant may request approval of one or more of its rules at the time it makes its initial application, or thereafter. Under section 5b(c)(3) of the Act, an applicant also may request that the Commission issue an order concerning whether a rule or practice of the applicant is the least anticompetitive means of achieving the objectives, purposes, and policies of the Act. In considering any requests for such orders, the Commission will review the analysis submitted by the applicant with respect to the rule or practice in question and will apply section 15(b) of the Act in a manner consistent with its previous application of section 15 to contract markets.

*B. Existing Derivatives Clearing Organizations*

Section 5b(d) of the Act provides that existing DCOs shall be deemed to be registered with the Commission to the extent that the DCO clears agreements, contracts, or transactions for a board of trade that had been designated by the Commission as a contract market for such agreements, contracts, or transactions prior to enactment of the CFMA. In response to comments, the Commission clarifies that clearing organizations that are grandfathered under this provision need not apply to the Commission to clear new contracts that were not cleared before the date of enactment of the CFMA.[15]

*C. Derivatives Clearing Organizations*

1. Exemption

As proposed, rule 39.2 provided that a DCO and the clearing of transactions on a DCO would be exempt from all Commission regulations except for those contained in proposed parts 39 and 40,[16] and certain select regulations relating to, for example, the segregation of customer funds and recordkeeping.[17] In response to comments noting that only subsection (b) of Commission regulation 1.38 is relevant to the activities of DCOs, the Commission has amended proposed rule 39.2 to reserve only that subsection.[18] The Commission also has amended proposed rule 39.2 to delete reservation of the option anti-fraud provisions in Commission regulation 33.10, because part 39 contains its own anti-fraud rule, which applies to the activity of clearing option contracts otherwise covered by regulation 33.10.[19] Parts 15 through 18 of the Commission's regulations continue to be reserved in final rule 39.2 to the extent they are applicable. These provisions are reserved in connection with the Commission's authority to make special calls pursuant to rule 39.5(d).[20]

Final rule 39.2 continues to provide that the reserved regulations apply to DCOs as though they were set forth in part 39 and included specific reference to DCOs. The Commission agrees with BOTCC's suggestion that this drafting convention be extended so that references in the regulations to the terms ''clearinghouse'' and ''clearing organization'' shall be deemed to mean a ''derivatives clearing organization,'' and has modified rule 39.2 accordingly.[21]

2. Rules

Rule 39.4 provides that a DCO may request that the Commission approve any of its rules either prior to or after implementation of the rule(s).[22] Such requests will be processed under the applicable procedures of part 40. As provided by part 40 and rule 39.4, any new or amended rule not voluntarily submitted to the Commission for approval must be submitted with a certification that the new rule or amendment complies with the Act. Also as provided by part 40 and added in final rule 39.4, a DCO that accepts for clearing a new product that is not traded on a designated contract market or a registered derivatives transaction execution facility must submit to the Commission any rules establishing the terms and conditions of the product that make it acceptable for clearing with a certification that the clearing of the product and the rules and terms and conditions comply with the Act and the rules thereunder. A DCO also may request, at any time, that the Commission issue an order concerning whether any of its rules or practices is the least anticompetitive means of achieving the objectives, purposes, and policies of the Act. As with such requests accompanying applications, the Commission will review the analysis submitted with respect to the rule or practice in question and will apply section 15(b) of the Act in a manner consistent with its previous application of section 15 to contract markets.

3. Information

Rule 39.5 allows the Commission to request certain information from DCOs in order to carry out its oversight function. For example, rule 39.5(b) allows the Commission to ask a DCO to submit, in writing, information deemed necessary to demonstrate that the DCO is operating in compliance with one or more of the core principles. Such a request is an informal method of resolving compliance issues and is intended to be a preferable alternative to the more formal procedures of section 5c(d) of the Act. As proposed in rule 39.3(e), the Commission has delegated the authority to request information under 39.5(b) to specified staff. This delegation is consistent with the delegation of authority in rule 37.8(d) regarding information relating to transactions on derivatives transaction execution facilities and in rule 40.7(a)(1) regarding product and rule amendments and supplements. The authority under rule 39.5(b) is an important complement to the streamlined and reduced requirements of the CFMA. In response to concerns expressed by CME, the

entitled to protection under the Freedom of Information Act. *See* rule 39.3(a)(7). As has been the case in the past, the staff is prepared to work with applicants to arrange reasonable accommodations to address concerns about the relevance of disclosures or the volume of submissions.

[15] *See* CME CL at 1. They would, however, be required under section 5c(c) of the Act to provide certification that the clearing of the new contract(s) complies with the Act and the Commission's regulations. Self-certification procedures for products are provided under rule 40.2.

[16] Part 40 of the regulations, which contains provisions common to contract markets, derivatives transactions execution facilities and DCOs, was adopted by the Commission on August 1, 2000. *See* 66 FR 42256 (August 10, 2001).

[17] This included Commission Regulation 1.31, which was updated and amended by the Commission in 1999 to provide broad, flexible performance standards for recordkeeping. It is substantially similar to the recordkeeping requirements maintained by the Securities and Exchange Commission. Notwithstanding the basic non-mandatory nature of the guidance provided in the appendix to part 39, the Commission clarifies that, with respect to Core Principle K, a DCO's recordkeeping must satisfy the performance standards in Regulation 1.31 in order to demonstrate compliance with the core principle, because that rule has been reserved.

[18] *See* BOTCC CL at 2.

[19] *Id.*

[20] *Id. See generally* the discussion regarding information needed by the Commission to fulfill its oversight function under section II. C. 3., *infra.*

[21] BOTCC CL at 2.

[22] The Act limits a registered entity seeking approval to request approval only ''prior'' to implementation. The Commission is using its section 4(c) exemptive authority with respect to this provision to provide DCOs with greater procedural flexibility.

Commission affirms its intent that rule 39.5 be used only when there is a reasonable basis upon which to request information about the ongoing compliance by a DCO with one or more core principles.[23]

Rule 39.5(c) requires that large trader information be provided to the Commission by futures commission merchants, clearing members, and foreign brokers. In response to comments, the Commission does not believe it is necessary to expand this list to include foreign traders or participants in a DCO, as in each instance, the report would be filed through an entity included on the list. Rule 39.5(d) authorizes the Commission to make special calls for information concerning customer accounts from futures commission merchants, clearing members, or foreign brokers. Commission staff will limit special calls as needed to carry out the Commission's oversight function with respect to DCOs and their operations.

4. Enforceability

As proposed, rule 39.6 provided that a contract or transaction cleared pursuant to the rules of a DCO shall not be void, voidable, subject to rescission, or otherwise invalidated or rendered unenforceable as a result of a violation by the DCO of the provisions of section 5b of the Act or part 39, or as a result of any Commission proceeding to alter, supplement, or require the DCO to adopt a specific rule or procedure, or refrain from taking a specific action. In its comment letter, ISDA stated that the reference to contracts or transactions ''cleared pursuant to the rules'' may create ambiguity and uncertainty in that it does not clearly cover contracts or transactions cleared by non-registered DCOs. ISDA suggested clarifying the applicability of the enforceability provision by substituting the words ''submitted to a derivatives clearing organization for clearance'' for ''cleared pursuant to the rules.'' The Commission has considered ISDA's comment and has amended final rule 39.6 in this manner to clarify the rule's applicability to DCOs that are required to register, as well as those that are already registered, with the Commission. The Commission believes this clarification is appropriate in that enforceability of contracts extends not only to DCOs properly registered with the Commission, but to those that should be, but are not, registered with the Commission and consequently are in violation of Section 5b(a) of the Act.

The Commission's substitution of the words ''submitted to a derivatives clearing organization for clearance'' in final rule 39.6 also addresses BOTCC's suggestion that the Commission clarify that the enforceability provision applies to cleared transactions and to those submitted for clearing, but for which the clearing process was delayed or interrupted.[24] In addition, in response to BOTCC comments, the Commission has modified proposed rule 39.6 to apply to violations of any of the provisions of the Act or of the Commission's regulations, rather than to violations of section 5b of the Act or part 39 of the regulations only.[25]

5. Anti-fraud

As proposed, rule 39.7 prohibited fraudulent actions by persons ''in or in connection with'' the clearing of transactions on a DCO. Both CME and ISDA commented that the proposed rule could be interpreted to apply to fraud with respect to aspects of a transaction cleared by a DCO other than the activity of clearing. ISDA asserted that the rule should be narrowly construed to mean fraud specific to the clearing function and not in connection with the solicitation or execution of a transaction merely because the transaction is also cleared.[26] CME stated that the rule could be read to apply to the execution of transactions cleared by a DCO even if the transaction would otherwise be outside the Commission's jurisdiction.[27] CME argued that participants in derivatives markets unregulated by the CFTC will arrange to have such transactions cleared by non-DCO clearing organizations if there appears to be any chance that rule 39.7 could subject their transactions to CFTC jurisdiction.[28]

In response to these comments, the Commission reaffirms that transactions that are outside the CFTC's jurisdiction do not become subject to its jurisdiction simply because they are cleared by a DCO. Thus, rule 39.7 does not govern, cover, or relate to the solicitation or execution of transactions. This is consistent with rule 39.6, which provides that a violation of any Commission regulation, which would include rule 39.7, does not affect the enforceability of transactions submitted for clearance on a DCO, and with the CFMA's separate treatment of clearing from the transaction facilities for which transactions are cleared.

BOTCC also requested confirmation that proof of scienter is needed for violations of rule 39.7.[29] The Commission confirms that violations of the anti-fraud provision do require proof of scienter.[30]

*D. Application Guidance and Compliance With Core Principles*

In order to become registered, an applicant must demonstrate the ability to comply with the core principles for DCOs set forth in Section 5b of the Act. In order to remain registered, a DCO must continue to comply with the core principles. An applicant or DCO has reasonable discretion in establishing the manner in which it demonstrates its ability to comply with the core principles or its ongoing compliance. Appendix A to part 39 provides guidance that applicants and DCOs can use to demonstrate initial ability to comply and continuing compliance with the core principles. The guidance illustrates the manner in which a clearing organization may meet a core principle and is not intended to be a mandatory checklist.

The proposed guidance for Core Principle B—Financial Resources—addressed the ''amount'' of resources dedicated to supporting the clearing function. As proposed, this guidance referred to the amount of resources available and their sufficiency to assure that no break in clearing operations will occur in a variety of market conditions. In response to comments, point 1 of the guidance has been modified to refer to the ''level'' rather than the ''amount'' of resources and assurance that no ''material adverse'' break in clearing

[23] *See* CME CL at 2–3. In order to perform properly its oversight function with respect to the core principles, such a request may include information related to the DCO's broader business as a clearing organization in addition to its business as a registered DCO, because the ability to fulfill the latter function may potentially be affected by the former. *See* BOTCC CL at 5.

[24] *See* BOTCC CL at 6, n.9. BOTCC notes that this distinction could be important in circumstances where the insolvency of a clearing member or DCO participant interferes with normal clearing processes.

[25] *See* BOTCC CL at 6.

[26] *See* ISDA CL at 3–4.

[27] *See* CME CL at 1–2.

[28] *See* CME CL at 2.

[29] *See* BOTCC CL at 6.

[30] This is consistent with other anti-fraud provisions such as Section 4(b) of the Act, Commission regulation 30.9 (concerning fraud involving foreign futures contracts) and Commission regulation 33.10 (concerning fraud in connection with domestic exchange-traded option transactions). The Commission has held that Regulations 30.9 and 33.10 require proof of scienter. *See, e.g.*, In Re Staryk [1996–1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,810 (CFTC Dec. 18, 1997). The Commission also removed the words ''other'' and ''thereof'' twice each from rule 39.7. These words do not serve a useful purpose in the rule and their removal does not change the meaning or application of the rule, but does make it consistent with rule 1.1 recently adopted by the Commission. *See* 66 FR 42256 (August 10, 2001). Rule 1.1 concerns fraud in or in connection with transactions in foreign currency subject to the Act.

operations will occur.[31] Point 2 continues to refer to the ''nature'' of the resources. The Commission recognizes that it may be difficult to quantify resource allocations. Thus, in the final guidance it suggests that applicants or DCOs may provide information describing the level and nature of resources available to support the clearing function, rather than the specific or exact amount of resources available at any one time. In addition, the Commission recognizes that certain temporary breakdowns that do not materially affect the clearing function do and will occur. The Commission notes that the guidance relevant to this issue addresses the allocation of sufficient resources to prevent breakdowns of a serious and fundamental nature that would materially, adversely affect an applicant's or DCO's ability to fulfill its basic clearing services.[32] Furthermore, reference in the guidance to a credit enhancement function is not intended to imply a requirement that a DCO provide that function.[33]

Point 2 of the proposed guidance under Core Principle B—Financial Resources—addressed the updating and reporting of certain financial information. With respect to public disclosure, this guidance has been amended so as to apply only ''when appropriate.'' Information is not expected to be made publicly available if it is not appropriate to do so, as in the case of certain confidential and proprietary financial and commercial information.[34] The proposed guidance on Core Principle L—Public Information—also referred to public disclosure and concerned rules and operating procedures governing clearing and settlement systems. This guidance has not been altered from its proposed form and is consistent with guidance regarding public disclosure of similar material by contract markets or applicants therefor.[35]

As proposed, point 3 of the guidance for Core Principle C—Participant and Product Eligibility—suggested that an applicant or DCO describe how it would establish criteria for the transactions it will clear, and point 2 of the guidance for Core Principle D—Risk Management—suggested providing a description of how appropriate forms and levels of collateral would be established and collected. In response to comments, these points have been reworded to clarify that the information suggested as relevant to demonstrating compliance relates to the different factors the applicant or DCO will consider in carrying out its responsibilities, rather than its internal procedures.[36] In addition, the words ''where applicable'' have been added to subpart (b) of point 2 of the guidance for Core Principle D, referring to sufficient resources to perform the central counterparty function, in recognition of the fact that the definition of DCO does not require the performance of a direct credit enhancement function.[37]

Point 1 of the guidance under Core Principle G—Default Rules and Procedures—has been revised to suggest more clearly that relevant information includes how the applicant or DCO defines default, what steps would be taken in the event of a default, and steps that would be taken in situations related to, but which may not constitute, default.[38] Point 5 of the guidance for Core Principle G concerning default rules and procedures suggests that applicants or DCOs address rules and procedures regarding priority of customer accounts over proprietary accounts of defaulting members/participants. In response to comments, the Commission clarifies that this is not meant, and should not be interpreted, to imply that customer priority procedures are a necessary element in the structure of all DCOs.[39] Rules and procedures regarding priority of customer accounts are only relevant with respect to a DCO that directly or indirectly clears contracts for one or more accounts that are customer accounts in the particular market for which it is clearing, while also clearing non-customer or proprietary accounts.

Point 2 of the proposed guidance for Core Principle I—System Safeguards—suggested that applicants or DCOs provide confirmation that system testing and review will be performed or assessed by a qualified independent professional. In response to comments, the Commission has clarified that a qualified independent professional need not necessarily be external to the organization to be considered independent.[40] An internal reviewer may qualify as independent if he/she is independent of the activities being audited and is organizationally able to render an objective assessment.

## III. Section 4(c) Findings

Section 4(c) of the Act provides that, in order to promote responsible economic or financial innovation and fair competition, the Commission may by rule, regulation or order exempt any class of agreements, contracts, or transactions, either unconditionally or on stated terms or conditions, from any of the requirements of any provision of the Act (except certain provisions governing a group or index of securities and security futures products). As relevant here, when granting an exemption pursuant to section 4(c), the Commission must find that the exemption would be consistent with the public interest.

The Commission is using its section 4(c) exemptive authority here to provide registered entities with greater procedural flexibility than is contained in the Act. Pursuant to rule 39.4, a DCO may request that the Commission approve its rules or rule amendments prior to their implementation, or any time thereafter, notwithstanding the Act's limitation on registered entities seeking approval to do so only prior to implementation.[41] The Commission believes this exercise of exemptive authority should provide DCOs with greater procedural flexibility. Accordingly, the Commission finds under section 4(c) of the Act that the exemption is consistent with the public interest. The Commission also notes that it will consider, under its section 4(c) exemptive authority, requests by designated contract markets to use the clearing services of organizations other than DCOs registered with the Commission.

## IV. Consideration of Costs and Benefits

Section 15 of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before promulgating a new regulation under the Act. The Commission has applied the cost-benefit provisions of section 15 in this rulemaking and understands that, by its terms, section 15 as amended does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, section 15 simply requires the Commission to ''consider the costs and benefits'' of its action.

The amended section 15 further specifies that costs and benefits shall be

[31] *See* BOTCC CL at 7.

[32] *See* BOTCC CL at 7.

[33] *See* ISDA CL at 4; *see also* footnote 9, supra.

[34] *See* BOTCC CL at 7.

[35] *See* the application guidance for designation criterion 7 of section 5(b) of the Act and the guidance on, and acceptable practices for, complying with core principles 7 and 10 of section 5(d) of the Act; *see also* BOTCC CL at 7.

[36] *See* BOTCC CL at 8.

[37] *See* footnote 9 and text accompanying footnote 33.

[38] *See* BOTCC CL at 8.

[39] *See* ISDA CL at 4–5.

[40] *See* BOTCC CL at 8.

[41] *See* section 5c(c)(2) of the Act.

evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

Part 39 is part of a package of related rule provisions implementing the CFMA. The Commission has considered the costs and benefits of part 39 and the costs and benefits of the related rule provisions. Significantly, part 39 limits the period of time for Commission review of DCO applications to 60 days, thereby providing the important benefit of an expedited review, even though the Act does not specify any time limit for review of DCO applications. Part 39 also provides the benefit of substantial, additional, non-binding guidance to DCO applicants and DCOs as to how they may comply with the statutory core principles. The rules impose reporting, recordkeeping and other informational requirements on DCOs only when they are mandated by, carry out, or are fully consistent with, the new provisions of the CFMA concerning DCOs.

The Commission has considered the costs and benefits of this rule package in light of the specific areas of concern identified in the CFMA. The rules impose limited costs on DCOs in requiring them to gather, compile, and submit certain information that the Commission needs in order to oversee their clearing functions and to enforce their compliance with the Act. The rules will not increase costs related to market competitiveness and will not affect the price discovery function of markets. The Commission believes that the anti-fraud provision of part 39 benefits market participants and the public interest by deterring illegal behavior and that the enforceability provision of part 39 benefits the public interest by furthering legal certainty.

After considering these factors, the Commission has determined to promulgate part 39. The Commission notes that it did not receive any comments in response to the discussion regarding the costs and benefits of part 39 included in the proposal. Moreover, insofar as the comments received raised any matters that might be deemed to relate to the costs and benefits of part 39, the Commission has addressed them in the foregoing discussion and through modifications to the original proposal.

## V. Implementation Issues; No-action

In light of Congress's intent to implement the changes of the CFMA without delay, the Commission determined when it proposed these rules that it would not bring any enforcement action against any person who complied with the proposed rules during the transition period between the effective date of the amendments to the Act (generally December 21, 2000) and the adoption of final implementing regulations. 66 FR at 24310. At that time, the Commission also advised persons relying on that no-action position that they would be required to bring their conduct into compliance with the final rules to the extent that the final rules differed from the proposed rules. *Id.*

The rules being adopted today will become effective October 29, 2001. To the extent that the final rules differ from the proposed rules, persons relying on the no-action position of the proposed rules will be required to bring their conduct into compliance with the final rules in order to continue to rely on the no-action. Furthermore, the Commission will not bring any enforcement action against any person who complies with the final rules during the period between their adoption and effective date.

## VI. Related Matters

### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires that agencies, in promulgating rules, consider the impact of those regulations on small entities. The rules adopted herein would affect DCOs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[42] In its previous determinations, the Commission has concluded that contract markets are not small entities for purposes of the RFA.[43] DCOs clear contracts executed on contract markets and other trading facilities. For reasons similar to those applicable to contract markets, DCOs, as defined in the CFMA, should not be considered small entities. In this regard, the Commission notes that it did not receive any comments regarding the RFA implications of part 39. Accordingly, the Commission does not expect the rules, as adopted herein, to have a significant economic impact on a substantial number of small entities. Therefore, the Acting Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the promulgated rules will not have a significant economic impact on a substantial number of small entities.

[42] 47 FR 18618 (April 30, 1982).

[43] 47 FR 18618, 18619 (discussing contract markets).

### *B. Paperwork Reduction Act*

Part 39 contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Commission submitted a copy of this part to the Office of Management and Budget (''OMB'') for its review. No comments were received in response to the Commission's invitation in the proposing release to comment on any potential paperwork burden associated with part 39.

### List of Subjects in 17 CFR Part 39

Commodity futures, Consumer protection.

In consideration of the foregoing, and pursuant to the authority contained in section 7b of title 7 of the U.S.C., as added by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000), the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations by adding part 39 to read as follows:

## PART 39—DERIVATIVES CLEARING ORGANIZATIONS

Sec.



**Authority:** 7 U.S.C. 7b as added by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

### § 39.1 Scope.

The provisions of this part apply to any derivatives clearing organization as defined under section 1a(9) of the Act which is registered or deemed to be registered with the Commission as a

derivatives clearing organization, is required to register as such with the Commission pursuant to section 5b(a) of the Act, or which voluntarily applies to register as such with the Commission pursuant to section 5b(b) or otherwise.

**§ 39.2 Exemption.**

A derivatives clearing organization and the clearing of agreements, contracts and transactions on a derivatives clearing organization are exempt from all Commission regulations except for the requirements of this part 39 and §§ 1.3, 1.12(f)(1), 1.20, 1.24, 1.25, 1.26, 1.27, 1.29, 1.31, 1.36, 1.38(b), part 40 and part 190 of this chapter, and as applicable to the agreement, contract or transaction cleared, parts 15 through 18 of this chapter. The foregoing reserved regulations are applicable to a derivatives clearing organization and its activities as though they were set forth in this section and included specific reference to derivatives clearing organizations. Any reference to the term ''clearinghouse'' or ''clearing organization'' contained in the regulations shall be deemed to refer to a derivatives clearing organization.

**§ 39.3 Procedures for registration.**

(a) *Registration by application.* An organization shall be deemed to be registered as a derivatives clearing organization sixty days after receipt by the Commission of an application for registration as a derivatives clearing organization unless notified otherwise during that period, or, as determined by Commission order, registered upon conditions, if:

(1) The application is labeled as being submitted pursuant to this part 39;

(2) The applicant represents that it will operate in accordance with the definition of derivatives clearing organization contained in section 1a(9) of the Act;

(3) The application includes a copy of the applicant's rules;

(4) To the extent it is not self evident from the applicant's rules, the application demonstrates how the applicant is able to satisfy each of the core principles specified in section 5b(c)(2) of the Act;

(5) The applicant submits agreements entered into or to be entered into between or among the applicant, its operator or its participants, and descriptions of system test procedures, tests conducted or test results, that will enable the applicant to comply, or demonstrate the applicant's ability to comply, with the core principles specified in section 5b(c)(2) of the Act;

(6) The applicant does not amend or supplement the application except as requested by the Commission or for correction of typographical errors, renumbering or other nonsubstantive revisions, during that period;

(7) The applicant identifies with particularity information in the application that will be subject to a request for confidential treatment and supports that request for confidential treatment with reasonable justification; and

(8) The applicant has not instructed the Commission in writing during the review period to review the application pursuant to the time provisions of and procedures under section 6 of the Act.

(b) *Termination of part 39 review.* If, during the sixty-day period for review provided by paragraph (a) of this section, it appears that the application's form or substance fails to meet the requirements of this part, the Commission shall notify the applicant seeking registration that the Commission is terminating review under this section and will review the proposal under the time period and procedures of section 6 of the Act. This termination notification will state the nature of the issues raised and the specific condition of registration that the applicant would violate, appears to violate, or the violation of which cannot be ascertained from the application. Within ten days of receipt of this termination notification, the applicant seeking registration may request that the Commission render a decision whether to register the applicant or to institute a proceeding to deny the proposed application under procedures specified in section 6 of the Act by notifying the Commission that the applicant views its submission as complete and final as submitted.

(c) *Withdrawal of application for registration.* An applicant for registration may withdraw its application by filing with the Commission such a request. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application for registration was pending with the Commission.

(d) *Guidance for applicants and registrants.* Appendix A to this part provides guidance to applicants and registrants on how the core principles specified in section 5b(c)(2) of the Act may be satisfied.

(e) *Delegation of authority.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Trading and Markets or the Director's delegatees, with the concurrence of the General Counsel or the General Counsel's delegatees, the authority to exercise the functions under paragraphs (a) and (b) of this section and under § 39.5.

(2) The Director of the Division of Trading and Markets may submit to the Commission for its consideration any matter which has been delegated in this paragraph.

(3) Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in paragraph (e)(1) of this section.

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

(a) *Request for approval of rules.* An applicant for registration, or a registered derivatives clearing organization, may request, pursuant to the procedures of § 40.5 of this chapter, that the Commission approve any or all of its rules and subsequent amendments thereto, including operational rules, prior to their implementation or, notwithstanding the provisions of section 5c(c)(2) of the Act, at any time thereafter, under the procedures of § 40.5 of this chapter. A derivatives clearing organization may label as, ''Approved by the Commission,'' only those rules that have been so approved.

(b) *Self-certification of rules.* Proposed new or amended rules of a derivatives clearing organization not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section must be submitted to the Commission with a certification that the proposed new rule or rule amendment complies with the Act and rules thereunder pursuant to the procedures of § 40.6 of this chapter.

(c) *Acceptance of certain new products for clearing.* A derivatives clearing organization that accepts for clearing a new product that is not traded on a designated contract market or a registered derivatives transaction execution facility must submit to the Commission any rules establishing the terms and conditions of the product that make it acceptable for clearing with a certification that the clearing of the product and the rules and terms and conditions comply with the Act and the rules thereunder pursuant to the procedures of § 40.2 of this chapter.

(d) *Orders regarding competition.* An applicant or a registered derivatives clearing organization may request that the Commission issue an order concerning whether a rule or practice of the organization is the least anticompetitive means of achieving the objectives, purposes, and policies of the Act.

**§ 39.5 Information relating to derivatives clearing organization operations.**

(a) Upon request by the Commission, a derivatives clearing organization shall file with the Commission such information related to its business as a clearing organization, including information relating to trade and clearing details, in the form and manner and within the time as specified by the Commission in the request.

(b) Upon request by the Commission, a derivatives clearing organization 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 derivatives clearing organization is in compliance with one or more core principles as specified in the request.

(c) Information regarding transactions by large traders cleared by a derivatives clearing organization shall be filed with the Commission, in a form and manner acceptable to the Commission, by futures commission merchants, clearing members, foreign brokers or registered entities other than a derivatives clearing organization, as applicable. Provided, however, that if no such person or entity is required to file large trader information with the Commission, such information must be filed with the Commission by a derivatives clearing organization.

(d) Upon special call by the Commission, each futures commission merchant, clearing member or foreign broker shall provide information to the Commission concerning customer accounts or related positions cleared on a derivatives clearing organization or other multilateral clearing organization in the form and manner and within the time specified by the Commission in the special call.

**§ 39.6 Enforceability.**

An agreement, contract or transaction submitted to a derivatives clearing organization for clearance shall not be void, voidable, subject to rescission, or otherwise invalidated or rendered unenforceable as a result of:

(a) A violation by the derivatives clearing organization of the provisions of the Act or of Commission regulations; or

(b) Any Commission proceeding to alter or supplement a rule 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 a derivatives clearing organization to adopt a specific rule or procedure, or to take or refrain from taking a specific action.

**§ 39.7 Fraud in connection with the clearing of transactions on a derivatives clearing organization.**

It shall be unlawful for any person, directly or indirectly, in or in connection with the clearing of transactions by a derivatives clearing organization:

(a) To cheat or defraud or attempt to cheat or defraud any person;

(b) Willfully to make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or

(c) Willfully to deceive or attempt to deceive any person by any means whatsoever.

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

This appendix provides guidance concerning the core principles with which applicants must demonstrate the ability to comply and with which registered derivatives clearing organizations must continue to comply to be granted and to maintain registration as a derivatives clearing organization under section 5b of the Act and § 39.3 and § 39.5 of the Commission's regulations. The guidance follows each core principle and can be used to demonstrate core principle compliance under § 39.3(a)(iv) and § 39.5(d). The guidance for each core principle is illustrative only of the types of matters a clearing organization may address, as applicable, and is not intended to be a mandatory checklist. Addressing the criteria set forth in this appendix would help the Commission in its consideration of whether the clearing organization is in compliance with the core principles. To the extent that compliance with, or satisfaction of, a core principle is not self-explanatory from the face of a clearing organization's rules, an application pursuant to § 39.3 or a submission pursuant to § 39.5 should include an explanation or other form of documentation demonstrating that the clearing organization is able to or does comply with the core principles.

*Core Principle A: IN GENERAL—To be registered and to maintain registration as a derivatives clearing organization, an applicant shall demonstrate to the Commission that the applicant complies with the core principles specified in this paragraph. The applicant shall have reasonable discretion in establishing the manner in which it complies with the core principles.*

An entity preparing to submit to the Commission an application to operate as a derivatives clearing organization is encouraged to contact Commission staff for guidance and assistance in preparing its application. Applicants may submit a draft application for review prior to the submission of an actual application without triggering the application review procedures of § 39.3 of the Commission's regulations. The Commission also may require a derivatives clearing organization to demonstrate to the Commission that it is operating in compliance with one or more core principles.

Core Principle B: FINANCIAL RESOURCES—The applicant shall demonstrate that the applicant has adequate financial, operational, and managerial resources to discharge the responsibilities of a derivatives clearing organization.

In addressing Core Principle B, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. The resources dedicated to supporting the clearing function:

a. The level of resources available to the clearing organization and the sufficiency of those resources to assure that no material adverse break in clearing operations will occur in a variety of market conditions; and

b. The level of member/participant default such resources could support as demonstrated through use of hypothetical default scenarios that explain assumptions and variables factored into the illustrations.

2. The nature of resources dedicated to supporting the clearing function:

a. The type of the resources, including their liquidity, and how they could be accessed and applied by the clearing organization promptly;

b. How financial and other material information will be updated and reported to members, the public, if and when appropriate, and to the Commission on an ongoing basis; and

c. Any legal or operational impediments or conditions to access.

*Core Principle C: PARTICIPANT AND PRODUCT ELIGIBILITY—The applicant shall establish (i) appropriate admission and continuing eligibility standards (including appropriate minimum financial requirements) for members of and participants in the organization; and (ii) appropriate standards for determining eligibility of agreements, contracts, or transactions submitted to the applicant.*

In addressing Core Principle C, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Member/participant admission criteria:

a. How admission standards for its clearing members/participants would contribute to the soundness and integrity of operations; and

b. Matters such as whether these criteria would be in the form of organization rules that apply to all clearing members/participants, whether different levels of membership/participation would relate to different levels of net worth, income, and creditworthiness of members/participants, and whether margin levels, position limits and other controls would vary in accordance with these levels.

2. Member/participant continuing eligibility criteria:

a. A program for monitoring the financial status of its members/participants; and

b. Whether and how the clearing organization would be able to change continuing eligibility criteria in accordance

with changes in a member's/participant's financial status.

3. Criteria for instruments acceptable for clearing:

a. The criteria, and the factors considered in establishing the criteria, for the types of agreements, contracts, or transactions it will clear; and

b. How those criteria take into account the different risks inherent in clearing different agreements, contracts, or transactions and how they affect maintenance of assets to support the guarantee function in varying risk environments.

4. The clearing function for each instrument the organization undertakes to clear.

*Core Principle D: RISK MANAGEMENT—The applicant shall have the ability to manage the risks associated with discharging the responsibilities of a derivatives clearing organization through the use of appropriate tools and procedures.*

In addressing Core Principle D, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Use of risk analysis tools and procedures:

a. How the adequacy of the overall level of financial resources would be tested on an ongoing periodic basis in a variety of market conditions;

b. How the organization would use specific risk management tools such as stress testing and value at risk calculations; and

c. What contingency plans the applicant has for managing extreme market events.

2. Use of collateral:

a. What forms and levels of collateral would be established and collected;

b. How amounts would be adequate to secure prudentially obligations arising from clearing transactions and, where applicable, performing as a central counterparty;

c. The factors considered in determining appropriate margin levels for an instrument cleared and for clearing members/participants;

d. The appropriateness of required or allowed forms of margin given the liquidity and related requirements of the clearing organization;

e. How the clearing organization would value open positions and collateral assets; and

f. The proposed margin collection schedule and how it would relate to changes in the value of market positions and collateral values.

3. Use of credit limits:

If systems would be implemented that would prevent members/participants and other market participants from exceeding credit limits and how they would operate.

*Core Principle E: SETTLEMENT PROCEDURES—The applicant shall have the ability to (i) complete settlements on a timely basis under varying circumstances; (ii) maintain an adequate record of the flow of funds associated with each transaction that the applicant clears; and (iii) comply with the terms and conditions of any permitted netting or offset arrangements with other clearing organizations.*

In addressing Core Principle E, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Settlement timeframe:

a. Procedures for completing settlements on a timely basis during times of normal operating conditions; and

b. Procedures for completing settlements on a timely basis in varying market circumstances including during a period when one or more significant members/participants have defaulted.

2. Recordkeeping:

a. The nature and quality of the information collected concerning the flow of funds involved in clearing and settlement; and

b. How such information would be recorded, maintained and accessed.

3. Interfaces with other clearing organizations:

How compliance with the terms and conditions of netting or offset arrangements with other clearing organizations would be met, including, among others, common banking or common clearing programs.

Core Principle F: TREATMENT OF FUNDS—The applicant shall have standards and procedures designed to protect and ensure the safety of member and participant funds.

In addressing Core Principle F, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Safe custody:

a. The safekeeping of funds, whether in accounts, in depositories, or with custodians, and how it would meet industry standards of safety;

b. Any written terms regarding the legal status of the funds and the specific conditions or prerequisites for movement of the funds; and

c. The extent to which the deposit of funds in accounts in depositories or with custodians would limit concentration of risk.

2. Segregation between customer and proprietary funds:

Requirements or restrictions regarding commingling customer funds with proprietary funds, obligating customer funds for any purpose other than to purchase, clear, and settle the products the clearing organization is clearing, or procedures regarding customer funds which are subject to cross-margin or similar agreements, and any other aspects of customer fund segregation.

3. Investment standards:

a. How customer funds would be invested consistent with high standards of safety; and

b. How the organization will gather and keep associated records and data regarding the details of such investments.

*Core Principle G: DEFAULT RULES AND PROCEDURES—The applicant shall have rules and procedures designed to allow for efficient, fair, and safe management of events when members or participants become insolvent or otherwise default on their obligations to the derivatives clearing organization.*

In addressing Core Principle G, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Definition of default:

a. The events that will constitute member or participant default;

b. What action the organization would take upon a default and how the organization would otherwise enforce the definition of default; and

c. How the organization would address situations related to but which may not constitute an event of default, such as failure to comply with certain rules, failure to maintain eligibility standards, actions taken by other regulatory bodies, or other events.

2. Remedial action:

The authority pursuant to which, and how, the clearing organization may take appropriate action in the event of the default of a member/participant which may include, among other things, closing out positions, replacing positions, set-off, and applying margin.

3. Process to address shortfalls:

Procedures for the prompt application of clearing organization and/or member/participant financial resources to address monetary shortfalls resulting from a default.

4. Use of cross-margin programs:

How cross-margining programs would provide for clear, fair, and efficient means of covering losses in the event of a program participant default.

5. Customer priority rule:

Rules and procedures regarding priority of customer accounts over proprietary accounts of defaulting members/participants and, where applicable, in the context of specialized margin reduction programs such as cross-margining or trading links with other exchanges.

*Core Principle H: RULE ENFORCEMENT—The applicant shall (i) maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with rules of the applicant and for resolution of disputes; and (ii) have the authority and ability to discipline, limit, suspend, or terminate a member's or participant's activities for violations of rules of the applicant.*

In addressing Core Principle H, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Surveillance:

Arrangements and resources for the effective monitoring of compliance with rules relating to clearing practices and financial surveillance.

2. Enforcement:

Arrangements and resources for the effective enforcement of rules and authority and ability to discipline and limit or suspend a member's/participant's activities pursuant to clear and fair standards.

3. Dispute resolution:

Where applicable, arrangements and resources for resolution of disputes between customers and members/participants, and between members/participants.

*Core Principle I: SYSTEM SAFEGUARDS—The applicant shall demonstrate that the applicant (i) has established and will maintain a program of oversight and risk analysis to ensure that the automated systems of the applicant function properly and have adequate capacity and security;*

*and (ii) has established and will maintain emergency procedures and a plan for disaster recovery, and will periodically test backup facilities sufficient to ensure daily processing, clearing, and settlement of transactions.*

In addressing Core Principle I, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Oversight/risk analysis program:

a. Whether a program addresses appropriate principles and procedures for the oversight of automated systems to ensure that its clearing systems function properly and have adequate capacity and security. The Commission believes that the guidelines issued by the International Organization of Securities Commissions (IOSCO) in 1990 and adopted by the Commission on November 21, 1990 (55 FR 48670), as supplemented in October 2000, are appropriate guidelines for an automated clearing system to apply.

b. Emergency procedures and a plan for disaster recovery; and

c. Periodic testing of back-up facilities and ability to provide timely processing, clearing, and settlement of transactions.

2. Appropriate periodic objective system reviews/testing:

a. Any program for the periodic objective testing and review of the system, including tests conducted and results; and

b. Confirmation that such testing and review would be performed or assessed by a qualified independent professional.

*Core Principle J: REPORTING—The applicant shall provide to the Commission all information necessary for the Commission to conduct the oversight function of the applicant with respect to the activities of the derivatives clearing organization.*

In addressing Core Principle J, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Information available to or generated by the clearing organization that will be made routinely available to the Commission, upon request and/or as appropriate, to enable the Commission to perform properly its oversight function, including information regarding counterparties and their positions, stress test results, internal governance, legal proceedings, and other clearing activities;

2. Information the clearing organization will make available to the Commission on a non-routine basis and the circumstances which would trigger such action;

3. The information the organization intends to make routinely available to members/participants and/or the general public; and

4. Provision of information:

a. The manner in which all relevant routine or non-routine information will be provided to the Commission, whether by electronic or other means; and

b. The manner in which any information will be made available to members/participants and/or the general public.

*Core Principle K: RECORDKEEPING—The applicant shall maintain records of all activities related to the business of the applicant as a derivatives clearing organization in a form and manner acceptable to the Commission for a period of 5 years.*

In addressing Core Principle K, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. The different activities related to the entity as a clearing organization for which it must maintain records; and

2. How the entity would satisfy the performance standards of Commission regulation 1.31 (17 CFR 1.31), reserved in this part 39 and applicable to derivatives clearing organizations, including:

a. What ''full'' or ''complete'' would encompass with respect to each type of book or record that would be maintained;

b. The form and manner in which books or records would be compiled and maintained with respect to each type of activity for which such books or records would be kept;

c. Confirmation that books and records would be open to inspection by any representative of the Commission or of the U.S. Department of Justice;

d. How long books and records would be readily available and how they would be made readily available during the first two years; and

e. How long books and records would be maintained (and confirmation that, in any event, they would be maintained for at least five years).

*Core Principle L: PUBLIC INFORMATION—The applicant shall make information concerning the rules and operating procedures governing the clearing and settlement systems (including default procedures) available to market participants.*

In addressing Core Principle L, applicants and registered derivatives clearing organizations may describe or otherwise document:

Disclosure of information regarding rules and operating procedures governing clearing and settlement systems:

a. Which rules and operating procedures governing clearing and settlement systems should be disclosed to the public, to whom they would be disclosed, and how they would be disclosed;

b. What other information would be available regarding the operation, purpose and effect of the clearing organization's rules;

c. How members/participants may become familiar with such procedures before participating in operations; and

d. How members/participants will be informed of their specific rights and obligations preceding a default and upon a default, and of the specific rights, options and obligations of the clearing organization preceding and upon the member's/participant's default.

*Core Principle M: INFORMATION SHARING—The applicant shall (i) enter into and abide by the terms of all appropriate and applicable domestic and international information-sharing agreements; and (ii) use relevant information obtained from the agreements in carrying out the clearing organization's risk management program.*

In addressing Core Principle M, applicants and registered derivatives clearing organizations may describe or otherwise document:

1. Applicable appropriate domestic and international information-sharing agreements and arrangements including the different types of domestic and international information-sharing arrangements, both formal and informal, which the clearing organization views as appropriate and applicable to its operations.

2. How information obtained from information-sharing arrangements would be used to carry out risk management and surveillance programs:

a. How information obtained from any information-sharing arrangements would be used to further the objectives of the clearing organization's risk management program and any of its surveillance programs including financial surveillance and continuing eligibility of its members/participants;

b. How accurate information is expected to be obtained and the mechanisms or procedures which would make timely use and application of all information; and

c. The types of information expected to be shared and how that information would be shared.

*Core Principle N: ANTITRUST CONSIDERATIONS—Unless appropriate to achieve the purposes of this Act, the derivatives clearing organization shall avoid (i) adopting any rule or taking any action that results in any unreasonable restraint of trade; or (ii) imposing any material anticompetitive burden on trading on the contract market.*

Pursuant to section 5b(c)(3) of the Act, a registered derivatives clearing organization or an entity seeking registration as a derivatives clearing organization may request that the Commission issue an order concerning whether a rule or practice of the organization is the least anticompetitive means of achieving the objectives, purposes, and policies of the Act. 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.

Issued in Washington, DC on August 22, 2001, by the Commission.

**Jean A. Webb,**

*Secretary of the Commission.*

[FR Doc. 01–21670 Filed 8–28–01; 8:45 am]

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## DEPARTMENT OF THE TREASURY

## Bureau of Alcohol, Tobacco and Firearms

## 27 CFR Parts 44, 46 and 275

**[T.D. ATF–465 ; Ref: Notice No. 913]**

**RIN 1512–AC35**

## Implementation of Public Laws 106–476 and 106–554, Relating to Tobacco Importation Restrictions, Markings, Repackaging, and Destruction of Forfeited Tobacco Products (2000R–492P)

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.