

positions in all physical commodity futures traded on DCMs and uses it for market surveillance purposes, including position limit enforcement. With today's proposed rule, we would have an analogous reporting system for swaps.

The proposal would require position reports on economically equivalent swaps from clearing organizations, their members and swap dealers. This will enable the CFTC to receive such data until swap data repositories are in operation and capable of fulfilling the Commission's need for this information.

#### **Concurring Statement of Commissioner Jill E. Sommers**

##### *Relating to the Commission's Proposal on Position Reports for Physical Commodity Swaps and Swaptions*

October 19, 2010

I support this proposal to receive daily position reports for physical commodity swaps and swaptions because I believe it furthers our continued effort to expand transparency into swap markets and because I believe it is critical that the Commission receive this information as soon as possible. I recognize that this proposal is a precursor to the Commission moving forward with a proposal on the imposition of position limits. That said, my vote in support of this proposal today should not in any way be interpreted as expressing support for moving forward with the imposition of position limits by the deadlines set forth in Dodd-Frank.

In July and August 2009, the Commission held three public hearings to discuss imposition of position limits in energy markets. Five months later, in January 2010, the Commission issued a proposed rule imposing position limits in four enumerated energy contracts. I had grave concerns about moving forward with position limits on those four contracts, and accordingly voted against the proposal. My grave concerns about moving forward with position limits have not been eased, and in fact, have only been heightened by certain provisions of Dodd-Frank.

Section 737 of Dodd-Frank states that the Commission shall by rule, regulation, or order establish limits on the amount of positions, *as appropriate*, that may be held by any person. This section requires the limits to be aggregated across markets and related products and to be imposed within 180 days for energy and metals contracts, and 270 days for agricultural contracts.

In my view, no position limit is appropriate if it is imposed without the benefit of receiving and fully analyzing complete data concerning the open

interest in each market. Only then is the Commission able to properly consider the size of each market and calibrate a limit that is appropriate for each market. Currently, the Commission does not have complete data and will not have complete data until swap data repositories are up and running and all swap market data is reported to swap data repositories or to the Commission. I believe that, optimistically, the earliest this reporting can happen will be by the end of 2011. Again that is an optimistic estimate.

Because of the 180 and 270 day requirements in Dodd-Frank, as we sit here today, the Commission is tentatively planning a November 30 public meeting to vote on proposed speculative position limits for exempt and agricultural commodities. Mind you, by November 30 the Commission will not have garnered any data from the proposed rule we are discussing today, because it, or some modified version of it, probably will not be effective in final form by November 30. In addition, by November 30, swap data repositories will still be at least one year away from operating. Even if the proposed rule we are discussing today were effective by November 30, it will not provide complete information sufficient to impose position limits.

Under these circumstances, when considering the imposition of aggregate position limits on exempt and agricultural commodities, I believe the Commission should find that imposing such limits is not appropriate in the absence of full and complete data and analysis on the open interest in each market. I believe it is a mistake to interpret the arbitrary 180 day and 270 day deadlines as somehow trumping the requirement that the Commission make an appropriateness determination before imposing any position limits.

This is an issue that I will be following closely, and I look forward to hearing the views of the public and market participants on this issue.

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#### **COMMODITY FUTURES TRADING COMMISSION**

##### **17 CFR Parts 39 and 140**

**RIN 3038-AD00**

#### **Process for Review of Swaps for Mandatory Clearing**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is proposing rules to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These proposed rules apply to the review of swaps by the Commission to determine whether the swaps are required to be cleared.

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

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

- *Agency Web Site, via its Comments Online process:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Hand Delivery/Courier:* Same as mail above.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in CFTC Regulation 145.9.<sup>1</sup>

#### **FOR FURTHER INFORMATION CONTACT:**

Eileen A. Donovan, Special Counsel, 202-418-5096, [edonovan@cftc.gov](mailto:edonovan@cftc.gov), Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>2</sup> Title VII of the

<sup>1</sup> Commission regulations referred to herein are found at 17 CFR Ch. 1.

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

Dodd-Frank Act<sup>3</sup> amended the Commodity Exchange Act (CEA)<sup>4</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

Section 723(a)(3) of the Dodd-Frank Act amends the CEA to provide that "it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization [(DCO)] that is registered under [the CEA] or a [DCO] that is exempt from registration under [the CEA] if the swap is required to be cleared."<sup>5</sup> Section 723(a)(3) requires the Commission to adopt rules for the review of a swap, or group, category, type, or class of swaps (collectively, "swaps") to make a determination as to whether the swaps should be required to be cleared.

In addition, Section 745(b) of the Dodd-Frank Act amends the CEA to direct the Commission to prescribe criteria, conditions, or rules under which the Commission will determine the initial eligibility or the continuing qualification of a DCO to clear swaps.<sup>6</sup>

Accordingly, the Commission is proposing to adopt Regulation 39.5 to implement procedures for determining the eligibility of a DCO to clear swaps that it plans to accept for clearing; for DCOs submitting swaps to the Commission for review; for Commission-initiated reviews of swaps; and for staying a clearing requirement while the clearing of a swap is reviewed.

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

## II. Proposed Regulations

### A. Eligibility of a DCO To Clear Swaps

The Dodd-Frank Act requires the Commission to determine, upon request or its own motion, the initial eligibility or continuing qualification of a DCO to clear a swap that it plans to accept for clearing, under criteria, conditions, or rules determined by the Commission. Such criteria, conditions, or rules must consider the financial integrity of the DCO and any other factors that the Commission determines to be appropriate.<sup>7</sup>

Under proposed Regulation 39.5(a), a DCO would be presumed eligible to accept for clearing any swap that is within a group, category, type, or class of swaps that the DCO already clears. However, such a presumption would be subject to Commission review, and if the Commission determines that the swap is not within a group, category, type, or class of swaps that the DCO already clears, the DCO would be required to request a determination by the Commission of its eligibility to clear the swap. A DCO that plans to accept for clearing any swap that is *not* within a group, category, type, or class of swaps that the DCO already clears also would be required to make such a request.

To receive a determination of eligibility to clear a swap, a DCO would have to file a written request with the Commission that addresses its ability to maintain compliance with the core principles for DCOs set out in Section 5b(c)(2) of the CEA if it accepts the swap for clearing, specifically: (1) The sufficiency of its financial resources; and (2) its ability to manage the risks associated with clearing the swap, especially if the Commission determines that the swap is required to be cleared.

### B. Submission of Swaps to the Commission for Review

The Dodd-Frank Act requires a DCO that plans to accept a swap (or group, category, type, or class of swaps) for clearing to submit the swap to the Commission for review.<sup>8</sup> Proposed Regulation 39.5(b) sets out the process for DCOs to follow, including what information a DCO must include in its submission to assist the Commission in its review.

First, the submission would have to include a statement that the DCO is eligible to clear the swap and, if the Commission determines that the swap is required to be cleared, the DCO would

be able to maintain compliance with Section 5b(c)(2) of the CEA. This provision is intended to satisfy the Dodd-Frank Act requirement that a swap submission be consistent with Section 5b(c)(2).<sup>9</sup> Regulation 39.5(b)(1) would require a DCO submitting a swap to be eligible to clear the swap under Regulation 39.5(a) and, as noted above, a DCO that seeks to be considered eligible to clear a swap must demonstrate its ability to maintain compliance with the core principles in Section 5b(c)(2). Therefore, a DCO submitting a swap under Regulation 39.5(b) would have already demonstrated pursuant to Regulation 39.5(a) its ability to comply with Section 5b(c)(2). Accordingly, the Commission believes it is appropriate to require only a statement to that effect in the swap submission itself.

A DCO would also have to provide a statement that includes, but is not limited to, information that would assist the Commission in the quantitative and qualitative assessment of five specific factors that the Dodd-Frank Act requires the Commission to take into account when reviewing a swap submission,<sup>10</sup> and additional information that the Commission believes is needed for an effective review of the swap submission. The proposed regulation would require the DCO to provide specific information relating to product specifications; participant eligibility standards; pricing sources, models, and procedures;<sup>11</sup> risk management procedures; measures of market liquidity and trading activity; the effect of a clearing requirement on the market for the swap; applicable rules, manuals, policies, or procedures; and terms and trading conventions on which the swap is currently traded.

Finally, the swap submission would have to include a description of the manner in which the DCO has provided

<sup>9</sup> See Section 2(h)(2)(D)(i) of the CEA, 7 U.S.C. 2(h)(2)(D)(i).

<sup>10</sup> See Section 2(h)(2)(D)(ii) of the CEA, 7 U.S.C. 2(h)(2)(D)(ii).

<sup>11</sup> This would include information about any price reference index used, such as the name of the index, the source that calculates it, the methodology used to calculate the price reference index and how often it is calculated, and when and where it is published publicly. For example, the BBA LIBOR 3-Month USD interest rate published by the British Bankers Association is calculated daily by Thomson Reuters on behalf of BBA. The rate is published daily at 11 a.m. London Time via data vendors like Reuters and Bloomberg, and is calculated using a survey of 16 major banks. The bank quotes are then ranked in order, high four and bottom four removed, and the remaining eight quotes are averaged to determine the official 3-Month USD LIBOR fixing rate for that day. A DCO would be required to provide documentation of the index methodology and publication frequency or the relevant hyperlink if it is openly available on the Internet.

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

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

<sup>5</sup> See Section 2(h) of the CEA, 7 U.S.C. 2(h).

<sup>6</sup> See Section 5c(c)(5)(C)(iii) of the CEA, 7 U.S.C. 7a-2(c)(5)(C)(iii).

<sup>7</sup> See Section 5c(c)(5)(C)(iii)(II) of the CEA, 7 U.S.C. 7a-2(c)(5)(C)(iii)(II).

<sup>8</sup> See Section 2(h)(2)(B)(i) of the CEA, 7 U.S.C. 2(h)(2)(B)(i).

notice of the submission to its members and a summary of any opposition to the submission expressed by members. The Dodd-Frank Act requires a DCO to provide notice of the submission to its members in a manner to be determined by the Commission.<sup>12</sup> The Commission recognizes that a DCO typically has established procedures for providing notice to its members and believes it is appropriate to allow the DCO to provide notice of a swap submission in the same manner. The submission to the Commission also would have to include a summary of any opposition expressed by members, which means that a DCO would be expected to notify members before it makes its submission to the Commission. The Commission invites comment on whether the regulation should prescribe a specific manner in which a DCO must provide notice to its members, and whether the regulation should prescribe a specific period of time between the notice to members and the submission to the Commission to allow time for members to make their views on the submission known.

Upon receiving a DCO's submission, the Commission would begin its 90-day review by posting the submission on the Commission Web site for a 30-day public comment period, as required by the Dodd-Frank Act. The Commission invites comment regarding the appropriateness and sufficiency of providing notice of the submission on the Commission Web site as compared to publishing notice of the submission in the **Federal Register**. The review would not begin until the submission was complete, as determined solely in the discretion of the Commission. Due to the relatively brief 90-day review period prescribed by the Dodd-Frank Act, the Commission must be certain before it begins a review that it has the information it needs to reach an appropriate determination.

The proposed regulation encourages a DCO to submit swaps to the Commission, to the extent reasonable and practicable to do so, by group, category, type, or class of swaps. The Commission believes this will make the review process more efficient. The Commission would be able to consolidate multiple submissions from one DCO or subdivide a DCO's submission for review as appropriate.

The Commission would review the submission and make a determination as to whether the swap will be required to be cleared not later than 90 days after receiving the submission, unless the submitting DCO agreed to an extension.

In making a determination that the swap must be cleared, the Commission would impose terms and conditions on the requirement as appropriate.

#### *C. Commission-Initiated Reviews of Swaps*

The Dodd-Frank Act requires the Commission on an ongoing basis to review swaps that have not been accepted for clearing by a DCO to make a determination as to whether the swaps should be required to be cleared.<sup>13</sup> Under proposed Regulation 39.5(c), the Commission would use information obtained pursuant to Commission regulations<sup>14</sup> from swap data repositories, swap dealers, and major swap participants, and any other available information, in undertaking such reviews.

If no DCO has accepted for clearing a particular swap, group, category, type, or class of swaps that the Commission finds would otherwise be subject to a clearing requirement, the Commission would, as required by the Dodd-Frank Act,<sup>15</sup> investigate the relevant facts and circumstances and, within 30 days of the completion of its investigation, issue a public report containing the results of the investigation. The Commission would take such actions as it determines to be necessary and in the public interest, which may include establishing margin or capital requirements for parties to the swap, group, category, type, or class of swaps.

#### *D. Stay of Clearing Requirement*

After making a determination that a swap (or group, category, type, or class of swaps) is required to be cleared, the Commission, on application of a counterparty to a swap or on its own initiative, may stay the clearing requirement until it completes a review of the terms of the swap and the clearing arrangement.<sup>16</sup> Proposed Regulation 39.5(d)(2) sets out the process for a counterparty to a swap to apply for a stay of the clearing requirement.

A counterparty to a swap that wants to apply for a stay of the clearing requirement for that swap would be required to submit a written request to the Secretary of the Commission that includes information that would assist the Commission in its review, including: The identity and contact

information of the counterparty to the swap; the terms of the swap subject to the clearing requirement; the name of the DCO that clears the swap; a description of the clearing arrangement; and a statement explaining why the swap should not be subject to a clearing requirement.

The Commission also would be able to obtain additional information to assist it in its review from the DCO that clears the swap. The Commission would complete its review not later than 90 days after issuance of the stay, unless the DCO that clears the swap agrees to an extension.

Upon completion of its review, the Commission could determine, subject to any terms and conditions as the Commission determines to be appropriate, that the swap must be cleared, or that the clearing requirement will not apply but clearing may continue on a non-mandatory basis.

### **III. Technical Amendments**

The Commission is proposing to amend Regulation 140.94<sup>17</sup> to delegate authority to the Director of the Division of Clearing and Intermediary Oversight to consolidate or subdivide swap submissions as appropriate for review under proposed Regulation 39.5(b)(2) and to request information from a derivatives clearing organization in connection with the stay of a clearing requirement under proposed Regulation 39.5(d)(3).

### **IV. Related Matters**

#### *A. 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>18</sup> The rules proposed by the Commission shall affect only DCOs. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.<sup>19</sup> The Commission has previously determined that DCOs are not small entities for the purpose of the RFA.<sup>20</sup>

<sup>17</sup> See 75 FR 55410 (Sep. 10, 2010). The Commission previously proposed to amend Regulation 140.94 in connection with the proposal of Regulation 39.11 (75 FR 63113 (Oct. 14, 2010)). The Commission intends to place all delegations to the Director of the Division of Clearing and Intermediary Oversight for Part 39 under this regulation.

<sup>18</sup> 5 U.S.C. 601 *et seq.*

<sup>19</sup> 47 FR 18618 (Apr. 30, 1982).

<sup>20</sup> See 66 FR 45605, 45609 (August 29, 2001).

<sup>12</sup> See Section 2(h)(2)(B)(i) of the CEA, 7 U.S.C. 2(h)(2)(B)(i).

<sup>13</sup> See Section 2(h)(2)(A) of the CEA, 7 U.S.C. 2(h)(2)(A).

<sup>14</sup> The Commission intends to adopt such regulations before any Commission reviews would be initiated.

<sup>15</sup> See Section 2(h)(4)(B) of the CEA, 7 U.S.C. 2(h)(4)(B).

<sup>16</sup> See Section 2(h)(3)(A) of the CEA, 7 U.S.C. 2(h)(3)(A).

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

### B. Paperwork Reduction Act

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. OMB has not yet assigned a control number to the new collection. The Paperwork Reduction Act of 1995 (PRA)<sup>21</sup> imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. This proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review. If adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR Part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, 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 is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

#### 1. Information Provided by Reporting Entities/Persons

The proposed regulations require each respondent to file information with the Commission on an occasional basis, which would result in one annual response per respondent. Commission staff estimates that each respondent would expend 40 hours to prepare each filing required under the proposed regulations, which was estimated based on the Commission's prior experience with DCOs and their preparation of filings for the Commission's review. Commission staff estimates that it would receive filings from up to 12 respondents annually, which assumes that each DCO would make an average of one filing per year. Accordingly the

burden in terms of hours would in the aggregate be 40 hours annually per respondent and 480 hours annually for all respondents.

Commission staff estimates that each respondent could expend up to \$4000 annually, based on an hourly wage rate of \$100, to comply with the proposed regulations. This would result in an aggregated cost of \$48,000 per annum (12 respondents x \$4000). The Commission invites public comment on the accuracy of its estimate regarding the collection requirements that would result from the proposed regulations.

#### 2. Information Collection Comments

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

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by e-mail at [OIRASubmissions@omb.eop.gov](mailto:OIRASubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting [RegInfo.gov](http://RegInfo.gov). OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

### C. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>22</sup> requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

*Summary of proposed requirements.* The proposed rule would implement processes for determining the eligibility of a DCO to clear swaps that it wishes to accept for clearing; for DCOs submitting swaps to the Commission for review; for Commission-initiated reviews of swaps; and for staying a clearing requirement while the clearing of a swap is reviewed.

*Costs.* With respect to costs, the Commission has determined that the rule results in minimal costs. The rule only requires DCOs and swap counterparties to provide sufficient information for the Commission to carry out its responsibilities under the Dodd-Frank Act in an efficient manner. The rule itself does not require the clearing of any swap, so the Commission did not consider the potential costs of mandatory clearing in its analysis.

*Benefits.* With respect to benefits, the Commission has determined that the rule will benefit the public by making information publicly available and by providing opportunity for comment. The rule also takes into account the risk management practices of a DCO in making a determination on the DCO's eligibility to clear swaps. The rule itself does not require the clearing of any swap, so the Commission did not

<sup>21</sup> 44 U.S.C. 3501 *et seq.*

<sup>22</sup> 7 U.S.C. 19(a).

consider the potential benefits of mandatory clearing in its analysis.

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

#### List of Subjects

##### 17 CFR Part 39

Business and industry, Commodity futures, Reporting and recordkeeping requirements.

##### 17 CFR Part 140

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

For the reasons stated in the preamble, the Commission proposes to amend 17 CFR parts 39 and 140 as follows:

### PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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

**Authority:** 7 U.S.C. 7a–1 as amended by Pub. L. 111–203, 124 Stat. 1376.

2. Redesignate §§ 39.5 through 39.7 as §§ 39.6 through 39.8 and add new § 39.5 to read as follows:

#### § 39.5 Review of swaps for Commission determination on clearing requirement.

(a) *Eligibility to clear swaps.* (1) A derivatives clearing organization shall be presumed eligible to accept for clearing any swap that is within a group, category, type, or class of swaps that the derivatives clearing organization already clears. Such presumption of eligibility, however, is subject to review by the Commission.

(2) A derivatives clearing organization that wishes to accept for clearing any swap that is not within a group, category, type, or class of swaps that the derivatives clearing organization already clears shall request a determination by the Commission of the derivatives clearing organization's eligibility to clear such a swap before accepting the swap for clearing. The request, which shall be filed electronically with the Secretary of the Commission, shall address the derivatives clearing organization's ability, if it accepts the swap for clearing, to maintain compliance with section 5b(c)(2) of the Act, specifically:

(i) The sufficiency of the derivatives clearing organization's financial resources; and

(ii) The derivative clearing organization's ability to manage the risks associated with clearing the swap, especially if the Commission determines that the swap is required to be cleared.

(b) *Swap submissions.* (1) A derivatives clearing organization shall submit to the Commission each swap, or any group, category, type, or class of swaps that it plans to accept for clearing. The derivatives clearing organization making the submission must be eligible under paragraph (a) of this section to accept for clearing the submitted swap, or group, category, type, or class of swaps.

(2) A derivatives clearing organization shall submit swaps to the Commission, to the extent reasonable and practicable to do so, by group, category, type, or class of swaps. The Commission may in its reasonable discretion consolidate multiple submissions from one derivatives clearing organization or subdivide a derivatives clearing organization's submission as appropriate for review.

(3) The submission shall be filed electronically with the Secretary of the Commission and shall include:

(i) A statement that the derivatives clearing organization is eligible to accept the swap, or group, category, type, or class of swaps for clearing and, if the Commission determines that the swap, or group, category, type, or class of swaps is required to be cleared, the derivatives clearing organization will be able to maintain compliance with section 5b(c)(2) of the Act;

(ii) A statement that includes, but is not limited to, information regarding the swap, or group, category, type, or class of swaps that is sufficient to provide the Commission a reasonable basis to make a quantitative and qualitative assessment of the following factors:

(A) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data;

(B) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;

(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the DCO available to clear the contract;

(D) The effect on competition, including appropriate fees and charges applied to clearing; and

(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant DCO or one or more of its clearing members with regard to the

treatment of customer and swap counterparty positions, funds, and property;

(iii) Product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing any life cycle events associated with the swap, and the extent to which the swap is electronically confirmable;

(iv) Participant eligibility standards, if different from the derivatives clearing organization's general participant eligibility standards;

(v) Pricing sources, models, and procedures, demonstrating an ability to obtain sufficient price data to measure credit exposures in a timely and accurate manner, including any agreements with clearing members to provide price data and copies of executed agreements with third-party price vendors, and information about any price reference index used, such as the name of the index, the source that calculates it, the methodology used to calculate the price reference index and how often it is calculated, and when and where it is published publicly;

(vi) Risk management procedures, including measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures, default management procedures, and an independent validation of the scalability of the derivatives clearing organization's risk management policies, systems, and procedures, including the margin methodology, settlement procedures, and default management procedures;

(vii) Measures of market liquidity and trading activity, including information on the sources of such measures;

(viii) An analysis of the effect of a clearing requirement on the market for the group, category, type, or class of swaps, both domestically and globally, including the potential effect on market liquidity, trading activity, use of swaps by direct and indirect market participants, and any potential market disruption;

(ix) Applicable rules, manuals, policies, or procedures;

(x) Terms and trading conventions on which the swap is currently traded;

(xi) A description of the manner in which the derivatives clearing organization has provided notice of the submission to its members and a summary of any opposition to the submission expressed by the members. A copy of the notice to members shall be included with the submission.

(4) The submission will be made available to the public and posted on

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) \* \* \*

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

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

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

\* \* \* \* \*

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

**David A. Stawick,**

*Secretary of the Commission.*

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

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

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

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

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#### **COMMODITY FUTURES TRADING COMMISSION**

##### **17 CFR Part 40**

**RIN 3038-AD07**

#### **Provisions Common to Registered Entities**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

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