

COMMODITY FUTURES TRADING COMMISSION

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

RIN Number 3038-AD53

Adaptation of Regulations to Incorporate Swaps

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "DFA") established a comprehensive new statutory framework for swaps and security-based swaps. The Dodd-Frank Act repeals some sections of the Commodity Exchange Act ("CEA" or "Act"), amends others, and adds a number of new provisions. The DFA also requires the Commodity Futures Trading Commission ("CFTC" or "Commission") to promulgate a number of rules to implement the new framework. The Commission has proposed numerous rules to satisfy its obligations under the DFA. Because the Dodd-Frank Act makes so many changes to the existing statutory and regulatory frameworks, the proposed rules would make a number of conforming changes to the CFTC's regulations to integrate them more fully with the new statutory and regulatory framework ("Proposal").

DATES: Comments must be received on or before August 8, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038-AD53, by any of the following methods:

- *The agency's Web site, at:* <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. Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from

disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
- II. Proposed Regulations
 - A. Part 1
 1. Regulation 1.3: Definitions
 - a. General Changes
 - b. Amended and New Definitions
 - c. Regulation 1.3(l): Physical
 - d. Regulation 1.3(yy): Commodity Interest
 2. Regulation 1.4: Use of Electronic Signatures
 3. Regulation 1.31: Books and Records; Keeping and Inspection
 4. Regulation 1.33: Monthly and Confirmation Statements
 5. Regulation 1.35: Records of Cash Commodity, Futures and Option Transactions
 6. Regulation 1.37: Customer's or Option Customer's Name, Address, and Occupation Recorded; Record of Guarantor or Controller of Account
 7. Regulation 1.39: Simultaneous Buying and Selling Orders of Different Principals; Execution of, for and Between Principals
 8. Regulation 1.40: Crop, Market Information Letters, Reports; Copies Required
 9. Regulation 1.59: Activities of Self-Regulatory Employees, Governing Board

¹ 17 CFR 145.9. Commission regulations referred to herein are found on the Commission's website.

Members, Committee Members and Consultants

10. Regulation 1.63: Service on Self-Regulatory Organization Governing Boards or Committees by Persons With Disciplinary Histories
11. Regulation 1.67: Notification of Final Disciplinary Action Involving Financial Harm to a Customer
12. Regulation 1.68: Customer Election Not To Have Funds, Carried by a Futures Commission Merchant for Trading on a Registered Derivatives Trading Execution Facility, Separately Accounted for and Segregated
13. Regulations 1.44, 1.53, and 1.62—Deletion of Regulations Inapplicable to Designated Contract Markets
14. Appendix C to Part 1: Bunched Orders and Account Identification
- B. Part 7
- C. Part 8
- D. Parts 15, 18, 21, and 36
- E. Parts 41, 140 and 145
- F. Part 155
- G. Other General Changes to CFTC Regulations
 1. Removal of References to DTEFs
 2. Other Conforming Changes
- III. Request for Comment
- IV. Administrative Compliance
 - A. Paperwork Reduction Act
 - B. Regulatory Flexibility Act
 - C. Cost-Benefit Analysis

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.² Title VII of the Dodd-Frank Act³ ("Title VII") amended the CEA⁴ to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted, among other reasons, to reduce risk, increase transparency, and promote market integrity within the financial system, including by: (1) Providing for the registration and comprehensive regulation of swap dealers ("SDs"), security-based swap dealers, major swap participants ("MSPs"), and major security-based swap participants; (2) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commissions with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

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

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

⁴ 7 U.S.C. 1 *et seq.* (2006).

Title VII added to the CEA two new categories of Commission registrant (*i.e.*, SDs⁵ and MSPs⁶) and provided a definition for associated persons of the foregoing.⁷ Title VII also added to the CEA compliance obligations for SDs and MSPs and revised the definitional scope of each existing intermediary registrant category,⁸ with the exception of retail foreign exchange dealers (“RFEDs”), to include intermediation activity involving swaps.

To apply its regulatory regime to the swap activity of intermediaries, the Commission must make a number of changes to its regulations to conform them to the Dodd-Frank Act. These changes primarily affect part 1 of the Commission’s rules, but also affect parts 5, 7, 8, 15, 18, 21, 36, 41, 140, 145, 155, and 166. To the extent the DFA required the Commission to promulgate rules to address certain specific DFA sections, the Commission has proposed or is in the process of proposing such rules separately.

Today’s Proposal contains amendments of three different types: ministerial, accommodating, and substantive. Many of the proposed amendments are purely ministerial—for instance, several proposed changes would update definitions to conform them to the CEA as amended by the Dodd-Frank Act; add to the Commission’s regulations new terms created by the Dodd-Frank Act; remove all regulations and references pertaining to derivatives transaction execution facilities (“DTEFs”), a category of exchange which was eliminated by the DFA; correct various statutory cross-references to the CEA in the regulations; and remove regulations in whole or in part that were rendered moot by the Commodity Futures Modernization Act of 2000 (“CFMA”).

The proposed accommodating amendments are essential to the implementation of the DFA in that they propose to add swaps, swap markets, and swap entities to numerous definitions and regulations, but are more than ministerial because they require some judgment in drafting. Accommodating amendments would include, among other things, amending numerous definitions in regulation 1.3

to reference or include swaps; creating new definitions as necessary in regulation 1.3; amending recordkeeping requirements to include information on swap transactions; adding references to swaps, swap execution facilities (“SEFs”) and derivatives clearing organizations (“DCOs”) to various part 1 regulations; and amending parts 15, 18, 21, and 36 to implement the DFA’s grandfathering and phase-out of exempt boards of trade and exempt commercial markets.

The remaining proposed substantive amendments are changes that would align requirements or procedures across futures and swap markets. They consist of proposed amendments to regulations 1.31 and 1.35 that would harmonize current part 1 recordkeeping requirements with those applicable to SDs and MSPs under proposed part 23 regulations and harmonize certain procedures applicable to swaps with those applicable to futures.

To aid the public in understanding the numerous changes to different parts of the CFTC’s regulations explained in the Proposal, the Commission will also publish on its Web site a “redline” of the affected regulations which will clearly reflect the proposed amendments and deletions.⁹

II. Proposed Regulations

A. Part 1

1. Regulation 1.3: Definitions

a. General Changes

The Commission proposes to revise regulation 1.3 so that its definitions, which are used throughout the regulations, incorporate relevant provisions of the DFA. For instance, proposed regulation 1.3 updates current definitions to conform them to the Dodd-Frank Act’s amendments of the same terms in the CEA’s definitions section,¹⁰ and also includes definitions specifically added by the Dodd-Frank Act to the CEA. This is the case for many of the definitions in proposed

regulation 1.3, including “associated person of a swap dealer or major swap participant,” “commodity pool operator,” “commodity trading advisor,” “futures commission merchant,” “floor broker,” “floor trader,” “swap data repository,” and “swap execution facility.”¹¹ Additionally, the Commission is proposing to revise the definition of “self-regulatory organization” (“SRO”) to include SEFs, a new category of regulated markets under the DFA, and to make clear that DCOs are SROs.¹²

b. Amended and New Definitions

The Commission also proposes (1) to simplify or clarify certain existing regulation 1.3 definitions, and (2) to add several new definitions to regulation 1.3, pursuant to amendments to the CEA by the Dodd-Frank Act, existing regulations, and other amendments in the Proposal.¹³

The term “contract market,” for instance, is not defined under the CEA, and is currently defined under regulation 1.3(h) as “a board of trade designated by the Commission as a contract market under the Commodity Exchange Act or in accordance with the provisions of part 33 of this chapter.” In certain provisions throughout the Commission’s regulations, contract markets are also referred to as “designated contract markets.” Because both terms are used interchangeably within the regulations, the Commission is proposing to revise the definition to mean contract market and designated contract market (“DCM”). Proposed

¹¹ The DFA amended the definition of “commodity pool operator” in CEA section 1a to add swaps to those contracts for which a CPO solicits investment. DFA section 721(a)(5). In addition to amending the definition of “commodity pool operator” in proposed regulation 1.3 to accommodate that revision, the Commission proposes to add equivalent language to the definition of “commodity trading advisor” in regulation 1.3.

¹² Currently, some individual rules specifically include DCO in the definition of SRO, but they are not included in the general definition of SRO in regulation 1.3.

¹³ The Commission realizes that several earlier published releases have also proposed to add definitions to regulation 1.3, and that these amendments may overlap, *e.g.*, more than one definition was proposed for regulation 1.3(zz). See *Agricultural Commodity Definition*, 75 FR 65586, Oct. 26, 2010; *Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest*, 75 FR 63732, Oct. 18, 2010. However, as each rule proposal is published as a final rulemaking, the Commission will ensure that the lettering of paragraphs within regulation 1.3 for newly added definitions is correct. Therefore, the Commission requests that the public review the new definitions proposed today for their content only and ignore any inconsistencies in lettering between the Proposal and prior NPRMs.

⁵ DFA section 721(a)(21), adding CEA section 1a(49), codified at 7 U.S.C. 1a(49).

⁶ DFA section 721(a)(16), adding CEA section 1a(33), codified at 7 U.S.C. 1a(33).

⁷ DFA section 721(a)(15), adding CEA section 1a(4), codified at 7 U.S.C. 1a(4).

⁸ Existing intermediary registrant categories include futures commission merchants (“FCMs”), commodity pool operators (“CPOs”), commodity trading advisors (“CTAs”), introducing brokers (“IBs”), floor brokers (“FBs”) and floor traders (“FTs”).

⁹ Furthermore, while there are many outstanding Notices of Proposed Rulemaking (“NPRMs”) published by the CFTC, today’s Proposal does not reflect those separately proposed amendments, most of which are not yet final. For example, the Proposal amends regulation 1.3(z) (definition of “bona fide hedging transactions and positions”) to remove certain cross-references, but the Proposal does not also show other amendments to that definition proposed earlier this year in a separate release. See *Position Limits for Derivatives*, 76 FR 4752, Jan. 26, 2011. All NPRMs are available on the Commission’s Web site for the public to review and provide comment. For a list of all rulemaking proposals related to the Dodd-Frank Act, please visit <http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankProposedRules/index.htm>.

¹⁰ CEA section 1a, 7 U.S.C. 1a.

regulation 1.3(h) will contain one definition identified by the title “Contract market; designated contract market.” The current definition also erroneously cross-references part 33 as the DCM provisions of the Commission’s regulations. The proposed definition would change that cross-reference to part 38 of the Commission’s regulations.

The Commission proposes a similar clarification regarding the definition of “customer.” The Proposal simplifies the definition of “customer” by combining two existing definitions, “Customer; commodity customer” in regulation 1.3(k) and “Option customer” in regulation 1.3(jj), and adding swaps.¹⁴ Therefore, the “customer” definition proposed herein would include swap customers, commodity customers, and option customers, and refer to them all with the single term, “customer.” Furthermore, the Commission proposes to revise all references to “commodity customer” and “option customer” throughout the Commission’s regulations, but particularly in part 1, to simply refer to “customer.”¹⁵ These revisions have retained references to requirements specific to certain contracts.¹⁶

The Commission proposes to define the term “confirmation” to reflect its differing use in various regulations depending on whether a transaction is executed by an FCM, IB or CTA on the one hand, or by a SD or MSP on the other hand. In the first case, the registrant is acting as an agent. In the second it is acting as a principal.¹⁷

The Commission also proposes to revise the “Member of a contract market” definition currently found at regulation 1.3(q) and to add to regulation 1.3 a definition of the term

“Registered entity,” currently provided in CEA section 1a(40), as revised by the Dodd-Frank Act. The definition of “registered entity” proposed in regulation 1.3 is identical to its CEA counterpart and would include DCOs, DCMs, SEFs, swap data repositories (“SDRs”) and certain electronic trading facilities. To correspond with this new definition, the Commission also proposes to replace the current “Member of a contract market” definition with a new definition of “Member,” which would be nearly identical to the “Member of a registered entity” definition provided in CEA section 1a(34), also as revised by the Dodd-Frank Act.¹⁸ Therefore, the proposed “Member” definition would be broadened to accommodate newly established SEFs, and it would include those “owning or holding membership in, or admitted to membership representation on, the registered entity; or having trading privileges on the registered entity.”

The Commission proposes to add a definition of the term “order.” This term has not previously been defined, although it is used in several of the regulations, *e.g.*, 1.35, 155.3, and 155.4. In light of this and with the addition of new categories of registrants (SDs and MSPs) who act as principals rather than agents, clarification of this term is appropriate. The definition would provide that an order is “an instruction or authorization provided by a customer to a futures commission merchant, introducing broker, or commodity trading advisor regarding trading in a commodity interest on behalf of the customer.”

Because amendments to regulation 1.31 also proposed herein incorporate the term “prudential regulator,” as added to the CEA by the Dodd-Frank Act, the Commission proposes to add it to regulation 1.3.¹⁹ Pursuant to proposed regulation 1.31, records of swap transactions must be presented, upon request, to “any applicable prudential regulator as that term is defined in section 1a(39) of the Act.” The proposed definition of “prudential regulator” in regulation 1.3 is coextensive with the definition in section 1a(39) of the Act and lists the various prudential regulators. Pursuant to the definition in section 1a(39) of the Act, determining the “applicable” prudential regulator depends upon what

type of entity the SD or MSP is and which regulator oversees that SD or MSP.²⁰ For example, if a SD is a national bank, it is overseen by the Office of the Comptroller of the Currency, and that agency would be the “applicable prudential regulator” for the purposes of proposed regulation 1.31.

The Commission proposes to add the term “registrant” to regulation 1.3 so that certain regulations in part 1 can refer to various intermediaries (*e.g.*, FCMs, IBs, CPOs), their employees (associated persons), and other registrants (MSPs). As discussed above, the Commission also has proposed to add the definition of “registered entity” from CEA section 1a, which refers to DCOs, DCMs, SEFs, SDRs, and other entities, to regulation 1.3. Because the DFA created a definition of and several proposed part 1 regulations refer to “associated persons of swap dealers or major swap participants,” the Commission proposes to add that term to regulation 1.3 as well.

The Commission also proposes adding the term “retail forex customer” to regulation 1.3 because it appears in several regulations in part 1 and currently is only defined in part 5. The proposed definition is identical in all material respects to the definition of this term as it currently appears in regulation 5.1(k).²¹

Proposed regulation 1.3 also changes certain definitions so that the Commission’s regulations properly refer to both futures and swaps. Additionally, for ease of reference, proposed regulation 1.3 would simply adopt several terms defined under the CEA, including “electronic trading facility,” “organized exchange,” and “trading facility.”

c. Regulation 1.3(l): Physical

Regulation 1.3(l) defines the term “physical” as “any good, article, service, right or interest upon which a commodity option may be traded in accordance with the Act and these regulations,”²² which is similar to the “commodity” definition in regulation 1.3(e).²³ Regulation 1.3(e) defines the

¹⁴ The “General Regulations and Derivatives Clearing Organizations” **Federal Register** release proposed to amend regulation 1.3(k) by adding “swap customer,” but there is nothing unique about that term requiring it to be separately defined. General Regulations and Derivatives Clearing Organizations, 75 FR 77576, Dec. 13, 2010.

¹⁵ The Commission proposes to remove references to commodity customers and option customers, replacing them with references to simply “customer,” in the following regulations: 17 CFR 1.3, 1.20–1.24, 1.26, 1.27, 1.30, 1.32–1.34, 1.35–1.37, 1.46, 1.57, 1.59, 155.3, 155.4, and 166.5.

¹⁶ For example, proposed regulation 1.33 (Monthly and confirmation statements) requires an FCM to document a customer’s positions in futures contracts differently from its option or swap positions. Proposed regulation 1.33 preserves these distinctions, even though it refers only to “customers” as opposed to “commodity customers,” “option customers,” and “swap customers.”

¹⁷ A single entity could be registered in more than one capacity, for example, as both a SD and a CTA. Which rules were applicable would depend on the capacity in which it was performing a particular function.

¹⁸ In accordance with the removal of DTEF references from many other Commission regulations, the proposed “Member” definition would not include DTEF references currently in the definition of “Member of a registered entity” found in CEA section 1a(34). See 7 U.S.C. 1a(34).

¹⁹ See *infra* Part II.A.3.

²⁰ 7 U.S.C. 1a(39), as amended by DFA section 721(a)(17).

²¹ 17 CFR 5.1(k) currently defines “retail forex customer” as “a person, other than an eligible contract participant as defined in section 1a(12) of the Act, acting on its own behalf and trading in any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act.” The Proposal would amend this definition in part 5 only to reflect the renumbering of section 1a of the Act by the DFA, and add an identically amended definition to regulation 1.3. See *infra* Part II.G.2.

²² 17 CFR 1.3(l).

²³ 17 CFR 1.3(e).

term “commodity,” in relevant part, as “all * * * goods and articles * * * and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in.”²⁴ The word “physical” is used in 45 Commission regulations other than regulation 1.3(ll).²⁵ The introductory text of regulation 1.3 states that “[t]he following terms, as used in the Commodity Exchange Act, or in the rules and regulations in this chapter, shall have the meanings hereby assigned to them, *unless the context otherwise requires*.”²⁶

The “physical” definition was first added to regulation 1.3 in 1983 to enable trading, on DCMs, in options to buy or sell an underlying commodity and has not been substantively amended.²⁷ In the **Federal Register** release proposing the addition of regulation 1.3(ll), the Commission stated that “[t]he proposed definition is intended to be coextensive with the Commission’s jurisdiction with respect to commodity options.”²⁸ At the time of that proposal in 1982, cash-settled futures on non-physical commodities

had just been introduced in the form of the Chicago Mercantile Exchange’s Eurodollar futures. In that context, in proposing rules to permit exchange-traded options on underlying commodities, it made sense to name such options based on physical commodities, which constituted the vast majority of commodities covered by then-existing futures contracts.

At present, however, options may be traded on both physically deliverable and non-physically deliverable commodities, such as interest rates and temperatures. Using the term “physical” to refer to an option on both physically deliverable commodities and non-physically deliverable commodities may be confusing on its face.²⁹ Also, the requirement in the forward exclusion from the “swap” definition contained in CEA section 1a(47)(B)(ii), as amended by Dodd-Frank section 721(a)(21), that a sale of a non-financial commodity or security for deferred shipment or delivery “is intended to be physically settled” would be meaningless if “physical” included non-physical. As noted above, the introductory text of regulation 1.3 states that its defined terms have the meanings assigned to them in regulation 1.3, unless the context otherwise requires.

The Commission requests comment on whether any changes to the “physical” definition are necessary or warranted. Should the Commission revise the definition of “physical” to limit it to its common sense meaning? Should the Commission remove it on the theory that the meaning of “physical” is self-evident? Should the Commission address such issues, if at all, in other rulemakings where they arise more directly, such as with respect to emission-related commodities as they relate to the forward exclusion from the swap definition?³⁰ If so, should the

Commission replace the term “physical” with some other more suitable term in the relevant regulations referencing current regulation 1.3(ll)? If so, what should the new term be? Should the Commission take no action, in reliance on the ability of interested parties to interpret the “unless the context otherwise requires” language of regulation 1.3, or on some other basis?³¹

d. Regulation 1.3(yy): Commodity Interest

The Commission proposes to add swaps on all commodities within the CFTC’s jurisdiction to the definition of “commodity interest” in regulation 1.3(yy).³² Commodity interest currently is defined as: “(1) Any contract for the purchase or sale of a commodity for future delivery; (2) Any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act; and (3) Any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act.” The term “commodity interest” is cross-referenced by 33 other Commission regulations and appendices to parts of Commission regulations.³³ Generally, the term is meant to encompass all agreements, contracts and transactions within the Commission’s jurisdiction, though not all such agreements, contracts and transactions are expressly set forth therein.³⁴

Chair, Market Oversight Committee, and Jeremy D. Weinstein, Member, Environmental Markets Association (available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26166&SearchText=ema>); Letter from R. Michael Sweeney, Jr., Mark W. Menezes, and David T. McIndoe, Hunton & Williams, LLP, on behalf of the Working Group of Commercial Energy Firms (available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26219&SearchText=working%20group>).

³¹ In a number of cases (e.g., the reference to “physical safeguards” in Regulation 160.30 (Procedures to safeguard customer records and information); and the reference to “provide physical access to handicapped persons” in Regulation 149.150 (Program accessibility: Existing facilities)), the context will make it obvious that the term “physical” is meant to have its plain meaning.

³² 17 CFR 1.3(yy).

³³ See 17 CFR 1.12, 1.56, 1.59, 3.10, 3.12, 3.21, 4.6, 4.7, 4.10, 4.12–4.14, 4.22–4.25, 4.30–4.34, 4.36, 4.41, 30.3, 160.3–160.5, and 166.1–166.3; 17 CFR pt. 3 app. B, 17 CFR pt. 4 app. A, and 17 CFR pt. 190 app. B.

³⁴ For example, the term “contract for the purchase or sale of a commodity for future delivery” in current regulation 1.3(yy)(1) encompasses options on futures and security futures products. Similarly, the term “swaps” if added to proposed regulation 1.3(yy) would include mixed swaps. Of course, the impact of the scope of proposed regulation 1.3(yy) is only as extensive as the other regulations referencing it.

²⁴ Regulation 1.3(e) tracks 7 U.S.C. 1a(9), as renumbered and amended by Dodd-Frank Sections 721(a)(1) and (4), respectively.

²⁵ See 17 CFR 1.3(z)(1), 1.3(kk), 1.17(c)(iii), 1.17(c)(5)(ii)(A), 1.17(c)(5)(xi), 1.17(j)(1), 1.31(b)(3)(iii)(B), 1.33(a)(2)(i), 1.33(a)(2)(ii), 1.33(b)(2)(iv), 1.33(b)(3), 1.34(b), 1.35(b)(2)(iii), 1.35(b)(3)(iii), 1.35(d)(1), 1.35(e), 1.39(a), 1.39(a)(3), 1.44, 1.44(b), 1.46(a)(iii), 1.46(a)(iv), 4.23(a)(1), 4.23(b)(1), 4.33(b)(1), 5.13(b)(3), 10.68(b)(1)(i), 15.00(p)(1)(ii), 16.00(a), 16.01(a), 16.01(b), 18.04(b)(3), 18.04(b)(3)(ii), 18.04(b)(6), 18.04(b)(6)(ii), 31.8(a)(1), 31.8(a)(2)(iii), 31.8(a)(2)(iv), 31.9(a), 31.9(a)(1), 32.12(a), 32.13(a), 32.13(e)(2), 33.4, 33.4(a)(4), 33.4(a)(5)(iv), 33.4(a)(5)(iv)(A), 33.4(a)(5)(iv)(B), 33.4(a)(5)(iv)(C), 33.4(a)(5)(iv), 33.4(b)(1)(iii), 33.4(d)(3), 33.7(b), 33.7(b)(1), 33.7(b)(2)(i), 33.7(b)(5), 33.7(b)(6), 33.7(b)(7)(ii), 33.7(b)(7)(iii), 33.7(b)(7)(iv), 33.7(b)(7)(v), and 33.7(b)(7)(x); 17 CFR pt. 36 app. A (paragraph 3 under PRICE LINKAGE, (c)(3)(ii) under CORE PRINCIPLE IV OF SECTION 2(h)(7)(C)—POSITION LIMITATIONS OR ACCOUNTABILITY, (c) under TRADING PROCEDURES, (c) under FAIR AND EQUITABLE TRADING, (b)(4) under POSITION LIMITATIONS OR ACCOUNTABILITY); 17 CFR 40.3(a)(4)(ii); 17 CFR pt. 40 app. A Guideline No. 1(a), (c)(2)(ii), and (c)(2)(ii)(B); 17 CFR 41.25(c), 41.25(g)(6), 145.7(j), 147.3(b)(7)(vi), 149.103, 149.150(b)(2), 149.150(d)(1), 150.3(a)(4)(i)(A), 150.5(b)(1), 150.5(c)(1), and 160.30; 17 CFR pt. 160 app. B Sample Clause A–7; 17 CFR 190.01(x)(1), 190.01(x)(2), 190.01(kk)(3), 190.01(kk)(4), 190.01(kk)(5), 190.01(ll), 190.02(f)(1), 190.05(a)(1), 190.05(b)(1), 190.05(b)(1)(iii), 190.05(c)(3), 190.07(e)(2)(i), 190.07(e)(2)(ii), 190.07(e)(2)(ii)(A), and 190.07(e)(2)(ii)(B); 17 CFR pt. 190 app. A, Form 1, paragraph 4 and Form 4 (Proof of Claim), paragraphs (c), (d) and (e).

²⁶ 17 CFR 1.3 (emphasis added).

²⁷ See Domestic Exchange-Traded Commodity Options; Expansion of Pilot Program To Include Options on Physicals, 47 FR 56996, Dec. 22, 1982 and 48 FR 12519, Mar. 25, 1983.

²⁸ Domestic Exchange-Traded Commodity Options; Expansion of Pilot Program Provisions, 47 FR 28401, June 30, 1982.

²⁹ Moreover, the Commission has recently proposed a rewrite of its options regulations in parts 32 and 33. References to options on a physical would be removed from part 33, which will apply only to DCM-traded options on futures. Options on physicals would be permitted to transact under revised part 32, which permits all options that are swaps under the Dodd-Frank swap definition to transact subject to the same rules applicable to any other swap. See Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

³⁰ The Commission received several comment letters regarding environmental commodity issues in response to the advance notice of proposed rulemaking regarding Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 FR 51429, Aug. 20, 2010. See Letter from Kyle Danish, Van Ness Feldman, P.C., Counsel to the Coalition for Emission Reduction Projects (available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26164&SearchText=emission%20reduction>); Letter from Thomas Huettelman, Chairman, Jeffery C. Fort,

The Dodd-Frank Act adds a definition of “swap” to the CEA.³⁵ DFA section 712(d) requires the Commission to further define the term “swap” jointly with the Securities and Exchange Commission.³⁶ The Commission is proposing to add “swap” to the “commodity interest” definition so that the regulations cross-referencing it will apply to swaps.

2. Regulation 1.4: Use of Electronic Signatures

The Commission proposes to revise regulation 1.4³⁷ to extend the benefit of electronic signatures and other electronic actions to SDs and MSPs. Section 731 of the Dodd-Frank Act amends the CEA by adding new sections 4s(i)(1), requiring SDs and MSPs to “conform with such standards as may be prescribed by the Commission by rule or regulation that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps,”³⁸ and 4s(i)(2), requiring the Commission to adopt rules “governing documentation standards for swap dealers and major swap participants.”³⁹

Pursuant to the foregoing authority, the Commission previously proposed new regulation 23.501(a)(1), which would require “[e]ach swap dealer and major swap participant entering into a swap transaction with a counterparty that is a swap dealer or major swap participant [to] execute a confirmation for the swap transaction,” according to a specified schedule.⁴⁰ Also pursuant to the foregoing authority, the Commission has proposed new regulation 23.501(a)(2), which would require “[e]ach swap dealer and major swap participant entering into a swap transaction with a counterparty that is not a swap dealer or a major swap participant [to] send an acknowledgment of such swap transaction,” according to a specified schedule.⁴¹ Proposed regulation 23.500(a) would define such an “acknowledgment” as “a written or electronic record of all of the terms of a swap signed and sent by one counterparty to the other.”⁴² In issuing the proposed confirmation and

acknowledgment rules cited above, the Commission explained that “[w]hen one party acknowledges the terms of a swap and its counterparty verifies it, the result is the issuance of a confirmation.”⁴³

Regulation 1.4 currently provides that an FCM, IB, CPO and CTA receiving an electronically signed document is in compliance with Commission regulations requiring signed documents, provided that such entity generally accepts electronic signatures.⁴⁴ The rationale for allowing the existing entities listed in regulation 1.4 to use electronic signatures (*i.e.*, “[a]s part of [the Commission’s] ongoing efforts to facilitate the use of electronic technology and media”)⁴⁵ applies equally to SDs and MSPs. Therefore, the Commission proposes to add SDs and MSPs to the list of entities covered by regulation 1.4 and to amend its structure to account for the provisions of the Commission’s proposed confirmation and acknowledgement obligations discussed above.⁴⁶

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

In recent years, the phrase “books and records” has evolved with respect to the varying formats used to communicate and store information.⁴⁷ The Federal Rules of Civil Procedure have been revised to reflect this evolution by requiring producing parties to produce electronically stored information as specified in the request, but if not so specified, then as they are kept in the normal course of business or in a reasonably usable form.⁴⁸ Similarly, the

Commission’s own data delivery standards, which accompany the Commission’s requests for production, indicate a preference for requested electronic information to be produced in native file format. The Commission’s delivery standards provide technical instructions to producers designed to enable the Commission to receive such information in a machine-readable format that is compatible with the technology used by the Commission.

Recognizing that storage formats vary across different types of electronically stored information and to be consistent with current Commission practice and the Federal Rules of Civil Procedure, the proposed changes to regulations 1.31(a)(1), (a)(2), and (b) would require that: (1) All books and records required to be kept by the Act or by the Commission’s regulations be kept in their original (for paper records) or native file format (for electronic records); and (2) production of such records be made in a form specified by the Commission. In addition, as provided in the existing regulation, books and records may continue to be stored on electronic storage media, provided, however, that for electronic records, the storage media must preserve the native file format of the electronic records.

Keeping electronic records in their native file format and producing them in a format designated by the Commission should not create any unreasonable burdens on persons required to maintain records under the Act and Commission regulations in light of Federal Rule of Civil Procedure 34(b), which would apply to such persons—and all other persons in possession of investigatory information—upon the filing of an enforcement action in Federal district court. Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced in order to facilitate its usability. This is recognition that “the form of production is more important to the exchange of electronically stored information than of hard-copy materials.”⁴⁹

The Commission also proposes amendments to regulation 1.31 to incorporate two books and records obligations that proposed regulation 23.203(b) applies to SDs and MSPs. Proposed regulation 23.203(b) would require SDs and MSPs to (1) keep

information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party”).

⁴⁹ Fed. R. Civ. P. 34, advisory committee note, 2006 amendment.

³⁵ DFA section 721(a)(47); codified at 7 U.S.C. 1a(47).

³⁶ The Commissions have not yet proposed a further definition of the term “swap.”

³⁷ 17 CFR 1.4.

³⁸ 7 U.S.C. 6s(i)(1).

³⁹ 7 U.S.C. 6s(i)(2).

⁴⁰ Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519, Dec. 28, 2010.

⁴¹ *Id.*

⁴² *Id.*

⁴³ 75 FR at 81522.

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

⁴⁵ Use of Electronic Signatures by Customers, Participants and Clients of Registrants, 64 FR 47151, Aug. 30, 1999.

⁴⁶ This includes proposing a change to the title of regulation 1.4 to reflect these changes. Proposed regulation 1.4 is entitled “Use of electronic signatures, acknowledgments and verifications.”

⁴⁷ U.S. Commodity Futures Trading Commission, Division of Market Oversight, Advisory for Futures Commission Merchants, Introducing Brokers, and Members of a Contract Market over Compliance with Recordkeeping Requirements, Feb. 5, 2009 (<http://www.cftc.gov/ucm/groups/public/@industryoversight/documents/file/recordkeepingdmoadvistory0209.pdf>) [hereinafter Recordkeeping Advisory].

⁴⁸ Fed. R. Civ. P. 34(b)(2)(E); Fed. R. Civ. P. 34, advisory committee note, 2006 amendment (“Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored

records of swap or related cash or forward transactions until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for a period of five years after such date; and (2) make such records available for inspection not only by the Commission and the United States Department of Justice, but also to any applicable prudential regulator, as that term is defined in section 1a(39) of the Act, or, in connection with security-based swap agreements described in section 1a(47)(A)(v) of the Act, the United States Securities and Exchange Commission. By contrast, existing regulation 1.31, which pertains to “all books and records required to be kept by the Act,” requires that records be kept for five years and that they be made available only to the Commission and the Department of Justice.⁵⁰ The Proposal would add to regulation 1.31 the special requirements for swaps and cash related transactions in proposed regulation 23.203(b).

The Commission solicits comments on the potential costs and effects of the proposed new requirement that all books and records be maintained in their original form (for paper) and their native file format (for electronic records) as provided in the proposed rule. Comment also is requested regarding whether the retention period for any communication medium (e.g., oral communications) should be shorter than the retention period applicable to other required records. In this regard, the Commission requests that commenters specify what the proposed retention period should be and why.

4. Regulation 1.33: Monthly and Confirmation Statements

Regulation 1.33 requires FCMs to maintain certain records and to regularly furnish monthly and confirmation statements to customers regarding commodity futures and option transactions they have entered into on behalf of customers. The DFA amended the definition of FCM in section 1a of the CEA to authorize an FCM to solicit or accept orders for swaps in addition to commodity futures and option transactions.⁵¹ Therefore, the Commission proposes adding requirements for monthly and confirmation statements applicable to swaps.

Proposed regulation 1.33(a)(3) describes what information on swap positions an FCM must provide in monthly statements to its customers. Proposed regulation 1.33(b)(2) would

extend the requirement that an FCM furnish confirmation statements to customers to swaps executed on a customer's behalf and describes what information such a confirmation statement must contain. In addition, the Commission proposes to amend regulation 1.33 to reflect proposed changes to the definitions of the terms “commodity interest,” “customer,” and “open contract” in regulation 1.3.

5. Regulation 1.35: Records of Cash Commodity, Futures and Option Transactions

The Commission proposes to amend regulation 1.35 in several respects. First, the Commission proposes to revise paragraph (a) such that this regulation's recordkeeping obligations would extend to trades executed by FCMs and IBs on SEFs. Those obligations currently apply only to trades executed on DCMs. Similarly, the proposed amendments would extend all of the regulation 1.35 recordkeeping obligations currently applicable to members of DCMs to include “members,” as that term is proposed to be defined in proposed regulation 1.3, of SEFs.

Second, the proposed revisions replace the terms “commodity futures transactions,” “retail forex exchange transactions,” and “commodity option transactions” with the term “commodity interests.” According to the Commission's proposed definition of “commodity interest” in regulation 1.3, “commodity interest” includes all of the aforementioned transactions as well as swaps. Thus, the Commission proposes that regulation 1.35's recordkeeping obligations for transactions in futures, commodity options, and retail forex exchange transactions also apply to swaps.⁵² Pursuant to the Dodd-Frank Act, DCMs are permitted to list swaps, and FCMs and IBs are permitted to execute swaps on behalf of customers.⁵³

In relevant part, existing regulation 1.35 requires FCMs, IBs, and DCM members to “keep full, complete, and systematic records, together with all pertinent data and memoranda, of all transactions relating to [their] business of dealing in commodity futures, commodity options and cash commodities,” subject to the requirements of regulation 1.31. Specifically included among the records to be retained under regulation 1.35 are “all orders (filled, unfilled, or canceled),

trading cards, signature cards, street books, journals, ledgers, canceled checks, copies of confirmations, copies of statements of purchase and sale, and all other records, data and memoranda” that have been prepared in the course of an FCM's, an IB's, or a DCM member's business of dealing in commodity futures, commodity options, and cash commodities.

On February 5, 2009, the Commission's Division of Market Oversight (“DMO”) issued an advisory stating that “[t]he Commission's recordkeeping regulations, by their terms, do not distinguish between whatever medium is used to record the information covered by the regulations, including emails, instant messages, and any other form of communication created or transmitted electronically.”⁵⁴ Thus, the advisory made clear that the existing language of regulation 1.35 “appl[ies] to records that are created or retained in an electronic format, including email, instant messages, and other forms of communication created or transmitted electronically for all trading.”⁵⁵ Accordingly, under the Commission's existing regulations, FCMs, IBs, and DCM members are required to retain and produce for inspection any such electronic records, subject to the retention and accessibility requirements set forth in regulation 1.31.

Notwithstanding the DMO advisory relating to certain electronic records, the Commission's existing recordkeeping requirements, as they relate to FCMs, IBs and DCM members, remain limited by a 1996 Commission decision, *Gilbert v. Lind-Waldock & Co.*, wherein audio tapes of telephone conversations with customers were found to be beyond the definition of “records” covered by regulation 1.35.⁵⁶

Consequently, where Commission-regulated persons use oral communications, the Commission has encountered greater difficulties in effectively exercising its enforcement responsibilities, thereby increasing the potential for market abuses. Such difficulties have been particularly acute in cases where the Commission is required to establish a threshold level of knowledge and/or intent on the part of the actor, such as cases involving market manipulation and false reporting. The Commission's enforcement success in such cases often has correlated directly with the

⁵² Accordingly, the Commission also proposes to amend the title of regulation 1.35 to reflect such a change. Therefore, proposed regulation 1.35 is entitled “Records of commodity interest and cash commodity transactions.”

⁵³ See 7 U.S.C. 1a(28) and 1a(31), as amended by DFA sections 721(a)(13) and (a)(15), respectively.

⁵⁴ See Recordkeeping Advisory, *supra* note 47, at 3.

⁵⁵ *Id.* at 4.

⁵⁶ [1994–1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,720 at 43,992 n.23 (CFTC June 17, 1996).

⁵⁰ 17 CFR 1.31(a) (emphasis added).

⁵¹ DFA section 721(a)(13).

existence of high-quality recordings of voice communications between the persons involved. Conversely, the Commission's enforcement capabilities have been limited in cases where such voice recordings were not available.

Significant technological advancements in recent years, particularly with respect to the cost of capturing and retaining copies of electronic material, including telephone communications, have made the prospect of enhancing the Commission's recordkeeping requirements for oral communications more economically feasible and systemically prudent. Evidence of these trends was examined in March 2008 by the United Kingdom's Financial Services Authority ("FSA"), which studied the issue of mandating the recording and retention of voice conversations and electronic communications. The FSA issued a Policy Statement detailing its findings and ultimately implemented rules relating to the recording and retention of such communications, including a rule requiring all financial service firms to record any relevant communication by employees on their firm-issued or firm-sanctioned cell phones that will take effect on November 14, 2011.⁵⁷ Similar rules that mandate recording of certain voice and/or telephone conversations have been promulgated by the Hong Kong Securities and Futures Commission⁵⁸ and by the Autorité des Marchés Financiers in France,⁵⁹ and have been recommended by the International Organization of Securities Commissions ("IOSCO").⁶⁰

Under the FSA rules, firms (identified generally as those entities conducting any of the following activities: receiving, executing, arranging for execution of customer orders or transactions carried out on behalf of the firm) must take reasonable steps to record relevant (relevant means

conversations or communications between the firm and the client or when the firm is acting on behalf of a client with another person) telephone conversations (including mobile telephones) and keep a copy of relevant electronic communications that enable the referenced activities to be carried out. Firms are required to keep recordings of certain telephone lines for a period of at least six months in a medium that is readily accessible.

In promulgating this rule, the FSA issued guidance stating the following benefits: "i) recorded communication may increase the probability of successful enforcement; ii) this reduces the expected value to be gained from committing market abuse; and iii) this, in principle, leads to increased market confidence and greater price efficiency." In determining its policy, the FSA conducted a cost-benefit analysis, including eight meetings with several trade associations including the Securities Industry and Financial Markets Association ("SIFMA"), the International Swaps and Derivatives Association ("ISDA"), and the Futures and Options Association ("FOA"). The FSA report estimated that 80% of telephone lines of its firms that would need to be recorded were already being recorded at the time of its study.⁶¹

Indeed, the futures industry has imposed a requirement on certain of its member firms to tape telephone conversations with customers since 1997. Since then, the National Futures Association ("NFA") has required member firms with more than a certain percentage of APs who have been disciplined to record all telephone conversations between the member's APs and both existing and potential customers for a period of two years. Those recordings must be retained for a period of five years from the date each tape is created, and the tapes shall be readily accessible during the first two years of the five year period.⁶² A similar rule exists in the securities industry.⁶³

⁵⁷ Financial Services Authority, "Policy Statement: Telephone Recording: recording of voice conversations and electronic communications" (Mar. 2008); Financial Services Authority, "Taping: Removing the mobile phone exemption," (Mar. 2010); Financial Services Authority, "Policy Statement: Taping of Mobile Phones: Feedback on CP 10/7 and Final Rules," (Nov. 2010).

⁵⁸ Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission para. 3.9 (2010) (H.K.).

⁵⁹ General Regulation of the Autorité des Marchés Financiers art. 313–51 (2010) (Fr.).

⁶⁰ Press Release, International Organization of Securities Commissions, "IOSCO Publishes Recommendations to Enhance Commodity Futures Markets Oversight," (Mar. 5, 2009), <http://www.iosco.org/news/pdf/IOSCONEWS137.pdf>. The IOSCO members on the committee formulating the recommendations included Brazil, Canada (Ontario and Quebec), Dubai, France, Germany, Hong Kong, Italy, Japan, Norway, Switzerland, the United Kingdom, and the United States.

⁶¹ See Financial Services Authority, "Policy Statement: Telephone Recording: recording of voice conversations and electronic communications" (Mar. 2008); Financial Services Authority, "Taping: Removing the mobile phone exemption" (Mar. 2010); Financial Services Authority, "Policy Statement: Taping of Mobile Phones: Feedback on CP 10/7 and Final Rules" (Nov. 2010).

⁶² See Interpretative Notice to NFA Compliance Rule 2–9, Supervision of Telemarketing Activity, 9021 (Feb. 18, 1997).

⁶³ See NASD Rule 3010, Supervision (the procedures required by this rule include taping all telephone conversations between the member's registered persons and both existing and potential customers. All tape recordings made pursuant to the requirements of this paragraph shall be retained for a period of not less than three years

Consistent with these developments, the proposed change to regulation 1.35(a) would explicitly require FCMs, RFEDs, IBs and members of DCMs and SEFs to record all oral communications that lead to the execution of transactions in a commodity interest or cash commodity. In addition to increasing consistency across regulatory regimes, this proposal would harmonize regulation 1.35 with the recordkeeping requirements proposed for SDs and MSPs under the Dodd-Frank Act.⁶⁴ The proposed amendments to regulation 1.35 would require that the recorded communications be identifiable by counterparty and transaction. As noted above, one of the proposed revisions to regulation 1.31 would require that each recorded communication be maintained in its native file format and produced in a form specified by any Commission representative. Records of these communications may continue to be stored on electronic storage media, provided, however, that for electronic records, the storage media must preserve the native file format of the electronic records. Records must be maintained for a period of five years and shall be readily accessible for the first two years of that five-year period.

The Commission solicits comments on the potential costs and benefits of requiring registrants to record and maintain oral communications as provided in the proposed rule.⁶⁵

As part of the ministerial amendments proposed in this release, the Commission is proposing to renumber portions of regulation 1.35 so that paragraphs currently numbered 1.35(a-1) and 1.35(a-2) will be renumbered 1.35(b) and 1.35(c), respectively. As a result, paragraphs currently numbered 1.35(b), (c), (d) and (e) will be

from the date the tape was created, the first two years in an easily accessible place).

⁶⁴ See Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 FR 7666, Dec. 9, 2010 (Proposed regulation 23.202(a)(1) would require "[e]ach swap dealer and major swap participant [to] make and keep pre-execution trade information, including, at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media").

⁶⁵ The Commission has received several comments on the costs and benefits associated with its proposed regulation 23.202 Daily Trading Records (Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 FR 7666, Dec. 9, 2010) and will consider those comments in connection with these proposed rules. The comments are available on the Commission's Web site at <http://www.cftc.gov>.

renumbered 1.35(d), (e) (f) and (g), respectively.

Because proposed regulation 1.35 extends recordkeeping obligations to swaps, the Commission has proposed special language for swaps, where appropriate. In paragraph (b)(2) (proposed (d)(2)) (records of futures, commodity options, and retail forex exchange transactions for each account), the Commission has proposed adding provision (iv). Proposed regulation 1.35(d)(2)(iv) would require FCMs, IBs, and any clearing members clearing swaps executed on a DCM or SEF to maintain records describing the date, price, quantity, market, commodity, and, if cleared, DCO of each swap.

The Commission recognizes that money managers currently execute bunched swap orders on behalf of clients and allocate the trades to individual clients post-execution. The Commission believes that the bunched order procedures currently applicable to futures can be adapted for use in swap trading. Therefore, the Commission proposes to amend subsection (a-1)(5) (proposed (b)(5)), which addresses post-execution allocation of bunched orders. As discussed below, the Commission also is proposing to delete appendix C to part 1, which predated regulation 1.35(a-1)(5) (proposed (b)(5)) and also addresses bunched orders.

In order to have a single standard for all intermediaries that might have discretion over customer accounts, the Commission is proposing to include FCMs and IBs as eligible account managers in regulation 1.35(a-1)(5) (proposed (b)(5)). Unlike other account managers, however, FCMs and IBs are prohibited from including proprietary trades in a bunched order with customer trades. Accordingly, the Commission is proposing to add a cross-reference in regulation 1.35(a-1)(5) (proposed (b)(5)) to regulations 155.3 and 155.4, which impose that restriction on FCMs and IBs, respectively. The Commission requests comment on whether the proposal to add FCMs and IBs to the list of eligible account managers is appropriate.

The Commission further proposes to amend regulation 1.35(a-1) (proposed (b)) to provide that specific customer account identifiers need not be included in confirmations or acknowledgments provided pursuant to proposed regulation 23.501(a), if the requirements of regulation 1.35(a-1)(5) (proposed (b)(5)) are met. This would enable account managers to bunch orders for trades executed bilaterally with SDs or MSPs. The proposal would require that, similar to the current procedure for futures, the allocation be completed by

the end of the day of execution and provided to the counterparty. The Commission requests comment on whether the proposed procedures for handling bunched swap orders would be effective. In particular, the Commission requests comment on whether allocation can be conducted by the end of the day of execution.

The Commission proposes deleting paragraphs (f)-(l) of regulation 1.35. Pursuant to the CFMA, regulation 38.2 required DCMs to comply with an enumerated list of Commission regulations, and exempted them from all remaining Commission regulations that were no longer applicable post-CFMA.⁶⁶ Paragraphs (f)-(l) of regulation 1.35 are not among those enumerated regulations still applicable to DCMs and, therefore, have been moot since regulation 38.2 took effect. Regulations 1.35(f)-(l) required contract markets: To identify floor brokers, floor traders, and clearing members in a certain manner; to keep records indicating the time of trade executions in a certain manner; to maintain records of changes in the price of transactions; to demonstrate their effectiveness in complying with recordkeeping obligations; and to create rules imposing certain recordkeeping requirements on contract market members. The DCM Core Principles proposal in December 2010 substantially revised part 38, but did not revoke regulation 38.2.⁶⁷

As part of the ministerial amendments proposed in this release, the Commission is proposing to eliminate from the Commission's regulations any provisions that have been inapplicable to DCMs since the passage of the CFMA, and that remain inapplicable after the passage of the DFA. Paragraphs (f)-(l) of regulation 1.35 are among those provisions. Pursuant to the proposed removal of paragraph (j) of regulation 1.35, the Commission also proposes copying most of that provision into proposed subsection (d)(7)(i) (currently (b)(7)(i)).

Finally, the Commission proposes the following technical correction to regulation 1.35(b)(3)(v) (proposed (d)(3)(v)): that the final sentence reference "commodity futures, retail forex, commodity option, or swap books and records" instead of "commodity retail forex or commodity option books and records."

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

Dodd-Frank Act section 723(a)(3) added a new section 2(h)(8) to the CEA to require, among other things, that swaps subject to the clearing requirement of CEA section 2(h)(1) be executed either on a DCM or on a SEF. The DFA established SEFs as a new category of regulated markets for the purpose of trading and executing swaps.⁶⁸ Because SEFs are now regulated markets under the CEA, many of the Commission's existing regulatory provisions that currently are applicable to DCMs also will become applicable to SEFs.

Accordingly, the Commission proposes to amend paragraphs (c) and (d) of regulation 1.37, pertaining to recording foreign traders' and guarantors' names, addresses, and business information. Currently, these provisions apply to DCMs and futures and options contracts executed on those facilities. The proposed revision would amend the provisions to also include SEFs and swap transactions. Additionally, the Commission proposes to amend the title and remaining text of regulation 1.37 to reflect the proposed removal of the term "option customer."⁶⁹

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

Like regulation 1.37, the Commission is proposing to amend regulation 1.39 to apply it to SEFs and swaps. Regulation 1.39, which currently applies to members of contract markets, governs the simultaneous execution of buy and sell orders of different principals for the same commodity for future delivery by a member and permits the execution of such orders between such principals on a contract market. The Commission proposes to amend this provision to include eligible contract participants ("ECPs") on SEFs and registrants, and to include swap transactions. The Commission is also amending paragraph (c) to eliminate the reference to "cross trades" as they are no longer defined under section 4c(a) of the Act, as amended by the DFA.

⁶⁸ Section 723(a)(3) of the Dodd-Frank Act amends section 2(h) of the CEA, providing that with respect to transactions involving a swap subject to the clearing requirement of section 2(h)(1) of the CEA, counterparties must execute the transaction on a DCM or a SEF.

⁶⁹ See *supra* note 15 and accompanying text.

⁶⁶ See 71 FR 1964, Jan. 12, 2006.

⁶⁷ Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572, Dec. 22, 2010.

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

Regulation 1.40 requires FCMs, RFEDs, IBs and members of contract markets to furnish to the Commission certain information they publish or circulate concerning crop or market information affecting prices of commodities. The Commission is proposing to apply regulation 1.40 to ECPs trading on SEFs to the extent that such ECPs have trading privileges on the SEF. ECPs that do not have trading privileges on a SEF would not be subject to regulation 1.40. The amendments also update the forms of communication covered by the regulation by replacing the word "telegram" with "telecommunication."

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

The Commission proposes to amend regulation 1.59 to include SEFs and swaps. The Commission is also proposing to amend regulation 1.59(b) to correct certain cross-references to the Act and its regulations. Paragraph (c) of proposed regulation 1.59 has been revised to apply only to registered futures associations, as the prohibitions contained therein applicable to the other SROs already are addressed in proposed regulation 40.9.

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

The Commission is proposing to amend regulation 1.63 to correct certain cross-references to the Act and its regulations. The Commission also is proposing to amend paragraph (d) to incorporate the posting of notices required under that paragraph on each SRO's Web site.

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

Regulation 1.67 requires contract markets, upon taking any final disciplinary action involving a member causing financial harm to a non-member, to provide notice to the FCM that cleared the transaction. FCMs and other registrants on SEFs should also be notified of any disciplinary action involving transactions on a SEF they executed for ECPs. Accordingly, the Commission is proposing to amend regulation 1.67 to include SEFs, registrants and ECPs on such facilities.

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

The Commission proposes to remove regulation 1.68. Regulation 1.68 permits a customer of an FCM to allow the FCM to not separately account for and segregate such customer's funds if, among other things, such funds are being carried by the FCM to trade on or through the facilities of a DTEF, a category of trading organization added to the CEA by section 111 of the CFMA.⁷⁰ No DTEF has ever registered with the Commission. Furthermore, section 734 of the Dodd-Frank Act repeals the DTEF provisions in the CEA, effective July 15, 2011. Therefore, because the statutory provisions underpinning regulation 1.68 will be repealed, the Commission proposes to remove it from the Commission's regulations.⁷¹

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

The CFMA adopted core principles for DCMs.⁷² On August 10, 2001, the Commission published final rules implementing provisions of the CFMA, in which it concluded that the CFMA's framework effectively constituted a broad exemption from many of the existing regulations applicable to DCMs.⁷³ In implementing the provisions of the CFMA, the final rule exempted DCMs from such regulations. Specifically, the final rule codified regulation 38.2, which required DCMs to comply with an enumerated list of Commission regulations, and exempted them from all remaining Commission regulations no longer applicable post-CFMA. As part of the ministerial amendments proposed in this release, the Commission is proposing to eliminate from the Commission's regulations any provisions that have been inapplicable to DCMs since the CFMA was enacted and that remain inapplicable after enactment of the DFA. Accordingly, the Commission proposes to eliminate the following regulations: Regulation 1.44 (Records and reports of

warehouses, depositories, and other similar entities; visitation of premises), regulation 1.53 (Enforcement of contract market bylaws, rules, regulations, and resolutions), and regulation 1.62 (Contract market requirement for floor broker and floor trader registration).

14. Appendix C to Part 1: Bunched Orders and Account Identification

The Commission proposes to eliminate appendix C to part 1. Appendix C consists of a Commission Interpretation regarding certain account identification requirements pertaining to the practice of combining orders for different accounts into a single order book, referred to as bunched orders. The procedures for bunched orders are set forth in regulation 1.35(a)-(5). Accordingly, the procedures under appendix C to part 1 are duplicative and no longer necessary.

B. Part 7

The Commission is proposing to rename part 7 of the Commission's regulations "Registered Entity Rules Altered or Supplemented by the Commission," thus reflecting the language in section 8a(7) of the Act, as amended by the Dodd-Frank Act, which provides the basis for Part 7. The Commission is also proposing to make a similar change in regulation 7.1, replacing contract market rules with registered entity rules. Finally, the Commission is proposing to remove and reserve subparts B (Chicago Mercantile Exchange Rules) and C (Board of Trade of the City of Chicago Rules) and their associated sections.

C. Part 8

The Commission proposes to remove part 8 of its regulations.⁷⁴ As part of its implementation of the Dodd-Frank Act, on December 1, 2010, the Commission issued a comprehensive NPRM for DCMs.⁷⁵ In the NPRM, the Commission proposed regulations in "Subpart N—Disciplinary Procedures" of part 38 to amend the disciplinary procedure requirements applicable to DCMs.⁷⁶ Several of the proposed regulations in

⁷⁴ Regulation 38.2 exempts designated contract markets from all Commission rules not specifically reserved. 17 CFR 38.2. The Part 8 rules were not reserved.

⁷⁵ Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572, Dec. 22, 2010.

⁷⁶ 75 FR at 80597. Section 735(a) of the Dodd-Frank Act eliminates all DCM designation criteria, including Designation Criterion 6 (Disciplinary Procedures). Section 735(b) of the Dodd-Frank Act creates a new Core Principle 13 (Disciplinary Procedures) that is devoted exclusively to exchange disciplinary proceedings, and captures disciplinary concepts inherent in both Designation Criterion 6 and in current DCM Core Principle 2.

⁷⁰ Public Law 106-554, 114 Stat. 2763, app. E (2000) (codified at CEA section 5a, 7 U.S.C. 7a).

⁷¹ The Commission is also proposing to delete all other references to DTEFs, except those already removed by other proposals, throughout its regulations. See *infra* Part II.G.

⁷² Public Law 106-554, 114 Stat. 2763 (2000).

⁷³ A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, 66 FR 42256, Aug. 10, 2001.

subpart N of part 38 are similar to the text of the disciplinary procedures found in part 8 of the Commission's regulations.⁷⁷ Although the Commission noted in the DCM NPRM that the proposed disciplinary procedures propose new disciplinary procedures for inclusion in part 38, the Commission proposes to remove part 8 from its regulations to avoid any confusion that could result from those regulations containing two sets of exchange disciplinary procedures.⁷⁸ The effective date of any deletion of these part 8 regulations would be contemporaneous with the effective date of any changes to the part 38 regulations.

D. Parts 15, 18, 21, and 36

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

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

Both sections 723 and 734 of the Dodd-Frank Act contain grandfather provisions whereby ECMs and EBOTs may petition the Commission to continue to operate as ECMs and EBOTs. Pursuant to the grandfather provisions, in September 2010, the Commission issued orders regarding the treatment of such grandfather petitions (the "Grandfather Relief Orders").⁷⁹ Under the Grandfather Relief Orders, the Commission may, subject to certain conditions, provide relief to ECMs and EBOTs for up to one year.

Pursuant to the DFA and the Grandfather Relief Orders, the Commission proposes to remove from parts 15, 18, 21 and 36⁸⁰ references to

CEA sections 2(h) and 5d and to replace those references, where appropriate, with references to the Grandfather Relief Orders as the authority under which ECMs and EBOTs can continue to operate. The Commission also proposes to remove from parts 15, 18, 21, and 36 of its regulations references to CEA sections 2(d), 2(g), and 5a, as well as references to DTEFs.

E. Parts 41, 140, and 145

The Commission also proposes to incorporate changes into its regulations to account for other new categories of registered entities and to include new products now subject to Commission jurisdiction. Section 733 of the Dodd-Frank Act added new section 5h to the CEA and created SEFs. Section 728 of the Dodd-Frank Act added new section 21 to the CEA and created SDRs. SEFs will allow for the trading and clearing of swap transactions between ECPs, as that term is defined in CEA section 1a(18).⁸¹ In addition to the amendments contained in proposed part 37, the Commission is proposing additional amendments throughout the regulations to include SEFs and SDRs where necessary. The Commission also proposes to delete from part 41 references to DTEFs as that term was deleted from CEA section 5b by the Dodd-Frank Act, effective July 15, 2011.⁸²

The proposed changes throughout parts 140 (Organization, Functions and Procedures of the Commission) and 145 (Commission Records and Information) reflect the need to incorporate SEFs and SDRs into the Commission's regulations dealing with the rights and obligations of other registered entities. Proposed regulation 140.72 provides the Commission with the authority to disclose confidential information to SEFs and SDRs. This provision allows the Commission, or specifically identified Commission personnel, to disclose information necessary to effectuate the purposes of the CEA, including such matters as transactions or market operations. Proposed regulation 140.96 authorizes the Commission to publish in the Federal Register information pertaining to the applications for registration of DCMs,

continue to operate under the Grandfather Relief Orders.

⁸¹ For a detailed discussion of the proposed rules as they directly relate to SEFs, see 76 FR 1214, Jan. 7, 2011.

⁸² Section 5b of the CEA provided for the registration of DTEFs. Although secondary references to DTEFs remain in the act, none of those would enable an entity to commence operations as a DTEF. The proposed deletions are in regulations 41.2, 41.12, 41.13, 41.21–41.25, 41.27, 41.43 and 41.49.

SEFs and SDRs, as well as new rules and rule amendments which present novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with the Act, or regulations under the Act. Proposed regulation 140.99 also includes SEFs and SDRs in the category of registered entities that may petition the Commission for exemptive relief and no-action and interpretative letters.

Proposed regulation 140.735–3 adds SEFs and SDRs to the list of entities from which Commission members and employees may not accept employment or compensation. The Commission proposes adding swaps to those agreements, contracts or transactions Commission staff may not trade. The Commission would like to take this opportunity to also add retail forex transactions, as that term is defined in regulation 5.1(m), to this list.

Finally, proposed regulation 145.9 expands the definition of "submitter" by adding SEFs and SDRs to the list of registered entities to which a person's confidential information has been submitted, and which, in turn, submit that information to the Commission. This amendment allows individuals who have submitted information to a SEF or SDR to request confidential treatment under regulation 145.9.

F. Part 155

1. Regulation 155.2: Trading Standards for Floor Brokers

The Commission proposes removing the references to regulation 1.41 within regulation 155.2 because the Commission removed and reserved regulation 1.41 in 2001 (66 FR 42256) pursuant to the CFMA. The Commission also proposes removing the related reference to former section 5a(a)(12)(A) of the Act.

G. Other General Changes to CFTC Regulations

1. Removal of References to DTEFs

The Commission proposes the removal of references to DTEFs and regulations pertaining to DTEFs in parts 1, 5, 15, 36, 41, 140, and 155 because section 734 of the DFA abolished DTEFs, effective July 15, 2011.⁸³

2. Other Conforming Changes

The Commission also proposes in various parts of its regulations to update

⁸³ This proposed rulemaking is not deleting those DTEF references that other NPRMs have already proposed deleting from the Commission's regulations (e.g., some references in part 3 and all references in part 40).

⁷⁷ Paragraph (b)(4) of the acceptable practices for former Core Principle 2 referenced part 8 of the Commission's regulations as an example that DCMs could follow to comply with Core Principle 2. 17 CFR pt. 38, app. B, Acceptable Practices for Core Principle 2 at (b)(4). In its experience, the Commission has found that many DCMs' disciplinary programs do in fact model their disciplinary structures and processes on part 8.

⁷⁸ 75 FR at 80597.

⁷⁹ 75 FR 56513, Sept. 16, 2010.

⁸⁰ Part 36 provisions apply to ECMs and EBOTs. The Commission is not proposing to delete part 36 in its entirety because part 36 provisions will continue to apply to ECMs and EBOTs that

cross-references to CEA provisions, now renumbered after the passage of the DFA. An example of one such change is proposed regulation 166.5, in which the Commission proposes to update the statutory reference to “eligible contract participant,” to reflect the Dodd-Frank Act’s renumbering of CEA section 1a. Additionally, where typographical errors or other minor inconsistencies were discovered while reviewing CFTC regulations, the Proposal includes instructions and proposed regulations to correct them.

III. Request for Comment

The Commission requests comment generally on all aspects of the proposed rules. As discussed in more detail above, the Commission also requests comment on: whether any changes to the “physical” definition in regulation 1.3 are necessary or warranted; the potential costs and effects of the proposed new requirements that all books and records be maintained in their original form (for paper) and their native file format (for electronic records); whether the retention period for any communication medium (e.g., oral communications) should be shorter than the retention period applicable to other required records; the potential costs and effects of requiring registrants to record and maintain oral communications; whether the proposal to add FCMs and IBs to the list of eligible account managers is appropriate; and whether the proposed procedures for handling bunched swap orders are feasible.

IV. Administrative Compliance

A. Paperwork Reduction Act

The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it has been approved by the Office of Management and Budget (“OMB”) and displays a currently valid control number.⁸⁴ This proposed rulemaking contains new collections of information for which the Commission must seek a valid control number. The Commission therefore is submitting this proposal to OMB for its review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for these new collections of information is “Books and Records Requirements for Certain Registrants and Other Market Participants.” Responses to these information collections would be mandatory.

With respect to all of the Commission’s collections, 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 Commodity Exchange Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Information To Be Provided by Reporting Entities/Persons

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

Regulation 1.31 describes the manner in which “all books and records required to be kept by the Act” must be maintained. Most of the requirements of regulation 1.31 are applicable to FCMs, IBs, RFEDs, CTAs, CPOs, and members of DCMs and SEFs in conjunction with other part 1 regulations, and the PRA burdens either have been or will be covered by the OMB control numbers associated with the other part 1 regulations. Examples of these other part 1 regulations are regulation 1.33, which requires certain registrants to produce monthly and confirmation statements, and regulation 1.35, which requires the maintenance of records of cash commodity, futures, and option transactions. Regulation 1.31 would also be applicable to SDs and MSPs in conjunction with proposed part 23 regulations.⁸⁵

i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

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

part 23 regulations. As members of SEFs will be newly subject to the part 1 regulations, the Commission must estimate the burden of subsection (b)(3)(ii) on these entities and seek OMB approval for this new application of the subsection.

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

As there will not be any SEFs operating until after the Dodd-Frank Act becomes effective in July 2011, it is not possible for the Commission to estimate with precision how many SEF members there will be or how many of those SEF members will be FCMs, SDs, or MSPs that are being covered by already pending existing information collections. Nonetheless, the Commission has estimated that 35 SEFs will register with it after the Dodd-Frank Act becomes effective, and now is estimating that there may be on average 100 members of a SEF that will not fall under one of the other collections. Accordingly, the aggregate new burden of subsection (b)(3)(ii) is estimated to be 100 one-time burden hours to approximately 3,500 SEF members.

The Commission expects that compliance and operations managers will be employed in the establishment of the written procedures and controls under subsection (b)(3)(ii). According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, “Financial Managers,” that is employed by the “Securities and Commodity Contracts Intermediation and Brokerage” industry is \$74.41.⁸⁶ Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of \$100 per hour. Accordingly, the burden associated with developing written procedures and controls will total approximately \$10,000 for each applicable member of a SEF on a one-time basis.

ii. Representation to the Commission

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

⁸⁵ Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 FR 76666, Dec. 9, 2010.

⁸⁶ Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, <http://www.bls.gov/oes/current/oes113031.htm> (May 2009).

⁸⁴ 44 U.S.C. 3501 *et seq.*

requires persons employing an electronic storage system to provide a representation to the Commission prior to the initial use of the system.⁸⁷ The Commission estimates the burden of drafting this representation in accordance with regulation 1.31(c) and submitting it to the Commission to be 1 hour.

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, “Financial Managers,” (which includes operations managers) that is employed by the “Securities and Commodity Contracts Intermediation and Brokerage” industry is \$74.41.⁸⁸ Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of \$100 per hour. Accordingly, the burden associated with drafting and submitting the representation prior to using an electronic storage system would be \$100 per affected member of a SEF.

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

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

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, “Financial Managers,” (which includes operations managers) that is employed by the “Securities and Commodity Contracts Intermediation and Brokerage” industry is \$74.41.⁸⁹ Accordingly the burden associated with

complying with 1.33 in respect of a swap confirmation and each monthly statement to be \$74.41 ($\74.41×1 hour) for each swap transaction entered into.

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

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

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, “Financial Managers,” (which includes operations managers) that is employed by the “Securities and Commodity Contracts Intermediation and Brokerage” industry is \$74.41.⁹⁰ Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of \$100 per hour. Thus, each SEF member will have a burden of \$201,600 per year ($2,016 \text{ hours} \times \$100/\text{hour}$).

The proposed amendments to regulation 1.35 would also require FCMs, RFEDs, IBs, and members of DCMs to comply with the regulation 1.35 recordkeeping requirements for any swap transactions into which they enter. Because the proposed recordkeeping requirements for swaps would be equivalent to the recordkeeping requirements they must currently follow in respect of futures and commodity option transactions, the additional burden for any swap transaction would be the same for any additional futures and commodity option transaction for which they keep records pursuant to regulation 1.35 in its current form. The Commission estimates that the recordkeeping burden associated with each swap transaction would be 0.5 hours, for a total burden of \$50 per transaction.

The proposed amendments to regulation 1.35 would also require that each FCM, IB, RFED and member of a DCM or SEF retain all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices,

that lead to the execution of transactions in a commodity interest or cash commodity, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media, with a further requirement that each transaction record be maintained as a separate electronic file identifiable by transaction and counterparty.

The Commission anticipates that the aforementioned registrants and members of DCMs and SEFs may incur certain one-time start-up costs in connection with establishing a system to retain oral communications. The Commission estimates that the cost of procuring systems to record these oral communications will be \$55,000 for an average large entity that does not already have such systems in place, and estimates procurement costs of \$10,000 for each small entity that does not already have such systems in place.

The Commission estimates the burden hours associated with these start-up costs to be 135 hours for any entity that does not already have a system in place. According to the recent Bureau of Labor Statistics, the mean hourly wage of computer programmers under occupation code 15–1021 and computer software engineers under program codes 15–1031 and 1032 are between \$34.10 and \$44.94.⁹¹ Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly programming wage of \$50 per hour for each of the categories of persons who will have to establish the system for maintaining oral records. Accordingly, the start-up burden associated with establishing an audit system would be \$6,750 ($\$50 \times 135 \text{ hours}$) per affected FCM, IB, RFED, member of a DCM, and member of a SEF.

The Commission also estimates that each of these persons will have to devote one hour per trading day to ensure the operation of the system to retain oral records. This would lead to \$12,600 per year ($1 \text{ hour per trading day} \times 252 \text{ trading days per year} \times \$50/\text{hour}$) per affected FCM, IB, RFED, member of a DCM, and member of a SEF.

⁸⁷ As with subsection (b)(3)(ii), regulation 1.31(c) is already applicable or will be made applicable by other actions to FCMs, IBs, DCM members, as well as SDs or MSPs pursuant to proposed part 23 regulations.

⁸⁸ Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, <http://www.bls.gov/oes/current/oes113031.htm> (May 2009).

⁸⁹ Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, <http://www.bls.gov/oes/current/oes113031.htm> (May 2009).

⁹⁰ Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, <http://www.bls.gov/oes/current/oes113031.htm> (May 2009).

⁹¹ Occupational Employment Statistics, Occupational Employment and Wages: 15–1021, Computer Programmers, <http://www.bls.gov/oes/current/oes151021.htm> (May 2009); Occupational Employment Statistics, Occupational Employment and Wages: 15–1031, Computer Software Engineers, Applications, <http://www.bls.gov/oes/current/oes151031.htm> (May 2009); Occupational Employment Statistics, Occupational Employment and Wages: 15–1032, Computer Software Engineers, Systems Software, <http://www.bls.gov/oes/current/oes151032.htm> (May 2009).

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

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

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

The Commission additionally proposes amending regulation 1.37(c) by requiring SEFs to comply with a provision that DCMs must currently follow: Keep a record showing the true name, address, and principal occupation or business of any foreign trader executing transactions on the facility or exchange. According to regulation 1.37(d), this provision does not apply in respect of futures/options/swaps that foreign traders execute through FCMs or IBs.

The Commission estimates that it would take a SEF a total of 0.4 hours to prepare each record in accordance with regulation 1.37(c). According to the Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 43-9021, "Data Entry Keyer," that is employed in "Office and Administrative Support" is \$14.03.⁹²

⁹² Occupational Employment Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 523100—Securities and Commodity Contracts Intermediation and

Because SEFs may be large entities employing persons at wages higher than the average, the Commission conservatively estimates the mean hourly wage to be \$19.03 per hour. Thus, the burden associated with preparing a record with regulation 1.37(c) would be \$7.61 (\$19.03/hour × 0.4 hours).

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

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

According to the recent Bureau of Labor Statistics, the mean hourly wage of computer programmers under occupation code 15-1021 and computer software engineers under program codes 15-1031 and 1032 are between \$34.10 and \$44.94.⁹³ Because SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly programming wage of \$50 per hour for each of the categories of persons who will have to establish the system for maintaining oral records. Accordingly, the start-up burden associated with the data capture requirements would be an average of \$5.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")⁹⁴ requires that agencies consider whether the rules they propose

Brokerage, http://www.bls.gov/oes/current/naics4_523100.htm#43-0000 (May 2009).

⁹³ Occupational Employment Statistics, Occupational Employment and Wages: 15-1021, Computer Programmers, <http://www.bls.gov/oes/current/oes151021.htm> (May 2009); Occupational Employment Statistics, Occupational Employment and Wages: 15-1031, Computer Software Engineers, Applications, <http://www.bls.gov/oes/current/oes151031.htm> (May 2009); Occupational Employment Statistics, Occupational Employment and Wages: 15-1032, Computer Software Engineers, Systems Software, <http://www.bls.gov/oes/current/oes151032.htm> (May 2009).

⁹⁴ 5 U.S.C. 601 *et seq.*

will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact. The rules proposed by the Commission are for the most part technical amendments to conform the affected parts to provisions of the Dodd-Frank Act and, as such, non-substantive. The Commission is also amending its books and records regulations to require FCMs, IBs, RFEDs, and members of DCMs to observe recordkeeping requirements for swaps that they currently observe in respect of futures and commodity option transactions. Additionally, the Commission is proposing to apply certain of those books and records regulations to members of SEFs, mirroring obligations that currently are met by members of DCMs. The Commission is also proposing to add a substantive rule change to regulation 1.35. The substantive rules would affect FCMs, IBs, RFEDs, and members of DCMs and SEFs.

Except for the new regulations requiring FCMs, IBs, RFEDs, and members of DCMs and SEFs to record all oral communications leading to the execution of transactions in a commodity interest or cash commodity, the Commission has determined that none of the proposed rules will have a significant economic impact on any substantial number of entities. Additionally, as presented below, the Commission previously has determined or is now determining that all entities except for certain IBs are not small entities for the purposes of the RFA.

Therefore, according to 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, is hereby certifying that all rules except for the oral communications recordkeeping rules will not have a significant economic effect on a significant number of small entities. A regulatory flexibility analysis addressing the impact of the oral communications recordkeeping rules on certain IBs is provided herein.

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

The Commission has previously determined that registered FCMs, RFEDs, DCMs, ECPs, and large traders are not small entities for purposes of the RFA.⁹⁵ 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

⁹⁵ See respectively and as indicated: 47 FR 18618, 18619, Apr. 30, 1982 (DCMs, FCMs, and large traders); 66 FR 20740, 20743, Apr. 25, 2001 (ECPs); and 75 FR 55410, 55416, Sept. 19, 2010 (RFEDs).

significant economic impact on a substantial number of small entities with respect to these entities.

2. SEFs

SEFs are new categories of registrant under the Dodd-Frank Act. Therefore, the Commission has not previously addressed the question of whether SEFs are, in fact, "small entities" for purposes of the RFA. For the reasons that follow, the Commission is hereby determining that none of these entities would be small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules, with respect to SEFs, will not have a significant impact on a substantial number of small entities.

The Dodd-Frank Act defines a SEF as a trading system or platform in which multiple participants have the ability to accept bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility that facilitates the execution of swaps between persons and is not a DCM. The Commission previously determined that a DCM is not a small entity because, among other things, it may only be designated when it meets specific criteria, including expenditure of sufficient resources to establish and maintain adequate self-regulatory programs. Likewise, the Commission will register an entity as a SEF only after it has met specific criteria, including the expenditure of sufficient resources to establish and maintain an adequate self-regulatory program. Moreover, members of SEFs, to whom many of the proposed regulations would apply, additionally are not small entities for the purposes of the RFA. As noted above, the Commission previously determined that ECPs are not small entities, and the Dodd-Frank Act provides that only ECPs can enter into swaps on a SEF. Accordingly, as with DCMs, the Commission is hereby determining that SEFs and members of SEFs are not "small entities" for purposes of the RFA.

3. Regulatory Flexibility Analysis for Oral Communication Rules Applicable to IBs

The Commission has not previously determined that IBs are not "small entities" for the purposes of the RFA. Historically, the Commission has evaluated within the context of a particular regulatory proposal whether all or some affected IBs would be considered to be small entities and, if so, the economic impact on them of the particular regulation.

Accordingly, the Commission offers, pursuant to 5 U.S.C. 603, the following initial regulatory flexibility analysis, which it shall transmit to the Chief Counsel for Advocacy of the Small Business Administration as 5 U.S.C. 603 requires:

a. A Description of the Reasons Why Action by the Agency Is Being Considered

The Commission is considering the adoption of the proposed amendments to regulation 1.35 requiring FCMs, RFEDs, IBs and DCM and SEF members to keep records of all oral communications leading to the execution of transactions in a commodity interest or cash commodity for several reasons. To begin, such an amendment to regulation 1.35 would protect customers from abusive sales practices, would protect registrants from the risks associated with transactional disputes, and would allow registrants to follow-up more effectively on customer complaints of abuses by their associated persons. Additionally, the amendment would make enforcement investigations more efficient by preserving critical evidence that otherwise may be lost to lapsed and inconsistent memories. This, in turn, is expected to increase the success of enforcement actions, which benefits customers, regulated entities, and the markets as a whole.⁹⁶ Finally, it is being proposed for regulatory parity, as it has been proposed recently for SDs and MSPs as part of their recordkeeping and reporting obligations.⁹⁷

b. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

As stated above, the objective of the proposed amendment to regulation 1.35 is to protect the market participants and the public, as well as to increase market integrity. In terms of the legal basis for this proposed rule, the Commission has been authorized by sections 4g and 8a(5) of the CEA to adopt regulations requiring registrants to keep books and records pertaining to such transactions

⁹⁶ In promulgating its own taping rule, the Financial Services Authority issued guidance stating the following benefits: "(i) Recorded communication may increase the probability of successful enforcement; (ii) this reduces the expected value to be gained from committing market abuse; and (iii) this, in principle, leads to increased market confidence and greater price efficiency." See Financial Services Authority, "Policy Statement: Telephone Recording: recording of voice conversations and electronic communications" (Mar. 2008).

⁹⁷ See Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 FR 76666, Dec. 9, 2010.

and positions in a form and manner and for such period as may be required by the Commission.⁹⁸

c. A Description of and, Where Feasible, an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

There are an estimated 1,500 IBs registered with the Commission at any given time. Between 80 and 90% of these IBs are "guaranteed introducing brokers," many of which may be small entities. There are an estimated 11,500 members of DCMs, some of which may be small entities. The Commission believes, however, that it is likely that less than 10% of the members of DCMs would be small entities given the capital and other resources they would need to comply with DCM rules.

d. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

Proposed regulation 1.35 would require all FCMs, RFEDs, IBs and members of DCMs or SEFs to keep records of all oral communications that lead to the execution of a commodity interest or cash commodity transaction. All small IBs and small DCM or SEF members will be subject to this requirement. The proposed regulation is primarily a recordkeeping requirement, which will obligate those firms that do not already do so to tape the telephone lines of their traders and sales forces. Maintenance of these oral communications for five years will require investments in hardware, software, and information technology personnel, all of which will be scalable to the size of the enterprise. There may be periodic reporting requirements, most frequently in response to a subpoena from the Commission, any other federal agency that has regulatory or civil enforcement authority over the firm, and the markets in which it conducts business, as well as law enforcement.

e. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule

The Commission has not identified any Federal rules which may duplicate, overlap, or conflict with the proposed rule. Certain firms may be obligated to

⁹⁸ 7 U.S.C. 6g and 12a(5).

retain oral communications by rule of a private SRO.

f. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The Commission has identified no significant alternatives that may minimize any significant economic impact of the proposed rule amendment on small entities. Clarification, consolidation, or simplification of compliance and reporting requirements would leave a large portion of the sales operations in the futures industry uncovered, and in consequence, the customers that transact business with them. Moreover, the benefits from the enforcement of the CEA by the Commission and by the Department of Justice at the criminal level would be lost. Finally, leaving a large portion of the sales operations uncovered by this rule could create regulatory arbitrage, causing large entities subject to this rule to move their sales operations into a series of small firms. The same would apply for exemptions.

Given the foregoing, the Commission has determined to treat equally all entities that engage in oral communications that lead to the execution of commodity interest and cash commodity transactions.

To the extent that certain IBs and members of DCMs and SEFs are impacted by the proposed amendments, the RFA analysis focuses on whether the proposed amendments will have a significant economic impact on a substantial number of small entities. At present, such entities are subject to certain recordkeeping retention and reporting requirements, based on the nature of their respective businesses; the proposed amendments would augment the existing recordkeeping retention and reporting requirements of these firms. The Commission understands that recent advancements in technology, particularly with respect to capturing records and storing such records, will enable all affected entities, including small entities, to incorporate into their existing recordkeeping programs the enhanced requirements set forth in the proposed amendments, without encountering a significant economic impact. The United Kingdom's FSA, which recently adopted similar recordkeeping requirements, discussed the declining costs of such recordkeeping programs in a Policy

Statement addressing these and other issues.⁹⁹

C. Cost-Benefit Analysis

Section 15(a) of the CEA¹⁰⁰ requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. Section 15(a) specifies that the costs and benefits shall be considered against 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 give greater weight to one or more of the five enumerated considerations to determine, in its discretion, that 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.

1. Costs

a. Amendments to Regulation 1.31

With respect to costs, the Commission has determined that for FCMs, IBs, CPOs, CTAs and members of DCMs, costs to institute recordkeeping systems to retain swap records for the life of the swap (*i.e.*, until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction) and for five years after that date would be far outweighed by the benefits to the financial system as a whole. The Commission is not imposing any cost that a prudent FCM, IB, CPO, CTA, and DCM member would not already incur in maintaining records for swap transactions. A prudent registrant would retain a swap record for the life of the swap to ensure that its rights under the contract are protected and its obligations are fulfilled.

As to the proposed requirements that records be kept in their original form (for paper records) and native file format (for electronic records), that the method of storage maintains electronic records in their native file format, and that the records be produced to the Commission in a form specified by the Commission, the Commission is not imposing significant new burdens on registrants

⁹⁹ Financial Services Authority, "Policy Statement: Telephone Recording: recording of voice conversations and electronic communications" (Mar. 2008). In addition to the rules promulgated by the Financial Services Authority, similar rules which mandate recording of certain voice and/or telephone conversations have been promulgated by the Comissão de Valores Mobiliários in Brazil and by the Autorité des Marchés Financiers in France.

¹⁰⁰ 7 U.S.C. 19(a).

and regulated entities. The Commission understands that registrants and regulated entities already retain electronic records in these forms. Moreover, to the extent that a registrant's transactional activity is retained on a platform operated by or additionally is captured by a regulated entity, trading mechanism, clearinghouse or another regulated entity (for example, where an IB transacts through an FCM) that is required to maintain these records in the same form, the registrant may rely on the retention requirements of the other registrant in order to comply with the proposed requirements of regulation 1.31.

b. Amendments to Regulation 1.33, 1.35, 1.37, and 1.39

The proposed regulations would require FCMs, IBs, RFEDs, DCMs and members of DCMs to comply with the same recordkeeping functions for swaps that they currently adhere to with respect to futures and commodity option transactions. The Commission anticipates that in complying with amended regulations 1.33, 1.35, 1.37 and 1.39, the aforementioned persons will already have the framework for producing and storing records and would only make adjustments as necessary to provide the additional information regarding swaps. Because the recordkeeping requirements in respect of swaps would be equivalent to the existing recordkeeping requirements for futures and commodity option transactions, the cost of complying with the proposed amendments should not differ materially from the cost of recording additional futures or commodity option transactions.

The Commission has also amended the aforementioned recordkeeping regulations by applying them to SEFs and their members. These persons will therefore need to factor in the costs in complying with these regulations before commencing their operations.

c. Amendments to Regulation 1.35 (Records of Oral Communications).

To the extent FCMs, RFEDs, IBs, members of DCMs, and members of SEFs enter into transactions in a commodity interest or cash commodity, the newly proposed requirements under regulation 1.35 would require them to record all oral communications that lead to the execution of transactions in a commodity interest or cash commodity. As described above, it is expected that any additional cost imposed by the recordkeeping requirements of proposed amendments to regulation 1.35 would be minimal for the average large FCM,

RFED, IB, or DCM or SEF member because the information and data required to be recorded is information and data a prudent FCM, RFED, IB, or DCM or SEF member would already maintain during the ordinary course of its business.¹⁰¹ Moreover, most FCMs, RFEDs, IBs, or members of DCMs or SEFs have adequate existing resources, technology systems, and recordkeeping structures that are capable of adjusting to the new regulatory framework without material diversion of resources away from commercial operations.

The Commission also believes that such costs would be minimal for the average small IB or member of a SEF who does not have digital telephone systems in place and may not have robust or up-to-date electronic data saving and storage capacity.

2. Benefits

a. Amendments to Regulation 1.31.

The Commission believes that the benefit of requiring FCMs, IBs, CPOs, CTAs, and DCM and SEF members to maintain swap records for the life of the swap (*i.e.*, until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction) and for five years after that date is significant, as is the requirement to maintain records in their native format. Proposed regulation 23.203(b)(2) has already proposed requiring SDs and MSPs to maintain swap records for the life of the swap and for five years after termination, maturity, expiration, transfer, assignment, or novation date of the transaction.¹⁰² It would therefore be inconsistent not to require other registrants, as well as DCM and SEF members to have the same obligation for swap records that they keep. The five-year retention period, which already applies to records for futures and commodity option transactions, is meant to protect market participants, the integrity of the market, and the

public at large by ensuring that an audit trail is maintained for routine compliance examinations, in the event of counterparty complaints, or in case of other events that may trigger an investigation by the Commission and other government agencies.

b. Amendments to Regulations 1.33, 1.35, 1.37, and 1.39

The Commission believes that there are significant benefits in requiring FCMs, IBs, RFEDs, DCMs and members of DCMs to comply with the same recordkeeping functions for swaps that they currently adhere to with respect to futures and commodity option transactions. The Commission also believes that there are significant benefits in requiring SEFs and members of SEFs to comply with certain of the recordkeeping functions contained in regulations 1.33, 1.35, 1.37 and 1.39. First is the issue of regulatory parity: Because many swaps will be executed on trading platforms, they should be subject to the same recordkeeping requirements as futures and commodity options. Moreover, these recordkeeping rules are fundamental to the Commission's efforts to maintain an orderly marketplace and to remain informed about market positions.

c. Amendments to Regulation 1.35 (Records of Oral Communications)

The proposed amendments to regulation 1.35 would newly require FCMs, RFEDs, IBs, and DCM and SEF members to comply with regulation 1.35 for any swap transactions into which they enter. The benefit of this amendment is significant because it requires these registrants to perform the same recordkeeping functions for swaps that they already perform for futures transactions, which protect the integrity and efficiency of the markets, market participants, and the public at large by ensuring that these records are available in the event of customer disputes, routine compliance examinations, and regulatory investigations.

Notwithstanding the potential costs described above that could be incurred by FCMs, RFEDs, IBs, and DCM and SEF members in complying with the proposed amendments that would newly require them to record all oral communications that lead to the execution of a transaction in a commodity interest or cash commodity, the Commission believes the benefits of the proposed amendments are significant and important.

First, the Commission believes that the proposed amendments will enhance the protection of market participants and the public by increasing the

probability of timely successful enforcement of the CEA and Commission regulations, particularly in cases involving suspected fraud, market manipulation and/or false reporting, by deterring market abuses, and additionally by reducing the expected value to be gained from committing market abuse. The Commission believes that increasing the quantity and quality of contemporaneous records that affected persons must retain, as provided under the proposed amendments, will protect market participants and the public from harm by wrongdoers. Such increases in the quantity and quality of contemporaneous records will enable the Commission to more fully and accurately establish the knowledge and intent of wrongdoers at the time of their wrongful acts. The Commission believes that the enhanced protection of market participants and the public outweighs the costs that may be borne by persons under the proposed amendments who do not already maintain oral communications.

Second, the Commission anticipates that the proposed amendments will lead to increased market confidence and greater price efficiency by reducing the expected value to be gained from committing market abuse, thereby deterring such inefficient acts. By requiring the recording of oral communications, which could be evidence of anti-competitive behavior, the proposed amendments will discourage anti-competitive behavior, thereby enhancing competition.

Third, the Commission believes that the proposed amendments, by increasing the probability of timely successful enforcement of the CEA and Commission regulations, and by deterring market abuses, will benefit the financial integrity of futures markets and lead to more effective price discovery. The Commission anticipates that such benefits will be achieved through the resultant enhanced investigative capabilities in cases involving suspected fraud, market manipulation, and/or false reporting.

Fourth, the Commission believes that the enhanced investigative and enforcement capabilities made possible under the proposed amendments ultimately will decrease the likelihood that incidents of wrongdoing, particularly with respect to cases of fraud, market manipulation and/or false reporting, will go undetected or unproven. The Commission believes that the cumulative impact of the proposed amendments will result in more successful prosecutions of wrongdoing under the CEA as well as

¹⁰¹ The Commission preliminarily has determined that any additional cost imposed by the recordkeeping requirements of proposed regulation 23.202(a)(1) (which has an analogous requirement for SDs and MSPs relating to retention of oral and written communications that lead to the execution of swaps) "would be minimal because the information and data required to be recorded is information and data a prudent swap dealer or major swap participant would already maintain during the ordinary course of its business," and "[m]oreover, most swap dealers and major swap participants have adequate, existing resources and recordkeeping structures that are capable of adjusting to the new regulatory framework without material diversion of resources away from commercial operations." See Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 FR 76666, 76673, Dec. 9, 2010.

¹⁰² 75 FR 76666, Dec. 9, 2010.

fewer market abuses being committed, which will benefit both market participants and the general public.

After considering these factors, the Commission has determined to propose the amendments described above. The Commission invites public comment on its application of the cost-benefit provision. Commenters also are invited to submit, with their comment letters, any data that quantifies the costs and benefits of the proposed amendments.

Other than the foregoing, these proposed rules do not impose any substantive regulatory obligations on any person. Rather, the Commission is adopting technical amendments to conform to the Dodd-Frank Act. Accordingly, there are no quantifiable costs associated with this rulemaking other than those discussed above. The sole qualitative benefit associated with this rulemaking, other than as discussed above, is accuracy.

List of Subjects

17 CFR Part 1

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

17 CFR Part 5

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

17 CFR Part 7

Commodity futures, Consumer protection, Registered entity.

17 CFR Part 8

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 15

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

17 CFR Part 18

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

17 CFR Part 21

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

17 CFR Part 36

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

17 CFR Part 41

Brokers, Reporting and recordkeeping requirements, Security futures products.

17 CFR Part 140

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

17 CFR Part 145

Confidential business information, Freedom of information.

17 CFR Part 155

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

17 CFR Part 166

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

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

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

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

2. Amend § 1.3 by:

a. Revising paragraphs (a), (b), (c), (d), (e), (g), (h), (k), (n), (p), (q), (r), (s), (t), (x), (y) introductory text, (y)(1), (y)(2) introductory text, (y)(2)(iii)(B), (y)(2)(iii)(C), (y)(2)(v)(B), (y)(2)(v)(C), (y)(2)(vii), (y)(2)(viii), (z)(1), (aa)(1)(i), (aa)(2)(i), (aa)(5), (bb), (cc), (ee), (ff), (gg), (ii), (kk), (mm)(1), (mm)(2) introductory text, (mm)(2)(i), (nn), (oo), (pp), (rr)(2), (ss), (tt), (vv), (xx), and (yy);

b. Removing and reserving paragraphs (jj) and (uu); and

c. Adding paragraphs (zz), (aaa), (bbb), (ccc), (ddd), (eee), (fff), (ggg), (hhh), (iii), (jjj), (kkk), and (lll), to read as follows:

§ 1.3 Definitions.

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

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

(c) *Clearing member*. This term means any person who is a member of, or enjoys the privilege of clearing trades in his own name through, the clearing organization of a designated contract market.

(d) *Clearing organization*. This term means the person or organization which acts as a medium for clearing transactions in commodities for future delivery or commodity option transactions, or for effecting settlements of contracts for future delivery or commodity option transactions, for and between members of any designated contract market.

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

* * * * *

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

(h) *Contract market; designated contract market*. These terms mean a board of trade designated by the Commission as a contract market under

the Act or in accordance with the provisions of part 38 of this chapter.

* * * * *

(k) *Customer*. This term means any person who uses a futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any commodity interest; *Provided, however*, an owner or holder of a proprietary account as defined in paragraph (y) of this section shall not be deemed to be a customer within the meaning of section 4d of the Act, the regulations that implement sections 4d and 4f of the Act and § 1.35, and such an owner or holder of such a proprietary account shall otherwise be deemed to be a customer within the meaning of the Act and §§ 1.37 and 1.46 and all other sections of these rules, regulations, and orders which do not implement sections 4d and 4f of the Act.

* * * * *

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

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

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

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

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

* * * * *

(p) *Futures commission merchant*. This term means:

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

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

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

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

(q) *Member*. This term means:

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

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

(ii) Having trading privileges on a registered entity.

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

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

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

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

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

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

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

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

(3) Swaps that have neither expired nor been terminated.

* * * * *

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

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

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

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

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

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

(1) For one of the following persons, or

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

* * * * *

(iii) * * *

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

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

* * * * *

(v) * * *

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

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

* * * * *

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

(viii) A business affiliate that, directly or indirectly is controlled by or is under common control with, such individual, partnership, corporation or association.

Provided, however, That an account owned by any shareholder or member of a cooperative association of producers, within the meaning of section 6a of the Act, which association is registered as a futures commission merchant and carries such account on its records, shall be deemed to be an account of a customer and not a proprietary account of such association, unless the shareholder or member is an officer, director or manager of the association.

(z) *Bona fide hedging transactions and positions*—(1) *General definition*. (i) Bona fide hedging transactions and positions shall mean transactions or positions in a contract for future delivery on any contract market, or in a commodity option, where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are

economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, and where they arise from:

(A) The potential change in the value of assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising, or

(B) The potential change in the value of liabilities which a person owns or anticipates incurring, or

(C) The potential change in the value of services which a person provides, purchases, or anticipates providing or purchasing.

(ii) Notwithstanding the foregoing, no transactions or positions shall be classified as bona fide hedging unless their purpose is to offset price risks incidental to commercial cash or spot operations and such positions are established and liquidated in an orderly manner in accordance with sound commercial practices and, for transactions or positions on contract markets subject to trading and position limits in effect pursuant to section 4a of the Act, unless the provisions of paragraph (z)(2) and (3) of this section have been satisfied.

* * * * *

(aa) * * *

(1) * * *

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

* * * * *

(2) * * *

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

* * * * *

(5) A leverage transaction merchant as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

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

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

(bb)(1) *Commodity trading advisor.* This term means any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in

section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option authorized under section 4c of the Act; any leverage transaction authorized under section 19 of the Act; any person registered with the Commission as a commodity trading advisor; or any person, who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing. The term does not include any bank or trust company or any person acting as an employee thereof, any news reporter, news columnist, or news editor of the print or electronic media or any lawyer, accountant, or teacher, any floor broker or futures commission merchant, the publisher or producer of any print or electronic data of general and regular dissemination, including its employees, the named fiduciary, or trustee, of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, or any fiduciary whose sole business is to advise that plan, any contract market, and such other persons not within the intent of this definition as the Commission may specify by rule, regulation or order: *Provided*, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession: *Provided further*, That the Commission, by rule or regulation, may include within this definition, any person advising as to the value of commodities or issuing reports or analyses concerning commodities, if the Commission determines that such rule or regulation will effectuate the purposes of this provision.

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

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

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

limitation, any subscriber of a commodity trading advisor.

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

* * * * *

(ee) *Self-regulatory organization.* This term means a contract market (as defined in § 1.3(h)), a swap execution facility (as defined in § 1.3(kkk)), a derivatives clearing organization (as defined in section 1a(15) of the Act), or a registered futures association under section 17 of the Act.

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

(1) Self-regulatory organization of which a futures commission merchant, an introducing broker, a leverage transaction merchant, a retail foreign exchange dealer, a swap dealer, or a major swap participant is a member; or

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

(3) If a leverage transaction merchant is a member of more than one self-regulatory organization and such leverage transaction merchant is the

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

(gg) *Customer funds*. This term means all money, securities, and property received by a futures commission merchant or by a clearing organization from, for, or on behalf of, customers:

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

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

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

(ii) As a premium payable to a customer;

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

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

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

* * * * *

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

(jj) [Reserved]

(kk) *Strike price*. This term means the price, per unit, at which a person may purchase or sell the commodity, swap or

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

* * * * *

(mm) * * *

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

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

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

(2) The term introducing broker shall not include:

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

* * * * *

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

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

credit in lieu thereof) in connection therewith.

(pp) *Leverage customer funds*. This term means all money, securities and property received, directly or indirectly by a leverage transaction merchant from, for, or on behalf of leverage customers to margin, guarantee or secure leverage contracts and all money, securities and property accruing to such customers as the result of such contracts, or the customers' leverage equity. In the case of a long leverage transaction, profit or loss accruing to a leverage customer is the difference between the leverage transaction merchant's current bid price for the leverage contract and the ask price of the leverage contract when entered into. In the case of a short leverage transaction, profit or loss accruing to a leverage customer is the difference between the bid price of the leverage contract when entered into and the leverage transaction merchant's current ask price for the leverage contract.

* * * * *

(rr) * * *

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

(ss) *Foreign board of trade*. This term means any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated, where foreign futures, foreign options, or foreign swaps are entered into.

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

(uu) [Reserved]

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

* * * * *

(xx) *Foreign broker*. This term means any person located outside the United States, its territories or possessions who is engaged in soliciting or in accepting orders only from persons located outside the United States, its territories or possessions for the purchase or sale of any commodity interest transaction on or subject to the rules of any designated contract market or swap

execution facility and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

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

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

(2) Any contract, agreement or transaction subject to a Commission regulation under section 4c or 19 of the Act;

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

(4) Any swap as defined in the Act, the Commission's regulations, a Commission order or interpretation, or a joint interpretation or order issued by the Commission and the Securities and Exchange Commission.

(zz) *Associated person of a swap dealer or major swap participant*. This term means any person who is associated with a swap dealer or major swap participant as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves the solicitation or acceptance of swaps, or the supervision of any person or persons so engaged. *Provided, however*, That the term does not include any person associated with a swap dealer or major swap participant the functions of which are solely clerical or ministerial.

(aaa) *Confirmation*. When used in reference to a futures commission merchant, introducing broker, or commodity trading advisor, this term means documentation (electronic or otherwise) that memorializes specified terms of a transaction executed on behalf of a customer. When used in reference to a swap dealer or major swap participant, this term means documentation (electronic or otherwise) that memorializes specified terms of a transaction executed opposite a counterparty.

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

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

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

(ccc) *Order*. This term means an instruction or authorization provided by a customer to a futures commission merchant, introducing broker or commodity trading advisor regarding

trading in a commodity interest on behalf of the customer.

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

(1) Permits trading—

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

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

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

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

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

(eee) *Prudential regulator*. This term has the meaning given to the term in section 1a(39) of the Commodity Exchange Act and includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant. The term also includes the Federal Deposit Insurance Corporation, with respect to any financial company as defined in section 201 of the Dodd-Frank Wall Street Reform and Consumer Protection Act or any insured depository institution under the Federal Deposit Insurance Act, and with respect to each affiliate of any such company or institution.

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

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

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

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

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

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

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

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

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

(iii) *Swap account*. This term means an account that is maintained in accordance with the segregation requirements of section 4d(f) of the Act and the rules thereunder.

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

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

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

(2) Is not a designated contract market.

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

3. Revise § 1.4 to read as follows:

§ 1.4 Use of electronic signatures, acknowledgments and verifications.

For purposes of complying with any provision in the Commodity Exchange Act or the rules or regulations in this Chapter I that requires a swap transaction to be acknowledged by a swap dealer or major swap participant or a document to be signed or verified by a customer of a futures commission merchant or introducing broker, a retail forex customer of a retail foreign exchange dealer or futures commission merchant, a pool participant or a client of a commodity trading advisor, or a counterparty of a swap dealer or major swap participant, an electronic signature executed by the customer, retail forex customer, participant, client, counterparty, swap dealer or major swap participant will be sufficient, if the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, swap dealer or major swap participant elects generally to accept electronic signatures, acknowledgments or verifications or another Commission rule permits the use of electronic signatures for the

purposes listed above; *Provided, however*, That the electronic signature must comply with applicable Federal laws and other Commission rules; And, *Provided further*, That the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, swap dealer or major swap participant must adopt and use reasonable safeguards regarding the use of electronic signatures, including at a minimum safeguards employed to prevent alteration of the electronic record with which the electronic signature is associated, after such record has been electronically signed.

4. Remove and reserve paragraph (a)(1)(ii) of § 1.17 to read as follows:

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

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

(ii) [Reserved]

* * * * *

5. Revise § 1.20 to read as follows:

§ 1.20 Customer funds to be segregated and separately accounted for.

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

clearing organization or any depository, that has received customer funds for deposit in a segregated account, as provided in this section, may hold, dispose of, or use any such funds as belonging to any person other than the customers of the futures commission merchant which deposited such funds.

(b) All customer funds received by a clearing organization from a member of the clearing organization to purchase, margin, guarantee, secure or settle the trades, contracts or commodity options of the clearing member's customers and all money accruing to such customers as the result of trades, contracts or commodity options so carried shall be separately accounted for and segregated as belonging to such customers, and a clearing organization shall not hold, use or dispose of such customer funds except as belonging to such customers. Such customer funds when deposited in a bank or trust company shall be deposited under an account name which clearly shows that they are the customer funds of the customers of clearing members, segregated as required by the Act and these regulations. The clearing organization shall obtain and retain in its files for the period provided by § 1.31 an acknowledgment from such bank or trust company that it was informed that the customer funds deposited therein are those of customers of its clearing members and are being held in accordance with the provisions of the Act and these regulations.

(c) Each futures commission merchant shall treat and deal with the customer funds of a customer as belonging to such customer. All customer funds shall be separately accounted for, and shall not be commingled with the money, securities or property of a futures commission merchant or of any other person, or be used to secure or guarantee the trades, contracts or commodity options, or to secure or extend the credit, of any person other than the one for whom the same are held: *Provided, however*, That customer funds treated as belonging to the customers of a futures commission merchant may for convenience be commingled and deposited in the same account or accounts with any bank or trust company, with another person registered as a futures commission merchant, or with a clearing organization, and that such share thereof as in the normal course of business is necessary to purchase, margin, guarantee, secure, transfer, adjust, or settle the trades, contracts or commodity options of such customers or resulting market positions, with the clearing organization or with any other

person registered as a futures commission merchant, may be withdrawn and applied to such purposes, including the payment of premiums to option grantors, commissions, brokerage, interest, taxes, storage and other fees and charges, lawfully accruing in connection with such trades, contracts or commodity options: *Provided further*, That customer funds may be invested in instruments described in § 1.25.

6. Revise § 1.21 to read as follows:

§ 1.21 Care of money and equities accruing to customers.

All money received directly or indirectly by, and all money and equities accruing to, a futures commission merchant from any clearing organization or from any clearing member or from any member of a contract market incident to or resulting from any trade, contract or commodity option made by or through such futures commission merchant on behalf of any customer shall be considered as accruing to such customer within the meaning of the Act and these regulations. Such money and equities shall be treated and dealt with as belonging to such customer in accordance with the provisions of the Act and these regulations. Money and equities accruing in connection with customers' open trades, contracts, or commodity options need not be separately credited to individual accounts but may be treated and dealt with as belonging undivided to all customers having open trades, contracts, or commodity option positions which if closed would result in a credit to such customers.

7. Revise § 1.22 to read as follows:

§ 1.22 Use of customer funds restricted.

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

8. Revise § 1.23 to read as follows:

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

The provision in section 4d(a)(2) of the Act and the provision in § 1.20(c), which prohibit the commingling of customer funds with the funds of a futures commission merchant, shall not be construed to prevent a futures

commission merchant from having a residual financial interest in the customer funds, segregated as required by the Act and the rules in this part and set apart for the benefit of customers; nor shall such provisions be construed to prevent a futures commission merchant from adding to such segregated customer funds such amount or amounts of money, from its own funds or unencumbered securities from its own inventory, of the type set forth in § 1.25, as it may deem necessary to ensure any and all customers' accounts from becoming undersegregated at any time. The books and records of a futures commission merchant shall at all times accurately reflect its interest in the segregated funds. A futures commission merchant may draw upon such segregated funds to its own order, to the extent of its actual interest therein, including the withdrawal of securities held in segregated safekeeping accounts held by a bank, trust company, contract market, clearing organization or other futures commission merchant. Such withdrawal shall not result in the funds of one customer being used to purchase, margin or carry the trades, contracts or commodity options, or extend the credit of any other customer or other person.

9. Revise § 1.24 to read as follows:

§ 1.24 Segregated funds; exclusions therefrom.

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

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

10. Revise § 1.26 to read as follows:

§ 1.26 Deposit of instruments purchased with customer funds.

(a) Each futures commission merchant who invests customer funds in instruments described in § 1.25 shall separately account for such instruments and segregate such instruments as belonging to such customers. Such instruments, when deposited with a bank, trust company, clearing organization or another futures commission merchant, shall be deposited under an account name which clearly shows that they belong to customers and are segregated as required by the Act and this part. Each futures commission merchant upon opening such an account shall obtain

and retain in its files an acknowledgment from such bank, trust company, clearing organization or other futures commission merchant that it was informed that the instruments belong to customers and are being held in accordance with the provisions of the Act and this part. *Provided, however*, that an acknowledgment need not be obtained from a clearing organization that has adopted and submitted to the Commission rules that provide for the segregation as customer funds, in accordance with all relevant provisions of the Act and the rules and orders promulgated thereunder, of all funds held on behalf of customers and all instruments purchased with customer funds. Such acknowledgment shall be retained in accordance with § 1.31. Such bank, trust company, clearing organization or other futures commission merchant shall allow inspection of such obligations at any reasonable time by representatives of the Commission.

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

11. Revise the introductory text of paragraph (a) in § 1.27 to read as follows:

§ 1.27 Record of investments.

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

* * * * *

12. Revise § 1.30 to read as follows:

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

Nothing in the regulations in this part shall prevent a futures commission merchant from lending its own funds to customers on securities and property pledged by such customers, or from repledging or selling such securities and property pursuant to specific written agreement with such customers. The proceeds of such loans used to purchase, margin, guarantee, or secure the trades, contracts, or commodity options of customers shall be treated and dealt with by a futures commission merchant as belonging to such customers, in accordance with and subject to the provisions of section 4d(a)(2) of the Act and these regulations.

13. Amend § 1.31 by revising paragraphs (a)(1), (a)(2), (b) introductory text, (b)(1)(ii)(D), (b)(2)(i), (b)(2)(ii), (b)(2)(iii), (b)(2)(v)(B), (b)(3)(i), (b)(3)(ii)(A), (b)(3)(ii)(C), (b)(3)(iii)(A), and (b)(4)(i), to read as follows:

§ 1.31 Books and records; keeping and inspection.

(a)(1) All books and records required to be kept by the Act or by these regulations shall be kept in their original form (for paper records) or native file format (for electronic records) for a period of five years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period; *Provided, however*, that records of any swap or related cash or forward transaction shall be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for a period of five years after such date. All such books and records shall be open to inspection by any representative of the Commission, the United States Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or, in connection with those security-based swap agreements described in section 1a(47)(A)(v) of the Act, the United States Securities and Exchange Commission. For purposes of this section, native file format means an electronic file that exists in the format it was originally created.

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

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

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

(1) * * *

(ii) * * *

(D) Permits the immediate downloading of indexes and records preserved on the electronic storage media onto paper, microfilm, microfiche or other medium acceptable under this paragraph (b) upon the request of representatives of the Commission, the Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the Securities and Exchange Commission with respect to those security-based swap agreements described in section 1a(47)(A)(5) of the Act.

(2) * * *

(i) Have available at all times, for examination by representatives of the Commission, the Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the Securities and Exchange Commission with respect to those security-based swap agreements described in section 1a(47)(A)(5) of the Act, facilities for immediate, easily readable projection or production of micrographic media or electronic storage media images;

(ii) Be ready at all times to provide, and immediately provide at the expense of the person required to keep such records, any easily readable hard-copy image that representatives of the Commission, the Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the Securities and Exchange Commission with respect to those security-based swap agreements

described in section 1a(47)(A)(5) of the Act, may request;

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

* * * * *

(v) * * *

(B) The index is available at all times for immediate examination by representatives of the Commission, the Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the Securities and Exchange Commission with respect to those security-based swap agreements described in section 1a(47)(A)(5) of the Act;

* * * * *

(3) * * *

(i) Be ready at all times to provide, and immediately provide at the expense of the person required to keep such records, copies of such records on such approved compatible data processing media as defined in § 15.00(d) of this chapter which any representative of the Commission, the Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the Securities and Exchange Commission with respect to those security-based swap agreements described in section 1a(47)(A)(5) of the Act, may request. Records must use a format and coding structure specified in the request.

(ii) * * *

(A) The results of such audit system are available at all times for immediate examination by representatives of the Commission, the Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the Securities and Exchange Commission with respect to those security-based swap agreements described in section 1a(47)(A)(5) of the Act;

* * * * *

(C) The written operational procedures and controls are available at all times for immediate examination by representatives of the Commission, the Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the Securities and Exchange Commission with respect to those security-based swap agreements described in section 1a(47)(A)(5) of the Act.

(iii) * * *

(A) Maintain, keep current, and make available at all times for immediate examination by representatives of the Commission, the Department of Justice,

any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the Securities and Exchange Commission with respect to those security-based swap agreements described in section 1a(47)(A)(5) of the Act, all information necessary to access records and indexes maintained on the electronic storage media; or

* * * * *

(4) * * *

(i) The Technical Consultant must file with the Commission an undertaking in a form acceptable to the Commission, signed by the Technical Consultant or a person duly authorized by the Technical Consultant. An acceptable undertaking must include the following provision with respect to the Electronic Recordkeeper: * * *

With respect to any books and records maintained or preserved on behalf of the Electronic Recordkeeper, the undersigned hereby undertakes to furnish promptly to any representative of the United States Commodity Futures Trading Commission, the United States Department of Justice, any applicable prudential regulator as that term is defined in section 1a(39) of the Act, or the United States Securities and Exchange Commission with respect to those security-based swap agreements described in section 1a(47)(A)(5) of the Act (the "Representative"), upon reasonable request, such information as is deemed necessary by the Representative to download information kept on the Electronic Recordkeeper's electronic storage media to any medium acceptable under 17 CFR 1.31. The undersigned also undertakes to take reasonable steps to provide access to information contained on the Electronic Recordkeeper's electronic storage media, including, as appropriate, arrangements for the downloading of any record required to be maintained under the Commodity Exchange Act or the rules, regulations, or orders of the United States Commodity Futures Trading Commission, in a format acceptable to the Representative. In the event the Electronic Recordkeeper fails to download a record into a readable format and after reasonable notice to the Electronic Recordkeeper, upon being provided with the appropriate electronic storage medium, the undersigned will undertake to do so, at no charge to the United States, as the Representative may request.

* * * * *

14. Revise paragraphs (a)(1) and (a)(2) of § 1.32 to read as follows:

§ 1.32 Segregated account; daily computation and record.

(a) * * *

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

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

* * * * *

15. Amend § 1.33 by:

a. Revising paragraph (a) introductory text, (a)(1) introductory text, (a)(1)(i), (a)(1)(ii), (a)(2) introductory text, and (a)(2)(v);

b. Adding paragraph (a)(3);

c. Revising paragraph (b) introductory text and paragraph (b)(1), redesignating paragraphs (b)(2) through (b)(4) as paragraphs (b)(3) through (b)(5), respectively, and adding paragraph (b)(2);

d. Revising redesignated paragraph (b)(3) introductory text, and redesignated paragraphs (b)(3)(i), (b)(4), and (b)(5); and

e. Revising paragraph (d) introductory text to read as follows:

§ 1.33 Monthly and confirmation statements.

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

(1) For each commodity futures and foreign futures position—

(i) The open position with prices at which acquired;

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

* * * * *

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

* * * * *

(v) A detailed accounting of all financial charges and credits to such customer's account(s) during the monthly reporting period, including all customer funds and funds on deposit with respect to foreign option transactions in accordance with § 30.7 of this chapter received from or disbursed to such customer, premiums charged and received, and realized profits and losses.

(3) For each swap position—

(i) All swaps caused to be executed by the futures commission merchant for the customer;

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

(iii) Any customer funds carried with the futures commission merchant; and

(iv) A detailed accounting of all financial charges and credits to such

customer accounts during the monthly reporting period, including all customer funds received from or disbursed to such customer and realized profits and losses.

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

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

(2) A written confirmation of each swap caused to be executed by it for the customer, containing at least the following information:

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

(ii) The product name of each swap;

(iii) The price at which the swap was executed;

(iv) The date of maturity for each swap; and

(v) If cleared, the derivatives clearing organization through which it is cleared.

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

(i) The customer's account identification number;

* * * * *

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

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

* * * * *

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

* * * * *

16. Revise § 1.34 to read as follows:

§ 1.34 Monthly record, "point balance".

(a) With respect to commodity futures transactions, each futures commission merchant shall prepare, and retain in

accordance with the requirements of § 1.31, a statement commonly known as a "point balance," which accrues or brings to the official closing price, or settlement price fixed by the clearing organization, all open positions of customers as of the last business day of each month or of any regular monthly date selected: *Provided, however*, That a futures commission merchant who carries part or all of customers' open positions with other futures commission merchants on an "instruct basis" will be deemed to have met the requirements of this section as to open positions so carried if a monthly statement is prepared which shows that the prices and amounts of such positions long and short in the customers' accounts are in balance with those in the carrying futures commission merchants' accounts, and such statements are retained in accordance with the requirements of § 1.31.

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

17. Section 1.35 is revised to read as follows:

§ 1.35 Records of commodity interest and cash commodity transactions.

(a) *Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets or swap execution facilities.* Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity interests and cash commodities. Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall retain the required records in accordance with the requirements of § 1.31, and produce them for inspection and furnish true and correct information and reports as to the contents or the meaning thereof, when and as requested by an authorized

representative of the Commission or the United States Department of Justice. Included among such records shall be all orders (filled, unfilled, or canceled), trading cards, signature cards, street books, journals, ledgers, canceled checks, copies of confirmations, copies of statements of purchase and sale, and all other records, which have been prepared in the course of its business of dealing in commodity interests and cash commodities, and all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of transactions in a commodity interest or cash commodity, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media. Each transaction record shall be maintained as a separate electronic file identifiable by transaction and counterparty. Among such records each member of a designated contract market or swap execution facility must retain and produce for inspection are all documents on which trade information is originally recorded, whether or not such documents must be prepared pursuant to the rules or regulations of either the Commission, the designated contract market or the swap execution facility. For purposes of this section, such documents are referred to as "original source documents."

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

(2)(i) Each member of a designated contract market who on the floor of such designated contract market receives a customer's order which is not in the form of a written record including the account identification, order number, and the date and time, to the nearest

minute, the order was transmitted or received on the floor of such designated contract market, shall immediately upon receipt thereof prepare a written record of the order in nonerasable ink, including the account identification, except as provided in paragraph (b)(5) of this section, and order number and shall record thereon, by time stamp or other timing device, the date and time, to the nearest minute, the order is received.

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

(A) Each member of a designated contract market who on the floor of such designated contract market receives an order from another member present on the floor which is not in the form of a written record shall, immediately upon receipt of such order, prepare a written record of the order or obtain from the member who placed the order a written record of the order, in non-erasable ink, including the account identification and order number and shall record thereon, by time stamp or other timing device, the date and time, to the nearest minute, the order is received; or

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

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

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

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

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

(A) A member of a designated contract market places with another member of

such designated contract market an order that is part of a spread transaction;

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

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

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

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

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

trades executed on designated contract markets or swap execution facilities:

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Summary or composite data sufficient for that customer to compare

its results with those of other comparable customers and, if applicable and consistent with § 155.3(a)(1) and § 155.4(a)(1) of this chapter, any account in which the account manager has an interest.

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

(A) Allocations must be made as soon as practicable after the entire transaction is executed, but in any event no later than the following times: For cleared trades, account managers must provide allocation information to futures commission merchants no later than a time sufficiently before the end of the day the order is executed to ensure that clearing records identify the ultimate customer for each trade. For uncleared trades, account managers must provide allocation information to the counterparty no later than the end of the calendar day that the swap was executed.

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

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

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

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

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

accounts to which contracts executed for such order are allocated.

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

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

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

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

(3) *Documentation.* For the purposes of this paragraph, documentation means those documents customarily generated

in accordance with cash market practices which demonstrate the existence and nature of the underlying cash transactions, including, but not limited to, contracts, confirmation statements, telex printouts, invoices, and warehouse receipts or other documents of title.

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

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

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

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

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

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

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

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

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

(ii) All retail forex transactions executed on that day for such account,

including the date, price, quantity, currency and the person who whom such transaction was made;

(iii) All commodity option transactions executed on that day, including the date, whether the transaction involved a put or call, the expiration date, quantity, underlying contract for future delivery or underlying physical, strike price, details of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made;

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

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

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

(f) *Members of designated contract markets.* (1) Each member of a designated contract market who, in the place provided by the designated contract market for the meeting of persons similarly engaged, executes

purchases or sales of any commodity for future delivery, commodity option, or swap on or subject to the rules of such designated contract market, shall prepare regularly and promptly a trading card or other record showing such purchases and sales. Such trading card or record shall show the member's name, the name of the clearing member, transaction date, time, quantity, and, as applicable, underlying commodity, contract for future delivery, swap or physical, price or premium, delivery month or expiration date, whether the transaction involved a put or a call, and strike price. Such trading card or other record shall also clearly identify the opposite floor broker or floor trader with whom the transaction was executed, and the opposite clearing member (if such opposite clearing member is made known to the member).

(2) Each member of a designated contract market recording purchases and sales on trading cards must record such purchases and sales in exact chronological order of execution on sequential lines of the trading card without skipping lines between trades; *Provided, however,* That if lines remain after the last execution recorded on a trading card, the remaining lines must be marked through.

(3) Each member of a designated contract market must identify on his or her trading cards the purchases and sales executed during the opening and closing periods designated by the designated contract market.

(4) Trading cards prepared by a member of a designated contract market must contain:

(i) Pre-printed member identification or other unique identifying information which would permit the trading cards of one member to be distinguished from those of all other members;

(ii) Pre-printed sequence numbers to permit the intra-day sequencing of the cards; and

(iii) Unique and pre-printed identifying information which would distinguish each of the trading cards prepared by the member from other such trading cards for no less than a one-week period.

(5) Trading cards prepared by a member of a designated contract market and submitted pursuant to paragraph (f)(7)(i) of this section must be time-stamped promptly to the nearest minute upon collection by either the designated contract market or the relevant clearing member.

(6) Each member of a designated contract market shall be accountable for all trading cards prepared in exact numerical sequence, whether or not

such trading cards are relied on as original source documents.

(7) Trading records prepared by a member of a designated contract market must:

(i) Be submitted to designated contract market personnel or the clearing member within 15 minutes of designated intervals not to exceed 30 minutes, commencing with the beginning of each trading session. The time period for submission of trading records after the close of trading in each market shall not exceed 15 minutes from the close. Such documents should nevertheless be submitted as often as is practicable to the designated contract market or relevant clearing member; and

(ii) Be completed in non-erasable ink. A member may correct any errors by crossing out erroneous information without obliterating or otherwise making illegible any of the originally recorded information. With regard to trading cards only, a member may correct erroneous information by rewriting the trading card; *Provided, however*, that the member must submit a ply of the trading card, or in the absence of plies the original trading card, that is subsequently rewritten in accordance with the collection schedule for trading cards and *provided further*, that the member is accountable for any trading card that subsequently is rewritten pursuant to paragraph (f)(6) of this section.

(8) Each member of a designated contract market must use a new trading card at the beginning of each designated 30-minute interval (or such lesser interval as may be determined appropriate) or as may be required pursuant hereto.

(g) *Members of derivatives clearing organizations clearing trades executed on designated contract markets and swap execution facilities.* (1) Each member of a derivatives clearing organization clearing trades executed on a designated contract market or swap execution facility shall maintain a single record which shall show for each futures, option or swap trade: the transaction date, time, quantity, and, as applicable, underlying commodity, contract for future delivery, swap or physical, price or premium, delivery month or expiration date, whether the transaction involved a put or a call, strike price, floor broker or floor trader buying, clearing member buying, floor broker or floor trader selling, clearing member selling, and symbols indicating the buying and selling customer types. The customer type indicator shall show, with respect to each person executing the trade, whether such person:

(i) Was trading for his or her own account, or an account for which he or she has discretion;

(ii) Was trading for his or her clearing member's house account;

(iii) Was trading for another member present on the exchange floor, or an account controlled by such other member; or

(iv) Was trading for any other type of customer.

(2) The record required by this paragraph (g) shall also show, by appropriate and uniform symbols, any transaction which is made non-competitively in accordance with the provisions of subpart J of part 38 of this chapter, and trades cleared on dates other than the date of execution. Except as otherwise approved by the Commission for good cause shown, the record required by this paragraph (g) shall be maintained in a format and coding structure approved by the Commission—

(i) In hard copy or on microfilm as specified in § 1.31, and

(ii) For 60 days in computer-readable form on compatible magnetic tapes or discs.

18. Revise § 1.36 to read as follows:

§ 1.36 Record of securities and property received from customers.

(a) Each futures commission merchant and each retail foreign exchange dealer shall maintain, as provided in § 1.31, a record of all securities and property received from customers or retail forex customers in lieu of money to margin, purchase, guarantee, or secure the commodity interests of such customers or retail forex customers. Such record shall show separately for each customer or retail forex customer: A description of the securities or property received; the name and address of such customer or retail forex customer; the dates when the securities or property were received; the identity of the depositories or other places where such securities or property are segregated or held; the dates of deposits and withdrawals from such depositories; and the dates of return of such securities or property to such customer or retail forex customer, or other disposition thereof, together with the facts and circumstances of such other disposition. In the event any futures commission merchant deposits with a clearing organization, directly or with a bank or trust company acting as custodian for such clearing organization, securities and/or property which belong to a particular customer, such futures commission merchant shall obtain written acknowledgment from such clearing organization that it was informed that such securities or

property belong to customers of the futures commission merchant making the deposit. Such acknowledgment shall be retained as provided in § 1.31.

(b) Each clearing organization which receives from members securities or property belonging to particular customers of such members in lieu of money to margin, purchase, guarantee, or secure the commodity interests of such customers, or receives notice that any such securities or property have been received by a bank or trust company acting as custodian for such clearing organization, shall maintain, as provided in § 1.31, a record which will show separately for each member, the dates when such securities or property were received, the identity of the depositories or other places where such securities or property are segregated, the dates such securities or property were returned to the member, or otherwise disposed of, together with the facts and circumstances of such other disposition including the authorization therefor.

19. Revise § 1.37 to read as follows:

§ 1.37 Customer's name, address, and occupation recorded; record of guarantor or controller of account.

(a) Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a contract market shall keep a record in permanent form which shall show for each commodity interest account carried or introduced by it the true name and address of the person for whom such account is carried or introduced and the principal occupation or business of such person as well as the name of any other person guaranteeing such account or exercising any trading control with respect to such account. For each such commodity option account, the records kept by such futures commission merchant, introducing broker, and member of a contract market must also show the name of the person who has solicited and is responsible for each customer's account or assign account numbers in such a manner to identify that person.

(b) As of the close of the market each day, each futures commission merchant which carries an account for another futures commission merchant, foreign broker (as defined in § 15.00 of this chapter), member of a contract market, or other person, on an omnibus basis shall maintain a daily record for each such omnibus account of the total open long contracts and the total open short contracts in each future and in each swap and, for commodity option transactions, the total open put options purchased, the total open put options granted, the total open call options

purchased, and the total open call options granted for each commodity option expiration date.

(c) Each designated contract market and swap execution facility shall keep a record in permanent form, which shall show the true name, address, and principal occupation or business of any foreign trader executing transactions on the facility or exchange. In addition, upon request, a designated contract market or swap execution facility shall provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such foreign trader.

(d) Paragraph (c) of this section shall not apply to a designated contract market or swap execution facility on which transactions in futures, swaps or options (other than swaps) contracts of foreign traders are executed through, or the resulting transactions are maintained in, accounts carried by a registered futures commission merchant or introduced by a registered introducing broker subject to the provisions of paragraph (a) of this section.

20. Amend § 1.39 by revising paragraph (a) introductory text, (a)(1)(ii), (a)(2), (a)(3), (a)(4), (b) introductory text, (b)(2), and (c), to read as follows:

§ 1.39 Simultaneous buying and selling orders of different principals; execution of, for and between principals.

(a) *Conditions and requirements.* A member of a contract market or a swap execution facility who shall have at the same time both buying and selling orders of different principals for the same swap, commodity for future delivery in the same delivery month or the same option (both puts or both calls, with the same underlying contract for future delivery or the same underlying physical, expiration date and strike price) may execute such orders for and directly between such principals at the market price, if in conformity with written rules of such contract market or swap execution facility which have been approved by or self-certified to the Commission, and:

(1) * * *

(ii) When in non-pit trading in swaps or contracts of sale for future delivery, bids and offers are posted on a board, such member:

(A) Pursuant to such buying order posts a bid on the board and, incident to the execution of such selling order, accepts such bid and all other bids posted at prices equal to or higher than the bid posted by him, or

(B) Pursuant to such selling order posts an offer on the board and, incident

to the execution of such buying order, accepts such offer and all other offers posted at prices equal to or lower than the offer posted by him;

(2) Such member executes such orders in the presence of an official representative of such contract market designated to observe such transactions or on a system or platform accessible by an official representative of such swap execution facility and, by appropriate descriptive words or symbol, clearly identifies all such transactions on his trading card or other record, made at the time of execution, and notes thereon the exact time of execution and promptly presents or makes available said record to such official representative for verification and initialing, as appropriate;

(3) Such swap execution facility or contract market keeps a record in permanent form of each such transaction showing all transaction details required to be captured by the Act, Commission rule or regulation; and

(4) Neither the futures commission merchant, other registrant receiving nor the member executing such orders has any interest therein, directly or indirectly, except as a fiduciary.

(b) *Large order execution procedures.* A member of a contract market or a swap execution facility may execute simultaneous buying and selling orders of different principals directly between the principals in compliance with Commission regulations and large order execution procedures established by written rules of the contract market or swap execution facility that have been approved by or self-certified to the Commission: *Provided*, That, to the extent such large order execution procedures do not meet the conditions and requirements of paragraph (a) of this section, the contract market or swap execution facility has petitioned the Commission for, and the Commission has granted, an exemption from the conditions and requirements of paragraph (a) of this section. Any such petition must be accompanied by proposed contract market or swap execution facility rules to implement the large order execution procedures. The petition shall include:

* * * * *

(2) A description of a special surveillance program that would be followed by the contract market or swap execution facility in monitoring the large order execution procedures.

* * * * *

(c) *Not deemed filling orders by offset.* The execution of orders in compliance with the conditions herein set forth will not be deemed to constitute the filling

of orders by offset within the meaning of section 4b(a) of the Act.

21. Revise § 1.40 to read as follows:

§ 1.40 Crop, market information letters, reports; copies required.

Each futures commission merchant, each retail foreign exchange dealer, each introducing broker, each member of a contract market and each eligible contract participant with trading privileges on a swap execution facility shall, upon request, furnish or cause to be furnished to the Commission a true copy of any letter, circular, telecommunication, or report published or given general circulation by such futures commission merchant, retail foreign exchange dealer, introducing broker, member or eligible contract participant which concerns crop or market information or conditions that affect or tend to affect the price of any commodity, including any exchange rate, and the true source of or authority for the information contained therein.

§ 1.44 [Removed and Reserved]

22. Remove and reserve § 1.44.

23. Amend § 1.46 by revising paragraph (a)(1) introductory text and paragraphs (a)(1)(iii), (a)(1)(iv), (a)(2)(iii), (a)(2)(iv), and (b), to read as follows:

§ 1.46 Application and closing out of offsetting long and short positions.

(a) *Application of purchases and sales.* (1) Except with respect to purchases or sales which are for omnibus accounts, or where the customer or account controller has instructed otherwise, any futures commission merchant who, on or subject to the rules of a designated contract market:

* * * * *

(iii) Purchases a put or call option for the account of any customer when the account of such customer at the time of such purchase has a short put or call option position with the same underlying futures contract or same underlying physical, strike price, expiration date and contract market as that purchased; or

(iv) Sells a put or call option for the account of any customer when the account of such customer at the time of such sale has a long put or call option position with the same underlying futures contract or same underlying physical, strike price, expiration date and contract market as that sold—shall on the same day apply such purchase or sale against such previously held short or long futures or option position, as the case may be, and shall, for futures transactions, promptly furnish such

customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant by an introducing broker and the names of the futures commission merchant and introducing broker.

(2) * * *

(iii) Purchases a put or call option involving foreign currency for the account of any customer when the account of such customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(iv) Sells a put or call option involving foreign currency for the account of any customer when the account of such customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold—shall immediately apply such purchase or sale against such previously held opposite transaction, and shall promptly furnish such retail forex customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant or retail foreign exchange dealer by an introducing broker and the names of the futures commission merchant or retail foreign exchange dealer, and the introducing broker.

(b) *Close-out against oldest open position.* In all instances wherein the short or long futures, retail forex transaction or option position in such customer's or retail forex customer's account immediately prior to such offsetting purchase or sale is greater than the quantity purchased or sold, the futures commission merchant or retail foreign exchange dealer shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position: *Provided*, That upon specific instructions from the customer the offsetting transaction shall be applied as specified by the customer without regard to the date of acquisition of the previously held position; and *Provided, further*, That a futures commission merchant or retail foreign exchange dealer, if permitted by the rules of a registered futures association, may offset, at the customer's request, retail forex transactions of the same size, even if the customer holds other transactions of a different size, but in each case must offset the transaction against the oldest transaction of the same size. Such instructions may also be accepted from any person who, by power of attorney or otherwise, actually

directs trading in the customer's or retail forex customer's account unless the person directing the trading is the futures commission merchant or retail foreign exchange dealer (including any partner thereof), or is an officer, employee, or agent of the futures commission merchant or retail foreign exchange dealer. With respect to every such offsetting transaction that, in accordance with such specific instructions, is not applied to the oldest portion of the previously held position, the futures commission merchant or retail foreign exchange dealer shall clearly show on the statement issued to the customer or retail forex customer in connection with the transaction, that because of the specific instructions given by or on behalf of the customer or retail forex customer the transaction was not applied in the usual manner, *i.e.*, against the oldest portion of the previously held position. However, no such showing need be made if the futures commission merchant or retail foreign exchange dealer has received such specific instructions in writing from the customer or retail forex customer for whom such account is carried.

* * * * *

24. Revise paragraph (b)(1)(iii) of § 1.49 to read as follows:

§ 1.49 Denomination of customer funds and location of depositories.

* * * * *

(b) * * * (1) * * *

(iii) In a currency in which funds have accrued to the customer as a result of trading conducted on a designated contract market, to the extent of such accruals.

* * * * *

§ 1.53 [Removed and Reserved]

25. Remove and reserve § 1.53.

26. Amend § 1.57 by revising paragraph (a)(1), (a)(2) introductory text, (a)(2)(ii), (c) introductory text, (c)(2), (c)(4)(i), and (c)(4)(iv), to read as follows:

§ 1.57 Operations and activities of introducing brokers.

(a) * * *

(1) Open and carry each customer's account with a carrying futures commission merchant on a fully-disclosed basis: *Provided, however*, That an introducing broker which has entered into a guarantee agreement with a futures commission merchant in accordance with the provisions of § 1.10(j) of this part must open and carry such customer's account with such guarantor futures commission merchant on a fully-disclosed basis; and

(2) Transmit promptly for execution all customer orders to:

* * * * *

(ii) A floor broker, if the introducing broker identifies its carrying futures commission merchant and that carrying futures commission merchant is also the clearing member with respect to the customer's order.

* * * * *

(c) An introducing broker may not accept any money, securities or property (or extend credit in lieu thereof) to margin, guarantee or secure any trades or contracts of customers, or any money, securities or property accruing as a result of such trades or contracts:

Provided, however, That an introducing broker may deposit a check in a qualifying account or forward a check drawn by a customer if:

* * * * *

(2) The check is payable to the futures commission merchant carrying the customer's account;

* * * * *

(4) * * *

(i) Which is maintained in an account name which clearly identifies the funds therein as belonging to customers of the futures commission merchant carrying the customer's account;

* * * * *

(iv) For which the bank or trust company provides the futures commission merchant carrying the customer's account with a written acknowledgment, which the futures commission merchant must retain in its files in accordance with § 1.31, that it was informed that the funds deposited therein are those of customers and are being held in accordance with the provisions of the Act and these regulations.

27. Amend § 1.59 by revising paragraphs (a)(4)(i), (a)(5), (a)(7), (a)(8), (a)(9) introductory text, (a)(10), (b)(1) introductory text, (b)(1)(i)(A), (b)(1)(i)(C), and (c), to read as follows:

§ 1.59 Activities of self-regulatory organization employees, governing board members, committee members and consultants.

(a) * * *

(4) * * *

(i) Any governing board member compensated by a self-regulatory organization solely for governing board activities; or

* * * * *

(5) *Material information* means information which, if such information were publicly known, would be considered important by a reasonable person in deciding whether to trade a particular commodity interest on a

contract market or a swap execution facility, or to clear a swap contract through a derivatives clearing organization. As used in this section, “material information” includes, but is not limited to, information relating to present or anticipated cash positions, commodity interests, trading strategies, the financial condition of members of self-regulatory organizations or members of linked exchanges or their customers, or the regulatory actions or proposed regulatory actions of a self-regulatory organization or a linked exchange.

* * * * *

(7) *Linked exchange* means:

(i) Any board of trade, exchange or market outside the United States, its territories or possessions, which has an agreement with a contract market or swap execution facility in the United States that permits positions in a commodity interest which have been established on one of the two markets to be liquidated on the other market;

(ii) Any board of trade, exchange or market outside the United States, its territories or possessions, the products of which are listed on a United States contract market, swap execution facility, or a trading facility thereof;

(iii) Any securities exchange, the products of which are held as margin in a commodity account or cleared by a securities clearing organization pursuant to a cross-margining arrangement with a futures clearing organization; or

(iv) Any clearing organization which clears the products of any of the foregoing markets.

(8) *Commodity interest* means any commodity futures, commodity option or swap contract traded on or subject to the rules of a contract market, a swap execution facility or linked exchange, or cleared by a derivatives clearing organization, or cash commodities traded on or subject to the rules of a board of trade which has been designated as a contract market.

(9) *Related commodity interest* means any commodity interest which is traded on or subject to the rules of a contract market, swap execution facility, linked exchange, or other board of trade, exchange, or market, or cleared by a derivatives clearing organization, other than the self-regulatory organization by which a person is employed, and with respect to which:

* * * * *

(10) *Pooled investment vehicle* means a trading vehicle organized and operated as a commodity pool within the meaning of § 4.10(d) of this chapter, and whose units of participation have

been registered under the Securities Act of 1933, or a trading vehicle for which § 4.5 of this chapter makes available relief from regulation as a commodity pool operator, *i.e.*, registered investment companies, insurance company separate accounts, bank trust funds, and certain pension plans.

(b) *Employees of self-regulatory organizations; Self-regulatory organization rules.* (1) Each self-regulatory organization must maintain in effect rules which have been submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of this chapter (or, pursuant to section 17(j) of the Act in the case of a registered futures association) that, at a minimum, prohibit:

(i) * * *

(A) Trading, directly or indirectly, in any commodity interest traded on or cleared by the employing contract market, swap execution facility, or clearing organization;

* * * * *

(C) Trading, directly or indirectly, in a commodity interest traded on contract markets or swap execution facilities or cleared by derivatives clearing organizations other than the employing self-regulatory organization if the employee has access to material, non-public information concerning such commodity interest;

* * * * *

(c) *Governing board members, committee members, and consultants; Registered futures association rules.* Each registered futures association must maintain in effect rules which have been submitted to the Commission pursuant to section 17(j) of the Act which provide that no governing board member, committee member, or consultant shall use or disclose—for any purpose other than the performance of official duties as a governing board member, committee member, or consultant—material, non-public information obtained as a result of the performance of such person’s official duties.

* * * * *

§ 1.62 [Removed and Reserved]

28. Remove and reserve § 1.62.

29. Amend § 1.63 by revising paragraph (a)(1), (b) introductory text and (d) to read as follows:

§ 1.63 Service on self-regulatory organization governing boards or committees by persons with disciplinary histories.

(a) * * *

(1) *Self-regulatory organization* means a “self-regulatory organization” as defined in § 1.3(ee) of this chapter, and

includes a “clearing organization” as defined in § 1.3(d) of this chapter, except as defined in paragraph (b)(6) of this section.

* * * * *

(b) Each self-regulatory organization must maintain in effect rules which have been submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of this chapter or, in the case of a registered futures association, pursuant to section 17(j) of the Act, that render a person ineligible to serve on its disciplinary committees, arbitration panels, oversight panels or governing board who:

* * * * *

(d) Each self-regulatory organization shall submit to the Commission a schedule listing all those rule violations which constitute disciplinary offenses as defined in paragraph (a)(6)(i) of this section and to the extent necessary to reflect revisions shall submit an amended schedule within thirty days of the end of each calendar year. Each self-regulatory organization must maintain and keep current the schedule required by this section, and post the schedule on the self-regulatory organization’s website so that it is in a public place designed to provide notice to members and otherwise ensure its availability to the general public.

* * * * *

30. Revise paragraph (a)(1) and paragraph (b) of § 1.67 to read as follows:

§ 1.67 Notification of final disciplinary action involving financial harm to a customer.

(a) * * *

(1) *Final disciplinary action* means any decision by or settlement with a contract market or swap execution facility in a disciplinary matter which cannot be further appealed at the contract market or swap execution facility, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction.

* * * * *

(b) Upon any final disciplinary action in which a contract market or swap execution facility finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer:

(1)(i) The contract market or swap execution facility shall promptly provide written notice of the disciplinary action to the futures commission merchant or other registrant; and

(ii) A futures commission merchant or other registrant that receives a notice, under paragraph (b)(1)(i) of this section shall promptly provide written notice of the disciplinary action to the customer as disclosed on its books and records. If the customer is another futures commission merchant or other registrant, such futures commission merchant or other registrant shall promptly provide notice to the customer.

(2) A written notice required by paragraph (b)(1) of this section must include the principal facts of the disciplinary action and a statement that the contract market or swap execution facility has found that the member has committed a rule violation that involved a transaction for the customer, whether executed or not, and that resulted in financial harm to the customer. For the purposes of this paragraph, a notice which includes the information listed in § 9.11(b) of this chapter shall be deemed to include the principal facts of the disciplinary action thereof.

§ 1.68 [Removed and Reserved]

31. Remove and reserve § 1.68.

32. Amend Appendix B to part 1 by revising paragraph (b) to read as follows:

Appendix B to Part 1—Fees for Contract Market Rule Enforcement Reviews and Financial Reviews

* * * * *

(b) The Commission determines fees charged to exchanges based upon a formula that considers both actual costs and trading volume.

* * * * *

Appendix C to Part 1—[Removed and Reserved]

33. Remove and reserve Appendix C to part 1.

PART 5—OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS

34a. The authority citation for part 5 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 6p, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, 23.

34b. Revise paragraphs (k) and (m) of § 5.1 to read as follows:

§ 5.1 Definitions.

* * * * *

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

* * * * *

(m) *Retail forex transaction* means any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act. A retail forex transaction does not include an account, agreement, contract or transaction in foreign currency that is a contract of sale of a commodity for future delivery (or an option thereon) that is executed, traded on or otherwise subject to the rules of a contract market designated pursuant to section 5(a) of the Act.

PART 7—CONTRACT MARKET RULES ALTERED OR SUPPLEMENTED BY THE COMMISSION

35. Revise part 7 to read as follows:

PART 7—REGISTERED ENTITY RULES ALTERED OR SUPPLEMENTED BY THE COMMISSION

Authority: 7 U.S.C. 7a–2(c) and 12a(7), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

Subpart A—General Provisions

§ 7.1. Scope of rules.

This part sets forth registered entity rules altered or supplemented by the Commission pursuant to section 8a(7) of the Act.

Subpart B—[Reserved]

Subpart C—[Reserved]

PART 8—[REMOVED AND RESERVED]

36. Remove and reserve part 8.

PART 15—REPORTS—GENERAL PROVISIONS

37a. The authority citation for part 15 is revised to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 9, 12a, 19, and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

37b. Revise paragraphs (a), (e), (f), (g) and (h) of § 15.05 to read as follows:

§ 15.05 Designation of agent for foreign persons.

(a) For purposes of this section, the term “futures contract” means any contract for the purchase or sale of any commodity for future delivery, or a contract identified under § 36.3(c)(1)(i) traded on an electronic trading facility operating in reliance on the exemption set forth in § 36.3 of this chapter, traded or executed on or subject to the rules of any designated contract market, or for the purposes of paragraph (i) of this section, a reporting market (including

all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term “option contract” means any contract for the purchase or sale of a commodity option, or as applicable, any other instrument subject to the Act, traded or executed on or subject to the rules of any designated contract market, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term “customer” means any person for whose benefit a foreign broker makes or causes to be made any futures contract or option contract; and the term “communication” means any summons, complaint, order, subpoena, special call, request for information, or notice, as well as any other written document or correspondence.

* * * * *

(e) Any designated contract market that permits a foreign broker to intermediate contracts, agreements or transactions, or permits a foreign trader to effect contracts, agreements or transactions on the facility or exchange, shall be deemed to be the agent of the foreign broker and any of its customers for whom the transactions were executed, or the foreign trader, for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission to the foreign broker, any of its customers or the foreign trader with respect to any contracts, agreements or transactions executed by the foreign broker or the foreign trader on the designated contract market. Service or delivery of any communication issued by or on behalf of the Commission to a designated contract market shall constitute valid and effective service upon the foreign broker, any of its customers or the foreign trader. A designated contract market which has been served with, or to which there has been delivered, a communication issued by or on behalf of the Commission to a foreign broker, any of its customers or a foreign trader shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the foreign broker, any of its customers or the foreign trader.

(f) It shall be unlawful for any designated contract market to permit a foreign broker, any of its customers or a foreign trader to effect contracts, agreements or transactions on the facility unless the designated contract

market prior thereto informs the foreign broker, any of its customers or the foreign trader, in any reasonable manner the facility deems to be appropriate, of the requirements of this section.

(g) The requirements of paragraphs (e) and (f) of this section shall not apply to any contracts, transactions or agreements traded on any designated contract market if the foreign broker, any of its customers or the foreign trader has duly executed and maintains in effect a written agency agreement in compliance with this paragraph with a person domiciled in the United States and has provided a copy of the agreement to the designated contract market prior to effecting any contract, agreement or transaction on the facility. This agreement must authorize the person domiciled in the United States to serve as the agent of the foreign broker, any of its customers or the foreign trader for purposes of accepting delivery and service of all communications issued by or on behalf of the Commission to the foreign broker, any of its customers or the foreign trader and must provide an address in the United States where the agent will accept delivery and service of communications from the Commission. This agreement must be filed with the Commission by the designated contract market prior to permitting the foreign broker, any of its customers or the foreign trader to effect any transactions in futures or option contracts. Unless otherwise specified by the Commission, the agreements required to be filed with the Commission shall be filed with the Secretary of the Commission at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. A foreign broker, any of its customers or a foreign trader shall notify the Commission immediately if the written agency agreement is terminated, revoked, or is otherwise no longer in effect. If the designated contract market knows or should know that the agreement has expired, been terminated, or is no longer in effect, the designated contract market shall notify the Secretary of the Commission immediately. If the written agency agreement expires, terminates, or is not in effect, the designated contract market and the foreign broker, any of its customers or the foreign trader are subject to the provisions of paragraphs (e) and (f) of this section.

(h) The provisions of paragraphs (e), (f) and (g) of this section shall not apply to a designated contract market on which all transactions of foreign brokers, their customers or foreign traders in futures or option contracts are executed through, or the resulting transactions are maintained in, accounts carried by a registered futures

commission merchant or introduced by a registered introducing broker subject to the provisions of paragraphs (a), (b), (c) and (d) of this section.

* * * * *

PART 18—REPORTS BY TRADERS

38a. The authority citation for part 18 is revised to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 12a and 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010); 5 U.S.C. 552 and 552(b), unless otherwise noted.

38b. Revise paragraphs (a)(2), (a)(3), and (a)(4) of § 18.05 to read as follows:

§ 18.05 Maintenance of books and records.

(a) * * *

(2) Executed over the counter or pursuant to part 35 of this chapter;

(3) On exempt commercial markets operating under a Commission grandfather relief order issued pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010));

(4) On exempt boards of trade operating under a Commission grandfather relief order issued pursuant to Section 734(c)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)); and

* * * * *

PART 21—SPECIAL CALLS

39a. The authority citation for part 21 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 12a, 19 and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010); 5 U.S.C. 552 and 552(b), unless otherwise noted.

39b. Revise paragraph (b) of § 21.03 to read as follows:

§ 21.03 Selected special calls—duties of foreign brokers, domestic and foreign traders, futures commission merchants, clearing members, introducing brokers, and reporting markets.

* * * * *

(b) It shall be unlawful for a futures commission merchant to open a futures or options account or to effect transactions in futures or options contracts for an existing account, or for an introducing broker to introduce such an account, for any customer for whom the futures commission merchant or introducing broker is required to provide the explanation provided for in § 15.05(c) of this chapter, or for a reporting market that is a registered

entity under section 1a(40)(F) of the Act, to cause to open an account, or to cause transactions to be effected, in a contract traded in reliance on a Commission grandfather relief order issued pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), for an existing account for any person that is a foreign clearing member or foreign trader, until the futures commission merchant, introducing broker, clearing member or reporting market has explained fully to the customer, in any manner that such person deems appropriate, the provisions of this section.

* * * * *

PART 36—EXEMPT MARKETS

40a. The authority citation for part 36 is revised to read as follows:

Authority: 7 U.S.C. 2, 6, 6c and 12a, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010); Sections 723(c)(2)(B) and 734(c)(2), Pub. L. 111–203, 124 Stat. 1376 (2010).

40b. Section 36.1 is revised to read as follows:

§ 36.1 Scope.

The provisions of this part apply to any board of trade or electronic trading facility that operates as:

(a) An exempt commercial market operating under a grandfather relief order issued by the Commission pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), or

(b) An exempt board of trade operating under a grandfather relief order issued by the Commission pursuant to Section 734(c)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)).

41. Amend § 36.2 by:

a. Revising paragraph (a) introductory text and (a)(2)(i);

b. Adding paragraph (a)(3); and

c. Revising paragraph (b) introductory text, (c)(1), (c)(2)(i) introductory text, (c)(2)(ii) introductory text, (c)(2)(iii), (c)(2)(iv)(A) introductory text, and (c)(3), to read as follows:

§ 36.2 Exempt boards of trade.

(a) *Eligible commodities.* Commodities eligible to be traded by an exempt board of trade are:

* * * * *

(2) * * *

(i) The commodities defined in section 1a(19) of the Act as “excluded commodities” (other than a security,

including any group or index thereof or any interest in, or based on the value of, any security or group or index of securities); and

* * * * *

(3) Such contracts must be entered into only between persons that are eligible contract participants, as defined in section 1a(18) of the Act and as further defined by the Commission, at the time at which the persons entered into the contract.

(b) *Notification.* Boards of trade operating as exempt boards of trade shall maintain on file with the Secretary of the Commission at the Commission's Washington, DC headquarters, in electronic form, a "Notification of Operation as an Exempt Board of Trade," and it shall include:

* * * * *

(c) *Additional requirements—(1) Prohibited representation.* A board of trade that meets the criteria set forth in this section and operates as an exempt board of trade shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(2) *Market data dissemination—(i) Criteria for price discovery determination.* An exempt board of trade performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract or transaction executed or traded on the facility when:

* * * * *

(ii) *Notification.* An exempt board of trade operating a market in reliance on the criteria set forth in this section shall notify the Commission when:

* * * * *

(iii) *Price discovery determination.* Following receipt of notice under paragraph (c)(2)(ii) of this section, or on its own initiative, the Commission may notify an exempt board of trade that the facility appears to meet the criteria for performing a significant price discovery function under paragraph (c)(2)(i)(A) or (B) of this section. Before making a final price discovery determination under this paragraph, the Commission shall provide the exempt board of trade with an opportunity for a hearing through the submission of written data, views and arguments. Any such written data, views and arguments shall be filed with the Secretary of the Commission in the form and manner and within the time specified by the Commission. After consideration of all relevant matters, the Commission shall issue an order containing its determination whether the facility performs a significant price discovery function under the criteria of

paragraph (c)(2)(i)(A) or (B) of this section.

(iv) *Price dissemination.* (A) An exempt board of trade that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section shall disseminate publicly, and on a daily basis, all of the following information with respect to transactions executed in reliance on the criteria set forth in this section:

* * * * *

(3) *Annual certification.* A board of trade operating as an exempt board of trade shall file with the Commission annually, no later than the end of each calendar year, a notice that includes:

(i) A statement that it continues to operate under the exemption; and

(ii) A certification that the information contained in the previous Notification of Operation as an Exempt Board of Trade is still correct.

42. Section 36.3 is revised to read as follows:

§ 36.3 Exempt commercial markets.

(a) *Eligible transactions.* Agreements, contracts or transactions in an exempt commodity eligible to be entered into on an exempt commercial market must be:

(1) Entered into on a principal-to-principal basis solely between persons that are eligible commercial entities, as that term is defined in section 1a(17) of the Act, at the time the persons enter into the agreement, contract or transaction; and

(2) Executed or traded on an electronic trading facility.

(b) *Notification.* An electronic trading facility relying upon the exemption set forth in this section shall maintain on file with the Secretary of the Commission at the Commission's Washington, DC headquarters, in electronic form, a "Notification of Operation as an Exempt Commercial Market," and it shall include the information and certifications specified in this section.

(c) *Required information—(1) All electronic trading facilities.* A facility operating in reliance on the exemption set forth in this section on an on-going basis, must:

(i) Provide the Commission with the terms and conditions, as defined in § 40.1(i) of this chapter and product descriptions for each agreement, contract or transaction listed by the facility in reliance on the exemption set forth in this section, as well as trading conventions, mechanisms and practices;

(ii) Provide the Commission with information explaining how the facility meets the definition of "trading facility" contained in section 1a(51) of the Act

and provide the Commission with access to the electronic trading facility's trading protocols, in a format specified by the Commission;

(iii) Demonstrate to the Commission that the facility requires, and will require, with respect to all current and future agreements, contracts and transactions, that each participant agrees to comply with all applicable laws; that the authorized participants are "eligible commercial entities" as defined in section 1a(17) of the Act; that all agreements, contracts and transactions are and will be entered into solely on a principal-to-principal basis; and that the facility has in place a program to routinely monitor participants' compliance with these requirements;

(iv) At the request of the Commission, provide any other information that the Commission, in its discretion, deems relevant to its determination whether an agreement, contract, or transaction performs a significant price discovery function; and

(v) File with the Commission annually, no later than the end of each calendar year, a completed copy of CFTC Form 205—Exempt Commercial Market Annual Certification. The information submitted in Form 205 shall include:

(A) A statement indicating whether the electronic trading facility continues to operate under the exemption; and

(B) A certification that affirms the accuracy of and/or updates the information contained in the previous Notification of Operation as an Exempt Commercial Market.

(2) *Electronic trading facilities trading or executing agreements, contracts or transactions other than significant price discovery contracts.* In addition to the requirements of paragraph (c)(1) of this section, a facility operating in reliance on the exemption set forth in this section, with respect to agreements, contracts or transactions that have not been determined to perform significant price discovery function, on an on-going basis must:

(i) Identify to the Commission those agreements, contracts and transactions conducted on the electronic trading facility with respect to which it intends, in good faith, to rely on the exemption set forth in this section, and which averaged five trades per day or more over the most recent calendar quarter; and, with respect to such agreements, contracts and transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day. Each such report shall be electronically transmitted weekly,

within such time period as is acceptable to the Commission after the end of the week to which the data applies, and shall show for each agreement, contract or transaction executed the following information:

(1) The underlying commodity, the delivery or price-basing location specified in the agreement, contract or transaction maturity date, whether it is a financially settled or physically delivered instrument, and the date of execution, time of execution, price, and quantity;

(2) Total daily volume and, if cleared, open interest;

(3) For an option instrument, in addition to the foregoing information, the type of option (*i.e.*, call or put) and strike prices; and

(4) Such other information as the Commission may determine; or

(B) Provide to the Commission, in a form and manner acceptable to the Commission, electronic access to those transactions conducted on the electronic trading facility in reliance on the exemption set forth in this section, and meeting the average five trades per day or more threshold test of this section, which would allow the Commission to compile the information set forth in paragraph (c)(2)(i)(A) of this section and create a permanent record thereof.

(ii) Maintain a record of allegations or complaints received by the electronic trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in this section. The record shall contain the name of the complainant, if provided, date of the complaint, market instrument, substance of the allegations, and name of the person at the electronic trading facility who received the complaint;

(iii) Provide to the Commission, in the form and manner prescribed by the Commission, a copy of the record of each complaint received pursuant to paragraph (c)(2)(ii) of this section that alleges, or relates to, facts that would constitute a violation of the Act or Commission regulations. Such copy shall be provided to the Commission no later than 30 calendar days after the complaint is received; *Provided, however*, that in the case of a complaint alleging, or relating to, facts that would constitute an ongoing fraud or market manipulation under the Act or Commission rules, such copy shall be provided to the Commission within three business days after the complaint is received; and

(iv) Provide to the Commission on a quarterly basis, within 15 calendar days of the close of each quarter, a list of each

agreement, contract or transaction executed on the electronic trading facility in reliance on the exemption set forth in this section and indicate for each such agreement, contract or transaction the contract terms and conditions, the contract's average daily trading volume, and the most recent open interest figures.

(3) *Electronic trading facilities trading or executing significant price discovery contracts.* In addition to the requirements of paragraph (c)(1) of this section, if the Commission determines that a facility operating in reliance on the exemption set forth in this section trades or executes an agreement, contract or transaction that performs a significant price discovery function, the facility must, with respect to any significant price discovery contract, publish and provide to the Commission the information required by § 16.01 of this chapter.

(4) *Delegation of authority.* The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting the required information under paragraphs (c)(1) through (3) of this section, to the Director of the Division of Market Oversight and such members of the Commission's staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph (c)(4).

(5) *Special calls.* (i) All information required upon special call of the Commission shall be transmitted at the same time and to the office of the Commission as may be specified in the call.

(ii) Such information shall include information related to the facility's business as an exempt electronic trading facility in reliance on the exemption set forth in this section, including information relating to data entry and transaction details in respect of transactions entered into in reliance on the exemption, as the Commission may determine appropriate—

(A) To enforce the antifraud and anti-manipulation provisions of the Act and Commission regulations, and

(B) To evaluate a systemic market event; or

(C) To obtain information requested by a Federal financial regulatory authority in order to enable the regulator to fulfill its regulatory or supervisory responsibilities.

(iii) The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls to the Directors of the Division of Market Oversight, the Division of Clearing and Intermediary Oversight, and the Division of Enforcement to be exercised by each such Director or by such other employee or employees as the Director may designate. The Directors may submit to the Commission for its consideration any matter that has been delegated in this paragraph (c)(5). Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(6) *Subpoenas to foreign persons.* A foreign person whose access to an electronic trading facility is limited or denied at the direction of the Commission based on the Commission's belief that the foreign person has failed timely to comply with a subpoena shall have an opportunity for a prompt hearing under the procedures provided in § 21.03(b) and (h) of this chapter.

(7) *Prohibited representation.* An electronic trading facility relying upon the exemption set forth in this section, with respect to agreements, contracts or transactions that are not significant price discovery contracts, shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(d) *Significant price discovery contracts—*(1) *Criteria for significant price discovery determination.* The Commission may determine, in its discretion, that an electronic trading facility operating a market in reliance on the exemption set forth in this section performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract or transaction executed or traded on the facility. In making such a determination, the Commission shall consider, as appropriate:

(i) *Price linkage.* The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position;

(ii) *Arbitrage.* The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a

designated contract market, or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis;

(iii) *Material price reference.* The extent to which, on a frequent and recurring basis, bids, offers, or transactions in a commodity are directly based on, or are determined by referencing, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility;

(iv) *Material liquidity.* The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market or an electronic trading facility operating in reliance on the exemption set forth in this section;

(v) *Other material factors.* [Reserved]

(2) *Notification of possible significant price discovery contract conditions.* An electronic trading facility operating in reliance on the exemption set forth in this section shall promptly notify the Commission, and such notification shall be accompanied by supporting information or data concerning any contract that:

(i) Averaged five trades per day or more over the most recent calendar quarter; and

(ii)(A) For which the exchange sells its price information regarding the contract to market participants or industry publications; or

(B) Whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another agreement, contract or transaction.

(3) *Procedure for significant price discovery determination.* Before making a final price discovery determination under this paragraph, the Commission shall publish notice in the Federal Register that it intends to undertake a determination with respect to whether a particular agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Any such written

data, views and arguments shall be filed with the Secretary of the Commission, in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the Federal Register or within such other time specified by the Commission. After prompt consideration of all relevant information, the Commission shall, within a reasonable period of time after the close of the comment period, issue an order explaining its determination whether the agreement, contract or transaction executed or traded by the electronic trading facility performs a significant price discovery function under the criteria specified in paragraph (d)(1)(i) through (v) of this section.

(4) *Compliance with core principles.*

(i) Following the issuance of an order by the Commission that the electronic trading facility executes or trades an agreement, contract or transaction that performs a significant price discovery function, the electronic trading facility must demonstrate, with respect to that agreement, contract or transaction, compliance with the Core Principles set forth in this section and the applicable provisions of this part. If the Commission's order represents the first time it has determined that one of the electronic trading facility's agreements, contracts or transactions performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the electronic trading facility has an additional agreement, contract or transaction that performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of the Commission's order. Attention is directed to Appendix B of this part for guidance on and acceptable practices for complying with the Core Principles. Submissions demonstrating how the electronic trading facility complies with the Core Principles with respect to its significant price discovery contract must be filed with the Secretary of the Commission at its Washington, DC headquarters. Submissions must include the following:

(A) A written certification that the significant price discovery contract(s) complies with the Act and regulations thereunder;

(B) A copy of the electronic trading facility's rules (as defined in § 40.1 of this chapter) and any technical manuals, other guides or instructions for users of, or participants in, the market, including

minimum financial standards for members or market participants. Subsequent rule changes must be certified by the electronic trading facility pursuant to section 5c(c) of the Act and § 40.6 of this chapter. The electronic trading facility also may request Commission approval of any rule changes pursuant to section 5c(c) of the Act and § 40.5 of this chapter;

(C) A description of the trading system, algorithm, security and access limitation procedures with a timeline for an order from input through settlement, and a copy of any system test procedures, tests conducted, test results and contingency or disaster recovery plans;

(D) A copy of any documents pertaining to or describing the electronic trading system's legal status and governance structure, including governance fitness information;

(E) An executed or executable copy of any agreements or contracts entered into or to be entered into by the electronic trading facility, including partnership or limited liability company, third-party regulatory service, or member or user agreements, that enable or empower the electronic trading facility to comply with a Core Principle;

(F) A copy of any manual or other document describing, with specificity, the manner in which the trading facility will conduct trade practice, market and financial surveillance;

(G) To the extent that any of the items in paragraphs (d)(4)(ii) through (vi) of this section raise issues that are novel, or for which compliance with a Core Principle is not self-evident, an explanation of how that item satisfies the applicable Core Principle or Principles.

(ii) The electronic trading facility must identify with particularity information in the submission that will be subject to a request for confidential treatment pursuant to § 145.09 of this chapter. The electronic trading facility must follow the procedures specified in § 40.8 of this chapter with respect to any information in its submission for which confidential treatment is requested.

(5) *Determination of compliance with core principles.* The Commission shall take into consideration differences between cleared and uncleared significant price discovery contracts when reviewing the implementation of the Core Principles by an electronic trading facility. The electronic facility has reasonable discretion in accounting for differences between cleared and uncleared significant price discovery contracts when establishing the manner in which it complies with the Core Principles.

(6) *Information relating to compliance with core principles.* Upon request by the Commission, an electronic trading facility trading a significant price discovery contract shall file with the Commission a written demonstration, containing such supporting data, information and documents, in the form and manner and within such time as the Commission may specify, that the electronic trading facility is in compliance with one or more Core Principles as specified in the request, or that is otherwise requested by the Commission to enable the Commission to satisfy its obligations under the Act.

(7) *Enforceability.* An agreement, contract or transaction entered into on or pursuant to the rules of an electronic trading facility trading or executing a significant price discovery contract shall not be void, voidable, subject to rescission or otherwise invalidated or rendered unenforceable as a result of:

(i) A violation by the electronic trading facility of the provisions set forth in this section; or

(ii) Any Commission proceeding to alter or supplement a rule, term or condition under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to alter, supplement or require an electronic trading facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(8) *Procedures for vacating a determination of a significant price discovery function—(i) By the electronic trading facility.* An electronic trading facility that executes or trades an agreement, contract or transaction that the Commission has determined performs a significant price discovery function under paragraph (d)(3) of this section may petition the Commission to vacate that determination. The petition shall demonstrate that the agreement, contract or transaction no longer performs a significant price discovery function under the criteria specified in paragraph (d)(1), and has not done so for at least the prior 12 months. An electronic trading facility shall not petition for a vacation of a significant price discovery determination more frequently than once every 12 months for any individual contract.

(ii) *By the Commission.* The Commission may, on its own initiative, begin vacation proceedings if it believes that an agreement, contract or transaction has not performed a significant price discovery function for at least the prior 12 months.

(iii) *Procedure.* Before making a final determination whether an agreement,

contract or transaction has ceased to perform a significant price discovery function, the Commission shall publish notice in the **Federal Register** that it intends to undertake such a determination and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Written submissions shall be filed with the Secretary of the Commission in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the **Federal Register**, or within such other time specified by the Commission. After consideration of all relevant information, the Commission shall issue an order explaining its determination whether the agreement, contract or transaction has ceased to perform a significant price discovery function and, if so, vacating its prior order. If such an order issues, and the Commission subsequently determines, on its own initiative or after notification by the electronic trading facility, that the agreement, contract or transaction that was subject to the vacation order again performs a significant price discovery function, the electronic trading facility must comply with the Core Principles within 30 calendar days of the date of the Commission's order.

(iv) *Automatic vacation of significant price discovery determination.*

Regardless of whether a proceeding to vacate has been initiated, any significant price discovery contract that has no open interest and in which no trading has occurred for a period of 12 complete and consecutive calendar months shall, without further proceedings, no longer be considered to be a significant price discovery contract.

(e) *Commission Review.* The Commission shall, at least annually, evaluate as appropriate agreements, contracts or transactions conducted on an electronic trading facility in reliance on the exemption set forth in this section to determine whether they serve a significant price discovery function as set forth in paragraph (d)(1) above.

43. Amend Appendix A to part 36 by revising introductory paragraph 1, the headings to paragraphs (A), (B), and (C), and paragraphs (D)2. and (D)4., to read as follows:

Appendix A to Part 36—Guidance on Specific Price Discovery Contracts

1. There are four factors that the Commission must consider, as appropriate, in making a determination that a contract is performing a significant price discovery function. The four factors prescribed by the

statute are: Price Linkage; Arbitrage; Material Price Reference; and Material Liquidity.

* * * * *

(A) *MATERIAL LIQUIDITY—The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market, or an electronic trading facility operating in reliance on the exemption set forth in this section.*

* * * * *

(B) *PRICE LINKAGE—The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.*

* * * * *

(C) *ARBITRAGE CONTRACTS—The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated contract market or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.*

* * * * *

(D) * * *

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2. In evaluating a contract's price discovery role as a directly referenced price source, the Commission will perform an analysis to determine whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract. Cash market prices are set explicitly at a differential to the contract being traded on the electronic trading facility when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a contract being traded on the electronic trading facility when, for instance, they are arrived at after adding to, or subtracting from the contract being traded on the electronic trading facility, but then quoted or reported at a flat price. The Commission will also consider whether cash market entities are quoting cash prices based on a contract being traded on the electronic trading facility on a frequent and recurring basis.

* * * * *

4. In applying this criterion, consideration will be given to whether prices established by a contract being traded on the electronic trading facility are reported in a widely distributed industry publication. In making

this determination, the Commission will consider the reputation of the publication within the industry, how frequently it is published, and whether the information contained in the publication is routinely consulted by industry participants in pricing cash market transactions.

* * * * *

44. Revise Appendix B to Part 36 to read as follows:

Appendix B to Part 36—Guidance on, and Acceptable Practices in, Compliance With Core Principles

1. This Appendix provides guidance on complying with the core principles set forth in this part, both initially and on an ongoing basis. The guidance is provided in paragraph (a) following each core principle and can be used to demonstrate to the Commission core principle compliance under § 36.3(d)(4). The guidance for each core principle is illustrative only of the types of matters an electronic trading facility may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues and questions set forth in this guidance will help the Commission in its consideration of whether the electronic trading facility is in compliance with the core principles. A submission pursuant to § 36.3(d)(4) should include an explanation or other form of documentation demonstrating that the electronic trading facility complies with the core principles.

2. Acceptable practices meeting selected requirements of the core principles are set forth in paragraph (b) following each core principle. Electronic trading facilities on which significant price discovery contracts are traded or executed that follow the specific practices outlined under paragraph (b) for any core principle in this appendix will meet the selected requirements of the applicable core principle. Paragraph (b) is for illustrative purposes only, and does not state the exclusive means for satisfying a core principle.

CORE PRINCIPLE I—CONTRACTS NOT READILY SUSCEPTIBLE TO MANIPULATION. *The electronic trading facility shall list only significant price discovery contracts that are not readily susceptible to manipulation.*

(a) *Guidance.* Upon determination by the Commission that a contract listed for trading on an electronic trading facility is a significant price discovery contract, the electronic trading facility must self-certify the terms and conditions of the significant price discovery contract under § 36.3(d)(4) within 90 calendar days of the date of the Commission's order if the contract is the electronic trading facility's first significant price discovery contract; or 30 days from the date of the Commission's order if the contract is not the electronic trading facility's first significant price discovery contract. Once the Commission determines that a contract performs a significant price discovery function, subsequent rule changes must be self-certified to the Commission by the electronic trading facility pursuant to § 40.6 or submitted to the Commission for review and approval pursuant to § 40.5.

(b) *Acceptable practices.* Guideline No.1, 17 CFR part 40, Appendix A may be used as guidance in meeting this core principle for significant price discovery contracts.

CORE PRINCIPLE II—MONITORING OF TRADING. *The electronic trading facility shall monitor trading in significant price discovery contracts to prevent market manipulation, price distortion, and disruptions of the delivery of cash-settlement process through market surveillance, compliance and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.*

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, demonstrate a capacity to prevent market manipulation and have trading and participation rules to detect and deter abuses. The facility should seek to prevent market manipulation and other trading abuses through a dedicated regulatory department or by delegation of that function to an appropriate third party. An electronic trading facility also should have the authority to intervene as necessary to maintain an orderly market.

(b) *Acceptable practices—(1) An acceptable trade monitoring program.* An acceptable trade monitoring program should facilitate, on both a routine and non-routine basis, arrangements and resources to detect and deter abuses through direct surveillance of each significant price discovery contract. Direct surveillance of each significant price discovery contract will generally involve the collection of various market data, including information on participants' market activity. Those data should be evaluated on an ongoing basis in order to make an appropriate regulatory response to potential market disruptions or abusive practices. For contracts with a substantial number of participants, an effective surveillance program should employ a much more comprehensive large trader reporting system.

(2) *Authority to collect information and documents.* The electronic trading facility should have the authority to collect information and documents in order to reconstruct trading for appropriate market analysis. Appropriate market analysis should enable the electronic trading facility to assess whether each significant price discovery contract is responding to the forces of supply and demand. Appropriate data usually include various fundamental data about the underlying commodity, its supply, its demand, and its movement through market channels. Especially important are data related to the size and ownership of deliverable supplies—the existing supply and the future or potential supply—and to the pricing of the deliverable commodity relative to the futures price and relative to the similar, but non-deliverable, kinds of the commodity. For cash-settled contracts, it is more appropriate to pay attention to the availability and pricing of the commodity making up the index to which the contract will be settled, as well as monitoring the continued suitability of the methodology for deriving the index.

(3) *Ability to assess participants' market activity and power.* To assess participants' activity and potential power in a market, electronic trading facilities, with respect to significant price discovery contracts, at a minimum should have routine access to the positions and trading of its participants and, if applicable, should provide for such access through its agreements with its third-party provider of clearing services.

CORE PRINCIPLE III—ABILITY TO OBTAIN INFORMATION. *The electronic trading facility shall establish and enforce rules that allow the electronic trading facility to obtain any necessary information to perform any of the functions set forth in this subparagraph, provide the information to the Commission upon request, and have the capacity to carry out such international information-sharing agreements as the Commission may require.*

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, have the ability and authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by participants. This includes having arrangements and resources for recording full data entry and trade details and safely storing audit trail data. An electronic trading facility should have systems sufficient to enable it to use the information for purposes of assisting in the prevention of participant and market abuses through reconstruction of trading and providing evidence of any violations of the electronic trading facility's rules.

(b) *Acceptable practices—(1) The goal of an audit trail is to detect and deter market abuse.* An effective contract audit trail should capture and retain sufficient trade-related information to permit electronic trading facility staff to detect trading abuses and to reconstruct all transactions within a reasonable period of time. An audit trail should include specialized electronic surveillance programs that identify potentially abusive trades and trade patterns. An acceptable audit trail must be able to track an order from time of entry into the trading system through its fill. The electronic trading facility must create and maintain an electronic transaction history database that contains information with respect to transactions executed on each significant price discovery contract.

(2) An acceptable audit trail should include the following: original source documents, transaction history, electronic analysis capability, and safe storage capability. An acceptable audit trail system would satisfy the following practices.

(i) *Original source documents.* Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded. For each order (whether filled, unfilled or cancelled, each of which should be retained or electronically captured), such records reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry.

(ii) *Transaction history.* A transaction history consists of an electronic history of each transaction, including:

(A) All the data that are input into the trade entry or matching system for the transaction to match and clear;

(B) Timing and sequencing data adequate to reconstruct trading; and

(C) The identification of each account to which fills are allocated.

(iii) *Electronic analysis capability.* An electronic analysis capability permits sorting and presenting data included in the transaction history so as to reconstruct trading and to identify possible trading violations with respect to market abuse.

(iv) *Safe storage capability.* Safe storage capability provides for a method of storing the data included in the transaction history in a manner that protects the data from unauthorized alteration, as well as from accidental erasure or other loss. Data should be retained in the form and manner specified by the Commission or, where no acceptable manner of retention is specified, in accordance with the recordkeeping standards of Commission rule 1.31 (17 CFR 1.31).

(3) Arrangements and resources for the disclosure of the obtained information and documents to the Commission upon request. The electronic trading facility should maintain records of all information and documents related to each significant price discovery contract in a form and manner acceptable to the Commission. Where no acceptable manner of maintenance is specified, records should be maintained in accordance with the recordkeeping standards of Commission rule 1.31 (17 CFR 1.31).

(4) The capacity to carry out appropriate information-sharing agreements as the Commission may require. Appropriate information-sharing agreements could be established with other markets or the Commission can act in conjunction with the electronic trading facility to carry out such information sharing.

CORE PRINCIPLE IV—POSITION LIMITATIONS OR ACCOUNTABILITY. *The electronic trading facility shall adopt, where necessary and appropriate, position limitations or position accountability for speculators in significant price discovery contracts, taking into account positions in other agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contracts to reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month.*

(a) *Guidance.* [Reserved]

(b) *Acceptable practices for uncleared trades.* [Reserved]

(c) *Acceptable practices for cleared trades—(1) Introduction.* In order to diminish potential problems arising from excessively large speculative positions, and to facilitate orderly liquidation of expiring contracts, an electronic trading facility relying on the exemption set forth in this section should adopt rules that set position limits or accountability levels on traders' cleared positions in significant price discovery contracts. These position limit rules

specifically may exempt bona fide hedging; permit other exemptions; or set limits differently by market, delivery month or time period. For the purpose of evaluating a significant price discovery contract's speculative-limit program for cleared positions, the Commission will consider the specified position limits or accountability levels, aggregation policies, types of exemptions allowed, methods for monitoring compliance with the specified limits or levels, and procedures for dealing with violations.

(2) *Accounting for cleared trades—(i)* Speculative-limit levels typically should be set in terms of a trader's combined position involving cleared trades in a significant price discovery contract, plus positions in agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contract. (This circumstance typically exists where an exempt commercial market lists a particular contract for trading but also allows for positions in that contract to be cleared together with positions established through bilateral or off-exchange transactions, such as block trades, in the same contract. Essentially, both the on-facility and off-facility transactions are considered fungible with each other.) In this connection, the electronic trading facility should make arrangements to ensure that it is able to ascertain accurate position data for the market.

(ii) For significant price discovery contracts that are traded on a cleared basis, the electronic trading facility should apply position limits to cleared transactions in the contract.

(3) *Limitations on spot-month positions.* Spot-month limits should be adopted for significant price discovery contracts to minimize the susceptibility of the market to manipulation or price distortions, including squeezes and corners or other abusive trading practices.

(i) *Contracts economically equivalent to an existing contract.* An electronic trading facility that lists a significant price discovery contract that is economically-equivalent to another significant price discovery contract or to a contract traded on a designated contract market should set the spot-month limit for its significant price discovery contract at the same level as that specified for the economically-equivalent contract.

(ii) *Contracts that are not economically equivalent to an existing contract.* There may not be an economically-equivalent significant price discovery contract or economically-equivalent contract traded on a designated contract market. In this case, the spot-month speculative position limit should be established in the following manner. The spot-month limit for a physical delivery market should be based upon an analysis of deliverable supplies and the history of spot-month liquidations. The spot-month limit for a physical-delivery market is appropriately set at no more than 25 percent of the estimated deliverable supply. In the case where a significant price discovery contract has a cash settlement provision, the spot-month limit should be set at a level that

minimizes the potential for price manipulation or distortion in the significant price discovery contract itself; in related futures and options contracts traded on a designated contract market; in other significant price discovery contracts; in other fungible agreements, contracts and transactions; and in the underlying commodity.

(4) *Position accountability for non-spot-month positions.* The electronic trading facility should establish for its significant price discovery contracts non-spot individual month position accountability levels and all-months-combined position accountability levels. An electronic trading facility may establish non-spot individual month position limits and all-months-combined position limits for its significant price discovery contracts in lieu of position accountability levels.

(i) *Definition.* Position accountability provisions provide a means for an exchange to monitor traders' positions that may threaten orderly trading. An acceptable accountability provision sets target accountability threshold levels that may be exceeded, but once a trader breaches such accountability levels, the electronic trading facility should initiate an inquiry to determine whether the individual's trading activity is justified and is not intended to manipulate the market. As part of its investigation, the electronic trading facility may inquire about the trader's rationale for holding a position in excess of the accountability levels. An acceptable accountability provision should provide the electronic trading facility with the authority to order the trader not to further increase positions. If a trader fails to comply with a request for information about positions held, provides information that does not sufficiently justify the position, or continues to increase contract positions after a request not to do so is issued by the facility, then the accountability provision should enable the electronic trading facility to require the trader to reduce positions.

(ii) *Contracts economically equivalent to an existing contract.* When an electronic trading facility lists a significant price discovery contract that is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market, the electronic trading facility should set the non-spot individual month position accountability level and all-months-combined position accountability level for its significant price discovery contract at the same levels, or lower, as those specified for the economically-equivalent contract.

(iii) *Contracts that are not economically equivalent to an existing contract.* For significant price discovery contracts that are not economically equivalent to an existing contract, the trading facility shall adopt non-spot individual month and all-months-combined position accountability levels that are no greater than 10 percent of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year. For electronic trading facilities that choose to adopt non-spot individual month and all-months-combined position

limits in lieu of position accountability levels for their significant price discovery contracts, the limits should be set in the same manner as the accountability levels.

(iv) *Contracts economically equivalent to an existing contract with position limits.* If a significant price discovery contract is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market that has adopted non-spot or all-months-combined position limits, the electronic trading facility should set non-spot month position limits and all-months-combined position limits for its significant price discovery contract at the same (or lower) levels as those specified for the economically-equivalent contract.

(5) *Account aggregation.* An electronic trading facility should have aggregation rules for significant price discovery contracts that apply to accounts under common control, those with common ownership, *i.e.*, where there is a ten percent or greater financial interest, and those traded according to an express or implied agreement. Such aggregation rules should apply to cleared transactions with respect to applicable speculative position limits. An electronic trading facility will be permitted to set more stringent aggregation policies. An electronic trading facility may grant exemptions to its price discovery contracts' position limits for bona fide hedging (as defined in § 1.3(z) of this chapter) and may grant exemptions for reduced risk positions, such as spreads, straddles and arbitrage positions.

(6) *Implementation deadlines.* An electronic trading facility with a significant price discovery contract is required to comply with Core Principle IV within 90 calendar days of the date of the Commission's order determining that the contract performs a significant price discovery function if such contract is the electronic trading facility's first significant price discovery contract, or within 30 days of the date of the Commission's order if such contract is not the electronic trading facility's first significant price discovery contract. For the purpose of applying limits on speculative positions in newly-determined significant price discovery contracts, the Commission will permit a grace period following issuance of its order for traders with cleared positions in such contracts to become compliant with applicable position limit rules. Traders who hold cleared positions on a net basis in the electronic trading facility's significant price discovery contract must be at or below the specified position limit level no later than 90 calendar days from the date of the electronic trading facility's implementation of position limit rules, unless a hedge exemption is granted by the electronic trading facility. This grace period applies to both initial and subsequent price discovery contracts. Electronic trading facilities should notify traders of this requirement promptly upon implementation of such rules.

(7) *Enforcement provisions.* The electronic trading facility should have appropriate procedures in place to monitor its position limit and accountability provisions and to address violations.

(i) An electronic trading facility with significant price discovery contracts should

use an automated means of detecting traders' violations of speculative limits or exemptions, particularly if the significant price discovery contracts have large numbers of traders. An electronic trading facility should monitor the continuing appropriateness of approved exemptions by periodically reviewing each trader's basis for exemption or requiring a reapplication. An automated system also should be used to determine whether a trader has exceeded applicable non-spot individual month position accountability levels and all-months-combined position accountability levels.

(ii) An electronic trading facility should establish a program for effective enforcement of position limits for significant price discovery contracts. Electronic trading facilities should use a large trader reporting system to monitor and enforce daily compliance with position limit rules. The Commission notes that an electronic trading facility may allow traders to periodically apply to the electronic trading facility for an exemption and, if appropriate, be granted a position level higher than the applicable speculative limit. The electronic trading facility should establish a program to monitor approved exemptions from the limits. The position levels granted under such hedge exemptions generally should be based upon the trader's commercial activity in related markets including, but not limited to, positions held in related futures and options contracts listed for trading on designated contract markets, fungible agreements, contracts and transactions, as determined by a derivatives clearing organization. Electronic trading facilities may allow a brief grace period where a qualifying trader may exceed speculative limits or an existing exemption level pending the submission and approval of appropriate justification. An electronic trading facility should consider whether it wants to restrict exemptions during the last several days of trading in a delivery month. Acceptable procedures for obtaining and granting exemptions include a requirement that the electronic trading facility approve a specific maximum higher level.

(iii) An acceptable speculative limit program should have specific policies for taking regulatory action once a violation of a position limit or exemption is detected. The electronic trading facility policies should consider appropriate actions.

(8) *Violation of Commission rules.* A violation of position limits for significant price discovery contracts that have been self-certified by an electronic trading facility is also a violation of section 4a(e) of the Act.

CORE PRINCIPLE V—EMERGENCY AUTHORITY. *The electronic trading facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, where necessary and appropriate, including the authority to liquidate open positions in significant price discovery contracts and to suspend or curtail trading in a significant price discovery contract.*

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded should have clear procedures and guidelines for decision-

making regarding emergency intervention in the market, including procedures and guidelines to avoid conflicts of interest while carrying out such decision-making. An electronic trading facility on which significant price discovery contracts are executed or traded should also have the authority to intervene as necessary to maintain markets with fair and orderly trading as well as procedures for carrying out the intervention. Procedures and guidelines should include notifying the Commission of the exercise of the electronic trading facility's regulatory emergency authority, explaining how conflicts of interest are minimized, and documenting the electronic trading facility's decision-making process and the reasons for using its emergency action authority. Information on steps taken under such procedures should be included in a submission of a certified rule and any related submissions for rule approval pursuant to part 40 of this chapter, when carried out pursuant to an electronic trading facility's emergency authority. To address perceived market threats, the electronic trading facility on which significant price discovery contracts are executed or traded should, among other things, be able to impose position limits in the delivery month, impose or modify price limits, modify circuit breakers, call for additional margin either from market participants or clearing members (for contracts that are cleared through a clearinghouse), order the liquidation or transfer of open positions, order the fixing of a settlement price, order a reduction in positions, extend or shorten the expiration date or the trading hours, suspend or curtail trading on the electronic trading facility, order the transfer of contracts and the margin for such contracts from one market participant to another, or alter the delivery terms or conditions or, if applicable, should provide for such actions through its agreements with its third-party provider of clearing services.

(b) *Acceptable practices.* [Reserved]

CORE PRINCIPLE VI—DAILY PUBLICATION OF TRADING INFORMATION. *The electronic trading facility shall make public daily information on price, trading volume, and other trading data to the extent appropriate for significant price discovery contracts.*

(a) *Guidance.* An electronic trading facility, with respect to significant price discovery contracts, should provide to the public information regarding settlement prices, price range, volume, open interest, and other related market information for all applicable contracts as determined by the Commission on a fair, equitable and timely basis. Provision of information for any applicable contract can be through such means as provision of the information to a financial information service or by timely placement of the information on the electronic trading facility's public Web site.

(b) *Acceptable practices.* Compliance with § 16.01 of this chapter, which is mandatory, is an acceptable practice that satisfies the requirements of Core Principle VI.

CORE PRINCIPLE VII—COMPLIANCE WITH RULES. *The electronic trading facility shall monitor and enforce compliance with*

the rules of the electronic trading facility, including the terms and conditions of any contracts to be traded and any limitations on access to the electronic trading facility.

(a) *Guidance*—(1) An electronic trading facility on which significant price discovery contracts are executed or traded should have appropriate arrangements and resources for effective trade practice surveillance programs, with the authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by its market participants. The arrangements and resources should facilitate the direct supervision of the market and the analysis of data collected. Trade practice surveillance programs may be carried out by the electronic trading facility itself or through delegation or contracting-out to a third party. If the electronic trading facility on which significant price discovery contracts are executed or traded delegates or contracts-out the trade practice surveillance responsibility to a third party, such third party should have the capacity and authority to carry out such programs, and the electronic trading facility should retain appropriate supervisory authority over the third party.

(2) An electronic trading facility on which significant price discovery contracts are executed or traded should have arrangements, resources and authority for effective rule enforcement. The Commission believes that this should include the authority and ability to discipline and limit or suspend the activities of a market participant as well as the authority and ability to terminate the activities of a market participant pursuant to clear and fair standards. The electronic trading facility can satisfy this criterion for market participants by expelling or denying such person's future access upon a determination that such a person has violated the electronic trading facility's rules.

(b) *Acceptable practices*. An acceptable trade practice surveillance program generally would include:

(1) Maintenance of data reflecting the details of each transaction executed on the electronic trading facility;

(2) Electronic analysis of this data routinely to detect potential trading violations;

(3) Appropriate and thorough investigative analysis of these and other potential trading violations brought to the electronic trading facility's attention; and

(4) Prompt and effective disciplinary action for any violation that is found to have been committed. The Commission believes that the latter element should include the authority and ability to discipline and limit or suspend the activities of a market participant pursuant to clear and fair standards that are available to market participants.

CORE PRINCIPLE VIII—CONFLICTS OF INTEREST. *The electronic trading facility on which significant price discovery contracts are executed or traded shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the electronic trading facility and establish a process for resolving such conflicts of interest.*

(a) *Guidance*. (1) The means to address conflicts of interest in the decision-making of an electronic trading facility on which significant price discovery contracts are executed or traded should include methods to ascertain the presence of conflicts of interest and to make decisions in the event of such a conflict. In addition, the Commission believes that the electronic trading facility on which significant price discovery contracts are executed or traded should provide for appropriate limitations on the use or disclosure of material non-public information gained through the performance of official duties by board members, committee members and electronic trading facility employees or gained through an ownership interest in the electronic trading facility or its parent organization(s).

(2) All electronic trading facilities on which significant price discovery contracts are traded bear special responsibility to regulate effectively, impartially, and with due consideration of the public interest, as provided in section 3 of the Act. Under Core Principle VIII, they are also required to minimize conflicts of interest in their decision-making processes. To comply with this core principle, electronic trading facilities on which significant price discovery contracts are traded should be particularly vigilant for such conflicts between and among any of their self-regulatory responsibilities, their commercial interests, and the several interests of their management, members, owners, market participants, other industry participants and other constituencies.

(b) *Acceptable practices*. [Reserved]
CORE PRINCIPLE IX—ANTITRUST CONSIDERATIONS. *Unless necessary or appropriate to achieve the purposes of this Act, the electronic trading facility, with respect to any significant price discovery contracts, shall endeavor to avoid adopting any rules or taking any actions that result in any unreasonable restraints of trade or imposing any material anticompetitive burden on trading on the electronic trading facility.*

(a) *Guidance*. An electronic trading facility, with respect to a significant price discovery contract, may at any time request that the Commission consider under the provisions of section 15(b) of the Act any of the electronic trading facility's rules, which may be trading protocols or policies, operational rules, or terms or conditions of any significant price discovery contract. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable practices*. [Reserved]

PART 41—SECURITY FUTURES PRODUCTS

45a. The authority citation for part 41 continues to read as follows:

Authority: Sections 206, 251 and 252, Pub. L. 106–554, 114 Stat. 2763, 7 U.S.C. 1a, 2, 6f, 6j, 7a–2, 12a; 15 U.S.C. 78g(c)(2).

45b. Revise § 41.2 to read as follows:

§ 41.2 Required records.

A designated contract market that trades a security index or security futures product shall maintain in accordance with the requirements of § 1.31 of this chapter books and records of all activities related to the trading of such products, including: Records related to any determination under subpart B of this part whether or not a futures contract on a security index is a narrow-based security index or a broad-based security index.

46. Revise paragraph (a) introductory text of § 41.12 to read as follows:

§ 41.12 Indexes underlying futures contracts trading for fewer than 30 days.

(a) An index on which a contract of sale for future delivery is trading on a designated contract market or foreign board of trade is not a narrow-based security index under section 1a(25) of the Act (7 U.S.C. 1a(25)) for the first 30 days of trading, if:

* * * * *

47. Revise § 41.13 to read as follows:

§ 41.13 Futures contracts on security indexes trading on or subject to the rules of a foreign board of trade.

When a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market.

48. Revise paragraphs (a)(1), (a)(3) and (b)(4) of § 41.21 to read as follows:

§ 41.21 Requirements for underlying securities.

(a) * * *

(1) The underlying security is registered pursuant to section 12 of the Securities Exchange Act of 1934;

* * * * *

(3) The underlying security conforms with the listing standards for the security futures product that the designated contract market has filed with the SEC under section 19(b) of the Securities Exchange Act of 1934.

(b) * * *

(4) The index conforms with the listing standards for the security futures product that the designated contract market has filed with the SEC under section 19(b) of the Securities Exchange Act of 1934.

49. Revise the introductory text and paragraph (e) of § 41.22 to read as follows:

§ 41.22 Required certifications.

It shall be unlawful for a designated contract market to list for trading or

execution a security futures product unless the designated contract market has provided the Commission with a certification that the specific security futures product or products and the designated contract market meet, as applicable, the following criteria:

* * * * *

(e) If the board of trade is a designated contract market pursuant to section 5 of the Act, dual trading in these security futures products is restricted in accordance with § 41.27;

* * * * *

50. Revise paragraph (a) introductory text, paragraph (a)(5), and paragraph (b) of § 41.23 to read as follows:

§ 41.23 Listing of security futures products for trading.

(a) *Initial listing of products for trading.* To list new security futures products for trading, a designated contract market shall submit to the Commission at its Washington, DC headquarters, either in electronic or hard-copy form, to be received by the Commission no later than the day prior to the initiation of trading, a filing that:

* * * * *

(5) If the board of trade is a designated contract market pursuant to section 5 of the Act, it includes a certification that the security futures product complies with the Act and rules thereunder; and

* * * * *

(b) *Voluntary submission of security futures products for Commission approval.* A designated contract market may request that the Commission approve any security futures product under the procedures of § 40.5 of this chapter, *provided however*, that the registered entity shall include the certification required by § 41.22 with its submission under § 40.5 of this chapter. Notice designated contract markets may not request Commission approval of security futures products.

51. Amend § 41.24 by removing paragraph (b), redesignating paragraph (c) as paragraph (b), and revising redesignated paragraph (b), to read as follows:

§ 41.24 Rule amendments to security futures products.

* * * * *

(b) *Voluntary submission of rules for Commission review and approval.* A designated contract market or a registered derivatives clearing organization clearing security futures products may request that the Commission approve any rule or proposed rule or rule amendment relating to a security futures product under the procedures of § 40.5 of this

chapter, *provided however*, that the registered entity shall include the certifications required by § 41.22 with its submission under § 40.5 of this chapter. Notice designated contract markets may not request Commission approval of rules.

52. Revise paragraphs (a)(1), (a)(2) introductory text, (a)(3) introductory text, (a)(3)(i)(A), (a)(3)(i)(B), (a)(3)(iv), and (d) of § 41.25 to read as follows:

§ 41.25 Additional conditions for trading for security futures products.

(a) *Common provisions—(1) Reporting of data.* The designated contract market shall comply with chapter 16 of this title requiring the daily reporting of market data.

(2) *Regulatory trading halts.* The rules of a designated contract market that lists or trades one or more security futures products must include the following provisions:

* * * * *

(3) *Speculative position limits.* The designated contract market shall have rules in place establishing position limits or position accountability procedures for the expiring futures contract month. The designated contract market shall:

(i) * * *

(A) For security futures products where the average daily trading volume in the underlying security exceeds 20 million shares, or exceeds 15 million shares and there are more than 40 million shares of the underlying security outstanding, the designated contract market may adopt a net position limit no greater than 22,500 (100-share) contracts applicable to positions held during the last five trading days of an expiring contract month; or

(B) For security futures products where the average daily trading volume in the underlying security exceeds 20 million shares and there are more than 40 million shares of the underlying security outstanding, the designated contract market may adopt a position accountability rule. Upon request by the designated contract market, traders who hold net positions greater than 22,500 (100-share) contracts, or such lower level specified by exchange rules, must provide information to the exchange and consent to halt increasing their positions when so ordered by the exchange.

* * * * *

(iv) For purposes of this section, average daily trading volume shall be calculated monthly, using data for the most recent six-month period. If the data justify a higher or lower speculative limit for a security future,

the designated contract market may raise or lower the position limit for that security future effective no earlier than the day after it has provided notification to the Commission and to the public under the submission requirements of § 41.24. If the data require imposition of a reduced position limit for a security future, the designated contract market may permit any trader holding a position in compliance with the previous position limit, but in excess of the reduced limit, to maintain such position through the expiration of the security futures contract; *provided*, that the designated contract market does not find that the position poses a threat to the orderly expiration of such contract.

* * * * *

(d) The Commission may exempt a designated contract market from the provisions of paragraphs (a)(2) and (b) of this section, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the public interest and the protection of customers. An exemption granted pursuant to this paragraph shall not operate as an exemption from any Securities and Exchange Commission rules. Any exemption that may be required from such rules must be obtained separately from the Securities and Exchange Commission.

53. Amend § 41.27 by:

a. Revising paragraphs (a)(1), (a)(3) introductory text, (a)(4)(v), (a)(5), (b), (d) introductory text, (d)(1), (d)(4), and (f); and

b. Removing and reserving paragraphs (c)(2) and (e)(2), to read as follows:

§ 41.27 Prohibition of dual trading in security futures products by floor brokers.

(a) * * *

(1) Trading session means hours during which a designated contract market is scheduled to trade continuously during a trading day, as set forth in its rules, including any related post settlement trading session. A designated contract market may have more than one trading session during a trading day.

* * * * *

(3) Broker association includes two or more designated contract market members with floor trading privileges of whom at least one is acting as a floor broker who:

* * * * *

(4) * * *

(v) An account for another member present on the floor of a designated contract market or an account controlled by such other member.

(5) Dual trading means the execution of customer orders by a floor broker

through open outcry during the same trading session in which the floor broker executes directly or by initiating and passing to another member, either through open outcry or through a trading system that electronically matches bids and offers pursuant to a predetermined algorithm, a transaction for the same security futures product on the same designated contract market for an account described in paragraphs (a)(4)(i) through (v) of this section.

(b) *Dual trading prohibition.* (1) No floor broker shall engage in dual trading in a security futures product on a designated contract market, except as otherwise provided under paragraphs (d), (e), and (f) of this section.

(2) A designated contract market operating an electronic market or electronic trading system that provides market participants with a time or place advantage or the ability to override a predetermined algorithm must submit an appropriate rule proposal to the Commission consistent with the procedures set forth in § 40.5. The proposed rule must prohibit electronic market participants with a time or place advantage or the ability to override a predetermined algorithm from trading a security futures product for accounts in which these same participants have any interest during the same trading session that they also trade the same security futures product for other accounts. This paragraph, however, is not applicable with respect to execution priorities or quantity guarantees granted to market makers who perform that function, or to market participants who receive execution priorities based on price improvement activity, in accordance with the rules governing the designated contract market.

(c) * * *

(2) [Reserved]

(d) *Specific permitted exceptions.* Notwithstanding the applicability of a dual trading prohibition under paragraph (b) of this section, dual trading may be permitted on a designated contract market pursuant to one or more of the following specific exceptions:

(1) *Correction of errors.* To offset trading errors resulting from the execution of customer orders, *provided*, that the floor broker must liquidate the position in his or her personal error account resulting from that error through open outcry or through a trading system that electronically matches bids and offers as soon as practicable, but, except as provided herein, not later than the close of business on the business day following the discovery of error. In the event that a floor broker is unable to offset the

error trade because the daily price fluctuation limit is reached, a trading halt is imposed by the designated contract market, or an emergency is declared pursuant to the rules of the designated contract market, the floor broker must liquidate the position in his or her personal error account resulting from that error as soon as practicable thereafter.

* * * * *

(4) *Market emergencies.* To address emergency market conditions resulting in a temporary emergency action as determined by a designated contract market.

(e) * * *

(2) [Reserved]

(f) *Unique or special characteristics of agreements, contracts or transactions, or of designated contract markets.*

Notwithstanding the applicability of a dual trading prohibition under paragraph (b) of this section, dual trading may be permitted on a designated contract market to address unique or special characteristics of agreements, contracts, or transactions, or of the designated contract market as provided herein. Any rule of a designated contract market that would permit dual trading when it would otherwise be prohibited, based on a unique or special characteristic of agreements, contracts, or transactions, or of the designated contract market must be submitted to the Commission for prior approval under the procedures set forth in § 40.5 of this chapter. The rule submission must include a detailed demonstration of why an exception is warranted.

54. Revise paragraph (a)(30) of § 41.43 to read as follows:

§ 41.43 Definitions.

(a) * * *

(30) *Self-regulatory authority* means a national securities exchange registered under section 6 of the Exchange Act, a national securities association registered under section 15A of the Exchange Act, or a contract market registered under section 5 of the Act or section 5f of the Act.

* * * * *

55. Revise paragraph (b) introductory text of § 41.49 to read as follows:

§ 41.49 Filing proposed margin rule changes with the Commission.

* * * * *

(b) *Filing requirements under the Act.* Any self-regulatory authority that is registered with the Commission as a designated contract market under section 5 of the Act shall, when filing a proposed rule change regarding customer margin for security futures

with the SEC for approval in accordance with section 19(b)(2) of the Securities Exchange Act, submit such proposed rule change to the Commission as follows:

* * * * *

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

56a. The authority citation for part 140 continues to read as follows:

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

56b. Amend § 140.72 by

a. Revising the heading; and

b. Revising paragraphs (a), (b), (d) and (f), to read as follows:

§ 140.72 Delegation of authority to disclose confidential information to a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization.

(a) Pursuant to the authority granted under sections 2(a)(11), 8a(5) and 8a(6) of the Act, the Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director, the Deputy Executive Director, the Special Assistant to the Executive Director, the Director of the Division of Clearing and Intermediary Oversight, each Deputy Director of the Division of Clearing and Intermediary Oversight, the Chief Accountant, the General Counsel, each Deputy General Counsel, the Director of the Division of Market Oversight, each Deputy Director of the Division of Market Oversight, the Director of the Market Surveillance Section, the Director of the Division of Enforcement, each Deputy Director of the Division of Enforcement, each Associate Director of the Division of Enforcement, the Chief Counsel of the Division of Enforcement, each Regional Counsel of the Division of Enforcement, each of the Regional Administrators, each of the Directors of the Market Surveillance Branches, the Chief Economist of the Office of the Chief Economist, the Deputy Chief Economist of the Office of the Chief Economist, the Director of the Office of International Affairs, and the Deputy Director of the Office of International Affairs, the authority to disclose to an official of any contract market, swap execution facility, swap data repository, registered futures association, or self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934, any information necessary or appropriate to effectuate the purposes of the Act, including, but not limited to, the full facts concerning any transaction or market operation, including the names of the parties

thereto. This authority to disclose shall be based on a determination that the transaction or market operation disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors or that disclosure is necessary or appropriate to effectuate the purposes of the Act. The authority to make such a determination is also delegated by the Commission to the Commission employees identified in this section. A Commission employee delegated authority under this section may exercise that authority on his or her own initiative or in response to a request by an official of a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization.

(b) Disclosure under this section shall only be made to a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization official who is named in a list filed with the Commission by the chief executive officer of the contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization, which sets forth the official's name, business address and telephone number. The chief executive officer shall thereafter notify the Commission of any deletions or additions to the list of officials authorized to receive disclosures under this section. The original list and any supplemental list required by this paragraph shall be filed with the Secretary of the Commission, and a copy thereof shall also be filed with the Regional Coordinator for the region in which the contract market, swap execution facility, or swap data repository is located or in which the registered futures association or self-regulatory organization has its principal office.

* * * * *

(d) For purposes of this section, the term "official" shall mean any officer or member of a committee of a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization who is specifically charged with market surveillance or audit or investigative responsibilities, or their duly authorized representative or agent, who is named on the list filed pursuant to paragraph (b) of this section or any supplement thereto.

* * * * *

(f) Any contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization receiving

information from the Commission under these provisions shall not disclose such information except that disclosure may be made in any self-regulatory action or proceeding.

57. Amend § 140.77 by:

a. Revising the heading; and

b. Revising paragraph (a) to read as follows:

§ 140.77 Delegation of authority to determine that applications for contract market designation, swap execution facility registration, or swap data repository registration are materially incomplete.

(a) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director's designees, the authority to determine that an application for contract market designation, swap execution facility registration, or swap data repository registration is materially incomplete under section 6 of the Commodity Exchange Act and to so notify the applicant.

* * * * *

58. Revise paragraphs (a) and (b) of § 140.96 to read as follows:

§ 140.96 Delegation of authority to publish in the Federal Register.

(a) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director's designee, with the concurrence of the General Counsel or the General Counsel's designee, the authority to publish in the **Federal Register** notice of the availability for comment of the proposed terms and conditions of applications for contract market designation, swap execution facility and swap data repository registration, and to determine to publish, and to publish, requests for public comment on proposed exchange, swap execution facility, or swap data repository rules, and rule amendments, when there exists novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with the Act, including regulations under the Act.

(b) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director's designee, and to the Director of the Division of Clearing and Intermediary Oversight or the Director's designee, with the concurrence of the General Counsel or the General

Counsel's designee, the authority to determine to publish, and to publish, in the **Federal Register**, requests for public comment on proposed exchange and self-regulatory organization rule amendments when publication of the proposed rule amendment is in the public interest and will assist the Commission in considering the views of interested persons.

* * * * *

59. Revise paragraph (d)(2) of § 140.99 to read as follows:

§ 140.99 Requests for exemptive, no-action and interpretative letters.

* * * * *

(d) * * *

(2) A request for a Letter relating to the provisions of the Act or the Commission's rules, regulations or orders governing designated contract markets, registered swap execution facilities, registered swap data repositories, exempt commercial markets, exempt boards of trade, the nature of particular transactions and whether they are exempt or excluded from being required to be traded on one of the foregoing entities, foreign trading terminals, hedging exemptions, and the reporting of market positions shall be filed with the Director, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. A request for a Letter relating to all other provisions of the Act or Commission rules shall be filed with the Director, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. The request must be submitted electronically using the e-mail address dmoletters@cftc.gov (for requests filed with the Division of Market Oversight), or dcioletters@cftc.gov (for requests filed with the Division of Clearing and Intermediary Oversight), as appropriate, and a properly signed paper copy of the request must be provided to the Division of Market Oversight or the Division of Clearing and Intermediary Oversight, as appropriate, within ten days for purposes of verification of the electronic submission.

* * * * *

60. Amend § 140.735-2 by:

a. Redesignating paragraphs (b)(1)(i), (b)(1)(ii), and (b)(1)(iii) as (b)(1)(ii), (b)(1)(iv), and (b)(1)(v), respectively;

b. Adding paragraphs (b)(1)(i) and (b)(1)(iii); and

c. Revising paragraphs (b)(2) and (c), to read as follows:

§ 140.735–2 Prohibited transactions.

* * * *

(b) * * *

(1) * * *

(i) In swaps;

* * * *

(iii) In retail forex transactions, as that term is defined in § 5.1(m);

* * * *

(2) Effect any purchase or sale of a commodity option, futures contract, or swap involving a security or group of securities;

* * * *

(c) *Exception for farming, ranching, and natural resource operations.* The prohibitions in paragraphs (b)(1)(i) and (ii) of this section shall not apply to a transaction in connection with any farming, ranching, oil and gas, mineral rights, or other natural resource operation in which the member or employee has a financial interest, if he or she is not involved in the decision to engage in, and does not have prior knowledge of, the actual futures, commodity option, or swap transaction and has previously notified the General Counsel² in writing of the nature of the operation, the extent of the member's or employee's interest, the types of transactions in which the operation may engage, and the identity of the person or persons who will make trading decisions for the operation;³

* * * *

61. Revise paragraph (b)(1) of § 140.735–2a to read as follows:

§ 140.735–2a Prohibited Interests.

* * * *

(b) * * *

(1) Have a financial interest, through ownership of securities or otherwise, in

any person⁵ registered with the Commission (including futures commission merchants, associated persons and agents of futures commission merchants, floor brokers, commodity trading advisors and commodity pool operators, and any other persons required to be registered in a fashion similar to any of the above under the Commodity Exchange Act or pursuant to any rule or regulation promulgated by the Commission), or any contract market, swap execution facility, swap data repository, board of trade, or other trading facility, or any clearing organization subject to regulation or oversight by the Commission;⁶

* * * *

62. Revise § 140.735–3 to read as follows:

§ 140.735–3 Non-governmental employment and other outside activity.

A Commission member or employee shall not accept employment or compensation from any person, exchange, swap execution facility, swap data repository or clearinghouse subject to regulation by the Commission. For purposes of this section, a person subject to regulation by the Commission includes but is not limited to a contract market, swap execution facility, swap data repository or clearinghouse or member thereof, a registered futures commission merchant, any person associated with a futures commission merchant or with any agent of a futures commission merchant, floor broker, commodity trading advisor, commodity pool operator or any person required to be registered in a fashion similar to any of the above or file reports under the Act or pursuant to any rule or regulation promulgated by the Commission.¹¹

PART 145—COMMISSION RECORDS AND INFORMATION

63a. The authority citation for part 145 continues to read as follows:

Authority: Pub. L. 99–570, 100 Stat. 3207; Pub. L. 89–554, 80 Stat. 383; Pub. L. 90–23, 81 Stat. 54; Pub. L. 98–502, 88 Stat. 1561–1564 (5 U.S.C. 552); Sec. 101(a), Pub. L. 93–

⁵ As defined in section 1a(38) of the Commodity Exchange Act and 17 CFR 1.3(u) thereunder, a “person” includes an individual, association, partnership, corporation and a trust.

⁶ Attention is directed to 18 U.S.C. 208.

¹¹ Attention is directed to section 2(a)(8) of the Commodity Exchange Act, which provides, among other things, that no Commission member or employee shall accept employment or compensation from any person, exchange or clearinghouse subject to regulation by the Commission, or participate, directly or indirectly, in any contract market operations or transactions of a character subject to regulation by the Commission.

463, 88 Stat. 1389 (5 U.S.C. 4a(j)); unless otherwise noted.

63b. Revise paragraph (c)(1), (d)(1) introductory text, and (d)(1)(vi) of § 145.9 to read as follows:

§ 145.9 Petition for confidential treatment of information submitted to the Commission.

* * * *

(c) * * *

(1) *Submitter.* A “submitter” is any person who submits any information or who permits any information or material to be submitted to the Commission. For purposes of paragraph (d)(1)(ii) of this section only, “submitter” includes any person whose information has been submitted to a designated contract market, derivatives clearing organization, swap execution facility, swap data repository or registered futures association that in turn has submitted the information to the Commission.

* * * *

(d) *Written request for confidential treatment.* (1) Any submitter may request in writing that the Commission afford confidential treatment under the Freedom of Information Act to any information that he or she submits to the Commission. Except as provided in paragraph (d)(4) of this section, no oral requests for confidential treatment will be accepted by the Commission. The submitter shall specify the grounds on which confidential treatment is being requested but need not provide a detailed written justification of the request unless required to do so under paragraph (e) of this section. Confidential treatment may be requested only on the grounds that disclosure:

* * * *

(vi) Would reveal investigatory records compiled for law enforcement purposes when disclosure would interfere with enforcement proceedings or disclose investigative techniques and procedures, *provided*, that the claim may be made only by a designated contract market, derivatives clearing organization, swap execution facility, swap data repository or registered futures association with regard to its own investigatory records.

* * * *

64. Revise paragraphs (a)(6), (a)(8), and (b)(13) of Appendix A to part 145 to read as follows:

Appendix A To Part 145—Compilation of Commission Records Available to the Public

* * * *

(a) * * *

² As used in this subpart, “General Counsel” refers to the General Counsel in his or her capacity as counselor for the Commission and designated agency ethics official for the Commission, and includes his or her designee and the alternate designated agency ethics official appointed by the agency head pursuant to 5 CFR 2638.202.

³ Although not required, if they choose to do so, members or employees may use powers of attorney or other arrangements in order to meet the notice requirements of, and to assure that they have no control or knowledge of, futures or options transactions permitted under paragraph (c) of this section. A member or employee considering such arrangements should consult with the Office of General Counsel in advance for approval. Should a member or employee gain knowledge of an actual futures, commodity option, or swap transaction entered into by an operation described in paragraph (c) of this section that has already taken place and the market position represented by that transaction remains open, he or she should promptly report that fact and all other details to the General Counsel and seek advice as to what action, including recusal from any particular matter that will have a direct and predictable effect on the financial interest in question, may be appropriate.

(6) Rule enforcement and financial reviews (public version).

* * * * *

(8) Commission rules and regulations, Federal Register notices, interpretative letters.

* * * * *

(b) * * *

(13) Publicly available portions of applications to become a registered entity including the transmittal letter, application form, proposed rules, proposed bylaws, corporate documents, any overview or similar summary provided by the applicant, any documents pertaining to the applicant's legal status and governance structure, including governance fitness information, and any other part of the application not covered by a request for confidential treatment.

* * * * *

PART 155—TRADING STANDARDS

65a. The authority citation for part 155 continues to read as follows:

Authority: 7 U.S.C. 6b, 6c, 6g, 6j and 12a, unless otherwise noted.

65b. Revise the introductory text of § 155.2 to read as follows:

§ 155.2 Trading standards for floor brokers.

Each contract market shall adopt rules which shall, at a minimum, with respect to each member of the contract market acting as a floor broker:

* * * * *

66. Revise paragraphs (a)(1), (b)(2)(ii), and (c)(1) of § 155.3 to read as follows:

§ 155.3 Trading standards for futures commission merchants.

(a) * * *

(1) Insure, to the extent possible, that each order received from a customer which is executable at or near the market price is transmitted to the floor of the appropriate contract market before any order in any future or in any commodity option in the same commodity for any proprietary account, any other account in which an affiliated person has an interest, or any account for which an affiliated person may originate orders without the prior specific consent of the account owner, if the affiliated person has gained knowledge of the customer's order prior to the transmission to the floor of the appropriate contract market of the order for a proprietary account, an account in which the affiliated person has an interest, or an account in which the affiliated person may originate orders without the prior specific consent of the account owner; and

* * * * *

(b) * * *

(2) * * *

(ii) In the case of a customer who does not qualify as an "institutional customer" as defined in § 1.3(g) of this chapter, a futures commission merchant must obtain the customer's prior consent through a signed acknowledgment, which may be accomplished in accordance with § 1.55(d) of this chapter.

(c) * * *

(1) Receives written authorization from a person designated by such other futures commission merchant or introducing broker with responsibility for the surveillance over such account pursuant to paragraph (a)(2) of this section or § 155.4(a)(2), respectively;

* * * * *

67. Revise paragraphs (a)(1), (b)(2)(ii), and (c)(2) of § 155.4 to read as follows:

§ 155.4 Trading standards for introducing brokers.

(a) * * *

(1) Insure, to the extent possible, that each order received from a customer which is executable at or near the market price is transmitted to the futures commission merchant carrying the account of the customer before any order in any future or in any commodity option in the same commodity for any proprietary account, any other account in which an affiliated person has an interest, or any account for which an affiliated person may originate orders without the prior specific consent of the account owner, if the affiliated person has gained knowledge of the customer's order prior to the transmission to the floor of the appropriate contract market of the order for a proprietary account, an account in which the affiliated person has an interest, or an account in which the affiliated person may originate orders without the prior specific consent of the account owner; and

* * * * *

(b) * * *

(2) * * *

(ii) In the case of a customer who does not qualify as an "institutional customer" as defined in § 1.3(g) of this chapter, an introducing broker must obtain the customer's prior consent through a signed acknowledgment, which may be accomplished in accordance with § 1.55(d) of this chapter.

* * * * *

(c) * * *

(2) Copies of all statements for such account and of all written records prepared by such futures commission merchant upon receipt of orders for such account pursuant to § 155.3(c)(2) are transmitted on a regular basis to the introducing broker with which such person is affiliated.

§ 155.6 [Removed and Reserved]

68. Remove and reserve § 155.6.

PART 166—CUSTOMER PROTECTION RULES

69a. The authority citation for part 155 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 6b, 6c, 6d, 6g, 6h, 6k, 6l, 6o, 7, 12a, 21, and 23, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

69b. Revise paragraph (a) introductory text and paragraph (b) of § 166.2 to read as follows:

§ 166.2 Authorization to trade.

* * * * *

(a) With respect to a commodity interest as defined in any paragraph of the commodity interest definition in § 1.3(yy) of this chapter, specifically authorized the futures commission merchant, retail foreign exchange dealer, introducing broker or any of their associated persons to effect the transaction (a transaction is "specifically authorized" if the customer or person designated by the customer to control the account specifies—

* * * * *

(b) With respect to a commodity interest as defined in paragraph (1) or (2) of the commodity interest definition in § 1.3(yy) of this chapter, authorized in writing the futures commission merchant, introducing broker or any of their associated persons to effect transactions in commodity interests for the account without the customer's specific authorization; *Provided, however,* That if any such futures commission merchant, introducing broker or any of their associated persons is also authorized to effect transactions in foreign futures or foreign options without the customer's specific authorization, such authorization must be expressly documented.

70. Revise paragraph (a)(2) of § 166.5 to read as follows:

§ 166.5 Dispute settlement procedures.

(a) * * *

(2) The term *customer* as used in this section includes any person for or on behalf of whom a member of a designated contract market, or a participant transacting on or through such designated contract market, effects a transaction on such contract market, except another member of or participant in such designated contract market. *Provided, however,* a person who is an "eligible contract participant" as defined in section 1a(18) of the Act shall not be

deemed to be a customer within the meaning of this section.

* * * * *

Issued in Washington, DC on April 27, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Adaptation of Regulations To Incorporate Swaps—Commission Voting Summary and Statements of Commissioners

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

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Chilton and O'Malia voted in the affirmative; Commissioner Sommers voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rulemaking to adapt existing CFTC regulations to the new requirements of the Dodd-Frank Act. The Act expanded the scope of the Commodity Exchange Act to include swaps. In addition to rulemakings implementing specific provisions of the Act, conforming changes across the Commission's existing regulations are needed to incorporate that expanded

scope. Specifically, this proposed rulemaking would update the definitions of futures commission merchant (FCM) and introducing broker (IB) to fulfill the Dodd-Frank Act's requirement to permit those entities to trade swaps on behalf of their customers. The proposal also would add swap execution facilities (SEFs) to the list of CFTC-regulated trading venues. The proposal includes recordkeeping requirements for FCMs, IBs and SEFs to ensure that similar records are kept for swaps as are currently kept for futures, among other protections that already exist in the futures markets. The rules for FCMs with regard to allocations of bunched orders for swaps will be consistent with those rules for futures.

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