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To cite the regulations in this volume use title, part and section number. Thus, 17 CFR 1.1 refers to title 17, part 1, section 1.
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Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

- Title 1 through Title 16 as of January 1
- Title 17 through Title 27 as of April 1
- Title 28 through Title 41 as of July 1
- Title 42 through Title 50 as of October 1

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(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

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An index to the text of “Title 3—The President” is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the “Contents” entries in the daily Federal Register.

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CHARLES A. BARTH,
Director,
Office of the Federal Register.
April 1, 2013.
Title 17—Commodity and Securities Exchanges is composed of three volumes. The first volume containing parts 1—199, comprises Chapter I—Commodity Futures Trading Commission. The second volume contains Chapter II—Securities and Exchange Commission, parts 200—239. The third volume, comprising part 240 to end, contains the remaining regulations of the Securities and Exchange Commission, and Chapter IV—Department of the Treasury. The contents of these volumes represent all current regulations issued by the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the Department of the Treasury as of April 1, 2013.

The OMB control numbers for the Securities and Exchange Commission appear in §200.800 of chapter II. For the convenience of the user, §200.800 is reprinted in the Finding Aids section of the volume containing part 240 to end.

For this volume, Jonn V. Lilyea was Chief Editor. The Code of Federal Regulations publication program is under the direction of Michael L. White, assisted by Ann Worley.
Title 17—Commodity and Securities Exchanges

(This book contains parts 1 to 199)

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AUTHORITY: 7 U.S.C. 1a, 2, 5, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 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).

SOURCE: 41 FR 3194, Jan. 21, 1976, unless otherwise noted.

DEFINITIONS

§ 1.1 [Reserved]

[66 FR 42269, Aug. 10, 2001]

§ 1.2 Liability of principal for act of agent.

The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust, within the scope of his employment or office, shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust as well as of such official, agent, or other person.

§ 1.3 Definitions.

Words used in the singular form in the rules and regulations in this chapter shall be deemed to import the plural and vice versa, as the context may require. The 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:

(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 that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization.

(d) Clearing organization or derivatives clearing organization. This term means a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to an agreement, contract, or transaction—

(1) Enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties;

(2) Arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the derivatives clearing organization; or

(3) Otherwise provides clearing services or arrangements that mutually or transfer among participants in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the participants.

(4) Exclusions. The terms clearing organization and derivatives clearing organization do not include an entity, facility, system, or organization solely because it arranges or provides for—
(i) Settlement, netting, or novation of obligations resulting from agreements, contracts or transactions, on a bilateral basis and without a central counterparty;

(ii) Settlement or netting of cash payments through an interbank payment system; or

(iii) Settlement, netting, or novation of obligations resulting from a sale of a commodity in a transaction in the spot market for the commodity.

(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.

(f) Commodity Exchange Act; the Act. These terms mean the Commodity Exchange Act, as amended, 7 U.S.C. 1 et seq.

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

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

(i) Contract of sale. This term includes sales, purchases, agreements of sale or purchase and agreements to sell or purchase.

(j) Controlled account. An account shall be deemed to be controlled by a person if such person by power of attorney or otherwise actually directs trading for such account.

(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.

(l) Delivery month. This term means the month of delivery specified in a contract of sale of any commodity for future delivery.

(m) Eligible contract participant. This term has the meaning set forth in Section 1a(18) of the Act, except that:

(1) A major swap participant, as defined in Section 1a(33) of the Act and paragraph (hhh) of this section, is an eligible contract participant;

(2) A swap dealer, as defined in Section 1a(49) of the Act and paragraph (ggg) of this section, is an eligible contract participant;

(3) A major security-based swap participant, as defined in Section 3(a)(67) of the Securities Exchange Act of 1934 and §240.3a67–1 of this title, is an eligible contract participant;

(4) A security-based swap dealer, as defined in Section 3(a)(71) of the Securities Exchange Act of 1934 and §240.3a71–1 of this title, is an eligible contract participant;

(5)(i) A transaction-level commodity pool with one or more direct participants that is not an eligible contract participant is not itself an eligible contract participant under either Section 1a(18)(A)(iv) or Section 1a(18)(A)(v) of the Act for purposes of entering into transactions described in Sections 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii) of the Act; and

(ii) In determining whether a commodity pool that is a direct participant in a transaction-level commodity pool is an eligible contract participant for purposes of paragraph (m)(5)(i) of this
section, the participants in the commodity pool that is a direct participant in the transaction-level commodity pool shall not be considered unless the transaction-level commodity pool, any commodity pool holding a direct or indirect interest in such transaction-level commodity pool, or any commodity pool in which such transaction-level commodity pool holds a direct or indirect interest, has been structured to evade subtitle A of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act by permitting persons that are not eligible contract participants to participate in agreements, contracts, or transactions described in Section 2(c)(2)(B)(i) or Section 2(c)(2)(C)(i) of the Act;

(6) A commodity pool that does not have total assets exceeding $5,000,000 or that is not operated by a person described in subclause (A)(iv)(II) of Section 1a(18) of the Act is not an eligible contract participant pursuant to clause (A)(v) of such Section;

(7)(i) For purposes of a swap (but not a security-based swap, security-based swap agreement or mixed swap) used to hedge or mitigate commercial risk, an entity may, in determining its net worth for purposes of Section 1a(18)(A)(v)(III) of the Act, include the net worth of any owner of such entity, provided that all the owners of such entity are eligible contract participants;

(ii)(A) For purposes of identifying the owners of an entity under paragraph (m)(7)(i) of this section, any person holding a direct ownership interest in such entity shall be considered to be an owner of such entity; provided, however, that any shell company shall be disregarded, and the owners of such shell company shall be considered to be the owners of any entity owned by such shell company;

(B) For purposes of paragraph (m)(7)(ii)(A) of this section, the term \textit{shell company} means any entity that limits its holdings to direct or indirect interests in entities that are relying on this paragraph (m)(7); and

(C) In determining whether an owner of an entity is an eligible contract participant for purposes of paragraph (m)(7)(ii)(A) of this section, an individual may be considered to be a proprietorship eligible contract participant only if the individual—

(1) Has an active role in operating a business other than an entity;

(2) Directly owns all of the assets of the business;

(3) Directly is responsible for all of the liabilities of the business; and

(4) Acquires its interest in the entity seeking to qualify as an eligible contract participant under paragraph (m)(7)(i) of this section in connection with the operation of the individual’s proprietorship or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the individual in the operation of the individual’s proprietorship; and

(iii) For purposes of paragraph (m)(7)(i) of this section, a swap is used to hedge or mitigate commercial risk if the swap complies with the conditions in paragraph (kkk) of this section; and

(8) Notwithstanding Section 1a(18)(A)(iv) of the Act and paragraph (m)(5) of this section, a commodity pool that enters into an agreement, contract, or transaction described in Section 2(c)(2)(B)(i) or Section 2(c)(2)(C)(i)(I) of the Act is an eligible contract participant with respect to such agreement, contract, or transaction, regardless of whether each participant in such commodity pool is an eligible contract participant, if all of the following conditions are satisfied:

(i) The commodity pool is not formed for the purpose of evading regulation under Section 2(c)(2)(B) or Section 2(c)(2)(C) of the Act or related Commission rules, regulations or orders;

(ii) The commodity pool has total assets exceeding $10,000,000; and

(iii) The commodity pool is formed and operated by a registered commodity pool operator or by a commodity pool operator who is exempt from registration as such pursuant to §4.13(a)(3) of this chapter.

(n) \textit{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—
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(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.

(o) Future delivery. This term does not include any sale of a cash commodity for deferred shipment or delivery.

(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)(1) or section 2(c)(2)(D)(1) 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)(1) or section 2(c)(2)(D)(1) 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 5 of the Act is deemed a member of the contract market for purposes of transactions in security futures products through the contract market.

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

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

(t) Open contracts. This term means:
(1) Positions in contracts of purchase or sale of any commodity made by or for any person on or subject to the rules of a board of trade for future delivery during a specified month or delivery period that have neither been fulfilled by delivery nor been offset by other contracts of purchase or sale in the same commodity and delivery month;
(2) Positions in commodity option transactions that have not expired, been exercised, or offset; and
(3) Positions in Cleared Swaps, as §22.1 of this chapter defines that term, that have not been fulfilled by delivery; not been offset; not expired; and not been terminated.

(u) Person. This term includes individuals, associations, partnerships, corporations, and trusts.

(v) [Reserved]

(w) Secretary of Agriculture. This term means the Secretary of Agriculture or any person to whom authority has heretofore lawfully been delegated or to whom authority may hereafter lawfully be delegated to act in his stead.

(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:
(i) Such individual himself, or such partnership, corporation or association itself;
(ii) In the case of a partnership, a general partner in such partnership;
(iii) In the case of a limited partnership, a limited or special partner in such partnership whose duties include:
(A) The management of the partnership business or any part thereof,
(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,
(D) The signing or co-signing of checks or drafts on behalf of such partnership;
(iv) In the case of a corporation or association, an officer, director or owner of ten percent or more of the capital stock, of such organization;
(v) An employee of such individual, partnership, corporation or association whose duties include:
(A) The management of the business of such individual, partnership, corporation or association or any part thereof,
(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
(D) The signing or co-signing of checks or drafts on behalf of such individual, partnership, corporation or association;
(vi) A spouse or minor dependent living in the same household of any of the foregoing persons;
(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.

(2) Bona fide hedging transactions and positions for excluded commodities—(1) General definition. Bona fide hedging transactions and positions shall mean any agreement, contract or transaction in an excluded commodity on a designated contract market or swap execution facility that is a trading facility, 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:
(i) 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;
(ii) The potential change in the value of liabilities which a person owns or anticipates incurring, or
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(iii) The potential change in the value of services which a person provides, purchases, or anticipates providing or purchasing.

(iv) 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 paragraphs (z)(2) and (3) of this section have been satisfied.

(2) Enumerated hedging transactions. The definitions of bona fide hedging transactions and positions in paragraph (z)(1) of this section includes, but is not limited to, the following specific transactions and positions:

(i) Sales of any agreement, contract, or transaction in an excluded commodity on a designated contract market or swap execution facility that is a trading facility which do not exceed in quantity:

(A) Ownership or fixed-price purchase of the same cash commodity by the same person; and

(B) Twelve months' unsold anticipated production of the same commodity by the same person provided that no such position is maintained in any agreement, contract or transaction during the five last trading days.

(ii) Purchases of any agreement, contract or transaction in an excluded commodity on a designated contract market or swap execution facility that is a trading facility which do not exceed in quantity:

(A) The fixed-price sale of the same cash commodity by the same person;

(B) The quantity equivalent of fixed-price sales of the cash products and by-products of such commodity by the same person; and

(C) Twelve months' unfilled anticipated requirements of the same cash commodity for processing, manufacturing, or feeding by the same person, provided that such transactions and positions in the five last trading days of any agreement, contract or transaction do not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month.

(iii) Offsetting sales and purchases in any agreement, contract or transaction in an excluded commodity on a designated contract market or swap execution facility that is a trading facility which do not exceed in quantity that amount of the same cash commodity which has been bought and sold by the same person at unfixed prices basis different delivery months of the contract market, provided that no such position is maintained in any agreement, contract or transaction during the five last trading days.

(iv) Purchases or sales by an agent who does not own or has not contracted to sell or purchase the offsetting cash commodity at a fixed price, provided that the agent is responsible for the merchandising of the cash position that is being offset, and the agent has a contractual arrangement with the person who owns the commodity or has the cash market commitment being offset.

(v) Sales and purchases described in paragraphs (z)(2)(i) through (iv) of this section may also be offset other than by the same quantity of the same cash commodity, provided that the fluctuations in value of the position for in any agreement, contract or transaction are substantially related to the fluctuations in value of the actual or anticipated cash position, and provided that the positions in any agreement, contract or transaction shall not be maintained during the five last trading days.

(3) Non-Enumerated cases. A designated contract market or swap execution facility that is a trading facility may recognize, consistent with the purposes of this section, transactions and positions other than those enumerated in paragraph (2) of this section as bona fide hedging. Prior to recognizing such non-enumerated transactions and positions, the designated contract market or swap execution facility that is a trading facility shall submit such rules for Commission review under section 5c of the Act and part 40 of this chapter.
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(aa) **Associated person.** This term means any natural person who is associated in any of the following capacities with:

(1) A futures commission merchant as a partner, officer, employee, 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 customers’ orders (other than in a clerical capacity) or
   (ii) The supervision of any person or persons so engaged;

(2) An introducing broker as a partner, officer, employee, 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 customers’ orders (other than in a clerical capacity) or
   (ii) The supervision of any person or persons so engaged;

(3) A commodity pool operator 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 of funds, securities, or property for a participation in a commodity pool or
   (ii) The supervision of any person or persons so engaged;

(4) A commodity trading advisor 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 of a client’s or prospective client’s discretionary account, or
   (ii) The supervision of any person or persons so engaged; and

(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.

(6) A swap dealer or major swap participant as a partner, officer, employee, agent (or any natural person occupying a similar status or performing similar functions), in any capacity that involves:
   (i) The solicitation or acceptance of swaps (other than in a clerical or ministerial capacity); 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 4e of the Act; any leverage transaction authorized under section 19 of the Act; any person registered with the Commission as a commodity trading advisor; or any person, who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing. The term does not include:
   (i) Any bank or trust company or any person acting as an employee thereof;
   (ii) Any news reporter, news columnist, or news editor of the print or electronic media or any lawyer, accountant, or teacher;
   (iii) Any floor broker or futures commission merchant;
   (iv) The publisher or producer of any print or electronic data of general and regular dissemination, including its employees;
   (v) The named fiduciary, or trustee, of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, or any fiduciary whose sole business is to advise that plan;
   (vi) Any contract market; and
   (vii) Such other persons not within the intent of this definition as the Commission may specify by rule, regulation or order. Provided, That the furnishing of such services by the foregoing persons is solely incidental to
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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.

(dd) Commission. This term means the Commodity Futures Trading Commission.

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

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

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

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

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

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

(hh) Commodity option transaction; commodity option. These terms each mean any transaction or agreement in interstate commerce which is or is held out to be of the character of, or is commonly known to the trade as, an “option,” “privilege,” “indemnity,” “bid,” “offer,” “call,” “put.” “advance guaranty,” or “decline guaranty,” and which is subject to regulation under the Act and these regulations.

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

(jj) [Reserved]

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

(ll) [Reserved]

(mm) Introducing broker. This term means:

(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;

(ii) Any commodity trading advisor, which, acting in its capacity as a commodity trading advisor, is not compensated on a per-trade basis or which solely manages discretionary accounts pursuant to a power of attorney, regardless of whether that commodity trading advisor is registered or exempt from registration in such capacity; and

(iii) Any commodity pool operator which, acting in its capacity as a commodity pool operator, solely operates commodity pools, regardless of whether that commodity pool operator 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
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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.

(qq) **Leverage contract.** Shall have the same meaning as that set forth in § 31.4(w) of this chapter.

(rr) **Foreign futures or foreign options secured amount.** This term means all money, securities and property held by or held for or on behalf of a futures commission merchant from, for, or on behalf of foreign futures or foreign options customers as defined in § 30.1 of this chapter:

(1) In the case of foreign futures customers, money, securities and property required by a futures commission merchant to margin, guarantee, or secure open foreign futures contracts plus or minus any unrealized gain or loss on such contracts; and

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

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

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

(uu) [Reserved]

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

(ww) **Securities account.** This term means an account that is maintained in accordance with the requirements of section 15(c)(3) of the Securities Exchange Act of 1934 and Rule 15c3-3 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 4e or 19 of the Act;

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

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

(zz) **Agricultural commodity.** This term means:

(1) The following commodities specifically enumerated in the definition of a “commodity” found in section 1a of the Act: Wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (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, but not onions;

(2) All other commodities that are, or once were, or are derived from, living organisms, including plant, animal and aquatic life, which are generally fungible, within their respective classes, and are used primarily for human food, shelter, animal feed or natural fiber;

(3) Tobacco, products of horticulture, and such other commodities used or consumed by animals or humans as the Commission may by rule, regulation or order designate after notice and opportunity for hearing; and

(4) Commodity-based indexes based wholly or principally on underlying agricultural commodities.

(aaa) **Clearing initial margin.** This term means initial margin posted by a clearing member with a derivatives clearing organization.

(bbb) **Customer initial margin.** This term means initial margin posted by a customer with a futures commission merchant, or by a non-clearing member futures commission merchant with a clearing member.

(ccc) **Initial margin.** This term means money, securities, or property posted by a party to a futures, option, or swap as performance bond to cover potential future exposures arising from changes in the market value of the position.

(ddd) **Margin call.** This term means a request from a futures commission merchant to a customer to post customer initial margin; or a request by a derivatives clearing organization to a clearing member to post clearing initial margin or variation margin.

(eee) **Spread margin.** This term means reduced initial margin that takes into account correlations between certain related positions held in a single account.

(fff) **Variation margin.** This term means a payment made by a party to a futures, option, or swap to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

(ggg) **Swap dealer.**—(1) In general. The term swap dealer means any person who:

(i) Holds itself out as a dealer in swaps;

(ii) Makes a market in swaps;

(iii) Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or

(iv) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in swaps.

(2) **Exception.** The term swap dealer does not include a person that enters into swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(3) **Scope of designation.** A person who is a swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into, regardless of the category of the swap or the person’s activities in connection with the swap. However, if a person makes an application to limit its designation as a swap dealer to specified categories of swaps or specified activities of the person in connection with swaps, the Commission shall determine whether the person’s designation as a swap dealer shall be so limited. If the Commission grants such limited designation, such limited designation swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into in the swap category or categories for which it is so designated, regardless of the person’s activities in connection with such category or categories of swaps. A person may make such application to limit the categories of swaps or activities of the person that are subject to its swap dealer designation at the same time as, or after, the person’s initial registration as a swap dealer.

(4) **De minimis exception.** (i) Except as provided in paragraph (ggg)(4)(vi) of this section, a person that is not currently registered as a swap dealer shall be deemed not to be a swap dealer as a result of its swap dealing activity involving counterparties, so long as the swap positions connected with those dealing activities into which the person—or any other entity controlling, controlled by or under common control with the person—enters over the course of the immediately preceding 12
months (or following the effective date of final rules implementing Section 1a(47) of the Act, 7 U.S.C. 1a(47), if that period is less than 12 months) have an aggregate gross notional amount of no more than $3 billion, subject to a phase in level of an aggregate gross notional amount of no more than $8 billion applied in accordance with paragraph (ggg)(4)(ii) of this section, and an aggregate gross notional amount of no more than $25 million with regard to swaps in which the counterparty is a “special entity” (as that term is defined in Section 4s(h)(2)(C) of the Act, 7 U.S.C. 6s(h)(2)(C), and § 23.401(c) of this chapter). For purposes of this paragraph, if the stated notional amount of a swap is leveraged or enhanced by the structure of the swap, the calculation shall be based on the effective notional amount of the swap rather than on the stated notional amount.

(ii) Phase-in procedure and staff report—(A) Phase-in period. For purposes of paragraph (ggg)(4)(i) of this section, except as provided in paragraph (ggg)(4)(vi) of this section, a person that engages in swap dealing activity that does not exceed the phase-in level set forth in paragraph (ggg)(4)(i) shall be deemed not to be a swap dealer as a result of its swap dealing activity until the “phase-in termination date” established as provided in paragraph (ggg)(4)(ii)(C) or (D) of this section. The Commission shall announce the phase-in termination date on the Commission Web site and publish such date in the Federal Register.

(B) Staff report. No later than 30 months following the date that a swap data repository first receives swap data in accordance with part 45 of this chapter, the staff of the Commission shall complete and publish such date in the Federal Register.

(iii) Registration period for persons that can no longer take advantage of the exception. A person that has not registered as a swap dealer by virtue of satisfying the requirements of this paragraph (ggg)(4), but that no longer can take advantage of that de minimis exception, will be deemed not to be a swap dealer until the earlier of the date on which it submits a complete application for registration pursuant
to Section 4s(b) of the Act, 7 U.S.C. 6s(b), or two months after the end of the month in which that person becomes no longer able to take advantage of the exception.

(iv) Applicability to registered swap dealers. A person who currently is registered as a swap dealer may apply to withdraw that registration, while continuing to engage in swap dealing activity in reliance on this section, so long as that person has been registered as a swap dealer for at least 12 months and satisfies the conditions of paragraph (ggg)(4)(i) of this section.

(v) Future adjustments to scope of the de minimis exception. The Commission may by rule or regulation change the requirements of the de minimis exception described in paragraphs (ggg)(4)(i) through (iv) of this section.

(vi) Voluntary registration. Notwithstanding paragraph (ggg)(4)(i) of this section, a person that chooses to register with the Commission as a swap dealer shall be deemed to be a swap dealer.

(5) Insured depository institution swaps in connection with originating loans to customers. Swaps entered into by an insured depository institution with a customer in connection with originating a loan with that customer shall not be considered in determining whether the insured depository institution is a swap dealer.

(i) An insured depository institution shall be considered to have entered into a swap with a customer in connection with originating a loan, as defined in paragraphs (ggg)(5)(ii) and (iii) of this section, with that customer only if:

(A) The insured depository institution enters into a swap with a customer no earlier than 90 days before and no later than 180 days after the date of execution of the applicable loan agreement, or no earlier than 90 days before and no later than 180 days after any transfer of principal to the customer by the insured depository institution pursuant to the loan;

(B)(I) The rate, asset, liability or other notional item underlying such swap is, or is directly related to, a financial term of such loan, which includes, without limitation, the loan’s duration, rate of interest, the currency or currencies in which it is made and its principal amount;

(2) Such swap is required, as a condition of the loan under the insured depository institution’s loan underwriting criteria, to be in place in order to hedge price risks incidental to the borrower’s business and arising from potential changes in the price of a commodity other than an excluded commodity;

(C) The duration of the swap does not extend beyond termination of the loan;

(D) The insured depository institution is:

(1) The sole source of funds to the customer under the loan;

(2) Committed to be, under the terms of the agreements related to the loan, the source of at least 10 percent of the maximum principal amount under the loan; or

(3) Committed to be, under the terms of the agreements related to the loan, the source of a principal amount that is greater than or equal to the aggregate notional amount of all swaps entered into by the insured depository institution with the customer in connection with the financial terms of the loan;

(E) The aggregate notional amount of all swaps entered into by the customer in connection with the financial terms of the loan is, at any time, not more than the aggregate principal amount outstanding under the loan at that time; and

(F) If the swap is not accepted for clearing by a derivatives clearing organization, the insured depository institution reports the swap as required by section 4r of the Act, 7 U.S.C. 6r (except as otherwise provided in section 4r(a)(3)(A), 7 U.S.C. 6r(a)(3)(A), or section 4r(a)(3)(B), 7 U.S.C. 6r(a)(3)(B) of the Act).

(ii) An insured depository institution shall be considered to have originated a loan with a customer if the insured depository institution:

(A) Directly transfers the loan amount to the customer;

(B) Is a part of a syndicate of lenders that is the source of the loan amount that is transferred to the customer;

(C) Purchases or receives a participation in the loan; or
(D) Otherwise is the source of funds that are transferred to the customer pursuant to the loan or any refinancing of the loan.

(iii) The term loan shall not include:
(A) Any transaction that is a sham, whether or not intended to qualify for the exclusion from the definition of the term swap dealer in this rule; or
(B) Any synthetic loan, including, without limitation, a loan credit default swap or loan total return swap.

(6) Swaps that are not considered in determining whether a person is a swap dealer—

(i) Inter-affiliate activities. In determining whether a person is a swap dealer, that person's swaps with majority-owned affiliates shall not be considered. For these purposes the counterparties to a swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the swap, where "majority interest" is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

(ii) Activities of a cooperative. (A) Any swap that is entered into by a cooperative with a member of such cooperative shall not be considered in determining whether the cooperative is a swap dealer, provided that:

(1) The swap is subject to policies and procedures of the cooperative requiring that the cooperative monitors and manages the risk of such swap;

(2) The cooperative reports the swap as required by Section 4r of the Act, 7 U.S.C. 6r (except as otherwise provided in Section 4r(a)(3)(A) of the Act, 7 U.S.C. 6r(a)(3)(A) or Section 4r(a)(3)(B) of the Act, 7 U.S.C. 6r(a)(3)(B)); and

(3) if the cooperative is a cooperative association of producers, the swap is primarily based on a commodity that is not an excluded commodity.

(B) For purposes of this paragraph (ggg)(6)(ii), the term cooperative shall mean:

(1) A cooperative association of producers as defined in section 1a(14) of the Act, 7 U.S.C. 1a(14), or

(2) A person chartered under Federal law as a cooperative and predominately engaged in activities that are financial in nature as defined in section 4(c) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k).

(C) For purposes of this paragraph (ggg)(6)(ii), a swap shall be deemed to be entered into by a cooperative association of producers with a member of such cooperative association of producers when the swap is between a cooperative association of producers and a person that is a member of a cooperative association of producers that is itself a member of the first cooperative association of producers.

(iii) Swaps entered into for the purpose of hedging physical positions. In determining whether a person is a swap dealer, a swap that the person enters into shall not be considered, if:

(A) The person enters into the swap for the purpose of offsetting or mitigating the person's price risks that arise from the potential change in the value of one or several—

(1) Assets that the person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(2) Liabilities that the person owns or anticipates incurring; or

(3) Services that the person provides, purchases, or anticipates providing or purchasing;

(B) The swap represents a substitute for transactions made or to be made or positions taken or to be taken by the person at a later time in a physical marketing channel;

(C) The swap is economically appropriate to the reduction of the person's risks in the conduct and management of a commercial enterprise;

(D) The swap is entered into in accordance with sound commercial practices; and

(E) The person does not enter into the swap in connection with activity structured to evade designation as a swap dealer.

(iv) Swaps entered into by floor traders. In determining whether a person is a swap dealer, each swap that the person
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enters into in its capacity as a floor trader as defined by section 1a(23) of the Act or on or subject to the rules of a swap execution facility shall not be considered for the purpose of determining whether the person is a swap dealer if the person:

(A) Is registered with the Commission as a floor trader pursuant to §3.11 of this chapter;

(B) Enters into swaps with proprietary funds for that trader’s own account solely on or subject to the rules of a designated contract market or swap execution facility and submits each such swap for clearing to a derivatives clearing organization;

(C) Is not an affiliated person of a registered swap dealer;

(D) Does not directly, or through an affiliated person, negotiate the terms of swap agreements, other than price and quantity or to participate in a request for quote process subject to the rules of a designated contract market or a swap execution facility;

(E) Does not directly or through an affiliated person offer or provide swap clearing services to third parties;

(F) Does not directly or through an affiliated person enter into swaps that would qualify as hedging physical positions pursuant to paragraph (ggg)(6)(iii) of this section or hedging or mitigating commercial risk pursuant to paragraph (kkk) of this section (except for any such swap executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction);

(G) Does not participate in any market making program offered by a designated contract market or swap execution facility; and

(H) Notwithstanding the fact such person is not registered as a swap dealer, such person complies with §§23.201, 23.202, 23.203, and 23.600 of this chapter with respect to each such swap as if it were a swap dealer.

(hhh) Major swap participant—(1) In general. The term major swap participant means any person:

(i) That is not a swap dealer; and

(ii)(A) That maintains a substantial position in swaps for any of the major swap categories, excluding both positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002, for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(B) Whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(C) That is a financial entity that:

(I) Is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency (as defined in Section 1a(2) of the Act, 7 U.S.C. 1a(2)); and

(2) Maintains a substantial position in outstanding swaps in any major swap category.

(2) Scope of designation. A person that is a major swap participant shall be deemed to be a major swap participant with respect to each swap it enters into, regardless of the category of the swap or the person’s activities in connection with the swap. However, if a person makes an application to limit its designation as a major swap participant to specified categories of swaps, the Commission shall determine whether the person’s designation as a major swap participant shall be so limited. If the Commission grants such limited designation, such limited designation major swap participant shall be deemed to be a major swap participant with respect to each swap it enters into in the swap category or categories for which it is so designated, regardless of the person’s activities in connection with such category or categories of swaps. A person may make such application to limit its designation at the same time as, or after, the person’s initial registration as a major swap participant.

(3) Timing requirements. A person that is not registered as a major swap participant, but that meets the criteria in this rule to be a major swap participant as a result of its swap activities in a fiscal quarter, will not be deemed to be a major swap participant until the
earlier of the date on which it submits a complete application for registration as a major swap participant pursuant to Section 4s(a)(2) of the Act, 7 U.S.C. 6s(a)(2), or two months after the end of that quarter.

(4) Reevaluation period. Notwithstanding paragraph (hhh)(3) of this section, if a person that is not registered as a major swap participant meets the criteria in this rule to be a major swap participant in a fiscal quarter, but does not exceed any applicable threshold by more than twenty percent in that quarter:

(i) That person will not be deemed a major swap participant pursuant to the timing requirements specified in paragraph (hhh)(3) of this section; but

(ii) That person will be deemed a major swap participant pursuant to the timing requirements specified in paragraph (hhh)(3) of this section at the end of the next fiscal quarter if the person exceeds any of the applicable daily average thresholds in that next fiscal quarter.

(5) Termination of status. A person that is deemed to be a major swap participant shall continue to be deemed a major swap participant until such time that its swap activities do not exceed any of the daily average thresholds set forth within this rule for four consecutive fiscal quarters after the date on which the person becomes registered as a major swap participant.

(6) Calculation of status. A person shall not be deemed to be a “major swap participant,” regardless of whether the criteria paragraph (hhh)(1) of this section otherwise would cause the person to be a major swap participant, provided the person meets the conditions set forth in paragraphs (hhh)(6)(i), (ii) or (iii) of this section.

(i) Caps on uncollateralized exposure and notional positions.

(A) Maximum potential uncollateralized exposure. The express terms of the person’s agreements or arrangements relating to swaps with its counterparties at no time would permit the person to maintain a total uncollateralized exposure of more than $100 million to all such counterparties, including any exposure that may result from thresholds or minimum transfer amounts established by credit support annexes or similar arrangements; and

(B) Maximum notional amount of swap positions. The person does not maintain swap positions in a notional amount of more than $2 billion in any major category of swaps, or more than $4 billion in the aggregate across all major categories; or

(ii) Caps on uncollateralized exposure plus monthly calculation.

(A) Maximum potential uncollateralized exposure. The express terms of the person’s agreements or arrangements relating to swaps with its counterparties at no time would permit the person to maintain a total uncollateralized exposure of more than $200 million to all such counterparties (with regard to swaps and any other instruments by which the person may have exposure to those counterparties), including any exposure that may result from thresholds or minimum transfer amounts established by credit support annexes or similar arrangements; and

(B) Calculation of positions. (1) At the end of each month, the person performs the calculations prescribed by paragraph (jjj) of this section with regard to whether the aggregate uncollateralized outward exposure plus aggregate potential outward exposure as of that day constitute a “substantial position” in a major category of swaps, or pose “substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets”; these calculations shall disregard provisions of those rules that provide for the analyses to be determined based on a daily average over a calendar quarter; and

(2) Each such analysis produces thresholds of no more than:

(i) $1 billion in aggregate uncollateralized outward exposure plus aggregate potential outward exposure in any major category of swaps; if the person is subject to paragraph (jjj) of this section, by virtue of being a highly leveraged financial entity that is not subject to capital requirements established by an appropriate Federal banking agency, this analysis shall account for all of the person’s swap positions in that major category (without excluding hedging positions), otherwise this
analysis shall exclude the same hedging and related positions that are excluded from consideration pursuant to paragraph (jjj)(1)(i) of this section; or

(ii) $2 billion in aggregate uncollateralized outward exposure plus aggregate potential outward exposure (without any positions excluded from the analysis) with regard to all of the person’s swap positions.

(iii) Calculations based on certain information. (A)(1) At the end of each month, the person’s aggregate uncollateralized outward exposure with respect to its swap positions in each major swap category is less than $1.5 billion with respect to the rate swap category and less than $500 million with respect to each of the other major swap categories; and

(2) At the end of each month, the sum of the amount calculated under paragraph (hhh)(6)(iii)(A)(1) of this section with respect to each major swap category and the total notional principal amount of the person’s swap positions in each such major swap category, adjusted by the multipliers set forth in paragraph (jjj)(3)(ii)(I) of this section on a position-by-position basis reflecting the type of swap, is less than $3 billion with respect to the rate swap category and less than $1 billion with respect to each of the other major swap categories; or

(B)(1) At the end of each month, the person’s aggregate uncollateralized outward exposure with respect to its swap positions across all major swap categories is less than $500 million; and

(2) The sum of the amount calculated under paragraph (hhh)(6)(iii)(B)(1) of this section and the product of the total effective notional principal amount of the person’s swap positions in all major swap categories multiplied by 0.15 is less than $1 billion.

(C) For purposes of the calculations set forth in this paragraph (hhh)(6)(iii):

(1) The person’s aggregate uncollateralized outward exposure for positions held with swap dealers shall be equal to such exposure reported on the most recent reports of such exposure received from such swap dealers; and

(2) The person’s aggregate uncollateralized outward exposure for positions that are not reflected in any report of exposure from a swap dealer (including all swap positions it holds with persons other than swap dealers) shall be calculated in accordance with paragraph (jjj)(2) of this section.

(iv) For purposes of the calculations set forth in this paragraph (hhh)(6), the person shall use the effective notional amount of a position rather than the stated notional amount of the position if the stated notional amount is leveraged or enhanced by the structure of the position.

(v) No presumption shall arise that a person is required to perform the calculations needed to determine if it is a major swap participant, solely by reason that the person does not meet the conditions specified in paragraph (hhh)(6)(i), (ii) or (iii) of this section.

(7) Exclusions. A person who is registered as a derivatives clearing organization with the Commission pursuant to section 5b of the Act and regulations thereunder, shall not be deemed to be a major swap participant, regardless of whether the criteria in this paragraph (hhh) otherwise would cause the person to be a major swap participant.

(iii) Category of swaps; major swap category. For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33), and paragraph (hhh) of this section, the terms major swap category, category of swaps and any similar terms mean any of the categories of swaps listed below. For the avoidance of doubt, the term swap as it is used in this paragraph (iii) has the meaning set forth in Section 1a(47) of the Act, 7 U.S.C. 1a(47), and the rules thereunder.

(1) Rate swaps. Any swap which is primarily based on one or more reference rates, including but not limited to any swap of payments determined by fixed and floating interest rates, currency exchange rates, inflation rates or other monetary rates, any foreign exchange swap, as defined in Section 1a(25) of the Act, 7 U.S.C. 1a(25), and any foreign exchange option other than an option to deliver currency.

(2) Credit swaps. Any swap that is primarily based on instruments of indebtedness, including but not limited to any swap primarily based on one or more broad-based indices related to debt instruments or loans, and any swap that is an index credit default...
swap or total return swap on one or more indices of debt instruments.

(3) **Equity swaps.** Any swap that is primarily based on equity securities, including but not limited to any swap based on one or more broad-based indices of equity securities and any total return swap on one or more equity indices.

(4) **Other commodity swaps.** Any swap that is not included in the rate swap, credit swap or equity swap categories.

(jjj) **Substantial position.** (1) In general. For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33), and paragraph (hhh) of this section, the term “substantial position” means swap positions that equal or exceed any of the following thresholds in the specified major category of swaps:

(i) For rate swaps:
   (A) $3 billion in daily average aggregate uncollateralized outward exposure; or
   (B) $6 billion in:
      (1) Daily average aggregate uncollateralized outward exposure plus
      (2) Daily average aggregate potential outward exposure.

(ii) For credit swaps:
   (A) $1 billion in daily average aggregate uncollateralized outward exposure; or
   (B) $2 billion in:
      (1) Daily average aggregate uncollateralized outward exposure plus
      (2) Daily average aggregate potential outward exposure.

(iii) For equity swaps:
   (A) $1 billion in daily average aggregate uncollateralized outward exposure; or
   (B) $2 billion in:
      (1) Daily average aggregate uncollateralized outward exposure plus
      (2) Daily average aggregate potential outward exposure.

(iv) For other commodity swaps:
   (A) $1 billion in daily average aggregate uncollateralized outward exposure; or
   (B) $2 billion in:
      (1) Daily average aggregate uncollateralized outward exposure plus
      (2) Daily average aggregate potential outward exposure.

(2) **Aggregate uncollateralized outward exposure.** In general. Aggregate uncollateralized outward exposure in general means the sum of the current exposure, obtained by marking-to-market using industry standard practices, of each of the person’s swap positions with negative value in a major swap category, less the value of the collateral the person has posted in connection with those positions.

(ii) Calculation of aggregate uncollateralized outward exposure. In calculating this amount the person shall, with respect to each of its swap counterparties in a given major swap category, determine the dollar value of the aggregate current exposure arising from each of its swap positions with negative value (subject to the netting provisions described below) in that major category by marking-to-market using industry standard practices; and deduct from that dollar amount the aggregate value of the collateral the person has posted with respect to the swap positions. The aggregate uncollateralized outward exposure shall be the sum of those uncollateralized amounts across all of the person’s swap counterparties in the applicable major category.

(iii) Relevance of netting agreements. (A) If the person has one or more master netting agreement in effect with a particular counterparty, the person may measure the current exposure arising from its swaps in any major category on a net basis, applying the terms of those agreements. Calculation of net current exposure may take into account offsetting positions entered into with that particular counterparty involving swaps (in any swap category) as well as security-based swaps and securities financing transactions (consisting of securities lending and borrowing, securities margin lending and repurchase and reverse repurchase agreements), and other financial instruments that are subject to netting offsets for purposes of applicable bankruptcy law, to the extent these are consistent with the offsets permitted by the master netting agreements.

(B) Such adjustments may not take into account any offset associated with positions that the person has with separate counterparties.

(iv) Allocation of uncollateralized outward exposure. If a person calculates current exposure with a particular
counterparty on a net basis, as provided by paragraph (jjj)(2)(iii) of this section, the portion of that current exposure that should be attributed to each "major" category of swaps for purposes of the substantial position analysis should be calculated according to the formula:

\[ \text{ES(MC)} = \text{E}_{\text{net total}} \cdot \frac{\text{OTM}_{\text{S(MC)}}}{\text{OTM}_{\text{S(MC)}} + \text{OTM}_{\text{S(OC)}} + \text{OTM}_{\text{non-S}}} \]

Where: \( \text{ES(MC)} \) equals the amount of aggregate current exposure attributable to the entity's swap positions in the "major" swap category at issue; \( \text{E}_{\text{net total}} \) equals the entity's aggregate current exposure to the counterparty at issue, after accounting for the netting of positions and the posting of collateral; \( \text{OTM}_{\text{S(MC)}} \) equals the exposure associated with the entity's out-of-the-money positions in swaps in the "major" category at issue, subject to those netting arrangements; and \( \text{OTM}_{\text{S(OC)}} \) equals the exposure associated with the entity's out-of-the-money positions in the other "major" categories of swaps, subject to those netting arrangements; and \( \text{OTM}_{\text{non-S}} \) equals the exposure associated with the entity's out-of-the-money positions associated with instruments, other than swaps, that are subject to those netting arrangements.

(3) Aggregate potential outward exposure—(i) In general. Aggregate potential outward exposure in any major swap category means the sum of:

(A) The aggregate potential outward exposure for each of the person's swap positions in a major swap category that are not subject to daily mark-to-market margining and are not cleared by a registered or exempt clearing agency or derivatives clearing organization, as calculated in accordance with paragraph (jjj)(3)(ii) of this section; and

(B) The aggregate potential outward exposure for each of the person's swap positions in such major swap category that are either subject to daily mark-to-market margining or are cleared by a registered or exempt clearing agency or derivatives clearing organization, as calculated in accordance with paragraph (jjj)(3)(iii) of this section.

(ii) Calculation of potential outward exposure for swaps that are not subject to daily mark-to-market margining and are not cleared by a registered or exempt clearing agency or derivatives clearing organization—(A) In general. (1) For positions in swaps that are not subject to daily mark-to-market margining and are not cleared by a registered or exempt clearing agency or a derivatives clearing organization, potential outward exposure equals the total notional principal amount of those positions, multiplied by the following factors on a position-by-position basis reflecting the type of swap. For any swap that does not appropriately fall within any of the specified categories, the "other commodities" conversion factors set forth in the following Table 1 are to be used. If a swap is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the market value of the swap is zero, the remaining maturity equals the time until the next reset date.

<table>
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<tr>
<th>Residual maturity</th>
<th>Interest rate</th>
<th>Foreign exchange rate and gold</th>
<th>Precious metals (except gold)</th>
<th>Other commodities</th>
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<td>Over one to five years</td>
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<table>
<thead>
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<th>Residual maturity</th>
<th>Credit</th>
<th>Equity</th>
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<td>Over five years</td>
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<td>0.10</td>
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</table>

(2) Use of effective notional amounts. If the stated notional amount on a position is leveraged or enhanced by the structure of the position, the calculation in paragraph (jjj)(3)(ii)(A)(i) of
this section shall be based on the effective notional amount of the position rather than on the stated notional amount.

(3) Exclusion of certain positions. The calculation in paragraph (jjj)(3)(ii)(A)(I) of this section shall exclude:

(i) Positions that constitute the purchase of an option, if the purchaser has no additional payment obligations under the position;

(ii) Other positions for which the person has prepaid or otherwise satisfied all of its payment obligations;

(iii) Positions for which, pursuant to law or a regulatory requirement, the person has assigned an amount of cash or U.S. Treasury securities that is sufficient at all times to pay the person’s maximum possible liability under the position, and the person may not use that cash or those Treasury securities for other purposes.

(A) Potential outward exposure equals the potential exposure that would be attributed to such positions using the procedures in paragraph (jjj)(3)(ii) of this section multiplied by: 0.1, in the case of positions cleared by a registered or exempt clearing agency or derivatives clearing organization; or 0.2, in the case of positions that are subject to daily mark-to-market margining but that are not cleared by a registered or exempt clearing agency or derivatives clearing organization.

(B) Solely for purposes of calculating potential outward exposure:

(1) A swap shall be considered to be subject to daily mark-to-market margining if, and for so long as, the counterparties follow the daily practice of exchanging collateral to reflect changes in the current exposure arising from the swap (after taking into account any other financial positions addressed by a netting agreement between the counterparties).

(2) If the person is permitted by agreement to maintain a threshold for which it is not required to post collateral, the position still will be considered to be subject to daily mark-to-market margining for purposes of calculating potential outward exposure, but the total amount of that threshold (regardless of the actual exposure at any time), less any initial margin posted up to the amount of that threshold, shall be added to the person’s aggregate uncollateralized outward exposure for purposes of paragraph (jjj)(1)(i)(B),

\[
P_{\text{Net}} = 0.4 \times P_{\text{Gross}} + 0.6 \times \text{NGR} \times P_{\text{Gross}}
\]

Where: \( P_{\text{Net}} \) is the potential outward exposure, adjusted for bilateral netting, of the person’s swaps with a particular counterparty; \( P_{\text{Gross}} \) is the potential outward exposure without adjustment for bilateral

\[
\text{NGR} = \frac{\text{current exposure arising from its swaps in the major category as calculated}}{\text{potential outward exposure associated with a position by which a person buys credit protection using a credit default swap or index credit default swap, or associated with a position by which a person purchases an option for which the person retains additional payment obligations under the position, is capped at the net present value of the unpaid premiums.}}
\]

\[
\text{NGR} = \frac{\text{current exposure arising from its swaps in the major category as calculated on}}{\text{potential exposure that would be attributed to such positions using the procedures in paragraph (jjj)(3)(ii) of this section, divided by the current exposure arising from its swaps in the major category as calculated in the absence of those netting procedures.}}
\]

\[
\text{NGR} = \frac{\text{current exposure arising from its swaps in the major category as calculated on}}{\text{potential outward exposure for swaps that are either subject to daily mark-to-market margining or are cleared by a registered or exempt clearing agency or derivatives clearing organization.}}
\]

\[
\text{NGR} = \frac{\text{current exposure arising from its swaps in the major category as calculated on}}{\text{potential outward exposure for swaps that are either subject to daily mark-to-market margining or are cleared by a registered or exempt clearing agency or derivatives clearing organization:}}
\]

\[
\text{NGR} = \frac{\text{current exposure arising from its swaps in the major category as calculated on}}{\text{potential outward exposure for swaps that are either subject to daily mark-to-market margining or are cleared by a registered or exempt clearing agency or derivatives clearing organization.}}
\]

\[
\text{NGR} = \frac{\text{current exposure arising from its swaps in the major category as calculated on}}{\text{potential outward exposure for swaps that are either subject to daily mark-to-market margining or are cleared by a registered or exempt clearing agency or derivatives clearing organization:}}
\]

\[
\text{NGR} = \frac{\text{current exposure arising from its swaps in the major category as calculated on}}{\text{potential outward exposure for swaps that are either subject to daily mark-to-market margining or are cleared by a registered or exempt clearing agency or derivatives clearing organization:}}
\]
(ii)(B), (iii)(B) or (iv)(B) of this section, as applicable.

(3) If the minimum transfer amount under the agreement is in excess of $1 million, the position still will be considered to be subject to daily mark-to-market margining for purposes of calculating potential outward exposure, but the entirety of the minimum transfer amount shall be added to the person’s aggregate uncollateralized outward exposure for purposes of paragraph (jjj)(1)(i)(B), (ii)(B), (iii)(B) or (iv)(B) of this section, as applicable.

(4) A person may, at its discretion, calculate the potential outward exposure of positions in swaps that are subject to daily mark-to-market margining in accordance with paragraph (jjj)(3)(ii) of this section in lieu of calculating the potential outward exposure of such swap positions in accordance with this paragraph (jjj)(3)(iii).

(4) Calculation of daily average. Measures of daily average aggregate uncollateralized outward exposure and daily average aggregate potential outward exposure shall equal the arithmetic mean of the applicable measure of exposure at the close of each business day, beginning the first business day of each calendar quarter and continuing through the last business day of that quarter.

(5) Inter-affiliate activities. In calculating its aggregate uncollateralized outward exposure and its aggregate potential outward exposure, the person shall not consider its swap positions with counterparties that are majority-owned affiliates. For these purposes the counterparties to a swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the swap, where “majority interest” is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

(kkk) Hedging or mitigating commercial risk. For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33) and paragraph (hhh) of this section, a swap position is held for the purpose of hedging or mitigating commercial risk when:

(1) Such position:

(i) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (or of a majority-owned affiliate of the enterprise), where the risks arise from:

(A) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise;

(B) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise;

(C) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise; or

(D) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise.

(2) The potential change in the value of assets, services, inputs, products, or commodities that a person owns, produces, manufactures, processes, merchandises, leases, or sells, or reasonably anticipates owning, producing, manufacturing, processing, merchandising, leasing, or selling in the ordinary course of business of the enterprise;

(3) Any potential change in value related to any of the foregoing arising from interest, currency, or foreign exchange rate movements associated with such assets, liabilities, services, inputs, products, or commodities; or

(4) Any fluctuation in interest, currency, or foreign exchange rate exposures arising from a person’s current or anticipated assets or liabilities; or

(ii) Qualifies as bona fide hedging for purposes of an exemption from position limits under the Act; or

(iii) Qualifies for hedging treatment under:

(A) Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging (formerly known as Statement No. 133); or

(B) Governmental Accounting Standards Board Statement 53, Accounting
and Financial Reporting for Derivative Instruments; and
   (2) Such position is:
      (i) Not held for a purpose that is in
           the nature of speculation, investing or
           trading; and
      (ii) Not held to hedge or mitigate the
           risk of another swap or security-based
           swap position, unless that other posi-
           tion itself is held for the purpose of
           hedging or mitigating commercial risk
           as defined by this rule or § 240.3a67–4 of
           this title.
   (lll) Substantial counterparty expo-
       sure—(1) In general. For purposes
       of Section 1a(33) of the Act, 7 U.S.C.
       1a(33), and paragraph (hhh) of this sec-
       tion, the term substantial counterparty
       exposure that could have serious adverse
       effects on the financial stability of the
       United States banking system or financial
       markets means a swap position that sat-
       isfies either of the following thresh-
       holds:
          (i) $5 billion in daily average aggre-
              gate uncollateralized outward expo-
              sure; or
          (ii) $8 billion in:
              (A) Daily average aggregate
                  uncollateralized outward exposure
                  plus
              (B) Daily average aggregate potential
                  outward exposure.
       (2) Calculation methodology. For these
           purposes, the terms daily average aggrega-
           te uncollateralized outward exposure and
daily average aggregate potential
outward exposure shall be calculated
the same way as is prescribed in para-
graph (jjj) of this section, except that
these amounts shall be calculated by
reference to all of the person’s swap po-
sitions, rather than by reference to a
specific major swap category.
   (mmm) Financial entity; highly lever-
       aged. For purposes of Section 1a(33) of
the Act, 7 U.S.C. 1a(33), and para-
graph (hhh) of this section, the term financial entity
means:
      (i) A security-based swap dealer;
      (ii) A major security-based swap par-
           ticipant;
      (iii) A commodity pool as defined in
           Section 1a(10) of the Act, 7 U.S.C.
           1a(10);
      (iv) A private fund as defined in Sec-
           tion 202(a) of the Investment Advisers
           Act of 1940, 15 U.S.C. 80b–2(a);
      (v) An employee benefit plan as de-
           fined in paragraphs (3) and (32) of Sec-
           tion 3 of the Employee Retirement In-
           1002; and
      (vi) A person predominantly engaged
           in activities that are in the business of
           banking or financial in nature, as de-
           fined in Section 4(k) of the Bank Hold-
           ing Company Act of 1956, 12 U.S.C.
           1843(k).
   (2) For purposes of Section 1a(33) of
the Act, 7 U.S.C. 1a(33), and paragraph
(hhh) of this section, the term highly leveraged
means the existence of a ratio
of an entity’s total liabilities to equity
in excess of 12 to 1 as measured at the
close of business on the last business
day of the applicable fiscal quarter.
For this purpose, liabilities and equity
should each be determined in accord-
ance with U.S. generally accepted ac-
counting principles; provided, however,
that a person that is an employee ben-
efit plan, as defined in paragraphs (3)
and (32) of Section 3 of the Employee
Retirement Income Security Act of
1974, 29 U.S.C. 1002, may exclude obliga-
tions to pay benefits to plan partic-
ipants from the calculation of liabilities
and substitute the total value of plan
assets for equity.
   (xxx) Swap—(1) In general. The term
swap has the meaning set forth in sec-
section 1a(47) of the Commodity Exchange
Act.
   (2) Inclusion of particular products. (i) The
swap includes, without lim-
iting the meaning set forth in section
1a(47) of the Commodity Exchange Act,
the following agreements, contracts,
and transactions:
          (A) A cross-currency swap;
          (B) A currency option, foreign cur-
               rency option, foreign exchange
               option and foreign exchange rate
               option;
          (C) A foreign exchange forward;
          (D) A foreign exchange swap;
          (E) A forward rate agreement; and
          (F) A non-deliverable forward involv-
               ing foreign exchange.
   (ii) The term swap does not include
an agreement, contract, or transaction
described in paragraph (xxx)(2)(i) of
this section that is otherwise excluded
by section 1a(47)(B) of the Commodity
Exchange Act.
   (3) Foreign exchange forwards and for-
   eign exchange swaps. Notwithstanding
paragraph (xxx)(2) of this section:
(i) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes a determination described in section 1a(47)(E)(i) of the Commodity Exchange Act.

(ii) Notwithstanding paragraph (xxx)(3)(i) of this section:

(A) The reporting requirements set forth in section 4r of the Commodity Exchange Act and regulations promulgated thereunder shall apply to a foreign exchange forward or foreign exchange swap;

(B) The business conduct standards set forth in section 4s(h) of the Commodity Exchange Act and regulations promulgated thereunder shall apply to a swap dealer or major swap participant that is a party to a foreign exchange forward or foreign exchange swap.

(iii) For purposes of section 1a(47)(E) of the Commodity Exchange Act and this paragraph (xxx), the term foreign exchange forward has the meaning set forth in section 1a(24) of the Commodity Exchange Act.

(iv) For purposes of section 1a(47)(E) of the Commodity Exchange Act and this paragraph (xxx), the term foreign exchange swap has the meaning set forth in section 1a(25) of the Commodity Exchange Act.

(v) For purposes of sections 1a(24) and 1a(25) of the Commodity Exchange Act and this paragraph (xxx), the following transactions are not foreign exchange forwards or foreign exchange swaps:

(A) A currency swap or a cross-currency swap;

(B) A currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; and

(C) A non-deliverable forward involving foreign exchange.

(4) Insurance. (i) This paragraph is a non-exclusive safe harbor. The terms swap as used in section 1a(47) of the Commodity Exchange Act and security-based swap as used in section 1a(42) of the Commodity Exchange Act do not include an agreement, contract, or transaction that:

(A) By its terms or by law, as a condition of performance on the agreement, contract, or transaction:

(1) Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction;

(2) Requires that loss to occur and to be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest;

(3) Is not traded, separately from the insured interest, on an organized market or over-the-counter; and

(4) With respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer; and

(B) Is provided:

(1) By a person that is subject to supervision by the insurance commissioner (or similar official or agency) of any State or by the United States or an agency or instrumentality thereof; and

(ii) Such agreement, contract, or transaction is regulated as insurance under applicable State law or the laws of the United States;

(2)(i) Directly or indirectly by the United States, any State or any of their respective agencies or instrumentalities; or

(ii) Pursuant to a statutorily authorized program thereof; or

(3) In the case of reinsurance only, by a person to another person that satisfies the conditions set forth in paragraph (xxx)(4)(i)(B) of this section, provided that:

(I) Such person is not prohibited by applicable State law or the laws of the United States from offering such agreement, contract, or transaction to such person that satisfies the conditions set forth in paragraph (xxx)(4)(i)(B) of this section;

(ii) The agreement, contract, or transaction to be reinsured satisfies the conditions set forth in paragraph (xxx)(4)(i)(A) or paragraph (xxx)(4)(i)(C) of this section; and

(iii) Except as otherwise permitted under applicable State law, the total amount reimbursable by all reinsurers for such agreement, contract, or transaction may not exceed the claims or losses paid by the person writing the
risk being ceded or transferred by such
person; or
(4) In the case of non-admitted insurance,
by a person who:
(i) Is located outside of the United States and listed on the Quarterly
Listing of Alien Insurers as maintained
by the International Insurers Department
of the National Association of Insur-
ance Commissioners; or
(ii) Meets the eligibility criteria for non-admitted insurers under applicable
State law; or
(C) Is provided in accordance with
the conditions set forth in paragraph
(xxx)(4)(i)(B) of this section and is one
of the following types of products:
(1) Surety bond;
(2) Fidelity bond;
(3) Life insurance;
(4) Health insurance;
(5) Long term care insurance;
(6) Title insurance;
(7) Property and casualty insurance;
(8) Annuity;
(9) Disability insurance;
(10) Insurance against default on in-
dividual residential mortgages; and
(11) Reinsurance of any of the fore-
going products identified in paragraphs
(xxx)(4)(C)(1) through (C) of this sec-
tion; or
(ii) The terms swap as used in section
1a(47) of the Commodity Exchange Act
and security-based swap as used in sec-
tion 1a(42) of the Commodity Exchange Act
do not include an agreement, con-
tract, or transaction that was entered
into on or before the effective date of paragraph
(xxx)(4) of this section, and
that, at such time that it was entered
into, was provided in accordance with
the conditions set forth in paragraph
(xxx)(4)(i)(B) of this section.
(5) State. For purposes of paragraph
(xxx)(4) of this section, the term State
means any state of the United States,
the District of Columbia, Puerto Rico,
the U.S. Virgin Islands, or any other
possession of the United States.
(6) Anti-Evasion:
(i) An agreement, contract, or trans-
action that is willfully structured to
 evade any provision of Subtitle A of
the Wall Street Transparency and Ac-
countability Act of 2010, including any
amendments made to the Commodity
Exchange Act thereby (Subtitle A), shall
be deemed a swap for purposes of Sub-
title A and the rules, regulations, and
orders of the Commission promulgated
thereunder.
(ii) An interest rate swap or currency
 swap, including but not limited to a
transaction identified in paragraph
(xxx)(3)(v) of this section, that is will-
fully structured as a foreign exchange
forward or foreign exchange swap to
 evade any provision of Subtitle A shall
be deemed a swap for purposes of Sub-
title A and the rules, regulations, and
orders of the Commission promulgated
thereunder.
(iii) An agreement, contract, or
transaction of a bank that is not under
the regulatory jurisdiction of an appro-
priate Federal banking agency (as de-
 fined in section 1a(2) of the Commodity
Exchange Act), where the agreement,
contract, or transaction is willfully
structured as an identified banking
product (as defined in section 402 of the
Legal Certainty for Bank Products Act
of 2000) to evade the provisions of the
Commodity Exchange Act, shall be
deemed a swap for purposes of the Com-
modity Exchange Act and the rules,
regulations, and orders of the Commis-
sion promulgated thereunder.
(iv) The form, label, and written doc-
umentation of an agreement, contract,
or transaction shall not be dispositive
in determining whether the agreement,
contract, or transaction has been will-
fully structured to evade as provided in
paragraphs (xxx)(6)(i) through (xxx)(6)(iii)
of this section.
(v) An agreement, contract, or trans-
action that has been willfully struc-
tured to evade as provided in para-
graphs (xxx)(6)(i) through (xxx)(6)(iii)
of this section shall be considered in
determining whether a person that so
willfully structured to evade is a swap
dealer or major swap participant.
(vi) Notwithstanding the foregoing,
no agreement, contract, or transaction
structured as a security (including a
security-based swap) under the securi-
ties laws (as defined in section 3(a)(47)
of the Securities Exchange Act of 1934
(15 U.S.C. 78c(a)(47))) shall be deemed a
swap pursuant to this paragraph
(xxx)(6) or shall be considered for pur-
poses of paragraph (xxx)(6)(v) of this
section.
(yyy) Narrow-based security index as
used in the definition of “security-based
swap’’—(1) In general. Except as otherwise provided in paragraphs (zzz) and (aaaa) of this section, for purposes of section 1a(42) of the Commodity Exchange Act, the term narrow-based security index has the meaning set forth in section 1a(35) of the Commodity Exchange Act, and the rules, regulations and orders of the Commission thereunder.

(2) Tolerance period for swaps traded on designated contract markets, swap execution facilities, and foreign boards of trade. Notwithstanding paragraph (yyy)(1) of this section, solely for purposes of swaps traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade, a security index underlying such swaps shall not be considered a narrow-based security index if:

(i)(A) A swap on the index is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade for at least 30 days as a swap on an index that was not a narrow-based security index; or

(B) Such index was not a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a swap on such index on a market described in paragraph (yyy)(2)(i)(A) of this section; and

(ii) The index has been a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(3) Tolerance period for security-based swaps traded on national securities exchanges or security-based swap execution facilities. Notwithstanding paragraph (yyy)(1) of this section, solely for purposes of security-based swaps traded on a national securities exchange or security-based swap execution facility, a security index underlying such security-based swaps shall be considered a narrow-based security index if:

(i)(A) A security-based swap on the index is traded on a national securities exchange or security-based swap execution facility for at least 30 days as a security-based swap on a narrow-based security index; or

(B) Such index was a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a security-based swap on such index on a market described in paragraph (yyy)(3)(i)(A) of this section; and

(ii) The index has been a security index that is not a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(4) Grace period—(i) Solely with respect to a swap that is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade, an index that becomes a narrow-based security index under paragraph (yyy)(2) of this section solely because it was a narrow-based security index for more than 45 business days over three consecutive calendar months shall not be a narrow-based security index for the following three calendar months.

(ii) Solely with respect to a security-based swap that is traded on a national securities exchange or security-based swap execution facility, an index that becomes a security index that is not a narrow-based security index under paragraph (yyy)(3) of this section solely because it was not a narrow-based security index for more than 45 business days over three consecutive calendar months shall be a narrow-based security index for the following three calendar months.

(zzz) Meaning of ‘‘issuers of securities in a narrow-based security index’’ as used in the definition of ‘‘security-based swap’’ as applied to index credit default swaps.

(1) Notwithstanding paragraph (yyy)(1) of this section, solely for purposes of determining whether a credit default swap is a security-based swap under the definition of ‘‘security-based swap’’ in section 3(a)(68)(A)(ii)(III) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)(ii)(III), as incorporated in section 1a(42) of the Commodity Exchange Act, the term issuers of securities in a narrow-based security index means issuers of securities included in an index (including an index referencing loan borrowers or loans of such borrowers) in which:
(i)(A) There are nine or fewer non-affiliated issuers of securities that are reference entities included in the index, provided that an issuer of securities shall not be deemed a reference entity included in the index for purposes of this section unless:

(1) A credit event with respect to such reference entity would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such reference entity; or

(2) The fact of such credit event or the calculation in accordance with paragraph (zzz)(1)(i)(A)(1) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(B) The effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index's weighting;

(C) The effective notional amount allocated to any five non-affiliated reference entities included in the index comprises more than 60 percent of the index's weighting; or

(D) Except as provided in paragraph (zzz)(2) of this section, for each reference entity included in the index none of the criteria in paragraphs (zzz)(1)(i)(D)(1) through (8) of this section is satisfied:

(1) The reference entity included in the index is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(2) The reference entity included in the index is eligible to rely on the exemption provided in rule 12g3–2(b) under the Securities Exchange Act of 1934 (17 CFR 240.12g3–2(b));

(3) The reference entity included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(4) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) makes available to the public or otherwise makes available to such eligible contract participant information about the reference entity included in the index pursuant to rule 144A(d)(4) under the Securities Act of 1933 (17 CFR 230.144A(d)(4));

(i) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) has outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least $1 billion;


(6) The reference entity included in the index is a government of a foreign country or a political subdivision of a foreign country;

(7) If the reference entity included in the index is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), such asset-backed security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.) and has publicly available distribution reports; and

(8) For a credit default swap entered into solely between eligible contract participants as defined in section 1a(18) of the Commodity Exchange Act:

(i) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(ii) Financial information about the reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(iii) In the case of a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C.
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78c(a)(77)), information of the type and level included in publicly available distribution reports for similar asset-backed securities is publicly available about both the reference entity included in the index and such asset-backed security; and

(ii)(A) The index is not composed solely of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982; and

(B) Without taking into account any portion of the index composed of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be within the term “issuer of securities in a narrow-based security index” under paragraph (zzz)(1)(i) of this section.

(2) Paragraph (zzz)(1)(i)(D) of this section will not apply with respect to a reference entity included in the index if:

(i) The effective notional amounts allocated to such reference entity comprise less than five percent of the index’s weighting; and

(ii) The effective notional amounts allocated to reference entities included in the index that satisfy paragraph (zzz)(1)(i)(D) of this section comprise at least 80 percent of the index’s weighting.

(3) For purposes of this paragraph (zzz):

(i) A reference entity included in the index is affiliated with another reference entity included in the index (for purposes of paragraph (zzz)(3)(iv) of this section) or another entity (for purposes of paragraph (zzz)(3)(v) of this section) if it controls, is controlled by, or is under common control with, that other reference entity included in the index or other entity, as applicable; provided that each reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other reference entity included in the index or any other entity that is an issuing entity of an asset-backed security.

(ii) Control for purposes of this section means ownership of more than 50 percent of the equity of a reference entity included in the index (for purposes of paragraph (zzz)(3)(iv) of this section) or another entity (for purposes of paragraph (zzz)(3)(v) of this section), or the ability to direct the voting of more than 50 percent of the voting equity of a reference entity included in the index (for purposes of paragraph (zzz)(3)(iv) of this section) or another entity (for purposes of paragraph (zzz)(3)(v) of this section).

(iii) In identifying a reference entity included in the index for purposes of this section, the term reference entity includes:

(A) An issuer of securities;

(B) An issuer of securities that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)); and

(C) An issuer of securities that is a borrower with respect to any loan identified in an index of borrowers or loans.

(iv) For purposes of calculating the thresholds in paragraphs (zzz)(1)(i)(A) through (1)(i)(C) of this section, the term reference entity included in the index includes a single reference entity included in the index or a group of affiliated reference entities included in the index as determined in accordance with paragraph (zzz)(3)(i) of this section (with each reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate reference entity included in the index).

(v) For purposes of determining whether one of the criterion in either paragraphs (zzz)(1)(i)(D) through
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(35)(zzz)(1)(i)(D)(4) of this section or paragraphs (35)(zzz)(1)(iv)(D)(6)(i) and (a)(1)(iv)(D)(6)(ii) of this section is met, the term reference entity included in the index includes a single reference entity included in the index or a group of affiliated entities as determined in accordance with paragraph (zzz)(3)(i) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate entity).

(aaaa) Meaning of “narrow-based security index” as used in the definition of “security-based swap” as applied to index credit default swaps.

(1) Notwithstanding paragraph (yyyy)(1) of this section, and solely for purposes of determining whether a credit default swap is a security-based swap under the definition of “security-based swap” in section 3(a)(68)(A)(ii)(I) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)(ii)(I), as incorporated in section 1a(42) of the Commodity Exchange Act, the term narrow-based security index means an index in which:

(i)(A) The index is composed of nine or fewer securities or securities that are issued by nine or fewer non-affiliated issuers, provided that a security shall not be deemed a component of the index for purposes of this section unless:

(I) A credit event with respect to the issuer of such security or a credit event with respect to such security would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such security; or

(2) The fact of such credit event or the calculation in accordance with paragraph (aaaa)(1)(i)(A)(7) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(B) The effective notional amount allocated to the securities of any issuer included in the index comprises more than 30 percent of the index’s weighting; or

(C) The effective notional amount allocated to the securities of any five non-affiliated issuers included in the index comprises more than 60 percent of the index’s weighting; or

(D) Except as provided in paragraph (aaaa)(2) of this section, for each security included in the index, none of the criteria in paragraphs (aaaa)(1)(i)(D)(1) through (6) is satisfied:

(1) The issuer of the security included in the index is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(2) The issuer of the security included in the index is eligible to rely on the exemption provided in rule 12g3–2(b) under the Securities Exchange Act of 1934 (17 CFR 240.12g3–2(b));

(3) The issuer of the security included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(4) The issuer of the security included in the index is a government of a foreign country or a political subdivision of a foreign country;


(6) The issuer of the security included in the index is a government of a foreign country or a political subdivision of a foreign country;

(8) For a credit default swap entered into solely between eligible contract
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participants as defined in section 1a(18) of the Commodity Exchange Act:

(i) The issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) makes available to the public or otherwise makes available to such eligible contract participant information about such issuer pursuant to rule 144A(d)(4) of the Securities Act of 1933 (17 CFR 230.144A(d)(4));

(ii) Financial information about the issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) is otherwise publicly available;

(iii) In the case of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed security; and


(B) Without taking into account any portion of the index composed of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be within the term "narrow-based security index" under paragraph (aaaa)(1)(i) of this section.

(2) Paragraph (aaaa)(1)(i)(D) of this section will not apply with respect to securities of an issuer included in the index if:

(i) The effective notional amounts allocated to all securities of such issuer included in the index comprise less than five percent of the index’s weighting; and

(ii) The securities that satisfy paragraph (aaaa)(1)(i)(D) of this section comprise at least 80 percent of the index’s weighting.

(3) For purposes of this paragraph (aaaa):

(i) An issuer of securities included in the index is affiliated with another issuer of securities included in the index (for purposes of paragraph (aaaa)(3)(iv) of this section) or another entity (for purposes of paragraph (aaaa)(3)(v) of this section) if it controls, is controlled by, or is under common control with, that other issuer or other entity, as applicable; provided that each issuer of securities included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other issuer of securities included in the index or any other entity that is an issuing entity of an asset-backed security.

(ii) Control for purposes of this section means ownership of more than 50 percent of the equity of an issuer of securities included in the index (for purposes of paragraph (aaaa)(3)(iv) of this section) or another entity (for purposes of paragraph (aaaa)(3)(v) of this section), or the ability to direct the voting of more than 50 percent of the voting equity of an issuer of securities included in the index (for purposes of paragraph (aaaa)(3)(v) of this section), or another entity (for purposes of paragraph (aaaa)(3)(v) of this section).

(iii) In identifying an issuer of securities included in the index for purposes of this section, the term issuer includes:

(A) An issuer of securities; and

(B) An issuer of securities that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)).

(iv) For purposes of calculating the thresholds in paragraphs (zzz)(1)(i)(A)
through (1)(i)(C) of this section, the term issuer of the security included in the index includes a single issuer of securities included in the index or a group of affiliated issuers of securities included in the index as determined in accordance with paragraph (aaaa)(3)(i) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) being considered a separate issuer of securities included in the index).

(v) For purposes of determining whether one of the criterion in either paragraphs (aaaa)(1)(i)(D)(1) through (aaaa)(1)(i)(D)(4) of this section or paragraphs (aaaa)(1)(iv)(D)(8)(i) and (aaaa)(1)(iv)(D)(8)(ii) of this section is met, the term issuer of the security included in the index includes a single issuer of securities included in the index or a group of affiliated entities as determined in accordance with paragraph (aaaa)(3)(i) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate entity).

(bbbb) Futures contracts on certain foreign sovereign debt. The term security-based swap as used in section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)), as incorporated in section 1a(42) of the Commodity Exchange Act, does not include an agreement, contract, or transaction that is based on or references a qualifying foreign futures contract (as defined in rule 3a12–8 under the Securities Exchange Act of 1934 (17 CFR 240.3a12–8)) on the debt securities of any one or more of the foreign governments enumerated in rule 3a12–8 under the Securities Exchange Act of 1934 (17 CFR 240.3a12–8), provided that such agreement, contract, or transaction satisfies the following conditions:

(1) The futures contract that the agreement, contract, or transaction references or upon which the agreement, contract, or transaction is based is a qualifying foreign futures contract that satisfies the conditions of rule 3a12–8 under the Securities Exchange Act of 1934 (17 CFR 240.3a12–8) applicable to qualifying foreign futures contracts;

(2) The agreement, contract, or transaction is traded on or through a board of trade (as defined in the Commodity Exchange Act);

(3) The debt securities upon which the qualifying foreign futures contract is based or referenced and any security used to determine the cash settlement amount pursuant to paragraph (bbbb)(4) of this section were not registered under the Securities Act of 1933 (15 U.S.C. 77 et seq.) or the subject of any American depositary receipt registered under the Securities Act of 1933;

(4) The agreement, contract, or transaction may only be cash settled; and

(5) The agreement, contract or transaction is not entered into by the issuer of the debt securities upon which the qualifying foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such agreement, contract or transaction), an affiliate (as defined in the Securities Act of 1933 (15 U.S.C. 77 et seq.) and the rules and regulations thereunder) of the issuer, or an underwriter of such issuer's debt securities.

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

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

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

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

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

(hhhh) Electronic trading facility. This term means a trading facility that—
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(1) Operates by means of an electronic or telecommunications network; and

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

(iii) Futures customer. This term means any person who uses a futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any contract for the purchase of sale of a commodity for future delivery or any option on such contract; Provided, however, an owner or holder of a proprietary account as defined in paragraph (y) of this section shall not be deemed to be a futures customer within the meaning of sections 4d(a) and 4d(b) of the Act, the regulations that implement sections 4d and 4f of the Act and §1.35, and such an owner or holder of such a proprietary account shall otherwise be deemed to be a futures customer within the meaning of sections 4d(a) and 4d(b) of the Act, the regulations that implement sections 4d and 4f of the Act and §§1.37 and 1.39 and all other sections of these rules, regulations, and orders which do not implement sections 4d and 4f of the Act.

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

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

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

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

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

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

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

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

(kkkk) 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.

(llll) 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.

(mmmm) 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.
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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.

Registrant. This term means:
(a) 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.
(b) A 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.
(c) A 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.
(d) A 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.

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

[41 FR 3194, Jan. 21, 1976]

EDITORIAL NOTE: For Federal Register citations affecting § 1.3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 1.4 Electronic signatures, acknowledgments and verifications.

For purposes of complying with any provision in the Commodity Exchange Act or the rules or regulations in this Chapter I that requires a swap transaction to be acknowledged by a swap dealer or major swap participant or a document to be signed or verified by a customer of a futures commission merchant or introducing broker, a retail forex customer of a retail foreign exchange dealer or futures commission merchant, a pool participant or a client of a commodity trading advisor, or a counterparty of a swap dealer or major swap participant, an electronic signature executed by the customer, retail forex customer, participant, client, counterparty, swap dealer, or major swap participant will be sufficient, if the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, or a counterparty of a 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, or a counterparty of a 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 signatures.
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[77 FR 66320, Nov. 2, 2012]

§ 1.5 [Reserved]

§ 1.6 Anti-evasion.

(a) It shall be unlawful to conduct activities outside the United States, including entering into agreements, contracts, and transactions and structuring entities, to willfully evade or attempt to evade any provision of the Commodity Exchange Act as enacted by Subtitle A of the Wall Street Transparency and Accountability Act of 2010 or the rules, regulations, and orders of the Commission promulgated thereunder (Subtitle A).

(b) The form, label, and written documentation of an agreement, contract, or transaction, or an entity, shall not be dispositive in determining whether the agreement, contract, or transaction, or entity, has been entered into or structured to willfully evade as provided in paragraph (a) of this section.

(c) An activity conducted outside the United States to evade as provided in paragraph (a) of this section shall be subject to the provisions of Subtitle A.

(d) Notwithstanding the foregoing, no agreement, contract, or transaction structured as a security (including a security-based swap) under the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))) shall be deemed a swap pursuant to this section.

[77 FR 48354, Aug. 13, 2012]

§ 1.7 Books and records requirements for security-based swap agreements.

(a) A person registered as a swap data repository under section 21 of the Commodity Exchange Act and the rules and regulations thereunder:

(1) Shall not be required to keep and maintain additional books and records regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained pursuant to section 21 of the Commodity Exchange Act and the rules and regulations thereunder; and

(2) Shall not be required to collect and maintain additional data regarding security-based swap agreements other than the data regarding swaps required to be collected and maintained by such persons pursuant to section 21 of the Commodity Exchange Act and the rules and regulations thereunder.

(b) A person shall not be required to keep and maintain additional books and records, including daily trading records, regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained by such persons pursuant to section 4s of the Commodity Exchange Act and the rules and regulations thereunder if such person is registered as:

(1) A swap dealer under section 4s(a)(1) of the Commodity Exchange Act and the rules and regulations thereunder;

(2) A major swap participant under section 4s(a)(2) of the Commodity Exchange Act and the rules and regulations thereunder;

(3) A security-based swap dealer under section 15F(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(a)(1)) and the rules and regulations thereunder; or


(c) The term security-based swap agreement has the meaning set forth in section 1a(47)(A)(v) of the Commodity Exchange Act.

[77 FR 48354, Aug. 13, 2012]

§ 1.8 Requests for interpretation of swaps, security-based swaps, and mixed swaps.

(a) In general. Any person may submit a request to the Commission and the Securities and Exchange Commission to provide a joint interpretation of whether a particular agreement, contract, or transaction (or class thereof) is:

(1) A swap, as that term is defined in section 1a(47) of the Commodity Exchange Act and the rules and regulations promulgated thereunder;

(2) A security-based swap, as that term is defined in section 1a(42) of the
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Commodity Exchange Act and the rules and regulations promulgated thereunder; or

(3) A mixed swap, as that term is defined in section 1a(47)(D) of the Commodity Exchange Act and the rules and regulations promulgated thereunder.

(b) Request process. In making a request pursuant to paragraph (a) of this section, the requesting person must provide the Commission and the Securities and Exchange Commission with the following:

(1) All material information regarding the terms of the agreement, contract, or transaction (or class thereof);

(2) A statement of the economic characteristics and purpose of the agreement, contract, or transaction (or class thereof);

(3) The requesting person’s determination as to whether the agreement, contract, or transaction (or class thereof) should be characterized as a swap, a security-based swap, or both (i.e., a mixed swap), including the basis for such determination; and

(4) Such other information as may be requested by the Commission or the Securities and Exchange Commission.

(c) Request withdrawal. A person may withdraw a request made pursuant to paragraph (a) of this section at any time prior to the issuance of a joint interpretation or joint proposed rule by the Commission and the Securities and Exchange Commission in response to the request; provided, however, that notwithstanding such withdrawal, the Commission and the Securities and Exchange Commission may provide a joint interpretation of whether the agreement, contract, or transaction (or class thereof) is a swap, a security-based swap, or both (i.e., a mixed swap).

(d) Request by the Commission or the Securities and Exchange Commission. In the absence of a request for a joint interpretation under paragraph (a) of this section:

(1) If the Commission or the Securities and Exchange Commission receives a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, a security-based swap, or both (i.e., a mixed swap), the Commission or the Securities and Exchange Commission, as applicable, promptly shall notify the other of the agreement, contract, or transaction (or class thereof); and

(2) The Commission or the Securities and Exchange Commission, or their Chairmen jointly, may submit a request for a joint interpretation as described in paragraph (a) of this section; such submission shall be made pursuant to paragraph (b) of this section, and may be withdrawn pursuant to paragraph (c) of this section.

(e) Timeframe for joint interpretation.

(1) If the Commission and the Securities and Exchange Commission determine to issue a joint interpretation as described in paragraph (a) of this section, such joint interpretation shall be issued within 120 days after receipt of a complete submission requesting a joint interpretation under paragraph (a) or (d) of this section.

(2) The Commission and the Securities and Exchange Commission shall consult with the Board of Governors of the Federal Reserve System prior to issuing any joint interpretation as described in paragraph (a) of this section.

(3) If the Commission and the Securities and Exchange Commission seek public comment with respect to a joint interpretation regarding an agreement, contract, or transaction (or class thereof), the 120-day period described in paragraph (e)(1) of this section shall be stayed during the pendency of the comment period, but shall recommence with the business day after the public comment period ends.

(4) Nothing in this section shall require the Commission and the Securities and Exchange Commission to issue any joint interpretation.

(5) If the Commission and the Securities and Exchange Commission do not issue a joint interpretation within the time period described in paragraph (e)(1) or (e)(3) of this section, each of the Commission and the Securities and Exchange Commission shall publicly provide the reasons for not issuing such a joint interpretation within the applicable timeframes.

(f) Joint proposed rule. (1) Rather than issue a joint interpretation pursuant to
paragraph (a) of this section, the Commission and the Securities and Exchange Commission may issue a joint proposed rule, in consultation with the Board of Governors of the Federal Reserve System, to further define one or more of the terms swap, security-based swap, or mixed swap.

(2) A joint proposed rule described in paragraph (f)(1) of this section shall be issued within the timeframe for issuing a joint interpretation set forth in paragraph (e) of this section.

[77 FR 48354, Aug. 13, 2012]

§ 1.9 Regulation of mixed swaps.

(a) In general. The term mixed swap has the meaning set forth in section 1a(47)(D) of the Commodity Exchange Act.

(b) Regulation of bilateral uncleared mixed swaps entered into by dually-registered dealers or major participants. A mixed swap that is neither executed on nor subject to the rules of a designated contract market, national securities exchange, swap execution facility, security-based swap execution facility, or foreign board of trade; that will not be submitted to a derivatives clearing organization or registered or exempt clearing agency to be cleared; and where at least one party is registered with the Commission as a swap dealer or major swap participant and also with the Securities and Exchange Commission as a security-based swap dealer or major security-based swap participant, shall be subject to:

(1) The following provisions of the Commodity Exchange Act, and the rules and regulations promulgated thereunder:

(i) Examinations and information sharing: sections 4s(f) and 8 of the Commodity Exchange Act;

(ii) Enforcement: sections 2(a)(1)(B), 4(b), 4c, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6d, 9, 13(a), 13(b), and 23 of the Commodity Exchange Act;

(iii) Reporting to a swap data repository: section 4r of the Commodity Exchange Act;

(iv) Real-time reporting: section 2(a)(13) of the Commodity Exchange Act;

(v) Capital: section 4s(e) of the Commodity Exchange Act; and

(vi) Position Limits: section 4a of the Commodity Exchange Act; and


(c) Process for determining regulatory treatment for other mixed swaps—(1) In general. Any person who desires or intends to list, trade, or clear a mixed swap (or class thereof) that is not subject to paragraph (b) of this section may request the Commission and the Securities and Exchange Commission to issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with specified parallel provisions of either the Commodity Exchange Act or the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), and the rules and regulations thereunder (collectively, specified parallel provisions), instead of being required to comply with parallel provisions of both the Commodity Exchange Act and the Securities Exchange Act of 1934. For purposes of this paragraph (c), parallel provisions means comparable provisions of the Commodity Exchange Act and the Securities Exchange Act of 1934 that were added or amended by the Wall Street Transparency and Accountability Act of 2010 with respect to swaps and security-based swaps, and the rules and regulations thereunder.

(2) Request process. A person submitting a request pursuant to paragraph (c)(1) of this section must provide the Commission and the Securities and Exchange Commission with the following:

(i) All material information regarding the terms of the specified, or specified class of, mixed swap;

(ii) The economic characteristics and purpose of the specified, or specified class of, mixed swap;

(iii) The specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for the mixed swap (or class thereof); and

(iv) An analysis of:
(A) The nature and purposes of the parallel provisions that are the subject of the request;
(B) The comparability of such parallel provisions;
(C) The extent of any conflicts or differences between such parallel provisions; and
(D) Such other information as may be requested by the Commission or the Securities and Exchange Commission.

(3) Request withdrawal. A person may withdraw a request made pursuant to paragraph (c)(1) of this section at any time prior to the issuance of a joint order under paragraph (c)(4) of this section by the Commission and the Securities and Exchange Commission in response to the request.

(4) Issuance of orders. In response to a request under paragraph (c)(1) of this section, the Commission and the Securities and Exchange Commission, as necessary to carry out the purposes of the Wall Street Transparency and Accountability Act of 2010, may issue a joint order, after notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the Commodity Exchange Act and the Securities Exchange Act of 1934. In determining the contents of such joint order, the Commission and the Securities and Exchange Commission may consider, among other things:
(i) The nature and purposes of the parallel provisions that are the subject of the request;
(ii) The comparability of such parallel provisions; and
(iii) The extent of any conflicts or differences between such parallel provisions.

(5) Timeframe. (i) If the Commission and the Securities and Exchange Commission determine to issue a joint order as described in paragraph (c)(4) of this section, such joint order shall be issued within 120 days after receipt of a complete request for a joint order under paragraph (c)(1) of this section, which time period shall be stayed during the pendency of the public comment period provided for in paragraph (c)(4) of this section and shall recommence with the business day after the public comment period ends.
(ii) Nothing in this section shall require the Commission and the Securities and Exchange Commission to issue any joint order.
(iii) If the Commission and the Securities and Exchange Commission do not issue a joint order within the time period described in paragraph (c)(5)(i) of this section, each of the Commission and the Securities and Exchange Commission shall publicly provide the reasons for not issuing such a joint order within that timeframe.

[77 FR 48354, Aug. 13, 2012]
(1) A Form 1-FR-FCM certified by an independent public accountant in accordance with §1.16 as of a date not more than 45 days prior to the date on which such report is filed; or

(2) A Form 1-FR-FCM as of a date not more than 17 business days prior to the date on which such report is filed and a Form 1-FR-FCM certified by an independent public accountant in accordance with §1.16 as of a date not more than one year prior to the date on which such report is filed.

(B) Each such person must include with such financial report a statement describing the source of his current assets and representing that his capital has been contributed for the purpose of operating his business and will continue to be used for such purpose.

(ii)(A) Except as provided in paragraphs (a)(3) and (h) of this section, each person who files an application for registration as an introducing broker and who is not so registered at the time of such filing, must concurrently with the filing of such application, file either:

(1) A Form 1-FR-IB certified by an independent public accountant in accordance with §1.16 as of a date not more than 45 days prior to the date on which such report is filed;

(2) A Form 1-FR-IB as of a date not more than 17 business days prior to the date on which such report is filed and a Form 1-FR-IB certified by an independent public accountant in accordance with §1.16 as of a date not more than one year prior to the date on which such report is filed;

(3) A Form 1-FR-IB as of a date not more than 17 business days prior to the date on which such report is filed, Provided, however, that such applicant shall be subject to a review by the applicant’s designated self-regulatory organization within six months of registration; or

(4) A guarantee agreement.

B) Each person filing in accordance with paragraphs (a)(2)(i)(A) (1), (2) or (3) of this section must include with such financial report a statement describing the source of his current assets and representing that his capital has been contributed for the purpose of operating his business and will continue to be used for such purpose.

(ii) The provisions of paragraph (a)(2) of this section do not apply to any person succeeding to and continuing the business of another futures commission merchant. Each such person who files an application for registration as a futures commission merchant and who is not so registered in that capacity at the time of such filing must file a Form 1-FR-FCM as of the first month end following the date on which his registration is approved. Such report must be filed with the National Futures Association, the Commission and the designated self-regulatory organization, if any, not more than 17 business days after the date for which the report is made.

(iv) The provisions of paragraph (a)(2) of this section do not apply to any person succeeding to and continuing the business of another introducing broker. (A) Each succeeding person who succeeds to and continues the business of an introducing broker which was not operating pursuant to a guarantee agreement, or which was operating pursuant to a guarantee agreement and was also a securities broker or dealer at the time of succession, who files an application for registration as an introducing broker, and who is not so registered in that capacity at the time of such filing, must file with the National Futures Association either a guarantee agreement with his application for registration or a Form 1-FR-IB as of the first month end following the date on which his registration is approved. Such Form 1-FR-IB must be filed not more than 17 business days after the date for which the report is made.

(B) Each such person who succeeds to and continues the business of an introducing broker which was operating pursuant to a guarantee agreement and which was not also a securities broker or dealer at the time of succession, who files an application for registration as an introducing broker, and who is not so registered in that capacity at the time of such filing, must file with the National Futures Association either a guarantee agreement or a Form 1-FR-IB with his application for registration. If such person files a Form 1-FR-IB with his application for registration, such person must also file a Form 1-FR-IB, certified by an independent...
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public accountant, as of a date no later than the end of the month registration is granted. The Form 1-FR-IB certified by an independent public accountant must be filed with the National Futures Association not more than 45 days after the date for which the report is made.

(b) Filing of financial reports. (1)(i) Except as provided in paragraphs (b)(3) and (h) of this section, each person registered as a futures commission merchant must file a Form 1-FR-FCM as of the close of business each month. Each Form 1-FR-FCM must be filed no later than 17 business days after the date for which the report is made.

(ii) In addition to the monthly financial reports required by paragraph (b)(1)(i) of this section, each person registered as a futures commission merchant must file a Form 1-FR-FCM as of the close of its fiscal year, which must be certified by an independent public accountant in accordance with § 1.16, and must be filed no later than 90 days after the close of the futures commission merchant’s fiscal year: Provided, however, that a registrant which is registered with the Securities and Exchange Commission as a securities broker or dealer must file this report no later than the time permitted for filing an annual audit report under §240.17a–5(d)(5) of this title.

(2)(i) Except as provided in paragraphs (b)(3) and (h) of this section, and except for an introducing broker operating pursuant to a guarantee agreement which is not also a securities broker or dealer, each person registered as an introducing broker must file a Form 1–FR–IB semiannually as of the middle and the close of each fiscal year. Each Form 1–FR–IB must be filed no later than 17 business days after the date for which the report is made.

(ii)(A) In addition to the financial reports required by paragraph (b)(2)(i) of this section, each person registered as an introducing broker must file a Form 1–FR–IB semiannually as of the close of its fiscal year which must be certified by an independent public accountant in accordance with §1.16 no later than 90 days after the close of each introducing broker’s fiscal year: Provided, however, that a registrant which is registered with the Securities and Exchange Commission as a securities broker or dealer must file this report not later than the time permitted for filing an annual audit report under §240.17a–5(d)(5) of this title.

(B) If an introducing broker has filed previously a Form 1–FR–IB, certified by an independent public accountant in accordance with the provisions of paragraphs (a)(2)(ii) or (j)(8) of this section and §1.16 of this part, as of a date not more than one year prior to the close of such introducing broker’s fiscal year, it need not have certified by an independent public accountant the Form 1–FR–IB filed as of the introducing broker’s first fiscal year-end following the as of date of its initial certified Form 1–FR–IB. In such a case, the introducing broker’s Form 1–FR–IB filed as of the close of the second fiscal year-end following the as of date of its initial certified Form 1–FR–IB must cover the period of time between those two dates and must be certified by an independent public accountant in accordance with §1.16 of this part.

(3) The provisions of paragraphs (b)(1) and (b)(2) of this section may be met by any person registered as a futures commission merchant or as an introducing broker who is a member of a designated self-regulatory organization and conforms to minimum financial standards and related reporting requirements set by such designated self-regulatory organization in its bylaws, rules, regulations, or resolutions and approved by the Commission pursuant to Section 4f(b) of the Act and §1.52: Provided, however, That each such registrant shall promptly file with the Commission a true and exact copy of each financial report which it files with such designated self-regulatory organization.

(4) Upon receiving written notice from any representative of the National Futures Association, the Commission or any self-regulatory organization of which it is a member, an applicant or registrant, except an applicant for registration as an introducing broker which has filed concurrently with its application for registration a guarantee agreement and which is not also a securities broker or dealer, must, monthly or at such times as specified, furnish the National Futures
Association, the Commission or the self-regulatory organization requesting such information a Form 1–FR or such other financial information as requested by the National Futures Association, the Commission or the self-regulatory organization. Each such Form 1–FR or such other information must be furnished within the time period specified in the written notice, and in accordance with the provisions of paragraph (c) of this section.

(c) Where to file reports. (1) Form 1–FR filed by an introducing broker pursuant to paragraph (b)(2) of this section need be filed only with, and will be considered filed when received by, the National Futures Association. Other reports or information provided for in this section will be considered filed when received by the regional office of the Commission with jurisdiction over the state in which the registrant’s principal place of business is located and by the designated self-regulatory organization, if any; and reports or other information required to be filed by this section by an applicant for registration will be considered filed when received by the National Futures Association. Any report or information filed with the National Futures Association pursuant to this paragraph shall be deemed for all purposes to be filed with, and to be the official record of, the Commission.

(2)(i) Except as provided in the last sentence of this subparagraph, all filings or other notices prepared by a futures commission merchant pursuant to this paragraph shall be submitted to the Commission in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission, if the futures commission merchant or a designated self-regulatory organization has provided the Commission with the means necessary to read and to process the information contained in such report. A Form 1–FR required to be certified by an independent public accountant in accordance with §1.16 which is filed by a futures commission merchant must be filed in paper form and may not be filed electronically.

(ii) Except as provided in paragraph (h) of this section, all filings or other notices or applications prepared by an introducing broker or applicant for registration as an introducing broker or futures commission merchant pursuant to this section must be filed electronically in accordance with electronic filing procedures established by the National Futures Association. In the case of a Form 1–FR–IB that is required to be certified by an independent public accountant in accordance with §1.16, a paper copy of any such filing with the original manually signed certification must be maintained by the introducing broker or applicant for registration as an introducing broker in accordance with §1.31.

(3) Any information required of a registrant by a self-regulatory organization pursuant to paragraph (b)(4) of this section need be furnished only to such self-regulatory organization and the Commission, and any information required of an applicant by the National Futures Association pursuant to paragraph (b)(4) of this section need be furnished only to the National Futures Association and the Commission.

(4) Any guarantee agreement entered into between a futures commission merchant and an introducing broker in accordance with the provisions of this section need be filed only with, and will be considered filed when received by, the National Futures Association.

(d) Contents of financial reports. (1) Each Form 1–FR filed pursuant to this §1.10 which is not required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain:

(i) A statement of financial condition as of the date for which the report is made;

(ii) Statements of income (loss) and a statement of changes in ownership equity for the period between the date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

(iii) A statement of changes in liabilities subordinated to claims of general creditors for the period between the
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date of the most recent statement of financial condition filed with the Commission and the date for which the report is made.

(iv) A statement of the computation of the minimum capital requirements pursuant to §1.17 as of the date for which the report is made;

(v) For a futures commission merchant only, the statements of segregation requirements and funds in segregation for customers trading on U.S. commodity exchanges and for customers' dealer options accounts, and the statement of secured amounts and funds held in separate accounts for foreign futures and foreign options customers in accordance with §30.7 of this chapter as of the date for which the report is made; and

(vi) In addition to the information expressly required, such further material information as may be necessary to make the required statements not misleading.

(2) Each Form 1–FR filed pursuant to this §1.10 which is required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain:

(i) A statement of financial condition as of the date for which the report is made;

(ii) Statements of income (loss), cash flows, changes in ownership equity, and changes in liabilities subordinated to claims of general creditors, for the period between the date of the most recent certified statement of financial condition filed with the Commission and the date for which the report is made: Provided, That for an applicant filing pursuant to paragraph (a)(2) of this section the period must be the year ending as of the date of the statement of financial condition;

(iii) A statement of the computation of the minimum capital requirements pursuant to §1.17 as of the date for which the report is made;

(iv) For a futures commission merchant only, the statements of segregation requirements and funds in segregation for customers trading on U.S. commodity exchanges and for customers' dealer options accounts, and the statement of secured amounts and funds held in separate accounts for foreign futures and foreign options customers in accordance with §30.7 of this chapter as of the date for which the report is made;

(v) Appropriate footnote disclosures;

(vi) A reconciliation, including appropriate explanations, of the statement of the computation of the minimum capital requirements pursuant to §1.17 and, for a futures commission merchant only, the statements of segregation requirements and funds in segregation for customers trading on U.S. commodity exchanges and for customers' dealer option accounts, and the statement of secured amounts and funds held in separate accounts for foreign futures and foreign options customers in accordance with §30.7 of this chapter, in the certified Form 1–FR with the applicant's or registrant's corresponding uncertified most recent Form 1–FR filing when material differences exist or, if no material differences exist, a statement so indicating; and

(vii) In addition to the information expressly required, such further material information as may be necessary to make the required statements not misleading.

(3) The statements required by paragraphs (d)(2)(i) and (d)(2)(ii) of this section may be presented in accordance with generally accepted accounting principles in the certified reports filed as of the close of the registrant's fiscal year pursuant to paragraphs (b)(1)(ii) or (b)(2)(ii) of this section or accompanying the application for registration pursuant to paragraph (a)(2) of this section, rather than in the format specifically prescribed by these regulations: Provided, the statement of financial condition is presented in a format as consistent as possible with the Form 1–FR and a reconciliation is provided reconciling such statement of financial condition to the statement of the computation of the minimum capital requirements pursuant to §1.17. Such reconciliation must be certified by an independent public accountant in accordance with §1.16.

(4) Attached to each Form 1–FR filed pursuant to this section must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the
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information contained in the Form 1–FR is true and correct. The individual making such oath or affirmation must be:

(i) If the registrant or applicant is a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the chief executive officer or chief financial officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership; or

(ii) If the registrant or applicant is registered with the Securities and Exchange Commission as a securities broker or dealer, the representative authorized under §240.17a–5 of this title to file for the securities broker or dealer its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, part II, part IIA, or part II CSE.

(iii) In the case of a Form 1–FR filed via electronic transmission in accordance with procedures established by or approved by the Commission, such transmission must be accompanied by the authorization assigned to the authorized signer under such procedures, and the use of such user authentication will constitute and become a substitute for the manual signature of the authorized signer for the purpose of making the oath or affirmation referred to in this paragraph.

(e) Election of fiscal year. (1) An applicant wishing to establish a fiscal year other than the calendar year may do so by notifying the National Futures Association of its election of such fiscal year, in writing, concurrently with the filing of the Form 1–FR pursuant to paragraph (a)(2) of this section. An applicant that does not so notify the National Futures Association will be deemed to have elected the calendar year as its fiscal year.

(2) (i) A registrant must continue to use its elected fiscal year, calendar or otherwise, unless a change in such fiscal year has been approved pursuant to this paragraph (e)(2).

(ii) Futures commission merchant registrants. (A) A futures commission merchant may file with its designated self-regulatory organization an application to change its fiscal year, a copy of which the registrant must file with the Commission. The application shall be approved or denied in writing by the designated self-regulatory organization. The registrant must file immediately with the Commission a copy of any notice it receives from the designated self-regulatory organization to approve or deny the registrant’s application to change its fiscal year. A written notice of approval shall become effective upon filing by the registrant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(B) A futures commission merchant that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization copies of any notice or application filed with its designated examining authority pursuant to §240.17a–5(d)(1) of this title, for a change in fiscal year or “as of” date for its annual audited financial statement. The registrant must also file immediately with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the registrant’s request for change in fiscal year or “as of” date. Upon the receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the change in fiscal year or “as of” date referenced in the notice shall be deemed approved under this paragraph (e)(2).

(C) Any copy that under this paragraph (e)(2) is required to be filed with the Commission shall be filed with the regional office of the Commission with jurisdiction over the state in which the registrant’s principal place of business is located, and any copy or application to be filed with the designated self-regulatory organization shall be filed at its principal place of business.

(iii) Introducing broker registrants. (A) An introducing broker may file with
the National Futures Association an application to change its fiscal year, which shall be approved or denied in writing.

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization a copy of any application that the registrant has filed with its designated examining authority, pursuant to §240.17–a5(l)(5) of this title, for an extension of time to file its FOCUS report. The registrant must also file immediately with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1).

(C) Any copy that under this subparagraph (f)(1)(i) is required to be filed with the Commission shall be filed with the regional office of the Commission with jurisdiction over the state in which the registrant’s principal place of business is located.

(i) Introducing broker registrants. (A) An introducing broker may file with the National Futures Association an application for extension of the time, which shall be approved or denied in writing.

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with the National Futures Association an application to change its fiscal year, which shall be approved or denied in writing.

(B) A futures commission merchant that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization a copy of any application that the registrant has filed with its designated examining authority, pursuant to §240.17–a5(l)(5) of this title, for an extension of time to file its FOCUS report. The registrant must also file immediately with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1).
(2) In the event an applicant finds that it cannot file its report for any period within the time specified in paragraph (b)(4) of this section without substantial undue hardship, it may file with the National Futures Association an application for an extension of time to a specified date which may not be more than 90 days after the date as of which the financial statements were to have been filed. The application must state the reasons for the requested extension and must contain an agreement to file the report on or before the specified date. The application must be received by the National Futures Association before the time specified in paragraph (b)(4) of this section for filing the report. Notice of such application must be filed with the regional office of the Commission with jurisdiction over the state in which the applicant’s principal place of business is located concurrently with the filing of such application with the National Futures Association. Within ten calendar days after receipt of the application for an extension of time, the National Futures Association shall:

(i) Notify the applicant of the grant or denial of the requested extension; or

(ii) Indicate to the applicant that additional time is required to analyze the request, in which case the amount of time needed will be specified.

(g) Public availability of reports. (1) Forms 1–FR filed pursuant to this section, and FOCUS reports filed in lieu of Forms 1–FR pursuant to paragraph (b) of this section, will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter, except for the information described in paragraph (g)(2) of this section.

(2) The following information in Forms 1–FR, and the same or equivalent information in FOCUS reports filed in lieu of Forms 1–FR pursuant to paragraph (b) of this section, will be publishedly available:

(i) The amount of the applicant’s or registrant’s adjusted net capital; the amount of its minimum net capital requirement under §1.17 of this chapter; and the amount of its adjusted net capital in excess of its minimum net capital requirement; and

(ii) The following statements and footnote disclosures thereof: the Statement of Financial Condition in the certified annual financial reports of futures commission merchants and introducing brokers; the Statements (to be filed by a futures commission merchant only) of Segregation Requirements and Funds in Segregation for customers trading on U.S. commodity exchanges and for customers’ dealer options accounts, and the Statement (to be filed by a futures commission merchant only) of Secured Amounts and Funds held in Separate Accounts for foreign futures and foreign options customers in accordance with §30.7 of this chapter.

(3) [Reserved]

(4) All information that is exempt from mandatory public disclosure under paragraph (g)(1) of this section will, however, be available for official use by any official or employee of the United States or any State, by any self-regulatory organization of which the person filing such report is a member, by the National Futures Association in the case of an applicant, and by any other person to whom the Commission believes disclosure of such information is in the public interest. Nothing in this paragraph (g) will limit the authority of any self-regulatory organization to request or receive any information relative to its members’ financial condition.

(5) The independent accountant’s opinion and a guarantee agreement filed pursuant to this section will be deemed public information.

(h) Filing option available to a futures commission merchant or an introducing broker that is also a securities broker or dealer. Any applicant or registrant which is registered with the Securities and Exchange Commission as a securities broker or dealer may comply with the requirements of this section by filing (in accordance with paragraphs (a), (b), (c), and (j) of this section) a copy of its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE (FOCUS Report), in lieu of Form 1–FR; Provided, however, That all information which is required to be furnished on and submitted with Form 1–FR is provided
with such FOCUS Report; and Provided, further, That a certified FOCUS Report filed by an introducing broker or applicant for registration as an introducing broker in lieu of a certified Form 1–FR–IB must be filed according to National Futures Association rules, either in paper form or electronically, in accordance with procedures established by the National Futures Association, and if filed electronically, a paper copy of such filing with the original manually signed certification must be maintained by such introducing broker or applicant in accordance with §1.31.

(i) **Filing option available to an introducing broker or applicant for registration as an introducing broker which is also a country elevator.** Any introducing broker or applicant for registration as an introducing broker which is also a country elevator but which is not also a securities broker or dealer may comply with the requirements of this section by filing (in accordance with paragraphs (a), (b) and (c) of this section) a copy of a financial report prepared by a grain commission firm which has been authorized by the Deputy Vice President of the Commodity Credit Corporation of the United States Department of Agriculture to provide a compilation report of financial statements of warehousemen for purposes of Uniform Grain Storage Agreements, and which complies with the standards for independence set forth in §1.16(b)(2) with respect to the registrant or applicant: Provided, however, That all information which is required to be furnished on and submitted with Form 1–FR is provided with such financial report, including a statement of the computation of the minimum capital requirements pursuant to §1.17: And, provided further, That the balance sheet is presented in a format as consistent as possible with the Form 1–FR and a reconciliation is provided reconciling such balance sheet to the statement of the computation of the minimum capital requirements pursuant to §1.17. Attached to each financial report filed pursuant to this paragraph (i) must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained therein is true and correct. If the applicant or registrant is a sole proprietorship, then the oath or affirmation must be made by the proprietor; if a partnership, by a general partner; or if a corporation, by the chief executive officer or chief financial officer.

(j) **Requirements for guarantee agreement.** (1) A guarantee agreement filed pursuant to this section must be signed in a manner sufficient to be a binding guarantee under local law by an appropriate person on behalf of the futures commission merchant or retail foreign exchange dealer and the introducing broker, and each signature must be accompanied by evidence that the signatory is authorized to enter the agreement on behalf of the futures commission merchant, retail foreign exchange dealer, or introducing broker and is such an appropriate person. For purposes of this paragraph (j), an appropriate person shall be the proprietor, if the firm is a sole proprietorship; a general partner, if the firm is a partnership; and either the chief executive officer or the chief financial officer, if the firm is a corporation; and, if the firm is a limited liability company or limited liability partnership, either the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership.

(2) No futures commission merchant or retail foreign exchange dealer may enter into a guarantee agreement if:

- (i) It knows or should have known that its adjusted net capital is less than the amount set forth in §1.12(b) of this part or §5.6(b) of this chapter, as applicable; or
- (ii) There is filed against the futures commission merchant or retail foreign exchange dealer an adjudicatory proceeding brought by or before the Commission pursuant to the provisions of sections 6(c), 6(d), 6c, 6d, 8a or 9 of the Act or §§3.55, §3.56 or §3.60 of this chapter.

(3) A retail foreign exchange dealer may enter into a guarantee agreement only with an introducing broker as defined in §5.1(f)(1) of this chapter. A retail foreign exchange dealer may not enter into a guarantee agreement with
§ 1.10 an introducing broker as defined in §1.3(mm) of this part.

(4) A guarantee agreement filed in connection with an application for initial registration as an introducing broker in accordance with the provisions of §3.10(a) of this chapter shall become effective upon the granting of registration or, if appropriate, a temporary license, to the introducing broker. A guarantee agreement filed other than in connection with an application for initial registration as an introducing broker shall become effective as of the date agreed to by the parties.

(5)(i) If the registration of the introducing broker is suspended, revoked, or withdrawn in accordance with the provisions of this chapter, the guarantee agreement shall expire as of the date of such suspension, revocation or withdrawal.

(ii) If the registration of the futures commission merchant or retail foreign exchange dealer is suspended or revoked, the guarantee agreement shall expire 30 days after such suspension or revocation, or at such earlier time as may be approved by the Commission, the introducing broker, and the introducing broker’s designated self-regulatory organization.

(6) A guarantee agreement may be terminated at any time during the term thereof:

(i) By mutual written consent of the parties, signed by an appropriate person on behalf of each party, with prompt written notice thereof, signed by an appropriate person on behalf of each party, to the Commission and to the designated self-regulatory organizations of the futures commission merchant or retail foreign exchange dealer and the introducing broker;

(ii) For good cause shown, by either party giving written notice of its intention to terminate the agreement, signed by an appropriate person, to the other party to the agreement, to the Commission, and to the designated self-regulatory organizations of the futures commission merchant or retail foreign exchange dealer and the introducing broker; or

(iii) By either party giving written notice of its intention to terminate the agreement, signed by an appropriate person, at least 30 days prior to the proposed termination date, to the other party to the agreement, to the Commission, and to the designated self-regulatory organizations of the futures commission merchant or retail foreign exchange dealer and the introducing broker.

(7) The termination of a guarantee agreement by a futures commission merchant, retail foreign exchange dealer or an introducing broker, or the expiration of such an agreement, shall not relieve any party from any liability or obligation arising from acts or omissions which occurred during the term of the agreement.

(8) An introducing broker may not simultaneously be a party to more than one guarantee agreement: Provided, however, That the provisions of this paragraph (j)(8) shall not be deemed to preclude an introducing broker from entering into a guarantee agreement with another futures commission merchant or retail foreign exchange dealer if the introducing broker, futures commission merchant or retail foreign exchange dealer which is a party to the existing agreement has provided notice of termination of the existing agreement in accordance with the provisions of paragraph (j)(6) of this section, and the new guarantee agreement does not become effective until the day following the date of termination of the existing agreement; And, provided further, That the provisions of this paragraph (j)(8) shall not be deemed to preclude an introducing broker from entering into a guarantee agreement with another futures commission merchant or retail foreign exchange dealer which is a party to the existing agreement ceases to remain registered and the existing agreement would therefore expire in accordance with the provisions of paragraph (j)(6)(ii) of this section.

(9)(i)(A) An introducing broker that is a party to a guarantee agreement that has been terminated in accordance with the provisions of paragraph (j)(6) of this section, or that is due to expire in accordance with the provisions of paragraph (j)(5)(ii) of this section, must cease doing business as an introducing broker on or before the effective date
of such termination or expiration unless, on or before 10 days prior to the effective date of such termination or expiration or such other period of time as the Commission or the designated self-regulatory organization may allow for good cause shown, the introducing broker files with its designated self-regulatory organization either a new guarantee agreement effective as of the day following the date of termination of the existing agreement, or, in the case of a guarantee agreement that is due to expire in accordance with the provisions of paragraph (j)(4)(ii) of this section, a new guarantee agreement effective on or before such expiration, or either:

1. A Form 1–FR–IB certified by an independent public accountant in accordance with §1.16 as of a date not more than 45 days prior to the date on which the report is filed; or

2. A Form 1–FR–IB as of a date not more than 17 business days prior to the date on which the report is filed and a Form 1–FR–IB certified by an independent public accountant in accordance with §1.16 as of a date not more than one year prior to the date on which the report is filed: Provided, however, that an introducing broker as defined in §5.1(f)(1) of this chapter that is party to a guarantee agreement that has been terminated or that has expired must cease doing business as an introducing broker on or before the effective date of such termination or expiration unless, on or before 10 days prior to the effective date of such termination or expiration or such other period of time as the Commission or the designated self-regulatory organization may allow for good cause shown, the introducing broker files with its designated self-regulatory organization a new guarantee agreement effective on or before the termination or expiration date of the terminating or expiring guarantee agreement.

(B) Each person filing a Form 1–FR–IB in accordance with this section must include with the financial report a statement describing the source of his current assets and representing that his capital has been contributed for the purpose of operating his business and will continue to be used for such purpose.

(ii)(A) Notwithstanding the provisions of paragraph (j)(9)(i) of this section or of §1.17(a), an introducing broker that is a party to a guarantee agreement that has been terminated in accordance with the provisions of paragraph (j)(6)(ii) of this section shall not be deemed to be in violation of the minimum adjusted net capital requirement of §1.17(a)(1)(iii) or (a)(2) for 30 days following such termination. Such an introducing broker must cease doing business as an introducing broker and may not resume doing business as an introducing broker unless and until it files a new agreement or either:

1. A Form 1–FR–IB certified by an independent public accountant in accordance with §1.16 as of a date not more than 45 days prior to the date on which the report is filed; or

2. A Form 1–FR–IB as of a date not more than 17 business days prior to the date on which the report is filed and a Form 1–FR–IB certified by an independent public accountant in accordance with §1.16 as of a date not more than one year prior to the date on which the report is filed: Provided, however, that an introducing broker as defined in §5.1(f)(1) of this chapter that is party to a guarantee agreement that has been terminated must cease doing business as an introducing broker from and after the effective date of such termination, and may not resume doing business as an introducing broker as defined in §5.1(f)(1) of this chapter unless and until it files a new guarantee agreement.

(B) Each person filing a Form 1–FR–IB in accordance with this section must include with the financial report a statement describing the source of his current assets and representing that his capital has been contributed for the purpose of operating his business and will continue to be used for such purpose.

(k) Filing option available to an introducing broker. (1) Any introducing broker or applicant for registration as an introducing broker which is not operating or intending to operate pursuant to a guarantee agreement may comply with the requirements of this section by filing (in accordance with
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§ 1.12 Maintenance of minimum financial requirements by futures commission merchants and introducing brokers.

(a) Each person registered as a futures commission merchant or who files an application for registration as a futures commission merchant, and each person registered as an introducing broker or who files an application for registration as an introducing broker (except for an introducing broker or applicant for registration as an introducing broker operating pursuant to, or who has filed concurrently with its application for registration, a guarantee agreement and who is not also a securities broker or dealer), who knows or should have known that its adjusted net capital at any time is less than the minimum required by §1.17 or by the capital rule of any self-regulatory organization to which such person is subject, if any, must:

(1) Give telephonic notice, to be confirmed in writing by facsimile notice, as set forth in paragraph (i) of this section that the applicant’s or registrant’s adjusted net capital is less than required by §1.17 or by other capital rule, identifying the applicable capital rule. The notice must be given immediately after the applicant or registrant knows or should know that its adjusted net capital is less than required by any of the aforesaid rules to which the applicant or registrant is subject; and

(2) Provide together with such notice documentation in such form as necessary to adequately reflect the applicant’s or registrant’s capital condition as of any date such person’s adjusted net capital is less than the minimum required. The applicant or registrant must provide similar documentation for other days as the Commission may request.

(b) Each person registered as a futures commission merchant, or who files an application for registration as a futures commission merchant, who knows or should have known that its adjusted net capital at any time is less than the greater of:

(1) 150 percent of the minimum dollar amount required by §1.17(a)(1)(i)(A);

(2) 110 percent of the amount required by §1.17(a)(1)(i)(B);

(3) 150 percent of the amount of adjusted net capital required by a registered futures association of which it is a member, unless such amount has been determined by a margin-based capital computation set forth in the rules of the registered futures association, and such amount meets or exceeds the amount of adjusted net capital required under the margin-based capital computation set forth in §1.17(a)(1)(i)(B), in which case the required percentage is 110 percent, or

(4) For securities brokers or dealers, the amount of net capital specified in Rule 17a–11(c) of the Securities and Exchange Commission (17 CFR 240.17a–11(c)), must file written notice to that effect as set forth in paragraph (i) of this section within twenty-four (24) hours of such event.

(c) If an applicant or registrant at any time fails to make or keep current the books and records required by these regulations, such applicant or registrant must, on the same day such event occurs, provide facsimile notice of such fact, specifying the books and

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records which have not been made or which are not current, and within forty-eight (48) hours after giving such notice file a written report stating what steps have been and are being taken to correct the situation.

(d) Whenever any applicant or registrant discovers or is notified by an independent public accountant, pursuant to § 1.16(e)(2) of this chapter, of the existence of any material inadequacy, as specified in § 1.16(d)(2) of this chapter, such applicant or registrant must give facsimile notice of such material inadequacy within twenty-four (24) hours, and within forty-eight (48) hours after giving such notice file a written report stating what steps have been and are being taken to correct the material inadequacy.

(e) Whenever any self-regulatory organization learns that a member registrant has failed to file a notice or written report as required by § 1.12, that self-regulatory organization must immediately report this failure by telephone, confirmed in writing immediately by facsimile notice, as provided in paragraph (i) of this section.

(f)(1) [Reserved]

(2) Whenever a registered futures commission merchant determines that any position it carries for another registered futures commission merchant or for a registered leveraged transaction merchant must be liquidated immediately, transferred immediately or that the trading of any account of such futures commission merchant or leveraged transaction merchant shall be only for purposes of liquidation, because the other futures commission merchant or the leveraged transaction merchant has failed to meet a call for margin or to make other required deposits, the carrying futures commission merchant must immediately give telephonic notice, confirmed in writing immediately by facsimile notice, of such a determination to the designated self-regulatory organization and the principal office of the Commission at Washington, DC. This paragraph (f)(2) shall apply to any account carried by the futures commission merchant, whether a customer, noncustomer, omnibus or proprietary account. For purposes of this paragraph (f)(3), if any person has an interest of 10 percent or more in ownership or equity in, or guarantees, more than one account, or has guaranteed an account in addition to his own account, all such accounts shall be combined. A designated self-regulatory organization may grant an exemption from the provisions of this paragraph to a futures commission merchant with respect to any particular account on a continuous basis provided the designated self-regulatory organization documents the reasons for granting such an exemption and continues to monitor any such account.

(3) Whenever a registered futures commission merchant determines that an account which it is carrying is undermargined by an amount which exceeds the futures commission merchant’s adjusted net capital, determined in accordance with § 1.17, the futures commission merchant must immediately give telephonic notice, confirmed in writing immediately by facsimile notice, whenever its excess adjusted net capital is less than six
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percent of the maintenance margin required by the futures commission merchant on all positions held in accounts of a noncustomer other than a noncustomer who is subject to the minimum financial requirements of:

(A) A futures commission merchant, or

(B) The Securities and Exchange Commission for a securities broker and dealer.

(ii) For purposes of paragraph (f)(5)(i) of this section, maintenance margin shall include all deposits which the futures commission merchant requires the noncustomer to maintain in order to carry its positions at the futures commission merchant.

(g) A futures commission merchant shall provide written notice of a substantial reduction in capital as compared to that last reported in a financial report filed with the Commission pursuant to §1.10. This notice shall be provided as follows:

(1) If any event or series of events, including any withdrawal, advance, loan or loss cause, on a net basis, a reduction in net capital (or, if the futures commission merchant is qualified to use the filing option available under §1.10(h), tentative net capital as defined in the rules of the Securities and Exchange Commission) of 20 percent or more, notice must be provided within two business days of the event or series of events causing the reduction; and

(2) If equity capital of the futures commission merchant or a subsidiary or affiliate of the futures commission merchant consolidated pursuant to §1.17(f) (or 17 CFR 240.15c3-1e) would be withdrawn by action of a stockholder or a partner or a limited liability company member or by redemption or repurchase of shares of stock by any of the consolidated entities or through the payment of dividends or any similar distribution, or an unsecured advance or loan would be made to a stockholder, partner, sole proprietor, limited liability company member, employee or affiliate, such that the withdrawal, advance or loan would cause, on a net basis, a reduction in excess adjusted net capital (or, if the futures commission merchant is qualified to use the filing option available under §1.10(h), excess net capital as defined in the rules of the Securities and Exchange Commission) of 30 percent or more, notice must be provided at least two business days prior to the withdrawal, advance or loan that would cause the reduction: Provided, however, That the provisions of paragraphs (g)(1) and (g)(2) of this section do not apply to any futures or securities transaction in the ordinary course of business between a futures commission merchant and any affiliate where the futures commission merchant makes payment to or on behalf of such affiliate for such transaction and then receives payment from such affiliate for such transaction within two business days from the date of the transaction.

(3) Upon receipt of such notice from a futures commission merchant, the Director of the Division of Clearing and Intermediary Oversight or the Director’s designee may require that the futures commission merchant provide or cause a Material Affiliated Person (as that term is defined in §1.14(a)(2)) to provide, within three business days from the date of request or such shorter period as the Division Director or designee may specify, such other information as the Division Director or designee determines to be necessary based upon market conditions, reports provided by the futures commission merchant, or other available information.

(h) Whenever a person registered as a futures commission merchant knows or should know that the total amount of its funds on deposit in segregated accounts on behalf of customers, or that the total amount set aside on behalf of customers trading on non-United States markets, is less than the total amount of such funds required by the Act and the Commission’s rules to be on deposit in segregated or secured amount accounts on behalf of such customers, the registrant must report such deficiency immediately by telephone notice, confirmed immediately in writing by facsimile notice, to the registrant’s designated self-regulatory organization and the principal office of the Commission in Washington, DC, to the attention of the Director and the Chief Accountant of the Division of Clearing and Intermediary Oversight.

(i)(1) Every notice and written report required to be given or filed by this
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§ 1.14 Risk assessment recordkeeping requirements for futures commission merchants.

(a) Requirement to maintain and preserve information. (1) Each futures commission merchant registered with the Commission pursuant to Section 4d of the Act, unless exempt pursuant to paragraph (d) of this section, shall prepare, maintain and preserve the following information:

(1) An organizational chart which includes the futures commission merchant and each of its affiliated persons. Included in the organizational chart shall be a designation of which affiliated persons are “Material Affiliated Persons” as that term is used in paragraph (a)(2) of this section, which Material Affiliated Persons file routine financial or risk exposure reports with the Securities and Exchange Commission, a federal banking agency, an insurance commissioner or other similar official or agency of a state, or a foreign regulatory authority, and which Material Affiliated Persons are dealers in financial instruments with off-balance sheet risk and, if a Material Affiliated Person is such a dealer, whether it is also an end-user of such instruments;

(2) Written policies, procedures, or systems concerning the futures commission merchant’s:

(A) Method(s) for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons;

(B) Financing and capital adequacy, including information regarding
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sources of funding, together with a narrative discussion by management of the liquidity of the material assets of the futures commission merchant, the structure of debt capital, and sources of alternative funding;

(C) Establishing and maintaining internal controls with respect to market risk, credit risk, and other risks created by the futures commission merchant’s proprietary and noncustomer clearing activities, including systems and policies for supervising, monitoring, reporting and reviewing trading activities in securities, futures contracts, commodity options, forward contracts and financial instruments; policies for hedging or managing risks created by trading activities or supervising accounts carried for noncustomer affiliates, including a description of the types of reviews conducted to monitor positions; and policies relating to restrictions or limitations on trading activities. Provided, however, that if the futures commission merchant has no such written policies, procedures or systems, it must so state in writing;

(iii) Fiscal year-end consolidated and consolidating balance sheets for the highest level Material Affiliated Person within the futures commission merchant’s organizational structure, which shall include the futures commission merchant and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated balance sheets shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which shall include appropriate explanatory notes. The consolidating balance sheets may be those prepared by the futures commission merchant’s highest level Material Affiliated Person as part of its internal financial reporting process. Any additional information required to be filed under §1.15(a)(2)(iii) shall also be maintained and preserved.

(2) The determination of whether an affiliated person of a futures commission merchant is a Material Affiliated Person shall involve consideration of all aspects of the activities of, and the relationship between, both entities, including without limitation, the following factors:

(i) The legal relationship between the futures commission merchant and the affiliated person;

(ii) The overall financing requirements of the futures commission merchant and the affiliated person, and the degree, if any, to which the futures commission merchant and the affiliated person are financially dependent on each other;

(iii) The degree, if any, to which the futures commission merchant or its customers rely on the affiliated person for operational support or services in connection with the futures commission merchant’s business;

(iv) The level of market, credit or other risk present in the activities of the affiliated person; and

(v) The extent to which the affiliated person has the authority or the ability to cause a withdrawal of capital from the futures commission merchant.

(3) For purposes of this section and §1.15, the term Material Affiliated Person does not include a natural person.

(4) The information, reports and records required by this section shall be maintained and preserved, and made
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readily available for inspection, in accordance with the provisions of §1.31.

(b) Special provisions with respect to Material Affiliated Persons subject to the supervision of certain domestic regulators.

A futures commission merchant shall be deemed to be in compliance with the recordkeeping requirements of paragraphs (a)(1)(i), (a)(1)(iii) and (a)(1)(iv) of this section with respect to a Material Affiliated Person if:

(1) The futures commission merchant is required, or that Material Affiliated Person is required, to maintain and preserve information, or such information is maintained and preserved by the futures commission merchant on behalf of the Material Affiliated Person, pursuant to §240.17h–1T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt, and maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of the records and reports maintained and filed on Form 17–H (or such other forms or reports as may be required) by such futures commission merchant or its Material Affiliated Person with the Securities and Exchange Commission pursuant to §§240.17h–1T and 240.17h–2T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt;

(2) In the case of a Material Affiliated Person (including a foreign banking organization) that is subject to examination, or the reporting requirements of, a Federal banking agency, the futures commission merchant or such Material Affiliated Person maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of all reports submitted by such Material Associated Person to the Federal Reserve Board pursuant to section 221 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners’ Loan Act, or section 5 of the Bank Holding Company Act of 1956; or

(3) In the case of a Material Affiliated Person that is subject to the supervision of an insurance commissioner or other similar official or agency of a state, the futures commission merchant or such Material Affiliated Person maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of the annual statements with schedules and exhibits prepared by the Material Affiliated Person on forms prescribed by the National Association of Insurance Commissioners or by a state insurance commissioner.

(c) Special provisions with respect to Material Affiliated Persons subject to the supervision of a Foreign Regulatory Authority.

A futures commission merchant shall be deemed to be in compliance with the recordkeeping requirements of paragraphs (a)(1)(ii) and (a)(1)(iv) of this section with respect to a Material Affiliated Person if such futures commission merchant maintains and makes available, or causes such Material Affiliated Person to make available, for inspection by the Commission in accordance with the provisions of this section copies of any financial or risk exposure reports filed by such Material Affiliated Person with a foreign futures authority or other foreign regulatory authority, provided that: (1) the futures commission merchant agrees to use its best efforts to obtain from the Material Affiliated Person and to cause the Material Affiliated Person to provide, directly or through its foreign futures authority or other foreign regulatory authority, any supplemental information the Commission may request and there is no statute or other bar in the foreign jurisdiction that would preclude the futures commission merchant, the Material Affiliated Person, the foreign futures authority or other foreign regulatory authority from providing such information to the Commission; or (2) the foreign futures authority or other foreign regulatory authority with whom the Material Affiliated Person files such reports has entered into an information-sharing agreement with the Commission which is in effect as of the futures commission merchant’s fiscal year-end and which will allow the Commission to obtain the type of information required herein. The futures commission merchant shall maintain a copy of the original report and a copy translated.
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into the English language. For the purposes of this section, the term “Foreign Futures Authority” shall have the meaning set forth in section 1a(10) of the Act.

(d) Exemptions. (1) The provisions of this section shall not apply to any futures commission merchant which holds funds or property of or for futures customers of less than $6,250,000 and has less than $5,000,000 in adjusted net capital as of the futures commission merchant’s current fiscal year-end; provided, however, that such futures commission merchant is not a clearing member of an exchange.

(2) The Commission may, upon written application by a Reporting Futures Commission Merchant, exempt from the provisions of this section, other than paragraph (a)(1)(ii) of this section, either unconditionally or on specified terms and conditions, any futures commission merchant affiliated with such Reporting Futures Commission Merchant. The term “Reporting Futures Commission Merchant” shall mean, in the case of a futures commission merchant that is affiliated with another registered futures commission merchant, the futures commission merchant which maintains the greater amount of adjusted net capital as last reported on financial reports filed with the Commission pursuant to §1.10 unless another futures commission merchant is acting as the Reporting Broker or Dealer under §240.17h–2T of this title, or the Commission permits another futures commission merchant to act as the Reporting Futures Commission Merchant. In granting exemptions under this section, the Commission shall consider, among other factors, whether the records required by this section concerning the Material Affiliated Persons of the futures commission merchant affiliated with the Reporting Futures Commission Merchant will be available to the Commission pursuant to this section or §1.15. A request for exemption filed under this paragraph (d)(2) shall explain the basis for the designation of a particular futures commission merchant as the Reporting Futures Commission Merchant and will become effective on the thirtieth day after receipt of such request by the Commission unless the Commission objects to the request by that date.

(3) The Commission may exempt any futures commission merchant from any provision of this section if it finds that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought. The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

(e) Location of records. A futures commission merchant required to maintain records concerning Material Affiliated Persons pursuant to this section may maintain those records either at the principal office of the Material Affiliated Person or at a records storage facility, provided that, except as set forth in paragraph (c) of this section, the records are located within the boundaries of the United States and the records are kept and available for inspection in accordance with §1.31. If such records are maintained at a place other than the futures commission merchant’s principal place of business, the Material Affiliated Person or other entity maintaining the records shall file with the Commission a written undertaking, in a form acceptable to the Commission, signed by a duly authorized person, to the effect that the records will be treated as if the futures commission merchant were maintaining the records pursuant to this section and that the entity maintaining the records will permit examination of such records at any time, or from time to time during business hours, by representatives or designees of the Commission and promptly furnish the Commission representative or its designee true, correct, complete and current hard copy of all or any part of such records. The election to maintain records at the principal place of business of the Material Affiliated Person or at a records storage facility pursuant to the provisions of this paragraph shall not relieve the futures commission merchant required to maintain and preserve such records from any of its responsibilities under this section or §1.15.

(f) Confidentiality. All information obtained by the Commission pursuant to the provisions of this section from a futures commission merchant concerning
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(a) Reporting requirements with respect to information required to be maintained by § 1.14. (1) Each futures commission merchant registered with the Commission pursuant to Section 4d of the Act, unless exempt pursuant to paragraph (c) of this section, shall file the following with the regional office with which it files periodic financial reports by no later than April 30, 1995, provided that in the case of a futures commission merchant whose registration becomes effective after December 31, 1994, such futures commission merchant shall file the following within 60 calendar days after the effective date of such registration, or by April 30, 1995, whichever comes later:

(i) A copy of the organizational chart maintained by the futures commission merchant pursuant to paragraph (a)(1)(i) of § 1.14. Where there is a material change in information provided, an updated organizational chart shall be filed within sixty calendar days after the end of the fiscal quarter in which the change has occurred; and

(ii) Copies of the financial, operational, and risk management policies, procedures and systems maintained by the futures commission merchant pursuant to paragraph (a)(1)(ii) of § 1.14. If the futures commission merchant has no such written policies, procedures or systems, it must file a statement so indicating. Where there is a material change in information provided, such change shall be reported within sixty calendar days after the end of the fiscal quarter in which the change has occurred.

(2) Each futures commission merchant registered with the Commission pursuant to Section 4d of the Act, unless exempt pursuant to paragraph (c) of this section, shall file the following with the regional office with which it files periodic financial reports within 105 calendar days after the end of each fiscal year or, if a filing is made pursuant to a written notice issued under paragraph (a)(2)(iii) of this section, within the time period specified in the written notice:

(i) Fiscal year-end consolidated and consolidating balance sheets for the highest level Material Affiliated Person within the futures commission merchant’s organizational structure, which shall include the futures commission merchant and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated balance sheets shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which consolidated balance sheets shall include appropriate explanatory notes. The consolidating balance sheets may be those prepared by the futures commission merchant’s highest level Material Affiliated Person as part of its internal financial reporting process;

(g) Implementation schedule. (1) Each futures commission merchant registered as of December 31, 1994 and subject to the requirements of this section shall maintain and preserve the information required by paragraphs (a)(1)(i) and (a)(1)(ii) of this section commencing April 30, 1995 and the information required by paragraphs (a)(1)(iii) and (a)(1)(iv) of this section commencing May 15, 1995 or, if December 31, 1994 is not the futures commission merchant’s fiscal year-end, 135 calendar days following the first fiscal year-end occurring after December 31, 1994.

(2) Each futures commission merchant whose registration becomes effective after December 31, 1994 and is subject to the requirements of this section shall maintain and preserve the information required by paragraphs (a)(1)(i) and (a)(1)(ii) of this section commencing 60 calendar days after registration becomes effective and the information required by paragraphs (a)(1)(iii) and (a)(1)(iv) of this section commencing 105 calendar days following the first fiscal year-end occurring after registration becomes effective.

[59 FR 66688, Dec. 28, 1994]
(i) Fiscal year-end annual consolidated and consolidating income statements and consolidated cash flow statements for the highest level Material Affiliated Person within the futures commission merchant’s organizational structure, which shall include the futures commission merchant and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated statements shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which consolidated statements shall include appropriate explanatory notes. The consolidating statements may be those prepared by the futures commission merchant’s highest level Material Affiliated Person as part of its internal financial reporting process; and

(ii) Upon receiving written notice from any representative of the Commission and within the time period specified in the written notice, such additional information which the Commission determines is necessary for a complete understanding of a particular affiliate’s financial impact on the futures commission merchant’s organizational structure.

(3) For the purposes of this section, the term Material Affiliated Person shall have the meaning used in §1.14.

(4) The reports required to be filed pursuant to paragraphs (a)(1) and (a)(2) of this section shall be considered filed when received by the regional office of the Commission with whom the futures commission files financial reports pursuant to §1.10.

(b) [Reserved]

(c) Exemptions. (1) The provisions of this section shall not apply to any futures commission merchant which holds funds or property of or for futures customers of less than $6,250,000 and has less than $5,000,000 in adjusted net capital as of the futures commission merchant’s fiscal year-end; provided, however, that such futures commission merchant is not a clearing member of an exchange.

(2) The Commission may, upon written application by a Reporting Futures Commission Merchant, exempt from the provisions of this section, other than paragraph (a)(1)(ii) of this section, either unconditionally or on specified terms and conditions, any futures commission merchant affiliated with such Reporting Futures Commission Merchant. The term “Reporting Futures Commission Merchant” shall mean, in the case of a futures commission merchant that is affiliated with another registered futures commission merchant, the futures commission merchant which maintains the greater amount of net capital as last reported on its financial reports filed with the Commission pursuant to §1.10 unless another futures commission merchant is acting as the Reporting Broker or Dealer under §240.17h–2T of this title or the Commission permits another futures commission merchant to act as the Reporting Futures Commission Merchant. In granting exemptions under this section, the Commission shall consider, among other factors, whether the records and other information required to be maintained pursuant to §1.14 concerning the Material Affiliated Persons of the futures commission merchant affiliated with the Reporting Futures Commission Merchant will be available to the Commission pursuant to the provisions of this section. A request for exemption filed under this paragraph (c)(2) shall explain the basis for the designation of a particular futures commission merchant as the Reporting Futures Commission Merchant and will become effective on the thirtieth day after receipt of such request by the Commission unless the Commission objects to the request by that date. The Reporting Futures Commission Merchant must submit the information required by paragraph (a)(1)(ii) of this section on behalf of its affiliated futures commission merchants.

(3) The Commission may exempt any futures commission merchant from any provision of this section if it finds that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought. The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

(d) Special provisions with respect to Material Affiliated Persons subject to the
supervision of certain domestic regulators.

(1) In the case of a futures commission merchant which is required to file, or has a Material Affiliated Person which is required to file, Form 17-H (or such other forms or reports as may be required) with the Securities and Exchange Commission pursuant to §240.17h–2T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt, such futures commission merchant shall be deemed to be in compliance with the reporting requirements of paragraphs (a)(1)(i) and (a)(2) of this section if the futures commission merchant furnishes, in accordance with paragraph (a)(2) of this section, a copy of the most recent Form 17-H filed by the futures commission merchant or its Material Affiliated Person with the Securities and Exchange Commission, provided however, that if the futures commission merchant has designated any of its affiliated persons as Material Affiliated Persons for purposes of this section and §1.14 which are not designated as Material Affiliated Persons for purposes of the Form 17-H filed pursuant to §§240.17h–1T and 240.17h–2T of this title, the futures commission must also designate any such affiliated person as a Material Affiliated Person on the organizational chart required as Item 1 of part I of Form 17-H. To comply with paragraphs (a)(1)(i) and (a)(2) of this section with respect to the Material Affiliated Person if:

(i) With respect to a Material Affiliated Person organized as a mutual insurance company or a non-public stock company, the futures commission merchant or such Material Affiliated Person maintains in accordance with §1.14 copies of the annual statements with schedules and exhibits prepared by the Material Affiliated Person on forms prescribed by the National Association of Insurance Commissioners or by a state insurance commissioner; and

(ii) With respect to a Material Affiliated Person organized as a public stock company, the futures commission merchant or such Material Affiliated Person maintains, in addition to the annual statements with schedules and exhibits required to be maintained pursuant to §1.14, copies of the filings made by the Material Affiliated Person pursuant to sections 13 or 15 of the Securities Exchange Act of 1934 and the Investment Company Act of 1940.

(2) In the case of a Material Affiliated Person (including a foreign banking organization) that is subject to examination by, or the reporting requirements of, a Federal banking agency, the futures commission merchant shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to such Material Affiliated Person if the futures commission merchant or such Material Affiliated Person maintains in accordance with §1.14 copies of all reports filed by the Material Affiliated Person with the Federal banking agency pursuant to section 5211 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners’ Loan Act, or section 5 of the Bank Holding Company Act of 1956.

(3) In the case of a futures commission merchant that has a Material Affiliated Person that is subject to the supervision of an insurance commissioner or other similar official or agency of a state, such futures commission merchant shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to the Material Affiliated Person if:

(i) With respect to a Material Affiliated Person organized as a mutual insurance company or a non-public stock company, the futures commission merchant or such Material Affiliated Person maintains in accordance with §1.14 copies of the annual statements with schedules and exhibits prepared by the Material Affiliated Person on forms prescribed by the National Association of Insurance Commissioners or by a state insurance commissioner; and

(ii) With respect to a Material Affiliated Person organized as a public stock company, the futures commission merchant or such Material Affiliated Person maintains, in addition to the annual statements with schedules and exhibits required to be maintained pursuant to §1.14, copies of the filings made by the Material Affiliated Person pursuant to sections 13 or 15 of the Securities Exchange Act of 1934 and the Investment Company Act of 1940.

(4) No futures commission merchant shall be required to furnish to the Commission any examination report of any Federal banking agency or any supervisory recommendations or analyses contained therein with respect to a Material Affiliated Person that is subject to the regulation of a Federal banking agency. All information received by the Commission pursuant to this section concerning a Material Affiliated Person that is subject to examination by or the reporting requirements of a Federal banking agency shall be deemed confidential for the purposes of section 8 of the Act.

(5) The furnishing of any information or documents by a futures commission merchant pursuant to this section
§ 1.16 Qualifications and reports of accountants.

(a) Definitions.—(1) Accountant’s report. The term “accountant’s report,” when used in regard to financial statements and schedules, means a document in which an independent licensed or certified public accountant indicates the scope of the audit (or examination) which he has made and sets forth his opinion regarding the financial statements and schedules taken as a whole or an assertion to the fact that an overall opinion cannot be expressed. When an overall opinion cannot be expressed, the reasons therefore must be stated.

(2) Audit or examination. The terms “audit” and “examination,” when used in regard to financial statements and schedules, mean an examination of the statements and schedules by an accountant in accordance with generally accepted auditing standards for the purposes of expressing an opinion thereon.

(3) Certified. The term “certified,” when used in regard to financial statements and schedules, means audited and reported upon with an opinion expressed by an independent certified
public accountant or independent licensed public accountant.

(4) *Customer.* The term “customer” means customer (as defined in §1.3(k)) and includes a foreign futures or foreign options customer (as defined in §30.1(c) of this chapter).

(b) *Qualifications of accountants.* (1) The Commission will recognize any person as a certified public accountant who is duly registered and in good standing as such under the laws of the place of his residence or principal office. The Commission will recognize any person as a licensed public accountant who was duly licensed on or before December 31, 1970, and is in good standing as such under the laws of the place of his residence or principal office.

(2) The Commission will not recognize any certified public accountant or licensed public accountant as independent who is not in fact independent. For example, an accountant will not be considered independent with respect to any applicant or registrant or any parent, subsidiary, or other affiliate of such applicant or registrant in which, during the period of his professional engagement to examine the financial statements and schedules being reported on or at the date of his report, he or his firm or a member thereof had, or was committed to acquire, any direct financial interest or any material indirect financial interest, or (ii) with which, during the period of his professional engagement to examine the financial statements and schedules being reported on, at the date of his report or during the period covered by the financial statements, he or his firm or a member thereof was connected as a promoter, underwriter, voting trustee, director, officer, or employee, except that a firm will be deemed independent with respect to an applicant or registrant and its affiliates if a former employee or officer of such applicant or registrant or any such affiliate is employed by the firm and such individual has completely disassociated himself from the applicant or registrant and its affiliates and does not participate in auditing financial statements and schedules of the applicant or registrant or its affiliates covering any period of his employment by the accountant or registrant or its affiliates. An accountant will not be considered independent if he or his firm or a member thereof performs manual or automated bookkeeping services or assumes responsibility for maintenance of the accounting records, including accounting classification decisions, of such applicant or registrant or any of its affiliates. For the purposes of this §1.16(b), the term “member” means all partners in the firm and all professional employees participating in the audit or located in the office of the firm participating in a significant portion of the audit.

(3) In determining whether an accountant may in fact not be independent with respect to a particular applicant or registrant, the Commission will give appropriate consideration to all relevant circumstances, including evidence bearing on all relationships between the accountant and that applicant or registrant or any affiliate thereof, and will not confine itself to the relationship existing in connection with the filing of reports with the Commission.

(c) *Accountant’s reports.*—(1) *Technical requirements.* The accountant’s report (i) must be dated, (ii) must be signed manually, (iii) must indicate the city and State where issued and (iv) must identify without detailed enumeration the financial statements covered by the report.

(2) *Representations as to the audit.* The accountant’s report (i) must state whether the audit was made in accordance with generally accepted auditing standards, and (ii) must designate any auditing procedures deemed necessary by the accountant under the circumstances of the particular case which have been omitted and the reasons for their omission. However, nothing in this paragraph (c)(2) shall be construed to imply authority for the omission of any procedure which independent accountants would ordinarily employ in the course of an audit made for the purposes of expressing the opinion required by paragraph (c)(3) of this section.

(3) *Opinion to be expressed.* The accountant’s report must state clearly: (i) The opinion of the accountant with respect to the financial statements and
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schedules covered by the report and the accounting principles and practices reflected therein and (ii) the opinion of the accountant as to the consistency of the application of the accounting principles, or as to any changes in such principles which have material effect on the financial statements and schedules.

(4) Exceptions. Any matters to which the accountant takes exception must be clearly identified, such exceptions specifically and clearly stated, and to the extent practicable, the effect of each exception on related financial statements and schedules given.

(5) Accountant’s report on material inadequacies. A registrant must file concurrently with the annual audit report a supplemental report by the accountant describing any material inadequacies found to exist or found to have existed since the date of the previous audit. An applicant must file concurrently with the audit report a supplemental report by the accountant describing any material inadequacies found to exist as of the date of the Form 1–FR being filed: Provided, however, That if such applicant is registered with the Securities and Exchange Commission as a securities broker or dealer, and it files (in accordance with §1.10(h)) a copy of its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part II A, or Part II CSE, in lieu of Form 1–FR, the accountant’s supplemental report must be made as of the date of such report. The supplemental report must indicate any corrective action taken or proposed by the applicant or registrant in regard thereto. If the audit did not disclose any material inadequacies, the supplemental report must so state.

(d) Audit objectives. (1) The audit must be made in accordance with generally accepted auditing standards and must include a review and appropriate tests of the accounting system, the internal accounting control, and the procedures for safeguarding customer and firm assets in accordance with the provisions of the Act and the regulations thereunder, since the prior examination date. The audit must include all procedures necessary under the circumstances to enable the independent licensed or certified public accountant to express an opinion on the financial statements and schedules. The scope of the audit and review of the accounting system, the internal controls, and procedures for safeguarding customer and firm assets must be sufficient to provide reasonable assurance that any material inadequacies existing at the date of the examination in (i) the accounting system, (ii) the internal accounting controls, and (iii) the procedures for safeguarding customer and firm assets (including, in the case of a futures commission merchant, the segregation requirements of section 4d(a)(2) of the Act and these regulations and the secured amount requirements of the Act and these regulations) will be discovered. Additionally, as specified objectives the audit must include reviews of the practices and procedures followed by the registrant in making (A) periodic computations of the minimum financial requirements pursuant to §1.17 and (B) in the case of a futures commission merchant, daily computations of the segregation requirements of section 4d(a)(2) of the Act and these regulations and the secured amount requirements of the Act and these regulations.

(2) A material inadequacy in the accounting system, the internal accounting controls, the procedures for safeguarding customer and firm assets, and the practices and procedures referred to in paragraph (d)(1) of this section which is to be reported in accordance with paragraph (e)(2) of this section includes any conditions which contributed substantially to or, if appropriate corrective action is not taken, could reasonably be expected to:

(i) Inhibit an applicant or registrant from promptly completing transactions or promptly discharging his responsibilities to customers or other creditors;

(ii) Result in material financial loss;

(iii) Result in material misstatement of the applicant’s or registrant’s financial statements and schedules; or

(iv) Result in violations of the Commission’s segregation or secured amount (in the case of a futures commission merchant), recordkeeping or financial reporting requirements to the
extent that could reasonably be expected to result in the conditions described in paragraph (d)(2)(i), (ii), or (iii) of this section.

(e) Extent and timing of audit procedures. (1) The extent and timing of audit procedures are matters for the independent public accountant to determine on the basis of his review and evaluation of existing internal controls and other audit procedures performed in accordance with generally accepted auditing standards and the audit objectives set forth in paragraph (d) of this section. In determining the extent of testing, consideration must be given to the materiality of an area and to the possible effect on the financial statements and schedules of a material misstatement in a related account.

(2) If during the course of an audit or interim work, the independent public accountant determines that any material inadequacies exist in the accounting system, in the internal accounting control, in the procedures for safeguarding customer or firm assets, or as otherwise defined in paragraph (d) of this section, he must call such inadequacies to the attention of the applicant or registrant, which has the responsibility to give notice to the National Futures Association, the designated self-regulatory organization, if any, and every futures commission merchant carrying or intending to carry customer accounts for the introducing introducing broker, within three (3) business days thereafter. Such report from the accountant must, if the applicant or registrant failed to file a notice, describe the material inadequacies found to exist. If the applicant or registrant filed a notice, the accountant must file a report detailing the aspects, if any, of the applicant’s or registrant’s notice with which the accountant does not agree.

(f)(1) Extension of time for filing audited reports. In the event a registered futures commission merchant or a registered introducing broker finds that it cannot file, without substantial undue hardship, its certified financial statements and schedules for any year within the time specified in §1.10(b)(1)(ii) or §1.10(b)(2)(ii) of this part, as applicable, such registrants may request approval for an extension of time, as follows:

(i) Futures commission merchant registrants. (A) A futures commission merchant may file with its designated self-regulatory organization an application for an extension of time, a copy of which the registrant must file with the Commission. The application shall be approved or denied in writing by the designated self-regulatory organization. The registrant must file immediately with the Commission a copy of any notice it receives from the designated self-regulatory organization to approve or deny the registrant’s request for extension of time. A written notice of approval shall become effective upon the filing by the registrant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(B) A futures commission merchant that is registered with the Securities
and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization a copy of any application that the registrant has filed with its designated examining authority, pursuant to §240.17–a5(l)(1) of this title, for an extension of time to file audited annual financial statements. The registrant must also file immediately with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(i).

(C) Any copy that under this paragraph (f)(1)(i) is required to be filed with the Commission shall be filed with the regional office of the Commission with jurisdiction over the state in which the registrant’s principal place of business is located.

(ii) Introducing broker registrants. (A) An introducing broker may file with the National Futures Association an application for extension of time, which shall be approved or denied in writing.

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with the National Futures Association copies of any application that the registrant has filed with its designated examining authority, pursuant to §240.17–a5(l)(1) of this title, for an extension of time to file audited annual financial statements. The registrant must also file immediately with the National Futures Association copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon the receipt by the National Futures Association of a copy of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(i).

(2) Exemption requests. On the written request of any designated self-regulatory organization or registrant, or on its own motion, the Commission may grant an extension of time or an exemption from any of the certified financial reporting requirements of this chapter either unconditionally or on specified terms and conditions.

(g) Replacement of accountant. (1) In the event (i) the independent public accountant who was previously engaged as the principal accountant to audit an applicant’s or registrant’s financial statements resigns (or indicates he declines to stand for re-election after the completion of the current audit) or is dismissed as the applicant’s or registrant’s principal accountant, (ii) another independent accountant is engaged as principal accountant, or (iii) an independent accountant on whom the principal accountant expresses reliance in his report regarding a subsidiary resigns (or formally indicates he declines to stand for re-election after completion of the current audit) or is dismissed or another independent public accountant is engaged to audit that subsidiary, an applicant shall file written notice of such occurrence with the National Futures Association, and a registrant shall file written notice of such occurrence with the Commission at its principal office in Washington, DC, and with the designated self-regulatory organization, if any, not more than 15 business days after such occurrence.

(2) Such notice must state (i) the date of such resignation (or declination to stand for re-election, dismissal or engagement) and (ii) whether, in connection with the audit of the two most recent fiscal years and any subsequent interim period preceding such resignation, dismissal or engagement, there were any disagreements with the former accountant on any matter of accounting principles or practices, financial statements disclosure, auditing scope or procedures, or compliance with the applicable rules of the Commission, which, if not resolved to the satisfaction of the former accountant, would have caused him to make reference in connection with his report to the subject matter of the disagreements (if so, describe such disagreements). The disagreements required to be reported in this paragraph (g)(2) include both those resolved to the former
accountant’s satisfaction and those not resolved to the former accountant’s satisfaction. Disagreements contemplated by this paragraph (g)(2) are those which occur at the decision-making level, i.e., between personnel of the applicant or registrant responsible for presentation of its financial statements and schedules and personnel of the accounting firm responsible for rendering its report. The notice must also state whether the accountant’s report on the financial statements and schedules for any of the past two years contained an adverse opinion or a disclaimer of opinion or was qualified as to uncertainties, audit scope, or accounting principles (if so, describe the nature of each such adverse opinion, disclaimer of opinion, or qualification).

An applicant must also request the former accountant to furnish the applicant with a letter addressed to the National Futures Association, and a registrant must also request the former accountant to furnish the registrant with a letter addressed to the Commission, stating whether he agrees with the statements contained in the notice of the applicant or registrant and, if not, stating the respects in which he does not agree. Each copy of the notice and accountant’s letter must be manually signed by the sole proprietor or a general partner or a duly authorized corporate officer of the applicant or registrant, as appropriate, and by the accountant.

(3) If (i) within the 24 months prior to the date of the most recent audited financial statement, a notice has been filed pursuant to paragraph (g)(1) of this section reporting a change of accountants, (ii) included in such filing there is a reported disagreement on any matters of accounting principles or practices, financial statements disclosure, auditing scope, or noncompliance with the applicable rules of the Commission, (iii) during the fiscal year in which the change in accountants took place or during the subsequent fiscal year, there have been any transactions or events similar to those which involved a reported disagreement, and (iv) such transactions or events are material and were accounted for or disclosed in a manner different from that which the former accountant apparently would have concluded was required, the existence and nature of the disagreements and also the effect on the financial statements must be stated in a written notice to the National Futures Association, in the case of an applicant, or to the Commission at its principal office in Washington, DC, and the designated self-regulatory organization, if any, in the case of a registrant, if the method which the former accountant apparently would have concluded was required had been followed. These disclosures need not be made if the method asserted by the former accountant ceases to be generally accepted because of authoritative standards or interpretations subsequently issued. The notice required by this paragraph (g)(3) must be filed by the applicant or registrant concurrently with the financial statements and schedules to which it pertains.

(h) Exemption for introducing broker or applicant therefor. The provisions of this section do not apply to an introducing broker which is operating pursuant to a guarantee agreement, nor do such provisions apply to an applicant for registration as an introducing broker who files concurrently with such application a guarantee agreement, provided such introducing broker or applicant therefor is not also a securities broker or dealer.
risk margin requirement for positions carried by the futures commission merchant in customer accounts and non-customer accounts.

(C) The amount of adjusted net capital required by a registered futures association of which it is a member; or

(D) For securities brokers and dealers, the amount of net capital required by Rule 15c3-1(a) of the Securities and Exchange Commission (17 CFR 240.15c3-1(a)).

(ii) [Reserved]

(iii) Except as provided in paragraph (a)(2) of this section, each person registered as an introducing broker must maintain adjusted net capital equal to or in excess of the greatest of:

(A) $45,000;
(B) The amount of adjusted net capital required by a registered futures association of which it is a member; or
(C) For securities brokers and dealers, the amount of net capital required by Rule 15c3-1(a) of the Securities and Exchange Commission (17 CFR 240.15c3-1(a)).

(2)(i) The requirements of paragraph (a)(1) of this section shall not be applicable if the registrant is a member of a designated self-regulatory organization and conforms to minimum financial standards and related reporting requirements set by such designated self-regulatory organization in its bylaws, rules, regulations or resolutions approved by the Commission pursuant to section 4f(b) of the Act and § 1.52.

(ii) The minimum requirements of paragraph (a)(1)(ii) of this section shall not be applicable to an introducing broker which elects to meet the alternative adjusted net capital requirement for introducing brokers by operation pursuant to a guarantee agreement which meets the requirements set forth in § 1.10(j). Such an introducing broker shall be deemed to meet the adjusted net capital requirement under this section so long as such agreement is binding and in full force and effect, and, if the introducing broker is also a securities broker or dealer, it maintains the amount of net capital required by Rule 15c3-1(a) of the Securities and Exchange Commission (17 CFR 240.15c3-1(a)).

(3) No person applying for registration as a futures commission merchant or as an introducing broker shall be so registered unless such person affirmatively demonstrates to the satisfaction of the National Futures Association that it complies with the financial requirements of this section. Each registrant must be in compliance with this section at all times and must be able to demonstrate such compliance to the satisfaction of the Commission or the designated self-regulatory organization.

(4) A futures commission merchant who is not in compliance with this section, or is unable to demonstrate such compliance as required by paragraph (a)(3) of this section, must transfer all customer accounts and immediately cease doing business as a futures commission merchant until such time as the firm is able to demonstrate such compliance: Provided, however, The registrant may trade for liquidation purposes only unless otherwise directed by the Commission and/or the designated self-regulatory organization: And, Provided further, That if such registrant immediately demonstrates to the satisfaction of the Commission or the designated self-regulatory organization the ability to achieve compliance, the Commission or the designated self-regulatory organization may in its discretion allow such registrant up to a maximum of 10 business days in which to achieve compliance without having to transfer accounts and cease doing business as required above. Nothing in this paragraph (a)(4) shall be construed as preventing the Commission or the designated self-regulatory organization from taking action against a registrant for non-compliance with any of the provisions of this section.

(5) An introducing broker who is not in compliance with this section, or is unable to demonstrate such compliance as required by paragraph (a)(3) of this section, must immediately cease doing business as an introducing broker until such time as the registrant is able to demonstrate such compliance: Provided, however, That if such registrant immediately demonstrates to the satisfaction of the Commission or the designated self-regulatory organization the ability to achieve compliance, the Commission or
the designated self-regulatory organization may in its discretion allow such registrant up to a maximum of 10 business days in which to achieve compliance without having to cease doing business as required above. If the introducing broker is required to cease doing business in accordance with this paragraph (a)(5), the introducing broker must immediately notify each of its customers and the futures commission merchants carrying the account of each customer that it has ceased doing business. Nothing in this paragraph (a)(5) shall be construed as preventing the Commission or the designated self-regulatory organization from taking action against a registrant for non-compliance with any of the provisions of this section.

(b) For the purposes of this section:

(1) Where the applicant or registrant has an asset or liability which is defined in Securities Exchange Act Rule 15c3–1 (§240.15c3–1 of this title) the inclusion or exclusion of all or part of such asset or liability for the computation of adjusted net capital shall be in accordance with §240.15c3–1 of this title, unless specifically stated otherwise in this section.

(2) Customer means customer (as defined in §1.3(k)), option customer (as defined in §1.3(jj) and in §32.1(c) of this chapter), cleared over the counter customer (as defined in §1.17(b)(10)), and includes a foreign futures, foreign options customer (as defined in §30.1(c) of this chapter).

(3) Proprietary account means an account in which commodity futures, options or cleared over the counter derivative positions are carried on the books of the applicant or registrant itself, or for general partners in the applicant or registrant.

(4) Noncustomer account means an account in which commodity futures, options or cleared over the counter derivative positions are carried on the books of the applicant or registrant which is either:

(i) An account that is not included in the definition of customer (as defined in §1.17(b)(2)) or proprietary account (as defined in §1.17(b)(3)), or

(ii) An account for a foreign-domiciled person trading futures or options on a foreign board of trade, and such account is a proprietary account as defined in §1.3(y) of this title, but is not a proprietary account as defined in §1.17(b)(3).

(5) Clearing organization means clearing organization (as defined in §1.3(d)) and includes a clearing organization of any board of trade.

(6) Business day means any day other than a Sunday, Saturday, or holiday.

(7) Customer account means an account in which commodity futures, options or cleared over the counter derivative positions are carried on the books of the applicant or registrant which is either:

(i) An account that is included in the definition of customer (as defined in §1.17(b)(2)), or

(ii) An account for a foreign-domiciled person trading on a foreign board of trade, where such account for the foreign-domiciled person is not a proprietary account (as defined in §1.17(b)(3)) or a noncustomer account (as defined in §1.17(b)(4)(ii)).

(8) Risk margin for an account means the level of maintenance margin or performance bond required for the customer or noncustomer positions by the applicable exchanges or clearing organizations, and, where margin or performance bond is required only for accounts at the clearing organization, for purposes of the FCM’s risk-based capital calculations applying the same margin or performance bond requirements to customer and noncustomer positions in accounts carried by the FCM, subject to the following.

(i) Risk margin does not include the equity component of short or long option positions maintained in an account;

(ii) The maintenance margin or performance bond requirement associated with a long option position may be excluded from risk margin to the extent that the value of such long option position does not reduce the total risk maintenance or performance bond requirement of the account that holds the long option position;

(iii) The risk margin for an account carried by a futures commission merchant which is not a member of the exchange or the clearing organization that requires collection of such margin
should be calculated as if the futures commission merchant were such a member; and

(iv) If a futures commission merchant does not possess sufficient information to determine what portion of an account’s total margin requirement represents risk margin, all of the margin required by the exchange or the clearing organization that requires collection of such margin for that account, shall be treated as risk margin.

(b) Cleared over the counter derivative positions means “over the counter derivative instrument” (as defined in 12 U.S.C. 4421) positions of any person in accounts carried on the books of the futures commission merchant and cleared by any organization permitted to clear such instruments under the laws of the relevant jurisdiction.

(c) Definitions: For the purposes of this section:

(1) Net capital means the amount by which current assets exceed liabilities. In determining “net capital”:

(i) Unrealized profits shall be added and unrealized losses shall be deducted in the accounts of the applicant or registrant, including unrealized profits and losses on fixed price commitments and forward contracts;

(ii) All long and all short positions in commodity options which are traded on a contract market and listed security options shall be marked to their market value and all long and all short securities and commodities positions shall be marked to their market value;

(iii) The value attributed to any commodity option which is not traded on a contract market shall be the difference between the option’s strike price and the market value for the commodity or futures contract which is the subject of the option. In the case of a call commodity option which is not traded on a contract market, if the market value for the commodity or futures contract which is the subject of the option is more than the strike price of the option, it shall be given no value; and

(iv) The value attributed to any unlisted security option shall be the difference between the option’s exercise value or striking value and the market value of the underlying security. In the case of an unlisted call, if the market value of the underlying security is less than the exercise value or striking value of such call, it shall be given no value; and, in the case of an unlisted put, if the market value of the underlying security is more than the exercise value or striking value of the unlisted put, it shall be given no value.

(2) The term current assets means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold during the next 12 months. “Current assets” shall:

(i) Exclude any unsecured commodity futures or option account containing a ledger balance and open trades, the combination of which liquidates to a deficit or containing a debit ledger balance only: Provided, however, Deficits or debit ledger balances in unsecured customers’, non-customers’, and proprietary accounts, which are the subject of calls for margin or other required deposits may be included in current assets until the close of business on the business day following the date on which such deficit or debit ledger balance originated providing that the account had timely satisfied, through the deposit of new funds, the previous day’s debit or deficits, if any, in its entirety.

(ii) Exclude all unsecured receivables, advances and loans except for:

(A) Receivables resulting from the marketing of inventories commonly associated with the business activities of the applicant or registrant and advances on fixed price purchases commitments: Provided, Such receivables or advances are outstanding no longer than 3 calendar months from the date that they are accrued.
(B) Interest receivable, floor brokerage receivable, commissions receivable from other brokers or dealers (other than syndicate profits), mutual fund concessions receivable and management fees receivable from registered investment companies and commodity pools: Provided, Such receivables are outstanding no longer than thirty (30) days from the date they are due; and dividends receivable outstanding no longer than thirty (30) days from the payable date;

(C) Receivables from clearing organizations and securities clearing organizations;

(D) Receivables from registered futures commission merchants or brokers, resulting from commodity futures or option transactions, except those specifically excluded under paragraph (c)(2)(i) of this section;

(E) Insurance claims which arise from a reportable segment of the applicant’s or registrant’s overall business activities, as defined in generally accepted accounting principles, other than in the commodity futures, commodity option, security and security option segments of the applicant’s or registrant’s business activities which are not outstanding more than 3 calendar months after the date they are recorded as a receivable;

(F) All other insurance claims not subject to paragraph (c)(2)(i)(E) of this section, which are not older than seven (7) business days from the date the loss giving rise to the claim is discovered; insurance claims which are not older than twenty (20) business days from the date the loss giving rise to the claim is discovered and which are covered by an opinion of outside counsel that the claim is valid and is covered by insurance policies presently in effect; insurance claims which are older than twenty (20) business days from the date the loss giving rise to the claim is discovered and which are covered by an opinion of outside counsel that the claim is valid and is covered by insurance policies presently in effect and which have been acknowledged in writing by the insurance carrier as due and payable: Provided, Such claims are not outstanding longer than twenty (20) business days from the date they are so acknowledged by the carrier;

(iii) Exclude all prepaid expenses and deferred charges;

(iv) Exclude all inventories except for:

(A) Readily marketable spot commodities; or spot commodities which “adequately collateralize” indebtedness under paragraph (c)(7) of this section;

(B) Securities which are considered “readily marketable” (as defined in §240.15c3–1(c)(11) of this title) or which “adequately collateralize” indebtedness under paragraph (c)(7) of this section;

(C) Work in process and finished goods which result from the processing of commodities at market value;

(D) Raw materials at market value which will be combined with spot commodities to produce a finished processed commodity; and

(E) Inventories held for resale commonly associated with the business activities of the applicant or registrant;

(v) Include fixed assets and assets which otherwise would be considered noncurrent to the extent of any long-term debt adequately collateralized by assets acquired for use in the ordinary course of the trade or business of an applicant or registrant and any other long-term debt adequately collateralized by assets of the applicant or registrant if the sole recourse of the creditor for nonpayment of such liability is to such asset: Provided, Such liabilities are not excluded from liabilities in the computation of net capital under paragraph (c)(4)(vi) of this section;

(vi) Exclude all assets doubtful of collection or realization less any reserves established therefor;

(vii) Include, in the case of future income tax benefits arising as a result of unrealized losses, the amount of such benefits not exceeding the amount of income tax liabilities accrued on the books and records of the applicant or registrant, but only to the extent such benefits could have been applied to reduce accrued tax liabilities on the date of the capital computation, had the related unrealized losses been realized on that date;

(viii) Include guarantee deposits with clearing organizations and stock in
clearing organizations to the extent of its margin value;

(ix) In the case of an introducing broker or an applicant for registration as an introducing broker, include 50 percent of the value of a guarantee or security deposit with a futures commission merchant which carries or intends to carry accounts for the customers of the introducing broker; and

(x) Exclude exchange memberships.

(3) A loan or advance or any other form of receivable shall not be considered “secured” for the purposes of paragraph (c)(2) of this section unless the following conditions exist:

(i) The receivable is secured by readily marketable collateral which is otherwise unencumbered and which can be readily converted into cash: Provided, however, That the receivable will be considered secured only to the extent of the market value of such collateral after application of the percentage deductions specified in paragraph (c)(5) of this section; and

(ii) (A) The readily marketable collateral is in the possession or control of the applicant or registrant; or

(B) The applicant or registrant has a legally enforceable, written security agreement, signed by the debtor, and has a perfected security interest in the readily marketable collateral within the meaning of the laws of the State in which the readily marketable collateral is located.

(4) The term liabilities means the total money liabilities of an applicant or registrant arising in connection with any transaction whatsoever, including economic obligations of an applicant or registrant that are recognized and measured in conformity with generally accepted accounting principles. “Liabilities” also include certain deferred credits that are not obligations but that are recognized and measured in conformity with generally accepted accounting principles. For the purposes of computing “net capital”, the term “liabilities”:

(i) Excludes liabilities of an applicant or registrant which are subordinated to the claims of all general creditors of the applicant or registrant pursuant to a satisfactory subordination agreement, as defined in paragraph (h) of this section; and

(ii) Excludes, in the case of a futures commission merchant, the amount of money, securities and property due to commodity futures or option customers which is held in segregated accounts in compliance with the requirements of the Act and these regulations: Provided, however, That such exclusion may be taken only if such money, securities and property held in segregated accounts have been excluded from current assets in computing net capital;

(iii) Includes, in the case of an applicant or registrant who is a sole proprietor, the excess of liabilities which have not been incurred in the course of business as a futures commission merchant or as an introducing broker over assets not used in the business;

(iv) Excludes the lesser of any deferred income tax liability related to the items in paragraphs (c)(4)(i) (A), (B), and (C) below, or the sum of paragraphs (c)(4)(i) (A), (B), and (C) below:

(A) The aggregate amount resulting from applying to the amount of the deductions computed in accordance with paragraph (c)(5) of this section the appropriate Federal and State tax rate(s) applicable to any unrealized gain on the asset on which the deduction was computed;

(B) Any deferred tax liability related to income accrued which is directly related to an asset otherwise deducted pursuant to this section;

(C) Any deferred tax liability related to unrealized appreciation in value of any asset(s) which has been otherwise excluded from current assets in accordance with the provisions of this section;

(v) Excludes any current tax liability related to income accrued which is directly related to an asset otherwise deducted pursuant to this section; and

(vi) Excludes liabilities which would be classified as long term in accordance with generally accepted accounting principles to the extent of the net book value of plant, property and equipment which is used in the ordinary course of any trade or business of the applicant or registrant which is a reportable segment of the applicant’s or registrant’s overall business activities, as defined in generally accepted accounting principles, other than in...
the commodity futures, commodity option, security and security option segments of the applicant's or registrant's business activities: Provided, That such plant, property and equipment is not included in current assets pursuant to paragraph (c)(2)(v) of this section.

(5) The term "adjusted net capital" means net capital less:

(i) The amount by which any advances paid by the applicant or registrant on cash commodity contracts and used in computing net capital exceeds 95 percent of the market value of the commodities covered by such contracts;

(ii) In the case of all inventory, fixed price commitments and forward contracts, the applicable percentage of the net position specified below:

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

(B) Inventory which is covered by an open futures contract or commodity option.—5 percent of the market value.

(C) Inventory which is not covered.—20 percent of the market value.

(D) Inventory and forward contracts in those foreign currencies that are purchased or sold for future delivery on or subject to the rules of a contract market, and which are covered by an open futures contract.—No charge.

(E) Inventory and forward contracts in euros, British pounds, Canadian dollars, Japanese yen, or Swiss francs, and which are not covered by an open futures contract or commodity option.—6 percent of the market value.

(F) Fixed price commitments (open purchases and sales) and forward contracts which are covered by an open futures contract or commodity option.—10 percent of the market value.

(G) Fixed price commitments (open purchases and sales) and forward contracts which are not covered by an open futures contract or commodity option.—20 percent of the market value.

(iii)-(iv) [Reserved]

(v) In the case of securities and obligations used by the applicant or registrant in computing net capital, and in the case of a futures commission merchant with securities in segregation pursuant to section 4(d)(2) of the Act and the regulations in this chapter which were not deposited by customers, the percentages specified in Rule 240.15c3-1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3-1(c)(2)(vi)) ("securities haircuts") and 100 percent of the value of "nonmarketable securities" as specified in Rule 240.15c3-1(c)(2)(vii) of the Securities and Exchange Commission (17 CFR 240.15c3-1(c)(2)(vii));

(vi) In the case of securities options and/or other options for which a haircut has been specified for the option or for the underlying instrument in §240.15c3-1 appendix A of this title, the treatment specified in, or under, §240.15c3-1 appendix A, after effecting certain adjustments to net capital for listed and unlisted options as set forth in such appendix;

(vii) In the case of an applicant or registrant who has open contractual commitments, as hereinafter defined, the deductions specified in §240.15c3-1(c)(2)(viii) of this title;

(viii) In the case of a futures commission merchant, for undermargined customer commodity futures accounts and commodity option customer accounts the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or if there are no such maintenance margin requirements, clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding three business days or less. If there are no such maintenance margin requirements or clearing organization margin requirements, then the amount of funds required to provide margin equal to the amount necessary after application of calls for margin or other required deposits which are outstanding three business days or less to restore original margin when the original margin has been depleted by 50 percent or more: Provided, To the extent a deficit is excluded from current assets in accordance with paragraph (c)(2)(i) of this section such amount shall not also be deducted under this paragraph (c)(5)(viii). In the event that an owner of a customer account has deposited an
asset other than cash to margin, guarantee or secure his account, the value attributable to such asset for purposes of this subparagraph shall be the lesser of (A) the value attributable to the asset pursuant to the margin rules of the applicable board of trade, or (B) the market value of the asset after application of the percentage deductions specified in this paragraph (c)(5);

(ix) In the case of a futures commission merchant, for undermargined commodity futures and commodity option noncustomer and omnibus accounts the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or if there are no such maintenance margin requirements, clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding two business days or less. If there are no such maintenance margin requirements, clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding two business days or less. If there are no such maintenance margin requirements, clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding two business days or less, then the amount of funds required to provide margin equal to the amount necessary after application of calls for margin or other required deposits outstanding two business days or less to restore original margin when the original margin has been depleted by 50 percent or more: Provided, To the extent a deficit is excluded from current assets in accordance with paragraph (c)(2)(i) of this section such amount shall not also be deducted under this paragraph (c)(5)(ix). In the event that an owner of a noncustomer or omnibus account has deposited an asset other than cash to margin, guarantee or secure his account the value attributable to such asset for purposes of this subparagraph shall be the lesser of (A) the value attributable to such asset pursuant to the margin rules of the applicable board of trade, or (B) the market value of such asset after application of the percentage deductions specified in this paragraph (c)(5);

(x) In the case of open futures contracts or cleared OTC derivative positions and granted (sold) commodity options held in proprietary accounts carried by the applicant or registrant which are not covered by a position held by the applicant or registrant or which are not the result of a “changer trade” made in accordance with the rules of a contract market:

(A) For an applicant or registrant which is a clearing member of a clearing organization for the positions cleared by such member, the applicable margin requirement of the applicable clearing organization;

(B) For an applicant or registrant which is a member of a self-regulatory organization 150 percent of the applicable maintenance margin requirement of the applicable board of trade, or clearing organization, whichever is greater;

(C) For all other applicants or registrants, 200 percent of the applicable maintenance margin requirements of the applicable board of trade or clearing organization, whichever is greater;

or

(D) For open contracts or granted (sold) commodity options for which there are no applicable maintenance margin requirements, 200 percent of the applicable initial margin requirement: Provided, The equity in any such proprietary account shall reduce the deduction required by this paragraph (c)(5)(x) if such equity is not otherwise includable in adjusted net capital;

(xi) In the case of an applicant or registrant which is a purchaser of a commodity option not traded on a contract market which has value and such value is used to increase adjusted net capital, ten percent of the market value of the commodity or futures contract which is the subject of such option but in no event more than the value attributed to such option;

(xii) In the case of an applicant or registrant which is a purchaser of a commodity option which is traded on a contract market the same safety factor as if the applicant or registrant were the grantor of such option in accordance with paragraph (c)(5)(x) of this section, but in no event shall the safety factor be greater than the market value attributed to such option;

(xiii) Five percent of all unsecured receivables includable under paragraph (c)(2)(ii)(D) of this section used by the applicant or registrant in computing “net capital” and which are not due from:
(A) A registered futures commission merchant;
(B) A broker or dealer that is registered as such with the Securities and Exchange Commission; or
(C) A foreign broker that has been granted comparability relief pursuant to §30.10 of this chapter, Provided, however, that the amount of the unsecured receivable not subject to the five percent capital charge is no greater than 150 percent of the current amount required to maintain futures and option positions in accounts with the foreign broker, or 100 percent of such greater amount required to maintain futures and option positions in the accounts at any time during the previous six-month period, and Provided, that, in the case of the foreign futures or foreign options secured amount, as §1.3(rr) defines such term, such account is treated in accordance with the special requirements of the applicable Commission order issued under §30.10 of this chapter.

(xiv) For securities brokers and dealers, all other deductions specified in §240.15c3–1 of this title.

(6) Election of alternative capital deductions that have received approval of Securities and Exchange Commission pursuant to §240.15c3–1(a)(7) of this title.

(i) Any futures commission merchant that is also registered with the Securities and Exchange Commission as a securities broker or dealer, and who also satisfies the other requirements of this paragraph (c)(6), may elect to compute its adjusted net capital using the alternative capital deductions that, under §240.15c3–1(a)(7) of this title, the Securities and Exchange Commission has approved by written order. To the extent that a futures commission merchant is permitted by the Securities and Exchange Commission to use alternative capital deductions for its unsecured receivables from over-the-counter derivatives transactions; by paragraph (c)(5)(ii) of this section for its proprietary positions in forward contracts; by paragraph (c)(5)(v) of this section for its proprietary positions in securities; and by paragraph (c)(5)(x) of this section for its proprietary positions in futures contracts.

(ii) Notifications of election or of changes to election. (A) No election to use the alternative market risk and credit risk deductions referenced in paragraph (c)(6)(i) of this section shall be effective unless and until the futures commission merchant has filed with the Commission, addressed to the Director of the Division of Clearing and Intermediary Oversight, a notice that is to include a copy of the approval order of the Securities and Exchange Commission referenced in paragraph (c)(6)(i) of this section, and to include also a statement that identifies the amount of tentative net capital below which the futures commission merchant is required to provide notice to the Securities and Exchange Commission, and which also provides the following information: a list of the categories of positions that the futures commission merchant holds in its proprietary accounts, and, for each such category, a description of the methods that the futures commission merchant will use to calculate its deductions for market risk and credit risk, and also, if calculated separately, deductions for specific risk; a description of the value at risk (VaR) models to be used for its market risk and credit risk deductions, and an overview of the integration of the models into the internal risk management control system of the futures commission merchant; a description of how the futures commission merchant will determine internal credit ratings of counterparties and internal credit risk weights of counterparties, if applicable; and a description of the estimated effect of the alternative market risk and credit risk deductions on the amounts reported by the futures commission merchant.
commission merchant as net capital and adjusted net capital.

(B) A futures commission merchant must also, upon the request of the Commission at any time, supplement the statement described in paragraph (c)(6)(ii)(A) of this section, by providing any other explanatory information regarding the computation of its alternative market risk and credit risk deductions as the Commission may require at its discretion.

(C) A futures commission merchant must also file the following supplemental notices with the Director of the Division and Clearing and Intermediary Oversight:

(1) A notice advising that the Securities and Exchange Commission has imposed additional or revised conditions for the approval evidenced by the order referenced in paragraph (c)(6)(i) of this section, and which describes the new or revised conditions in full, and

(2) A notice which attaches a copy of any approval by the Securities and Exchange Commission of amendments that a futures commission merchant has requested for its application, filed under 17 CFR 240.15c3–1e, to use alternative market risk and credit risk deductions approved by the Securities and Exchange Commission.

(D) A futures commission merchant may voluntarily change its election to use the alternative market risk and credit risk deductions referenced in paragraph (c)(6)(i) of this section, by filing with the Director of the Division of Clearing and Intermediary Oversight a written notice specifying a future date as of which it will no longer use the alternative market risk and credit risk deductions, and will instead compute such deductions in accordance with the requirements otherwise applicable under paragraph (c)(2)(ii) of this section for unsecured receivables from over-the-counter derivatives transactions; by paragraph (c)(5)(ii) of this section for proprietary positions in forward contracts; by paragraph (c)(5)(v) of this section for proprietary positions in securities; and by paragraph (c)(5)(x) of this section for proprietary positions in futures contracts, upon the occurrence of any of the following:

(A) The Securities and Exchange Commission revokes its approval of the market risk and credit risk deductions for such futures commission merchant;

(B) A futures commission merchant fails to come into compliance with its filing requirements under this paragraph (c)(6), after having received from the Director of the Division of Clearing and Intermediary Oversight written notification that the firm is not in compliance with its filing requirements, and must cease using alternative capital deductions permitted under this paragraph (c)(6) if it has not come into compliance by a date specified in the notice; or

(C) The Commission by written order finds that permitting the futures commission merchant to continue to use such alternative market risk and credit risk deductions is no longer necessary or appropriate for the protection of customers of the futures commission merchant or of the integrity of the futures or options markets.

(iv) Additional filing requirements. Any futures commission merchant that elects to use the alternative market risk and credit risk deductions referenced in paragraph (c)(6)(i) of this section must file with the Commission, in addition to the filings required by paragraph (c)(6)(ii) of this section, copies of any and all of the following documents, at such time as the originals are filed with the Securities and Exchange Commission:

(A) Information that the futures commission merchant files on a monthly basis with its designated examining authority or the Securities and Exchange Commission, whether by
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way of schedules to its FOCUS reports or by other filings, in satisfaction of 17 CFR 240.17a–5(a)(5)(i);

(B) The quarterly reports required by 17 CFR 240.17a–5(a)(5)(ii);

(C) The supplemental annual filings as required by 17 CFR 240.17a–9(k);

(D) Any notification to the Securities and Exchange Commission or the futures commission merchant’s designated examining authority of planned withdrawals of excess net capital; and

(E) Any notification that the futures commission merchant is required to file with the Securities and Exchange Commission when its tentative net capital is below an amount specified by the Securities and Exchange Commission.

(7) Liabilities are “adequately collateralized” when, pursuant to a legally enforceable written instrument, such liabilities are secured by identified assets that are otherwise unencumbered and the market value of which exceeds the amount of such liabilities.

(8) The term contractual commitments shall include underwriting, when issued, when distributed, and delayed delivery contracts; and the writing or endorsement of security puts and calls and combinations thereof; but shall not include uncleared regular way purchases and sales of securities. A series of contracts of purchase or sale of the same security, conditioned, if at all, only upon issuance, may be treated as an individual commitment.

(d) Each applicant or registrant shall have equity capital (inclusive of satisfactory subordination agreements which qualify under this paragraph (d) as equity capital) of not less than 30 percent of the debt-equity total, provided, an applicant or registrant may be exempted from the provisions of this paragraph (d) for a period not to exceed 90 days or for such longer period which the Commission may, upon application of the applicant or registrant, grant in the public interest or for the protection of investors. For the purposes of this paragraph (d):

(1) Equity capital means a satisfactory subordination agreement entered into by a partner or stockholder or limited liability company member which has an initial term of at least 3 years and has a remaining term of not less than 12 months if:

(i) It does not have any of the provisions for accelerated maturity provided for by paragraphs (h)(2) (ix)(A), (x)(A), or (x)(B) of this section, or the provisions allowing for special prepayment provided for by paragraph (h)(2)(vii)(B) of this section, and is maintained as capital subject to the provisions restricting the withdrawal thereof required by paragraph (e) of this section; or

(ii) The partnership agreement provides that capital contributed pursuant to a satisfactory subordination agreement as defined in paragraph (h) of this section shall in all respects be partnership capital subject to the provisions restricting the withdrawal thereof required by paragraph (e) of this section, and

(A) In the case of a corporation, the sum of its par or stated value of capital stock, paid in capital in excess of par, retained earnings, unrealized profit and loss, and other capital accounts.

(B) In the case of a partnership, the sum of its capital accounts of partners (inclusive of such partners’ commodities, options and securities accounts subject to the provisions of paragraph (e) of this section), and unrealized profit and loss.

(C) In the case of a sole proprietorship, the sum of its capital accounts of the sole proprietorship and unrealized profit and loss.

(D) In the case of a limited liability company, the sum of its capital accounts of limited liability company members, and unrealized profit and loss.

(2) Debt-equity total means equity capital as defined in paragraph (d)(1) of this section plus the outstanding principal amount of satisfactory subordination agreements.

(e) No equity capital of the applicant or registrant or a subsidiary’s or affiliate’s equity capital consolidated pursuant to paragraph (f) of this section, whether in the form of capital contributions by partners (including amounts in the commodities, options and securities trading accounts of partners which are treated as equity capital but excluding amounts in such
trading accounts which are not equity capital and excluding balances in limited partners' capital accounts in excess of their stated capital contributions, par or stated value of capital stock, paid-in capital in excess of par or stated value, retained earnings or other capital accounts, may be withdrawn by action of a stockholder or partner or limited liability company member or by redemption or repurchase of shares of stock by any of the consolidated entities or through the payment of dividends or any similar distribution, nor may any unsecured advance or loan be made to a stockholder, partner, sole proprietor, limited liability company member, or employee if, after giving effect thereto and to any other such withdrawals, advances or payments of payment obligations (as defined in paragraph (h) of this section) under satisfactory subordination agreements and any payments of liabilities excluded pursuant to paragraph (c)(4)(vi) of this section which are scheduled to occur within six months following such withdrawal, advance or loan:

(1) Either adjusted net capital of any of the consolidated entities would be less than the greatest of:
   (i) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(ii)(A) of this section;
   (ii) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

(2) In the case of any applicant or registrant included within such consolidation, if equity capital of the applicant or registrant (inclusive of satisfactory subordination agreements which qualify as equity under paragraph (d) of this section) would be less than 30 percent of the required debt-equity total as defined in paragraph (d) of this section.

Provided, That this paragraph (e) shall not preclude an applicant or registrant from making required tax payments or preclude the payment to partners of reasonable compensation. The Commission may, upon application of the applicant or registrant, grant relief from this paragraph (e) if the Commission deems it to be in the public interest or for the protection of nonproprietary accounts:

(f)(1) Every applicant or registrant, in computing its net capital pursuant to this section must, subject to the provisions of paragraphs (f)(2) and (f)(4) of this section, consolidate in a single computation, assets and liabilities of any subsidiary or affiliate for which it guarantees, endorses, or assumes directly or indirectly the obligations or liabilities. The assets and liabilities of a subsidiary or affiliate whose liabilities and obligations have not been guaranteed, endorsed, or assumed directly or indirectly by the applicant or registrant may also be so consolidated if an opinion of counsel is obtained as provided for in paragraph (f)(2) of this section.

(f)(2)(i) If the consolidation, provided for in paragraph (f)(1) of this section, of any such subsidiary or affiliate results in the increase of the applicant's or registrant's adjusted net capital or decreases the minimum adjusted net capital requirement, and an opinion of counsel called for in paragraph (f)(2)(ii) of this section has not been obtained, such benefits shall not be recognized in the applicant's or registrant's computation required by this section.

(f)(2)(ii) Except as provided for in paragraph (f)(2)(i) of this section, consolidation shall be permitted with respect to any subsidiaries or affiliates which are majority owned and controlled by the applicant or registrant, and for which the applicant can demonstrate to the satisfaction of the National Futures Association, or for which the registrant can demonstrate to the satisfaction of the Commission and the designated self-regulatory organization, that the net asset values or the portion thereof related to the parent's ownership interest in the subsidiary or affiliate, may
be caused by the applicant or registrant or an appointed trustee to be distributed to the applicant or registrant within 30 calendar days. Such opinion must also set forth the actions necessary to cause such a distribution to be made, identify the parties having the authority to take such actions, identify and describe the rights of other parties or classes of parties, including but not limited to customers, general creditors, subordinated lenders, minority shareholders, employees, litigants, and governmental or regulatory authorities, who may delay or prevent such a distribution and such other assurances as the National Futures Association, the Commission or the designated self-regulatory organization by rule or interpretation may require. Such opinion must be current and periodically renewed in connection with the applicant’s or registrant’s annual audit pursuant to §1.10 or upon any material change in circumstances.

(3) In preparing a consolidated computation of adjusted net capital pursuant to this section, the following minimum and non-exclusive requirements shall be observed:

(i) Consolidated adjusted net capital shall be reduced by the estimated amount of any tax reasonably anticipated to be incurred upon distribution of the assets of the subsidiary or affiliate.

(ii) Liabilities of a consolidated subsidiary or affiliate which are subordinated to the claims of present and future creditors pursuant to a satisfactory subordination agreement shall be deducted from consolidated adjusted net capital unless such subordination extends also to the claims of present or future creditors of the parent applicant or registrant and all consolidated subsidiaries.

(iii) Subordinated liabilities of a consolidated subsidiary or affiliate which are consolidated in accordance with paragraph (f)(3)(ii) of this section may not be prepaid, repaid, or accelerated if any of the entities included in such consolidation would otherwise be unable to comply with the provisions of paragraph (h) of this section.

(iv) Each applicant or registrant included within the consolidation shall at all times be in compliance with the adjusted net capital requirement to which it is subject.

(4) No applicant or registrant shall guarantee, endorse, or assume directly or indirectly any obligation or liability of a subsidiary or affiliate unless the obligation or liability is reflected in the computation of adjusted net capital pursuant to this section except as provided in paragraph (f)(2)(i) of this section.

(g)(1) The Commission may by order restrict, for a period up to twenty business days, any withdrawal by a futures commission merchant of equity capital, or any unsecured advance or loan to a stockholder, partner, limited liability company member, sole proprietor, employee or affiliate, if:

(i) Such withdrawal, advance or loan would cause, when aggregated with all other withdrawals, advances or loans during a 30 calendar day period from the futures commission merchant or a subsidiary or affiliate of the futures commission merchant consolidated pursuant to §1.17(f) (or 17 CFR 240.15c3-1e), a net reduction in excess adjusted net capital (or, if the futures commission merchant is qualified to use the filing option available under §1.10(h), excess net capital as defined in the rules of the Securities and Exchange Commission) of 30 percent or more, and

(ii) The Commission, based on the facts and information available, concludes that any such withdrawal, advance or loan may be detrimental to the financial integrity of the futures commission merchant, or may unduly jeopardize its ability to meet customer obligations or other liabilities that may cause a significant impact on the markets.

(2) The futures commission merchant may file with the Secretary of the Commission a written petition to request rescission of the order issued under paragraph (g)(1) of this section. The petition filed by the futures commission merchant must specify the facts and circumstances supporting its request for rescission. The Commission shall respond in writing to deny the futures commission merchant’s petition for rescission, or, if the Commission determines that the order issued under paragraph (g)(1) of this section should
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not remain in effect, the order shall be rescinded.

(h) The term satisfactory subordination agreement ("subordination agreement") means an agreement which contains the minimum and nonexclusive requirements set forth below.

(1) Certain definitions for purposes of this section:

(i) A subordination agreement may be either a subordinated loan agreement or a secured demand note agreement.

(ii) The term subordinated loan agreement means the agreement or agreements evidencing or governing a subordinated borrowing of cash.

(iii) The term "collateral value" of any securities pledged to secure a secured demand note means the market value of such securities after giving effect to the percentage deductions specified in Rule 240.15c3-1d(a)(2)(iii) of the Securities and Exchange Commission (17 CFR 240.15c3-1d(a)(2)(iii)).

(iv) The term payment obligation means the obligation of an applicant or registrant in respect to any subordination agreement:

(A) To repay cash loaned to the applicant or registrant pursuant to a subordinated loan agreement; or

(B) To return a secured demand note contributed to the applicant or registrant or to reduce the unpaid principal amount thereof and to return cash or securities pledged as collateral to secure the secured demand note; and

(C) "Payment" shall mean the performance by an applicant or registrant of a payment obligation.

(v)(A) The term secured demand note agreement means an agreement (including the related secured demand note) evidencing or governing the contribution of a secured demand note to an applicant or registrant and the pledge of securities and/or cash with the applicant or registrant as collateral to secure payment of such secured demand note. The secured demand note agreement may provide that neither the lender, his heirs, executors, administrators, or assigns shall be personally liable on such note and that in the event of default the applicant or registrant shall look for payment of such note solely to the collateral then pledged to secure the same.

(B) The secured demand note shall be a promissory note executed by the lender and shall be payable on the demand of the applicant or registrant to which it is contributed: Provided, however, That the making of such demand may be conditioned upon the occurrence of any of certain events which are acceptable to the designated self-regulatory organization and the Commission.

(C) If such note is not paid upon presentation and demand as provided for therein, the applicant or registrant shall have the right to liquidate all or any part of the securities then pledged as collateral to secure payment of the same and to apply the net proceeds of such liquidation, together with any cash then included in the collateral, in payment of such note. Subject to the prior rights of the applicant or registrant as pledgee, the lender, as defined in paragraph (h)(i)(v)(F) of this section may retain ownership of the collateral and have the benefit of any increases and bear the risks of any decreases in the value of the collateral and may retain the right to vote securities contained within the collateral and any right to income therefrom or distributions thereon, except the applicant or registrant shall have the right to receive and hold as pledgee all dividends payable in securities and all partial and complete liquidating dividends.

(D) Subject to the prior rights of the applicant or registrant as pledgee, the lender may have the right to direct the sale of any securities included in the collateral, to direct the purchase of securities with any cash included therein, to withdraw excess collateral or to substitute cash or other securities as collateral: Provided, That the net proceeds of any such sale and the cash so substituted and the securities so purchased or substituted are held by the applicant or registrant as pledgee, and are included within the collateral to secure payment of the secured demand note: And provided further, That no such transaction shall be permitted, if, after giving effect thereto, the sum of the amount of any cash, plus the collateral value of the securities, then pledged as collateral to secure the secured demand note would be less than
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the unpaid principal amount of the secured demand note.

(E) Upon payment by the lender, as distinguished from a reduction by the lender which is provided for in paragraph (h)(2)(vi)(C) of this section or reduction by the applicant or registrant as provided for in paragraph (h)(2)(vi) of this section, of all or any part of the unpaid principal amount of the secured demand note, the applicant or registrant shall issue to the lender a subordinated loan agreement in the amount of such payment (or in the case of an applicant or registrant that is a partnership, credit a capital account of the lender), or issue preferred or common stock of the applicant or registrant in the amount of such payment, or any combination of the foregoing, as provided for in the secured demand note agreement.

(F) The term lender means the person who lends cash to an applicant or registrant pursuant to a subordinated loan agreement and the person who contributes a secured demand note to an applicant or registrant pursuant to a secured demand note agreement.

(2) Minimum requirements for subordination agreements:

(i) Subject to paragraph (h)(1) of this section, a subordination agreement shall mean a written agreement between the applicant or registrant and the lender, which:

(A) Has a minimum term of 1 year, except for temporary subordination agreements provided for in paragraph (h)(3)(v) of this section, and

(B) Is a valid and binding obligation enforceable in accordance with its terms (subject as to enforcement to applicable bankruptcy, insolvency, reorganization, moratorium, and other similar laws) against the applicant or registrant and the lender and their respective heirs, executors, administrators, successors, and assigns.

(ii) Specific amount. All subordination agreements shall be for a specific dollar amount which shall not be reduced for the duration of the agreement except by installments as specifically provided for therein and except as otherwise provided in this paragraph (h)(2) of this section.

(iii) Effective subordination. The subordination agreement shall effectively subordinate any right of the lender to receive any payment with respect thereto, together with accrued interest or compensation, to the prior payment or provision for payment in full of all claims of all present and future creditors of the applicant or registrant arising out of any matter occurring prior to the date on which the related payment obligation matures, except for claims which are the subject of subordination agreements which rank on the same priority as or junior to the claim of the lender under such subordination agreements.

(iv) Proceeds of subordinated loan agreements. The subordinated loan agreement shall provide that the cash proceeds thereof shall be used and dealt with by the applicant or registrant as part of its capital and shall be subject to the risks of the business.

(v) Certain rights of the borrower. The subordination agreement shall provide that the applicant or registrant shall have the right to:

(A) Deposit any cash proceeds of a subordinated loan agreement and any cash pledged as collateral to secure a secured demand note in an account or accounts in its own name in any bank or trust company;

(B) Pledge, repledge, hypothecate and rehypothecate, any or all of the securities pledged as collateral to secure a secured demand note, without notice, separately or in common with other securities or property for the purpose of securing any indebtedness of the applicant or registrant; and

(C) Lend to itself or others any or all of the securities and cash pledged as collateral to secure a secured demand note.

(vi) Collateral for secured demand notes. Only cash and securities which are fully paid for and which may be publicly offered or sold without registration under the Securities Act of 1933, and the offer, sale, and transfer of which are not otherwise restricted, may be pledged as collateral to secure a secured demand note. The secured demand note agreement shall provide that if at any time the sum of the amount of any cash, plus the collateral value of any securities, then pledged as
collateral to secure the secured demand note is less than the unpaid principal amount of the secured demand note, the applicant or registrant must immediately transmit written notice to that effect to the lender. The secured demand note agreement shall also provide that if the borrower is an applicant, such notice must also be transmitted immediately to the National Futures Association, and if the borrower is a registrant, such notice must also be transmitted immediately to the designated self-regulatory organization, if any, and the Commission. The secured demand note agreement shall also require that following such transmittal:

(A) The lender, prior to noon of the business day next succeeding the transmittal of such notice, may pledge as collateral additional cash or securities sufficient, after giving effect to such pledge, to bring the sum of the amount of any cash plus the collateral value of any securities, then pledged as collateral to secure the secured demand note, up to an amount not less than the unpaid principal amount of the secured demand note; and

(B) Unless additional cash or securities are pledged by the lender as provided in paragraph (h)(2)(vi)(A) above, the applicant or registrant at noon on the business day next succeeding the transmittal of notice to the lender must commence sale, for the account of the lender, of such of the securities then pledged as collateral to secure the secured demand note and apply so much of the net proceeds thereof, together with such of the cash then pledged as collateral to secure the secured demand note as may be necessary to eliminate the unpaid principal amount of the secured demand note: Provided, however, That the unpaid principal amount of the secured demand note need not be reduced below the sum of the amount of any remaining cash, plus the collateral value of the remaining securities, then pledged as collateral to secure the secured demand note. The applicant or registrant may not purchase for its own account any securities subject to such a sale; and

(C) The secured demand note agreement may also provide that, in lieu of the procedures specified in the provisions required by paragraph (h)(2)(vi)(B) of this section, the lender, with the prior written consent of the applicant and the National Futures Association, or with the prior written consent of the registrant and the designated self-regulatory organization or, if the registrant is not a member of a designated self-regulatory organization, the Commission, may reduce the unpaid principal amount of the secured demand note: Provided, That after giving effect to such reduction the adjusted net capital of the applicant or registrant would not be less than the greatest of:

(I) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(ii)(A) of this section;

(2) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

(3) 120 percent of the amount of adjusted net capital required by a registered futures association of which it is a member; or

(4) For an applicant or registrant which is also a securities broker or dealer, the amount of net capital specified in Rule 15c3-1d(b)(6)(iii) of the Securities and Exchange Commission (17 CFR 240.15c3-1d(b)(6)(iii)): Provided, further, That no single secured demand note shall be permitted to be reduced by more than 15 percent of its original principal amount and after such reduction no excess collateral may be withdrawn.

(vii) Permissive prepayments and special prepayments. (A) An applicant or registrant at its option, but not at the option of the lender, may, if the subordination agreement so provides, make a payment of all or any portion of the payment obligation thereunder prior to the scheduled maturity date of such payment obligation (hereinafter referred to as a “prepayment”), but in no event may any prepayment be made before the expiration of one year from the date such subordination agreement became effective: Provided, however, That the foregoing restriction shall not apply to temporary subordination agreements which comply with the provisions of paragraph (h)(3)(v) of this
section nor shall it apply to “special prepayments” made in accordance with the provisions of paragraph (h)(2)(vii)(B) of this section. No prepayment shall be made if, after giving effect thereto (and to all payments of payment obligations under any other subordination agreements then outstanding, the maturity or accelerated maturities of which are scheduled to fall due within six months after the date such prepayment is to occur pursuant to this provision), the adjusted net capital of the applicant or registrant is less than the greatest of:

1. 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;
2. For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;
3. 120 percent of the amount of adjusted net capital required by a registered futures association of which it is a member; or
4. For an applicant or registrant which is also a securities broker or dealer, the amount of net capital specified in Rule 15c3-1d(c)(5)(ii) of the Securities and Exchange Commission (17 CFR 240.15c3-1d(c)(5)(ii)).

Provided, however, That no special prepayment shall be made if pre-tax losses during the latest three-month period were greater than 15 percent of current excess adjusted net capital.

(C)(1) Notwithstanding the provisions of paragraphs (h)(2)(vii)(A) and (h)(2)(vii)(B) of this section, in the case of an applicant, no prepayment or special prepayment shall occur without the prior written approval of the National Futures Association; in the case of a registrant, no prepayment or special prepayment shall occur without the prior written approval of the designated self-regulatory organization, if any, or of the Commission if the registrant is not a member of a self-regulatory organization.

(C)(2) A registrant may make a prepayment or special prepayment without the prior written approval of the designated self-regulatory organization: Provided, that the registrant: Is a securities broker or dealer registered with the Securities and Exchange Commission; files a request to make a prepayment or special prepayment with its applicable securities designated examining authority, as defined in Rule 15c3-1(e)(12) of the Securities and Exchange Commission (17 CFR 240.15c3-
1(c)(12)), in the form and manner prescribed by the designated examining authority; files a copy of the prepayment request or special prepayment request with the designated self-regulatory organization at the time it files such request with the designated examining authority in the form and manner prescribed by the designated self-regulatory organization; and files a copy of the designated examining authority’s approval of the prepayment or special prepayment with the designated self-regulatory organization immediately upon receipt of such approval. The approval of the prepayment or special prepayment by the designated examining authority will be deemed approval by the designated self-regulatory organization, unless the designated self-regulatory organization notifies the registrant that the designated examining authority’s approval shall not constitute designated self-regulatory organization approval.

(3) The designated self-regulatory organization shall immediately provide the Commission with a copy of any notice of approval issued where the requested prepayment or special prepayment will result in the reduction of the registrant’s net capital by 20 percent or more or the registrant’s excess adjusted net capital by 30 percent or more.

(viii) Suspended repayment. (A) The payment obligation of the applicant or registrant in respect of any subordination agreement shall be suspended and shall not mature if, after giving effect to payment of such payment obligation (and to all payments of payment obligations of the applicant or registrant under any other subordination agreement(s) then outstanding which are scheduled to mature on or before such payment obligation), the adjusted net capital of the applicant or registrant would be less than the greatest of:

(1) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(2) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

(3) 120 percent of the amount of adjusted net capital required by a registered futures association of which it is a member; or

(4) For an applicant or registrant which is also a securities broker or dealer, the amount of net capital specified in Rule 15c3-1d(b)(8)(i) of the Securities and Exchange Commission (17 CFR 240.15c3-1d(b)(8)(i)): Provided, That the subordination agreement may provide that if the payment obligation of the applicant or registrant thereunder does not mature and is suspended as a result of the requirement of this paragraph (h)(2)(viii) for a period of not less than six months, the applicant or registrant shall then commence the rapid and orderly liquidation of its business, but the right of the lender to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of this section.

(B) [Reserved]

(ix) Accelerated maturity. Obligation to repay to remain subordinate:

(A) Subject to the provisions of paragraph (h)(2)(viii) of this section, a subordination agreement may provide that the lender may, upon prior written notice to the applicant and the National Futures Association, or upon prior written notice to the registrant and the designated self-regulatory organization or, if the registrant is not a member of a designated self-regulatory organization, the Commission, given not earlier than six months after the effective date of such subordination agreement, accelerate the date on which the payment obligation of the borrower, together with accrued interest or compensation, is scheduled to mature to a date not earlier than six months after giving of such notice, but the right of the lender to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of this paragraph (h)(2) of this section.

(B) Notwithstanding the provisions of paragraph (h)(2)(viii) of this section, the payment obligation of the applicant or registrant with respect to a subordination agreement, together with accrued interest or compensation, shall mature in the event of any receivership, insolvency, liquidation pursuant to the Securities Investor Protection Act of 1970 or otherwise,
bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to the bankruptcy laws, or any other marshalling of the assets and liabilities of the applicant or registrant, but the right of the lender to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of paragraph (h)(2) of this section.

(x) Accelerated maturity of subordination agreements on event of default and event of acceleration. Obligation to repay to remain subordinate:

(A) A subordination agreement may provide that the lender may, upon prior written notice to the applicant and the National Futures Association, or upon prior written notice to the registrant and the designated self-regulatory organization or, if the registrant is not a member of a designated self-regulatory organization, the Commission, of the occurrence of any event of acceleration (as hereinafter defined) given no sooner than six months after the effective date of such subordination agreement, accelerate the date on which the payment obligation of the applicant or registrant, together with accrued interest or compensation, is scheduled to mature, to the last business day of a calendar month which is not less than six months after notice of acceleration is received by the applicant and by the National Futures Association, or by the registrant and the designated self-regulatory organization or, if the registrant is not a member of a designated self-regulatory organization, the Commission. Any subordination agreement containing such events of acceleration may also provide that, if upon such accelerated maturity date the payment obligation of the applicant or registrant is suspended as required by paragraph (h)(2)(viii) of this section and liquidation of the applicant or registrant has not commenced on or prior to such accelerated maturity date, notwithstanding paragraph (h)(2)(viii) of this section, the payment obligation of the applicant or registrant with respect to such subordination agreement shall mature on the day immediately following such accelerated maturity date and in any such event the payment obligations of the applicant or registrant with respect to all other subordination agreements then outstanding shall also mature at the same time but the rights of the respective lenders to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of paragraph (h)(2) of this section. Events of acceleration which may be included in a subordination agreement complying with this paragraph (h)(2)(x) of this section shall be limited to:

(B) Notwithstanding the provisions of paragraph (h)(2)(viii) of this section, a subordination agreement may provide that, if liquidation of the business of the applicant or registrant shall also mature at the same time but the rights of the respective lenders to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of paragraph (h)(2) of this section. Events of acceleration which may be included in a subordination agreement complying with this paragraph (h)(2)(x) of this section shall be limited to:

(1) Failure to pay interest or any installment of principal on a subordination agreement as scheduled; 

(2) Failure to pay when due other money obligations of a specified material amount; 

(3) Discovery that any material, specified representation or warranty of the applicant or registrant which is included in the subordination agreement and on which the subordination agreement was based or continued was inaccurate in a material respect at the time made; 

(4) Any specified and clearly measurable event which is included in the subordination agreement and which the lender and the applicant or registrant agree, (a) is a significant indication that the financial position of the applicant or registrant has changed materially and adversely from agreed upon specified norms; or (b) could materially and adversely affect the ability of the applicant or registrant to conduct its business as conducted on the date the subordination agreement was made; or (c) is a significant change in the senior management of the applicant or registrant or in the general business conducted by the applicant or registrant from that obtained on the date the subordination agreement became effective; 

(5) Any continued failure to perform agreed covenants included in the subordination agreement relating to the conduct of the business of the applicant or registrant or relating to the maintenance and reporting of its financial position; and 

(B) Notwithstanding the provisions of paragraph (h)(2)(viii) of this section, a subordination agreement may provide that, if liquidation of the business of
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the applicant or registrant has not already commenced, the payment obligation of the applicant or registrant shall mature, together with accrued interest or compensation, upon the occurrence of an event of default (as hereinafter defined). Such agreement may also provide that, if liquidation of the business of the applicant or registrant has not already commenced, the rapid and orderly liquidation of the business of the applicant or registrant shall then commence upon the happening of an event of default. Any subordination agreement which so provides for maturity of the payment obligation upon the occurrence of an event of default shall also provide that the date on which such event of default occurs shall, if liquidation of the applicant or registrant has not already commenced, be the date on which the payment obligation of the applicant or registrant with respect to all other subordination agreements then outstanding shall mature but the rights of the respective lenders to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of paragraph (h)(2) of this section. Events of default which may be included in a subordination agreement shall be limited to:

(1) The making of an application by the Securities Investor Protection Corporation for a decree adjudicating that customers of the applicant or registrant are in need of protection under the Securities Investor Protection Act of 1970 and the failure of the applicant or registrant to obtain the dismissal of such application within 30 days;

(2) Failure to meet the minimum capital requirements of the designated self-regulatory organization, or of the Commission, throughout a period of 15 consecutive business days, commencing on the day the borrower first determines and notifies the designated self-regulatory organization, if any, of which he is a member and the Commission, in the case of a registrant, or the National Futures Association, in the case of an applicant, or commencing on the day any self-regulatory organization, the Commission or the National Futures Association first determines and notifies the applicant or registrant of such fact;

(3) The Commission shall revoke the registration of the applicant or registrant;

(4) The self-regulatory organization shall suspend (and not reinstate within 10 days) or revoke the applicant or registrant’s status as a member thereof;

(5) Any receivership, insolvency, liquidation pursuant to the Securities Investor Protection Act of 1970 or otherwise, bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to bankruptcy laws, or any other marshalling of the assets and liabilities of the applicant or registrant. A subordination agreement which contains any of the provisions permitted by this subparagraph (2)(x) shall not contain the provision otherwise permitted by paragraph (h)(2)(ix)(A) of this section.

(3) Miscellaneous provisions—

(i) Prohibited cancellation. The subordination agreement shall not be subject to cancellation by either party; no payment shall be made with respect thereto and the agreement shall not be terminated, rescinded or modified by mutual consent or otherwise if the effect thereof would be inconsistent with the requirements of paragraph (h) of this section.

(ii) Notice of maturity or accelerated maturity. Every applicant or registrant shall immediately notify the National Futures Association, and the registrant shall immediately notify the designated self-regulatory organization, the Commission if, after giving effect to all payments of payment obligations under subordination agreements then outstanding which are then due or mature within the following six months without reference to any projected profit or loss of the applicant or registrant, its adjusted net capital would be less than:

(A) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(B) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

(C) 120 percent of the amount of adjusted net capital required by a registered futures association of which it is a member; or
(D) For an applicant or registrant which is also a securities broker or dealer, the amount of net capital specified in Rule 15c3-1d(c)(2) of the Securities and Exchange Commission (17 CFR 240.15c3-1d(c)(2)).

(iii) Certain legends. If all the provisions of a satisfactory subordination agreement do not appear in a single instrument, then the debenture or other evidence of indebtedness shall bear on its face an appropriate legend stating that it is issued subject to the provisions of a satisfactory subordination agreement which shall be adequately referred to and incorporated by reference.

(iv) Legal title to securities. All securities pledged as collateral to secure a secured demand note must be in bearer form, or registered in the name of the applicant or registrant or the name of its nominee or custodian.

(v) Temporary subordinations. To enable an applicant or registrant to participate as an underwriter of securities or undertake other extraordinary activities and remain in compliance with the adjusted net capital requirements of this section, an applicant or registrant shall be permitted, on no more than three occasions in any 12-month period, to enter into a subordination agreement on a temporary basis which has a stated term of no more than 45 days from the date the subordination agreement became effective: Provided, That this temporary relief shall not apply to any applicant or registrant if the adjusted net capital of the applicant or registrant is less than the greatest of:

(A) 120 percent of the appropriate minimum dollar amount required by paragraphs (a)(1)(i)(A) or (a)(1)(iii)(A) of this section;

(B) For a futures commission merchant or applicant therefor, 120 percent of the amount required by paragraph (a)(1)(i)(B) of this section;

(C) 120 percent of the amount of adjusted net capital required by a registered futures association of which it is a member;

(D) For an applicant or registrant which is also a securities broker or dealer, the amount of net capital specified in Rule 15c3-1d(c)(5)(i) of the Securities and Exchange Commission (17 CFR 240.15c3-1d(c)(5)(i)); or

(E) The amount of equity capital as defined in paragraph (d) of this section is less than the limits specified in paragraph (d) of this section. Such temporary subordination agreement shall be subject to all the other provisions of this section.

(vi) Filing. An applicant shall file a signed copy of any proposed subordination agreement (including nonconforming subordination agreements) with the National Futures Association at least ten days prior to the proposed effective date of the agreement or at such other time as the National Futures Association for good cause shall accept such filing. A registrant that is not a member of any designated self-regulatory organization shall file two signed copies of any proposed subordination agreement (including nonconforming subordination agreements) with the regional office of the Commission nearest the principal place of business of the registrant at least ten days prior to the proposed effective date of the agreement or at such other time as the Commission for good cause shall accept such filing. A registrant that is a member of a designated self-regulatory organization shall file signed copies of any proposed subordination agreement (including nonconforming subordination agreements) with the designated self-regulatory organization in such quantities and at such time as the designated self-regulatory organization may require prior to the effective date. The applicant or registrant shall also file with said parties a statement setting forth the name and address of the lender, the business relationship of the lender to the applicant or registrant and whether the applicant or registrant carried funds or securities for the lender at or about the time the proposed agreement was so filed. A proposed agreement filed by an applicant with the National Futures Association shall be reviewed by the National Futures Association, and no such agreement shall be a satisfactory subordination agreement for the purposes of this section unless and until the National Futures Association has found the agreement acceptable and such agreement has become effective in
the form found acceptable. A proposed agreement filed by a registrant shall be reviewed by the designated self-regulatory organization with whom such an agreement is required to be filed prior to its becoming effective or, if the registrant is not a member of any designated self-regulatory organization, by the regional office of the Commission where the agreement is required to be filed prior to its becoming effective. No proposed agreement shall be a satisfactory subordination agreement for the purposes of this section unless and until the designated self-regulatory organization or, if a registrant is not a member of any designated self-regulatory organization, the Commission, has found the agreement acceptable and such agreement has become effective in the form found acceptable: Provided, however, That a proposed agreement shall be a satisfactory subordination agreement for purpose of this section if the registrant: is a securities broker or dealer registered with the Securities and Exchange Commission; files signed copies of the proposed subordination agreement with the applicable securities designated examining authority, as defined in Rule 15c3-1(c)(12) of the Securities and Exchange Commission (17 CFR 240.15c3-1(c)(12)), in the form and manner prescribed by the designated examining authority; files signed copies of the proposed subordination agreement with the designated self-regulatory organization at the time it files such copies with the designated examining authority in the form and manner prescribed by the designated self-regulatory organization; and files a copy of the designated examining authority’s approval of the proposed subordination agreement with the designated self-regulatory organization immediately upon receipt of such approval. The designated examining authority’s determination that the proposed subordination agreement satisfies the requirements for a satisfactory subordination agreement will be deemed a like finding by the designated self-regulatory organization, unless the designated self-regulatory organization notifies the registrant that the designated examining authority’s determination shall not constitute a like finding by

(vii) Subordination agreements that incorporate adjusted net capital requirements in effect prior to September 30, 2004. Any subordination agreement that incorporates the adjusted net capital requirements in paragraphs (h)(2)(vi)(C)(2), (h)(2)(vii)(A)(2) and (B)(2), (h)(2)(viii)(A)(2), (h)(3)(ii)(B), and (h)(3)(v)(B) of this section, as in effect prior to September 30, 2004, and which has been deemed to be satisfactorily subordinated pursuant to this section prior to September 30, 2004, shall continue to be deemed a satisfactory subordination agreement until the maturity of such agreement. In the event, however, that such agreement is amended or renewed for any reason, then such agreement shall not be deemed a satisfactory subordination agreement unless the amended or renewed agreement meets the requirements of this section.

(4) A designated self-regulatory organization and the Commission may allow debt with a maturity date of 1 year or more to be treated as meeting the provisions of this paragraph (h): Provided, (i) Such exemption shall only be given when the registrant’s adjusted net capital is less than the minimum required by this section or by the capital rule of the designated self-regulatory organization to which such registrant is subject;

(ii) That such debt did not exist prior to its use under this paragraph (h)(4);

(iii) Such exemption shall be for a period of 30 days or such lesser period as the designated self-regulatory organization to which such registrant is subject;

(iv) Such exemption shall not be allowed more than once in any 12 month period and;

(v) At all times during such exemption the registrant shall make a good faith effort to comply with the provisions of this section or the capital rule of the designated self-regulatory organization to which such registrant is subject exclusive of any benefits derived from this paragraph (h)(4).

(i) [Reserved]

(j) For the purposes of this section cover is defined as follows:
(1) **General definition.** Cover shall mean transactions or positions in a contract for future delivery on a board of trade or 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:

(i) 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.

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

(iii) The potential change in the value of services which a person provides, purchases or anticipates providing or purchasing. Notwithstanding the foregoing, no transactions or positions shall be classified as cover for the purposes of this section unless their purpose is to offset price risks incidental to commercial cash or spot operations and such positions are established and liquidated in accordance with sound commercial practices and unless the provisions of paragraphs (j)(1) and (j)(3) of this section have been satisfied.

(2) **Enumerated cover transactions.** The definition of covered transactions and positions in paragraph (j)(1) of this section includes, but is not limited to, the following specific transactions and positions:

(i) Ownership or fixed-price purchase of any commodity which does not exceed in quantity (A) the sales of the same commodity for future delivery on a board of trade or (B) the purchase of a put commodity option of the same commodity for which the market value for the actual commodity or futures contract which is the subject of the option is more than the strike price of the option: Provided, That for purposes of paragraph (c)(5)(x) of this section the market value for the actual commodity or futures contract which is the subject of such option need not be more than the strike price of that option;

(ii) Fixed-price sale of any commodity which does not exceed in quantity (A) the purchase of the same commodity for future delivery on a board of trade or (B) the purchase of a call commodity option of the same commodity for which the market value for the actual commodity or futures contract which is the subject of such option is more than the strike price of the option or (C) ownership of a commodity option position established by the sale (grant) of a put commodity option of the same commodity for which the market value for the actual commodity or futures contract which is the subject of the option is less than the strike price of the option: Provided, That for purposes of paragraph (c)(5)(x) of this section the market value for the actual commodity or futures contract which is the subject of such option need not be less than the strike price of that option; and

(iii) Ownership or fixed-price contracts of a commodity described in paragraphs (j)(2)(i) and (j)(2)(ii) of this section may also be covered other than by the same quantity of the same cash commodity, provided that the fluctuations in value of the position for future delivery or commodity option are substantially related to the fluctuations in value of the actual position.

(3) **Nonenumerated cases.** Upon specific request, the Commission may recognize transactions and positions other than those enumerated in paragraph (j)(2) of this section as cover in amounts and under the terms and conditions as it may specify. Any applicant or registrant who wishes to avail itself of the provisions of this paragraph (j)(3) must apply to the Commission in writing at its principal office in Washington, DC giving full details of the transaction including detailed information which will demonstrate that the transaction is economically appropriate to the reduction of risk exposure attendant to
§ 1.18 Records for and relating to financial reporting and monthly computation by futures commission merchants and introducing brokers.

(a) No person shall be registered as a futures commission merchant or as an introducing broker under the Act unless, commencing on the date his application for such registration is filed, he prepares and keeps current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting his asset, liability, income, expense and capital accounts, and in which (except as otherwise permitted in writing by the Commission) all his asset, liability and capital accounts are classified into either the account classification subdivisions specified on Form 1–FR–FCM or Form 1–FR–IB, respectively, or, if such person is registered with the Securities and Exchange Commission as a securities broker or dealer and he files (in accordance with § 1.10(h)) a copy of his Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE (FOCUS report) in accordance with the requirements of § 1.10(b) will be deemed to have satisfied the requirements of paragraph (b)(1) of this section for such month.

(b)(1) Each applicant or registrant must make and keep as a record in accordance with § 1.31 formal computations of its adjusted net capital and of its minimum financial requirements pursuant to § 1.17 or the requirements of the designated self-regulatory organization to which it is subject as of the close of business each month. Such computations must be completed and made available for inspection by any representative of the National Futures Association, in the case of an applicant, or of the Commission or designated self-regulatory organization, if any, in the case of a registrant, within 17 business days after the date for which the computations are made, commencing the first month end after the date the application for registration is filed.

(2) An applicant or registrant that has filed a monthly Form 1–FR or Statement of Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE (FOCUS report) in accordance with the requirements of § 1.10(b) will be deemed to have satisfied the requirements of paragraph (b)(1) of this section for such month.

(c) The provisions of this section do not apply to an introducing broker which is operating pursuant to a guarantee agreement, nor do such provisions apply to an applicant for registration as an introducing broker who files concurrently with such application a guarantee agreement, provided such introducing broker or applicant therefor is not also a securities broker or dealer.


PROHIBITED TRADING IN COMMODITY OPTIONS

§ 1.19 Prohibited trading in certain "puts" and "calls".

No futures commission merchant or introducing broker may make, underwrite, issue, or otherwise assume any financial responsibility for the fulfillment of, any commodity option except:

(a) Commodity options traded on or subject to the rules of a contract market in accordance with the requirements of part 33 of this chapter;

(b) Commodity options traded on or subject to the rules of a foreign board of trade in accordance with the requirements of part 30 of this chapter; or

(c) For futures commission merchants, any option permitted under § 32.4 of this chapter, provided however,
that a capital treatment for such options is referenced in §1.17(c)(5)(vi).


CUSTOMERS' MONEY, SECURITIES, AND PROPERTY

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

(a) All futures customer funds shall be separately accounted for and segregated as belonging to futures customers. Such futures customer funds when deposited with any bank, trust company, derivatives clearing organization or another futures commission merchant shall be deposited under an account name which clearly identifies them as such and shows that they are segregated as required by sections 4d(a) and 4d(b) of the Act and this part. Each registrant shall obtain and retain in its files for the period provided in §1.31 a written acknowledgment from such bank, trust company, derivatives clearing organization, or futures commission merchant, that it was informed that the futures customer funds deposited therein are those of futures customers and are being held in accordance with the provisions of the Act and this part: Provided, however, that an acknowledgment need not be obtained from a derivatives clearing organization that has adopted and submitted to the Commission rules that provide for the segregation as futures customer funds, in accordance with all relevant provisions of the Act and these regulations. The derivatives clearing organization shall obtain and retain in its files for the period provided by §1.31 an acknowledgment from such bank or trust company that it was informed that the futures customer funds deposited therein are those of futures customers of its clearing members and are being held in accordance with the provisions of the Act and these regulations.

(b) All futures customer funds received by a derivatives clearing organization from a member of the derivatives clearing organization to purchase, margin, guarantee, secure or settle the trades, contracts or commodity options of the clearing member's futures customers and all money accruing to such futures customers as the result of trades, contracts or commodity options so carried shall be separately accounted for and segregated as belonging to such futures customers, and a derivatives clearing organization shall not hold, use or dispose of such futures customer funds except as belonging to such futures customers. Such futures customer funds when deposited in a bank or trust company shall be deposited under an account name which clearly shows that they are the futures customer funds of the futures customers of clearing members, segregated as required by sections 4d(a) and 4d(b) of the Act and these regulations. The derivatives clearing organization shall obtain and retain in its files for the period provided by §1.31 an acknowledgment from such bank or trust company that it was informed that the futures customer funds deposited therein are those of futures customers of its clearing members and are being held in accordance with the provisions of the Act and these regulations.

(c) Each futures commission merchant shall treat and deal with the futures customer funds of a futures customer as belonging to such futures customer. All futures customer funds shall be separately accounted for, and shall not be commingled with the money, securities or property of a futures commission merchant or of any other person, or be used to secure or guarantee the trades, contracts or commodity options, or to secure or extend the credit, of any person other than the one for whom the same are held: Provided, however, That futures customer funds treated as belonging to the futures customers of a futures commission merchant may for convenience be commingled and deposited in the same account or accounts with any bank or trust.
§ 1.21 Care of money and equities accruing to futures customers.

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

§ 1.22 Use of futures customer funds restricted.

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

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

The provisions in section 4d(a) and 4d(b) of the Act and the provision in §1.20(c), which prohibit the commingling of futures customer funds with the funds of a futures commission merchant, shall not be construed to prevent a futures commission merchant from having a residual financial interest in the futures customer funds, segregated as required by the Act and the rules in this part and set apart for the benefit of futures customers; nor shall such provisions be construed to prevent a futures commission merchant from adding to such segregated futures customer funds such amount or amounts of money, from its own funds or unencumbered securities from its own inventory, of the type set forth in §1.25, as it may deem necessary to ensure any and all futures customers’ accounts from becoming undersegregated at any time. The books and records of a futures commission merchant shall at all times accurately reflect its interest in the segregated funds. A futures commission merchant may draw upon such segregated funds to its own order, to the extent of its actual interest therein, including the withdrawal of securities held in segregated safekeeping accounts held by a bank, trust company, contract market, derivatives clearing organization or other futures commission merchant. Such withdrawal shall not result in the funds of one futures customer being used to purchase, margin or carry the trades,
§ 1.24 Segregated funds; exclusions therefrom.

Money held in a segregated account by a futures commission merchant shall not include:

(a) Money invested in obligations or stocks of any derivatives clearing organization or in memberships in or obligations of any contract market; or

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

§ 1.25 Investment of customer funds.

(a) Permitted investments. (1) Subject to the terms and conditions set forth in this section, a futures commission merchant or a derivatives clearing organization may invest customer money in the following instruments (permitted investments):

(i) Obligations of the United States and obligations fully guaranteed as to principal and interest by the United States (U.S. government securities);

(ii) General obligations of any State or of any political subdivision thereof (municipal securities);

(iii) Obligations of any United States government corporation or enterprise sponsored by the United States government (U.S. agency obligations);

(iv) Certificates of deposit issued by a bank (certificates of deposit) as defined in section 3(a)(6) of the Securities Exchange Act of 1934, or a domestic branch of a foreign bank that carries deposits insured by the Federal Deposit Insurance Corporation;

(v) Commercial paper fully guaranteed as to principal and interest by the United States under the Temporary Liquidity Guarantee Program as administered by the Federal Deposit Insurance Corporation (commercial paper);

(vi) Corporate notes or bonds fully guaranteed as to principal and interest by the United States under the Temporary Liquidity Guarantee Program as administered by the Federal Deposit Insurance Corporation (corporate notes or bonds); and

(vii) Interests in money market mutual funds.

(2)(i) In addition, a futures commission merchant or derivatives clearing organization may buy and sell the permitted investments listed in paragraphs (a)(1)(i) through (vii) of this section pursuant to agreements for resale or repurchase of the instruments, in accordance with the provisions of paragraph (d) of this section.

(ii) A futures commission merchant or a derivatives clearing organization may sell securities deposited by customers as margin pursuant to agreements to repurchase subject to the following:

(A) Securities subject to such repurchase agreements must be “highly liquid” as defined in paragraph (b)(1) of this section.

(B) Securities subject to such repurchase agreements must not be “specifically identifiable property” as defined in §190.01(kk) of this chapter.

(C) The terms and conditions of such an agreement to repurchase must be in accordance with the provisions of paragraph (d) of this section.

(D) Upon the default by a counterparty to a repurchase agreement, the futures commission merchant or derivatives clearing organization shall act promptly to ensure that the default does not result in any direct or indirect cost or expense to the customer.

(3) Obligations issued by the Federal National Mortgage Association or the Federal Home Loan Mortgage Association are permitted while these entities operate under the conservatorship or receivership of the Federal Housing Finance Authority with capital support from the United States.

(b) General terms and conditions. A futures commission merchant or a derivatives clearing organization is required to manage the permitted investments consistent with the objectives of preserving principal and maintaining liquidity and according to the following specific requirements:
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(1) **Liquidity.** Investments must be “highly liquid” such that they have the ability to be converted into cash within one business day without material discount in value.

(2) **Restrictions on instrument features.**

(i) With the exception of money market mutual funds, no permitted investment may contain an embedded derivative of any kind, except as follows:

(A) The issuer of an instrument otherwise permitted by this section may have an option to call, in whole or in part, at par, the principal amount of the instrument before its stated maturity date; or

(B) An instrument that meets the requirements of paragraph (b)(2)(iv) of this section may provide for a cap, floor, or collar on the interest paid; provided, however, that the terms of such instrument obligate the issuer to repay the principal amount of the instrument at not less than par value upon maturity.

(ii) No instrument may contain interest-only payment features.

(iii) No instrument may provide payments linked to a commodity, currency, reference instrument, index, or benchmark except as provided in paragraph (b)(2)(iv) of this section, and it may not otherwise constitute a derivative instrument.

(iv)(A) Adjustable rate securities are permitted, subject to the following requirements:

(1) The interest payments on variable rate securities must correlate closely and on an unleveraged basis to a benchmark of either the Federal Funds target or effective rate, the prime rate, the three-month Treasury Bill rate, the one-month or three-month LIBOR rate, or the interest rate of any fixed rate instrument that is a permitted investment listed in paragraph (a)(1) of this section;

(2) The interest payment, in any period, on floating rate securities must be determined solely by reference, on an unleveraged basis, to a benchmark of either the Federal Funds target or effective rate, the prime rate, the three-month Treasury Bill rate, the one-month or three-month LIBOR rate, or the interest rate of any fixed rate instrument that is a permitted investment listed in paragraph (a)(1) of this section;

(3) Benchmark rates must be expressed in the same currency as the adjustable rate securities that reference them; and

(4) No interest payment on an adjustable rate security, in any period, can be a negative amount.

(B) For purposes of this paragraph, the following definitions shall apply:

(1) The term **adjustable rate security** means, a floating rate security, a variable rate security, or both.

(2) The term **floating rate security** means a security, the terms of which provide for the adjustment of its interest rate whenever a specified interest rate changes and that, at any time until the final maturity of the instrument or the period remaining until the principal amount can be recovered through demand, can reasonably be expected to have market value that approximates its amortized cost.

(3) The term **variable rate security** means a security, the terms of which provide for the adjustment of its interest rate on set dates (such as the last day of a month or calendar quarter) and that, upon each adjustment until the final maturity of the instrument or the period remaining until the principal amount can be recovered through demand, can reasonably be expected to have a market value that approximates its amortized cost.

(v) Certificates of deposit must be redeemable at the issuing bank within one business day, with any penalty for early withdrawal limited to any accrued interest earned according to its written terms.

(vi) Commercial paper and corporate notes or bonds must meet the following criteria:

(A) The size of the issuance must be greater than $1 billion;

(B) The instrument must be denominated in U.S. dollars; and

(C) The instrument must be fully guaranteed as to principal and interest by the United States for its entire term.

(3) **Concentration**—(1) **Asset-based concentration limits for direct investments.**

(A) Investments in U.S. government securities shall not be subject to a concentration limit.
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(B) Investments in U.S. agency obligations may not exceed 50 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(C) Investments in each of commercial paper, corporate notes or bonds and certificates of deposit may not exceed 25 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(D) Investments in municipal securities may not exceed 10 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(E) Subject to paragraph (b)(3)(i)(G) of this section, investments in money market mutual funds comprising only U.S. government securities shall not be subject to a concentration limit.

(F) Subject to paragraph (b)(3)(i)(G) of this section, investments in money market mutual funds, other than those described in paragraph (b)(3)(i)(E) of this section, may not exceed 50 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(G) Investments in money market mutual funds comprising less than $1 billion in assets and/or which have a management company comprising less than $25 billion in assets, may not exceed 10 percent of the total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(ii) Issuer-based concentration limits for direct investments. (A) Securities of any single issuer of U.S. agency obligations held by a futures commission merchant or derivatives clearing organization may not exceed 25 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(B) Securities of any single issuer of municipal securities, certificates of deposit, commercial paper, or corporate notes or bonds held by a futures commission merchant or derivatives clearing organization may not exceed 5 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(C) Interests in any single family of money market mutual funds described in paragraph (b)(3)(i)(F) of this section may not exceed 25 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(D) Interests in any individual money market mutual fund described in paragraph (b)(3)(i)(F) of this section may not exceed 10 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(E) For purposes of determining compliance with the issuer-based concentration limits set forth in this section, securities issued by entities that are affiliated, as defined in paragraph (b)(5) of this section, shall be aggregated and deemed the securities of a single issuer. An interest in a permitted money market mutual fund is not deemed to be a security issued by its sponsoring entity.

(iii) Concentration limits for agreements to repurchase—(A) Repurchase agreements.

For purposes of determining compliance with the asset-based and issuer-based concentration limits set forth in this section, securities sold by a futures commission merchant or derivatives clearing organization subject to agreements to repurchase shall be combined with securities held by the futures commission merchant or derivatives clearing organization as direct investments.

(B) Reverse repurchase agreements.

For purposes of determining compliance with the asset-based and issuer-based concentration limits set forth in this section, securities purchased by a futures commission merchant or derivatives clearing organization subject to agreements to resell shall be combined with securities held by the futures commission merchant or derivatives clearing organization as direct investments.

(iv) Treatment of customer-owned securities.

For purposes of determining compliance with the asset-based and issuer-based concentration limits set forth in this section, securities owned by the customers of a futures commission merchant and posted as margin collateral are not included in total assets held in segregation by the futures commission merchant, and securities posted by a futures commission merchant...
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with a derivatives clearing organization are not included in total assets held in segregation by the derivatives clearing organization.

(v) Counterparty concentration limits. Securities purchased by a futures commission merchant or derivatives clearing organization from a single counterparty, subject to an agreement to resell to that counterparty, shall not exceed 25 percent of total assets held in segregation by the futures commission merchant or derivatives clearing organization.

(4) Time-to-maturity. (i) Except for investments in money market mutual funds, the dollar-weighted average of the time-to-maturity of the portfolio, as that average is computed pursuant to §270.2a–7 of this title, may not exceed 24 months.

(ii) For purposes of determining the time-to-maturity of the portfolio, an instrument that is set forth in paragraphs (a)(1)(i) through (vii) of this section may be treated as having a one-day time-to-maturity if the following terms and conditions are satisfied:

(A) The instrument is deposited solely on an overnight basis with a derivatives clearing organization pursuant to the terms and conditions of a collateral management program that has become effective in accordance with §39.4 of this chapter;

(B) The instrument is one that the futures commission merchant owns or has an unqualified right to pledge, is not subject to any lien, and is deposited by the futures commission merchant into a segregated account at a derivatives clearing organization;

(C) The derivatives clearing organization prices the instrument each day based on the current mark-to-market value; and

(D) The derivatives clearing organization reduces the assigned value of the instrument each day by a haircut of at least 2 percent.

(5) Investments in instruments issued by affiliates. (i) A futures commission merchant shall not invest customer funds in obligations of an entity affiliated with the futures commission merchant, and a derivatives clearing organization shall not invest customer funds in obligations of an entity affiliated with the derivatives clearing organization. An affiliate includes parent companies, including all entities through the ultimate holding company, subsidiaries to the lowest level, and companies under common ownership of such parent company or affiliates.

(ii) A futures commission merchant or derivatives clearing organization may invest customer funds in a fund affiliated with that futures commission merchant or derivatives clearing organization.

(6) Recordkeeping. A futures commission merchant and a derivatives clearing organization shall prepare and maintain a record that will show for each business day with respect to each type of investment made pursuant to this section, the following information:

(i) The type of instruments in which customer funds have been invested;

(ii) The original cost of the instruments; and

(iii) The current market value of the instruments.

(c) Money market mutual funds. The following provisions will apply to the investment of customer funds in money market mutual funds (the fund).

(1) The fund must be an investment company that is registered under the Investment Company Act of 1940 with the Securities and Exchange Commission and that holds itself out to investors as a money market fund, in accordance with §270.2a–7 of this title.

(2) The fund must be sponsored by a federally-regulated financial institution, a bank as defined in section 3(a)(6) of the Securities Exchange Act of 1934, an investment adviser registered under the Investment Advisers Act of 1940, or a domestic branch of a foreign bank insured by the Federal Deposit Insurance Corporation.

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

(4) The net asset value of the fund must be computed by 9 a.m. of the business day following each business day and made available to the futures commission merchant or derivatives clearing organization by that time.

(5)(i) General requirement for redemption of interests. A fund shall be legally obligated to redeem an interest and to make payment in satisfaction thereof by the business day following a redemption request, and the futures commission merchant or derivatives clearing organization shall retain documentation demonstrating compliance with this requirement.

(ii) Exception. A fund may provide for the postponement of redemption and payment due to any of the following circumstances:

(A) For any period during which there is a non-routine closure of the Fedwire or applicable Federal Reserve Banks;

(B) For any period:

1. During which the New York Stock Exchange is closed other than customary week-end and holiday closings; or

2. During which trading on the New York Stock Exchange is restricted;

(C) For any period during which an emergency exists as a result of which:

1. Disposal by the company of securities owned by it is not reasonably practicable; or

2. It is not reasonably practicable for such company fairly to determine the value of its net assets;

(D) For any period as the Securities and Exchange Commission may by order permit for the protection of security holders of the company;

(E) For any period during which the Securities and Exchange Commission has, by rule or regulation, deemed that:

1. Trading shall be restricted; or

2. An emergency exists; or

(F) For any period during which each of the conditions of §270.22e–3(a)(1) through (3) of this title are met.

(6) The agreement pursuant to which the futures commission merchant or derivatives clearing organization has acquired and is holding its interest in a fund must contain no provision that would prevent the pledging or transferring of shares.

(7) The appendix to this section sets forth language that will satisfy the requirements of paragraph (c)(5) of this section.

(d) Repurchase and reverse repurchase agreements. A futures commission merchant or derivatives clearing organization may buy and sell the permitted investments listed in paragraphs (a)(1)(i) through (vii) of this section pursuant to agreements for resale or repurchase of the securities (agreements to repurchase or resell), provided the agreements to repurchase or resell conform to the following requirements:

1. The securities are specifically identified by coupon rate, par amount, market value, maturity date, and CUSIP or ISIN number.

2. Permitted counterparties are limited to a bank as defined in section 3(a)(6) of the Securities Exchange Act of 1934, a domestic branch of a foreign bank insured by the Federal Deposit Insurance Corporation, a securities broker or dealer, or a government securities broker or government securities dealer registered with the Securities and Exchange Commission or which has filed notice pursuant to section 15C(a) of the Government Securities Act of 1986.

3. A futures commission merchant or derivatives clearing organization shall not enter into an agreement to repurchase or resell with a counterparty that is an affiliate of the futures commission merchant or derivatives clearing organization, respectively. An affiliate includes parent companies, including all entities through the ultimate holding company, subsidiaries to the lowest level, and companies under common ownership of such parent company or affiliates.

4. The transaction is executed in compliance with the concentration limit requirements applicable to the securities transferred to the customer.
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segregated custodial account in connection with the agreements to repurchase referred to in paragraphs (b)(3)(iii)(A) and (B) of this section.

(5) The transaction is made pursuant to a written agreement signed by the parties to the agreement, which is consistent with the conditions set forth in paragraphs (d)(1) through (13) of this section and which states that the parties thereto intend the transaction to be treated as a purchase and sale of securities.

(6) The term of the agreement is no more than one business day, or reversal of the transaction is possible on demand.

(7) Securities transferred to the futures commission merchant or derivatives clearing organization under the agreement are held in a safekeeping account with a bank as referred to in paragraph (d)(2) of this section, a derivatives clearing organization, or the Depository Trust Company in an account that complies with the requirements of § 1.26.

(8) The futures commission merchant or the derivatives clearing organization may not use securities received under the agreement in another similar transaction and may not otherwise hypothecate or pledge such securities, except securities may be pledged on behalf of customers at another futures commission merchant or derivatives clearing organization. Substitution of securities is allowed, provided, however, that:

(i) The qualifying securities being substituted and original securities are specifically identified by date of substitution, market values substituted, coupon rates, par amounts, maturity dates and CUSIP or ISIN numbers;

(ii) Substitution is made on a “delivery versus delivery” basis; and

(iii) The market value of the substituted securities is at least equal to that of the original securities.

(9) The transfer of securities to the customer segregated custodial account is made on a delivery versus payment basis in immediately available funds. The transfer of funds to the customer segregated cash account is made on a payment versus delivery basis. The transfer is not recognized as accomplished until the funds and/or securities are actually received by the custodian of the futures commission merchant’s or derivatives clearing organization’s customer funds or securities purchased on behalf of customers. The transfer or credit of securities covered by the agreement to the futures commission merchant’s or derivatives clearing organization’s customer segregated custodial account is made simultaneously with the disbursement of funds from the futures commission merchant’s or derivatives clearing organization’s customer segregated cash account at the custodian bank. On the sale or resale of securities, the futures commission merchant’s or derivatives clearing organization’s customer segregated cash account at the custodian bank must receive same-day funds credited to such segregated account simultaneously with the delivery or transfer of securities from the customer segregated custodial account.

(10) A written confirmation to the futures commission merchant or derivatives clearing organization specifying the terms of the agreement and a safekeeping receipt are issued immediately upon entering into the transaction and a confirmation to the futures commission merchant or derivatives clearing organization is issued once the transaction is reversed.

(11) The transactions effecting the agreement are recorded in the record required to be maintained under § 1.27 of investments of customer funds, and the securities subject to such transactions are specifically identified in such record as described in paragraph (d)(1) of this section and further identified in such record as being subject to repurchase and reverse repurchase agreements.

(12) An actual transfer of securities to the customer segregated custodial account by book entry is made consistent with Federal or State commercial law, as applicable. At all times, securities received subject to such transactions are reflected as “customer property.”

(13) The agreement makes clear that, in the event of the bankruptcy of the futures commission merchant or derivatives clearing organization, any securities purchased with customer funds that are subject to an agreement may
be immediately transferred. The agreement also makes clear that, in the event of a futures commission merchant or derivatives clearing organization bankruptcy, the counterparty has no right to compel liquidation of securities subject to an agreement or to make a priority claim for the difference between current market value of the securities and the price agreed upon for resale of the securities to the counterparty, if the former exceeds the latter.

(e) Deposit of firm-owned securities into segregation. A futures commission merchant shall not be prohibited from directly depositing unencumbered securities of the type specified in this section, which it owns for its own account, into a segregated safekeeping account or from transferring any such securities from a segregated account to its own account, up to the extent of its residual financial interest in customers' segregated funds; provided, however, that such investments, transfers of securities, and disposition of proceeds from the sale or maturity of such securities are recorded in the record of investments required to be maintained by §1.27. All such securities may be segregated in safekeeping only with a bank, trust company, derivatives clearing organization, or other futures commission merchant. Furthermore, for purposes of §§1.25, 1.27, 1.28, and 1.29, investments permitted by §1.25 that are owned by the futures commission merchant and deposited into such segregated account shall be considered customer funds until such investments are withdrawn from segregation. Investments permitted by §1.25 that are owned by the futures commission merchant and deposited into a segregated account pursuant to §1.26 shall be considered futures customer funds until such investments are withdrawn from segregation. Investments permitted by §1.25 that are owned by the futures commission merchant and deposited into a segregated account pursuant to §22.5 of this chapter shall be considered Cleared Swaps Customer Collateral until such investments are withdrawn from segregation.

APPENDIX TO §1.25—MOney MARKET MUTual FUND PROSPECTUS PROVISIONS ACCEPTABLE FOR COMPLIANCE WITH SECTION 1.25(c)(5)

Upon receipt of a proper redemption request submitted in a timely manner and otherwise in accordance with the redemption procedures set forth in this prospectus, the [Name of Fund] will redeem the requested shares and make a payment to you in satisfaction thereof no later than the business day following the redemption request. The [Name of Fund] may postpone and/or suspend redemption and payment beyond one business day only as follows:

a. For any period during which there is a non-routine closure of the Fedwire or applicable Federal Reserve Banks;
b. For any period (1) during which the New York Stock Exchange is closed other than customary week-end and holiday closings or (2) during which trading on the New York Stock Exchange is restricted;
c. For any period during which an emergency exists as a result of which (1) disposal of securities owned by the [Name of Fund] is not reasonably practicable or (2) it is not reasonably practicable for the [Name of Fund] to fairly determine the net asset value of shares of the [Name of Fund];
d. For any period during which the Securities and Exchange Commission has, by rule or regulation, deemed that (1) trading shall be restricted or (2) an emergency exists;
e. For any period that the Securities and Exchange Commission, may by order permit for your protection; or
f. For any period during which the [Name of Fund,] as part of a necessary liquidation of the fund, has properly postponed and/or suspended redemption of shares and payment in accordance with federal securities laws.


§1.26 Deposit of instruments purchased with futures customer funds.

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

1. The date on which such investments were made;
2. The name of the person through whom such investments were made;
3. The amount of money or current market value of securities so invested;
4. A description of the instruments in which such investments were made, including the CUSIP or ISIN numbers;
5. The identity of the depositories or other places where such instruments are segregated;
6. The date on which such investments were liquidated or otherwise disposed of and the amount of money or current market value of securities received on such disposition, if any; and
7. The name of the person to or through whom such investments were disposed of;
8. Daily valuation for each instrument and readily available documentation supporting the daily valuation for each instrument. Such supporting documentation must be sufficient to enable auditors to verify the valuations and the accuracy of any information from external sources used in those valuations.

(b) Each derivatives clearing organization which receives documents from its clearing members representing investment of customer funds shall keep a record showing separately for each clearing member the following:

1. The date on which such documents were received from the clearing member;
2. A description of such documents, including the CUSIP or ISIN numbers; and
3. The date on which such documents were returned to the clearing member or the details of disposition by other means.

[77 FR 66322, Nov. 2, 2012]
§ 1.28 Appraisal of instruments purchased with customer funds.

Futures commission merchants who invest customer funds in instruments described in § 1.25 of this part shall include such instruments in segregated account records and reports at values which at no time exceed current market value, determined as of the close of the market on the date for which such computation is made.


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

The investment of customer funds in instruments described in § 1.25 shall not prevent the futures commission merchant or derivatives clearing organization so investing such funds from receiving and retaining as its own any increment or interest resulting therefrom.

[77 FR 66322, Nov. 2, 2012]

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

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

[77 FR 66323, Nov. 2, 2012]
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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) For purposes of this section:
   (i) The term "micrographic media" means microfilm or microfiche or any similar medium.
   (ii) The term "electronic storage media" means any digital storage medium or system that:
       (A) Preserves the records exclusively in a non-rewritable, non-erasable format;
       (B) Verifies automatically the quality and accuracy of the storage media recording process;
       (C) Serializes the original and, if applicable, duplicate units of storage media and creates a time-date record for the required period of retention for the information placed on such electronic storage media; and
       (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 upon the request of representatives of the Commission or the Department of Justice.

(2) Persons who use either micrographic media or electronic storage media to maintain records in accordance with this section must:
   (i) Have available at all times, for examination by representatives of the Commission or the Department of Justice, 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 hardcopy image that representatives of the Commission or Department of Justice may request;
   (iii) Keep only Commission-required records on the individual medium employed (e.g., a disk or sheets of microfiche);
   (iv) Store a duplicate of the record, in any medium acceptable under this regulation, at a location separate from the original for the period of time required for maintenance of the original; and
   (v) Organize and maintain an accurate index of all information maintained on both the original and duplicate storage media such that:
       (A) The location of any particular record stored on the media may be immediately ascertained;
       (B) The index is available at all times for immediate examination by representatives of the Commission or the Department of Justice;
       (C) A duplicate of the index is stored at a location separate from the original index; and
       (D) Both the original index and the duplicate index are preserved for the time period required for the records included in the index.

(3) In addition to the foregoing conditions, persons using electronic storage media must:
   (i) Be ready at all times to provide, and immediately provide at the expense of the person required to keep such records, copies of such records on such compatible data processing media as defined in §15.00(d) of this chapter which any representative of the Commission or the Department of Justice may request. Records must use a format and coding structure specified in the request.
   (ii) Develop and maintain written operational procedures and controls (an "audit system") designed to provide accountability over both the initial entry of required records to the electronic storage media and the entry of each change made to any original or duplicate record maintained on the electronic storage media such that:
       (A) The results of such audit system are available at all times for immediate examination by representatives of the Commission or the Department of Justice;
       (B) The results of such audit system are preserved for the time period required for the records maintained on the electronic storage media; and
       (C) The written operational procedures and controls are available at all times for immediate examination by
representatives of the Commission or the Department of Justice.

(iii) Either

(A) Maintain, keep current, and make available at all times for immediate examination by representatives of the Commission or Department of Justice all information necessary to access records and indexes maintained on the electronic storage media; or

(B) Place in escrow and keep current a copy of the physical and logical format of the electronic storage media, the file format of all different information types maintained on the electronic storage media and the source code, documentation, and information necessary to access the records and indexes maintained on the electronic storage media.

(4) In addition to the foregoing conditions, any person who uses only electronic storage media to preserve some or all of its required records (“Electronic Recordkeeper”) shall, prior to the media’s use, enter into an arrangement with at least one third party technical consultant (“Technical Consultant”) who has the technical and financial capability to perform the undertakings described in this paragraph (b)(4). The arrangement shall provide that the Technical Consultant will have access to, and the ability to download, information from the Electronic Recordkeeper’s electronic storage media to any medium acceptable under this regulation.

(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 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.

(ii) [Reserved]

(c) Persons employing an electronic storage system shall provide a representation to the Commission prior to the initial use of the system. The representation shall be made by the person required to maintain the records, the storage system vendor, or another third party with appropriate expertise and shall state that the selected electronic storage system meets the requirements set forth in paragraph (b)(1)(ii) of this section. Persons employing an electronic storage system using media other than optical disk or CD-ROM technology shall so state. The representation shall be accompanied by the type of oath or affirmation described in §1.10(d)(4).

(d) Trading cards, documents on which trade information is originally recorded, written orders required to be kept pursuant to §1.35(a), (a–1)(1), (a–1)(2) and (d), and paper copies of electronically filed certified Forms 1–FR and FOCUS Reports with the original manually signed certification must be retained in hard-copy for the required time period.

(Approved by the Office of Management and Budget under control numbers 3038–0007 and 3038–0022)


§ 1.32 Segregated account; daily computation and record.

(a) Each futures commission merchant must compute as of the close of
each business day, on a currency-by-currency basis:

(1) The total amount of futures customer funds on deposit in segregated accounts on behalf of futures customers;
(2) The amount of such futures customer funds required by the Act and these regulations to be on deposit in segregated accounts on behalf of such futures customers; and
(3) The amount of the futures commission merchant’s residual interest in such futures customer funds.

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

(c) The daily computations required by this section must be completed by the futures commission merchant prior to noon on the next business day and must be kept, together with all supporting data, in accordance with the requirements of §1.31.

§ 1.33 Monthly and confirmation statements.

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

(1) For each commodity futures customer and foreign futures or foreign options customer position—
   (i) The open contracts with prices at which acquired;
   (ii) The net unrealized profits or losses in all open contracts marked to the market; and
   (iii) Any futures customer funds or foreign futures or foreign options secured amount, as defined by §1.3(rr), carried with the futures commission merchant.

(2) For each commodity option position and foreign option position—
   (i) All commodity options and foreign options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying futures contract or underlying commodity, strike price, transaction date, and expiration date;
   (ii) The open commodity option and foreign option positions carried for such customer as of the end of the monthly reporting period, identified by underlying futures contract or underlying commodity, strike price, transaction date, and expiration date;
   (iii) All open commodity option and foreign option positions marked to the market and the amount each position is in the money, if any;
   (iv) Any related customer funds carried in such customer’s account(s) or any related foreign futures or foreign options secured amount carried in the account(s) of a foreign futures or foreign options customer.

(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 options transactions received from or disbursed to such customer, premiums charged and received, and realized profits and losses.

(3) For each Cleared Swaps Customer position—
   (i) The Cleared Swaps, as §22.1 of this chapter defines that term, carried by the futures commission merchant for the Cleared Swaps Customer;
   (ii) The net unrealized profits or losses in all Cleared Swaps marked to the market;
   (iii) Any Cleared Swaps Customer Collateral carried with the futures commission merchant; and
(4) A detailed accounting of all financial charges and credits to customers and foreign futures or foreign options customers, during the monthly reporting period, including all customer funds and any foreign futures or foreign options secured amount, received from or disbursed to customers or foreign futures or foreign options customers, as well as realized profits and losses.

(b) Confirmation statement. Each futures commission merchant must, not later than the next business day after any commodity interest or commodity option transaction, including any foreign futures or foreign options transactions, furnish to each customer or foreign futures or foreign options customer:
   (1) A written confirmation of each commodity futures transaction caused to be executed by it for the customer.
   (2) A written confirmation of each Cleared Swap carried by the futures commission merchant, containing at least the following information:
      (i) The unique swap identifier, as required by §45.4(a) of this chapter, for each Cleared Swap and the date each Cleared Swap was executed;
      (ii) The product name of each Cleared Swap;
      (iii) The price at which the Cleared Swap was executed;
      (iv) The date of maturity for each Cleared Swap; and
   (v) The derivatives clearing organization through which it is cleared.
(3) To each option customer, a written confirmation of each commodity option transaction, containing at least the following information:
   (i) The customer’s account identification number;
   (ii) A separate listing of the actual amount of the premium, as well as each mark-up thereon, if applicable, and all other commissions, costs, fees and other charges incurred in connection with the commodity option transaction;
   (iii) The strike price;
   (iv) The underlying futures contract or underlying commodity;
   (v) The final exercise date of the commodity option purchased or sold; and
   (vi) The date the commodity option transaction was executed.
(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.

(c) Exemptions. The requirements of paragraphs (a)(1)(i), (a)(1)(ii), and (b)(1) of this section shall not apply to the following:
   (1) Any account carried for a person who is a member of any contract market;
   (2) Any omnibus account carried for another futures commission merchant; and
   (3) Any account containing only bona fide hedge positions, except that confirmations must be furnished to accounts containing only bona fide hedge positions.
(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:

(1) Promptly furnish in writing to such other person the information required by paragraphs (a) and (b) of this section;

(2) [Reserved]

(3) Promptly furnish in writing to such other person a copy of the statement required by §1.46: Provided, however, That the provisions of this paragraph (d) shall not apply to an account controlled by the spouse, parent or child of the customer for whom such account is carried.

(e) Recordkeeping. Each futures commission merchant shall retain, in accordance with §1.31, a copy of each monthly statement and confirmation required by this section.

(f) Introduced accounts. Each statement provided pursuant to the provisions of this section must, if applicable, show that the account for which the futures commission merchant is providing the statement was introduced by an introducing broker and the names of the futures commission merchant and introducing broker.

(g) Electronic transmission of statements. (1) The statements required by this section, and by §1.46, may be furnished to any customer by means of electronic media if the customer so consents, Provided, however, that a futures commission merchant must, prior to the transmission of any statement by means of electronic media, disclose the electronic medium or source through which statements will be delivered, the duration, whether indefinite or not, of the period during which consent will be effective, any charges for such service, the information that will be delivered by such means, and that consent to electronic delivery may be revoked at any time.

(2) In the case of a customer who does not qualify as an “institutional customer” as defined in §1.3(g), a futures commission merchant must obtain the customer’s signed consent acknowledging disclosure of the information set forth in paragraph (g)(1) of this section prior to the transmission of any statement by means of electronic media.

(3) Any statement required to be furnished to a person other than a customer in accordance with paragraph (d) of this section may be furnished by electronic media.

(4) A futures commission merchant who furnishes statements to any customer by means of electronic media must retain a daily confirmation statement for each customer as of the end of the trading session, reflecting all transactions made during that session for the customer, in accordance with §1.31.

(Approved by the Office of Management and Budget under control numbers 3038–0007 and 3038–0024; the information collection requirements in paragraph (c) were approved under control number 3038–0005)

§ 1.34 Monthly record, “point balance”.

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

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

(77 FR 66324, Nov. 2, 2012)

§ 1.35 Records of commodity interest and related cash or forward transactions.

(a) Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets or swap execution facilities.

(1) 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 related cash or forward transactions. 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 related cash or forward transactions. 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.” Such records shall be kept in a form and manner identifiable and searchable by transaction. Also included among the records required to be kept by this paragraph are all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media; Provided, however, the requirement in this paragraph (a)(1) to record oral communications shall not apply to:

(i) Oral communications that lead solely to the execution of a related cash or forward transaction;

(ii) Oral communications provided or received by a floor broker that do not lead to the purchase or sale for any person other than the floor broker of any commodity for future delivery, security futures product, swap, or commodity option authorized under section 4c of the Commodity Exchange Act;

(iii) An introducing broker that has generated over the preceding three years $5 million or less in aggregate gross revenues from its activities as an introducing broker;

(iv) A floor trader;

(v) A commodity pool operator;

(vi) A swap dealer;

(vii) A major swap participant; or

(viii) A member of a designated contract market or swap execution facility that is not registered or required to be registered with the Commission in any capacity.

(2) For purposes of paragraph (a)(1) of this section, “related cash or forward transaction” means a purchase or sale for immediate or deferred physical shipment or delivery of an asset related to a commodity interest transaction where the commodity interest transaction and the related cash or forward transaction are used to hedge, mitigate the risk of, or offset one another.

(3) Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall retain the records required to be kept by this section 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.
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(4)(i) The Commission may in its discretion establish an alternative compliance schedule for the requirement to record oral communications under paragraph (a)(1) of this section that is found to be technologically or economically impracticable for an affected entity that seeks, in good faith, to comply with the requirement to record oral communications under paragraph (a)(1) of this section within a reasonable time period beyond the date on which compliance by such affected entity is otherwise required.

(ii) A request for an alternative compliance schedule under paragraph (a)(4)(i) of this section shall be acted upon within 30 days from the time such a request is received, or it shall be deemed approved.

(iii) The Commission hereby delegates to the Director of the Division of Swap Dealer and Intermediary Oversight or such other employee or employees as the Director may designate from time to time, the authority to exercise the discretion. Notwithstanding such delegation, in any case in which a Commission employee delegated authority under this paragraph believes it appropriate, he or she may submit to the Commission for its consideration the question of whether an alternative compliance schedule should be established. The delegation of authority in this paragraph shall not prohibit the Commission, at its election, from exercising the discretion set forth in paragraph (a)(4)(i) of this section.

(iv) Relief granted under paragraph (a)(4)(i) of this section shall not cause an affected entity to be out of compliance or deemed in violation of any recordkeeping requirements.

(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 which cannot immediately be entered into a trade matching engine shall immediately upon receipt thereof prepare a written record of the order including the account identification, except as provided in paragraph (b)(5) of this section, and order number, and shall record thereon, by timestamp or other timing device, the date and time, to the nearest minute, the order is received, and in addition, for commodity option orders, the time, to the nearest minute, the order is transmitted for execution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) An investment adviser registered with the Securities and Exchange Commission pursuant to the Investment Advisers Act of 1940 or with a state pursuant to applicable state law or 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
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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 documentation of cash transactions underlying exchanges of futures or swaps for cash commodities or exchanges of futures or swaps in connection with cash commodity transactions.

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

(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;
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(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 commodity, strike price, and details of the purchase price of the option, including premium, mark-up, commission and fees; and
(iv) All swap transactions executed for such account, including the date, price, quantity, market, commodity, swap, and, if cleared, the derivatives clearing organization; and

(3) A record or journal which will separately show for each business day complete details of:
(i) All commodity futures transactions executed on that day, including the date, price, quantity, market, commodity, future and the person for whom such transaction was made;
(ii) All retail forex transactions executed on that day for such account, including the date, price, quantity, currency and the person who whom such transaction was made;
(iii) All commodity option transactions executed on that day, including the date, whether the transaction involved a put or call, the expiration date, quantity, underlying contract for future delivery or underlying commodity, strike price, details of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made;
(iv) All swap transactions executed on that day, including the date, price, quantity, market, commodity, swap, the person for whom such transaction was made, and, if cleared, the derivatives clearing organization; and
(v) In the case of an introducing broker, the record or journal required by this paragraph (d)(3) shall also include the futures commission merchant or retail foreign exchange dealer carrying the account for which each commodity futures, retail forex, commodity option, and swap transaction was executed on that day. Provided, however, that where reproductions on microfilm, microfiche or optical disk are substituted for hard copy in accordance with the provisions of §1.31(b), the requirements of paragraphs (d)(1) and (d)(2) of this section will be considered met if the person required to keep such records is ready at all times to provide, and immediately provides in the same city as that in which such person’s commodity futures, retail forex, commodity option, or swap books and records are maintained, at the expense of such person, reproduced copies which show the records as specified in paragraphs (d)(1) and (d)(2) of this section, on request of any representatives of the Commission or the U.S. Department of Justice.

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

(f) Members of designated contract markets. (1) Each member of a designated contract market who, in the place provided by the designated contract market for the meeting of persons similarly engaged, executes purchases or sales of any commodity for future delivery, commodity option, or swap on or subject to the rules of such designated contract market, shall prepare regularly and promptly a trading card or other record showing such purchases and sales. Such trading card or record shall show the member’s name, the name of the clearing member, transaction date, time, quantity, and, as applicable, underlying commodity, contract for future delivery, or swap, price or premium, delivery month or expiration date, whether the transaction involved a put or a call, and strike price. Such trading card or other record shall also clearly identify the opposite floor broker or floor trader with whom the

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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 writing 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, or swap, price or premium, delivery month or expiration date, whether the transaction involved a put or a call, strike price, floor broker or floor trader buying, clearing member buying, floor broker or floor trader selling, clearing member selling, and symbols indicating the buying and selling customer types. The customer type indicator shall show, with respect
§ 1.36 Record of securities and property received from customers.

(a) Each futures commission merchant and each retail foreign exchange dealer shall maintain, as provided in §1.31, a record of all securities and property received from customers or retail forex customers in lieu of money to margin, purchase, guarantee, or secure the commodity interests of such customers or retail forex customers. Such record shall show separately for each customer or retail forex customer:

A description of the securities or property received; the name and address of such customer or retail forex customer; the dates when the securities or property were received; the identity of the depositories or other places where such securities or property are segregated or held; the dates of deposits and withdrawals from such depositories; and the dates of return of such securities or property to such customer or retail forex customer, or other disposition thereof, together with the facts and circumstances of such other disposition. In the event any futures commission merchant deposits with a derivatives clearing organization, directly or with a bank or trust company acting as custodian for such derivatives clearing organization, securities and/or property which belong to a particular customer, such futures commission merchant shall obtain written acknowledgment from such derivatives clearing organization that it was informed that such securities or property belong to customers of the futures commission merchant making the deposit. Such acknowledgment shall be retained as provided in §1.31.

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

[77 FR 66328, Nov. 2, 2012]
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§ 1.39 Simultaneous buying and selling orders of different principals; execution of, for and between principals.

(a) Conditions and requirements. A member of a contract market or a swap execution facility who shall have at the same time both buying and selling orders of different principals for the same swap, commodity for future delivery in the same delivery month or the same option (both puts or both calls, with the same underlying contract for future delivery or the same underlying commodity, expiration date

§ 1.38 Execution of transactions.

(a) Competitive execution required; exceptions. All purchases and sales of any commodity for future delivery, and of any commodity option, on or subject to the rules of a contract market shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity or commodity option: Provided, however, That this requirement shall not apply to transactions which are executed non-competitively in accordance with written rules of the contract market which have been submitted to and approved by the Commission, specifically providing for the non-competitive execution of such transactions.

(b) Noncompetitive trades; exchange of futures, etc.; requirements. Every person handling, executing, clearing, or carrying trades, transactions or positions which are not competitively executed, including transfer trades or office trades, or trades involving the exchange of futures for cash commodities or the exchange of futures in connection with cash commodity transactions, shall identify and mark by appropriate symbol or designation all such transactions or contracts and all orders, records, and memoranda pertaining thereto.

(Approved by the Office of Management and Budget under control numbers 3038–0007 and 3038–0022)


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

(a) Conditions and requirements. A member of a contract market or a swap execution facility who shall have at the same time both buying and selling orders of different principals for the same swap, commodity for future delivery in the same delivery month or the same option (both puts or both calls, with the same underlying contract for future delivery or the same underlying commodity, expiration date

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(a) When trading is conducted in a trading pit or ring, such orders are first offered openly and competitively by open outcry in such trading pit or ring (A) by both bidding and offering at the same price, and neither such bid nor offer is accepted, or (B) by bidding and offering to a point where such offer is higher than such bid by not more than the minimum permissible price fluctuation applicable to such futures contract or commodity option on such contract market, and neither such bid nor offer is accepted; or

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

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

(B) Pursuant to such selling order posts an offer on the board and, incident to the execution of such buying order, accepts such offer and all other offers posted at prices equal to or lower than the offer posted by him;

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

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

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

(b) Large order execution procedures.

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

(i) An explanation of why the proposed large order execution rules do not comply with paragraph (a) of this section; and

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

(2) The Commission may, in its discretion and upon such terms and conditions as it deems appropriate, grant such petition for exemption if it finds that the exemption is not contrary to the public interest and the purpose of the provision from which explanation is sought. The petition shall be considered concurrently with the proposed large order execution rules.

(c) Not deemed filling orders by offset.

The execution of orders in compliance with the conditions herein set forth will not be deemed to constitute the filling of orders by offset within the meaning of section 4b(a) of the Act.

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

Each futures commission merchant, each retail foreign exchange dealer, each introducing broker, and each member of a contract market or a swap execution facility shall, upon request, furnish or cause to be furnished to the Commission a true copy of any letter, circular, telecommunication, or report published by a futures commission merchant, retail foreign exchange dealer, introducing broker, 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.

§ 1.46 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:

(i) Purchases any commodity for future delivery for the account of any customer when the account of such customer at the time of such purchase has a short position in the same future of the same commodity on the same market;

(ii) Sells any commodity for future delivery for the account of any customer when the account of such customer at the time of such sale has a long position in the same future of the same commodity on the same market;

(iv) Sells a put or call option for the account of any customer when the account of such customer at the time of such sale has a long put or call option position with the same underlying futures contract or same underlying commodity, strike price, expiration date and contract market as that sold—shall on the same day apply such purchase or sale against such previously held short or long futures or option position, as the case may be, and shall, for futures transactions, promptly furnish such customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant by an introducing broker and the names of the futures commission merchant and introducing broker.

(2) Any futures commission merchant or retail foreign exchange dealer who:

(i) Engages in a retail forex transaction involving the purchase of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has an open retail forex transaction for the sale of the same currency;

(ii) Engages in a retail forex transaction involving the sale of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has an open retail forex transaction for the purchase of the same currency;

(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;

(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...
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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.

(c) In-and-out trades; day trades. Notwithstanding the provisions of paragraphs (a) and (b) of this section shall not be deemed to require the application of purchases or sales closed out during the same day (commonly known as “in-and-out trades” or “day trades”) against short or long positions carried forward from a prior date.

(d) Exceptions. The provisions of this section shall not apply to:

(1) Purchases or sales of commodity options constituting “bona fide hedging transactions” pursuant to rules of the contract market which have been adopted in accordance with the requirements of §1.61(b) and approved by the Commission pursuant to; section 5a(a)(12)(A) of the Act Provided, That no contract market or futures commission merchant shall permit such option positions to be offset other than by open and competitive execution in the trading pit or ring provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity option.

(2) Purchases or sales constituting “bona fide hedging transactions” as defined in §1.3(z); nor

(3) Sales during a delivery period for the purpose of making delivery during such delivery period if such sales are accompanied by instructions to make delivery thereon, together with warehouse receipts or other documents necessary to effectuate such delivery.

(4)–(7) [Reserved]

(8) Purchases or sales held in error accounts, including but not limited to floor broker error accounts, and purchases or sales identified as errors at the time they are assigned to an account that contains other purchases or sales not identified as errors and held
in that account ("error trades"), provided that:

(i) Each error trade does not offset another error trade held in the same account;

(ii) Each error trade is offset by open and competitive means on or subject to the rules of a contract market by not later than the close of business on the business day following the day the error trade is discovered and assigned to an error account or identified as an error trade, unless at the close of business on the business day following the discovery of the error trade, the relevant market has reached a daily price fluctuation limit and the trader is unable to offset the error trade, in which case the error trade must be offset as soon as practicable thereafter; and

(iii) No error trade is closed out by transferring such an open position to another account also controlled by that same trader.

The statements required by paragraph (a) of this section may be furnished to the customer or the person described in §1.33(d) by means of electronic transmission, in accordance with §1.33(g).

(Approved by the Office of Management and Budget under control number 3038–0007)

(Sees. 4g, 5, 8a, 50 Stat. 100, 49 Stat. 1496; 7 U.S.C. 6g, 7; secs. 4g, 5, 8a, 7 U.S.C. 6g, 7, 12a)

[41 FR 3194, Jan. 21, 1976]

Editorial Note: For Federal Register citations affecting §1.49, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 1.49 Denomination of customer funds and location of depositories.

(a) Definitions. For purposes of this section:

(1) Money center country. This term means Canada, France, Italy, Germany, Japan, and the United Kingdom.

(2) Money center currency. This term means the currency of any money center country and the Euro.

(b) Permissible denominations of obligations. (1) Subject to the terms and conditions set forth in this section, a futures commission merchant’s obligations to a customer shall be denominated:

(i) In the United States dollar;

(ii) In a currency in which funds were deposited by the customer or were converted at the request of the customer, to the extent of such deposits and conversions; or

(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.

(2) (i) A futures commission merchant shall prepare and maintain a written record of each transaction converting customer funds from one currency to another.

(ii) A written record prepared under paragraph (b)(2)(i) of this section must include the date the transaction was executed, the currencies converted, the amount converted, and the resulting amount.

(iii) The information required under paragraph (b)(2)(ii) of this section must be provided to the customer upon the customer’s request.

(c) Permissible locations of depositories. (1) Unless a customer provides instructions to the contrary, a futures commission merchant or a derivatives clearing organization may hold customer funds:

(i) In the United States;

(ii) In a money center country; or

(iii) In the country of origin of the currency.

(2) A futures commission merchant or derivatives clearing organization may hold customer funds outside the United States, in a jurisdiction that is not a money center country, or the country of origin of the currency only to the extent authorized by the customer, provided, that the futures commission merchant or derivatives clearing organization must make and maintain a written record of such authorization. Notwithstanding the foregoing, in no event shall a futures commission merchant or derivatives clearing organization hold customer funds outside the United States, in a jurisdiction that is not a money center country, or the country of origin of the currency only to the extent authorized by the customer, provided, that the futures commission merchant or derivatives clearing organization must make and maintain a written record of such authorization. Notwithstanding the foregoing, in no event shall a futures commission merchant or derivatives clearing organization hold customer funds outside the United States, in a jurisdiction that is not a money center country, or the country of origin of the currency only to the extent authorized by the customer, provided, that the futures commission merchant or derivatives clearing organization must make and maintain a written record of such authorization. Notwithstanding the foregoing, in no event shall a futures commission merchant or derivatives clearing organization hold customer funds outside

(d) Qualifications for depositories. (1) To hold customer funds required to be segregated pursuant to the Act and §§1.20 through 1.32 and 1.36, a depository must provide the depositing
futures commission merchant or derivatives clearing organization with the appropriate written acknowledgment as required under §§1.20 and 1.26.

(2) A depository, if located in the United States, must be:
   (i) A bank or trust company;
   (ii) A futures commission merchant registered as such with the Commission; or
   (iii) A derivatives clearing organization.

(3) A depository, if located outside the United States, must be:
   (i) A bank or trust company that has in excess of $1 billion of regulatory capital;
   (ii) A futures commission merchant that is registered as such with the Commission; or
   (iii) A derivatives clearing organization.

(e) Segregation requirements. (1) Each futures commission merchant and each derivatives clearing organization must, as of the close of each business day, hold in segregated accounts on behalf of commodity or option customers:
   (i) Sufficient United States dollars, held in the United States, to meet all United States dollar obligations; and
   (ii) Sufficient funds in each other currency to meet obligations in such currency.

(2) Notwithstanding paragraph (e)(1)(ii) of this section, assets denominated in one currency may be held to meet obligations denominated in another currency as follows:
   (i) United States dollars may be held in the United States or in money center countries to meet obligations denominated in any other currency; and
   (ii) Funds in money center currencies may be held in the United States or in money center countries to meet obligations other than the United States dollar.

(3) Each futures commission merchant and each derivatives clearing organization shall make and maintain records sufficient to demonstrate compliance with this paragraph (e).

(a) Each self-regulatory organization must adopt rules prescribing minimum financial and related reporting requirements for members who are registered futures commission merchants, registered retail foreign exchange dealers, or registered introducing brokers. The self-regulatory minimum financial and related reporting requirements must be the same as, or more stringent than, the requirements contained in §§1.10 and 1.17 of this chapter, for futures commission merchants and introducing brokers, and §§5.7 and 5.12 of this chapter for retail foreign exchange dealers; provided, however, a self-regulatory organization may permit its member registrants that are registered with the Securities and Exchange Commission as securities brokers or dealers to file (in accordance with §1.10(h) of this chapter) a copy of their Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE, in lieu of Form 1–FR. The definition of adjusted net capital must be the same as that prescribed in §1.17(c) of this chapter for futures commission merchants and introducing brokers, and §5.7(b)(2) of this chapter for futures commission merchants offering or engaging in retail foreign exchange transactions and for retail foreign exchange dealers. (b) Each self-regulatory organization must establish and operate a supervisory program for the purpose of assessing whether each member registrant is in compliance with the applicable self-regulatory organization and Commission rules and regulations governing minimum net capital and related financial requirements, the obligation to segregate customer funds, financial reporting requirements, recordkeeping requirements, and sales practice and other compliance requirements. The supervisory program also must address the following elements:

(1) Adequate levels and independence of audit staff. A self-regulatory organization must maintain staff of an adequate size, training, and experience to effectively implement a supervisory
program. Staff of the self-regulatory organization, including officers, directors and supervising committee members, must maintain independent judgment and its actions must not impair its independence nor appear to impair its independence in matters related to the supervisory program. The self-regulatory organization must provide annual ethics training to all staff with responsibilities for the supervisory program.

(2) **Ongoing surveillance.** A self-regulatory organization’s ongoing surveillance of member registrants must include the review and analysis of financial reports and regulatory notices filed by member registrants with the designated self-regulatory organization.

(3) **High-risk firms.** A self-regulatory organization’s supervisory program must include procedures for identifying member registrants that are determined to pose a high degree of potential financial risk, including the potential risk of loss of customer funds. High-risk member registrants must include firms experiencing financial or operational difficulties, failing to meet segregation or net capital requirements, failing to maintain current books and records, or experiencing material inadequacies in internal controls. Enhanced monitoring for high risk firms should include, as appropriate, daily review of net capital, segregation, and secured calculations, to assess compliance with self-regulatory and Commission requirements.

(4) **On-site examinations.** (i) A self-regulatory organization must conduct routine periodic on-site examinations of member registrants. Member futures commission merchants and retail foreign exchange dealers must be subject to on-site examinations no less frequently than once every eighteen months. A self-regulatory organization may establish a risk-based method of establishing the scope of each on-site examination, provided however, that the scope of each on-site examination of a futures commission merchant or retail foreign exchange dealer must include an assessment of whether the registrant is in compliance with applicable Commission and self-regulatory organization minimum capital and customer fund protection requirements, recordkeeping, and reporting requirements.

(ii) A self-regulatory organization must establish the frequency of on-site examinations of member introducing brokers that do not operate pursuant to guarantee agreements with futures commission merchants or retail foreign exchange dealers using a risk-based approach, provided however, that each introducing broker is subject to an on-site examination no less frequently than once every three years.

(iii) A self-regulatory organization must conduct on-site examinations of member registrants in accordance with uniform audit programs and procedures that have been submitted to the Commission.

(5) **Adequate documentation.** A self-regulatory organization must adequately document all aspects of the operation of the supervisory program, including the conduct of risk-based scope setting and the risk-based surveillance of high-risk member registrants, and the imposition of remedial and punitive action(s) for material violations.

(c) Any two or more self-regulatory organizations may file with the Commission a plan for delegating to a designated self-regulatory organization, for any registered futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one such self-regulatory organization, the responsibility of:

(1) Monitoring and auditing for compliance with the minimum financial and related reporting requirements adopted by such self-regulatory organizations and the Commission in accordance with paragraphs (a) and (b) of this section; and

(2) Receiving the financial reports necessitated by such minimum financial and related reporting requirements.

(d) Any plan filed under this section may contain provisions for the allocation of expenses reasonably incurred by the designated self-regulatory organization among the self-regulatory organizations participating in such a plan.

(e) A plan’s designated self-regulatory organization must report to:
(1) That plan’s other self-regulatory organizations any violation of such other self-regulatory organizations’ rules and regulations for which the responsibility to monitor, audit or examine has been delegated to such designated self-regulatory organization under this section; and

(2) The Commission any violation of a self-regulatory organization’s rules and regulations or any violation of the Commission’s regulations for which the responsibility to monitor, audit or examine has been delegated to such designated self-regulatory organization under this section.

(f) The self-regulatory organizations may, among themselves, establish programs to provide access to any necessary financial or related information.

(g) After appropriate notice and opportunity for comment, the Commission may, by written notice, approve such a plan, or any part of the plan, if it finds that the plan, or any part of it:

(1) Is necessary or appropriate to serve the public interest;

(2) Is for the protection and in the interest of customers;

(3) Reduces multiple monitoring and multiple auditing for compliance with the minimum financial rules of the self-regulatory organizations submitting the plan of any futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization;

(4) Reduces multiple reporting of the financial information necessitated by such minimum financial and related reporting requirements by any futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization;

(5) Fosters cooperation and coordination among the self-regulatory organizations; and

(6) Does not hinder the development of a registered futures association under section 17 of the Act.

(h) After the Commission has approved a plan, or part thereof, under §1.52(g), a self-regulatory organization relieved of responsibility must notify each of its members that are subject to such a plan:

(1) Of the limited nature of its responsibility for such a member’s compliance with its minimum financial and related reporting requirements; and

(2) Of the identity of the designated self-regulatory organization that has been delegated responsibility for such a member.

(i) The Commission may at any time, after appropriate notice and opportunity for hearing, withdraw its approval of any plan, or part thereof, established under this section, if such plan, or part thereof, ceases to adequately effectuate the purposes of section 4f(b) of the Act or of this section.

(j) Whenever a registered futures commission merchant, a registered retail foreign exchange dealer, or a registered introducing broker holding membership in a self-regulatory organization ceases to be a member in good standing of that self-regulatory organization, such self-regulatory organization must, on the same day that event takes place, give electronic notice of that event to the Commission at its Washington, DC, headquarters and send a copy of that notification to such futures commission merchant, retail foreign exchange dealer, or introducing broker.

(k) Nothing in this section shall preclude the Commission from examining any futures commission merchant, retail foreign exchange dealer, or introducing broker for compliance with the minimum financial and related reporting requirements to which such futures commission merchant, retail foreign exchange dealer, or introducing broker is subject.

(l) In the event a plan is not filed and/or approved for each registered futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization, the Commission may design and, after notice and opportunity for comment, approve a plan for those futures commission merchant, retail foreign exchange dealers, or introducing brokers that are not the subject of an approved plan (under paragraph (g) of this section), delegating to a designated self-
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regulatory organization the responsibilities described in paragraph (c) of this section.

[77 FR 36694, June 19, 2012]

§ 1.55 Distribution of “Risk Disclosure Statement” by futures commission merchants and introducing brokers.

(a)(1) Except as provided in 1.65, no futures commission merchant, or in the case of an introduced account no introducing broker, may open a commodity futures account for a customer, other than for a customer specified in paragraph (f) of this section, unless the futures commission merchant or introducing broker first:

(i) Furnishes the customer with a separate written disclosure statement containing only the language set forth in paragraph (b) of this section (except for nonsubstantive additions such as captions) or as otherwise approved under paragraph (c) of this section; Provided, however, that the disclosure statement may be attached to other documents as the cover page or the first page of such documents and as the only material on such page; and

(ii) Receives from the customer an acknowledgment signed and dated by the customer that he received and understood the disclosure statement.

(b) The language set forth in the written disclosure document required by paragraph (a) of this section shall be as follows:

RISK DISCLOSURE STATEMENT

The risk of loss in trading commodity futures contracts can be substantial. You should, therefore, carefully consider whether such trading is suitable for you in light of your circumstances and financial resources. You should be aware of the following points:

(1) You may sustain a total loss of the funds that you deposit with your broker to establish or maintain a position in the commodity futures market, and you may incur losses beyond these amounts. If the market moves against your position, you may be called upon by your broker to deposit a substantial amount of additional margin funds, on short notice, in order to maintain your position. If you do not provide the required funds within the time required by your broker, your position may be liquidated at a loss, and you will be liable for any resulting deficit in your account.

(2) Under certain market conditions, you may find it difficult or impossible to liquidate a position. This can occur, for example, when the market reaches a daily price fluctuation limit (“limit move”).

(3) Placing contingent orders, such as “stop-loss” or “stop-limit” orders, will not necessarily limit your losses to the intended amounts, since market conditions on the exchange where the order is placed may make it impossible to execute such orders.

(4) All futures positions involve risk, and a “spread” position may not be less risky than an outright “long” or “short” position.

(5) The high degree of leverage (gearing) that is often obtainable in futures trading because of the small margin requirements can work against you as well as for you. Leverage (gearing) can lead to large losses as well as gains.

(6) You should consult your broker concerning the nature of the protections available to safeguard funds or property deposited for your account.

ALL OF THE POINTS NOTED ABOVE APPLY TO ALL FUTURES TRADING WHETHER FOREIGN OR DOMESTIC. IN ADDITION, IF YOU ARE CONTEMPLATING TRADING FOREIGN FUTURES OR OPTIONS CONTRACTS, YOU SHOULD BE AWARE OF THE FOLLOWING ADDITIONAL RISKS:

(7) Foreign futures transactions involve executing and clearing trades on a foreign exchange. This is the case even if the foreign exchange is formally “linked” to a domestic exchange, whereby a trade executed on one exchange liquidates or establishes a position
on the other exchange. No domestic organization regulates the activities of a foreign exchange, including the execution, delivery, and clearing of transactions on such an exchange, and no domestic regulator has the power to compel enforcement of the rules of the foreign exchange or the laws of the foreign country. Moreover, such laws or regulations may vary depending on the foreign country in which the transaction occurs. For these reasons, customers who trade on foreign exchanges may not be afforded certain of the protections which apply to domestic transactions, including the right to use domestic alternative dispute resolution procedures. In particular, funds received from customers to margin foreign futures transactions may not be provided the same protections as funds received to margin futures transactions on domestic exchanges. Before you trade, you should familiarize yourself with the foreign rules which will apply to your particular transaction.

(8) Finally, you should be aware that the price of any foreign futures or option contract and, therefore, the potential profit and loss resulting therefrom, may be affected by any fluctuation in the foreign exchange rate between the time the order is placed and the foreign futures contract is liquidated or the foreign option contract is liquidated or exercised.

THIS BRIEF STATEMENT CANNOT, OF COURSE, DISCLOSE ALL THE RISKS AND OTHER ASPECTS OF THE COMMODITY MARKETS

I hereby acknowledge that I have received and understood this risk disclosure statement.

______________________________
Signature of Customer

Date

(c) The Commission may approve for use in lieu of the risk disclosure document required by paragraph (b) of this section a risk disclosure statement approved by one or more foreign regulatory agencies or self-regulatory organizations if the Commission determines that such risk disclosure statement is reasonably calculated to provide the disclosure required by paragraph (b) of this section. Notice of risk disclosure statements that may be used to satisfy Commission disclosure requirements, what requirements such statements meet and the jurisdictions which accept each format will be set forth in appendix A to this section.

(d) Any futures commission merchant, or in the case of an introduced account any introducing broker, may open a commodity futures account for a customer without obtaining the separate acknowledgments of disclosure and elections required by this section and by §1.33(g), and by §§33.7 and 190.06 of this chapter, provided that:

(1) Prior to the opening of such account, the futures commission merchant or introducing broker obtains an acknowledgement from the customer, which may consist of a single signature at the end of the futures commission merchant’s or introducing broker’s customer account agreement, or on a separate page, of the disclosure statements, consents and elections specified in this section and §1.33(g), and in §§33.7, §155.3(b)(2), §155.4(b)(2), and §190.06 of this chapter, and which may include authorization for the transfer of funds from a segregated customer account to another account of such customer, as listed directly above the signature line, provided the customer has acknowledged by check or other indication next to a description of each specified disclosure statement, consent or election that the customer has received and understood such disclosure statement or made such consent or election; and

(2) The acknowledgment referred to in paragraph (d)(1) of this section is accompanied by and executed contemporaneously with delivery of the disclosures and elective provisions required by this section and §1.33(g), and by §§33.7 and 190.06 of this chapter.

(e) The acknowledgment required by paragraph (a) of this section must be retained by the futures commission merchant or introducing broker in accordance with §1.31.

(f) A futures commission merchant or, in the case of an introduced account, an introducing broker, may open a commodity futures account for an “institutional customer” as defined in §1.3(g) without furnishing such institutional customer the disclosure statements or obtaining the acknowledgments required under paragraph (a) of this section §§1.33(g) and 1.65(a)(3), and §§30.6(a), 33.7(a), 155.3(b)(2), 155.4(b)(2) and 190.10(c) of this chapter.
(g) This section does not relieve a futures commission merchant or introducing broker from any other disclosure obligation it may have under applicable law.

(h) Notwithstanding any other provision of this section or §1.65, a person registered or required to be registered with the Commission as a futures commission merchant pursuant to sections 4(h)(1) or 4(h)(2) of the Commodity Exchange Act and registered or required to be registered with the Securities and Exchange Commission as a broker or dealer pursuant to sections 15(b)(1) or 15(b)(11) of the Securities Exchange Act of 1934 and rules thereunder must provide to a customer or prospective customer, prior to the acceptance of any order for, or otherwise handling any transaction in or in connection with, a security futures product for a customer, the disclosures set forth in §41.41(b)(1) of this chapter.

(Approved by the Office of Management and Budget under control number 3038–0022)

(Secs. 4b, 4c(b), 4g(1), 4f, 4o, and 8a(5), Commodity Exchange Act, 7 U.S.C. 6b, 6c(b), 6g(1), 6f, 6o, and 12a(5)1976), and sec. 217, Commodity Futures Trading Act of 1974, 88 Stat. 1405; secs. 2(a)(1), 4b, 4c, 4d, 4f and 8a, Commodity Exchange Act, as amended (7 U.S.C. 2, 6b, 6c, 6f and 12a))
APPENDIX A TO CFTC RULE 1.55(c) — GENERIC RISK DISCLOSURE STATEMENT

Risk Disclosure Statement for Futures and Options

This brief statement does not disclose all of the risks and other significant aspects of trading in futures and options. In light of the risks, you should undertake such transactions only if you understand the nature of the contracts (and contractual relationships) into which you are entering and the extent of your exposure to risk. Trading in futures and options is not suitable for many members of the public. You should carefully consider whether trading is appropriate for you in light of your experience, objectives, financial resources and other relevant circumstances.

Futures

1. Effect of ‘Leverage’ or ‘Gearing’

Transactions in futures carry a high degree of risk. The amount of initial margin is small relative to the value of the futures contract so that transactions are ‘leveraged’ or ‘geared’. A relatively small market movement will have a proportionately larger impact on the funds you have deposited or will have to deposit; this may work against you as well as for you. You may sustain a total loss of initial margin funds and any additional funds deposited with the firm to maintain your position. If the market moves against your position or margin levels are increased, you may be called upon to pay substantial additional funds on short notice to maintain your position. If you fail to comply with a request for additional funds within the time prescribed, your position may be liquidated at a loss and you will be liable for any resulting deficit.

2. Risk-reducing orders or strategies

The placing of certain orders (e.g. ‘stop-loss’ orders, where permitted under local law, or ‘stop-limit’ orders) which are intended to limit losses to certain amounts may not be effective because market conditions may make it impossible to execute such orders. Strategies using combinations of positions, such as ‘spread’ and ‘straddle’ positions may be as risky as taking simple ‘long’ or ‘short’ positions.

Options

3. Variable degree of risk

Transactions in options carry a high degree of risk. Purchasers and sellers of options should familiarize themselves with the type of option (i.e. put or call) which they contemplate trading and the associated risks. You should calculate the extent to which the value of the options must increase for your position to become profitable, taking into account the premium and all transaction costs.

The purchaser of options may offset or exercise the options or allow the options to expire. The exercise of an option results either in a cash settlement or in the purchaser acquiring or delivering the underlying interest. If the option is on a future, the purchaser will acquire a futures position with associated liabilities for margin (see the section on Futures above). If the purchased options expire worthless, you will suffer a total loss of your investment which will consist of the option premium plus transaction costs. If you are contemplating purchasing deep-out-of-the-money options, you should be aware that the chance of such options becoming profitable ordinarily is remote.

Selling (‘writing’ or ‘granting’) an option generally entails considerably greater risk than purchasing options. Although the premium received by the seller is fixed, the seller may sustain a loss well in excess of that amount. The seller will be liable for additional margin to maintain the position if the market moves unfavorably. The seller will also be exposed to the risk of the purchaser exercising the option and the seller will be obligated to either settle the option in cash or to acquire or deliver the underlying interest. If the option is on a future, the seller will acquire a position in a future with associated liabilities for margin (see the section on Futures above). If the option is ‘covered’ by the seller holding a corresponding position in the underlying interest or a future or another option, the risk may be reduced. If the option is not covered, the risk of loss can be unlimited.

Certain exchanges in some jurisdictions permit deferred payment of the option premium, exposing the purchaser to liability for margin payments not exceeding the amount of the premium. The purchaser is still subject to the risk of losing the premium and transaction costs. When the option is exercised or expires, the purchaser is responsible for any unpaid premium outstanding at that time.

Additional risks common to futures and options

4. Terms and conditions of contracts

You should ask the firm with which you deal about the terms and conditions of the specific futures or options which you are trading and associated obligations (e.g. the circumstances under which you may become obligated to make or take delivery of the underlying interest of a futures contract and, in respect of options, expiration dates and restrictions on the time for exercise). Under certain
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circumstances the specifications of outstanding contracts (including the exercise price of an option) may be modified by the exchange or clearing house to reflect changes in the underlying interest.

5. Suspension or restriction of trading and pricing relationships

Market conditions (e.g. illiquidity) and/or the operation of the rules of certain markets (e.g. the suspension of trading in any contract or contract month because of price limits or ‘circuit breakers’) may increase the risk of loss by making it difficult or impossible to effect transactions or liquidate/offset positions. If you have sold options, this may increase the risk of loss.

Further, normal pricing relationships between the underlying interest and the future, and the underlying interest and the option may not exist. This can occur when, for example, the futures contract underlying the option is subject to price limits while the option is not. The absence of an underlying reference price may make it difficult to judge ‘fair’ value.

6. Deposited cash and property

You should familiarize yourself with the protections accorded money or other property you deposit for domestic and foreign transactions, particularly in the event of a firm insolvency or bankruptcy. The extent to which you may recover your money or property may be governed by specific legislation or local rules. In some jurisdictions, property which had been specifically identifiable as your own will be pro-rated in the same manner as cash for purposes of distribution in the event of a shortfall.

7. Commission and other charges

Before you begin to trade, you should obtain a clear explanation of all commission, fees and other charges for which you will be liable. These charges will affect your net profit (if any) or increase your loss.

8. Transactions in other jurisdictions

Transactions on markets in other jurisdictions, including markets formally linked to a domestic market, may expose you to additional risk. Such markets may be subject to regulation which may offer different or diminished investor protection. Before you trade you should enquire about any rules relevant to your particular transactions. Your local regulatory authority will be unable to compel the enforcement of the rules of regulatory authorities or markets in other jurisdictions where your transactions have been effected. You should ask the firm with which you deal for details about the types of redress available in both your home jurisdiction and other relevant jurisdictions before you start to trade.

9. Currency risks

The profit or loss in transactions in foreign currency-denominated contracts (whether they are traded in your own or another jurisdiction) will be affected by fluctuations in currency rates where there is a need to convert from the currency denomination of the contract to another currency.

10. Trading facilities

Most open-outcry and electronic trading facilities are supported by computer-based component systems for the order-routing, execution, matching, registration or clearing of trades. As with all facilities and systems, they are vulnerable to temporary disruption or failure. Your ability to recover certain losses may be subject to limits on liability imposed by the system provider, the market, the clearing house and/or member firms. Such limits may vary: you should ask the firm with which you deal for details in this respect.

11. Electronic trading

Trading on an electronic trading system may differ not only from trading in an open-outcry market but also from trading on other electronic trading systems. If you undertake transactions on an electronic trading system, you will be exposed to risks associated with the system including the failure of hardware and software. The result of any system failure may be that your order is either not executed according to your instructions or is not executed at all.

12. Off-exchange transactions

In some jurisdictions, and only then in restricted circumstances, firms are permitted to effect off-exchange transactions. The firm with which you deal may be acting as your counterparty to the transaction. It may be difficult or impossible to liquidate an existing position, to assess the value, to determine a fair price or to assess the exposure to risk. For these reasons, these transactions may involve increased risks. Off-exchange transactions may be less regulated or subject to a separate regulatory regime. Before you undertake such transactions, you should familiarize yourself with applicable rules and attendant risks.

I hereby acknowledge that I have received and understood this risk disclosure statement.

________________________________________  __________________________________________
Date                                                                                     Signature of Customer

* * * * * *

(The following language should be printed on a page other than the pages containing the disclosure language above and may be omitted from the required disclosure statement)

This disclosure document meets the risk disclosure requirements in the jurisdictions
§ 1.56 Prohibition of guarantees against loss.

(a) [Reserved]

(b) No futures commission merchant or introducing broker may in any way represent that it will, with respect to any commodity interest in any account carried by the futures commission merchant for or on behalf of any person:

(1) Guarantee such person against loss;

(2) Limit the loss of such person; or

(3) Not call for or attempt to collect initial and maintenance margin as established by the rules of the applicable board of trade.

(c) No person may in any way represent that a futures commission merchant or introducing broker will engage in any of the acts or practices described in paragraph (b) of this section.

(d) This section shall not be construed to prevent a futures commission merchant or introducing broker from:

(1) Assuming or sharing in the losses resulting from an error or mishandling of an order; or

(2) Participating as a general partner in a commodity pool which is a limited partnership.

(e) This section shall not affect any guarantee entered into prior to January 28, 1982, but this section shall apply to any extension, modification or renewal thereof entered into after such date.


§ 1.57 Operations and activities of introducing brokers.

(a) Each introducing broker must:

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

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

(i) A carrying futures commission merchant; or

(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.

(b) An introducing broker may not carry proprietary accounts, nor may an introducing broker carry accounts in foreign futures.

(c) An introducing broker may not accept any money, securities or property (or extend credit in lieu thereof) to margin, guarantee or secure any trades or contracts of customers, or any money, securities or property accruing as a result of such trades or contracts: Provided, however, That an introducing broker may deposit a check in a qualifying account or forward a check drawn by a customer if:

(1) The futures commission merchant carrying the customer’s account authorizes the introducing broker, in writing, to receive a check in the name of the futures commission merchant, and the introducing broker retains such written authorization in its files in accordance with §1.31:

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

(3) The check is deposited by the introducing broker, on the same day upon which it is received, in a bank or
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§ 1.59 Activities of self-regulatory organization employees, governing board members, committee members, and consultants.

(a) Definitions. For purposes of this section:

(1) Self-regulatory organization means "self-regulatory organization," as defined in §1.3(ee), and includes the term "clearing organization," as defined in §1.3(d).

(2) Governing board member means a member, or functional equivalent thereof, of the board of governors of a self-regulatory organization.

(3) Committee member means a member, or functional equivalent thereof, of any committee of a self-regulatory organization.

(4) Employee means any person hired or otherwise employed on a salaried or contract basis by a self-regulatory organization, but does not include:

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

(ii) Any committee member compensated by a self-regulatory organization solely for committee activities; or

(iii) Any consultant hired by a self-regulatory organization.

(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.

(6) **Non-public information** means information which has not been disseminated in a manner which makes it generally available to the trading public.

(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:

(i) Such employing self-regulatory organization has recognized or established intermarket spread margins or other special margin treatment between that other commodity interest and a commodity interest which is traded on or subject to the rules of the employing self-regulatory organization; or

(ii) Such other self-regulatory organization has recognized or established intermarket spread margins or other special margin treatment with another commodity interest as to which the person has access to material, non-public information.

(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) Employees of the self-regulatory organization from:

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

(B) Trading, directly or indirectly, in any related commodity interest;

(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;

(D) Trading, directly or indirectly, in a commodity interest traded on or
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§ 1.60

cleared by a linked exchange if the employee has access to material, non-public information concerning such commodity interest; and

(ii) Employees of the self-regulatory organization from disclosing to any other person any material, non-public information which such employee obtains as a result of his or her employment at the self-regulatory organization where such employee has or should have a reasonable expectation that the information disclosed may assist another person in trading any commodity interest; Provided, however, That such rules shall not prohibit disclosures made in the course of an employee's duties, or disclosures made to another self-regulatory organization, linked exchange, court of competent jurisdiction or representative of any agency or department of the federal or state government acting in his or her official capacity.

(2) Each self-regulatory organization may adopt rules, which must be submitted to the Commission pursuant to section 5(a)(12)(A) of the Act and Commission regulation 1.41 (or, pursuant to section 17(j) of the Act in the case of a registered futures association), which set forth circumstances under which exemptions from the trading prohibition contained in paragraph (b)(1)(i) of this section may be granted; such exemptions are to be administered by the self-regulatory organization on a case-by-case basis. Specifically, such circumstances may include:

(i) Participation by an employee in pooled investment vehicles where the employee has no direct or indirect control with respect to transactions executed for or on behalf of such vehicles; and

(ii) Trading by an employee under circumstances enumerated by the self-regulatory organization in rules which the self-regulatory organization determines are not contrary to the purposes of this regulation, the Commodity Exchange Act, the public interest, or just and equitable principles of trade.

§ 1.60 Pending legal proceedings.

(a) Every contract market shall submit to the Commission copies of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decisions and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the contract market is a party or its property or assets is subject.

(b) Every futures commission merchant shall submit to the Commission copies of any dispositive or partially
dispositive decision for which a notice of appeal has been filed, the notice of appeal and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the futures commission merchant is a party or its property or assets is subjects.

(c) Every contract market shall submit to the Commission copies of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decisions and such further documents as the Commission may thereafter request filed in any material legal proceeding instituted against any officer, director, or other official of the contract market arising from conduct in such person’s capacity as a contract market official and alleging violations of:

(1) The act or any rule, regulation, or order thereunder;
(2) the constitution, bylaws or rules of the contract market; or
(3) the applicable provisions of state law relating to the duties of officers, directors, or other officials of business organizations.

d) Every futures commission merchant shall submit to the Commission copies of any dispositive or partially dispositive decision concerning which a notice of appeal has been filed, the notice of appeal, and such further documents as the Commission may thereafter request filed in any material legal proceeding instituted against any person who is a principal of the futures commission merchant (as that term is defined in §3.1(a) of this chapter) arising from conduct in such person’s capacity as a principal of the futures commission merchant and alleging violations of:

(1) The act or any rule, regulation, or order thereunder;
(2) the constitution, bylaws or rules of the futures commission merchant; or
(3) the applicable provisions of state law relating to a duty or obligation owed by such a principal.

(e) All documents required by this section to be submitted to the Commission shall be mailed to the Commission within 45 days of that effective date. Thereafter, all complaints required by this section to be submitted to the Commission by contract markets shall be mailed to the Commission within 10 days after the initiation of the legal proceedings to which they relate, all decisions required to be submitted by contract markets shall be mailed within 10 days of their date of issuance, all notices of appeal required to be submitted by contract markets shall be mailed within 10 days of the filing or receipt by the contract market of the notice of appeal, and all decisions and notices of appeal required to be submitted by futures commission merchants shall be mailed within 10 days of the filing or receipt by the futures commission merchant of the relevant notice of appeal. For purposes of paragraph (a), (b), (c) and (d) of this rule, a “material legal proceeding” includes but is not limited to actions involving alleged violations of the Commodity Exchange Act or the Commission’s regulations. However, a legal proceeding is not “material” for the purposes of this rule if the proceeding is not in a federal or state court or if the Commission is a party.

[49 FR 17750, Apr. 25, 1984]

§§ 1.61–1.62 [Reserved]

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

(a) Definitions. For purposes of this section:

(1) Self-regulatory organization means a “self-regulatory organization” as defined in §1.3(ee), and includes a “clearing organization” as defined in §1.3(d), except as defined in paragraph (b)(6) of this section.

(2) Disciplinary committee means any person or committee of persons, or any subcommittee thereof, that is authorized by a self-regulatory organization to issue disciplinary charges, to conduct disciplinary proceedings, to settle disciplinary charges, to impose disciplinary sanctions or to hear appeals thereof.
(3) Arbitration panel means any person or panel empowered by a self-regulatory organization to arbitrate disputes involving such organization’s members or their customers.

(4) Oversight panel means any panel authorized by a self-regulatory organization to review, recommend or establish policies or procedures with respect to the self-regulatory organization’s surveillance, compliance, rule enforcement or disciplinary responsibilities.

(5) Final decision means:

(i) A decision of a self-regulatory organization which cannot be further appealed within the self-regulatory organization, 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; or,

(ii) Any decision by an administrative law judge, a court of competent jurisdiction or the Commission which has not been stayed or reversed.

(6) Disciplinary offense means:

(i) Any violation of the rules of a self-regulatory organization except those rules related to

(A) Decorum or attire,

(B) Financial requirements, or

(C) Reporting or recordkeeping unless resulting in fines aggregating more than $5,000 within any calendar year;

(ii) Any rule violation described in subparagraphs (a)(6)(i) (A) through (C) of this regulation which involves fraud, deceit or conversion or results in a suspension or expulsion;

(iii) Any violation of the Act or the regulations promulgated thereunder; or,

(iv) Any failure to exercise supervisory responsibility with respect to acts described in paragraphs (a)(6) (i) through (iii) of this section when such failure is itself a violation of either the rules of a self-regulatory organization, the Act or the regulations promulgated thereunder.

(v) A disciplinary offense must arise out of a proceeding or action which is brought by a self-regulatory organization, the Commission, any federal or state agency, or other governmental body.

(7) Settlement agreement means any agreement consenting to the imposition of sanctions by a self-regulatory organization, a court of competent jurisdiction or the Commission.

(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:

(1) Was found within the prior three years by a final decision of a self-regulatory organization, an administrative law judge, a court of competent jurisdiction or the Commission to have committed a disciplinary offense;

(2) Entered into a settlement agreement within the prior three years in which any of the findings or, in the absence of such findings, any of the acts charged included a disciplinary offense;

(3) Currently is suspended from trading on any contract market, is suspended or expelled from membership with any self-regulatory organization, is serving any sentence of probation or owes any portion of a fine imposed pursuant to either:

(i) A finding by a final decision of a self-regulatory organization, an administrative law judge, a court of competent jurisdiction or the Commission that such person committed a disciplinary offense; or,

(ii) A settlement agreement in which any of the findings or, in the absence of such findings, any of the acts charged included a disciplinary offense.

(4) Currently is subject to an agreement with the Commission or any self-regulatory organization not to apply for registration with the Commission or membership in any self-regulatory organization;

(5) Currently is subject to or has had imposed on him within the prior three years a Commission registration revocation or suspension in any capacity for any reason, or has been convicted within the prior three years of any of the felonies listed in section 8a(2)(D) (ii) through (iv) of the Act;

(6) Currently is subject to a denial, suspension or disqualification from serving on the disciplinary committee, arbitration panel or governing board of
any self-regulatory organization as that term is defined in section 3(a)(26) of the Securities Exchange Act of 1934.

(c) No person may serve on a disciplinary committee, arbitration panel, oversight panel or governing board of a self-regulatory organization if such person is subject to any of the conditions listed in paragraphs (b)(1) through (6) of this section.

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

(e) Each self-regulatory organization shall submit to the Commission within thirty days of the end of each calendar year a certified list of any persons who have been removed from its disciplinary committees, arbitration panels, oversight panels or governing board pursuant to the requirements of this regulation during the prior year.

(f) Whenever a self-regulatory organization finds by final decision that a person has committed a disciplinary offense and such finding makes such person ineligible to serve on that self-regulatory organization’s disciplinary committees, arbitration panels, oversight panels or governing board, the self-regulatory organization shall inform the Commission of that finding and the length of the ineligibility in any notice it is required to provide to the Commission pursuant to either section 17(h)(1) of the Act or Commission regulation 9.11.

be considered a different membership interest:

(A) Futures commission merchants,

(B) Introducing brokers,

(C) Commodity pool operators,

(D) Commodity trading advisors; and,

(E) Associated persons, except that under paragraph (c)(3) of this section an associated person will be deemed to represent the same membership interest as its sponsor.

(b) Each self-regulatory organization must maintain in effect standards and procedures with respect to its governing board which have been submitted to the Commission pursuant to section 5a(a)(12)(A) of the Act and §1.41 or, when applicable to a registered futures association, pursuant to section 17(j) of the Act, that ensure:

(1) That twenty percent or more of the regular voting members of the board are persons who:

(i) Are knowledgeable of futures trading or financial regulation or are otherwise capable of contributing to governing board deliberations; and,

(ii) (A) Are not members of the self-regulatory organization,

(B) Are not currently salaried employees of the self-regulatory organization,

(C) Are not primarily performing services for the self-regulatory organization in a capacity other than as a member of the self-regulatory organization’s governing board, or

(D) Are not officers, principals or employees of a firm which holds a membership at the self-regulatory organization either in its own name or through an employee on behalf of the firm;

(2) In the case of a contract market, that ten percent or more of the regular voting members of the governing board be comprised where applicable of persons representing farmers, producers, merchants or exporters of principal commodities underlying a commodity futures or commodity option traded on the contract market; and

(3) That the board’s membership includes a diversity of membership interests. The self-regulatory organization must be able to demonstrate that the board membership fairly represents the diversity of interests at such self-regulatory organization and is otherwise consistent with this regulation’s composition requirements;

(c) Each self-regulatory organization must maintain in effect rules with respect to its major disciplinary committees which have been submitted to the Commission pursuant to section 5a(a)(12)(A) of the Act and §1.41 or, when applicable to a registered futures association, pursuant to section 17(j) of the Act, that ensure:

(1) That at least one member of each major disciplinary committee or hearing panel thereof be a person who is not a member of the self-regulatory organization whenever such committee or panel is acting with respect to a disciplinary action in which:

(i) The subject of the action is a member of the self-regulatory organization’s:

(A) Governing board, or

(B) Major disciplinary committee; or,

(ii) Any of the charged, alleged or adjudicated contract market rule violations involve:

(A) Manipulation or attempted manipulation of the price of a commodity, a futures contract or an option on a futures contract, or

(B) Conduct which directly results in financial harm to a non-member of the contract market;

(2) In the case of a contract market, that more than fifty percent of each major disciplinary committee or hearing panel thereof include persons representing membership interests other than that of the subject of the disciplinary proceeding being considered;

(3) In the case of a registered futures association, that each major disciplinary committee or hearing panel thereof include persons representing membership interests other than that of the subject of the disciplinary proceeding being considered; and,

(4) That each major disciplinary committee or hearing panel thereof include sufficient different membership interests so as to ensure fairness and to prevent special treatment or preference for any person in the conduct of a committee’s or the panel’s responsibilities.

(d) Each self-regulatory organization must submit to the Commission within thirty days after each governing board election a list of the governing board’s members, the membership interests
they represent and how the composition of the governing board otherwise meets the requirements of §1.64(b) and the self-regulatory organization’s implementing standards and procedures.

[58 FR 37654, July 13, 1993; 59 FR 5082, Feb. 3, 1994]

§ 1.65 Notice of bulk transfers and disclosure obligations to customers.

(a) Notice and Disclosure to Customers.

(1) Prior to transferring a customer account to another futures commission merchant or introducing broker other than at the request of the customer, a futures commission merchant or introducing broker must obtain the customer’s specific consent to the transfer.

(2) If the customer account agreement contains a valid consent by the customer to prospective transfers of the account, the transferor futures commission merchant or introducing broker may transfer the account if the customer is provided with written notice of, and a reasonable opportunity to object to, the transfer and the customer has not asserted an objection to the transfer or given other instructions as to the disposition of the account. The notice to the customer must include:

(i) A clear statement of the reason(s) for the transfer, the name, address and telephone number of the proposed transferee firm and other information material to the transfer;

(ii) A statement that the customer is not required to accept the proposed transfer and may direct the transfer or firm to liquidate the account or transfer the account to a firm of the customer’s selection;

(iii) The name, telephone number and address of a contact person at the transferor firm to whom the customer may give instructions as to the disposition of the account;

(iv) Notice that a failure to respond to the letter within a specified time period, which must be a reasonable period in the circumstances, will be deemed consent to the transfer; and

(v) A clear statement as to the means by which the customer may object to or otherwise respond to the notice of proposed transfer.

(3) Where customer accounts are transferred to a futures commission merchant or introducing broker, other than at the customer’s request, the transferee introducing broker or futures commission merchant must provide each customer whose account is transferred with the risk disclosure statements and acknowledgments required by §1.55 (domestic futures and foreign futures and options trading), and §§33.7 (domestic exchange-traded commodity options) and 190.10(c) (non-cash margin—to be furnished by futures commission merchants only) of this chapter and receive the required acknowledgments within sixty days of the transfer of accounts. This requirement shall not apply:

(i) As to customers owning transferred accounts for which the transferee futures commission merchant or introducing broker has clear written evidence that the customer has received and acknowledged the required disclosure documents; or

(ii) As to customers for which the transferee futures commission merchant or introducing broker has clear evidence that such customer was at the time the account was opened by the transferring futures commission merchant or introducing broker, or is at the time the account is being transferred, a customer listed in §1.55(f); or

(iii) If the transfer of accounts is made from one introducing broker to another introducing broker guaranteed by the same futures commission merchant pursuant to a guarantee agreement in accordance with the requirements of §1.10(j) and such futures commission merchant maintains the relevant acknowledgments required by §§1.55(a)(1)(i) and 33.7(a)(1)(ii) of this chapter and can establish compliance with §190.10(c) of this chapter.

(b) Notice to the Commission. Each futures commission merchant or introducing broker shall file with the Commission, at least five business days in advance of the transfer, notice of any transfer of customer accounts carried or introduced by such futures commission merchant or introducing broker that is not initiated at the request of the customer, where the transfer involves the lesser of:

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(1) 25 percent of the total number of customer accounts carried or introduced by such firm if that percentage represents at least 100 accounts; or
(2) 50 percent or more of the total number of customer accounts carried or introduced by such firm. The computation of the percentage and number of accounts must be based on the total number of accounts carried by the transferee futures commission merchant or introduced by the introducing broker, irrespective of whether such accounts are transferred to a single or multiple transferees.

(c) The notice required by paragraph (b) of this section shall include:
(1) The name, principal business address and telephone number of the transferee futures commission merchant or introducing broker;
(2) The name, principal business address and telephone number of each transferee futures commission merchant or introducing broker;
(3) The designated self-regulatory organization for the transferee and transferee firms;
(4) A brief statement as to the reasons for the transfer;
(5) A copy of the notice to customers informing them of the proposed transfer and providing an opportunity to object to such transfer; and
(6) A statement of the number of accounts to be transferred and the estimated liquidating equity of the accounts to be transferred.

(d) The notice required by paragraph (b) of this section shall be filed with the Deputy Director, Compliance and Registration Section, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; the National Futures Association Attn: Vice President-Compliance; and the designated self-regulatory organization for the transferee firm.

(e) In the event that the notice required by paragraph (b) of this section cannot be filed with the Commission at least five days prior to the account transfer, the transferee futures commission merchant or introducing broker shall file such notice as soon as practicable and no later than the day of the transfer. Such notice shall include a brief statement explaining the circumstances necessitating the delay in filing.

(f) The requirements of this section shall not affect the obligations of a futures commission merchant or introducing broker under the rules of a self-regulatory organization or applicable customer account agreement with respect to transfer of accounts.

(g) If a proposed transfer is not completed in accordance with the notice required to be filed by paragraph (b) of this section, a corrective notice shall be filed within five business days of the date such proposed transfer was to occur explaining why the proposed transfer was not completed.


§ 1.66 No-action positions with respect to floor traders.

(a) Notwithstanding any other provision of law, if a contract market submits to the National Futures Association by April 26, 1993 a list of floor traders who were granted trading privileges on that contract market on or before April 26, 1993, and whose trading privileges remain in effect, which includes the name, date of birth and social security number of such floor traders, as well as facts regarding such floor traders which are set forth as statutory disqualifications in section 8a(2) of the Act if the contract market knows of such facts, and such list is signed by the chief operating officer of the contract market, the Commission will not commence an enforcement proceeding against a floor trader on that list based solely upon the floor trader's failure to register or receive a temporary license under section 4f of the Act and § 3.11 of this chapter, nor will the Commission commence an enforcement proceeding against the contract market under § 1.62 for failing to bar such floor trader from operating as such: Provided, however, That for those floor traders listed as to whom the contract market knows of facts set forth as statutory disqualifications in section 8a(2) of the Act, the no-action position contained in paragraph (a) of this section will only apply if the contract market submits a supplemental
statement signed by the chief operating officer of the contract market stating that, in light of the Congressional mandate requiring registration of floor traders under the Act, the contract market acknowledges its responsibility to take affirmative action to conduct appropriate surveillance of such floor traders. These no-action positions shall expire upon the floor's trader being granted or denied registration under the Act, or on June 11, 1993, whichever comes earliest: Provided, however, That if the floor trader files an application for registration in accordance with §3.11 of this chapter with the National Futures Association by June 11, 1993, the no-action positions for the floor trader and the contract market as to the registration of such floor trader will be extended until the floor trader is granted or denied registration under the Act, unless an Administrative Law Judge issues an interim order suspending the no-action status of the floor trader under paragraph (a) of this section and requiring the floor trader to show cause within thirty days after receipt of the floor trader's written submission, if any, and any reply thereto, shall issue an interim order suspending the no-action status of the floor trader under paragraph (a) of this section and requiring the floor trader to show cause within twenty days of the date of the order why, notwithstanding the existence of the statutory disqualification, the registration of the floor trader should not be denied. The no-action status of the floor trader shall be suspended, effective five days after the order to show cause is served upon the floor trader in accordance with §3.50(a) of this chapter, until a final order with respect to the order to show cause has been issued: Provided, That if the sole basis upon which the floor trader is subject to statutory disqualification is the existence of a temporary order, judgment or decree of the type described in section 8a(2)(C) of the Act, the order to show cause shall not be issued and the floor trader shall be suspended until such time as the temporary order, judgment or decree shall have expired: Provided, however, That in no event
§ 1.69 Voting by interested members of self-regulatory organization governing boards and various committees.

(a) Definitions. For purposes of this section:

Disciplinary committee means any person or committee of persons, or any subcommittee thereof, that is authorized by a self-regulatory organization to issue disciplinary charges, to conduct disciplinary proceedings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the self-regulatory organization except those cases where the person or committee is authorized summarily to impose minor penalties for violating rules regarding decorum, attire, the timely submission of accurate records for clearing or verifying transactions, and similar violations.

(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 [Reserved]

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

(a) Definitions. For purposes of this section:

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

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

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

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

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

(2) Family relationship of a person means the person’s spouse, former spouse, parent, stepparent, child, stepchild, sibling, stepbrother, stepsister, grandparent, grandchild, uncle, aunt, nephew, niece or in-law.

(3) Governing board means a self-regulatory organization’s board of directors, board of governors, board of managers, or similar body, or any subcommittee thereof, duly authorized, pursuant to a rule of the self-regulatory organization that has been approved by the Commission or has become effective pursuant to either Section 5(a)(12)(A) or 17(j) of the Act to take action or to recommend the taking of action on behalf of the self-regulatory organization.

(4) Oversight panel means any panel, or any subcommittee thereof, authorized by a self-regulatory organization to recommend or establish policies or procedures with respect to the self-regulatory organization’s surveillance, compliance, rule enforcement, or disciplinary responsibilities.

(5) Member’s affiliated firm is a firm in which the member is a “principal,” as defined in §3.1(a), or an employee.

(6) Named party in interest means a person or entity that is identified by name as a subject of any matter being considered by a governing board, disciplinary committee, or oversight panel.

(7) Self-regulatory organization means a “self-regulatory organization” as defined in §1.3(ee) and includes a “clearing organization” as defined in §1.3(d), but excludes registered futures associations for the purposes of paragraph (b)(2) of this section.

(8) Significant action includes any of the following types of self-regulatory organization actions or rule changes that can be implemented without the Commission’s prior approval:

(i) Any actions or rule changes which address an “emergency” as defined in §1.41(a)(4)(i) through (iv) and (vi) through (viii); and,

(ii) Any changes in margin levels that are designed to respond to extraordinary market conditions such as an actual or attempted corner, squeeze, congestion or undue concentration of positions, or that otherwise are likely to have a substantial effect on prices in any contract traded or cleared at such self-regulatory organization; but does not include any rule not submitted for prior Commission approval because such rule is unrelated to the terms and conditions of any contract traded at such self-regulatory organization.

(b) Self-regulatory organization rules. Each self-regulatory organization shall maintain in effect rules that have been submitted to the Commission pursuant to Section 5(a)(12)(A) of the Act and §1.41 or, in the case of a registered futures association, pursuant to Section 17(j) of the Act, to address the avoidance of conflicts of interest in the execution of its self-regulatory functions. Such rules must provide for the following:

(1) Relationship with named party in interest—

(i) Nature of relationship. A member of a self-regulatory organization’s governing board, disciplinary committee or oversight panel must abstain from such body’s deliberations and voting on any matter involving a named party in interest where such member:

(A) Is a named party in interest;

(B) Is an employer, employee, or fellow employee of a named party in interest;

(C) Is associated with a named party in interest through a “broker association” as defined in §156.1;

(D) Has any other significant, ongoing business relationship with a named party in interest, not including relationships limited to executing futures or option transactions opposite of each other or to clearing futures or option transactions through the same clearing member; or,

(E) Has a family relationship with a named party in interest.

(ii) Disclosure of relationship. Prior to the consideration of any matter involving a named party in interest, each member of a self-regulatory organization governing board, disciplinary committee or oversight panel must disclose to the appropriate self-regulatory organization staff whether he or she has one of the relationships listed in paragraph (b)(1)(i) of this section with a named party in interest.
(iii) Procedure for determination. Each self-regulatory organization must establish procedures for determining whether any member of its governing board, disciplinary committees or oversight committees is subject to a conflict restriction in any matter involving a named party in interest. Taking into consideration the exigency of the committee action, such determinations should be based upon:

(A) Information provided by the member pursuant to paragraph (b)(1)(ii) of this section; and

(B) Any other source of information that is held by and reasonably available to the self-regulatory organization.

(2) Financial interest in a significant action—(i) Nature of interest. A member of a self-regulatory organization’s governing board, disciplinary committee or oversight panel must abstain from such body’s deliberations and voting on any significant action if the member knowingly has a direct and substantial financial interest in the result of the vote based upon either exchange or non-exchange positions that could reasonably be expected to be affected by the action.

(ii) Disclosure of interest. Prior to the consideration of any significant action, each member of a self-regulatory organization governing board, disciplinary committee or oversight panel must disclose to the appropriate self-regulatory organization staff the position information referred to in paragraph (b)(2)(iii) of this section that is known to him or her. This requirement does not apply to members who choose to abstain from deliberations and voting on the subject significant action.

(iii) Procedure for determination. Each self-regulatory organization must establish procedures for determining whether any member of its governing board, disciplinary committees or oversight committees is subject to a conflict restriction under this section in any significant action. Such determination must include a review of:

(A) Gross positions held at that self-regulatory organization in the member’s personal accounts or “controlled accounts,” as defined in §1.3(j);

(B) Gross positions held at that self-regulatory organization in proprietary accounts, as defined in §1.17(b)(3), at the member’s affiliated firm;

(C) Gross positions held at that self-regulatory organization in accounts in which the member is a principal, as defined in §3.1(a);

(D) Net positions held at that self-regulatory organization in “customer” accounts, as defined in §1.17(b)(2), at the member’s affiliated firm; and,

(E) Any other types of positions, whether maintained at that self-regulatory organization or elsewhere, held in the member’s personal accounts or the proprietary accounts of the member’s affiliated firm that the self-regulatory organization reasonably expects could be affected by the significant action.

(iv) Bases for determination. Taking into consideration the exigency of the significant action, such determinations should be based upon:

(A) The most recent large trader reports and clearing records available to the self-regulatory organization;

(B) Information provided by the member with respect to positions pursuant to paragraph (b)(2)(ii) of this section; and,

(C) Any other source of information that is held by and reasonably available to the self-regulatory organization.

(3) Participation in deliberations. (i) Under the rules required by this section, a self-regulatory organization governing board, disciplinary committee or oversight panel may permit a member to participate in deliberations prior to a vote on a significant action for which he or she otherwise would be required to abstain, pursuant to paragraph (b)(2) of this section, if such participation would be consistent with the public interest and the member recuses himself or herself from voting on such action.

(ii) In making a determination as to whether to permit a member to participate in deliberations on a significant action for which he or she otherwise would be required to abstain, pursuant to paragraph (b)(2) of this section, if such participation would be consistent with the public interest and the member recuses himself or herself from voting on such action.

(A) Whether the member’s participation in deliberations is necessary for the deliberating body to achieve a quorum in the matter; and
§ 1.70 Notification of State enforcement actions brought under the Commodity Exchange Act.

(a) Immediately upon instituting any proceeding in any Federal district court for violation of the Act or any rule, regulation or order thereunder against any person who is subject to suit pursuant to sections 6d(1)–(6) of the Act, the authorized State official of the State instituting the proceeding shall submit to the Commission a copy of the complaint filed in the proceeding, together with a written notice which:

(1) Indicates the names of parties to the proceeding;

(2) Indicates the provision of the Act or the rule, regulation or order thereunder which is alleged to have been violated.

(b) Prior to instituting any proceeding in a State court for the alleged violation of any antifraud provisions of the Act or any antifraud rule, regulation or order thereunder against any person registered with the Commission who is subject to suit pursuant to the provisions of section 6d(8) of the Act, the authorized State official of the State intending to institute the proceeding shall submit to the Commission written notice which:

(1) Indicates the names of parties to the proposed proceeding;

(2) Indicates the provision of the Act or the rule, regulation or order thereunder which will be alleged to have been violated;

(3) Contains a brief statement of the facts on which the proposed action will be based.

Except as provided in paragraph (c), this written notice must be sent by first-class U.S. mail or personally delivered to the Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581 not less than 5 business days prior to instituting the proceeding in State court.

(c) Where it is impracticable to provide the Commission with written notice within the time period specified in paragraph (b) of this section, the authorized state official must inform the Secretary of the Commission by telephone as soon as practicable to institute a proceeding in state court and must send the written notice required in paragraph (b)(1) through (b)(3) of this section by facsimile or other similarly expeditious means of written communication to the Secretary of the Commission, prior to instituting the proceeding in state court.

(d) Immediately upon instituting any proceeding in a State court pursuant to the provisions of section 6d(8) of the Act for alleged violation of any antifraud provisions of the Act or any antifraud rule, regulation or order thereunder, the authorized State official instituting the proceeding shall submit
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§ 1.71 Conflicts of interest policies and procedures by futures commission merchants and introducing brokers.

(a) Definitions. For purposes of this section, the following terms shall be defined as provided.

(1) Affiliate. This term means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

(2) Business trading unit. This term means any department, division, group, or personnel of a futures commission merchant or introducing broker or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of, any pricing (excluding price verification for risk management purposes), trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a futures commission merchant or introducing broker or any of its affiliates.

(3) Clearing unit. This term means any department, division, group, or personnel of a futures commission merchant or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of, any proprietary or customer clearing activities on behalf of a futures commission merchant or any of its affiliates.

(4) Derivative. This term means:
   (i) A contract for the purchase or sale of a commodity for future delivery;
   (ii) A security futures product;
   (iii) A swap;
   (iv) Any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; and
   (v) Any commodity option authorized under section 4c of the Act; and (vi) any leverage transaction authorized under section 19 of the Act.

(5) Non-research personnel. This term means any employee of the business trading unit or clearing unit, or any other employee of the futures commission merchant or introducing broker, other than an employee performing a legal or compliance function, who is not directly responsible for, or otherwise not directly involved in, research or analysis intended for inclusion in a research report.

(6) Public appearance. This term means any participation in a conference call, seminar, forum (including an interactive electronic forum) or other public speaking activity before 15 or more persons (individuals or entities), or interview or appearance before one or more representatives of the media, radio, television or print media, or the writing of a print media article, in which a research analyst makes a recommendation or offers an opinion concerning a derivatives transaction. This term does not include a password-protected Webcast, conference call or similar event with 15 or more existing customers, provided that all of the event participants previously received the most current research report or other documentation that contains the required applicable disclosures, and that the research analyst appearing at the event corrects and updates during the public appearance any disclosures in the research report that are inaccurate, misleading, or no longer applicable.

(7) Research analyst. This term means the employee of a futures commission merchant or introducing broker who is primarily responsible for, and any employee who reports directly or indirectly to such research analyst in connection with, preparation of the substance of a research report relating to any derivative, whether or not any such person has the job title of “research analyst.”

(8) Research department. This term means any department or division that is principally responsible for preparing the substance of a research report relating to any derivative on behalf of a futures commission merchant or introducing broker, including a department or division contained in an affiliate of
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a futures commission merchant or introducing broker.  

(9) Research report. This term means any written communication (including electronic) that includes an analysis of the price or market for any derivative, and that provides information reasonably sufficient upon which to base a decision to enter into a derivatives transaction. This term does not include:

(i) Communications distributed to fewer than 15 persons;

(ii) Commentaries on economic, political or market conditions;

(iii) Statistical summaries of multiple companies’ financial data, including listings of current ratings;

(iv) Periodic reports or other communications prepared for investment company shareholders or commodity pool participants that discuss individual derivatives positions in the context of a fund’s past performance or the basis for previously-made discretionary decisions;

(v) Any communications generated by an employee of the business trading unit that is conveyed as a solicitation for entering into a derivatives transaction, and is conspicuously identified as such; and

(vi) Internal communications that are not given to current or prospective customers.

(b) Policies and procedures. (1) Except as provided in paragraph (b)(2) of this section, each futures commission merchant and introducing broker subject to this rule must adopt and implement written policies and procedures reasonably designed to ensure that the futures commission merchant or introducing broker and its employees comply with the provisions of this rule.

(2) Small Introducing Brokers. An introducing broker that has generated, over the preceding 3 years, $5 million or less in aggregate gross revenues from its activities as an introducing broker must establish structural and institutional safeguards reasonably designed to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity or derivative are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons.

(c) Research analysts and research reports—(1) Restrictions on relationship with research department. (i) Non-research personnel shall not direct a research analyst’s decision to publish a research report of the futures commission merchant or introducing broker, and non-research personnel shall not direct the views and opinions expressed in a research report of the futures commission merchant or introducing broker.

(ii) No research analyst may be subject to the supervision or control of any employee of the futures commission merchant’s or introducing broker’s business trading unit or clearing unit, and no employee of the business trading unit or clearing unit may have any influence or control over the evaluation or compensation of a research analyst.

(iii) Except as provided in paragraph (c)(1)(iv) of this section, non-research personnel, other than the board of directors and any committee thereof, shall not review or approve a research report of the futures commission merchant or introducing broker before its publication.

(iv) Non-research personnel may review a research report before its publication as necessary only to verify the factual accuracy of information in the research report, to provide for non-substantive editing, to format the layout or style of the research report, or to identify any potential conflicts of interest, provided that:

(A) Any written communication between non-research personnel and research department personnel concerning the content of a research report must be made either through authorized legal or compliance personnel of the futures commission merchant or introducing broker or in a transmission copied to such personnel; and

(B) Any oral communication between non-research personnel and research department personnel concerning the content of a research report must be documented and made either through authorized legal or compliance personnel acting as an intermediary or in
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(2) Restrictions on communications. Any written or oral communication by a research analyst to a current or prospective customer relating to any derivative must not omit any material fact or qualification that would cause the communication to be misleading to a reasonable person.

(3) Restrictions on research analyst compensation. A futures commission merchant or introducing broker may not consider a factor in reviewing or approving a research analyst’s compensation his or her contributions to the futures commission merchant’s or introducing broker’s trading or clearing business. Except for communicating client or customer feedback, ratings and other indicators of research analyst performance to research department management, no employee of the business trading unit or clearing unit of the futures commission merchant or introducing broker may influence the review or approval of a research analyst’s compensation.

(4) Prohibition of promise of favorable research. No futures commission merchant or introducing broker may directly or indirectly offer favorable research, or threaten to change research, to an existing or prospective customer as consideration or inducement for the receipt of business or compensation.

(5) Disclosure requirements—(1) Ownership and material conflicts of interest. A futures commission merchant or introducing broker must disclose in research reports and a research analyst must disclose in public appearances whether the research analyst maintains a financial interest in any derivative of a type, class, or category that the research analyst follows, and the general nature of the financial interest.

(ii) Prominence of disclosure. Disclosures and references to disclosures must be clear, comprehensive, and prominent. With respect to public appearances by research analysts, the disclosures required by paragraph (c)(5) of this section must be conspicuous.

(iii) Records of public appearances. Each futures commission merchant and introducing broker must maintain records of public appearances by research analysts sufficient to demonstrate compliance by those research analysts with the applicable disclosure requirements under paragraph (c)(5) of this section.

(iv) Third-party research reports. (A) For the purposes of paragraph (c)(5)(iv) of this section, “independent third-party research report” shall mean a research report, in respect of which the person or entity producing the report:

(1) Has no affiliation or business or contractual relationship with the distributing futures commission merchant or introducing broker, or that futures commission merchant’s or introducing broker’s affiliates, that is reasonably likely to inform the content of its research reports; and

(2) Makes content determinations without any input from the distributing futures commission merchant or introducing broker or from the futures commission merchant’s or introducing broker’s affiliates.

(B) Subject to paragraph (c)(5)(iv)(C) of this section, if a futures commission merchant or introducing broker distributes or makes available any independent third-party research report, the futures commission merchant or introducing broker must accompany the research report with, or provide a web address that directs the recipient to, the current applicable disclosures, as they pertain to the futures commission merchant or introducing broker, required by this section. Each futures commission merchant and introducing broker must establish written policies and procedures reasonably designed to ensure the completeness and accuracy of all applicable disclosures.

(C) The requirements of paragraph (c)(5)(iv)(B) of this section shall not apply to independent third-party research reports made available by a futures commission merchant or introducing broker to its customers:

(1) Upon request; or

(2) Through a Web site maintained by the futures commission merchant or introducing broker.

(6) Prohibition of retaliation against research analysts. No futures commission merchant or introducing broker, and no employee of a futures commission merchant or introducing broker who is involved with the futures commission merchant or introducing broker, may retaliate against a research analyst for any communications that such research analyst has made to a customer or potential customer.
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merchant’s or introducing broker’s trading or clearing activities, may, directly or indirectly, retaliate against or threaten to retaliate against any research analyst employed by the futures commission merchant or introducing broker or its affiliates as a result of an adverse, negative, or otherwise unfavorable research report or public appearance written or made, in good faith, by the research analyst that may adversely affect the futures commission merchant’s or introducing broker’s present or prospective trading or clearing activities.

(7) Small Introducing Brokers. An introducing broker that has generated, over the preceding 3 years, $5 million or less in aggregate gross revenues from its activities as an introducing broker is exempt from the requirements set forth in this paragraph (c).

(d) Clearing activities. (1) No futures commission merchant shall permit any affiliated swap dealer or major swap participant to directly or indirectly interfere with, or attempt to influence, the decision of the clearing unit personnel of the futures commission merchant to provide clearing services and activities to a particular customer, including but not limited to a decision relating to the following:

(i) Whether to offer clearing services and activities to a particular customer;

(ii) Whether to accept a particular customer for the purposes of clearing derivatives;

(iii) Whether to submit a customer’s transaction to a particular derivatives clearing organization;

(iv) Whether to set or adjust risk tolerance levels for a particular customer;

(v) Whether to accept certain forms of collateral from a particular customer; or

(vi) Whether to set a particular customer’s fees for clearing services based upon criteria that are not generally available and applicable to other customers of the futures commission merchant.

(2) Each futures commission merchant shall create and maintain an appropriate informational partition between business trading units of an affiliated swap dealer or major swap participant and clearing unit personnel of the futures commission merchant to reasonably ensure compliance with the Act and the prohibitions specified in paragraph (d)(1) of this section. At a minimum, such informational partitions shall require that:

(i) No employee of a business trading unit of an affiliated swap dealer or major swap participant may review or approve the provision of clearing services and activities by clearing unit personnel of the futures commission merchant, make any determination regarding whether the futures commission merchant accepts clearing customers, or in any way condition or tie the provision of trading services upon or to the provision of clearing services or otherwise participate in the provision of clearing services by improperly incentivizing or encouraging the use of the affiliated futures commission merchant. Any employee of a business trading unit of an affiliated swap dealer or major swap participant may participate in the activities of the futures commission merchant as necessary for (A) participating in default management undertaken by a derivatives clearing organization during an event of default; and (B) transferring, liquidating, or hedging any proprietary or customer positions during an event of default;

(ii) No employee of a business trading unit of an affiliated swap dealer or major swap participant shall supervise, control, or influence any employee of a clearing unit of the futures commission merchant;

(iii) No employee of the business trading unit of an affiliated swap dealer or major swap participant shall supervise, control, or influence any employee of a clearing unit of the futures commission merchant.

(e) Undue influence on customers. Each futures commission merchant and introducing broker must adopt and implement written policies and procedures that mandate the disclosure to its customers of any material incentives and any material conflicts of interest regarding the decision of a customer as to the trade execution and/or clearing of the derivatives transaction.

(f) Records. All records that a futures commission merchant or introducing
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§ 1.73 Clearing futures commission merchant risk management.

(a) Each futures commission merchant that is a clearing member of a derivatives clearing organization shall:

(1) Establish risk-based limits in the proprietary account and in each customer account based on position size, order size, margin requirements, or similar factors;

(2) Screen orders for compliance with the risk-based limits in accordance with the following:

(i) When a clearing futures commission merchant provides electronic market access or accepts orders for automated execution, it shall use automated means to screen orders for compliance with the limits;

(ii) When a clearing futures commission merchant accepts orders for non-automated execution, it shall establish and maintain systems of risk controls reasonably designed to ensure compliance with the limits;

(iii) When a clearing futures commission merchant accepts transactions that were executed bilaterally and then submitted for clearing, it shall establish and maintain systems of risk management controls reasonably designed to ensure compliance with the limits;

(iv) When a firm executes an order on behalf of a customer but gives it up to another firm for clearing,

(A) The clearing futures commission merchant shall establish risk-based limits for the customer, and enter into an agreement in advance with the executing firm that requires the executing firm to screen orders for compliance with those limits in accordance with paragraph (a)(2)(i) or (ii) as applicable; and

(B) The clearing futures commission merchant shall establish and maintain systems of risk management controls reasonably designed to ensure compliance with the limits.

(v) When an account manager bunches orders on behalf of multiple customers for execution as a block and post-trade allocation to individual accounts for clearing,

(A) The futures commission merchant that initially clears the block shall establish risk-based limits for the block account and screen the order in accordance with paragraph (a)(2)(i) or (ii) as applicable;

(B) The futures commission merchants that clear the allocated trades on behalf of customers shall establish risk-based limits for each customer and enter into an agreement in advance with the account manager that requires the account manager to screen orders for compliance with those limits; and

(C) The futures commission merchants that clear the allocated trades on behalf of customers shall establish and maintain systems of risk management controls reasonably designed to ensure compliance with the limits.

(3) Monitor for adherence to the risk-based limits intra-day and overnight;

§ 1.72 Restrictions on customer clearing arrangements.

No futures commission merchant providing clearing services to customers shall enter into an arrangement that:

(a) Discloses to the futures commission merchant or any swap dealer or major swap participant the identity of a customer’s original executing counterparty;

(b) Limits the number of counterparties with whom a customer may enter into a trade;

(c) Restricts the size of the position a customer may take with any individual counterparty, apart from an overall limit for all positions held by the customer at the futures commission merchant;

(d) Impairs a customer’s access to execution of a trade on terms that have a reasonable relationship to the best terms available; or

(e) Prevents compliance with the timeframes set forth in §1.74(b), §23.610(b), or §39.12(b)(7) of this chapter.

[77 FR 21306, Apr. 9, 2012]
§ 1.74 
(a) Each futures commission merchant that is a clearing member of a derivatives clearing organization shall coordinate with each derivatives clearing organization on which it clears to establish systems that enable the futures commission merchant, or the derivatives clearing organization acting on its behalf, to accept or reject each trade submitted to the derivatives clearing organization for clearing by or for the futures commission merchant or a customer of the futures commission merchant as quickly as would be technologically practicable if fully automated systems were used; and 
(b) Each futures commission merchant that is a clearing member of a derivatives clearing organization shall accept or reject each trade submitted by or for it or its customers as quickly as would be technologically practicable if fully automated systems were used; a clearing futures commission merchant may meet this requirement by:
(1) Establishing systems to pre-screen orders for compliance with criteria specified by the clearing futures commission merchant;
(2) Establishing systems that authorize a derivatives clearing organization to accept or reject on its behalf trades that meet, or fail to meet, criteria specified by the clearing futures commission merchant; or
(3) Establishing systems that enable the clearing futures commission merchant to communicate to the derivatives clearing organization acceptance or rejection of each trade as quickly as would be technologically practicable if fully automated systems were used.

§ 1.75 Delegation of authority to the Director of the Division of Clearing and Risk to establish an alternative compliance schedule to comply with futures commission merchant acceptance for clearing.
(a) The Commission hereby delegates to the Director of the Division of Clearing and Risk or such other employee or employees as the Director may designate from time to time, the authority to establish an alternative compliance schedule for requirements of §1.74 for swaps that are found to be technologically or economically impracticable for an affected futures commission merchant that seeks, in good faith, to comply with the requirements of §1.74 within a reasonable time period beyond the date on which compliance by such futures commission merchant is otherwise required.
(b) A request for an alternative compliance schedule under this section shall be acted upon by the Director of the Division of Clearing and Risk within 30 days from the time such a request is received, or it shall be deemed approved.
(c) An exception granted under this section shall not cause a registrant to
§ 2.2 Authority to affix seal.

(a) The following officials of the Commodity Futures Trading Commission are authorized to affix the Seal to appropriate documents and other materials of the Commission for all purposes including those authorized by 28 U.S.C. 1733(b) (relating to authenticated copies of agency documents used as evidence): The Chairman and all Commissioners, the General Counsel, the Executive Director, the Directors of Divisions, and the Secretariat.

§ 2.1 Description.

Pursuant to section 2(a)(10) of the Commodity Exchange Act, as amended, 7 U.S.C. 4(a), the Commodity Futures Trading Commission has adopted an official seal (the “Seal”), the description of which is as follows:

(a) An American bald eagle in black and white holding the scales of balanced interests over a black and white wheel of commerce and a farmer’s plow, also in black and white. These symbols are enclosed with an inner red octagon and a blue outer octagon representing traditional futures contract trading pits. Around the outside of the octagons are the words “Commodity Futures Trading Commission” separated by two stars from the year “1975,” the first year of the Commission’s existence.

(b) The Seal of the Commodity Futures Trading Commission is illustrated as follows:

![Seal Image]

APPENDIX C TO PART 1 [RESERVED]

PART 2—OFFICIAL SEAL

Sec.

2.1 Description.

2.2 Authority to affix seal.

2.3 Prohibitions against misuse of seal.

2.4 Employee Recreation Association’s use of Commission seal.

AUTHORITY: 7 U.S.C. 2a(11).
§ 2.3

(b) The officials named in paragraph (a) of this section, may redelegate, and authorize redelegation of this authority, except that the Secretary may redelegate this authority only to the Deputy Secretary.


§ 2.3 Prohibitions against misuse of seal.

(a) Fraudulently or wrongfully affixing or impressing the Seal to or upon any certificate, instrument, document or paper or with knowledge of its fraudulent character, or with wrongful or fraudulent intent, using, buying, procuring, selling or transferring to another any such paper is punishable under section 1017 of title 18, U.S. Code.

(b) Falsely making, forging, counterfeiting, mutilating, or altering the Seal, or knowingly using a fraudulent or altered Seal or possessing any such Seal knowingly is punishable under section 506 of title 18, U.S. Code.

§ 2.4 Employee Recreation Association's use of Commission seal.

(a) As a specific exception to the provisions of 17 CFR 2.2 and 2.3, the Commodity Futures Trading Commission Employee Recreation Association ("Association") is hereby authorized to use the Commission seal as an imprint upon sport apparel (e.g., hats, clothing, accessories, etc.) and novelty items (e.g., office mugs, lanyards, badge holders, stationary items, among other);

(b) The Association may sell or distribute above said items imprinted with the Commission seal to members of the Association or others to meet its fundraising goals and/or in conjunction with its sports, social or similar events.

[72 FR 29247, May 25, 2007]
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§ 3.1 Definitions.

(a) Principal. Principal means, with respect to an entity that is an applicant for registration, a registrant or a person required to be registered under the Act or the regulations in this part:

(1) If the entity is organized as a sole proprietorship, the proprietor and chief compliance officer; if a partnership, any general partner and chief compliance officer; if a corporation, any director, the president, chief executive officer, chief operating officer, chief financial officer, chief compliance officer, and any person in charge of a principal business unit, division or function subject to regulation by the Commission; if a limited liability company or limited liability partnership, any membervested with the management authority for the entity, and any person in charge of a principal business unit, division or function subject to regulation by the Commission; and, in addition, any person occupying a similar status or performing similar functions, having the power, directly or indirectly, through agreement or otherwise, to exercise a controlling influence over the entity's activities that are subject to regulation by the Commission;

(2)(i) Any individual who directly or indirectly, through agreement, holding company, nominee, trust or otherwise, is either the owner of ten percent or more of the outstanding shares of any class of equity securities, other than non-voting securities, is entitled to vote or has the power to sell or direct the sale of ten percent or more of the outstanding shares of any class of equity securities, other than non-voting securities, is entitled to receive ten percent or more of the profits of the entity, or has the power to exercise a controlling influence over the entity's activities that are subject to regulation by the Commission; or

(ii) Any person other than an individual that is the direct owner of ten percent or more of the outstanding shares of any class of equity securities, other than non-voting securities; or

(3) Any person that has contributed ten percent or more of the capital of the entity, provided, however, that if such capital contribution consists of subordinated debt contributed by either:

(i) An unaffiliated bank insured by the Federal Deposit Insurance Corporation,

(ii) An unaffiliated “foreign bank,” as defined in 12 CFR 211.21(n) that currently operates an “office of a foreign bank,” as defined in 12 CFR 211.21(t), which is licensed under 12 CFR 211.24(a),

(iii) Such unaffiliated office of a foreign bank that is licensed, or

(iv) An insurance company subject to regulation by any State, such bank, foreign bank, office of a foreign bank, or insurance company will not be deemed to be a principal for purposes of this section, provided such debt is not guaranteed by another party not listed as a principal.

(4) Any individual who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose
or effect of divesting such person of direct or indirect ownership of an equity security of the entity, other than a non-voting security, or preventing the vesting of such ownership, or of avoiding making a contribution of ten percent or more of the capital of the entity, as part of a plan or scheme to evade being deemed a principal of the entity, shall be deemed to be a principal of the entity.

(b) Current. As used in this subpart, a Form 8-R is current if, subsequent to the filing of that form and continuously thereafter, the registrant or principal has been either registered or affiliated with a registrant as a principal.

(c) Sponsor. Sponsor means the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity trading advisor, commodity pool operator or leverage transaction merchant which makes the certification required by §3.12 of this part for the registration of an associated person of such sponsor.

(d)-(e) [Reserved]

(f) Section 4s Implementing Regulation. Section 4s Implementing Regulation means a regulation the Commission issues pursuant to section 4s(e), 4s(f), 4s(g), 4s(h), 4s(i), 4s(j), 4s(k) or 4s(l) of the Act.

(g) Swap Definitional Regulation. Swap Definitional Regulation means a regulation the Commission issues to further define the term “swap dealer,” “major swap participant” or “swap” in section 1a(49), 1a(33) or 1a(47) of the Act, respectively, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(h) Swaps activities. Swaps activities means, with respect to a registrant, such registrant’s activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives.

(i) Board of directors. Board of directors means the board of directors, board of governors, or equivalent governing body of a registrant.

§ 3.2 Registration processing by the National Futures Association; notification and duration of registration.

(a) Except as otherwise provided in any rule, regulation or order of the Commission, the registration functions of the Commission set forth in subpart A, subpart B and subpart C of this part shall be performed by the National Futures Association, in accordance with such rules, consistent with the provisions of the Act and this part, applicable to registrations granted under the Act that the National Futures Association may adopt and are approved by the Commission pursuant to section 17(j) of the Act.

(b) Notwithstanding any other provision of this part, the original of any registration form, any schedule or supplement thereto, any fingerprint card or other document required by this part to be filed with both the Commission and the National Futures Association, may be filed with either the Commission or the National Futures Association if:

(1) A legible, accurate, and complete photocopy of that form, schedule, supplement, fingerprint card, or other document required by this part to be filed with the Commission and the National Futures Association, may be filed with either the Commission or the National Futures Association if:

(2) Such photocopy contains an original signature and date in each place where such signature and date is required on the original form, schedule, supplement, fingerprint card, or other document.

(c) The National Futures Association shall notify the registrant, or the sponsor in the case of an applicant for registration as an associated person, and each designated contract market and swap execution facility that has granted the applicant trading privileges in the case of an applicant for registration as a floor broker or floor trader, if
registration has been granted under the Act.

(1) If an applicant for registration as an associated person receives a temporary license in accordance with §3.40, the National Futures Association shall notify the sponsor that only a temporary license has been granted.

(2) If an applicant for registration as a floor broker or floor trader receives a temporary license in accordance with §3.40, the National Futures Association shall notify the designated contract market or swap execution facility that has granted the applicant trading privileges that only a temporary license has been granted.

(3)(i) If an applicant for registration as a swap dealer or major swap participant pursuant to §3.10(a)(1)(v) files a Form 7–R and a Form 8–R and fingerprint card for each natural person who is a principal of the applicant, accompanied by such documentation as may be required to demonstrate compliance with each of the Section 4s Implementing Regulations, as defined in §3.1(f), as are applicable to it, in accordance with the terms of the Section 4s Implementing Regulations, the National Futures Association shall notify the swap dealer or major swap participant, as the case may be, that it is provisionally registered.

(ii) Subsequent to providing notice of provisional registration to an applicant for registration as a swap dealer or major swap participant, the National Futures Association shall determine whether the documentation submitted pursuant to §3.10(a)(1)(v) by the applicant demonstrates compliance with the Section 4s Implementing Regulation to which it pertains; Provided, that where the National Futures Association has notified the applicant that it is provisionally registered, the applicant must supplement its registration application by providing such documentation as may be required to demonstrate compliance with each Section 4s Implementing Regulation that the Commission issues subsequent to the date the National Futures Association notifies the applicant that it is provisionally registered.

(iii) On and after the date on which the National Futures Association confirms that the applicant for registration as a swap dealer or major swap participant has demonstrated its initial compliance with the applicable requirements of each of the Section 4s Implementing Regulations and all other applicable registration requirements under the Act and Commission regulations, the provisional registration of the applicant shall cease and it shall be registered as a swap dealer or major swap participant, as the case may be.

(d) Any registration form, any schedule or supplement thereto, any fingerprint card or other document required by this part or any rule of the National Futures Association to be filed with the National Futures Association shall be deemed for all purposes to have been filed with, and to be the official record of, the Commission.

§ 3.3 Chief compliance officer.

(a) Designation. Each futures commission merchant, swap dealer, and major swap participant shall designate an individual to serve as its chief compliance officer, and provide the chief compliance officer with the responsibility and authority to develop, in consultation with the board of directors or the senior officer, appropriate policies and procedures to fulfill the duties set forth in the Act and Commission regulations relating to the swap dealer’s or major swap participant’s swaps activities, or to the futures commission merchant’s business as a futures commission merchant and to ensure compliance with the Act and Commission regulations relating to the swap dealer’s or major swap participant’s swaps activities, or to the futures commission merchant’s business as a futures commission merchant.

(1) The chief compliance officer shall report to the board of directors or the senior officer of the futures commission merchant, swap dealer, or major swap participant. The board of directors or the senior officer shall appoint the chief compliance officer, shall approve the compensation of the chief compliance officer, and shall meet with the chief compliance officer at least
§ 3.3

once a year and at the election of the chief compliance officer.

(2) Only the board of directors or the senior officer of the futures commission merchant, swap dealer, or major swap participant may remove the chief compliance officer.

(b) Qualifications. The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual disqualified, or subject to disqualification, from registration under section 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(c) Submission with registration. Each application for registration as a futures commission merchant under § 3.10, a swap dealer under § 23.21, or a major swap participant under § 23.21, must include a designation of a chief compliance officer by submitting a Form 8-R for the chief compliance officer as a principal of the applicant pursuant to § 3.10(a)(2).

(d) Chief compliance officer duties. The chief compliance officer’s duties shall include, but are not limited to:

(1) Administering the registrant’s policies and procedures reasonably designed to ensure compliance with the Act and Commission regulations;

(2) In consultation with the board of directors or the senior officer, resolving any conflicts of interest that may arise;

(3) Taking reasonable steps to ensure compliance with the Act and Commission regulations relating to the swap dealer’s or major swap participant’s swaps activities, or to the futures commission merchant’s business as a futures commission merchant;

(4) Establishing procedures, in consultation with the board of directors or the senior officer, for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(5) Establishing procedures, in consultation with the board of directors or the senior officer, for the handling, management response, remediation, re-testing, and closing of noncompliance issues; and

(6) Preparing and signing the annual report required under paragraphs (e) and (f) of this section.

(e) Annual report. The chief compliance officer annually shall prepare a written report that covers the most recently completed fiscal year of the futures commission merchant, swap dealer, or major swap participant, and provide the annual report to the board of directors or the senior officer. The annual report shall, at a minimum:

(1) Contain a description of the written policies and procedures, including the code of ethics and conflicts of interest policies, of the futures commission merchant, swap dealer, or major swap participant;

(2) Review each applicable requirement under the Act and Commission regulations, and with respect to each:

(i) Identify the policies and procedures that are reasonably designed to ensure compliance with the requirement under the Act and Commission regulations;

(ii) Provide an assessment as to the effectiveness of these policies and procedures; and

(iii) Discuss areas for improvement, and recommend potential or prospective changes or improvements to its compliance program and resources devoted to compliance;

(3) List any material changes to compliance policies and procedures during the coverage period for the report;

(4) Describe the financial, managerial, operational, and staffing resources set aside for compliance with respect to the Act and Commission regulations, including any material deficiencies in such resources; and

(5) Describe any material non-compliance issues identified, and the corresponding action taken.

(f) Furnishing the annual report to the Commission. (1) Prior to furnishing the annual report to the Commission, the chief compliance officer shall provide the annual report to the board of directors or the senior officer of the futures commission merchant, swap dealer, or major swap participant for its review. Furnishing the annual report to the board of directors or the senior officer shall be recorded in the board minutes or otherwise, as evidence of compliance with this requirement.
§ 3.4

(2) The annual report shall be furnished electronically to the Commission not more than 90 days after the end of the fiscal year of the futures commission merchant, swap dealer, or major swap participant, simultaneously with the submission of Form 1–FR–PCM, as required under §1.10(b)(2)(i), simultaneously with the Financial and Operational Combined Uniform Single Report, as required under §1.10(h), or simultaneously with the financial condition report, as required under section 4s(f) of the Act, as applicable.

(3) The report shall include a certification by the chief compliance officer or chief executive officer of the registrant that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the information contained in the annual report is accurate and complete.

(4) The futures commission merchant, swap dealer, or major swap participant shall promptly furnish an amended annual report if material errors or omissions in the report are identified. An amendment must contain the certification required under paragraph (f)(3) of this section.

(5) A futures commission merchant, swap dealer, or major swap participant may request from the Commission an extension of time to furnish its annual report, provided the registrant’s failure to timely furnish the report could not be eliminated by the registrant without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission.

(6) A futures commission merchant, swap dealer, or major swap participant may incorporate by reference sections of an annual report that has been furnished within the current or immediately preceding reporting period to the Commission. If the futures commission merchant, swap dealer, or major swap participant is registered in more than one capacity with the Commission, and must submit more than one annual report, an annual report submitted as one registrant may incorporate by reference sections in the annual report furnished within the current or immediately preceding reporting period as the other registrant.

(g) Recordkeeping. (1) The futures commission merchant, swap dealer, or major swap participant shall maintain:

(i) A copy of the registrant’s policies and procedures reasonably designed to ensure compliance with the Act and Commission regulations;

(ii) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (e) of this section; and

(iii) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are created, sent or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report.

(2) All records or reports that a futures commission merchant, swap dealer, or major swap participant are required to maintain pursuant to this section shall be maintained in accordance with §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of the applicable prudential regulator, as defined in 1a(39) of the Act.

[77 FR 20200, Apr. 3, 2012]

§ 3.3 [Reserved]

§ 3.4 Registration in one capacity not included in registration in any other capacity.

(a) Except as may be otherwise provided in the Act or in any rule, regulation, or order of the Commission, each futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, floor broker, floor trader of any commodity for future delivery, commodity trading advisor, commodity pool operator, introducing broker, leverage transaction merchant, and associated person (other than an associated person of a swap dealer or major swap participant) must register as such under the Act. Except as may be otherwise provided in the Act or in any rule, regulation, or order of the Commission, registration in one
capacity under the Act shall not include registration in any other capacity.

(b) Except as may be provided in any rule, regulation or order of the Commission, registration as an associated person in one capacity shall not include registration as an associated person in any other capacity: *Provided, however, That an associated person who is sponsored by a registrant, which itself is registered in more than one capacity, need register only once to act as an associated person of the registrant, and shall be deemed to be an associated person of such registrant, in each such capacity.*


§§ 3.5–3.9 [Reserved]

§ 3.10 Registration of futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity pool operators, swap dealers, major swap participants and leverage transaction merchants.

(a) Application for registration. (1)(i) Except as provided in paragraph (a)(3) of this section, application for registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant must be on Form 7–R, completed and filed with the National Futures Association in accordance with the instructions thereto.

(ii) Applicants for registration as a futures commission merchant, retail foreign exchange dealer, or introducing broker must accompany their Form 7–R with a Form 1–FR–FCM or Form 1–FR–IB, respectively, in accordance with the provisions of § 1.10(h) of this chapter.

Provided, however, That an applicant for registration as a futures commission merchant or introducing broker which is registered with the Securities and Exchange Commission as a securities broker or dealer may accompany its Form 7–R with a copy of its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II or Part II A, in accordance with the provisions of § 1.10(h) of this chapter.

(iii) Applicants for registration as a commodity pool operator must accompany their Form 7–R with the financial statements described in § 4.13(c) of this chapter.

(iv) Applicants for registration as a leverage transaction merchant must accompany their Form 7–R with a Form 2–FR in accordance with the provisions of § 31.13 of this chapter.

(v)(A) Applicants for registration as a swap dealer or major swap participant must accompany their Form 7–R with such documentation as may be required to demonstrate compliance with each Section 4s Implementing Regulation, as defined in § 3.1(f), applicable to them, in accordance with the terms of the Section 4s Implementing Regulation: *Provided, however, that for the purposes of this paragraph (a)(1)(v) the term “compliance” includes the term “the ability to comply,” to the extent that a particular Section 4s Implementing Regulation may require demonstration of the ability to comply with a requirement thereunder.*

(B) The filing of the Form 7–R and accompanying documentation by the applicant swap dealer or major swap participant authorizes the Commission to conduct on-site inspection of the applicant to determine compliance with the Section 4s Implementing Regulations applicable to it.

(C)(1) At any time prior to the latest effective date of the Swap Definitional Regulations, defined in § 3.1(g), any person may apply to be registered as a swap dealer or major swap participant.

(2) By no later than the latest effective date of the Swap Definitional Regulations, each person who is a swap dealer or major swap participant on that date must apply to be registered as a swap dealer or major swap participant, as the case may be.

(3) From and after the latest effective date of the Swap Definitional Regulations, each person who intends to engage in business as a swap dealer or major swap participant must apply to be registered as a swap dealer or major swap participant, as the case may be.
Commodity Futures Trading Commission

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(D)(I) Where an applicant for registration as a swap dealer or major swap participant to whom the National Futures Association has provided notice of provisional registration under §3.2(c)(3) fails to demonstrate compliance with a Section 4s Implementing Regulation, the National Futures Association will notify the applicant that its application is deficient, whereupon the applicant must withdraw its registration application, it must not engage in any new activity as a swap dealer or major swap participant, as the case may be, and the applicant shall cease to be provisionally registered; Provided, that in the event the applicant fails to withdraw its registration application or cure the deficiency within 90 days following receipt of notice from the National Futures Association that its application is deficient, the application will be deemed withdrawn and thereupon its provisional registration shall cease; Provided further, that upon written request by the applicant submitted to the Commission, the Commission may in its discretion extend the time by which the applicant must cure the deficiency.

(E) Unless specifically reserved in the applicable swap documentation, no withdrawal, deemed withdrawal, cessation or revocation of registration as a swap dealer or major swap participant pursuant to paragraph (a)(1)(v), (b), or (d) of this section shall constitute a termination event, force majeure, an illegality, increased costs, a regulatory change, or a similar event under a swap (including any related credit support arrangement) that would permit a party to terminate, renegotiate, modify, amend or supplement one or more transactions under the swap.

(2) Each Form 7-R filed in accordance with the requirements of paragraph (a)(1)(i) of this section must be accompanied by a Form 8-R, completed in accordance with the instructions thereto and executed by each natural person who is a principal of the applicant, and must be accompanied by the fingerprints of that principal on a fingerprint card provided by the National Futures Association for that purpose; Provided, however, that if such principal is a director who qualifies for the exemption from the fingerprint requirement pursuant to §3.21(c) or has a current Form 8-R on file with the Commission or the National Futures Association, the fingerprints of that principal do not need to accompany the Form 7-R.

(3) Notice registration as a futures commission merchant or introducing broker for certain securities brokers or dealers. (i) Any broker or dealer that is registered with the Securities and Exchange Commission may be registered as a futures commission merchant or introducing broker, as applicable, by following such procedures for notice registration as may be specified by the National Futures Association, if—

(A) The broker or dealer limits its solicitation of orders, acceptance of orders, or execution of orders, or placing of orders on behalf of others involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market, to security futures products as defined in section 1a(44) of the Act;

(B) The registration of the broker or dealer is not suspended pursuant to an order of the Securities and Exchange Commission; and

(C) The broker or dealer is a member of a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934.

(ii) The registration will be effective upon the filing of the notice prescribed by the National Futures Association in accordance with the instructions thereto.

(b) Duration of registration. (1) A person registered as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant in accordance with paragraph (a) of this section will continue to be so registered until the effective date of any
§ 3.10 17 CFR Ch. I (4–1–13 Edition)

revocation or withdrawal of such registration. Upon effectiveness of any revocation or withdrawal of registration, such person will immediately be prohibited from engaging in new activities requiring registration under the Act or from representing himself to be a registrant under the Act or the representative or agent of any registrant during the pendency of any suspension of such registration.

(2) A person registered as an introducing broker who was a party to a guarantee agreement with a futures commission merchant in accordance with §1.10(j) of this chapter will have its registration cease thirty days after the termination of such guarantee agreement unless the procedures set forth in §1.10(j)(6) of this chapter are followed.

(c) Exemption from registration for certain persons. (1) A person trading solely for proprietary accounts, as defined in §1.3(y) of this chapter, is not required to register as a futures commission merchant: Provided, that such person remains subject to all other provisions of the Act and of the rules, regulations and orders thereunder.

(2)(i) A foreign broker, as defined in §1.3(xx) of this chapter, is not required to register as a futures commission merchant if it submits any commodity interest transactions executed bilaterally, on or subject to the rules of a designated contract market, or on or subject to the rules of a swap execution facility, for clearing on an omnibus basis through a futures commission merchant registered in accordance with section 4d of the Act.

(ii) A person acting in accordance with paragraph (c)(3)(i) of this section remains subject to section 4d of the Act, but otherwise is not required to comply with those provisions of the Act and of the rules, regulations and orders thereunder applicable solely to any person registered in such capacity, or any person required to be so registered.

(3)(i) A person located outside the United States, its territories or possessions engaged in the activity of: An introducing broker, as defined in §1.3(mm) of this chapter; a commodity trading advisor, as defined in §1.3(bb) of this chapter; or a commodity pool operator, as defined in §1.3(nn) of this chapter, in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility only on behalf of persons located outside the United States, its territories or possessions, is not required to register in such capacity provided that any such commodity interest transaction is submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act.

(ii) A person acting in accordance with paragraph (c)(3)(i) of this section is not required to comply with those provisions of the Act and of the rules, regulations and orders thereunder applicable solely to any person registered in such capacity, or any person required to be so registered.

(4) A person located outside the United States, its territories or possessions that is exempt from registration as a futures commission merchant in accordance with §30.10 of this chapter is not required to register as an introducing broker in accordance with section 4d of the Act if:

(i) Such a person is affiliated with a futures commission merchant registered in accordance with section 4d of the Act;

(ii) Such a person introduces, on a fully-disclosed basis in accordance with §1.57 of this chapter, any institutional customer, as defined in §1.3(g) of this chapter, to a registered futures commission merchant for the purpose of trading on a designated contract market;

(iii) Such person's affiliated futures commission merchant has filed with the National Futures Association (Attn: Vice President, Compliance) an acknowledgement that the affiliated futures commission merchant will be jointly and severally liable for any violations of the Act or the Commission's regulations committed by such person in connection with those introducing activities, whether or not the affiliated futures commission merchant submits for clearing any trades resulting from those introducing activities; and

(iv) Such person does not solicit any person located in the United States, its
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§ 3.11 Registration of floor brokers and floor traders.

(a) Application for registration. (1) Application for registration as a floor broker or floor trader must be on Form 8–R, if as an individual, or Form 7–R, if as a non-natural person, and must be completed and filed with the National Futures Association in accordance with the instructions thereto. Each Form 7–R filed in accordance with this paragraph (a) must be accompanied by a Form 8–R, completed in accordance with the instructions thereto and executed by each individual who is a principal of the applicant, and each individual responsible for entry of orders from that applicant’s own account. Each Form 8–R filed in accordance with this paragraph (a) must be accompanied by the fingerprints of the applicant on a fingerprint card provided for that purpose by the National Futures Association, except that a fingerprint card need not be filed by any applicant who has a current Form 8–R on file with the Commission or the National Futures Association.

(b) Duration of registration. A person registered as a floor broker or floor trader will not be registered or issued a temporary license as a floor broker or floor trader unless the applicant has been granted trading privileges by a board of trade designated as a contract market or swap execution facility by the Commission.

(c) When the Commission or the National Futures Association determines that an applicant for registration as a floor broker or floor trader is not disqualified from such registration or temporary license, the National Futures Association will notify the applicant and any contract market or swap execution facility that has granted the applicant trading privileges that the applicant’s registration or temporary license as a floor broker or floor trader is granted.

(d) On a date to be established by the National Futures Association, and in accordance with procedures established by the National Futures Association, each registrant as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant shall, on an annual basis, review and update registration information maintained with the National Futures Association. The failure to complete the review and update within thirty days following the date established by the National Futures Association shall be deemed to be a request for withdrawal from registration, which shall be processed in accordance with the provisions of §3.33(f).

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§ 3.12  Registration of associated persons of futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators and leverage transaction merchants.

(a) Registration required. It shall be unlawful for any person to be associated with a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity trading advisor, commodity pool operator or leverage transaction merchant as an associated person unless that person shall have registered under the Act as an associated person of that sponsoring futures commission merchant, retail foreign exchange dealer, introducing broker, commodity trading advisor, commodity pool operator or leverage transaction merchant in accordance with the procedures in paragraphs (c), (d), (f), or (i) of this section or is exempt from such registration pursuant to paragraph (h) of this section.

(b) Duration of registration. A person registered in accordance with paragraphs (c), (d), (f), or (i) of this section and whose registration has not been revoked will continue to be so registered until the revocation or withdrawal of the registration of each of the registrant’s sponsors, or until the cessation of the association of the registrant with each of the registrant’s sponsors. Such person will be prohibited from engaging in activities requiring registration under the Act or from representing himself or herself to be a registrant under the Act or the representative or agent of any registrant during the pendency of any suspension of such registration or of all such trading privileges. Each contract market and swap execution facility that has granted trading privileges to a person who is registered, or has applied for registration, as a floor broker or floor trader must provide notice in accordance with §3.31(c) reporting the termination of the association of the associated person.

(c) Application for registration. Except as otherwise provided in paragraphs (d), (f), and (i) of this section, application for registration as an associated person in any capacity must be on Form 8–R, completed and filed in accordance with the instructions thereto.

(1) No person will be registered as an associated person in accordance with this paragraph (c) unless a person duly authorized by the sponsor certifies that:

(i) It is the intention of the sponsor to hire or otherwise employ the applicant as an associated person and that it will do so within thirty days after the receipt of the notification provided in accordance with paragraph (c)(4) of this section and that the applicant will not be permitted to engage in any activity requiring registration as an associated person until the applicant is registered as such in accordance with this section:
(i) The sponsor has verified the information supplied by the applicant in response to the questions on Form 8-R which relate to the applicant’s education and employment history during the preceding three years;

(ii) To the best of the sponsor’s knowledge, information, and belief, all of the publicly available information supplied by the applicant on Form 8-R is accurate and complete: Provided, That it is unlawful for the sponsor to make the certification required by this paragraph (c)(1)(iii) if the sponsor knew or should have known that any of that information is not accurate and complete; and

(2) The certification required by paragraph (c)(1) of this section must be submitted concurrently with the Form 8-R. 

(3) Each Form 8-R filed in accordance with the requirements of paragraph (c) of this section must be accompanied by the fingerprints of the applicant on a fingerprint card provided for that purpose by the National Futures Association.

(4) When the Commission or the National Futures Association determines that an applicant for registration as an associated person is not unfit for such registration, it will notify the sponsor that has made the certifications required by paragraph (c)(1) of this section that the applicant’s registration as an associated person is granted contingent upon the sponsor hiring or otherwise employing the applicant as such within thirty days.

(d) Special temporary licensing and registration procedures for certain persons—

(1) Registration terminated within the preceding 60 days. Except as otherwise provided in paragraphs (f) and (i) of this section, any person whose registration as an associated person is granted contingent upon the sponsor hiring or otherwise employing the applicant as such within thirty days.

(2) Any temporary license granted pursuant to paragraph (d)(1) of this section shall be terminated immediately upon notice to the sponsor of the person granted the temporary license that, within 20 days following the date the temporary license was issued, the National Futures Association has not received the applicant’s fingerprints.

(3) A temporary license received in accordance with paragraph (d)(1) of this section shall be subject to the provisions of §§3.42 and 3.43.

(4) The certifications permitted by paragraphs (d)(1)(i) and (v) of this section must be filed by a person duly authorized by the sponsor. The certifications permitted by paragraphs (d)(1)(ii)–(iv) must be filed by the applicant for registration as an associated person.
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(e) Retention of records. The sponsor must retain in accordance with § 1.31 of this chapter such records as are necessary to support the certifications required by this section.

(f) Reporting of dual and multiple associations. (1)(i) Except as otherwise provided in paragraph (f)(4) of this section, a person who is already registered as an associated person in any capacity whose registration is not subject to conditions or restrictions may become associated as an associated person with another sponsor if the new sponsor (who must meet the requirements set forth in § 3.60(b)(2)(i) (A) and (B)) files with the National Futures Association a Form 8-R in accordance with the instructions thereto.

(ii) NFA shall notify each sponsor of the associated person that the associated person has applied to become associated with another sponsor.

(iii) Each sponsor of the associated person shall supervise that associated person and each sponsor is jointly and severally responsible for the conduct of the associated person with respect to the:

(A) Solicitation or acceptance of customers’ orders,

(B) Solicitation of funds, securities, or property for a participation in a commodity pool,

(C) Solicitation of a client’s or prospective client’s discretionary account,

(D) Solicitation or acceptance of leverage customers’ orders for leverage transactions, and

(E) Associated person’s supervision of any person or persons engaged in any of the foregoing solicitations or acceptances, with respect to any customers common to it and any other futures commission merchant, retail foreign exchange dealer, introducing broker, commodity trading advisor, commodity pool operator, or leverage transaction merchant with which the associated person is associated.

(2) Upon receipt by the National Futures Association of a Form 8-R filed in accordance with paragraph (f)(1) of this section from an associated person, the associated person named therein shall be registered as an associated person of the new sponsor.

(3) A person who is simultaneously associated with more than one sponsor in accordance with the provisions of paragraphs (f)(1) and (f)(2) of this section shall be required, upon receipt of notice from the National Futures Association, to file with the National Futures Association his fingerprints on a fingerprint card provided by the National Futures Association for that purpose as well as such other information as the National Futures Association may require. The National Futures Association may require such a filing every two years, or at such greater period of time as the National Futures Association may deem appropriate, after the associated person has become associated with a new sponsor in accordance with the requirements of paragraphs (f)(1) and (f)(2) of this section.

(4) If a person is associated with a futures commission merchant, with a retail foreign exchange dealer, or with an introducing broker and he directs customers seeking a managed account to use the services of a commodity trading advisor(s) approved by the futures commission merchant, retail foreign exchange dealer or introducing broker and all such customers’ accounts solicited or accepted by the associated person are carried by the futures commission merchant, retail foreign exchange dealer or introduced by the introducing broker with which the associated person is associated, such a person shall be deemed to be associated solely with the futures commission merchant, retail foreign exchange dealer or introducing broker and may not also register as an associated person of the commodity trading advisor(s).

(g) Petitions for exemption. Any person adversely affected by the operation of this section may file a petition with the Secretary of the Commission, which petition must set forth with particularity the reasons why that person believes that an applicant should be exempted from the requirements of this section and why such an exemption would not be contrary to the public interest and the purposes of the provision from which exemption is sought. The petition will be granted or denied by the Commission on the basis of the papers filed. The Commission may grant such a petition if it finds that the exemption is not contrary to the public interest.
interest and the purposes of the provision from which exemption is sought. The petition may be granted subject to such terms and conditions as the Commission may find appropriate.

(h) Exemption from registration. (1) A person is not required to register as an associated person in any capacity if that person is:

(i) Registered under the Act as a futures commission merchant, retail foreign exchange dealer, floor broker, major swap participant, or as an introducing broker,

(ii) Engaged in the solicitation of funds, securities, or property for a participation in a commodity pool, or the supervision of any person or persons so engaged, pursuant to registration with the Financial Industry Regulatory Authority as a registered representative, registered principal, limited representative or limited principal, and that person does not engage in any other activity subject to regulation by the Commission;

(iii) The chief operating officer, general partner or other person in the supervisory chain-of-command, provided the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity trading advisor, commodity pool operator, or leverage transaction merchant engages in commodity interest related activity for customers as no more than ten percent of its total revenue on an annual basis, the firm is not subject to a pending proceeding brought by the Commission or a self-regulatory organization alleging fraud or failure to supervise, and has not been found in such a proceeding to have committed fraud or failed to supervise, as required by the Act, the rules promulgated thereunder or the rules of a self-regulatory organization, holds and exercises full and final supervisory authority, including authority to hire and fire personnel, over the customer commodity interest related activities of the firm; and

(D) If the person (or persons) so designated in accordance with paragraph (h)(1)(iii)(C) of this section ceases to have the authority referred to therein, the firm will notify the National Futures Association within twenty days of such occurrence by means of a subsequent resolution which resolution must also include the name of another associated person (or persons) who has been vested with full supervisory authority, including authority to hire and fire personnel, over the customer commodity interest related activities of the firm in the event that all of those previously designated in accordance with paragraph (h)(1)(iii)(C) of this section have been relieved of such authority. Subsequent changes in supervisory authority shall be reported in the same manner; or
(iv) Engaged in any activity as an associated person, as defined in §1.3(aa) of this chapter, from a location outside the United States, its territories or possessions, and limits such activities to customers located outside the United States, its territories or possessions.

(2) A person is not required to register as an associated person of a commodity trading advisor if that person is:

(i) Registered as a commodity trading advisor, if that person is associated with a commodity trading advisor; or

(ii) Exempt from registration as a commodity trading advisor pursuant to the provisions of §4.14(a)(1), §4.14(a)(2) or §4.14(a)(8) of this chapter or is associated with a person who is so exempt from registration. Provided, That the provisions of paragraph (h)(2)(ii) of this section shall not apply to the solicitation of a client’s or prospective client’s discretionary account, or the supervision of any person or persons so engaged, by, for or on behalf of a commodity trading advisor which is:

(A) Not exempt from registration pursuant to the provisions of §4.14(a)(1), §4.14(a)(2) or §4.14(a)(8) of this chapter or

(B) Registered as a commodity pool operator notwithstanding the availability of that exemption; or

(iii) Where a commodity pool is operated or to be operated by two or more commodity pool operators, registered as an associated person of one of the pool operators of the commodity pool in accordance with the provisions of paragraphs (c), (d), (f), or (i) of this section: Provided, That each such commodity pool operator shall be jointly and severally liable for the conduct of that associated person in the solicitation of funds, securities, or property for participation in the commodity pool, or the supervision of any person or persons so engaged, regardless of whether that associated person is registered as an associated person of each such commodity pool operator.

(i) Special registration or temporary licensing procedures when previous sponsor’s registration ceases. (1) Any person whose registration as an associated person in any capacity was not subject to conditions or restrictions, and was terminated within the preceding sixty days because the previous sponsor’s registration was revoked or withdrawn, and who becomes associated with a new sponsor, will be registered as an associated person of such new sponsor upon the mailing by that new sponsor to the National Futures Association of written certifications stating:

(i) That such person has been hired or is otherwise employed by that sponsor;

(ii) That such person’s registration as an associated person in any capacity is not suspended or revoked;

(iii) That such person is eligible to be registered in accordance with paragraph (i) of this section;

(iv) That such person is eligible to be registered in accordance with paragraph (i) of this section; and

(v) That the new sponsor has received a copy of the notice of the institution
§ 3.21 Exemption from fingerprinting requirement in certain cases.

(a) Any person who is required by this part to submit a fingerprint card may file, or cause to be filed, in lieu of such card:

(1) A legible, accurate and complete photocopy of a fingerprint card that has been submitted to the Federal Bureau of Investigation for identification and appropriate processing and of each report, record, and notation made available by the Federal Bureau of Investigation with respect to that fingerprint card if such identification and processing has been completed satisfactorily by the Federal Bureau of Investigation not more than ninety days prior to the filing with the National Futures Association of the photocopy;

(2) A statement that such person’s application for initial registration in any capacity was granted within the preceding ninety days, provided that the provisions of this paragraph (a)(2) shall not be applicable to any person who, by Commission rule, regulation, or order, was not required to file a fingerprint card in connection with such application for initial registration; or

(3) A statement that such person has a current Form 8–R on file with the Commission or the National Futures Association.

(b) Each photocopy and statement filed in accordance with the provisions of paragraph (a)(1) or (a)(2) of this section must be signed and dated. Such signature shall constitute a certification by that individual that the photocopy or statement is accurate and complete and must be made by:

(1) With respect to the fingerprints of an associated person: An officer, if the sponsor is a corporation; a general partner, if a partnership; or the proprietor, if a sole proprietorship.

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partner, if a partnership; or the sole proprietor, if a sole proprietorship;

(2) With respect to fingerprints of a floor broker or individual floor trader: The applicant for registration; and with respect to fingerprints of each individual who is responsible for entry of orders from the account of a floor trader that is a non-natural person, the applicant for registration, or

(3) With respect to the fingerprints of a principal: An officer, if the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, commodity trading advisor, commodity pool operator, introducing broker, floor trader that is a non-natural person, or leverage transaction merchant with which the principal will be affiliated is a corporation; a general partner, if a partnership; or the sole proprietor, if a sole proprietorship.

(c) Outside directors. Any futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity trading advisor, floor trader that is a non-natural person, or leverage transaction merchant that has a principal who is a director but is not also an officer or employee of the firm may, in lieu of submitting a fingerprint card in accordance with the provisions of §3.10(a)(2), file a “Notice Pursuant to Rule 3.21(c)” with the National Futures Association. Such notice shall state, if true, that such outside director:

(1) Is not engaged in:
   (i) The solicitation or acceptance of customers’ orders or retail forex customers’ orders,
   (ii) The solicitation of funds, securities or property for a participation in a commodity pool.
   (iii) The solicitation of a client’s or prospective client’s discretionary account,
   (iv) The solicitation of leverage customers’ orders for leverage transactions,
   (v) The solicitation or acceptance of a swap agreement;
(2) Does not regularly have access to the keeping, handling or processing of:
   (i) Transactions involving “commodity interests,” as that term is defined in §1.3(yy);
   (ii) Customer funds, retail forex customer funds, leverage customer funds, foreign futures or foreign options secured amount, or adjusted net capital; or
   (3) Does not have direct supervisory responsibility over persons engaged in the activities referred to in paragraphs (c)(1) and (c)(2) of this section; and
(4) The Notice Pursuant to Rule 3.21(c) shall also include:
   (i) The name of the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity trading advisor, commodity pool operator, floor trader that is a non-natural person, leverage transaction merchant, or applicant for registration in any of these capacities of which the person is an outside director;
   (ii) The nature of the duties of the outside director for whom exemption under paragraph (c) of this section is sought;
   (iii) The internal controls used to ensure that the outside director for whom exemption under this paragraph (c) is sought does not have access to the keeping, handling or processing of the items described in paragraphs (c)(2)(i) and (ii) of this section; and
   (iv) The reasons why the outside director believes he should be exempted from the fingerprint requirement and why such an exemption would not be contrary to the public interest and the purposes of the provision from which exemption is sought.

(d) A firm that has filed a Notice Pursuant to Rule 3.21(c) with respect to an outside director described therein must file with the National Futures Association on behalf of such outside director a Form 8–R, completed in accordance with the instructions thereto and executed by the outside director. The exemption provided for in paragraph (c) of this section is limited solely to the outside director’s fingerprint requirement and does not affect any other duties or responsibilities of the firm or the outside director under the Act or the rules set forth in this chapter. In appropriate cases, the Commission and the National Futures Association may require further information
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§ 3.30 Current address for purpose of delivery of communications from the Commission or the National Futures Association.

(a) The address of each registrant, applicant for registration, or principal, as submitted on the application for registration (Form 7–R or Form 8–R) or as submitted on the biographical supplement (Form 8–R) shall be deemed to be the address for delivery to the registrant, applicant or principal for any communications from the Commission or the National Futures Association, including any summons, complaint, reparation claim, order, subpoena, special call, request for information, notice, and other written documents or correspondence, unless the registrant, applicant or principal specifies another address for this purpose: Provided that the Commission or the National Futures Association may address any correspondence relating to a biographical supplement submitted for or on behalf of a principal to the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, floor trader that is a non-natural person, or leverage transaction merchant with which the principal is affiliated and may address any correspondence relating to an associated person to the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, floor trader that is a non-natural person, or leverage transaction merchant with which the associated person or the applicant for registration is or will be associated as an associated person.

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§§ 3.23–3.29 [Reserved]

§ 3.22 Supplemental filings.

Notwithstanding any other provision of this chapter, the Commission, the Directors of the Division of Clearing and Intermediary Oversight or Division of Enforcement or either Director’s designee, or the National Futures Association may, at any time, give written notice to any registrant, applicant for registration, or person required to be registered:

(a)(1) That derogatory information has come to the attention of the staff of the Commission or the National Futures Association which, if true, could constitute grounds upon which to base a determination that the person is unfit to become, or to remain, registered or temporarily licensed in accordance with the Act or the regulations thereunder and setting forth such information in the notice and requesting the person to provide evidence mitigating the seriousness of the statutory disqualification set forth in the notice and evidence that the person has undergone rehabilitation, or

(2) That the Commission or the National Futures Association has undertaken a routine or periodic review of the registrant’s fitness to remain registered or temporarily licensed; and

(b) That the person, or any individual who, based upon his or her relationship with that person is required to file a Form 8–R in accordance with the requirements of this part, as applicable, must, within such period of time as the Commission or the National Futures Association may specify, complete and file with the Commission or the National Futures Association a current Form 7–R, or if appropriate, a Form 8–R, in accordance with the instructions thereto.

(c) Failure to provide the information required under paragraph (b) of this section is a violation of the Commission’s regulations which itself constitutes grounds upon which to base a determination that the person is unfit to become or to remain so registered.


§ 3.30 Current address for purpose of delivery of communications from the firm with respect to any outside director referred to in a Notice Pursuant to Rule 3.21(c).


§ 3.22 Supplemental filings.

Notwithstanding any other provision of this chapter, the Commission, the Directors of the Division of Clearing and Intermediary Oversight or Division of Enforcement or either Director’s designee, or the National Futures Association may, at any time, give written notice to any registrant, applicant for registration, or person required to be registered:

(a)(1) That derogatory information has come to the attention of the staff of the Commission or the National Futures Association which, if true, could constitute grounds upon which to base a determination that the person is unfit to become, or to remain, registered or temporarily licensed in accordance with the Act or the regulations thereunder and setting forth such information in the notice and requesting the person to provide evidence mitigating the seriousness of the statutory disqualification set forth in the notice and evidence that the person has undergone rehabilitation, or

(2) That the Commission or the National Futures Association has undertaken a routine or periodic review of the registrant’s fitness to remain registered or temporarily licensed; and

(b) That the person, or any individual who, based upon his or her relationship with that person is required to file a Form 8–R in accordance with the requirements of this part, as applicable, must, within such period of time as the Commission or the National Futures Association may specify, complete and file with the Commission or the National Futures Association a current Form 7–R, or if appropriate, a Form 8–R, in accordance with the instructions thereto.

(c) Failure to provide the information required under paragraph (b) of this section is a violation of the Commission’s regulations which itself constitutes grounds upon which to base a determination that the person is unfit to become or to remain so registered.

(Approved by the Office of Management and Budget under control number 3038–0023)
§ 3.31 Deficiencies, inaccuracies, and changes, to be reported.

(a)(1) Each applicant or registrant as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, commodity trading advisor, commodity pool operator, introducing broker, floor trader that is a non-natural person or leverage transaction merchant shall, in accordance with the instructions thereto, promptly correct any deficiency or inaccuracy in Form 7–R or Form 8–R that no longer renders accurate and current the information contained therein, with the exception of any change that requires withdrawal from registration under §3.33. Each such correction shall be prepared and filed in accordance with the instructions thereto to create a Form 3–R record of change.

(2) Where a registrant has changed its form of organization to or from a sole proprietorship, the registrant must request withdrawal from registration in accordance with §3.33.

(c) After the filing of a Form 8–R or updating a Form 8–R to create a Form 3–R record of change by or on behalf of any person for the purpose of permitting that person to be an associated person of a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, floor trader or associated person, and each principal of a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, commodity trading advisor, commodity pool operator, introducing broker, floor trader that is a non-natural person, or leverage transaction merchant must, within thirty days after the occurrence of either of the following, file a notice thereof with the National Futures Association indicating:

(i) The failure of that person to become associated with the futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, or leverage transaction merchant, and the reasons therefor; or

(ii) The termination of the association of the associated person with the futures commission merchant, retail foreign exchange dealer, commodity
trading advisor, commodity pool operator, introducing broker, or leverage transaction merchant, and the reasons therefor.

(2) Each person registered as, or applying for registration as, a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity trading advisor, commodity pool operator, introducing broker, floor trader or floor trader may request that its registration be withdrawn in accordance with the requirements of this section if:

(1) The registrant has ceased, or has not commenced, engaging in activities requiring registration in such capacity;

(2) The registrant is exempt from registration in such capacity; or

(3) The registrant is excluded from the persons or any class of persons required to be registered in such capacity: Provided, That the National Futures Association or the Commission, as appropriate, may consider separately each capacity for which withdrawal is requested in acting upon such a request.

(b) A request for withdrawal from registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity trading advisor, commodity pool operator, floor trader that is a non-natural person, or leverage transaction merchant must be made on Form 7–W, and a request for withdrawal from registration as a floor broker or individual floor trader must be made on Form 8–W, completed and filed with the National Futures Association in accordance with the instructions thereto. The request for withdrawal must be made by a person duly authorized by the registrant and must specify:

(1) The name of the registrant for which withdrawal is being requested;

(2) The registration capacities for which withdrawal is being requested;

(3) The name, address, and telephone number of the person who will have custody of the books and records of the registrant; the address where such books and records will be located; and a statement that such person is authorized to make them available in accordance with the requirements of §1.31 of this chapter;

(4) The applicable basis under paragraph (a) of this section for requesting withdrawal for each capacity for which withdrawal is requested.
(5) If withdrawal is requested under paragraph (a)(2) or (a)(3) of this section, then, with respect to each capacity for which withdrawal is requested, the section of the Act, regulations, or other authority permitting the exemption or exclusion, and the circumstances which entitle the registrant to claim such exemption or exclusion.

(6) If a basis for withdrawal from registration under paragraph (a)(1) of this section is that the registrant has ceased engaging in activities requiring registration, then, with respect to each capacity for which the registrant has ceased such activities:

(i) That all customer, retail forex customer or option customer agreements, if any, have been terminated;

(ii) That all customer, retail forex customer or option customer positions, if any, have been transferred on behalf of customers or option customers or closed;

(iii) That all customer, retail forex customer or option customer cash balances, securities, or other property, if any, have been transferred on behalf of customers, retail forex customers or option customers or returned, and that there are no obligations to customers, retail forex customers or option customers outstanding;

(iv) In the case of a commodity pool operator, that all interests in, and assets of, any commodity pool have been redeemed, distributed, or transferred, on behalf of the participants therein, and that there are no obligations to such participants outstanding;

(v) In the case of a leverage transaction merchant:

(A) Either that all leverage customer agreements, if any, and all leverage contracts have been terminated, and that all leverage customer cash balances, securities or other property, if any, have been returned, or

(B) Alternatively, that pursuant to Commission approval, the leverage contract obligations of the leverage transaction merchant have been assumed by another leverage transaction merchant and all leverage customer cash balances, securities or other property, if any, have been transferred to such leverage transaction merchant on behalf of leverage customers or returned, and that there are no obligations to leverage customers outstanding;

(vi) The nature and extent of any pending customer, retail forex customer, option customer, leverage customer, swap counterparty or commodity pool participant claims against the registrant, and, to the best of the registrant’s knowledge and belief, the nature and extent of any anticipated or threatened customer, option customer, leverage customer, swap counterparty or commodity pool participant claims against the registrant;

(vii) In the case of a futures commission merchant or a retail foreign exchange dealer which is a party to a guarantee agreement, that all such agreements have been or will be terminated in accordance with the provisions of §1.10(j) of this chapter not more than thirty days after the filing of the request for withdrawal from registration;

(viii) In the case of a swap dealer, that the person will not engage in any new activity described in the definition of the term “swap dealer” in section 1a(49) of the Act, as such term may be further defined by the Commission; and

(ix) In the case of a major swap participant, that the person will not engage in any new activity described in the definition of the term “major swap participant” in section 1a(33) of the Act, as such term may be further defined by the Commission.

(c) Where a leverage transaction merchant is requesting withdrawal from registration in that capacity and the basis for withdrawal under paragraph (a)(1) of this section is that it has ceased engaging in activities requiring registration, the request for withdrawal must be accompanied by a form 2–FR which contains the information specified in §31.13(f) of this chapter as of a date not more than 30 days prior to the date of the withdrawal request.

(d) [Reserved]

(e) A request for withdrawal from registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, floor trader that is a non-natural
person, or leverage transaction merchant on Form 7–W, and a request for withdrawal from registration as a floor broker or individual floor trader on Form 8–W, must be filed with the National Futures Association within three business days of the receipt of such withdrawal request to the Commodity Futures Trading Commission, Division of Swap Dealer and Intermediary Oversight, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. In addition, any floor broker or individual floor trader requesting withdrawal from registration must file a copy of his or her Form 8–W with each contract market or swap execution facility that has granted him or her trading privileges, and any floor trader that is a non-natural person requesting withdrawal from registration must file a copy of its Form 7–W with each contract market or swap execution facility that has granted it trading privileges. Within three business days of any determination by the National Futures Association under §3.10(d) to treat the failure by a registrant to file an annual Form 7–R as a request for withdrawal, the National Futures Association shall send the Commission notice of that determination.

(f) A request for withdrawal from registration will become effective on the thirtieth day after receipt of such request by the National Futures Association, or earlier upon written notice from the National Futures Association (with the written concurrence of the Commission) of the granting of such request, unless prior to the effective date:

(1) The Commission or the National Futures Association has instituted a proceeding to suspend or revoke such registration;

(2) The Commission or the National Futures Association imposes, or gives notice by mail which notice shall be complete upon mailing, that it intends to impose terms or conditions upon such withdrawal from registration;

(3) The Commission or the National Futures Association notifies the registrant otherwise is notified that it is the subject of an investigation to determine, among other things, whether such registrant has violated, is violating, or is about to violate the Act, rules, regulations or orders adopted thereunder;

(4) The Commission or the National Futures Association requests from the registrant further information pertaining to its request for withdrawal from registration; or

(5) The Commission or National Futures Association determines that it would be contrary to the requirements of the Act, or of any rule, regulation or order thereunder, or to the public interest to permit such withdrawal from registration.

(g) Withdrawal from registration in one capacity does not constitute withdrawal from registration in any other capacity.

(h) Withdrawal from registration does not constitute a release from liability for any violation of the Act or of any rule, regulation, or order thereunder.

(Approved by the Office of Management and Budget under control number 3038–0008)

[46 FR 48917, Oct. 5, 1981]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §3.33, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

Subpart B—Temporary Licenses

§3.40 Temporary licensing of applicants for associated person, floor broker or floor trader registration.

(a) Notwithstanding any other provision of these regulations and pursuant to the terms and conditions of this subpart:

(1) The National Futures Association may grant a temporary license to any applicant for registration as an associated person upon the contemporaneous filing with the National Futures Association of:

(i) A Form 8–R, properly completed in accordance with the instructions thereto; and

(ii) The sponsor’s certification required by §3.12(c); Provided, however, that the fingerprints of the applicant on a fingerprint card provided by the
National Futures Association for that purpose must be filed with the National Futures Association within 20 days following the date the temporary license is issued; and, provided further, that failure to file the fingerprints within this period will result in the termination of the temporary license immediately upon notice to the applicant’s sponsor that the National Futures Association has not received the applicant’s fingerprints.

(2) The National Futures Association may grant a temporary license to any applicant for registration as a floor broker or individual floor trader upon the contemporaneous filing with the National Futures Association of:

(i) A Form 8-R, properly completed in accordance with the instructions thereto;

(ii) The fingerprints of the applicant on a fingerprint card provided by the National Futures Association for that purpose;

(iii) A Supplemental Sponsor Certification Statement executed by a sponsor meeting the requirements under §3.60(b)(2)(i), if the applicant is subject to an order imposing conditions on the applicant’s registration; and

(iv) Evidence that the applicant has been granted trading privileges by a contract market or swap execution facility that has filed with the National Futures Association a certification signed by its chief operating officer with respect to the review of an applicant’s employment, credit and other history in connection with the granting of trading privileges.

(b) The failure of an applicant or the applicant’s sponsor to respond to a request by the Commission or the National Futures Association for clarification of any information set forth in the application of the applicant or for the resubmission of fingerprints in accordance with such request will be deemed to constitute a withdrawal of the application and shall result in the immediate termination of the applicant’s temporary license.

(c) Subject to the provisions of §3.42 and all of the obligations imposed on such registrants under the Act (in particular, section 14 thereof) and the rules, regulations, and orders thereunder, an applicant for registration as an associated person who has received notification that a temporary license has been granted may act in the capacity of an associated person, an applicant for registration as a floor trader who has received written notification that a temporary license has been granted may act in the capacity of a floor trader, and an applicant for registration as a floor broker who has received written notification that a temporary license has been granted may act in the capacity of a floor broker.

§ 3.42 Termination.

(a) A temporary license issued pursuant to §3.40 shall terminate:

(1) Five days after service upon the applicant of a notice by the Commission or the National Futures Association pursuant to §3.60 of this part that the applicant for registration may be found subject to a statutory disqualification from registration; and

(2) Immediately upon termination of the association of the applicant for registration as an associated person with the registrant which filed the sponsorship certification, or immediately upon loss of trading privileges by an applicant for registration as a floor broker or floor trader on all contract markets and swap execution facilities which filed the certification described in §3.40;

(3) Immediately upon the withdrawal of the registration application pursuant to §3.40;

(4) Immediately upon failure to comply with an order to pay a civil monetary penalty, restitution, or disgorgement within the time permitted under sections 6(e), 6b, or 6c(d) of the Act;

(5) Immediately upon failure to pay the full amount of a reparation order within the time permitted under section 14(f) of the Act;

(6) Immediately upon failure to comply with an award in an arbitration proceeding conducted pursuant to the rules of a designated contract market, swap execution facility or registered futures association within the time specified in section 10(g) of the National Futures Association’s Code of

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§ 3.44 Temporary licensing of applicants for guaranteed introducing broker registration.

(a) Notwithstanding any other provisions of these regulations, and pursuant to the terms and conditions of this subpart, the National Futures Association may grant a temporary license to any applicant for registration as an introducing broker upon the contemporaneous filing with the National Futures Association of:

1. A properly completed guarantee agreement (Form 1–FR part B) from a futures commission merchant or retail foreign exchange dealer which is eligible to enter into such an agreement pursuant to §1.10(j)(2) of this chapter;

2. A Form 7–R properly completed in accordance with the instructions thereto;

3. A Form 8–R for the applicant, if a sole proprietor, and each principal (including each branch office manager) thereof, properly completed in accordance with the instructions thereto, all of whom would be eligible for a temporary license if they had applied as associated persons.

(b) The effective date of a guarantee agreement filed in accordance with paragraph (a)(1) of this section is the date upon which the temporary license is granted by the National Futures Association.
§ 3.45 Restrictions upon activities.

(a) Subject to the provisions of § 3.46 of this subpart and all of the obligations imposed on such registrants under the Act (in particular, section 14 thereof) and the rules, regulations and orders thereunder, an applicant for registration as an introducing broker who has received written notification that a temporary license has been granted may act in the capacity of a guaranteed introducing broker.

(b) An applicant for registration as an introducing broker who has received a temporary license may be guaranteed by a futures commission merchant other than the futures commission merchant which provided the initial guarantee agreement described in § 3.44(a)(1) of this subpart: Provided, That, at least 10 days prior to the effective date of the termination of the existing guarantee agreement in accordance with the provisions of § 1.10(j)(4)(ii) or (j)(5) of this chapter, or such other period of time as the National Futures Association may allow for good cause shown, the applicant files with the National Futures Association (1) written notice of such termination and (2) a new guarantee agreement with another futures commission merchant effective the day following the last effective date of the existing guarantee agreement.

§ 3.46 Termination.

(a) A temporary license issued pursuant to § 3.44 shall terminate:

(1) Five days after service upon the applicant of a notice by the National Futures Association that the applicant for registration may be found subject to a statutory disqualification from registration;

(2) Immediately upon termination of the applicant’s guarantee agreement in accordance with § 1.10(j)(4)(ii) or (j)(5) of this chapter, unless a new guarantee agreement is filed in accordance with § 3.45(b);

(3) Immediately upon the failure of an applicant to respond to a written request by the Commission or the National Futures Association for clarification of information set forth in the application of the applicant or any principal (including any branch office manager) thereof or for the resubmission of a fingerprint card pursuant to § 3.44(c) in accordance with such request;

(4) Immediately upon the revocation or withdrawal of the guarantor futures commission merchant’s registration;

(5) Immediately upon the withdrawal of the registration application pursuant to § 3.44(c);

(6) Immediately upon failure to comply with an order to pay a civil monetary penalty, restitution, or disgorgement within the time permitted under section 6(e), 6b, or 6c(d) of the Act;

(7) Immediately upon failure to pay the full amount of a reparation order within the time permitted under section 14(f) of the Act;

(8) Immediately upon failure to comply with an award in an arbitration proceeding conducted pursuant to the rules of a designated contract market, swap execution facility, or registered futures association within the time specified in section 10(g) of the National Futures Association’s Code of Arbitration or the comparable time period specified in the rules of a contract market, swap execution facility, or other appropriate arbitration forum.

(9) Whenever a person not listed as a principal on the applicant’s initial registration application becomes a principal under § 3.1(a); or

§ 3.51 Withdrawal of application for registration.

(a) Notice. Whenever information comes to the attention of the Commission that an applicant for initial registration in any capacity under the Act may be found subject to a statutory disqualification under sections 8a(2) or 8a(3) of the Act, the Commission may serve written notice upon the applicant or registrant at the address shown on his application or any amendment thereto, and which notice shall specify the statutory disqualifications to which the person served may respond thereto shall be increased by three days.

(b) A copy of any notice served in accordance with paragraph (a) of this section shall also be served upon:

(1) Any registrant sponsoring the applicant or registrant pursuant to the provisions of §3.12 of this part if the applicant or registrant is an individual registered as or applying for registration as an associated person; or

(2) Any futures commission merchant or retail foreign exchange dealer which has entered into a guarantee agreement in accordance with §1.10(j) of this chapter, if the applicant or registrant is registered as or applying for registration as an introducing broker.

(c) Documents served upon the Division of Clearing and Intermediary Oversight or upon the Division of Enforcement or filed with the Commission under this subpart shall be considered served or filed only upon actual receipt at the Commission's Washington, DC office, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(d) Except for the documents which may be served under §3.51, any documents served upon an applicant or registrant or upon the Division of Clearing and Intermediary Oversight or the Division of Enforcement or filed with the Commission under this subpart shall be concurrently filed with the Proceedings Clerk, together with proof of service, in accordance with the provisions of §10.12 (d) and (e) of this chapter.
the applicant may be subject and advise the applicant that:

(1) The information, if true, is a basis upon which the applicant’s registration may be denied;

(2) Unless the applicant voluntarily withdraws the application, it may be necessary to institute the denial procedures described in this subpart; and

(3) If the applicant does not confirm in writing that the applicant wishes to have the application given further consideration, the application of the applicant will be deemed to have been withdrawn.

(b) The applicant must serve the written confirmation referred to in paragraph (a)(3) of this section upon the Secretary of the Commission on or before twenty days after the date the notice described in paragraph (a) of this section is served.

§§ 3.52–3.54 [Reserved]

§ 3.55 Suspension and revocation of registration pursuant to section 8a(2) of the Act.

(a) Notice. On the basis of information obtained by the Commission, the Commission may at any time serve notice upon a registrant in any capacity under the Act that:

(1) The Commission alleges and is prepared to prove that the registrant is subject to one or more of the statutory disqualifications set forth in section 8a(2) of the Act;

(2) An Administrative Law Judge shall make a determination, based upon written evidence, as to whether the registrant is subject to such statutory disqualification; and

(3) If the registrant is found to be subject to a statutory disqualification, the registration of the registrant may be suspended and the registrant ordered to show cause why such registration should not be revoked.

(b) Written submission. If the registrant wishes to challenge the accuracy of the allegations set forth in the notice, the registrant may submit written evidence limited to the type described in §3.60(b)(1) of this part. Such written submission must be served upon the Division of Enforcement and filed with the Proceedings Clerk within twenty days of the date of service of notice to the registrant.

(c) Reply. Within ten days of receipt of any written submission filed by the registrant, the Division of Enforcement may serve upon the registrant and file with the Proceedings Clerk a reply.

(d) Determination by Administrative Law Judge. A determination by the Administrative Law Judge as to whether the registrant is subject to a statutory disqualification must be based upon the evidence of the statutory disqualification, notice with proof of service, the written submission, if any, filed by the registrant in response thereto, any written reply submitted by the Division of Enforcement and such other papers as the Administrative Law Judge may require or permit.

(e) Suspension and order to show cause. (1) If the registrant is found to be subject to a statutory disqualification, the Administrative Law Judge, within thirty days after receipt of the registrant’s written submission, if any, and any reply thereto, shall issue an interim order suspending the registration of the registrant and requiring the registrant to show cause within twenty days of the date of the order why, notwithstanding the existence of the statutory disqualification, the registration of the registrant should not be revoked. The registration of the registrant shall be suspended, effective five days after the order to show cause is served upon the registrant in accordance with §3.50(a), until a final order with respect to the order to show cause has been issued: Provided, That if the sole basis upon which the registrant is subject to statutory disqualification is the existence of a temporary order, judgment or decree of the type described in section 8a(2)(C) of the Act, the order to show cause shall not be issued and the registrant shall be suspended until such time as the temporary order, judgment or decree shall have expired: Provided, however, That in no event shall the registrant be suspended for a period to exceed six months.

(2) If the registrant is found not to be subject to a statutory disqualification, the Administrative Law Judge shall issue an order to that effect and the
Proceedings Clerk shall promptly serve a copy of such order on the registrant, the Division of Clearing and Intermediary Oversight and the Division of Enforcement. Such order shall be effective as a final order of the Commission fifteen days after the date it is served upon the registrant in accordance with the provisions of §3.50(a) of this part unless a timely application for review is filed in accordance with §10.102 of this chapter. The appellate procedures set forth in §§10.102, 10.103, 10.104, 10.106, 10.107 and 10.109 of this chapter shall apply to any appeal brought under paragraph (e)(2) of this section.

(f) Further proceedings. If an order to show cause is issued pursuant to paragraph (e)(1) of this section, further proceedings on such order shall be conducted in accordance with the provisions of §3.60(b)–(j) of this part.

§3.56 Suspension or modification of registration pursuant to section 8a(11) of the Act.

(a) Notice. (1) On the basis of information obtained by the Commission, the Commission may at any time serve written notice upon a registrant in any capacity under the Act that:

(i) The Commission alleges and is prepared to prove, by reference to an information, indictment or complaint authorized by a United States Attorney or an appropriate official of any State that the registrant is charged with the commission of or participation in a crime involving a violation of the Act or a violation of any other provision of Federal or State law that would reflect on the honesty or the fitness of the person to act as a fiduciary that is punishable by imprisonment for a term exceeding one year, and that continued registration of the person may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission; and

(ii) An Administrative Law Judge shall make a determination, based upon written evidence and any oral hearing granted, as to whether the registrant is charged with the Commission of or participation in such a crime and whether the continued registration of the person may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission; and

(iii) If the registrant is found to be charged with the commission of or participation in such a crime and it is found that the continued registration of the person may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission, the registration of the registrant shall be suspended or modified.

(2) The notice referred to in paragraph (a) of this section shall include a short and plain statement that the continued registration of the registrant may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission.

(b) Response. (1) If the registrant wishes to challenge the accuracy of the allegations in the notice, the registrant may submit written evidence as to:

(i) The registrant’s identity;

(ii) The existence of a clerical error in any record documenting the information, indictment or complaint; or

(iii) The nature of the information, indictment or complaint; or

(iv) The statement accompanying the notice referred to in paragraph (a)(2) of this section and, in an effort to have his registration modified rather than suspended, the Supplemental Sponsor Certification Statement signed by a sponsor, supervising floor broker or, in the case of a floor trader, a supervising registrant, principal, contract market, or swap execution facility, as appropriate for the registrant in accordance with §3.60(b)(2)(i) and who meets the standards set forth in §3.60(b)(2)(i)(A) and (C).

(2) The registrant may also request an oral hearing, which shall include a statement of the issues to be addressed, a list of any witnesses to be called, a summary of the testimony to be elicited and copies of any documents to be introduced. An oral hearing shall be granted upon request.
§ 3.57 Proceedings under section 8a(2)(E) of the Act.

The Commission will not initiate a proceeding under section 8a(2)(E) of the Act, if respondeat superior is the sole basis upon which the registrant may be found subject to a statutory disqualification.

§ 3.60 Procedure to deny, condition, suspend, revoke or place restrictions upon registration pursuant to sections 8a(2), 8a(3) and 8a(4) of the Act.

(a) Notice. On the basis of information obtained by the Commission, the Commission may at any time give written notice to any applicant for registration or any registrant in any capacity under the Act that:

(1) The Commission alleges and is prepared to prove that the registrant...

(3) Such written submissions must be served upon the Division of Enforcement and filed with the Proceedings Clerk within twenty days of the date of service of notice to the registrant under paragraph (a) of this section.

(c) Reply. Within ten days of receipt of any written submission filed by the registrant, the Division of Enforcement may serve upon the registrant and file with the Proceedings Clerk a reply.

(d) Oral hearing. An oral hearing shall be conducted pursuant to such sections of the Commission’s Rules of Practice, 17 CFR part 10, as the Administrative Law Judge deems necessary and in a manner which shall ensure that the proceeding is resolved expeditiously.

(e) Determination by Administrative Law Judge. (1) A determination by the Administrative Law Judge as to whether the Division of Enforcement has shown by a preponderance of the evidence that the registrant is charged with the commission of or participation in a crime as set forth in the notice and that the continued registration of the registrant may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission must be based upon the evidence of service, the response, if any, filed by the registrant, any written reply submitted by the Division of Enforcement and such other papers as the Administrative Law Judge may require or permit, and the oral hearing, if any. If the Division of Enforcement has made the required showings, the Administrative Law Judge, within thirty days after the last written submission or the oral hearing, shall issue an order suspending or modifying the registration of the registrant. If the Division of Enforcement has not made the required showings, the Administrative Law Judge, within thirty days after the last written submission or the oral hearing, shall issue an order to that effect.

(f) Any order of suspension or modification issued under this section shall remain in effect until such information, indictment, or complaint is disposed of or until terminated by the Commission.

(g) On disposition of such information, indictment, or complaint, the Commission may issue and serve on such registrant a notice under § 3.55 or § 3.60 to suspend, restrict, or revoke the registration of such person.

(h) A finding of not guilty or other disposition of the charge shall not preclude the Commission from thereafter instituting any other proceedings under the Act or its rules.

(i) A person aggrieved by an order issued under this section may obtain review of such order in the same manner and on the same terms and conditions as are provided in section 6(c) of the Act.

or applicant is subject to one or more of the statutory disqualifications set forth in section 8a(2), 8a(3) or 8a(4) of the Act;

(2) The allegations set forth in the notice, if true, constitute a basis upon which registration may be denied, granted upon conditions, suspended, revoked or restricted;

(3) The applicant or registrant is entitled to file a response within thirty days of the date of service of the notice to challenge the evidentiary basis of the statutory disqualification set forth in the notice or show cause why, notwithstanding the accuracy of those allegations, registration should nevertheless be granted, or granted upon condition, or should not be conditioned, suspended, revoked or restricted; and

(4) If the applicant or registrant does not file a timely response to the notice:

(i) The applicant or registrant will be deemed to have waived his right to a hearing on all issues and the facts stated in the notice shall be deemed to be true and conclusive for the purpose of finding that the applicant or registrant is subject to a statutory disqualification under sections 8a(2), 8a(3) or 8a(4) of the Act; and

(ii) A presiding officer may thereafter decide whether to issue an order of default in accordance with paragraph (g) of this section to deny, condition, suspend, revoke, or place restrictions upon registration based solely upon the facts set forth in the notice.

(b) Response. Within thirty days after service upon the applicant or registrant of a notice issued in accordance with the provisions of paragraph (a) of this section, the applicant or registrant shall file a response with the Proceedings Clerk and serve a copy of the response on the Division of Enforcement.

(1) In the response, the applicant or registrant shall state whether he challenges the evidentiary basis of the statutory disqualification set forth in the notice. The grounds for such a challenge shall include evidence as to:

(i) The applicant’s or registrant’s identity,

(ii) The existence of a clerical error in any record documenting the statutory disqualification,

(iii) The nature or date of the statutory disqualification,

(iv) The post-conviction modification of any record of conviction, or

(v) The favorable disposition of any appeal.

The applicant or registrant shall state the nature of each challenge and submit a verified statement or affidavit to support facts material to each challenge raised in the response.

(2)(i) In the response, if the person is not an associated person, a floor broker or a floor trader or an applicant for registration in any of those capacities, the applicant or registrant shall also state whether he or she intends to show that registration would not pose a substantial risk to the public despite the existence of the disqualification set forth in the notice. If the person is an associated person, a floor broker or a floor trader or an applicant for registration in any of those capacities, the applicant or registrant shall also state whether he or she intends to show that full, conditioned or restricted registration would not pose a substantial risk to the public despite the existence of the disqualification set forth in the notice. If the person is an associated person or an applicant for registration as an associated person and intends to make such a showing, he or she must also submit a letter signed by an officer or general partner authorized to bind the sponsor whereby the sponsor agrees to sign a Supplemental Sponsor Certification Statement and supervise compliance with any conditions or restrictions that may be imposed on the applicant or registrant as a result of a statutory disqualification proceeding under this section; if the person is a floor broker or a floor trader or an applicant for registration in either capacity and intends to make such a showing, he or she must also submit a letter signed by his employer or if he or she has no employer by another floor broker, or, in the case of a floor trader or applicant for registration as a floor trader, also submit a letter signed by an officer of his clearing member, if such officer is a registrant or a principal of a registrant, or
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the chief operating officer of each contract market or swap execution facility that has granted trading privileges, whereby the employer or floor broker, appropriate registrant, principal or chief operating officer (on behalf of the contract market or swap execution facility) agrees to sign a Supplemental Sponsor Certification Statement and supervise compliance with any conditions or restrictions that may be imposed on the applicant or registrant as a result of a statutory disqualification proceeding under this section; provided, that, with respect to such sponsor, supervising employer or floor broker, supervising registrant or principal:

(A) An adjudicatory proceeding pursuant to the provisions of sections 6(c), 6(d), 6c, 6d, 8a or 9 of the Act is not pending; and

(B) In the case of a sponsor which is a futures commission merchant, a retail foreign exchange dealer or a leveraged transaction merchant, the sponsor is not subject to the reporting requirements of § 1.12(b), § 5.6(b) or § 31.7(b) of this chapter, respectively; and

(C) Such person is not barred from service on self-regulatory organization governing boards or committees based on disciplinary history in accordance with § 1.63 of this chapter.

(ii) If, in the response, the applicant or registrant states that he intends to make the showing referred to in paragraph (b)(2)(i) of this section, he shall also, within fifteen days after filing his initial response under paragraph (b) of this section, file with the Proceeding Clerk and serve a copy on the Division of Enforcement a submission which includes a statement of the applicant, registrant or his attorney identifying and summarizing the testimony of each witness whom the applicant or registrant intends to have testify in support of facts material to his showing. The factors forming the basis for a disqualified applicant’s or registrant’s showing referred to in paragraph (b)(2)(i) of this section may include:

(A) Evidence mitigating the seriousness of the wrongdoing underlying the statutory disqualification set forth in the notice;

(B) Evidence that the applicant or registrant has undergone rehabilitation since the time of the wrongdoing underlying the statutory disqualification; and

(C) If the person is an associated person, floor broker or floor trader or an applicant for registration in any of those capacities, evidence that the applicant’s or registrant’s registration on a conditioned or restricted basis would be subject to supervisory controls likely both to detect future wrongdoing by the applicant or registrant and protect the public from any harm arising from the applicant’s or registrant’s future wrongdoing, including proposed conditions or restrictions.

(c) Reply. Within thirty days after the latter of the date the applicant or registrant serves a copy of the response on the Division of Enforcement (if no further submission is to be made in accordance with paragraph (b)(2)(ii) of this section), or the date the applicant or registrant serves a copy of the further submission made in accordance with paragraph (b)(2)(ii) of this section on the Division of Enforcement, the Division of Enforcement shall file a reply thereto with the Proceedings Clerk and serve a copy of the reply on the applicant or registrant. The Division of Enforcement’s reply shall include either:

(1) A motion for summary disposition stating that there are no genuine issues of material fact to be determined and that registration should be denied or revoked, based upon the applicant’s or registrant’s response and further submission, if any, and any other materials which are attached to the reply and would be admissible under § 10.91 of this chapter; or

(2) A description of factual issues raised in the applicant’s or registrant’s response and further submission, if any, that the Division of Enforcement regards as material and disputed. Such a reply shall also include the identity and a summary of the expected testimony of each witness whom the Division intends to have testify, and copies of all documents which the Division intends to introduce.

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(d) Oral Presentation. Within thirty days of the date the Division of Enforcement files its reply in accordance with the provisions of paragraph (c) of this section to the applicant’s or registrant’s response and further submission, if any, the Administrative Law Judge shall issue an order:

(1) If the Administrative Law Judge finds, based on the motion for summary disposition, that a party is entitled to judgment as a matter of law, granting, denying, suspending, or revoking the registration of an applicant or registrant, or dismissing the notice issued in accordance with paragraph (a) of this section, and such order shall be made in accordance with the standards set forth in paragraphs (e) and (f) of this section; or

(2) Notifying the parties of a time and place of hearing. At such hearing, the parties shall be limited to presentation of witnesses and documents listed in previous filings except, for good cause shown, the parties may request that the witness and document lists be supplemented for purposes of rebuttal. Such oral hearing shall be conducted in accordance with §§10.61–10.81 and 10.83 of this chapter. The Administrative Law Judge shall file an initial decision in accordance with the standards set forth in paragraphs (e) and (f) of this section.

(3) Upon notice that the Administrative Law Judge has concluded that an oral presentation is appropriate, the parties may elect to participate by telephone in accordance with §§12.209(b) of this chapter. To effect such an election, the party shall file a notice with the Proceedings Clerk and serve a copy on all opposing parties within fifteen days of the date the Administrative Law Judge’s notice is served. The filing of an election to participate by telephone will be deemed a waiver of the party’s right to a full oral hearing on the parties’ material disputes of fact. The Administrative Law Judge shall schedule a telephone hearing only if all parties to the proceeding elect such a procedure. The Administrative Law Judge shall conduct such a hearing in accordance with §12.209(b) of this chapter. Following the hearing, the Administrative Law Judge shall issue a written decision in accordance with the standards set forth in paragraphs (e) and (f) of this section.

(e) Determination by Administrative Law Judge—Standards of Proof. The Administrative Law Judge’s written determination shall specifically consider whether the Division of Enforcement has shown by a preponderance of the evidence that the applicant or registrant is subject to the statutory disqualification set forth in the notice issued by the Commission and, where appropriate:

(1) In actions involving statutory disqualifications set forth in section 8a(2) of the Act, whether the applicant or registrant has made a clear and convincing showing that full, conditioned or restricted registration would not pose a substantial risk to the public despite the existence of the statutory disqualification; or

(2) In actions involving statutory disqualifications set forth in sections 8a(3) or 8a(4) of the Act, whether the applicant or registrant has shown by a preponderance of the evidence that full, conditioned or restricted registration would not pose a substantial risk to the public despite the existence of the statutory disqualification.

(f) Determination of Administrative Law Judge—Findings. In making his written determination, the Administrative Law Judge shall set forth the facts material to his conclusion and provide an explanation of his decision in light of the statutory disqualification set forth in the notice and, where appropriate, his findings regarding:

(1) Evidence mitigating the seriousness of the wrongdoing underlying the applicant’s or registrant’s statutory disqualification;

(2) Evidence that the applicant or registrant has undergone rehabilitation since the time of the wrongdoing underlying the statutory disqualification; and

(3) If the person is an associated person, a floor broker or a floor trader or an applicant for registration in any of those capacities, evidence that the applicant’s or registrant’s registration on a conditioned or restricted basis would be subject to supervisory controls likely both to detect future wrongdoing by the applicant or registrant and protect
the public from any harm arising from future wrongdoing by the applicant or registrant. Any decision providing for a conditioned or restricted registration shall take into consideration the applicant’s or registrant’s statutory disqualification and the time period remaining on such statutory disqualification, and shall fix a time period after which the registrant and his or her sponsor, supervising employer or floor broker, or supervising registrant, principal, contract market, or swap execution facility may petition to lift or modify the conditions or restrictions in accordance with §3.64.

(g) Default. The procedures for obtaining a default order and the setting aside of a default order in a proceeding instituted under this section shall follow the procedures set forth in §§10.93 and 10.94 of this chapter.

(h) Settlements—(1) When offers may be made. Parties may, at any time during the course of the proceeding, propose offers of settlement. All offers of settlement shall be in writing.

(2) Content of offer. Each offer of settlement made by a respondent shall:

(i) Acknowledge service of the notice;

(ii) Admit the jurisdiction of the Commission with respect to the matters set forth in the notice;

(iii) Include a waiver of:

(A) A hearing,

(B) All post-hearing procedures,

(C) Judicial review, and

(D) Any objection to the staff’s participation in the Commission’s consideration of the offer;

(iv) Stipulate the record basis on which an order may be entered, which may consist solely of the notice and any findings contained in the offer of settlement; and

(v) Consent to the entry of an order reflecting the terms of settlement agreed upon, including, where appropriate:

(A) Findings that the respondent is subject to statutory disqualification under sections 8a(2), 8a(3), or 8a(4) of the Act, and

(B) The revocation, suspension, denial or granting of full registration or imposition of conditioned or restricted registration.

(3) Submission of offer. Offers of settlement made by a respondent shall be submitted in writing to the Division of Enforcement, which shall present them to the Commission with the Division’s recommendation. The respondent will be informed if the recommendation will be unfavorable, in which event the offer shall not be presented to the Commission unless the respondent so requests. Any offer of settlement not presented to the Commission shall be null and void with respect to any acknowledgment, admission, waiver, stipulation or consent contained in the offer and shall not be used in any manner in the proceeding by any party thereto.

(4) Acceptance of offer. The offer of settlement will only be deemed accepted upon issuance by the Commission of an opinion and order based on the offer. Upon issuance of the opinion and order, the proceeding shall be terminated as to the respondent involved and so noted on the docket by the Proceedings Clerk.

(5) Rejection of offer. When an offer of settlement is rejected, the party making the offer shall be notified by the Division of Enforcement and the offer of settlement shall be deemed withdrawn. A rejected offer of settlement and any documents relating thereto shall not constitute a part of the record in the proceeding; and the offer will be null and void with respect to any acknowledgment, admission, waiver, stipulation or consent contained in the offer and shall not be used in any manner in the proceeding by any party thereto.

(i) Effect of the Administrative Law Judge’s Determination. The Administrative Law Judge’s written determination shall become the final decision of the Commission thirty days following the date the Proceedings Clerk serves the determination on the parties unless:

(1) One or more of the parties files and serves a timely notice of appeal in accordance with §10.102 of this chapter; or

(2) The Commission issues an order staying the effective date of the determination and notifying the parties of its intention to undertake sua sponte review in accordance with §10.105 of this chapter.

(j) Appeal. Following the filing of a notice of appeal, the rules of appellate
Commodity Futures Trading Commission

§ 3.64 Procedure to lift or modify conditions or restrictions.

(a) Petition. The registrant and his sponsor or supervising floor broker may file a petition with the Proceedings Clerk and serve a copy of the petition on the Division of Enforcement to lift or modify conditions or restrictions on the registrant’s registration.

(1) The petition may be filed after the period specified in the order imposing the conditioned or restricted registration.

(2) In the petition, the registrant and his or her sponsor, supervising employer or floor broker, or supervising registrant, principal, contract market, or swap execution facility shall be limited to a showing, by affidavit, that the conditions or restrictions have been satisfied pursuant to the order which imposed them. The affidavit must be sworn to by a person with actual knowledge of the registrant’s activities on behalf of the sponsor, supervising employer or floor broker, or supervising registrant, principal, contract market or swap execution facility.

(b) Response. (1) Within thirty days of receipt of the petition, pursuant to

procedure set forth in §§10.102, 10.103, 10.104, 10.106, 10.107 and 10.109 of this chapter shall apply to any proceeding brought under this section.

(k) With the exception of §§10.2 through 10.5, 10.7 through 10.12(a) (1), 10.12(a) (3) through 10.12(g), 10.26(a)-(d), 10.34, 10.43, 10.44 and 10.84 of this chapter, or unless otherwise provided in §§3.50 through 3.64 of this part, the provisions of the Commission’s Rules of Practice in part 10 of this chapter shall not apply in any proceeding brought under this part to deny, suspend, revoke, restrict or condition registration pursuant to sections 8a(2), 8a(3) or 8a(4) of the Commodity Exchange Act.

(l) The failure of any sponsor, supervising employer or floor broker, or supervising registrant, principal, contract market, or swap execution facility to fulfill its obligations with respect to supervision or monitoring of a conditioned or restricted registrant as agreed to in the Supplemental Sponsor Certification Statement shall be deemed a violation of this rule under the Act.


§ 3.61 Extensions of time for proceedings brought under § 3.55, § 3.56, and § 3.60 of this part.

(a) In general. Except as otherwise provided by law or by these rules, for good cause shown, the Commission or an Administrative Law Judge before whom a proceeding brought under § 3.55, § 3.56 or § 3.60 is then pending, on their own motion or the motion of a party, may at any time extend or shorten the time limit prescribed by those rules for filing any document. In any instance in which a time limit is not prescribed for an action to be taken concerning any matter, the Commission or the Administrative Law Judge may set a time limit for that action.

(b) Motions for extension of time. Absent extraordinary circumstances, in any instance in which a time limit that has been prescribed for an action to be taken concerning any matter exceeds seven days from the date of the order establishing the time limit, requests for extension of time shall be filed at least five (5) days prior to the expiration of the time limit and shall explain why an extension of time is necessary.

[57 FR 23154, June 2, 1992, as amended at 58 FR 19597, Apr. 15, 1993]

§ 3.62 [Reserved]

§ 3.63 Service of order issued by an Administrative Law Judge or the Commission.

A copy of any order issued pursuant to § 3.60 of this part shall be served promptly upon the applicant or registrant, the Division of Clearing and Intermediary Oversight, the Division of Enforcement, the National Futures Association, and any contract markets where the applicant or registrant is a member or has trading privileges in accordance with the provisions of § 3.50(a) of this part.

§ 3.70 Notification of certain information regarding associated persons.

(a) Notice. A registrant must notify the Commission under section 4k(5) of the Act of any facts regarding an associated person of the registrant or an applicant for registration as an associated person whom it has sponsored pursuant to the provisions of § 3.12 of this part or whom it intends to hire or otherwise employ as an associated person which are set forth as statutory disqualifications in section 8a(2) of the Act within ten business days of the date upon which the registrant first knows or should have known such facts. Notice to the Commission shall be sufficient if the registrant gives notice to the Director of the Division of Clearing and Intermediary Oversight or the Director's designee by telephone and confirms such notice in writing by certified or registered mail or equivalent means to the Commission at its Washington, DC office (Attn: Deputy Director, Compliance and Registration Section, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581).

(b) Unlawful to act as an associated person. Upon the earlier of notification to the Commission by the registrant pursuant to paragraph (a) of this section, or actual receipt of notice to the registrant pursuant to § 3.50(b)(1) of this part, that an associated person of the registrant or an applicant for registration as an associated person may be subject to a statutory disqualification as set forth in section 8a(2) of the Act, it shall be unlawful for the registrant to permit such person to act in

files a timely notice of appeal in accordance with § 10.102 of this chapter.

(e) Appeal. Following the filing of a notice of appeal, the rules of appellate procedure set forth in §§ 10.102, 10.103, 10.104, 10.106, 10.107 and 10.109 of this chapter shall apply to any proceeding brought under this section.

the capacity of an associated person of
the registrant until the Commission
determines that such person should
nonetheless be registered.
(c) Proceedings under subpart C. Upon
notification to the Commission by the
registrant under paragraph (a) of this
section, the Commission may promptly
issue notice under §3.55 or §3.60 of this
part, as appropriate, to suspend and re-
voke the registration of the associated
person of the registrant or to deny the
registration of the applicant for reg-
istration as an associated person of the
registrant.
[49 FR 8223, Mar. 5, 1984, as amended at 57 FR
23155, June 2, 1992; 59 FR 5315, Feb. 4, 1994; 77
FR 51909, Aug. 28, 2012]

APPENDIX A TO PART 3—INTERPRETIVE
STATEMENT WITH RESPECT TO
SECTION 8a(2)(C) AND (E) AND SEC-
TION 8a(3)(J) AND (M) OF THE COM-
MODITY EXCHANGE ACT

Section 8a(2) (C) and (E)

The provisions of sections 8a(2)–8a(4) of the
Commodity Exchange Act ("Act") establish
a system of statutory disqualifications pur-
suant to which the Commission may find an
applicant or registrant unfit for registration
and vest the Commission with wide discre-
tion to deny, condition, suspend, restrict or
revoke the registration of any person subject
to one or more of the disqualifications set
forth therein. The Commission recognizes
that the full exercise of its authority under
these provisions of the Act may have unin-
tended results. In particular, the exercise of
such authority may, in certain cases, impede
the efficient enforcement of the Act and the
various federal and state securities acts.

At this time, the Commission cannot an-
ticipate all of the circumstances under
which it may elect not to exercise its au-
thority under sections 8a(2)–8a(4). Until the
Commission has gained experience with
these provisions of the Act, such determina-
tions generally must be made on a case-by-
case basis. Nonetheless, the Commission has
identified two paragraphs of section 8a(2) of
the Act which it has determined to interpret
more narrowly than required.

Section 8a(2)(C). Section 8a(2) of the Act au-
thorizes the Commission to deny, condition,
suspend or restrict the registration of any
person "upon notice, but without a hearing"
and to revoke the registration of any person
"with such hearing as may be appropriate." If
such person is subject to one or more of
the disqualifications described in paragraphs
(A)–(H). Section 8a(2)(C) authorizes the Com-
mision to affect the registration of any per-
son:

"if such person is permanently or tempo-
orarily enjoined by order, judgment, or decree
of any court of competent jurisdiction * * *,
including an order entered pursuant to an
agreement of settlement to which the Com-
mision or any Federal or State agency or
other governmental body is a party, from (i)
acting as a futures commission merchant, introducing broker, floor broker, floor trader, commodity trading advisor, commodity pool operator, associated person of any registrant under the Act, securities broker, securities dealer, municipal securities broker, municipal securities dealer, transfer agent, clearing agency, securities information processor, investor, an adviser to an investment company, or affiliated person or employee of any of the foregoing or (ii) engaging in or continuing any activity involving any transaction in or advice concerning contracts of sales of a commodity for future delivery, concerning matters subject to Commission regulation under section 4 or 19 of the Act, or concerning securities:

The Commission believes that a person enjoined from acting in a certain capacity as described in section 8a(2)(C)(i), even if the order of injunction is entered into pursuant to an agreement of settlement, similarly should be prohibited from acting in any other capacity which requires registration with the Commission. Therefore, the Commission does not intend to limit its authority under section 8a(2)(C)(i) of the Act.

However, the Commission is also aware that it has often initiated proceedings in which the sole relief sought was an injunction from engaging in certain conduct. In such circumstances, the Commission has accepted offers of settlement which provide that the findings set forth in the settlement will not form the sole basis for the denial, suspension or revocation of such person’s registration with the Commission. The Commission does not wish to impede the resolution by negotiated settlement of such proceedings. Therefore, the Commission has determined that it will not exercise its authority under section 8a(2)(C)(ii) of the Act with respect to any person temporarily or permanently enjoined by agreement of settlement from engaging in any conduct described in that paragraph, if the agreement of settlement clearly restricts the use of such order of injunction or any findings set forth therein in subsequent or collateral proceedings.

Thus, a provision in the agreement of settlement to the effect, inter alia, that the findings set forth in the agreement will not form the sole basis upon which the registration of such person may be affected, such other sanctions as may be deemed appropriate.

Section 8a(2)(E) of the Act authorizes the Commission to affect the registration of any person:

If such person, within ten years preceding the filing of the application or at any time thereafter, has been found in a proceeding brought by the Commission or any Federal or State agency or other governmental body, or by agreement of settlement to which the Commission or any Federal or State agency or other governmental body is a party, (i) to have violated any provision of this Act, [the securities acts], chapter 96 of title 18 of the United States Code, or any similar statute of a State or foreign jurisdiction, or any rule, regulation, or order under any such statutes, or the rules of the Municipal Securities Rulemaking Board where such violation involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling, or (ii) to have willfully aided, abetted, counseled, commanded, induced, or procured such violation by any other person;

As in section 8a(2)(C)(ii), the Commission will not exercise its authority under section 8a(2)(E) of the Act with respect to any person subject to a statutory disqualification thereunder. If the findings are part of an agreement of settlement which clearly restricts the use of such findings by inclusion of a provision to the effect, inter alia, that the findings set forth in the agreement will not form the sole basis upon which the registration of such person may be affected.

Section 2(a)(1)(A) of the Act, inter alia, codifies the legal concept of respondent superior by providing that a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator or leverage transaction merchant may be held liable for the conduct of an associated person sponsored by such registrant. Thus, findings of the type described in paragraph (E) may be entered against a registrant solely because such registrant is responsible, under section 2(a)(1)(A) of the Act, for the conduct of its associated persons. As prescribed in §3.57 of the Commission’s regulations, however, the Commission will not exercise its authority under section 8a(2)(E) to affect the registration of such registrant, if respondent superior.

*Specifically, section 2(a)(1)(A)(iii) of the Act provides in part, that the “act, omission or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust as well as of such official, agent, or other person.” 7 U.S.C. 4 (1982).
superior is the sole basis for finding that the registrant is subject to a statutory disqualification.

The Commission notes that section 8a(3)(C) and 8a(4) authorize the Commission to affect the registration of a person if it is found, after notice and opportunity for a hearing, that such person "failed reasonably to supervise another person, who is subject to such person's supervision, with a view to preventing violations of this Act or [the securities orders], or any of the rules, regulations or orders thereunder, and the person subject to supervision committed such a violation * * *". In this connection, the Commission believes that such proceedings are intended primarily to provide restitution to the customer and are not intended to be punitive in nature. Therefore, it may not be appropriate to use findings in such proceedings to affect the registration of any person under section 8a(2)(E).

At the same time, however, such findings may form the basis of a proceeding against a person under the provisions of section 8a(3)(C) and 8a(4), which authorize the Commission, after notice and opportunity for a hearing, to deny, condition, suspend, restrict or revoke the registration of any person if "there is other good cause." Similarly, such findings may form the basis for a proceeding against a registrant under sections 8a(3)(C) and 8a(4) for the failure of such registrant "reasonably to supervise another person, who is subject to such person's supervision, with a view to preventing violations of this Act * * * or of any of the rules, regulations or orders thereunder." Moreover, because the Commission views actions by private parties as an important adjunct to the Commission's own enforcement proceedings, the Commission intends to monitor carefully decisions in such proceedings and may amend this interpretation if deemed appropriate.

Section 8a(3) (J) and (M)

Section 8a(3) authorizes the Commission to refuse to register an applicant for registration if, after notice and opportunity for a hearing, the applicant is found subject to one or more of the disqualifications described in paragraphs (A)–(M). Section 8a(4) authorizes the Commission, after notice and opportunity for a hearing, to condition, suspend, restrict, or revoke the registration of any person subject to a disqualification under section 8a(3).

Section 8a(3)(J) authorizes the Commission to affect the registration of any person if: such person is subject to an outstanding order denying, suspending, or expelling such person from membership in a contract market, a registered futures association, any other self-regulatory organization or any foreign regulatory body that the Commission recognizes as having a comparable regulatory program, or barraging or suspending such person from being associated with any member or members of such contract market, association, self-regulatory organization, or foreign regulatory body.

The Commission interprets the term "self-regulatory organization" to include, in addition to a contract market and a registered futures association, any self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934. Thus, a self-regulatory organization includes any national securities exchange, any registered securities association, any registered clearing agency and the Municipal Securities Rulemaking Board.

Section 8a(3)(M). Section 8a(3)(M) authorizes the Commission to affect the registration of any person if "there is other good cause," specifically, the Commission interprets paragraph (M) to authorize the Commission to refuse to register such person in any new capacity, if such person, or any principal of such person, is the subject of an administrative proceeding brought by the Commission to revoke the existing registration of such person in any other capacity, pending a final decision in such administrative proceeding. The Commission believes it would be inconsistent to register a person in a new capacity, thereby determining that such person is qualified to be registered, while simultaneously seeking to revoke such person's registration in a different capacity because such person's conduct disqualifies him from registration.

Similarly, the Commission interprets paragraph (M) to authorize the Commission to refuse to register, register conditionally or otherwise affect the registration of any person if such person has consented, in connection with an agreement of settlement with a contract market, a registered futures association, or any other self-regulatory organization, to comply with an undertaking to withdraw all forms of existing or pending registration and/or not to apply for registration with the National Futures Association or the Commission in any capacity. Such
person's effort to violate his or her prior undertaking to withdraw from and/or not to apply for registration shall be considered to constitute "other good cause" under paragraph (M). The Commission believes that allowing such a person to be registered would be inappropriate and inconsistent with the intention of parties to the prior settlement agreement or to revoke, suspend or place restrictions upon the registration of any person if such person's prior registration has been suspended (and the period of such suspension has not expired) or has been revoked, and Section 8a(3)(J), which authorizes the Commission to refuse to register or to register conditionally, or to revoke, suspend or place restrictions upon the registration of any person if such person's prior registration has been suspended (and the period of such suspension has not expired) or has been revoked, and Section 8a(3)(J), which authorizes the Commission to refuse to register or to register conditionally any person if he or she is subject to an outstanding order denying, suspending, or expelling such person from membership in a contract market, a registered futures association, or any other self-regulatory organization.

Good cause to affect a person's registration also exists: (1) If the operations of such person disrupt or would tend to disrupt orderly market conditions, or cause or would tend to cause sudden or unreasonable fluctuations or unwarranted changes in the price of commodities or contracts for future delivery of commodities or commodity options; (2) If such person has used or is using in its name a term such as "board of trade", "clearing corporation" or "exchange" in a misleading context, or uses any terms in its representations to the public which may indicate that the person is a contract market or a member of a contract market when such is not the case, or has used or is using a misleading name which would tend to suggest to the public the person that the person is affiliated with another person when that is not the case or that the person is engaged in a commodity-related business when the person is not in fact substantially so engaged, or has failed to disclose to the public an agency relationship with another person when such failure could mislead the public; (3) If such person is subject to an outstanding order denying, suspending or revoking the license of such person by a licensing authority, such as a state real estate or insurance commission; and (4) If such person has failed to answer the inquiries or requests for further information concerning an application for registration filed with the Commission.

This listing, of course, is not exclusive. In general, the Commission interprets paragraph (M) to authorize the Commission to affect the registration of any person if, as a result of any act or pattern of conduct attributable to such person, although never the subject of formal action or proceeding before either a court or governmental agency, such person's potential disregard of or inability to comply with the requirements of the Act or the rules, regulations or order thereunder, or such person's moral turpitude, or lack of honesty or financial responsibility is demonstrated to the Commission.

Any inability to deal fairly with the public and consistent with just and equitable principles of trade may render an applicant or registrant unfit for registration, given the high ethical standards which must prevail in the industry.

The Commission has further addressed "other good cause" under Section 8a(3)(M) of the Act in issuing guidance letters on assessing the fitness of floor brokers, floor traders or applicants in either category:

[First guidance letter]
December 4, 1997
Robert K. Wilmouth, President, National Futures Association, 200 West Madison Street, Chicago, IL 60606-3447
Re: Adverse Registration Actions with Respect to Floor Brokers, Floor Traders and Applicants for Registration in Either Category

Dear Mr. Wilmouth: As you know, the Commission on June 26, 1997, approved for publication in the Federal Register a Notice and Order concerning adverse registration actions by the National Futures Association ("NFA") with respect to registered floor brokers ("FBs"), registered floor traders ("FTs") and applicants for registration in either category. 62 Fed. Reg. 36050 (July 3, 1997). The Notice and Order authorized NFA to grant or to maintain, either with or without conditions or restrictions, FB or FT registration where NFA previously would have forwarded the case to the Commission for review of disciplinary history. The Commission has worked with its staff to determine which of the pending matters could efficiently be returned to NFA for handling, and such matters have been forwarded to NFA. The Commission will continue to accept or to act upon requests for exemption, and the Commission staff will consider requests for "no-action" opinions with respect to applicable registration requirements.

By this correspondence, the Commission is issuing guidance that provides NFA further direction on how it expects NFA to exercise its delegated power, based upon the experience of the Commission and the staff with the registration review process during the past three years. This guidance will help ensure that NFA exercises its delegated power.
in a manner consistent with Commission precedent.

In exercising its delegated authority, NFA, of course, needs to apply all of the provisions of Section 8a(3) and 17 U.S.C. 7(e) of the Commodity Exchange Act ("Act"). In that regard, NFA should consider the matters in which the Commission has taken action in the past and endeavor to seek similar registration restrictions, conditions, suspensions, denials, or revocations under similar circumstances.

One of the areas in which NFA appears to have had the most uncertainty is with regard to previous self-regulatory organization ("SRO") disciplinary actions. Commission Rule 1.63 provides clear guidelines for determining whether a person's history of "disciplinary offenses" should preclude service on SRO governing boards or committees. In determining whether to grant or to maintain, either with or without conditions or restrictions, FB or FT registration, NFA should, as an initial matter, apply the Rule 1.63(a)(6) criteria to those registered FBs, registered FTs and applicants for registration.

17 U.S.C. 12a(2) and (3) (1994). The letter is intended to supplement, not to supersedethe burden of proof is on the party seeking registration, rather than the NFA, and the NFA should continue to follow other guidance provided by the Commission or its staff.

Commission rules referred to herein are found at 17 CFR Ch. 1. Rule 1.63(c) provides that a person is ineligible from serving on an SRO's disciplinary committees, arbitration panels, oversight panels or governing board if, as provided in Rule 1.63(b), the person, inter alia: (1) within the past three years has been found by a final decision of an SRO, an administrative law judge, a court of competent jurisdiction or the Commission to have committed a disciplinary offense; or (2) within the past three years has entered into a settlement agreement in which any of the findings or, in the absence of such findings, any of the acts charged included a disciplinary offense.

Rule 1.63(a)(6) provides that a "disciplinary offense" includes: (i) any violation of the rules of an SRO except those rules related to (A) decorum or attire, (B) financial requirements, or (C) reporting or record-keeping unless resulting in fines aggregating more than $5,000 within any calendar year; (ii) any rule violation described in subparagraphs (A) through (C) above that involves fraud, deceit or conversion or results in a suspension or expulsion; (iii) any violation of the Act or the regulations promulgated thereunder; or (iv) any failure to exercise supervisory responsibility with respect to an act described in paragraphs (i) through (iii) above when such failure is itself a violation of either the rules of an SRO, the Act or the regulations promulgated thereunder.

17 CFR Ch. I.

Application of the Rule 1.63 criteria, as modified, to these matters will aid NFA in making registration determinations that are reasonably consonant with Commission views. NFA should focus on the nature of the underlying conduct rather than the sanction imposed by an SRO. Thus, if a disciplinary action would not come within the coverage of Rule 1.63 but for the imposition of a short suspension of trading privileges (such as for a matter involving fighting, use of profane language or minor recordkeeping violations), NFA could exercise discretion, as has the Commission, not to institute a statutory disqualification case. On the other hand, conduct that falls clearly within the terms of Rule 1.63, such as violations of rules involving potential harm to customers of the exchange, should not be exempt from review simply because the exchange imposed a relatively minor sanction.

The Commission has treated the registration process and the SRO disciplinary process as separate matters involving separate considerations. The fact that the Commission has not pursued its own enforcement case in a particular situation does not necessarily mean that the Commission considers the situation to be a minor matter for which no registration sanctions are appropriate. Further, the Commission believes that it and NFA entities with industry-wide perspective and responsibilities, are the appropriate bodies, rather than any individual exchange, to review and take action on disciplinary matters.

Thus, for example, a disciplinary action taken by the Chicago Board Options Exchange or the National Association of Securities Dealers, Inc. should be considered in a manner similar to a disciplinary action of the Chicago Board of Trade or NFA.

decide issues relating to registration status, which can affect a person’s ability to function in the industry well beyond the jurisdiction of a particular exchange. Thus, NFA’s role is in no way limited to review of exchange sanctions for particular conduct, but rather it is the entirely separate task of determining whether an FB’s or FT’s conduct should impact his or her registration.

NFA also should look to Commission precedent in selecting conditions or restrictions to be imposed, such as a dual trading ban where a person has been involved in disciplinary offenses involving customer abuse. Where conditions or restrictions are imposed, or agreed upon, NFA also should follow Commission precedent, under which such conditions or restrictions generally have been imposed for a two-year period.

The Commission has required sponsorship for conditioned FBs and FTs when their disciplinary offenses have involved noncompetitive trading and fraud irrespective of the level of sanctions imposed by an SRO. Indeed, but for a sponsorship requirement there would be no one routinely watching and responsible for the activities of these registrants. Absent sponsorship, such FBs and FTs would only be subject to routine Commission and exchange surveillance. The Commission’s rules are premised upon the judgment that requiring FTs and FBs to have sponsors to ensure their compliance with conditions is both appropriate and useful. See Rule 3.60(b)(2)(i).

A question has arisen whether, if NFA is required to prove up the underlying facts of an SRO disciplinary action, the exchanges can provide information on exchange disciplinary proceedings directly to NFA. Although Section 8(c)(a)(2) of the Act states that an exchange shall not disclose the evidence for a disciplinary action except to the person disciplined and to the Commission, Section 8(a)(10) of the Act allows the Commission to authorize any person to perform any portion of the registration functions under the Act, notwithstanding any other provision of law. The effective discharge of the delegated registration function requires NFA to have access to the exchange evidence. Thus, the Commission believes that Section 8(a)(10) may reasonably be interpreted to allow the disclosure of information from exchange disciplinary proceedings directly to NFA despite the provisions of Section 8(c)(a)(2).

Nothing in the Notice and Order affects the Commission’s authority to review the granting of a registration application by NFA in the performance of Commission registration functions, including review of the sufficiency of conditions or restrictions imposed by NFA, to review the determination by NFA not to take action to affect an existing registration, or to take its own action to address a statutory disqualification. Moreover, the Commission Order contemplates that to allow for appropriate Commission oversight of NFA’s exercise of this delegated authority, NFA will provide for the Commission’s review quarterly schedules of all applicants cleared for registration and all registrants whose registrations are maintained without adverse action by NFA’s Registration, Compliance, Legal Committee despite potential statutory disqualifications.

The Commission will continue to monitor NFA activities through periodic rule enforcement reviews, and NFA remains subject to the present requirement that it monitor compliance with the conditions and restrictions imposed on conditioned and restricted registrants.

Sincerely,

Jean A. Webb, Secretary of the Commission

[Second guidance letter]
April 13, 2000

Robert K. Wilmouth, President, National Futures Association, 200 West Madison Street, Chicago, IL 60606–3447

Re: Use of Exchange Disciplinary Actions as “Other Good Cause” to Affect Floor Broker/Floor Trader Registration

Dear Mr. Wilmouth:

1. Introduction and Background

In July 1997, the Commission issued a Notice and Order authorizing the National Futures Association (“NFA”) to grant or to maintain, either with or without conditions or restrictions, floor broker (“FB”) or floor trader (“FT”) registration where NFA previously would have forwarded the case to the Commission for review of disciplinary history.1 By letter dated December 4, 1997 (“Guidance Letter”), the Commission provided further direction on how the Commission expected NFA to exercise its delegated power and to ensure that NFA exercised its delegated power in a manner consistent with Commission precedent.

The Commission has determined to revise the Guidance Letter. Specifically, the Commission is revising the portion of the Guidance Letter that addresses the use of exchange disciplinary actions as “other good cause” to affect FB and FT registrations. The Commission has made this determination following its own reconsideration of the issue and at the urging of industry members.2


2Registration Actions by National Futures Association With Respect to Floor Brokers, Floor Traders and Applicants for Registration in Either Category, 62 FR 36650 (July 3, 1997).
The Guidance Letter pointed out that, in exercising its delegated authority, NFA must apply all of the provisions of Sections 8a(2) and (3) of the Commodity Exchange Act ("Act."). In particular, Section 8a(3)(M) of the Act authorizes the Commission to refuse to register or to register conditionally any person if it is found, after opportunity for hearing, that there is other good cause for statutory disqualification from registration beyond the specifically listed grounds in Sections 8a(2) and 8a(3) of the Act. The Commission held in In the Matter of Clark that statutory disqualification under the "other good cause" provision of Section 8a(3)(M) may arise on the basis of, among other things, a pattern of exchange disciplinary actions alleging serious rule violations that result in significant sanctions, and that it is immaterial whether the sanctions imposed resulted from a fully-adjudicated disciplinary action or an action that was taken following a settlement. 4

The Guidance Letter recommended the application of the provisions of Commission Rule 1.63 5 as criteria to aid in assessing the impact of an FB or FT applicant's or registrant's previous disciplinary history on the person's fitness to be registered, with the exception that NFA should be acting based on disciplinary history from the previous five years, rather than the three years provided for in Rule 1.63. 6 The Guidance Letter also dated October 18, 1999, and the Joint Compliance Committee ("JCC"), dated February 2, 2000. The JCC consists of senior compliance officials from all domestic futures exchanges and the NFA (i.e., the domestic self-regulatory organizations ("SROs")). In addition, staff from the Contract Markets Section of the Commission’s Division of Clearing and Intermediary Oversight attend the JCC meetings as observers. The JCC was established to aid in the development of improved compliance systems through joint efforts and information-sharing among the SROs. Commission staff have also discussed this issue with SRO staff.

37 U.S.C. 12a(2) and (3) (1994).


4Commission rules referred to in this letter are found at 17 CFR Ch. 1.

5Rule 1.63 provides, among other things, that a person is ineligible from serving on SRO disciplinary committees, arbitration panels, oversight panels or governing boards if that person, inter alia, entered into a settlement agreement within the past three years in which any of the findings or, in the absence of such findings, any of the acts charged included a disciplinary offense.

6Rule 1.63(a)(6) defines a “disciplinary offense” to include:
(i) any violation of the rules of an SRO except those rules related to (A) decorum or attire, (B) financial requirements, or (C) reporting or record-keeping unless resulting in fines aggregating more than $5,000 within any calendar year; (ii) any violation of the rules described in subparagraphs (A) through (C) above that involves fraud, deceit or conversion or results in a suspension or expulsion; (iii) any violation of the Act or the regulations promulgated thereunder; or (iv) any failure to exercise supervisory responsibility with respect to an act described in paragraphs (i) through (iii) above when such failure is itself a violation of either the rules of an SRO, the Act or the regulations promulgated thereunder.

7Clark at 44,929.
in Section 3(a)(26) of the 1934 Exchange Act. Furthermore, NFA should review an applicant’s or registrant’s disciplinary history for the past five years.8 At least one of the actions forming the pattern, however, must have become final after Clark was decided by the Commission on April 22, 1997. Finally, “serious rule violations” consist of, or are substantially related to, charges of fraud, customer abuse, other illicit trading practices, or the obstruction of an exchange investigation.

Congress, the courts and the Commission have indicated the importance of considering an applicant’s history of exchange disciplinary actions in assessing that person’s fitness to register.9 Furthermore, NFA’s review of exchange disciplinary actions within the context of the registration process should not simply mirror the disciplinary actions undertaken by the exchanges. The two processes are separate matters that involve separate considerations. As part of their ongoing self-regulatory obligations, exchanges must take disciplinary action10 and such disciplinary actions in assessing that person’s fitness to register.9 Furthermore, NFA’s review of exchange disciplinary actions within the context of the registration process should not simply mirror the disciplinary actions undertaken by the exchanges. The two processes are separate matters that involve separate considerations. As part of their ongoing self-regulatory obligations, exchanges must take disciplinary action10 and such disciplinary actions necessarily focus on the specific misconduct that forms the allegation. In a statutory disqualification action, however, NFA must determine whether the disciplinary history of an FB, FT or applicant over the preceding five years should impact his or her registration. Additionally, NFA possesses industry-wide perspective and responsibilities. As such, NFA, rather than an individual exchange, should decide registration status issues, since those issues affect an individual’s status within the industry as a whole, well beyond the jurisdiction of a particular exchange.

The Commission also wants to clarify to the fullest extent possible that its power to delegate the authority to deny or condition the registration of an FB, FT, or an applicant for registration in either category permits exchanges to disclose to NFA all evidence underlying exchange disciplinary actions, notwithstanding the language of Section 8c(a)(2) of the Act.11 The Commission’s power to delegate stems from Section 8a(10) of the Act, which permits delegation of registration functions, including statutory disqualification actions, to any person in accordance with rules adopted by such person and submitted to the Commission for approval or for review under Section 17(j) of the Act, “notwithstanding any other provision of law.” Certainly, Section 8c(a)(2) qualifies as “any other provision of law.” Furthermore, the effective discharge of the delegated function requires NFA to have access to the exchange evidence. Thus, the exercise of the delegated authority pursuant to Section 8a(10) permits the exchanges to disclose all evidence underlying disciplinary actions to NFA.12

This letter supersedes the Guidance Letter to the extent discussed above. In all other aspects, the Guidance Letter and other guidance provided by the Commission or its staff remain in effect. Therefore, NFA should continue to follow Commission precedent when selecting conditions or restrictions to be imposed. For example, NFA should impose a dual trading ban where customer abuse is involved and any conditions or restrictions imposed should be for a two-year period. Furthermore, NFA should require sponsorship for conditioned FBs or FTs when their disciplinary offenses involve noncompetitive trading and fraud.

Nothing in the Notice and Order or this letter affects the Commission’s authority to review the granting of a registration application by NFA in the performance of Commission registration functions, including review of the sufficiency of conditions or restrictions imposed by NFA, to review the determination by NFA not to take action to affect an existing registration, or to take its

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8 The Commission generally looked at a five-year period of disciplinary history. On occasion, however, the Commission examined a longer period of an applicant’s or registrant’s disciplinary history. For example, the Commission revoked the registration of one FB on the basis of exchange disciplinary cases that extended back six years, see Clark, 2 Comm. Fut. L. Rep. (CCH) ¶ 27,032, and denied an application for registration as an FT on the basis of exchange disciplinary cases that extended back seven years, see In the Matter of Castellano, [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,360 (Nov. 23, 1988), summarily aff’d (May 29, 1990), rev. denied [1990–1992 Transfer Binder] Comm. Fut. L. Rep. ¶ 24,870 (June 26, 1990), aff’d sub nom. Castellano v. CFTC, Docket No. 90–2298 (7th Cir. Nov. 20, 1991).


10 See Rule 1.51(a)(7).
own action to address a statutory disqualification. Moreover, the Commission Order contemplates that to allow for appropriate Commission oversight of NFA's exercise of this delegated authority, NFA will provide for the Commission's review quarterly schedules of all applicants cleared for registration and all registrants whose registrations are maintained without action by the Commission's Registration, Compliance, Legal Committee despite potential statutory disqualifications.

The Commission will continue to monitor NFA activities through periodic rule enforcement reviews, and NFA remains subject to the present requirement that it monitor compliance with the conditions and restrictions imposed on conditioned and restricted registrants.

Sincerely,
Jean A. Webb,
Secretary of the Commission.


APPENDIX B TO PART 3—STATEMENT OF ACCEPTABLE PRACTICES WITH RESPECT TO ETHICS TRAINING

(a) The provisions of Section 4p(b) of the Act (7 U.S.C. 6p(b) (1994)) set forth requirements regarding training of registrants as to their responsibilities to the public. This section requires the Commission to issue regulations requiring new registrants to attend ethics training sessions within six months of registration, and all registrants to attend such training on a periodic basis. The awareness and maintenance of professional ethical standards are essential elements of a registrant's fitness. Further, the use of ethics training programs is relevant to a registrant's maintenance of adequate supervision, a requirement under Rule 166.3.

(b) The Commission recognizes that technology has provided new, faster means of sharing and distributing information. In view of the foregoing, the Commission has chosen to allow registrants to develop their own ethics training programs. Nevertheless, futures industry professionals may want guidance as to the role of ethics training. Registrants may wish to consider what ethics training should be retained, its format, and how it might best be implemented. Therefore, the Commission finds it appropriate to issue this Statement of Acceptable Practices regarding appropriate training for registrants, as interpretative guidance for intermediaries on fitness and supervision. Commission registrants may look to this Statement of Acceptable Practices as a "safe harbor" concerning acceptable procedures in this area.

(2) The Commission believes that section 4p(b) of the Act reflects an intent by Congress that industry professionals be aware, and remain abreast, of their continuing obligations to the public under the Act and the regulations thereunder. The text of the Act provides guidance as to the nature of these responsibilities. As expressed in section 4p(b) of the Act, personnel in the industry have an obligation to the public to observe the Act, the rules of the Commission, the rules of any appropriate self-regulatory organizations or contract markets (which would also include registered derivatives transaction execution facilities), or other applicable federal or state laws or regulations. Further, section 4p(b) acknowledges that registrants have an obligation to the public to observe "just and equitable principles of trade."

(3) Additionally, section 4p(b) reflects Congress' intent that registrants and their personnel retain an up-to-date knowledge of these requirements. The Act requires that registrants receive training on a periodic basis. Thus, it is the intent of Congress that Commission registrants remain current with regard to the ethical ramifications of new technology, commercial practices, regulations, or other changes.

(c) The Commission believes that training should be focused to some extent on a person's registration category, although there will obviously be certain principles and issues common to all registrants and certain general subjects that should be taught. Topics to be addressed include:

(1) An explanation of the applicable laws and regulations, and the rules of self-regulatory organizations or contract markets and registered derivatives transaction execution facilities;

(2) The registrant's obligation to the public to observe just and equitable principles of trade;

(3) How to act honestly and fairly and with due skill, care and diligence in the best interests of customers and the integrity of the market;

(4) How to establish effective supervisory systems and internal controls;

(5) Obtaining and assessing the financial situation and investment experience of customers;

(6) Disclosure of material information to customers; and

(7) Avoidance, proper disclosure and handling of conflicts of interest.

(d) An acceptable ethics training program would apply to all of a firm's associated persons and its principals to the extent they are required to register as associated persons. Additionally, personnel of firms that rely on their registration with other regulators, such as the Securities and Exchange Commission, should be provided with ethics training to the extent the Act and the Commission's regulations apply to their business.
(e) As to the providers of such training, the Commission believes that classes sponsored by independent persons, firms, or industry associations would be acceptable. It would also be permissible to conduct in-house training programs. Further, registrants should ascertain the credentials of any ethics training providers they retain. Thus, persons wanting ethics training should be required to provide proof of satisfactory completion of the proficiency testing requirements applicable to the registrant and evidence of three years of relevant industry or pedagogical experience in the field. This industry experience might include the practice of law in the fields of futures or securities, or employment as a trader or risk manager at a brokerage or end-user firm. Likewise, the Commission believes that registrants should employ as ethics training providers only those persons they reasonably believe in good faith are not subject to any investigations or to bars to registration or to service on a self-regulatory organization governing board or disciplinary panel.

(f)(1) With regard to the frequency and duration of ethics training, it is permissible for a firm to require training on whatever periodic basis and during the registrant (and relevant self-regulatory organizations) deem appropriate. It may even be appropriate not to require any such specific requirements as, for example, where ethics training could be termed ongoing. For instance, a small entity, sole proprietorship, or even a small section in an otherwise large firm, might satisfy its obligation to remain current with regard to ethics obligations by distribution of periodicals, legal cases, or advisories. Use of the latest information technology, such as Internet websites, can be useful in this regard. In such a context, there would be no structured classes, but the goal should be a continuous awareness of changing industry standards. A corporate culture to maintain high ethical standards should be established on a continuing basis.

(2) On the other hand, larger firms which transact business with a larger segment of the public may wish to implement a training program that requires periodic classwork. In such a situation, the Commission believes it appropriate for registrants to maintain such records as evidence of attendance and of the materials used for training. In the case of a floor broker or floor trader, the applicable contract market or registered derivatives transaction execution facility should maintain such evidence on behalf of its member. This evidence of ethics training could be offered to demonstrate fitness and overall compliance during audits by self-regulatory organizations, and during reviews of contract market or registered derivatives transaction execution facility operations.

(g) The methodology of such training may also be flexible. Recent innovations in information technology have made possible new, fast, and cost-efficient ways for registrants to maintain their awareness of events and changes in the commodity interest markets. In this regard, the Commission recognizes that the needs of a firm will vary according to its size, personnel, and activities. No format of classes will be required. Rather, such training could be in the form of formal class lectures, video presentation, Internet transmission, or by simple distribution of written materials. These options should provide sufficiently flexible means for adherence to Congressional intent in this area.

(h) Finally, it should be noted that self-regulatory organizations and industry associations will have a significant role in this area. Such organizations may have separate ethics and proficiency standards, including ethics training and testing programs, for their own members.

[66 FR 53521, Oct. 23, 2001]

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

Subpart A—General Provisions, Definitions and Exemptions

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APPENDIX A TO PART 4—FORM CPO–PQR
APPENDIX B TO PART 4—ADJUSTMENTS FOR ADDITIONS AND WITHDRAWALS IN THE COMPUTATION OF RATE OF RETURN
APPENDIX C TO PART 4—FORM CTA–PR

AUTHORITY: 7 U.S.C. 1a, 2, 6b, 6c, 6f, 6m, 6n, 6c, 12a 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 (July 21, 2010).

SOURCE: 46 FR 26013, May 8, 1981, unless otherwise noted.

Subpart A—General Provisions, Definitions and Exemptions

§ 4.1 Requirements as to form.
(a) Each document distributed pursuant to this part 4 must be:
(1) Clear and legible;
(2) Paginated; and
(3) Fastened in a secure manner.
(b) Information that is required to be “prominently” disclosed under this part 4 must be displayed in capital letters and boldface type or, as warranted in the context, another manner reasonably calculated to draw the recipient’s attention to the information and accord it greater prominence than the surrounding text; and
(c) Where a document is distributed through an electronic medium:
(1) The requirements of paragraphs (a) of this section shall mean that required information must be presented in a format that is readily communicated to the recipient. For purposes of this paragraph (c), information is readily communicated to the recipient if it is accessible to the ordinary user by means of commonly available hardware and software and if the electronically delivered document is organized in substantially the same manner as would be required for a paper document with respect to the order of presentation and the relative prominence of information. Where a table of contents is required, the electronic document must either include page numbers in the text or employ a substantially equivalent cross-reference or indexing method or tool;
(2) The requirements of paragraph (b) of this section shall mean that such information must be presented in capital letters and boldface type or, as warranted in the context, another manner reasonably calculated to draw the recipient’s attention to the information and accord it greater prominence than the surrounding text; and
(3) A complete paper version of the document that complies with the applicable provisions of this part 4 must be provided to the recipient upon request.

(d) If graphic, image or audio material is included in a document delivered to a prospective or existing client or pool participant, and such material cannot be reproduced in an electronic filing, a fair and accurate narrative description, tabular representation or transcript of the omitted material must be included in the filed version of the document. Inclusion of such material in a Disclosure Document shall be subject to the requirements of § 4.24(v) in the case of pool Disclosure Documents, and § 4.34(n) in the case of commodity trading advisor Disclosure Documents.

(Approved by the Office of Management and Budget under control number 3038–0005)


§§ 4.2–4.4 [Reserved]

§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term “commodity pool operator.”
(a) Subject to compliance with the provisions of this section, the following persons, and any principal or employee thereof, shall be excluded from the definition of the term “commodity pool operator”:

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operator” with respect to the operation of a qualifying entity specified in paragraph (b) of this section:

(1) An investment company registered as such under the Investment Company Act of 1940;

(2) An insurance company subject to regulation by any State:

(3) A bank, trust company or any other such financial depository institution subject to regulation by any State or the United States; and

(4) A trustee of, a named fiduciary of (or a person designated or acting as a fiduciary pursuant to a written delegation from or other written agreement with the named fiduciary) or an employer maintaining a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974; Provided, however, That for purposes of this § 4.5 the following employee benefit plans shall not be construed to be pools:

(i) A noncontributory plan, whether defined benefit or defined contribution, covered under title I of the Employee Retirement Income Security Act of 1974;

(ii) A contributory defined benefit plan covered under title IV of the Employee Retirement Income Security Act of 1974; Provided, however, That such entity will be operated in the manner specified in paragraph (c)(2) of this section.

(3) With respect to any person specified in paragraph (a)(3) of this section, the assets of any trust, custodial account or other separate unit of investment for which it is acting as a fiduciary and for which it is vested with investment authority; and

(4) With respect to any person specified in paragraph (a)(4) of this section, and subject to the proviso thereof, a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974; Provided, however, That a plan fiduciary who is not a named fiduciary as described in paragraph (a)(4) of this section may claim the exclusion through the notice filed by the named fiduciary.

Any person who desires to claim the exclusion provided by this section shall file electronically a notice of eligibility with the National Futures Association through its electronic exemption filing system; Provided, however, That the notice of eligibility must contain the following information:

(i) The name of such person;

(ii) The applicable subparagraph of paragraph (a) of this section pursuant to which such person is claiming exclusion;

(iii) The name of the qualifying entity which such person intends to operate pursuant to the exclusion; and

(iv) The applicable subparagraph of paragraph (b) of this section pursuant to which such entity is a qualifying entity.

For the purposes of this section, the term “qualifying entity” means:

(1) With respect to any person specified in paragraph (a)(1) of this section, an investment company registered as such under the Investment Company Act of 1940;

(2) With respect to any person specified in paragraph (a)(2) of this section, a separate account established and maintained or offered by an insurance company pursuant to the laws of any State or territory of the United States, under which income gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account, without regard to other income, gains, or losses of the insurance company;

(3) With respect to any person specified in paragraph (a)(3) of this section, subject to the proviso thereof, a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974; Provided, however, That such entity will be operated in the manner specified in paragraph (c)(2) of this section.

(b) For the purposes of this section, the term “qualifying entity” means:

(1) With respect to any person specified in paragraph (a)(1) of this section, an investment company registered as such under the Investment Company Act of 1940:

(2) With respect to any person specified in paragraph (a)(2) of this section, a separate account established and maintained or offered by an insurance company pursuant to the laws of any State or territory of the United States, under which income gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account, without regard to other income, gains, or losses of the insurance company;

(3) With respect to any person specified in paragraph (a)(3) of this section, the assets of any trust, custodial account or other separate unit of investment for which it is acting as a fiduciary and for which it is vested with investment authority; and

(4) With respect to any person specified in paragraph (a)(4) of this section, and subject to the proviso thereof, a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974; Provided, however, That such entity will be operated in the manner specified in paragraph (c)(2) of this section.

(3) With respect to any person specified in paragraph (a)(3) of this section, the assets of any trust, custodial account or other separate unit of investment for which it is acting as a fiduciary and for which it is vested with investment authority; and

(4) With respect to any person specified in paragraph (a)(4) of this section, and subject to the proviso thereof, a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974; Provided, however, That such entity will be operated in the manner specified in paragraph (c)(2) of this section.

(c) Any person who desires to claim the exclusion provided by this section shall file electronically a notice of eligibility with the National Futures Association through its electronic exemption filing system; Provided, however, That a plan fiduciary who is not a named fiduciary as described in paragraph (a)(4) of this section may claim the exclusion through the notice filed by the named fiduciary.

(1) The notice of eligibility must contain the following information:

(i) The name of such person;

(ii) The applicable subparagraph of paragraph (a) of this section pursuant to which such person is claiming exclusion;

(iii) The name of the qualifying entity which such person intends to operate pursuant to the exclusion; and

(iv) The applicable subparagraph of paragraph (b) of this section pursuant to which such entity is a qualifying entity.

(2) The notice of eligibility must contain representations that such person...
Commodity Futures Trading Commission

§ 4.5

will operate the qualifying entity specified therein in a manner such that the qualifying entity:

(i) Will disclose in writing to each participant, whether existing or prospective, that the qualifying entity is operated by a person who has claimed an exclusion from the definition of the term “commodity pool operator” under the Act and, therefore, who is not subject to registration or regulation as a pool operator under the Act; Provided, that such disclosure is made in accordance with the requirements of any other federal or state regulatory authority to which the qualifying entity is subject. The qualifying entity may make such disclosure by including the information in any document that its other Federal or State regulator requires to be furnished routinely to participants or, if no such document is furnished routinely, the information may be disclosed in any instrument establishing the entity’s investment policies and objectives that the other regulator requires to be made available to the entity’s participants; and

(ii) Will submit to such special calls as the Commission may make to require the qualifying entity to demonstrate compliance with the provisions of this § 4.5(c); Provided, however, that the making of such representations shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which such person or qualifying entity is subject.

(iii) Furthermore, if the person claiming the exclusion is an investment company registered as such under the Investment Company Act of 1940, then the notice of eligibility must also contain representations that such person will operate the qualifying entity as described in Rule 4.5(b)(1) in a manner such that the qualifying entity:

(A) Will use commodity futures or commodity options contracts, or swaps solely for bona fide hedging purposes within the meaning and intent of Rules 1.3(z)(1) and 151.5 (17 CFR 1.3(z)(1) and 151.5), determined at the time the most recent position was established, does not exceed 100 percent of the liquidation value of the pool’s portfolio, after taking into account unrealized profits and unrealized losses, if any, and for any cleared swap by the value as determined consistent with the terms of 17 CFR part 46; and

(B) The aggregate net notional value of commodity futures, commodity options contracts, or swaps positions not used solely for bona fide hedging purposes within the meaning and intent of Rules 1.3(z)(1) and 151.5 (17 CFR 1.3(z)(1) and 151.5), determined at the time the transaction was established, excluding for this purpose the value in U.S. Dollars of offsetting long and short transactions, if any, and for any cleared swap by the value as determined consistent with the terms of 17 CFR part 46; and

(C) Will not be, and
§ 4.6 Exclusion for certain otherwise regulated persons from the definition of the term “commodity trading advisor.”

(a) Subject to compliance with the provisions of this section, the following persons, and any principal or employee thereof, shall be excluded from the definition of the term “commodity trading advisor:”

(1) An insurance company subject to regulation by any State, or any wholly-owned subsidiary or employee thereof; Provided, however, That its commodity interest advisory activities are solely incidental to the conduct of the insurance business of the insurance company as such; and

(2) A person who is excluded from the definition of the term “commodity pool operator” by § 4.5; Provided, however, That:

(i) Its commodity interest advisory activities are solely incidental to its operation of those trading vehicles for which § 4.5 provides relief; and

(ii) Where necessary, prior to providing any commodity interest trading advice to any such trading vehicle the person files a notice of eligibility as specified in § 4.5 to claim the relief available under that section.

(3) A swap dealer registered with the Commission as such pursuant to the Act or excluded or exempt from registration under the Act or the Commission’s regulations; Provided, however, That the commodity interest and swap advisory activities of the swap dealer are solely incidental to the conduct of its business as a swap dealer.

(b) Any person who has claimed an exclusion under this § 4.6 must submit...
§ 4.7 Exemption from certain part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to advising qualified eligible persons.

This section is organized as follows: Paragraph (a) contains definitions for the purposes of § 4.7; paragraph (b) contains the relief available to commodity pool operators under § 4.7; paragraph (c) contains the relief available to commodity trading advisors under § 4.7; paragraph (d) concerns the Notice of Claim for Exemption under § 4.7; and paragraph (e) addresses the effect of an insignificant deviation from a term, condition or requirement of § 4.7. (a) Definitions. Paragraph (a)(1) of this section contains general definitions, paragraph (a)(2) of this section contains the definition of the term qualified eligible person with respect to those persons who do not need to satisfy the Portfolio Requirement and paragraph (a)(3) of this section contains the definition of the term qualified eligible person with respect to those persons who must satisfy the Portfolio Requirement. For the purposes of this section:

1. In general—(i) Affiliate of, or a person affiliated with, a specified person means a person that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with the specified person.

(ii) Exempt account means the account of a qualified eligible person that is directed or guided by a commodity trading advisor pursuant to an effective claim for exemption under § 4.7.

(iii) Exempt pool means a pool that is operated pursuant to an effective claim for exemption under § 4.7.

(iv) Non-United States person means:

(A) A natural person who is not a resident of the United States;

(B) A partnership, corporation or other entity, other than an entity organized principally for passive investment, organized under the laws of a foreign jurisdiction and which has its principal place of business in a foreign jurisdiction;

(C) An estate or trust, the income of which is not subject to United States income tax regardless of source;

(D) An entity organized principally for passive investment such as a pool, investment company or other similar entity. Provided, That units of participation in the entity held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10% of the beneficial interest in the entity, and that such entity was not formed principally for the purpose of facilitating investment by persons who do not qualify as Non-United States persons in a pool with respect to which the operator is exempt from certain requirements of part 4 of the Commission’s regulations by virtue of its participants being Non-United States persons; and

(E) A pension plan for the employees, officers or principals of an entity organized and with its principal place of business outside the United States.

(v) Portfolio Requirement means that a person:

(A) Owns securities (including pool participations) of issuers not affiliated with such person and other investments with an aggregate market value of at least $2,000,000;

(B) Has had on deposit with a futures commission merchant, for its own account at any time during the six-month period preceding either the date of sale to that person of a pool participation in the exempt pool or the date that the person opens an exempt account with the commodity trading advisor, at least $200,000 in exchange-specified initial margin and option premiums, together with required minimum security deposit for retail forex transactions (as defined in § 5.1(m) of this chapter) for commodity interest transactions; or
(C) Owns a portfolio comprised of a combination of the funds or property specified in paragraphs (a)(1)(v)(A) and (B) of this section in which the sum of the funds or property includable under paragraph (a)(1)(v)(A), expressed as a percentage of the minimum amount required thereunder, and the amount of futures margin and option premiums includable under paragraph (a)(1)(v)(B), expressed as a percentage of the minimum amount required thereunder, equals at least one hundred percent. An example of a composite portfolio acceptable under this paragraph (a)(1)(v)(C) would consist of $1,000,000 in securities and other property (50% of paragraph (a)(1)(v)(A)) and $100,000 in exchange-specified initial margin and option premiums (50% of paragraph (a)(1)(v)(B)).

(vi) United States means the United States, its states, territories or possessions, or an enclave of the United States government, its agencies or instrumentalities.

(2) Persons who do not need to satisfy the Portfolio Requirement to be qualified eligible persons. Qualified eligible person means any person, acting for its own account or for the account of a qualified eligible person, who the commodity pool operator reasonably believes, at the time of the sale to that person of a pool participation in the exempt pool, or who the commodity trading advisor reasonably believes, at the time that person opens an exempt account, is:

(i)(A) A futures commission merchant registered pursuant to section 4d of the Act, or a principal thereof;

(B) A retail foreign exchange dealer registered pursuant to section 2(c)(2)(B)(i)(gg) of the Act, or a principal thereof;

(C) A swap dealer registered pursuant to section 4s(a)(1) of the Act, or a principal thereof;

(ii) A broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, or a principal thereof;

(iii) A commodity pool operator registered pursuant to section 4m of the Act, or a principal thereof; Provided, That the pool operator:

(A) Has been registered and active as such for two years; or

(B) Operates pools which, in the aggregate, have total assets in excess of $5,000,000;

(iv) A commodity trading advisor registered pursuant to section 4m of the Act, or a principal thereof; Provided, That the trading advisor:

(A) Has been registered and active as such for two years; or

(B) Provides commodity interest trading advice to commodity accounts which, in the aggregate, have total assets in excess of $5,000,000 deposited at one or more futures commission merchants;

(v) An investment adviser registered pursuant to section 203 of the Investment Advisers Act of 1940 (“Investment Advisers Act”) or pursuant to the laws of any state, or a principal thereof; Provided, That the investment adviser:

(A) Has been registered and active as such for two years; or

(B) Provides securities investment advice to securities accounts which, in the aggregate, have total assets in excess of $5,000,000 deposited at one or more registered securities brokers;

(vi) A “qualified purchaser” as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (the “Investment Company Act”);

(vii) A “knowledgeable employee” as defined in § 270.3c-5 of this title;

(viii)(A) With respect to an exempt pool:

(1) The commodity pool operator, commodity trading advisor or investment adviser of the exempt pool offered or sold, or an affiliate of any of the foregoing;

(2) A principal of the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or of an affiliate of any of the foregoing;

(3) An employee of the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or of an affiliate of any of the foregoing (other than an employee performing solely clerical, secretarial or administrative functions with regard to such person or its investments) who, in connection
with his or her regular functions or duties, participates in the investment activities of the exempt pool, other commodity pools operated by the pool operator of the exempt pool or other accounts advised by the trading advisor or the investment adviser of the exempt pool, or by the affiliate; Provided, That such employee has been performing such functions and duties for or on behalf of the exempt pool, pool operator, trading advisor, investment adviser or affiliate, or substantially similar functions or duties for or on behalf of another person engaged in providing commodity interest, securities or other financial services, for at least 12 months;

(4) Any other employee of, or an agent engaged to perform legal, accounting, auditing or other financial services for, the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or any other employee of, or agent so engaged by, an affiliate of any of the foregoing (other than an employee or agent performing solely clerical, secretarial or administrative functions with regard to such person or its investments); Provided, That such employee or agent:

(i) Is an accredited investor as defined in §230.501(a)(5) or (6) of this title; and

(ii) Has been employed or engaged by the exempt pool, commodity pool operator, commodity trading advisor, investment adviser or affiliate, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months;

(5) The spouse, child, sibling or parent of a person who satisfies the criteria of paragraph (a)(2)(viii)(A)(1), (2), (3) or (4) of this section; Provided, That:

(i) An investment in the exempt pool by any such family member is made with the knowledge and at the direction of the person; and

(ii) The family member is not a qualified eligible person for the purposes of paragraph (a)(3)(xii) of this section;

(6)(i) Any person who acquires a participation in the exempt pool by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from a person listed in paragraph (a)(2)(viii)(A)(1), (2), (3), (4) or (5) of this section;

(ii) The estate of any person listed in paragraph (a)(2)(viii)(A)(1), (2), (3), (4) or (5) of this section; or

(iii) A company established by any person listed in paragraph (a)(2)(viii)(A)(1), (2), (3), (4) or (5) of this section exclusively for the benefit of (or owned exclusively by) that person and any person listed in paragraph (a)(2)(viii)(A)(6)(i) or (ii) of this section;

(B) With respect to an exempt account:

(1) An affiliate of the commodity trading advisor of the exempt account;

(2) A principal of the commodity trading advisor of the exempt account or of an affiliate of the trading advisor;

(3) An employee of the commodity trading advisor of the exempt account or of an affiliate of the trading advisor (other than an employee performing solely clerical, secretarial or administrative functions with regard to such person or its investments) who, in connection with his or her regular functions or duties, participates in the investment activities of the trading advisor or the affiliate; Provided, That such employee has been performing such functions and duties for or on behalf of the trading advisor or the affiliate, or substantially similar functions or duties for or on behalf of another person engaged in providing commodity interest, securities or other financial services, for at least 12 months;

(4) Any other employee of, or an agent engaged to perform legal, accounting, auditing or other financial services for, the commodity trading advisor of the exempt account or any other employee of, or agent so engaged by, an affiliate of the trading advisor (other than an employee or agent performing solely clerical, secretarial or administrative functions with regard to such person or its investments); Provided, That such employee or agent:

(i) Is an accredited investor as defined in §230.501(a)(5) or (6) of this title; and

(ii) Has been employed or engaged by the commodity trading advisor or the affiliate, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months; or
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(5) The spouse, child, sibling or parent of the commodity trading advisor of the exempt account or of a person who satisfies the criteria of paragraph (a)(2)(viii)(B)(1), (2), (3) or (4) of this section; Provided, That:

(i) The establishment of an exempt account by any such family member is made with the knowledge and at the direction of the person; and

(ii) The family member is not a qualified eligible person for the purposes of paragraph (a)(3)(xi) of this section;

(6)(i) Any person who acquires an interest in an exempt account by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from a person listed in paragraph (a)(2)(viii)(B)(1), (2), (3), (4) or (5) of this section;

(ii) The estate of any person listed in paragraph (a)(2)(viii)(B)(1), (2), (3), (4) or (5) of this section; or

(iii) A company established by any person listed in paragraph (a)(2)(viii)(B)(1), (2), (3), (4) or (5) of this section exclusively for the benefit of (or owned exclusively by) that person and any person listed in paragraph (a)(2)(viii)(B)(6)(i) or (ii) of this section;

(iv) A trust; Provided, That:

(A) The trust was not formed for the specific purpose of either participating in the exempt pool or opening an exempt account; and

(B) The trustee or other person authorized to make investment decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a qualified eligible person;

(v) An organization described in section 501(c)(3) of the Internal Revenue Code (the “IRC”); Provided, That the trustee or other person authorized to make investment decisions with respect to the organization, and the person who has established the organization, is a qualified eligible person;

(vi) A Non-United States person;

(vii)(A) An entity in which all of the unit owners or participants, other than the commodity trading advisor claiming relief under this section, are qualified eligible persons;

(B) An exempt pool; or

(C) Notwithstanding paragraph (a)(3) of this section, an entity as to which a notice of eligibility has been filed pursuant to §4.5 which is operated in accordance with such rule and in which all unit owners or participants, other than the commodity trading advisor claiming relief under this section, are qualified eligible persons.

(3) Persons who must satisfy the Portfolio Requirement to be qualified eligible persons. Qualified eligible person means any person who the commodity pool operator reasonably believes, at the time of the sale to that person of a pool participation in the exempt pool, or any person who the commodity trading advisor reasonably believes, at the time that person opens an exempt account, satisfies the Portfolio Requirement and is:

(i) An investment company registered under the Investment Company Act or a business development company as defined in section 2(a)(48) of such Act not formed for the specific purpose of either investing in the exempt pool or opening an exempt account;

(ii) A bank as defined in section 3(a)(2) of the Securities Act of 1933 (the “Securities Act”) or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Securities Act acting for its own account or for the account of a qualified eligible person;

(iii) An insurance company as defined in section 2(13) of the Securities Act acting for its own account or for the account of a qualified eligible person;

(iv) A plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000;

(v) An employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974; Provided, That the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is a bank, savings and loan association, insurance company, or registered investment adviser; or that the employee benefit plan has total assets in excess of $5,000,000; or, if the plan is self-directed, that investment decisions are made solely by persons that are qualified eligible persons;
(vi) A private business development company as defined in section 202(a)(22) of the Investment Advisers Act;
(vii) An organization described in section 501(c)(3) of the IRC, with total assets in excess of $5,000,000;
(viii) A corporation, Massachusetts or similar business trust, or partnership, limited liability company or similar business venture, other than a pool, which has total assets in excess of $5,000,000, and is not formed for the specific purpose of either participating in the exempt pool or opening an exempt account;
(ix) A natural person whose individual net worth, or joint net worth with that person’s spouse at the time of either his purchase in the exempt pool or his opening of an exempt account would qualify him as an accredited investor as defined in §230.501(a)(5) of this title;
(x) A natural person who would qualify as an accredited investor as defined in §203.501(a)(6) of this title;
(xi) A pool, trust, insurance company separate account or bank collective trust, with total assets in excess of $5,000,000, not formed for the specific purpose of either participating in the exempt pool or opening an exempt account, and whose participation in the exempt pool or investment in the exempt account is directed by a qualified eligible person; or
(xii) Except as provided for the governmental entities referenced in paragraph (a)(3)(iv) of this section, if otherwise authorized by law to engage in such transactions, a governmental entity (including the United States, a state, or a foreign government) or political subdivision thereof, or a multinational or supranational entity or an instrumentality, agency, or department of any of the foregoing.

(b) Relief available to commodity pool operators. Upon filing the notice required by paragraph (d) of this section, and subject to compliance with the conditions specified in paragraph (d) of this section, any registered commodity pool operator who offers or sells participations in a pool solely to qualified eligible persons in an offering which qualifies for exemption from the registration requirements of the Securities Act pursuant to section 4(2) of that Act or pursuant to Regulation S, 17 CFR 230.901 et seq., and any bank registered as a commodity pool operator in connection with a pool that is a collective trust fund whose securities are exempt from registration under the Securities Act pursuant to section 3(a)(2) of that Act and are offered or sold, without marketing to the public, solely to qualified eligible persons, may claim any or all of the following relief with respect to such pool:

(1) Disclosure relief. (i) Exemption from the specific requirements of §§4.21, 4.24, 4.25 and 4.26 with respect to each exempt pool; Provided, That if an offering memorandum is distributed in connection with soliciting prospective participants in the exempt pool, such offering memorandum must include all disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading; and that the following statement is prominently disclosed on the cover page of the offering memorandum, or, if none is provided, immediately above the signature line on the subscription agreement or other document that the prospective participant must execute to become a participant in the pool:

“PURSUANT TO AN EXEMPTION FROM THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH POOLS WHOSE PARTICIPANTS ARE LIMITED TO QUALIFIED ELIGIBLE PERSONS, AN OFFERING MEMORANDUM FOR THIS POOL IS NOT REQUIRED TO BE, AND HAS NOT BEEN, FILED WITH THE COMMISSION. THE COMMODITY FUTURES TRADING COMMISSION DOES NOT PASS UPON THE MERITS OF PARTICIPATING IN A POOL OR UPON THE ADEQUACY OR ACCURACY OF AN OFFERING MEMORANDUM. CONSEQUENTLY, THE COMMODITY FUTURES TRADING COMMISSION HAS NOT REVIEWED OR APPROVED THIS OFFERING OR ANY OFFERING MEMORANDUM FOR THIS POOL.”

(ii) Exemption from disclosing the past performance of exempt pools in the Disclosure Document of non-exempt pools except to the extent that such past performance is material to the non-exempt pool being offered; Provided, That a pool operator that has claimed exemption hereunder and elects not to disclose any such performance in the Disclosure Document
of non-exempt pools shall state in a footnote to the performance disclosure therein that the operator is operating or has operated exempt pools whose performance is not disclosed in this Disclosure Document.

(2) Periodic reporting relief. Exemption from the specific requirements of §§4.22(a) and (b); Provided, That a statement signed and affirmed in accordance with §4.22(h) is prepared and distributed to pool participants no less frequently than quarterly within 30 calendar days after the end of the reporting period. This statement must be presented and computed in accordance with generally accepted accounting principles and indicate:

(i) The net asset value of the exempt pool as of the end of the reporting period;

(ii) The change in net asset value from the end of the previous reporting period; and

(iii) The net asset value per outstanding unit of participation in the exempt pool as of the end of the reporting period.

(A) Either the net asset value per outstanding participation unit in the exempt pool as of the end of the reporting period, or

(B) The total value of the participant’s interest or share in the exempt pool as of the end of the reporting period.

(iv) Where the pool is comprised of more than one ownership class or series, the net asset value of the series or class on which the account statement is reporting, and the net asset value per unit or value of the participant’s share, also must be included in the statement required by this paragraph (b)(2); except that, for a pool that is a series fund structured with a limitation on liability among the different series, the account statement required by this paragraph (b)(2) is not required to include the consolidated net asset value of all series of the pool.

(v) A commodity pool operator of a pool that meets the conditions specified in §4.22(d)(2)(i) of this part to present and compute the commodity pool’s financial statements contained in the Annual Report in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board and has filed notice pursuant to §4.22(d)(2)(ii) of this part also may use such International Financial Reporting Standards in the computation and presentation of the account statement.

(3) Annual report relief. (i) Exemption from the specific requirements of §4.22(c) of this part; Provided, that within 90 calendar days after the end of the exempt pool’s fiscal year or the permanent cessation of trading, whichever is earlier, the commodity pool operator electronically files with the National Futures Association and distributes to each participant in lieu of the financial information and statements specified by that section, an annual report for the exempt pool, affirmed in accordance with §4.22(h) which contains, at a minimum:

(A) A Statement of Financial Condition as of the close of the exempt pool’s fiscal year (elected in accordance with §4.22(g));

(B) A Statement of Operations for that year;

(C) Appropriate footnote disclosure and such further material information as may be necessary to make the required statements not misleading. For a pool that invests in other funds, this information must include, but is not limited to, separately disclosing the amounts of income, management and incentive fees associated with each investment in an investee fund that exceeds five percent of the pool’s net assets. The income, management and incentive fees associated with an investment in an investee fund that is less than five percent of the pool’s net assets may be combined and reported in the aggregate with the income, management and incentive fees of other investee funds that, individually, represent an investment of less than five percent of the pool’s net assets. If the commodity pool operator is not able to obtain the specific amounts of management and incentive fees charged by an investee fund, the commodity pool operator must disclose the percentage amounts and computational basis for each such fee and include a statement that the CPO is not able to obtain the specific fee amounts for this fund;
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(D) Where the pool is comprised of more than one ownership class or series, information for the series or class on which the financial statements are reporting should be presented in addition to the information presented for the pool as a whole; except that, for a pool that is a series fund structured with a limitation on liability among the different series, the financial statements are not required to include consolidated information for all series.

(ii) Legend. If a claim for exemption has been made pursuant to this section, the commodity pool operator must make a statement to that effect on the cover page of each annual report.

(4) Recordkeeping relief. Exemption from the specific requirements of §4.23; Provided, That the commodity pool operator must maintain the reports referred to in paragraphs (b)(2) and (b)(3) of this section and all books and records prepared in connection with his activities as the pool operator of the exempt pool (including, without limitation, records relating to the qualifications of qualified eligible persons and substantiating any performance representations) at his main business address and must make such books and records available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of §1.31.

(c) Relief available to commodity trading advisors. Upon filing the notice required by paragraph (d) of this section, and subject to compliance with the conditions specified in paragraph (d) of this section, any registered commodity trading advisor who anticipates directing or guiding the commodity interest accounts of qualified eligible persons may claim any or all of the following relief with respect to the accounts of qualified eligible persons who have given due consent to their account being an exempt account under §4.7:

(1) Disclosure relief. (i) Exemption from the specific requirements of §§4.31, 4.34, 4.35 and 4.36; Provided, That if the commodity trading advisor delivers a brochure or other disclosure statement to such qualified eligible persons, such brochure or statement shall include all additional disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading; and that the following statement is prominently displayed on the cover page of the brochure or statement or, if none is provided, immediately above the signature line of the agreement that the client must execute before it opens an account with the commodity trading advisor:

“PURSUANT TO AN EXEMPTION FROM THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH ACCOUNTS OF QUALIFIED ELIGIBLE PERSONS, THIS BROCHURE OR ACCOUNT DOCUMENT IS NOT REQUIRED TO BE, AND HAS NOT BEEN, FILED WITH THE COMMISSION. THE COMMODITY FUTURES TRADING COMMISSION DOES NOT PASS UPON THE MERITS OF PARTICIPATING IN A TRADING PROGRAM OR UPON THE ADEQUACY OR ACCURACY OF COMMODITY TRADING ADVISOR DISCLOSURE. CONSEQUENTLY, THE COMMODITY FUTURES TRADING COMMISSION HAS NOT REVIEWED OR APPROVED THIS TRADING PROGRAM OR THIS BROCHURE OR ACCOUNT DOCUMENT.”

(ii) Exemption from disclosing the past performance of exempt accounts in the Disclosure Document for non-exempt accounts except to the extent that such past performance is material to the non-exempt account being offered; Provided, That a commodity trading advisor that has claimed exemption hereunder and elects not to disclose any such performance in the Disclosure Document for non-exempt accounts shall state in a footnote to the performance disclosure therein that the advisor is advising or has advised exempt accounts for qualified eligible persons whose performance is not disclosed in this Disclosure Document.

(2) Recordkeeping relief. Exemption from the specific requirements of §4.33; Provided, That the commodity trading advisor must maintain, at its main business office, all books and records prepared in connection with his activities as the commodity trading advisor of qualified eligible persons (including, without limitation, records relating to the qualifications of such qualified eligible persons and substantiating any performance representations) and must make such books and records available
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to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of §1.31.

(d) Notice of claim for exemption. (1) A notice of a claim for exemption under this section must:

(i) Provide the name, main business address, main business telephone number and the National Futures Association commodity pool operator or commodity trading advisor identification number of the person claiming the exemption;

(ii)(A) Where the claimant is a commodity pool operator, provide the name(s) of the pool(s) for which the request is made; Provided, That a single notice representing that the pool operator anticipates operating single-investor pools may be filed to claim exemption for single-investor pools and such notice need not name each such pool;

(B) Where the claimant is a commodity trading advisor, contain a representation that the trading advisor anticipates providing commodity interest trading advice to qualified eligible persons;

(iii) Contain representations that:

(A) Neither the commodity pool operator or commodity trading advisor nor any of its principals is subject to any statutory disqualification under section 8a(2) or 8a(3) of the Act unless such disqualification arises from a matter which was previously disclosed in connection with a previous application for registration if such registration was granted or which was disclosed more than thirty days prior to the filing of the notice under this paragraph (d);

(B) The commodity pool operator or commodity trading advisor will comply with the applicable requirements of §4.7; and

(C) Where the claimant is a commodity pool operator, that the exempt pool will be offered and operated in compliance with the applicable requirements of §4.7;

(iv) Specify the relief claimed under §4.7;

(v) Where the claimant is a commodity pool operator, state the closing date of the offering or that the offering will be continuous;

(vi) Be filed by a representative duly authorized to bind the commodity pool operator or commodity trading advisor;

(vii) Be filed electronically with the National Futures Association through its electronic exemption filing system; and

(viii)(A)(1) Where the claimant is a commodity pool operator, except as provided in paragraph (d)(1)(ii)(A) of this section with respect to single-investor pools and in paragraph (d)(1)(viii)(A)(2) of this section, be received by the National Futures Association:

(i) Before the date the pool first enters into a commodity interest transaction, if the relief claimed is limited to that provided under paragraphs (b)(2), (3) and (4) of this section; or

(ii) Prior to any offer or sale of any participation in the exempt pool if the claimed relief includes that provided under paragraph (b)(1) of this section.

(2) Where participations in a pool have been offered or sold in full compliance with part 4, the notice of a claim for exemption may be filed with the National Futures Association at any time; Provided, That the claim for exemption is otherwise consistent with the duties of the commodity pool operator and the rights of pool participants and that the commodity pool operator notifies the pool participants of his intention, absent objection by the holders of a majority of the units of participation in the pool who are unaffiliated with the commodity pool operator within twenty-one days after the date of the notification, to file a notice of claim for exemption under §4.7 and such holders have not objected within such period. A commodity pool operator filing a notice under this paragraph (d)(1)(viii)(A)(2) shall either provide disclosure and reporting in accordance with the requirements of part 4 to those participants objecting to the filing of such notice or allow such participants to redeem their units of participation in the pool within three months of the filing of such notice.

(B) Where the claimant is a commodity trading advisor, be received by the Commission before the date the trading advisor first enters into an
agreement to direct or guide the commodity interest account of a qualified eligible person pursuant to §4.7.

(2) The notice will be effective upon receipt by the National Futures Association with respect to each pool for which it was made where the claimant is a commodity pool operator and otherwise generally where the claimant is a commodity trading advisor; Provided, That any notice which does not include all the required information shall not be effective, and that if at the time the National Futures Association receives the notice an enforcement proceeding brought by the Commission under the Act or the regulations is pending against the pool operator or trading advisor or any of its principals, the exemption will not be effective until twenty-one calendar days after receipt of the notice by the National Futures Association and that in such case an exemption may be denied by the Commission or the National Futures Association or made subject to such conditions as the Commission or the National Futures Association may impose.

(3) Any exemption claimed hereunder shall cease to be effective upon any change which would cause the commodity pool operator of an exempt pool to be ineligible for the relief claimed with respect to such pool or which would cause a commodity trading advisor to be ineligible for the relief claimed. The pool operator or trading advisor must promptly file a notice advising the National Futures Association of such change.

(4)(i) Any exemption from the requirements of §4.21, 4.22, 4.23, 4.24, 4.25 or 4.26 claimed hereunder with respect to a pool shall not affect the obligation of the commodity pool operator to comply with all other applicable provisions of part 4, the Act and the Commission's rules and regulations, with respect to any qualified eligible person and any other client to which the commodity trading advisor provides or intends to provide commodity interest trading advice.

(e) Insignificant deviations from a term, condition or requirement of §4.7. (1) A failure to comply with a term or condition of §4.7 will not result in the loss of the exemption with respect to a particular pool or client if the commodity pool operator or the commodity trading advisor relying on the exemption shows that:

(i) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular qualified eligible person;

(ii) The failure to comply was insignificant with respect to the exempt pool as a whole or to the particular exempt account; and

(iii) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of §4.7.

A transaction made in reliance on §4.7 must comply with all applicable terms, conditions and requirements of §4.7. Where an exemption is established only through reliance upon paragraph (e)(1) of this section, the failure to comply shall nonetheless be actionable by the Commission.

§4.8 Exemption from certain requirements of rule 4.26 with respect to pools offered or sold in certain offerings exempt from registration under the Securities Act.

(a) Notwithstanding paragraph (d) of §4.26 and subject to the conditions specified herein, the registered commodity pool operator of a pool offered or sold solely to “accredited investors” as defined in 17 CFR 230.501 in an offering exempt from the registration requirements of the Securities Act of 1933 pursuant to Rule 505 or 506 of Regulation D, 17 CFR 230.505 or 230.506, may
solicit, accept and receive funds, securities and other property from prospective participants in that pool upon filing with the National Futures Association and providing to such participants the Disclosure Document for the pool.

(b) Notwithstanding paragraph (d) of §4.26 and subject to the conditions specified herein, the registered commodity pool operator of a pool offered or sold in an offering exempt from the registration requirements of the Securities Act of 1933 pursuant to Rule 506 or 506 of Regulation D, 17 CFR 230.505 or 230.506, that is operated in compliance with, and has filed the notice required by §4.12(b) may solicit, accept and receive funds, securities and other property from prospective participants in that pool upon filing with the National Futures Association and providing to such participants the Disclosure Document for the pool.

(c) The relief provided under §4.8 is not available if an enforcement proceeding brought by the Commission under the Act or the regulations is pending against the commodity pool operator or any of its principals or if the commodity pool operator or any of its principals is subject to any statutory disqualification under §§8a(2) or 8a(3) of the Act.

§4.9 [Reserved]

§4.10 Definitions.

For purposes of this part:

(a) [Reserved]

(b) Net asset value means total assets minus total liabilities, determined in accordance with generally accepted accounting principles, with each position in a commodity interest accounted for at fair market value.

(c) Participant means any person that has any direct financial interest in a pool (e.g., a limited partner).

(d)(1) Pool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests.

(2) Multi-advisor pool means a pool in which:

(i) No commodity trading advisor is allocated or intended to be allocated more than twenty-five percent of the pool’s funds available for commodity interest trading; and

(ii) No investee pool is allocated or intended to be allocated more than twenty-five percent of the pool’s net asset value.

(3) Principal-protected pool means a pool (commonly referred to as a “guaranteed pool”) that is designed to limit the loss of the initial investment of its participants.

(4) Investee pool means any pool in which another pool or account participates or invests, e.g., as a limited partner thereof.

(5) Major investee pool means, with respect to a pool, any investee pool that is allocated or intended to be allocated at least ten percent of the net asset value of the pool.

(e)(1) Principal, when referring to a person that is a principal of a particular entity, shall have the same meaning as the term “principal” under §3.1(a) of this chapter.

(2) Trading principal means:

(i) With respect to a commodity pool operator, a principal who participates in making trading decisions for a pool, or who supervises, or has authority to allocate pool assets to, persons so engaged; and

(ii) With respect to a commodity trading advisor, a principal who participates in making trading decisions for the account of a client or who supervises or selects persons so engaged.

(f) Direct, as used in the context of trading commodity interest accounts, refers to agreements whereby a person is authorized to cause transactions to be effected for a client’s commodity interest account without the client’s specific authorization.

(g) Trading program refers to the program pursuant to which a person (1) directs a client’s commodity interest account, or (2) guides the client’s commodity interest trading by means of a systematic program that recommends specific transactions.

(h) Trading manager means, with respect to a pool, any person, other than the commodity pool operator of the pool, having sole or partial authority to allocate pool assets to commodity trading advisors or investee pools.
(i) Major commodity trading advisor means, with respect to a pool, any commodity trading advisor that is allocated or is intended to be allocated at least ten percent of the pool’s funds available for commodity interest trading. For this purpose, the percentage allocation shall be the amount of funds allocated to the trading advisor by agreement with the commodity pool operator (or trading manager) on behalf of the pool, expressed as a percentage of the lesser of the aggregate value of the assets allocated to the pool’s trading advisors or the net assets of the pool at the time of allocation.

(j) Break-even point—(1) Means the trading profit that a pool must realize in the first year of a participant’s investment to equal all fees and expenses such that such participant will recoup its initial investment, as calculated pursuant to rules promulgated by a registered futures association pursuant to section 17(j) of the Act; and

(2) Must be expressed both as a dollar amount and as a percentage of the minimum unit of initial investment and assume redemption of the initial investment at the end of the first year of investment.

(k) Draw-down means losses experienced by a pool or account over a specified period.

(l) Worst peak-to-valley draw-down means the greatest cumulative percentage decline in month-end net asset value due to losses sustained by a pool, account or trading program during any period in which the initial month-end net asset value is not equaled or exceeded by a subsequent month-end net asset value. Such decline must be expressed as a percentage of the initial month-end net asset value, together with an indication of the months and year(s) of such decline from the initial month-end net asset value to the lowest month-end net asset value of such decline.\(^1\) For purposes of §§4.25 and 4.35, a peak-to-valley draw-down which began prior to the beginning of the most recent five calendar years is deemed to have occurred during such five-calendar-year period.

(m) Partially-funded account means a client participation in the program of a commodity trading advisor in which the amount of funds in the client’s commodity interest account over which such commodity trading advisor has trading authority is less than the account size that establishes the client’s level of trading in a commodity trading advisor’s program.

[Further text]

\(^1\)For example, a worst peak-to-valley draw-down of “4 to 8-92/25%” means that the peak-to-valley draw-down lasted from April to August of 1992 and resulted in a twenty-five percent cumulative draw-down.
(C) Will not enter into commodity interest transactions for which the aggregate initial margin and premiums, and required minimum security deposit for retail forex transactions (as defined in §5.1(m) of this chapter) exceed 10 percent of the fair market value of the pool’s assets, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; Provided, however, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in §190.01(x) of this chapter may be excluded in computing such 10 percent; and

(D) Will trade such commodity interests in a manner solely incidental to its securities trading activities.

(ii) Each existing participant and prospective participant in the pool for which it makes such request is informed in writing of the restrictions set forth in paragraph (b)(1)(i) (C) and (D) of this section prior to the date the pool commences trading commodity interests. The pool operator may furnish this information by way of the pool’s Disclosure Document, Account Statement, a separate notice or other similar means, including written communication delivered through electronic transmission.

(2) Relief available to pool operator. The commodity pool operator of a pool which meets the criteria of paragraph (b)(1) of this section may claim the following relief:

(i) In the case of §4.21, that the Commission accept in lieu and in satisfaction of the Disclosure Document specified by that section an offering memorandum for the pool which does not contain the information required by §§4.24(a), 4.24(b), and 4.24(n); Provided, however, that the offering memorandum:

(A) Is prepared pursuant to the requirements of the Securities Act of 1933, as amended, or the exemption from said Act pursuant to which the pool is being offered and sold;

(B) Contains the information required by §§4.24(c) through (m) and (o) through (u); and

(C) Complies with the requirements of §§4.24(v) and (w).

(ii) In the case of §4.22 (a) and (b), that the Commission accept in lieu and in satisfaction of the Account Statement and prescribed frequency respectively specified by those sections a statement which indicates the net asset value of the pool as of the end of the reporting period and the change in net asset value from the end of the previous reporting period, to be prepared and distributed no less frequently than quarterly; Provided, however, That each such statement complies with the other requirements of §4.22 (a) and (b), including the references in those sections to §4.22 (g) and (h).

(iii) In the case of §4.22 (c) through (e), that the Commission accept in lieu and in satisfaction of the financial information and statements in the Annual Report specified by those sections an annual report for the pool which contains, at a minimum, a Statement of Financial Condition as of the close of the pool’s fiscal year and a Statement of Income (Loss) for that year; Provided, however, That:

(A) Each such annual report complies with the other requirements of §4.22(c), including the reference in that section to §4.22(b) and the requirement in §4.22(d) that the annual report must contain appropriate footnote disclosure and further material information; and

(B) The financial statements in such annual report must be presented and computed in accordance with generally accepted accounting principles consistently applied and must be certified by an independent public accountant.

(iv) In the case of §4.23(a) (10) and (11), to exempt the pool operator from the requirements of those sections with respect to the pool.

(c) Exemption from Subpart B for certain commodity pool operators based on listing of pool participation units for trading on a national securities exchange—

(1) Eligibility. Subject to compliance with the provisions of paragraph (d) of this section, any person who is registered as a commodity pool operator, or has applied for such registration, may claim any or all of the relief available under paragraph (c)(2) of this section if the units of participation in the pool for which it makes such claim:

(A) Will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933; and
(ii) Will be listed for trading on a national securities exchange registered as such under the Securities Exchange Act of 1934.

(2) Relief available to pool operator. The commodity pool operator of a pool whose units of participation meet the criteria of paragraph (c)(1) of this section may claim the following relief:

(i) In the case of §4.21, exemption from the Disclosure Document delivery and acknowledgment requirements of that section. Provided, however, that the pool operator:

(A) Cause the pool’s Disclosure Document to be readily accessible on an Internet Web site maintained by the pool operator;

(B) Cause the Disclosure Document to be kept current in accordance with the requirements of §4.26(a);

(C) Clearly inform prospective pool participants with whom it has contact of the Internet address of such Web site and direct any broker, dealer or other selling agent to whom the pool operator sells units of participation in the pool to so inform prospective pool participants; and

(D) Comply with all other requirements applicable to pool Disclosure Documents under part 4. The pool operator may satisfy the requirement of §4.26(b) to attach to the Disclosure Document a copy of the pool’s most current Account Statement and Annual Report if the pool operator makes such Account Statement and Annual Report readily accessible on an Internet Web site maintained by the pool operator.

(ii) In the case of §4.22, exemption from the Account Statement distribution requirement of that section. Provided, however, that the pool operator:

(A) Cause the pool’s Account Statements, including the certification required by §4.22(h), to be readily accessible on an Internet Web site maintained by the pool operator within 30 calendar days after the last day of the applicable reporting period and continuing for a period of not less than 30 calendar days; and

(B) Cause the Disclosure Document for the pool to clearly indicate:

(1) That the information required to be included in the Account Statements will be readily accessible on an Internet Web site maintained by the pool operator; and

(2) The Internet address of such Web site.

(iii) In the case of §4.23, exemption from the requirement to keep the books and records specified by that section at the pool operator’s main business office. Provided, however, that:

(A) The books and records that the pool operator will not keep at its main business office will be maintained by one or more of the following: The pool’s administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool;

(B) At the time it files electronically with the National Futures Association the notice required under paragraph (d) of this section, the pool operator files a statement that:

(1) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the pool operator;

(2) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the pool operator;

(3) Specifies, by reference to the respective paragraph of §4.23, the books and records that such person will be keeping; and

(4) Contains representations from the pool operator that:

(i) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by §4.23 changes, by identifying in such amendment the new location and any other information that has changed;

(ii) It remains responsible for ensuring that all books and records required by §4.23 are kept in accordance with §1.31;

(iii) Within forty-eight hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the pool operator’s main business office. Provided, however, that if the original books and records are permitted to be, and are maintained, at a location outside the

United States, its territories or possessions, the pool operator will obtain and provide such original books and records for inspection at the pool operator's main business office within seventy-two hours of such a request; and

(iv) It will disclose in the pool’s Disclosure Document the location of its books and records that are required under §4.23.

(C) At the time it files the notice required under paragraph (d) of this section, the pool operator files electronically with the National Futures Association a statement from each person who will be keeping required books and records in lieu of the pool operator wherein such person:

(1) Acknowledges that the pool operator intends that the person keep and maintain required pool books and records;

(2) Agrees to keep and maintain such required books and records in accordance with §1.31 of this chapter and to make such required books and records open to inspection by any representative of the Commission or the United States Justice Department in accordance with §1.31 of this chapter and to make such required books and records available to pool participants in accordance with §4.23 of this chapter.

(d)(1) Notice of claim for exemption. Any registered commodity pool operator, or applicant for commodity pool operator registration, who desires to claim the relief available under paragraph (b) or (c) of this §4.12 must file electronically a claim of exemption with the National Futures Association through its electronic exemption filing system. Such claim must:

(i) Provide the name, main business address and main business telephone number of the registered commodity pool operator, or applicant for such registration, making the request;

(ii) Provide the name of the commodity pool for which the request is being made;

(iii) Contain representations that the pool will be operated in compliance with §4.12(b)(1)(i) and the pool operator will comply with the requirements of §4.12(b)(1)(ii);

(A) The pool will be operated in compliance with paragraph (b)(1)(i) of this section and the pool operator will comply with the requirements of paragraph (b)(1)(ii) of this section; or

(B) The pool will be operated in compliance with paragraph (c)(1) of this section;

(iv) Specify the relief sought under paragraph (b)(2) or (c)(2) of this section, as the case may be, and

(v) Be filed by a representative duly authorized to bind the pool operator.

(2)(i) The claim of exemption must be filed before the date the commodity pool first enters into a commodity interest transaction.

(ii) The claim of exemption shall be effective upon filing: Provided, however, That any exemption claimed hereunder:

(A) Will not be effective unless and until the notice required by this paragraph (d) contains all information called for herein and any statements required under paragraph (c)(2)(iii) have been provided; and

(B) Will cease to be effective upon any change which would render the representations made pursuant to paragraph (d)(1)(iii) of this section inaccurate or the continuation of such representations false or misleading.

(3)(i) If a claim of exemption has been made under §4.12(b)(2)(i), the commodity pool operator must make a statement to that effect on the cover page of each offering memorandum, or amendment thereto, that it is required to file with the National Futures Association pursuant to §4.26.

(ii) If a claim of exemption has been made with respect to paragraph (b)(2)(iii) of this section, the pool operator must make a statement to that effect on the cover page of each annual report that it is required to file with the National Futures Association pursuant to §4.22(c).

(4)(i) Any claim of exemption effective hereunder shall be effective only with respect to the pool for which it has been made.

(ii) The effectiveness of such claim shall not affect the obligations of the commodity pool operator to comply with all other applicable provisions of this part 4, the Act and the Commission’s rules and regulations issued thereunder with respect to the pool and
any other pool the pool operator operates or intends to operate.

§ 4.13 Exemption from registration as a commodity pool operator.

This section is organized as follows: Paragraph (a) of this section specifies the criteria that must be met to qualify for exemption from registration under this section; paragraph (b) of this section governs the notice that must be filed to claim exemption from registration; paragraph (c) of this section sets forth the continuing obligations of a person who has claimed exemption under this section; paragraph (d) of this section specifies information certain persons must provide if they subsequently register; paragraph (e) of this section specifies the effect of registration on a person who has claimed an exemption under this section or who is eligible to claim an exemption from registration hereunder; and paragraph (f) of this section specifies the effect of this section on § 4.5 of this chapter.

(a) A person is not required to register under the Act as a commodity pool operator if:

(1)(i) It does not receive any compensation or other payment, directly or indirectly, for operating the pool; except reimbursement for the ordinary administrative expenses of operating the pool;

(ii) It operates only one commodity pool at any time;

(iii) It is not otherwise required to register with the Commission and is not a business affiliate of any person required to register with the Commission; and

(iv) Neither the person nor any other person involved with the pool does any advertising in connection with the pool (for purposes of this section, advertising includes the systematic solicitation of prospective participants by telephone or seminar presentation);

(2)(i) None of the pools operated by it has more than 15 participants at any time; and

(ii) The total gross capital contributions it receives for units of participation in all of the pools it operates or that it intends to operate do not in the aggregate exceed $100,000.

(iii) For the purpose of determining eligibility for exemption under paragraph (a)(2) of this section, the person may exclude the following participants and their contributions:

(A) The pool’s operator, commodity trading advisor, and the principals thereof;

(B) A child, sibling or parent of any of these participants;

(C) The spouse of any participant specified in paragraph (a)(2)(iii)(A) or (B) of this section; and

(D) Any relative of a participant specified in paragraph (a)(2)(iii)(A), (B) or (C) of this section, its spouse or a relative of its spouse, who has the same principal residence as such participant;

(3) For each pool for which the person claims exemption from registration under this paragraph (a)(3):

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold without marketing to the public in the United States;

(ii) At all times, the pool meets one or the other of the following tests with respect to its commodity interest positions, including positions in security futures products, whether entered into for bona fide hedging purposes or otherwise:

(A) The aggregate initial margin, premiums, and required minimum security deposit for retail forex transactions (as defined in § 5.1(m) of this chapter) required to establish such positions, determined at the time the most recent position was established, will not exceed 5 percent of the liquidation value of the pool’s portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into; Provided, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in §190.01(x) of this chapter may be excluded in computing such 5 percent; or

(B) The aggregate notional value of such positions, determined at the time the most recent position was established, does not exceed 100 percent of the liquidation value of the pool’s
portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into. For the purpose of this paragraph:

(1) The term “notional value” shall be calculated for each futures position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract), by the current market price per unit, for each such option position by multiplying the number of contracts by the size of the contract, adjusted by its delta, in contract units (taking into account any multiplier specified in the contract), by the strike price per unit, for each such retail forex transaction, by calculating the value in U.S. Dollars of such transaction, at the time the transaction was established, excluding for this purpose the value in U.S. Dollars of offsetting long and short transactions, if any, and for any cleared swap by the value as determined consistent with the terms of 17 CFR part 45; and

(2) The person may net futures contracts with the same underlying commodity across designated contract markets and foreign boards of trade; and swaps cleared on the same derivatives clearing organization where appropriate; and

(iii) The person reasonably believes, at the time of investment (or, in the case of an existing pool, at the time of conversion to a pool meeting the criteria of paragraph (a)(3) of this section), that each person who participates in the pool is:

(A) An “accredited investor,” as that term is defined in §230.501 of this title;

(B) A trust that is not an accredited investor but that was formed by an accredited investor for the benefit of a family member;

(C) A “knowledgeable employee,” as that term is defined in §270.3c–5 of this title;

(D) A “qualified eligible person,” as that term is defined in §4.7(a)(2)(viii)(A) of this chapter; or

(E) A person eligible to participate in a pool for which the pool operator can claim exemption from registration under paragraph (a)(4) of this section; and

(iv) Participations in the pool are not marketed as or in a vehicle for trading in the commodity futures or commodity options markets; Provided, That nothing in paragraph (a)(3) of this section shall prohibit the person from claiming an exemption under this section if it additionally operates one or more pools for which it meets the criteria of paragraph (a)(4) of this section; (4) [Reserved]

(5) The person is acting as a director or trustee with respect to a pool whose operator is registered as a commodity pool operator and is eligible to claim relief under §4.12(c) of this chapter, Provided, however, that:

(i) The person acts in such capacity solely to comply with the requirements under section 10A of the Securities Exchange Act of 1934, as amended, and any Securities and Exchange Commission rules and exchange listing requirements adopted pursuant thereto, that the pool have an audit committee comprised exclusively of independent directors or trustees;

(ii) The person has no power or authority to manage or control the operations or activities of the pool except as necessarily to comply with such requirements; and

(iii) The registered pool operator of the pool is and will be liable for any violation of the Act or the Commission’s regulations by the person in connection with the person’s serving as a director or trustee with respect to the pool.

(6)(i) Eligibility for exemption under paragraph (a)(1), (a)(2), (a)(3) or (a)(4) of this section is subject to the person furnishing in written communication physically delivered or delivered through electronic transmission to each prospective participant in the pool:

(A) A statement that the person is exempt from registration with the Commission as a commodity pool operator and that therefore, unlike a registered commodity pool operator, it is not required to deliver a Disclosure Document and a certified annual report to participants in the pool; and

(B) A description of the criteria pursuant to which it qualifies for such exemption from registration.
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(ii) The person must make these disclosures by no later than the time it delivers a subscription agreement for the pool to a prospective participant in the pool.

(b)(1) Any person who desires to claim the relief from registration provided by this section, must file electronically a notice of exemption from commodity pool operator registration with the National Futures Association through its electronic exemption filing system. The notice must:

(i) Provide the name, main business address, main business telephone number, main facsimile number and main email address of the person claiming the exemption and the name of the pool for which it is claiming exemption;

(ii) Contain the section number pursuant to which the operator is filing the notice (i.e., § 4.13(a)(1), (2), or (3)) and represent that the pool will be operated in accordance with the criteria of that paragraph; and

(iii) Be filed by a representative duly authorized to bind the person.

(2) The person must file the notice by no later than the time that the pool operator delivers a subscription agreement for the pool to a prospective participant in the pool; Provided, however, that in the case of a claim for relief under § 4.13(a)(5), the person must file the notice by the later of the effective date of the pool’s registration statement under the Securities Act of 1933 or the date on which the person first becomes a director or trustee; and Provided, further, that where a person registered with the Commission as a commodity pool operator intends to withdraw from registration in order to claim exemption hereunder, the person must notify its pool’s participants in written communication physically delivered or delivered through electronic transmission that it intends to withdraw from registration and claim the exemption, and it must provide each such participant with a right to redeem its interest in the pool prior to the person filing a notice of exemption from registration.

(3) The notice will be effective upon filing, provided the notice is materially complete.

(4) Annual notice. Each person who has filed a notice of exemption from registration under this section must affirm on an annual basis the notice of exemption from registration, withdraw such exemption due to the cessation of activities requiring registration or exemption therefrom, or withdraw such exemption and apply for registration within 60 days of the calendar year end through National Futures Association’s electronic exemption filing system.

(5) Each person who has filed a notice of exemption from registration under this section must, in the event that any of the information contained or representations made in the notice becomes inaccurate or incomplete, amend the notice through National Futures Association’s electronic exemption filing system as may be necessary to render the notice accurate and complete. This amendment must be filed electronically within 15 business days after the pool operator becomes aware of the occurrence of such event.

(c)(1) Each person who has filed a notice of exemption from registration under this section must:

(i) Make and keep all books and records prepared in connection with its activities as a pool operator for a period of five years from the date of preparation;

(ii) Keep such books and records readily accessible during the first two years of the five-year period. All such books and records must be available for inspection upon the request of any representative of the Commission, the United States Department of Justice, or any other appropriate regulatory agency; and

(iii) Submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the applicable criteria for exemption under this section.

(2) Each person who has filed a notice of exemption from registration pursuant to paragraph (a)(1) or (a)(2) of this section must:

(i) Promptly furnish to each participant in the pool a copy of each monthly statement for the pool that the pool operator received from a futures commission merchant pursuant to § 1.33 of this chapter; and
(i) Clearly show on such statement, or on an accompanying supplemental statement, the net profit or loss on all commodity interests closed since the date of the previous statement.

(d) Each person who applies for registration as a commodity pool operator subsequent to claiming relief under paragraph (a)(1) or (a)(2) of this section must include with its application the financial statements and other information required by §4.22(c)(1) through (5) for each pool that it has operated as an operator exempt from registration. That information must be presented and computed in accordance with generally accepted accounting principles consistently applied. If the person is granted registration as a commodity pool operator, it must comply with the provisions of this part with respect to each such pool.

(e)(1) Subject to the provisions of paragraph (e)(2) of this section, if a person who is eligible for exemption from registration as a commodity pool operator under this section nonetheless registers as a commodity pool operator, the person must comply with the provisions of this part with respect to each commodity pool identified on its registration application or supplement thereto.

(2) If a person operates one or more commodity pools described in paragraph (a)(3) of this section, and one or more commodity pools for which it must be, and is, registered as a commodity pool operator, the person is exempt from the requirements applicable to a registered commodity pool operator with respect to the pool or pools described in paragraph (a)(3) of this section; Provided, That the person:

(i) Furnishes in written communication physically delivered or delivered through electronic transmission to each prospective participant in a pool described in paragraph (a)(3) of this section that it operates:

(A) A statement that it will operate the pool as if the person was exempt from registration as a commodity pool operator;

(B) A description of the criteria pursuant to which it will so operate the pool;

(ii) Complies with paragraph (c) of this section; and

(iii) Provides each existing participant in a pool that the person elects to operate as described in paragraph (a)(3) of this section a right to redeem the participant’s interest in the pool, and informs each such participant of that right no later than the time the person commences to operate the pool as described in paragraph (a)(3) of this section.

(f) The filing of a notice of exemption from registration under this section will not affect the ability of a person to qualify for exclusion from the definition of the term “commodity pool operator” under §4.5 in connection with its operation of another trading vehicle that is not covered under this §4.13.

(Approved by the Office of Management and Budget under control number 3038–0005)

[Secs. 2(a)(1), 4c(a)–(d), 4d, 4f, 4g, 4k, 4m, 4n, 8a, 15 and 17, Commodity Exchange Act (7 U.S.C. 2, 4, 6c(a)–(d), 6f, 6g, 6k, 6m, 6n, 12a, 19 and 21; 5 U.S.C. 552 and 552b))


§4.14 Exemption from registration as a commodity trading advisor.

This section is organized as follows: Paragraph (a) of this section specifies the criteria that must be met to qualify for exemption from registration under this section, including the notice of exemption from registration and continuing obligations of persons who have claimed exemption under paragraph (a)(8) of this section; paragraph (b) of this section concerns “cash market transactions”; and paragraph (c) of this section specifies the effect of registration on a person who has claimed an exemption from registration under this section or who is eligible to claim an exemption from registration hereunder.

(a) A person is not required to register under the Act as a commodity trading advisor if:

(1) It is a dealer, processor, broker, or seller in cash market transactions of any commodity (or product thereof)
and the person’s commodity trading advice is solely incidental to the conduct of its cash market business;

(2) It is a non-profit, voluntary membership, trade association or farm organization and the person’s commodity trading advice is solely incidental to the conduct of its business as such association or organization;

(3) It is registered under the Act as an associated person and the person’s commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it is so registered;

(4) It is registered under the Act as a commodity pool operator and the person’s commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it is so exempt;

(5) It is registered under the Act as an introducing broker and the person’s trading advice is solely in connection with its business as an introducing broker;

(7)(i) It is registered under the Act as a leverage transaction merchant and the person’s trading advice is solely in connection with its business as a leverage transaction merchant;

(ii) It is registered under the Act as a retail foreign exchange dealer and the person’s trading advice is solely in connection with its business as a retail foreign exchange dealer.

(8) It is registered as an investment adviser under the Investment Advisers Act of 1940 or with the applicable securities regulatory agency of any State, or it is exempt from such registration, or it is excluded from the definition of the term “investment adviser” pursuant to the provisions of sections 202(a)(2) and 202(a)(11) of the Investment Advisers Act of 1940, Provided, That:

(i) The person’s commodity interest trading advice is directed solely to, and for the sole use of, one or more of the following:

(A) “Qualifying entities,” as that term is defined in §4.5(b), for which a notice of eligibility has been filed;

(B) Collective investment vehicles that are excluded from the definition of the term commodity “pool” under §4.5(a)(4); and

(C) Commodity pools that are organized and operated outside of the United States, its territories or possessions, where:

(1) The commodity pool operator of each such pool has not so organized and is not so operating the pool for the purpose of avoiding commodity pool operator registration;

(2) With the exception of the pool’s operator, advisor and their principals, solely “Non-United States persons,” as that term is defined in §4.7(a)(1)(iv), will contribute funds or other capital to, and will own beneficial interests in, the pool; Provided, That units of participation in the pool held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10 percent of the beneficial interest of the pool;

(3) No person affiliated with the pool conducts any marketing activity for the purpose of, or that could reasonably have the effect of, soliciting participation from other than Non-United States persons; and

(4) No person affiliated with the pool conducts any marketing activity from within the United States, its territories or possessions; and

(D) A commodity pool operator who has claimed an exemption from registration under §4.13(a)(3), or, if registered as a commodity pool operator, who may treat each pool it operates that meets the criteria of §4.13(a)(3) as if it were not so registered; and

(ii) The person:

(A) Provides commodity interest trading advice solely incidental to its business of providing securities or other investment advice to qualifying entities, collective investment vehicles and commodity pools as described in paragraph (a)(8)(i) of this section; and

(B) Is not otherwise holding itself out as a commodity trading advisor.

(iii)(A) A person who desires to claim the relief from registration provided by this §4.14(a)(8) must file electronically a notice of exemption from commodity trading advisor registration with the National Futures Association through
its electronic exemption filing system. The notice must:

(1) Provide the name, main business address, main business telephone number, main facsimile number and main email address of the trading advisor claiming the exemption;

(2) Contain the section number pursuant to which the advisor is filing the notice (i.e., under § 4.14(a)(8)(i)) and represent that it will provide commodity interest advice to its clients in accordance with the criteria of that paragraph or paragraphs; and

(3) Be filed by a representative duly authorized to bind the person.

(B) The person must file the notice by no later than the time it delivers an advisory agreement for the trading program pursuant to which it will offer commodity interest advice to a client; Provided, That where the advisor is registered with the Commission as a commodity trading advisor, it must notify its clients in written communication physically delivered or delivered through electronic transmission that it intends to withdraw from registration and claim the exemption and must provide each such client with a right to terminate its advisory agreement prior to the person filing a notice of exemption from registration.

(C) The notice will be effective upon filing, provided the notice is materially complete.

(D) Annual notice. Each person who has filed a notice of exemption from registration under this section must affirm on an annual basis the notice of exemption from registration, withdraw such exemption due to the cessation of activities requiring registration or exemption therefrom, or withdraw such exemption and apply for registration within 60 days of the calendar year end through National Futures Association’s electronic exemption filing system.

(E) Each person who has filed a notice of exemption from registration under this section must, in the event that any of the information contained or representations made in the notice becomes inaccurate or incomplete, amend the notice electronically through National Futures Association’s electronic exemption filing system as may be necessary to render the notice accurate and complete. This amendment must be filed within 15 business days after the trading advisor becomes aware of the occurrence of such event.

(iv) Each person who has filed a notice of registration exemption under this § 4.14(a)(8) must:

(A)(1) Make and keep all books and records prepared in connection with its activities as a trading advisor, including all books and records demonstrating eligibility for and compliance with the applicable criteria for exemption under this section, for a period of five years from the date of preparation; and

(2) Keep such books and records readily accessible during the first two years of the five-year period. All such books and records must be available for inspection upon the request of any representative of the Commission, the United States Department of Justice, or any other appropriate regulatory agency; and

(B) Submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the applicable criteria for exemption under this section;

(9) It does not engage in any of the following activities:

(i) Directing client accounts; or

(ii) Providing commodity trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients; or

(10) If, as provided for in section 4m(1) of the Act, during the course of the preceding 12 months, it has not furnished commodity trading advice to more than 15 persons and it does not hold itself out generally to the public as a commodity trading advisor.

(i) For the purpose of paragraph (a)(10) of this section, the following are deemed a single person:

(A) A natural person, and:

(1) Any minor child of the natural person;

(2) Any relative, spouse, or relative of the spouse of the natural person who has the same principal residence;

(3) All accounts of which the natural person and/or the persons referred to in paragraph (a)(10)(I)(A) of this section are the only primary beneficiaries; and
(4) All trusts of which the natural person and/or the persons referred to in paragraph (a)(10)(i)(A) of this section are the only primary beneficiaries;

(B)(i) A corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(10)(i)(A)(4) of this section), or other legal organization (any of which are referred to hereinafter as a “legal organization”) that receives commodity interest trading advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members, or beneficiaries (any of which are referred to hereinafter as an “owner”); and

(2) Two or more legal organizations referred to in paragraph (a)(10)(i)(B)(1) of this section that have identical owners.

(ii) Special Rules. For the purpose of paragraph (a)(10) of this section:

(A) An owner must be counted in its own capacity as a person if the commodity trading advisor provides advisory services to the owner separate and apart from the advisory services provided to the legal organization; Provided, That the determination that an owner is a client will not affect the applicability of paragraph (a)(10) of this section with regard to any other owner;

(B)(1) A general partner of a limited partnership, or other person acting as a commodity trading advisor to the partnership, may count the limited partnership as one person; and

(2) A manager or managing member of a limited liability company, or any other person acting as a commodity trading advisor to the company, may count the limited liability company as one person.

(C) A commodity trading advisor that has its principal office and place of business outside of the United States, its territories or possessions must count only clients that are residents of the United States, its territories and possessions; a commodity trading advisor that has its principal office and place of business in the United States or in any territory or possession thereof must count all clients.

(iii) Holding Out. Any commodity trading advisor relying on paragraph (a)(10) of this section shall not be deemed to be holding itself out generally to the public as a commodity trading advisor, within the meaning of section 4m(1) of the Act, solely because it participates in a non-public offering of interests in a collective investment vehicle under the Securities Act of 1933.

(b) For purposes of this section, “cash market transactions” shall not include transactions involving contracts for the purchase or sale of a commodity for future delivery or transactions subject to Commission regulation under section 4c or 19 of the Act.

(c)(1) Subject to the provisions of paragraph (c)(2) of this section, if a person who is eligible for exemption from registration as a commodity trading advisor under this section nonetheless registers as a commodity trading advisor, the person must comply with the provisions of this part with respect to those clients for which it could have claimed an exemption from registration hereunder.

(2) If a person provides commodity interest trading advice to a client described in paragraph (a) of this section and to a client for which it must be, and is, registered as a commodity trading advisor, the person is exempt from the requirements applicable to a registered commodity trading advisor with respect to the clients so described; Provided, That the person furnishes in writing to each prospective client described in paragraph (a) of this section a statement that it will provide commodity interest trading advice to the client as if it was exempt from registration as a commodity trading advisor; Provided Further, That the person provides to each existing client described in paragraph (a) of this section a right to terminate its advisory agreement, and informs such client of that right no later than the time the person commences to provide commodity interest trading advice to the client as if
§ 4.15 Continued applicability of anti-fraud section.

The provisions of section 40 of the Act shall apply to any person even though such person is exempt from registration under this part 4, and it shall continue to be unlawful for any such person to violate section 40 of the Act.

[50 FR 15884, Apr. 23, 1985]

§ 4.16 Prohibited representations.

It shall be unlawful for any commodity pool operator, commodity trading advisor, principal thereof or person who solicits therefor to represent or imply in any manner whatsoever that such commodity pool operator or commodity trading advisor has been sponsored, recommended or approved, or that its abilities or qualifications have in any respect been passed upon, by the Commission, the Federal government or any agency thereof.

Subpart B—Commodity Pool Operators

§ 4.20 Prohibited activities.

(a)(1) Except as provided in paragraph (a)(2) of this section, a commodity pool operator must operate its pool as an entity cognizable as a legal entity separate from that of the pool operator.

(a)(2) The Commission may exempt a corporation from the requirements of paragraph (a)(1) of this section if:

(i) The corporation represents in writing to the Commission that each participant in its pool will be issued stock or other evidences of ownership in the corporation for all funds, securities or other property that the participant contributes for the purchase of an ownership interest in the pool;

(ii) The corporation demonstrates to the satisfaction of the Commission that it has established procedures adequate to assure compliance with paragraphs (b) and (c) of this section; and

(iii) The Commission finds that the exemption is not contrary to the public interest and to the purposes of the provision from which the exemption is sought.

(b) All funds, securities or other property received by a commodity pool operator from an existing or prospective pool participant for the purchase of an interest or as an assessment (whether voluntary or involuntary) on an interest in a pool that it operates or that it intends to operate must be received in the pool’s name.

(c) No commodity pool operator may commingle the property of any pool that it operates or that it intends to operate with the property of any other person.

(Approved by the Office of Management and Budget under control number 3038–0005)

Document in any material respect, the prospective participant must be in receipt of the Disclosure Document at least 48 hours prior to its subscription being accepted by the pool operator.

(2) For the purpose of the Disclosure Document delivery requirement, including any offering memorandum delivered pursuant to § 4.7(b)(1) or 4.12(b)(2)(i), the term “prospective pool participant” does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of the offered pool.

(b) The commodity pool operator may not accept or receive funds, securities or other property from a prospective participant unless the pool operator first receives from the prospective participant an acknowledgment signed and dated by the prospective participant stating that the prospective participant received a Disclosure Document for the pool. Where a Disclosure Document is delivered to a prospective pool participant by electronic means, in lieu of a manually signed and dated acknowledgment, the pool operator may establish receipt by electronic means that use a unique identifier to confirm the identity of the recipient of such Disclosure Document, Provided, however, That the requirement of §4.23(a)(3) to retain the acknowledgment specified in this paragraph (b) applies equally to such substitute evidence of receipt, which must be retained either in hard copy form or in another form approved by the Commission.

§ 4.22 Reporting to pool participants.

(a) Except as provided in paragraph (a)(4) or (a)(6) of this section, each commodity pool operator registered or required to be registered under the Act must periodically distribute to each participant in each pool that it operates, within 30 calendar days after the last date of the reporting period prescribed in paragraph (b) of this section, an Account Statement, which shall be presented in the form of a Statement of Operations and a Statement of Changes in Net Assets, for the prescribed period. These financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied. The Account Statement must be signed in accordance with paragraph (b) of this section.

(i) The portion of the Account Statement which must be presented in the form of a Statement of Operations must separately itemize the following information:

(ii) The change in unrealized net gain or loss on commodity interest positions during the reporting period;

(iii) The total amount of net gain or loss from all other transactions in which the pool engaged during the reporting period, including interest and dividends earned on funds not paid as premiums or used to margin the pool’s commodity interest positions;

(iv) The total amount of all management fees during the reporting period;

(v) The total amount of all advisory fees during the reporting period;

(vi) The total amount of all brokerage commissions during the reporting period;

(vii) The total amount of other fees for commodity interest and other investment transactions during the reporting period; and

(viii) The total amount of all other expenses incurred or accrued by the pool during the reporting period.

(2) The portion of the Account Statement that must be presented in the form of a Statement of Changes in Net Assets must separately itemize the following information:

(i) The net asset value of the pool as of the beginning of the reporting period;

(ii) The total amount of additions to the pool, whether voluntary or involuntary, made during the reporting period;

(iii) The total amount of withdrawals from and redemption of participation units in the pool, whether voluntary or involuntary, for the reporting period;

(iv) The total net income or loss of the pool during the reporting period;

(v) The net asset value of the pool as of the end of the reporting period; and

(vi)(A) The net asset value per outstanding participation unit in the pool as of the end of the reporting period, or

(B) The total value of the participant’s interest or share in the pool as of the end of the reporting period.

(3) The Account Statement must also disclose any material business dealings between the pool, the pool’s operator, commodity trading advisor, futures commission merchant, retail foreign exchange dealer, swap dealer, or the principals thereof that previously have not been disclosed in the pool’s Disclosure Document or any amendment thereto, other Account Statements or Annual Reports.

(4) For the purpose of the Account Statement delivery requirement, including any Account Statement distributed pursuant to §4.7(b)(2) or 4.12(b)(2)(ii), the term “participant” does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of a pool in which the commodity pool has invested.

(5) Where the pool is comprised of more than one ownership class or series, information for the series or class on which the account statement is reporting should be presented in addition to the information presented for the pool as a whole; except that, for a pool that is a series fund structured with a limitation on liability among the different series, the account statement is not required to include consolidated information for all series.

(6) A commodity pool operator of a pool that meets the conditions specified in paragraph (d)(2)(i) of this section and has filed notice pursuant to paragraph (d)(2)(ii) of this section may elect to follow the same accounting treatment with respect to the computation and presentation of the account statement.

(b) The Account Statement must be distributed at least monthly in the case of pools with net assets of more than $500,000 at the beginning of the pool’s fiscal year, and otherwise at least quarterly; Provided, however, That an Account Statement for the last reporting period of the pool’s fiscal year need not be distributed if the Annual Report required by paragraph (c) of this section is sent to pool participants within 45 calendar days after the end of the fiscal year. The requirement to distribute an Account Statement shall commence as of the date the pool is formed as specified in paragraph (g)(1) of this section.

(c) Except as provided in paragraph (c)(7) or (c)(8) of this section, each commodity pool operator registered or required to be registered under the Act must distribute an Annual Report to each participant in each pool that it operates, and must electronically submit a copy of the Report and key financial balances from the Report to the National Futures Association pursuant to the electronic filing procedures of the National Futures Association, within 90 calendar days after the end of the pool’s fiscal year or the permanent cessation of trading, whichever is earlier; Provided, however, that if during any calendar year the commodity pool operator did not operate a commodity pool, the pool operator must so notify the National Futures Association within 30 calendar days after the end of such calendar year. The Annual Report must be affirmed pursuant to paragraph (h) of this section and must contain the following:

1) The net asset value of the pool as of the end of each of the pool’s two preceding fiscal years.

2)(i) The net asset value per outstanding participation unit in the pool as of the end of each of the pool’s two preceding fiscal years, or

(ii) The total value of the participant’s interest or share in the pool as of the end of each of the pool’s two preceding fiscal years,

3) A Statement of Financial Condition as of the close of the pool’s fiscal year and preceding fiscal year.

4) Statements of Operations, and Changes in Net Assets, for the period between—

1) The later of:

(A) The date of the most recent Statement of Financial Condition delivered to the National Futures Association pursuant to this paragraph (c); or

(B) The date of the formation of the pool; and
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(i) The close of the pool’s fiscal year, together with Statements of Operations, and Changes in Net Assets for the corresponding period of the previous fiscal year.

(5) Appropriate footnote disclosure and such further material information as may be necessary to make the required statements not misleading. For a pool that invests in other funds, this information must include, but is not limited to, separately disclosing the amounts of income, management and incentive fees associated with each investment in an investee fund that exceeds five percent of the pool’s net assets. The management and incentive fees associated with an investment in an investee fund that is less than five percent of the pool’s net assets may be combined and reported in the aggregate with the income, management and incentive fees of other investee funds that, individually, represent an investment of less than five percent of the pool’s net assets. If the commodity pool operator is not able to obtain the specific amounts of management and incentive fees charged by an investee fund, the commodity pool operator must disclose the percentage amounts and computational basis for each such fee and include a statement that the CPO is not able to obtain the specific fee amounts for this fund;

(6) Where the pool is comprised of more than one ownership class or series, information for the series or class on which the financial statements are reporting should be presented in addition to the information presented for the pool as a whole; except that, for a pool that is a series fund structured with a limitation on liability among the different series, the financial statements are not required to include consolidated information for all series.

(7) For a pool that has ceased operation prior to, or as of, the end of the fiscal year, the commodity pool operator may provide the following, within 90 days of the permanent cessation of trading, in lieu of the annual report that would otherwise be required by § 4.22(c) or § 4.7(b)(3):

(1) The date of the most recent Statement of Financial Condition filed with the National Futures Association pursuant to this paragraph (c); or

(2) The date of the formation of the pool; and

(B) The close of the pool’s fiscal year or the date of the cessation of trading, whichever is earlier; and

(ii)(A) An explanation of the winding down of the pool’s operations and written disclosure that all interests in, and assets of, the pool have been redeemed, distributed or transferred on behalf of the participants;

(B) If all funds have not been distributed or transferred to participants by the time that the final report is issued, disclosure of the value of assets remaining to be distributed and an approximate timeframe of when the distribution will occur. If the commodity pool operator does not distribute the remaining pool assets within the timeframe specified, the commodity pool operator must provide written notice to each participant and to the National Futures Association that the distribution of the remaining assets of the pool has not been completed, the value of assets remaining to be distributed, and a timeframe of when the final distribution will occur.

(C) If the commodity pool operator will not be able to liquidate the pool’s assets in sufficient time to prepare, file and distribute the final annual report for the pool within 90 days of the permanent cessation of trading, the commodity pool operator must provide written notice to each participant and to National Futures Association disclosing:

(1) The value of investments remaining to be liquidated, the timeframe within which liquidation is expected to occur, any impediments to liquidation, and the nature and amount of any fees and expenses that will be charged to the pool prior to the final distribution of the pool’s funds;

(2) Which financial reports the commodity pool operator will continue to provide to pool participants from the time that trading ceased until the final annual report is distributed, and the frequency with which such reports will be provided, pursuant to the pool’s operative documents; and
(3) The timeframe within which the commodity pool operator will provide the final report.

(iii) A report filed pursuant to this paragraph (c)(7) that would otherwise be required by this paragraph (c) is not required to be audited in accordance with paragraph (d) of this section if the commodity pool operator obtains from all participants written waivers of their rights to receive an audited Annual Report, and at the time of filing the Annual Report with National Futures Association, certifies that it has received waivers from all participants. The commodity pool operator must maintain the waivers in accordance with §1.31 of this chapter and must make the waivers available to the Commission or National Futures Association upon request.

(8) For the purpose of the Annual Report distribution requirement, including any annual report distributed pursuant to §4.7(b)(3) or 4.12(b)(2)(iii), the term “participant” does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of a pool in which the commodity pool has invested; Provided, That the Annual Report of such investing pool contain financial statements that include such information as the Commission may specify concerning the operations of the pool in which the commodity pool has invested.

(d)(1) The financial statements in the Annual Report must be presented and computed in accordance with generally accepted accounting principles consistently applied and must be audited by an independent public accountant. The requirements of §1.16(g) of this chapter shall apply with respect to the engagement of such independent public accountants, except that any related notifications to be made may be made solely to the National Futures Association, and the certification must be in accordance with §1.16 of this chapter, except that the following requirements of that section shall not apply:

(i) All other references in §1.16 to the segregation requirements; and

(ii) Section 1.16(c)(5), (d)(2), (e)(2), and (f).

(2)(i) The financial statements in the Annual Report required by this section or by §4.7(b)(3) may be presented and computed in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board if the following conditions are met:

(A) The pool is organized under the laws of a foreign jurisdiction;

(B) The Annual Report will include a condensed schedule of investments, or, if required by the alternate accounting standards, a full schedule of investments;

(C) The preparation of the pool’s financial statements under International Financial Reporting Standards is not inconsistent with representations set forth in the pool’s offering memorandum or other operative document that is made available to participants;

(D) Special allocations of ownership equity will be reported in accordance with §4.22(e)(2); and

(E) In the event that the International Financial Reporting Standards require consolidated financial statements for the pool, such as a feeder fund consolidating with its master fund, all applicable disclosures required by generally accepted accounting principles for the feeder fund must be presented with the reporting pool’s consolidated financial statements.

(ii) The commodity pool operator of a pool that meets the conditions specified in this paragraph (d)(2) may claim relief from the requirement in paragraph (d)(1) of this section by filing a notice with the National Futures Association, within 90 calendar days after the end of the pool’s fiscal year.

(A) The notice must contain the name, main business address, main telephone number and the National Futures Association registration identification number of the commodity pool operator, and name and the identification number of the commodity pool.

(B) The notice must include representations regarding the pool’s compliance with each of the conditions specified in §4.22(d)(2)(A) through (D), and, if applicable, (E); and
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(C) The notice must be signed by the commodity pool operator in accordance with paragraph (h) of this section.

(e)(1) The Statement of Operations required by this section must itemize brokerage commissions, management fees, advisory fees, incentive fees, interest income and expense, total realized net gain or loss from commodity interest trading, and change in unrealized net gain or loss on commodity interest positions during the pool’s fiscal year. Gains and losses on commodity interests need not be itemized by commodity or by specific delivery or expiration date.

(2)(i) Any share of a pool’s profits or transfer of a pool’s equity which exceeds the general partner’s or any other class’s share of profits computed on the general partner’s or other class’s pro rata capital contribution are “special allocations.” Special allocations of partnership equity or other interests must be recognized in the pool’s Statement of Operations in the same period as the net income, interest income, or other basis of computation of the special allocation is recognized. Special allocations must be recognized and classified either as an expense of the pool or, if not recognized as an expense of the pool, presented in the Statement of Operations as a separate, itemized allocation of the pool’s net income to arrive at net income available for pro rata distribution to all partners.

(ii) Special allocations of ownership interest also must be reported separately in the Statement of Partners’ Equity, in addition to the pro-rata allocations of net income, as to each class of ownership interest.

(3) Realized gains or losses on regulated commodities transactions presented in the Statement of Operations of a commodity pool may be combined with realized gains or losses from trading in non-commodity interest transactions, provided that the gains or losses to be combined are part of a related trading strategy.

(f)(1)(i) In the event the commodity pool operator finds that it cannot distribute the Annual Report for a pool that it operates within the time specified in paragraph (c) of this section without substantial undue hardship, it may file with the National Futures Association an application for extension of time to a specified date not more than 90 calendar days after the date as of which the Annual Report was to have been distributed. The application must be made by the pool operator and must:

(A) State the name of the pool for which the application is being made;

(B) State the reasons for the requested extension;

(C) Indicate that the inability to make a timely filing is due to circumstances beyond the control of the pool operator, if such is the case, and describe briefly the nature of such circumstances;

(D) Contain an undertaking to file the Annual Report on or before the date specified in the application; and

(E) Be filed with the National Futures Association prior to the date on which the Annual Report is due.

(ii) The application must be accompanied by a letter from the independent public accountant answering the following questions:

(A) What specifically are the reasons for the extension request?

(B) Do you have any indication from the part of your audit completed to date that would lead you to believe that the commodity pool operator was or is not meeting the recordkeeping requirements of this part or was or is not complying with the §4.20(c) prohibition on commingling of property of any pool with the property of any other person?

(iii) Within ten calendar days after receipt of an application for an extension of time, the National Futures Association shall:

(A) Notify the commodity pool operator of the grant or denial of the requested extension, or

(B) Indicate to the pool operator that additional time is required to analyze
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the request, in which case the amount of time needed will be specified.

(2) In the event a commodity pool operator finds that it cannot obtain information necessary to prepare annual financial statements for a pool that it operates within the time specified in either paragraph (c) of this section or § 4.7(b)(3)(i), as a result of the pool investing in another collective investment vehicle, it may claim an extension of time under the following conditions:

(i) The commodity pool operator must, within 90 calendar days of the end of the pool’s fiscal year, file a notice with the National Futures Association, except as provided in paragraph (f)(2)(v) of this section.

(ii) The notice must contain the name, main business address, main telephone number and the National Futures Association registration identification number of the commodity pool operator, and name and the identification number of the commodity pool.

(iii) The notice must state the date by which the Annual Report will be distributed and filed (the “Extended Date”), which must be no more than 180 calendar days after the end of the pool’s fiscal year. The Annual Report must be distributed and filed by the Extended Date.

(iv) The notice must include representations by the commodity pool operator that:

(A) The pool for which the Annual Report is being prepared has investments in one or more collective investment vehicles (the “Investments”);

(B) For all reports prepared under § 4.7(b)(3)(i) that are audited by an independent public accountant, the commodity pool operator has been informed by the independent public accountant engaged to audit the commodity pool’s financial statements that specified information required to complete the pool’s annual report is necessary in order for the accountant to render an opinion on the commodity pool’s financial statements. The notice must include the name, main business address, main telephone number, and contact person of the accountant; and

(C) The information specified by the accountant cannot be obtained in sufficient time for the Annual Report to be prepared, audited, and distributed before the Extended Date.

(D) For unaudited reports prepared under § 4.7(b)(3)(i), the commodity pool operator has been informed by the operators of the Investments that specified information required to complete the pool’s annual report cannot be obtained in sufficient time for the Annual Report to be prepared and distributed before the Extended Date.

(v) For each fiscal year following the filing of the notice described in paragraph (f)(2)(i) of this section, for a particular pool, it shall be presumed that the particular pool continues to invest in another collective investment vehicle and the commodity pool operator may claim the extension of time; Provided, however, that if the particular pool is no longer investing in another collective investment vehicle, then the commodity pool operator must file electronically with the National Futures Association an Annual Report within 90 days after the pool’s fiscal year-end accompanied by a notice indicating the change in the pool’s status.

(vi) Any notice or statement filed pursuant to this paragraph (f)(2) must be signed by the commodity pool operator in accordance with paragraph (h) of this section.

(g)(1) A commodity pool operator may initially elect any fiscal year for a pool, but the first fiscal year may not end more than one year after the pool’s formation. For purposes of this section, a pool shall be deemed to have elected the calendar year as the pool’s fiscal year.

(2) If a commodity pool operator elects a fiscal year other than the calendar year, it must give written notice of the election to all participants and must file the notice with the National Futures Association within 90 calendar days after the date of the pool’s formation. If this notice is not given, the pool operator will be deemed to have elected the calendar year as the pool’s fiscal year.

(3) The commodity pool operator must continue to use the elected fiscal
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year for the pool unless it provides written notice of any proposed change to all participants and files such notice with the National Futures Association at least 90 days before the change and the National Futures Association does not disapprove the change within 30 days after the filing of the notice.

(h)(1) Each Account Statement and Annual Report, including an Account Statement or Annual Report provided pursuant to §4.7(b) or 4.12(b), must contain an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the document is accurate and complete; Provided, however, That it shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in the document is not accurate and complete.

(2) Each oath or affirmation must be made by a representative duly authorized to bind the pool operator, and

(i) for the copy of a commodity pool’s Annual Report submitted to the National Futures Association, such representative shall satisfy the required oath or affirmation through compliance with the National Futures Association’s electronic filing procedures, and

(ii) for a commodity pool Account Statement or Annual Report distributed to participants, a facsimile of the manually signed oath or affirmation of such representative may be used so long as the manually signed original is retained in accordance with §4.23.

(3) For each manually signed oath or affirmation, there must be typed beneath the signed oath or affirmation:

(i) The name of the individual signing the document;

(ii) The capacity in which he is signing;

(iii) The name of the commodity pool operator for whom he is signing; and

(iv) The name of the commodity pool for which the document is being distributed.

(i) The Account Statement or Annual Report may be distributed to a pool participant by means of electronic media, a commodity pool operator must disclose to the participant that it intends to distribute electronically the Account Statement or Annual Report or both documents, as the case may be, absent objection from the participant, which objection, if any, the participant must make no later than 10 business days following its receipt of the disclosure.

(Approved by the Office of Management and Budget under control number 3038–0005)

(See Secs. 2(a)(1), 4(a)–(d), 4d, 4f, 4g, 4k, 4m, 4n, 6a, 15 and 17. Commodity Exchange Act (7 U.S.C. 2, 4, 6c(a)–(d), 6f, 6g, 6k, 6m, 6n, 12a, 19 and 21; 5 U.S.C. 552 and 552b))


§ 4.23 Recordkeeping.

Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner at its main business office and in accordance with §1.31. All books and records required by this section except those required by paragraphs (a)(3), (a)(4), (b)(1), (b)(2) and (b)(3) must be made available to participants for inspection and copying during normal business hours at the main business office of the pool operator. Upon request, copies must be sent by mail to any participant within five business days if reasonable reproduction and distribution costs are paid by the pool participant. If the commodity pool operator’s main business office is outside of the United States, its territories or possessions, then upon the request of a Commission representative, the pool operator must provide such books and records as requested at the place in the United States, its territories or possessions designated by the representative within 72 hours after the pool operator receives the request.

(a) Concerning the commodity pool: (1) An itemized daily record of each commodity interest transaction of the pool, showing the transaction date,

quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying commodity, swap type and counterparty, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized.

(2) A journal of original entry or other equivalent record showing all receipts and disbursements of money, securities and other property.

(3) The acknowledgement specified by § 4.21(b) for each participant in the pool.

(4) A subsidiary ledger or other equivalent record for each participant in the pool showing the participant’s name and address and all funds, securities and other property that the pool received from or distributed to the participant.

(5) Adjusting entries and any other records of original entry or their equivalent forming the basis of entries in any ledger.

(6) A general ledger or other equivalent record containing details of all asset, liability, capital, income and expense accounts.

(7) Copies of each confirmation or acknowledgment of a commodity interest transaction of the pool, and each purchase and sale statement and each monthly statement for the pool received from a futures commission merchant, retail foreign exchange dealer or swap dealer.

(8) Cancelled checks, bank statements, journals, ledgers, invoices, computer generated records, and all other records, data and memoranda prepared or received in connection with the operation of the pool.

(9) The original or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice (including the texts of standardized oral presentations and of radio, television, sem-
§ 4.24 General disclosures required.

Except as otherwise provided herein, a Disclosure Document must include the following information.

(a) Cautionary Statement. The following Cautionary Statement must be prominently displayed on the cover page of the Disclosure Document.

THE COMMODITY FUTURES TRADING COMMISSION HAS NOT PASSED UPON THE MERITS OF PARTICIPATING IN THIS COMMODITY POOL. THERFORE, BEFORE YOU DECIDE TO PARTICIPATE IN THIS COMMODITY POOL, YOU SHOULD CAREFULLY STUDY THIS DISCLOSURE DOCUMENT, INCLUDING A DESCRIPTION OF THE PRINCIPAL RISK FACTORS OF THIS INVESTMENT, AT PAGE (insert page number).

(b) Risk Disclosure Statement. (1) The following Risk Disclosure Statement must be prominently displayed immediately following any disclosures required to appear on the cover page of the Disclosure Document as provided by the Commission, by any applicable federal or state securities laws and regulations or by any applicable laws of non-United States jurisdictions.

RISK DISCLOSURE STATEMENT

YOU SHOULD CAREFULLY CONSIDER WHETHER YOUR FINANCIAL CONDITION PERMITS YOU TO PARTICIPATE IN A COMMODITY POOL. IN SO DOING, YOU SHOULD BE AWARE THAT COMMODITY INTEREST TRADING CAN QUICKLY LEAD TO LARGE LOSSES AS WELL AS GAINS. SUCH TRADING LOSSES CAN SHARPLY REDUCE THE NET ASSET VALUE OF THE POOL AND CONSEQUENTIAL THE VALUE OF YOUR INTEREST IN THE POOL. IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL. IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL.

FURTHER, COMMODITY POOLS MAY BE SUBJECT TO SUBSTANTIAL CHARGES FOR MANAGEMENT, AND ADVISORY AND BROKERAGE FEES. IT MAY BE NECESSARY FOR THOSE POOLS THAT ARE SUBJECT TO THESE CHARGES TO MAKE SUBSTANTIAL TRADING PROFITS TO AVOID DEPLETION OR EXHAUSTION OF THEIR ASSETS. THIS DISCLOSURE DOCUMENT CONTAINS A COMPLETE DESCRIPTION OF EACH EXPENSE TO BE CHARGED THIS POOL AT PAGE (insert page number) AND A STATEMENT OF THE PERCENTAGE RETURN NECESSARY TO BREAK EVEN, THAT IS, TO RECOVER THE AMOUNT OF YOUR INITIAL INVESTMENT, AT PAGE (insert page number).

THIS BRIEF STATEMENT CANNOT DISCLOSE ALL THE RISKS AND OTHER FACTORS NECESSARY TO EVALUATE YOUR PARTICIPATION IN THIS COMMODITY POOL. THEREFORE, BEFORE YOU DECIDE TO PARTICIPATE IN THIS COMMODITY POOL, YOU SHOULD CAREFULLY STUDY THIS DISCLOSURE DOCUMENT, INCLUDING A DESCRIPTION OF THE PRINCIPAL RISK FACTORS OF THIS INVESTMENT, AT PAGE (insert page number).

(2) If the pool may trade foreign futures or options contracts, the Risk Disclosure Statement must further state:

YOU SHOULD ALSO BE AWARE THAT THIS COMMODITY POOL MAY TRADE FOREIGN FUTURES OR OPTIONS CONTRACTS. TRANSACTIONS ON MARKETS LOCATED OUTSIDE THE UNITED STATES, INCLUDING MARKETS FORMALLY LINKED TO A UNITED STATES MARKET, MAY BE SUBJECT TO REGULATIONS.
WHICH OFFER DIFFERENT OR DIMINISHED PROTECTION TO THE POOL AND ITS PARTICIPANTS. FURTHER, UNITED STATES REGULATORY AUTHORITIES MAY BE UNABLE TO ENFORCE THE RULES OF REGULATORY AUTHORITIES OR MARKETS IN NON-UNITED STATES JURISDICTIONS WHERE TRANSACTIONS FOR THE POOL MAY BE EFFECTED.

(3) If the potential liability of a participant in the pool is greater than the amount of the participant’s contribution for the purchase of an interest in the pool and the profits earned thereon, whether distributed or not, the commodity pool operator must make the following additional statement in the Risk Disclosure Statement, to be prominently disclosed as the last paragraph thereof:

ALSO, BEFORE YOU DECIDE TO PARTICIPATE IN THIS POOL, YOU SHOULD NOTE THAT YOUR POTENTIAL LIABILITY AS A PARTICIPANT IN THIS POOL FOR TRADING LOSSES AND OTHER EXPENSES OF THE POOL IS NOT LIMITED TO THE AMOUNT OF YOUR CONTRIBUTION FOR THE PURCHASE OF AN INTEREST IN THE POOL, AND ANY PROFITS EARNED THEREON. A COMPLETE DESCRIPTION OF THE LIABILITY OF A PARTICIPANT IN THIS POOL IS EXPLAINED MORE FULLY IN THIS DISCLOSURE DOCUMENT.

(4) If the pool may engage in retail Forex transactions, the Risk Disclosure Statement must further state:

YOU SHOULD ALSO BE AWARE THAT THIS COMMODITY POOL MAY ENGAGE IN OFF-EXCHANGE FOREIGN CURRENCY TRADING. SUCH TRADING IS NOT CONDUCTED IN THE INTERBANK MARKET. THE FUNDS THAT THE POOL USES FOR OFF-EXCHANGE FOREIGN CURRENCY TRADING WILL NOT RECEIVE THE SAME PROTECTIONS AS FUNDS USED TO MARGIN OR GUARANTEE EXCHANGE-TRADED FUTURES AND OPTION CONTRACTS. IF THE POOL DEPOSITS SUCH FUNDS WITH A COUNTERPARTY AND THAT COUNTERPARTY BECOMES INSOLVENT, THE POOL’S CLAIM FOR AMOUNTS DEPOSITED OR PROFITS EARNED ON TRANSACTIONS WITH THE COUNTERPARTY MAY NOT BE TREATED AS A COMMODITY CUSTOMER CLAIM FOR PURPOSES OF SUBCHAPTER IV OF CHAPTER 7 OF THE BANKRUPTCY CODE AND THE REGULATIONS THEREUNDER. THE POOL MAY BE A GENERAL CREDITOR AND ITS CLAIM MAY BE PAID, ALONG WITH THE CLAIMS OF OTHER GENERAL CREDITORS, FROM ANY MONIES STILL AVAILABLE AFTER PRIORITY CLAIMS ARE PAID. EVEN POOL FUNDS THAT THE COUNTERPARTY KEEPS SEPARATE FROM ITS OWN FUNDS MAY NOT BE SAFE FROM THE CLAIMS OF PRIORITY AND OTHER GENERAL CREDITORS.

(5) If the pool may engage in swaps, the Risk Disclosure Statement must further state:

SWAPS TRANSACTIONS, LIKE OTHER FINANCIAL TRANSACTIONS, INVOLVE A VARIETY OF SIGNIFICANT RISKS. THE SPECIFIC RISKS PRESENTED BY A PARTICULAR SWAP TRANSACTION NECESSARILY DEPEND UPON THE TERMS OF THE TRANSACTION AND YOUR CIRCUMSTANCES. IN GENERAL, HOWEVER, ALL SWAPS TRANSACTIONS INVOLVE SOME COMBINATION OF MARKET RISK, CREDIT RISK, COUNTERPARTY CREDIT RISK, FUNDING RISK, LIQUIDITY RISK, AND OPERATIONAL RISK.

HIGHLY CUSTOMIZED SWAPS TRANSACTIONS IN PARTICULAR MAY INCREASE LIQUIDITY RISK, WHICH MAY RESULT IN A SUSPENSION OF REDEMPTIONS. HIGHLY LEVERAGED TRANSACTIONS MAY EXPERIENCE SUBSTANTIAL GAINS OR LOSSES IN VALUE AS A RESULT OF RELATIVELY SMALL CHANGES IN THE VALUE OR LEVEL OF AN UNDERLYING OR RELATED MARKET FACTOR.

IN EVALUATING THE RISKS AND CONTRACTUAL OBLIGATIONS ASSOCIATED WITH A PARTICULAR SWAP TRANSACTION, IT IS IMPORTANT TO CONSIDER THAT A SWAP TRANSACTION MAY BE MODIFIED OR TERMINATED ONLY BY MUTUAL CONSENT OF THE ORIGINAL PARTIES AND SUBJECT TO AGREEMENT ON INDIVIDUALLY NEGOTIATED TERMS. THEREFORE, IT MAY NOT BE POSSIBLE FOR THE COMMODITY POOL OPERATOR TO MODIFY, TERMINATE, OR OFFSET THE POOL’S OBLIGATIONS OR THE POOL’S EXPOSURE TO THE RISKS ASSOCIATED WITH A TRANSACTION PRIOR TO ITS SCHEDULED TERMINATION DATE.

(c) Table of contents. A table of contents showing, by subject matter, the location of the disclosures made in the Disclosure Document must appear immediately following the Risk Disclosure Statement.

(d) Information required in the forepart of the Disclosure Document. (1) The name, address of the main business office, main business telephone number and form of organization of the pool. If the mailing address of the main business office is a post office box number or is not within the United States, its
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territories or possessions, the pool operator must state where the pool’s books and records will be kept and made available for inspection;

(2) The name, address of the main business office, main business telephone number and form of organization of the commodity pool operator. If the mailing address of the main business office is a post office box number or is not within the United States, its territories or possessions, the pool operator must state where its books and records will be kept and made available for inspection;

(3) As applicable, a statement that the pool is:
   (i) Privately offered pursuant to section 4(2) of the Securities Act of 1933, as amended (15 U.S.C. 77d(2)), or pursuant to Regulation D thereunder (17 CFR 230.501 et seq.);
   (ii) A multi-advisor pool as defined in § 4.10(d)(2);
   (iii) A principal-protected pool as defined in § 4.10(d)(3); or
   (iv) Continuously offered. If the pool is not continuously offered, the closing date of the offering must be disclosed.

(4) The date when the commodity pool operator first intends to use the Disclosure Document; and

(5) The break-even point per unit of initial investment, as specified in § 4.10(j).

(e) Persons to be identified. The names of the following persons:
   (1) Each principal of the pool operator;
   (2) The pool’s trading manager, if any, and each principal thereof;
   (3) Each major investee pool, the operator of such investee pool, and each principal of the operator thereof;
   (4) Each major commodity trading advisor and each principal thereof;
   (5) Which of the foregoing persons will make trading decisions for the pool; and
   (6) If known, the futures commission merchant and/or retail foreign exchange dealer through which the pool will execute its trades, and, if applicable, the introducing broker through which the pool will introduce its trades to the futures commission merchant and/or retail foreign exchange dealer.

(f) Business background. (1) The business background, for the five years preceding the date of the Disclosure Document, of:
   (i) The commodity pool operator;
   (ii) The pool’s trading manager, if any;
   (iii) Each major commodity trading advisor;
   (iv) The operator of each major investee pool; and
   (v) Each principal of the persons referred to in this paragraph (f)(1) who participates in making trading or operational decisions for the pool or who supervises persons so engaged.

(2) The pool operator must include in the description of the business background of each person identified in § 4.24(f)(1) the name and main business of that person’s employers, business associations or business ventures and the nature of the duties performed by such person for such employers or in connection with such business associations or business ventures. The location in the Disclosure Document of any required past performance disclosure for such person must be indicated.

(g) Principal risk factors. A discussion of the principal risk factors of participation in the offered pool. This discussion must include, without limitation, risks relating to volatility, leverage, liquidity, counterparty creditworthiness, as applicable to the types of trading programs to be followed, trading structures to be employed and investment activity (including retail forex and swap transactions) expected to be engaged in by the offered pool.

(h) Investment program and use of proceeds. The pool operator must disclose the following:
   (1) The types of commodity interests and other interests which the pool will trade, including:
      (i) The approximate percentage of the pool’s assets that will be used to trade commodity interests, securities and other types of interests, categorized by type of commodity or market sector, type of swap, type of security (debt, equity, preferred equity), whether traded or listed on a regulated exchange market, maturity ranges and investment rating, as applicable;
      (ii) The extent to which such interests are subject to state or federal regulation, regulation by a non-United
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States jurisdiction or rules of a self-regulatory organization;

(iii)(A) The custodian or other entity (e.g., bank or broker-dealer) which will hold such interests; and

(B) If such interests will be held or if pool assets will be invested in a non-United States jurisdiction, the jurisdiction in which such interests or assets will be held or invested.

(2) A description of the trading and investment programs and policies that will be followed by the offered pool, including the method chosen by the pool operator concerning how futures commission merchants and/or retail foreign exchange dealers carrying the pool’s accounts shall treat offsetting positions pursuant to §1.46 of this chapter, if the method is other than to close out all offsetting positions or to close out offsetting positions on other than a first-in, first-out basis, and any material restrictions or limitations on trading required by the pool’s organizational documents or otherwise. This description must include, if applicable, an explanation of the systems used to select commodity trading advisors, investee pools and types of investment activity to which pool assets will be committed;

(3)(i) A summary description of the pool’s major commodity trading advisors, including their respective percentage allocations of pool assets, a description of the nature and operation of the trading programs such advisors will follow, including the types of interests traded pursuant to such programs, and each advisor’s historical experience trading such program including material information as to volatility, leverage and rates of return and the length of time during which the advisor has traded such program;

(ii) A summary description of the pool’s major investee pools or funds, including their respective percentage allocations of pool assets and a description of the nature and operation of such investee pools and funds, including for each investee pool or fund the types of interests traded, material information as to volatility, leverage and rates of return for such investee pool or fund and the period of its operation; and

(4)(i) The manner in which the pool will fulfill its margin requirements and the approximate percentage of the pool’s assets that will be held in segregation pursuant to the Act and the Commission’s regulations thereunder;

(ii) If the pool will fulfill its margin requirements with other than cash deposits, the nature of such deposits; and

(iii) If assets deposited by the pool as margin or as security deposit generate income, to whom that income will be paid.

(i) Fees and expenses. (1) The Disclosure Document must include a complete description of each fee, commission and other expense which the commodity pool operator knows or should know has been incurred by the pool for its preceding fiscal year and is expected to be incurred by the pool in its current fiscal year, including fees or other expenses incurred in connection with the pool’s participation in investee pools and funds.

(2) This description must include, without limitation:

(i) Management fees;

(ii) Brokerage fees and commissions, including interest income paid to futures commission merchants, and any fees incurred to maintain an open position in retail forex transactions;

(iii) Fees and commissions paid in connection with trading advice provided to the pool;

(iv) Fees and expenses incurred within investments in investee pools, investee funds and other collective investment vehicles, which fees and expenses must be disclosed separately for each investment tier;

(v) Incentive fees;

(vi) Any allocation to the commodity pool operator, or any agreement or understanding which provides the commodity pool operator with the right to receive a distribution, where such allocation or distribution is greater than a pro rata share of the pool’s profits based on the percentage of capital contributions made by the commodity pool operator;

(vii) Commissions or other benefits, including trailing commissions paid or that may be paid or accrue, directly or indirectly, to any person in connection with the solicitation of participations in the pool;

(2) Fees and expenses. (1) The Disclosure Document must include a complete description of each fee, commission and other expense which the commodity pool operator knows or should know has been incurred by the pool for its preceding fiscal year and is expected to be incurred by the pool in its current fiscal year, including fees or other expenses incurred in connection with the pool’s participation in investee pools and funds.

(2) This description must include, without limitation:

(i) Management fees;

(ii) Brokerage fees and commissions, including interest income paid to futures commission merchants, and any fees incurred to maintain an open position in retail forex transactions;

(iii) Fees and commissions paid in connection with trading advice provided to the pool;

(iv) Fees and expenses incurred within investments in investee pools, investee funds and other collective investment vehicles, which fees and expenses must be disclosed separately for each investment tier;

(v) Incentive fees;

(vi) Any allocation to the commodity pool operator, or any agreement or understanding which provides the commodity pool operator with the right to receive a distribution, where such allocation or distribution is greater than a pro rata share of the pool’s profits based on the percentage of capital contributions made by the commodity pool operator;

(vii) Commissions or other benefits, including trailing commissions paid or that may be paid or accrue, directly or indirectly, to any person in connection with the solicitation of participations in the pool;
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(viii) Professional and general administrative fees and expenses, including legal and accounting fees and office supplies expenses;

(ix) Organizational and offering expenses;

(x) Clearance fees and fees paid to national exchanges and self-regulatory organizations;

(xi) For principal-protected pools, any direct or indirect costs to the pool associated with providing the protection feature, as referred to in paragraph (o)(3) of this section; and

(xii) Any costs or fees included in the spread between bid and asked prices for retail forex or, if known, swap transactions; and

(xiii) Any other direct or indirect cost.

(3) Where any fee, commission or other expense is determined by reference to a base amount including, but not limited to, “net assets,” “allocation of assets,” “gross profits,” “net profits,” or “net gains,” the pool operator must explain how such base amount will be calculated, in a manner consistent with calculation of the break-even point.

(4) Where any fee, commission or other expense is based on an increase in the value of the pool, the pool operator must specify how the increase is calculated, the period of time during which the increase is calculated, the fee, commission or other expense to be charged at the end of that period and the value of the pool at which payment of the fee, commission or other expense commences.

(5) Where any fee, commission or other expense of the pool has been paid or is to be paid by a person other than the pool, the pool operator must disclose the nature and amount thereof and the person who paid or who is expected to pay it.

(6) The pool operator must provide, in a tabular format, an analysis setting forth how the break-even point for the pool was calculated. The analysis must include all fees, commissions and other expenses of the pool, as set forth in § 4.24(1)(2).

(j) Conflicts of interest. (1) A full description of any actual or potential conflicts of interest regarding any aspect of the pool on the part of:

(i) The commodity pool operator;

(ii) The pool’s trading manager, if any;

(iii) Any major commodity trading advisor;

(iv) The commodity pool operator of any major investee pool;

(v) Any principal of the persons described in paragraphs (j)(1)(i), (ii), (iii) and (iv) of this section; and

(vi) Any other person providing services to the pool, soliciting participants for the pool, acting as a counterparty to the pool’s retail forex or swap transactions, or acting as a swap dealer with respect to the pool.

(2) Any other material conflict involving the pool.

(3) Included in the description of such conflicts must be any arrangement whereby a person may benefit, directly or indirectly, from the maintenance of the pool’s account with the futures commission merchant and/or retail foreign exchange dealer and/or from the maintenance of the pool’s swap positions with a swap dealer, or from the introduction of the pool’s account to a futures commission merchant and/or retail foreign exchange dealer and/or swap dealer by an introducing broker (such as payment for order flow or soft dollar arrangements) or from an investment of pool assets in investee pools or funds or other investments.

(k) Related party transactions. A full description, including a discussion of the costs thereof to the pool, of any material transactions or arrangements for which there is no publicly disseminated price between the pool and any person affiliated with a person providing services to the pool.

(1) Litigation. (1) Subject to the provisions of § 4.24(1)(2), any material administrative, civil or criminal action, whether pending or concluded, within five years preceding the date of the Document, against any of the following persons; Provided, however, that a concluded action that resulted in an adjudication on the merits in favor of such person need not be disclosed:

(i) The commodity pool operator, the pool’s trading manager, if any, the pool’s major commodity trading advisors, and the operators of the pool’s major investee pools;
(ii) Any principal of the foregoing; and
(iii) The pool’s futures commission merchants and/or retail foreign exchange dealers and/or swap dealers and its introducing brokers, if any.

(2) With respect to a futures commission merchant and/or retail foreign exchange dealer and/or swap dealer or an introducing broker, an action will be considered material if:
(i) The action would be required to be disclosed in the notes to the futures commission merchant’s, retail foreign exchange dealer’s, swap dealer’s or introducing broker’s financial statements prepared pursuant to generally accepted accounting principles;
(ii) The action was brought by the Commission; Provided, however, that a concluded action that did not result in civil monetary penalties exceeding $50,000 need not be disclosed unless it involved allegations of fraud or other willful misconduct; or
(iii) The action was brought by any other federal or state regulatory agency, a non-United States regulatory agency or a self-regulatory organization and involved allegations of fraud or other willful misconduct.

(m) Trading for own account. If the commodity pool operator, the pool’s trading manager, any of the pool’s commodity trading advisors or any principal thereof trades or intends to trade commodity interests for its own account, the pool operator must disclose whether participants will be permitted to inspect the records of such person’s trades and any written policies related to such trading.

(n) Performance disclosures. Past performance must be disclosed as set forth in §4.25.

(o) Principal-protected pools. If the pool is a principal-protected pool as defined in §4.10(d)(3), the commodity pool operator must:
(1) Describe the nature of the principal protection feature intended to be provided, the manner by which such protection will be achieved, including sources of funding, and what conditions must be satisfied for participants to receive the benefits of such protection;
(2) Specify when the protection feature becomes operative; and
(3) Disclose, in the break-even analysis required by §4.24(i)(6), the costs of purchasing and carrying the assets to fund the principal protection feature or other limitation on risk, expressed as a percentage of the price of a unit of participation.

(p) Transferability and redemption. (1) A complete description of any restrictions upon the transferability of a participant’s interest in the pool; and
(2) A complete description of the frequency, timing and manner in which a participant may redeem interests in the pool. Such description must specify:
(i) How the redemption value of a participant’s interest will be calculated;
(ii) The conditions under which a participant may redeem its interest, including the cost associated therewith, the terms of any notification required and the time between the request for redemption and payment;
(iii) Any restrictions on the redemption of a participant’s interest, including any restrictions associated with the pool’s investments; and
(iv) Any liquidity risks relative to the pool’s redemption capabilities.

(q) Liability of pool participants. The extent to which a participant may be held liable for obligations of the pool in excess of the funds contributed by the participant for the purchase of an interest in the pool.

(r) Distribution of profits and taxation. (1) The pool’s policies with respect to the payment of distributions from profits or capital and the frequency of such payments;
(2) The federal income tax effects of such payments for a participant, including a discussion of the federal income tax laws applicable to the form of organization of the pool and to such payments therefrom; and
(3) If a pool is specifically structured to accomplish certain federal income tax objectives, the commodity pool operator must explain those objectives, the manner in which they will be achieved and any risks relative thereto.

(s) Inception of trading and other information. (1) The minimum aggregate subscriptions that will be necessary for
the pool to commence trading commodity interests;

(2) The minimum and maximum aggregate subscriptions that may be contributed to the pool;

(3) The maximum period of time the pool will hold funds prior to the commencement of trading commodity interests;

(4) The disposition of funds received if the pool does not receive the necessary amount to commence trading, including the period of time within which the disposition will be made; and

(5) Where the pool operator will deposit funds received prior to the commencement of trading by the pool, and a statement specifying to whom any income from such deposits will be paid.

(t) Ownership in pool. The extent of any ownership or beneficial interest in the pool held by the following:

(1) The commodity pool operator;

(2) The pool’s trading manager, if any;

(3) The pool’s major commodity trading advisors;

(4) The operators of the pool’s major investee pools; and

(5) Any principal of the foregoing.

(u) Reporting to pool participants. A statement that the commodity pool operator is required to provide all participants with monthly or quarterly (whichever applies) statements of account and with an annual report containing financial statements certified by an independent public accountant.

(v) Supplemental information. If any information, other than that required by Commission rules, the antifraud provisions of the Act, other federal or state laws or regulations, rules of a self-regulatory agency or laws of a non-United States jurisdiction, is provided, such information:

(1) May not be misleading in content or presentation or inconsistent with required disclosures;

(2) Is subject to the antifraud provisions of the Act and Commission rules and to rules regarding the use of promotional material promulgated by a registered futures association pursuant to section 17(j) of the Act, all supplemental information must be provided in the second part of the two-part document:

(i) Supplemental performance information (not including proprietary trading results as defined in §4.25(a)(8), or hypothetical, extracted, pro forma or simulated trading results) must be placed after all specifically required performance information; Provided, however, that required volatility disclosure may be included with the related required performance disclosure;

(ii) Supplemental non-performance information relating to a required disclosure may be included with the related required disclosure; and

(iii) Other supplemental information may be included after all required disclosures; Provided, however, that any proprietary trading results as defined in §4.25(a)(8), and any hypothetical, extracted, pro forma or simulated trading results included in the Disclosure Document must appear as the last disclosure therein following all required and non-required disclosures.

(w) Material information. Nothing set forth in §§4.21, 4.24, 4.25 or §4.26 shall relieve a commodity pool operator from any obligation under the Act or the regulations thereunder, including the obligation to disclose all material information to existing or prospective pool participants even if the information is not specifically required by such sections.


§ 4.25 Performance disclosures.

(a) General principles—(1) Capsule performance information—(i) For pools. Unless otherwise specified, disclosure of the past performance of a pool must include the following information. Amounts shown must be net of any fees, expenses or allocations to the commodity pool operator.

(A) The name of the pool;

(B) A statement as to whether the pool is:

(I) Privately offered pursuant to section 4(2) of the Securities Act of 1933,
as amended (15 U.S.C. 77d(2)), or pursuant to Regulation D thereunder (17 CFR 230.501 et seq.);

(2) A multi-advisor pool as defined in §4.10(d)(2); and

(3) A principal-protected pool as defined in §4.10(d)(3);

(C) The date of inception of trading;

(D) The aggregate gross capital subscriptions to the pool;

(E) The pool’s current net asset value;

(F) The largest monthly draw-down during the most recent five calendar years and year-to-date, expressed as a percentage of the pool’s net asset value and indicating the month and year of the draw-down (the capsule must include a definition of “draw-down” that is consistent with §4.10(k));

(G) The worst peak-to-valley draw-down during the most recent five calendar years and year-to-date, expressed as a percentage of the pool’s net asset value and indicating the months and year of the draw-down;

(H) Subject to §4.25(a)(2) for the offered pool, the annual and year-to-date rate of return for the pool for the most recent five calendar years and year-to-date, computed on a compounded monthly basis;

(ii) For accounts. Disclosure of the past performance of an account required under this §4.25 must include the following capsule performance information:

(A) The name of the commodity trading advisor or other person trading the account and the name of the trading program;

(B) The date on which the commodity trading advisor or other person trading the account began trading client accounts and the date when client funds began being traded pursuant to the trading program;

(C) The number of accounts directed by the commodity trading advisor or other person trading the account pursuant to the trading program specified, as of the date of the Disclosure Document;

(D)(I) The total assets under the management of the commodity trading advisor or other person trading the account, as of the date of the Disclosure Document; and

(2) The total assets traded pursuant to the trading program specified, as of the date of the Disclosure Document;

(E) The largest monthly draw-down for the trading program specified during the most recent five calendar years and year-to-date expressed as a percentage of client funds, and indicating the month and year of the draw-down;

(F) The worst peak-to-valley draw-down for the trading program specified during the most recent five calendar years and year-to-date, expressed as a percentage of net asset value and indicating the months and year of the draw-down;

(G) The annual and year-to-date rate-of-return for the program specified, computed on a compounded monthly basis.

(H) Partially-funded accounts directed by a commodity trading advisor may be presented in accordance with §4.35(a)(7).

(2) Additional requirements with respect to the offered pool. (i) The performance of the offered pool must be identified as such and separately presented first;

(ii) The rate of return of the offered pool must be presented on a monthly basis for the period specified in §4.25(a)(5), either in a numerical table or in a bar graph;

(iii) A bar graph used to present monthly rates of return for the offered pool:

(A) Must show percentage rate of return on the vertical axis and one-month increments on the horizontal axis;

(B) Must be scaled in such a way as to clearly show month-to-month differences in rates of return; and

(C) Must separately display numerical percentage annual rates of return for the period covered by the bar graph; and

(iv) The pool operator must make available upon request to prospective and existing participants all supporting data necessary to calculate monthly rates of return for the offered pool as specified in §4.25(a)(7), for the period specified in §4.25(a)(5).

(3) Additional requirements with respect to pools other than the offered pool. With respect to pools other than the offered
pool for which past performance is required to be presented under this section:

(i) Performance data for pools of the same class as the offered pool must be presented following the performance of the offered pool, on a pool-by-pool basis.

(ii) Pools of a different class than the offered pool must be presented less prominently and, unless such presentation would be misleading, may be presented in composite form; Provided, however, that:

(A) The Disclosure Document must disclose how the composite was developed;

(B) Pools of different classes or pools with materially different rates of return may not be presented in the same composite.

(iii) For the purpose of § 4.25(a)(3)(ii), the following, without limitation, shall be considered pools of different classes: Pools privately offered pursuant to section 4(2) of the Securities Act of 1933, as amended (15 U.S.C. 77d(2)), or pursuant to Regulation D thereunder (17 CFR 230.501 et seq.), and public offerings; and principal-protected and non-principal-protected pools. Multi-advisor pools as defined in § 4.10(d)(2) will be presumed to have materially different rates of return from those of non-multi-advisor pools absent evidence sufficient to demonstrate otherwise.

(iv) Material differences among the pools for which past performance is disclosed, including, without limitation, differences in leverage and use of different trading programs, must be described.

(4) Additional requirements with respect to accounts. (i) Unless such presentation would be misleading, past performance of accounts required to be presented under this section may be presented in composite form on a program-by-program basis using the format set forth in § 4.25(a)(1)(ii).

(ii) Accounts that differ materially with respect to rates of return may not be presented in the same composite.

(iii) The commodity pool operator must disclose all material differences among accounts included in a composite.

(5) Time period for required performance. All required performance information must be presented for the most recent five calendar years and year-to-date or for the life of the pool, account or trading program, if less than five years.

(6) Trading programs. If the offered pool will use any of the trading programs for which past performance is required to be presented, the Disclosure Document must so indicate.

(7) Calculation of, and recordkeeping concerning, performance information. (i) All performance information presented in a Disclosure Document, including performance information contained in any capsule and performance information not specifically required by Commission rules, must be current as of a date not more than three months preceding the date of the Document, and must be supported by the following amounts, calculated on an accrual basis of accounting in accordance with generally accepted accounting principles, as specified below or by a method otherwise approved by the Commission.

(A) The beginning net asset value for the period, which shall be the same as the previous period’s ending net asset value;

(B) All additions, whether voluntary or involuntary, during the period;

(C) All withdrawals and redemptions, whether voluntary or involuntary, during the period;

(D) The net performance for the period, which shall represent the change in the net asset value net of additions, withdrawals, and redemptions;

(E) The ending net asset value for the period, which shall represent the beginning net asset value plus or minus additions, withdrawals, redemptions and net performance;

(F) The rate of return for the period, which shall be calculated by dividing the net performance by the beginning net asset value or by a method otherwise approved by the Commission; and

(G) The number of units outstanding at the end of the period, if applicable.

(ii) All supporting documents necessary to substantiate the computation of such amounts must be maintained in accordance with §1.31.
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(8) Proprietary trading results. (i) Proprietary trading results may not be included in a Disclosure Document unless such performance is prominently labeled as proprietary and is set forth separately after all disclosures in accordance with §4.24(v), together with a discussion of any differences between such performance and the performance of the offered pool, including, but not limited to, differences in costs, leverage and trading methodology.

(ii) For the purposes of §4.24(v) and this §4.25(a), proprietary trading results means the performance of any pool or account in which fifty percent or more of the beneficial interest is owned or controlled by:

(A) The commodity pool operator, trading manager (if any), commodity trading advisor or any principal thereof;

(B) An affiliate or family member of the commodity pool operator, trading manager (if any) or commodity trading advisor; or

(C) Any person providing services to the pool.

(9) Required legend. Any past performance presentation, whether or not required by Commission rules, must be preceded by the following statement, prominently displayed:

PAST PERFORMANCE IS NOT NECESSARILY INDICATIVE OF FUTURE RESULTS.

(b) Performance disclosure when the offered pool has at least a three-year operating history. The commodity pool operator must disclose the performance of the offered pool, in accordance with paragraphs (a)(1)(i)(A) through (H) and (a)(2) of this §4.25; or

(ii) If the offered pool has no operating history, the pool operator must prominently display the following statement:

THIS POOL HAS NOT COMMENCED TRADING AND DOES NOT HAVE ANY PERFORMANCE HISTORY.

(2) Other performance of commodity pool operator. (i)(A) Except as provided in §4.25(a)(8), the commodity pool operator must disclose, for the period specified by §4.25(a)(5), the performance of each other pool operated by the pool operator (and by the trading manager if the offered pool has a trading manager) in accordance with paragraphs (a)(1)(i) (C) through (H) and (a)(3) of this §4.25, and the performance of each other account traded by the pool operator (and by the trading manager if the offered pool has a trading manager) in accordance with paragraphs (a)(1)(ii) (C) through (G) of this §4.25. If the trading manager has been delegated complete authority for the offered pool’s trading, and the trading manager’s performance is not materially different from that of the pool operator, the performance of the other pools operated by and accounts traded by the pool operator is not required to be disclosed.

(ii) If neither the pool operator or trading manager (if any), nor any of its trading principals has operated any...
other pools or traded any other accounts, the pool operator must prominently display the following statement: NEITHER THIS POOL OPERATOR (TRADING MANAGER, IF APPLICABLE) NOR ANY OF ITS TRADING PRINCIPALS HAS PREVIOUSLY OPERATED ANY OTHER POOLS OR TRADED ANY OTHER ACCOUNTS. If the commodity pool operator or trading manager, if applicable, is a sole proprietorship, reference to its trading principals may be deleted from the prescribed statement.

(3) Major commodity trading advisor performance. (i) The commodity pool operator must disclose the performance of any accounts (including pools) directed by a major commodity trading advisor in accordance with paragraphs (a)(1)(ii) (C) through (G) of this § 4.25.

(ii) If a major commodity trading advisor has not previously traded accounts, the pool operator must prominently display the following statement:

(name of the major commodity trading advisor), A COMMODITY TRADING ADVISOR THAT HAS DISCRETIONARY TRADING AUTHORITY OVER (percentage of the pool’s funds available for commodity interest trading allocated to that trading advisor) PERCENT OF THE POOL’S COMMODITY INTEREST TRADING HAS NOT PREVIOUSLY DIRECTED ANY ACCOUNTS.

(4) Major investee pool performance. (i) The commodity pool operator must disclose the performance of any major investee pool.

(ii) If a major investee pool has not commenced trading, the pool operator must prominently display the following statement:

(name of the major investee pool), AN INVESTEE POOL THAT IS ALLOCATED (percentage of the pool assets allocated to that investee pool) PERCENT OF THE POOL’S ASSETS HAS NOT COMMENCED TRADING.

(5) With respect to commodity trading advisors and investee pools for which performance is not required to be disclosed pursuant to § 4.25(c) (3) and (4), the pool operator must provide a summary description of the performance history of each of such advisors and pools including the following information, provided that where the pool operator uses a two-part document pursuant to the rules promulgated by a registered futures association pursuant to Section 17(j) of the Act, such summary description may be provided in the second part of the two-part document:

(i) Monthly return parameters (highs and lows);

(ii) Historical volatility and degree of leverage; and

(iii) Any material differences between the performance of such advisors and pools as compared to that of the offered pool’s major trading advisors and major investee pools.


(a)(1) Subject to paragraph (c) of this section, all information contained in the Disclosure Document and, where used, profile document, must be current as of the date of the Document; provided, however, that performance information may be current as of a date not more than three months prior to the date of the Document.

(2) No commodity pool operator may use a Disclosure Document or profile document dated more than nine months prior to the date of its use.

(b) The commodity pool operator must attach to the Disclosure Document the most current Account Statement and Annual Report for the pool required to be distributed in accordance with § 4.22; provided, however, that in lieu of the most current Account Statement the commodity pool operator may provide performance information for the pool current as of a date not more than sixty days prior to the date on which the Disclosure Document is distributed and covering the period since the most recent performance information contained in the Disclosure Document.

(c)(1) If the commodity pool operator knows or should know that the Disclosure Document or profile document is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to:
§ 4.27 Additional reporting by advisors of certain large commodity pools.

(a) General definitions. For the purposes of this section:
(1) Commodity pool operator or CPO has the same meaning as commodity pool operator defined in section 1a(11) of the Commodity Exchange Act;
(2) Commodity trading advisor or CTA has the same meaning as defined in section 1a(12);
(3) Direct has the same meaning as defined in section 4.10(f);
(4) Net asset value or NAV has the same meaning as net asset value as defined in section 1a(10) of the Commodity Exchange Act;
(5) Reporting period means the reporting period as defined in the forms promulgated hereunder;
(b) Persons required to report. A reporting person is:
(1) Any commodity pool operator that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder; or
(2) Any commodity trading advisor that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder.

(c) Reporting.
(1) Except as provided in paragraph (c)(2) of this section, each reporting person shall file with the National Futures Association, a report with respect to the directed assets of each pool under the advisement of the commodity pool operator consistent with appendix A to this part or commodity trading advisor consistent with appendix C to this part.
(2) All financial information shall be reported in accordance with generally accepted accounting principles consistently applied.

(d) Investment advisers to private funds. Except as otherwise expressly provided in this section, CPOs and CTAs that are dually registered with the Securities and Exchange Commission and are required to file Form PF pursuant to the rules promulgated under the Investment Advisers Act of 1940, shall file Form PF with the Securities and Exchange Commission in lieu of filing...
such other reports with respect to private funds as may be required under this section. In addition, except as otherwise expressly provided in this section, CPOs and CTAs that are dually registered with the Securities and Exchange Commission and are required to file Form PF pursuant to the rules promulgated under the Investment Advisers Act of 1940, may file Form PF with the Securities and Exchange Commission in lieu of filing such other reports with respect to commodity pools that are not private funds as may be required under this section. Dually registered CPOs and CTAs that file Form PF with the Commission for purposes of any enforcement action regarding any false or misleading statement of a material fact in Form PF.

(e) Filing requirements. Each report required to be filed with the National Futures Association under this section shall:

(1)(i) Contain an oath and affirmation that, to the best of the knowledge and belief of the individual making the oath and affirmation, the information contained in the document is accurate and complete; Provided, however, That it shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in the document is not accurate and complete and (ii) Each oath or affirmation must be made by a representative duly authorized to bind the CPO or CTA.

(2) Be submitted consistent with the National Futures Association’s electronic filing procedures.

(f) Termination of reporting requirement. All reporting persons shall continue to file such reports as are required under this section until the effective date of a Form 7W filed in accordance with the Commission’s regulations.

(g) Public records. Reports filed pursuant to this section shall not be considered Public Records as defined in §145.0 of this chapter.

[77 FR 17330, Mar. 26, 2012]

§ 4.30 Prohibited activities.

(a) Except as provided in paragraph (b) of this section, no commodity trading advisor may solicit, accept or receive from an existing or prospective client funds, securities or other property in the trading advisor’s name (or extend credit in lieu thereof) to purchase, margin, guarantee or secure any commodity interest of the client.

(b) The prohibition in paragraph (a) of this section shall not apply to:

(1) A futures commission merchant that is registered as such under the Act;

(2) A leverage transaction merchant that is registered as a commodity trading advisor under the Act;

(3) A retail foreign exchange dealer that is registered as such under the Act; or

(4) A swap dealer that is registered as such under the Act, with respect to funds, securities or other property accepted to purchase, margin, guarantee or secure any swap that is not cleared through a derivatives clearing organization.

[77 FR 54359, Sept. 5, 2012]

§ 4.31 Required delivery of Disclosure Document to prospective clients.

(a) Each commodity trading advisor registered or required to be registered under the Act must deliver or cause to be delivered to a prospective client a Disclosure Document containing the information set forth in §§4.34 and 4.35 for the trading program pursuant to which the trading advisor seeks to direct the client’s commodity interest account or to guide the client’s commodity interest trading by means of a systematic program that recommends specific transactions by no later than the time the trading advisor delivers to the prospective client an advisory agreement to direct or guide the client’s account; Provided, That any information distributed in advance of the delivery of the Disclosure Document to a prospective client is consistent with or amended by the information contained in the Disclosure Document and with the obligations of the commodity
trading advisor under the Act, the Commission’s regulations issued thereunder, and the laws of any other applicable federal or state authority; Provided further, That in the event such previously distributed information is amended by the Disclosure Document in any material respect, the prospective participant must be in receipt of the Disclosure Document at least 48 hours prior to the advisory agreement being accepted by the trading advisor.

(b) The commodity trading advisor may not enter into an agreement with a prospective client to direct the client’s commodity interest account or to guide the client’s commodity interest trading unless the trading advisor first receives from the prospective client an acknowledgment signed and dated by the prospective client stating that the client received a Disclosure Document for the trading program pursuant to which the trading advisor will direct his account or will guide his trading. Where a Disclosure Document is delivered to a prospective client by electronic means, in lieu of a manually signed and dated acknowledgment the trading advisor may establish receipt by electronic means that use a unique identifier to confirm the identity of the recipient of such Disclosure Document, Provided, however, That the requirement of §4.33(a)(2) to retain the acknowledgment specified in this paragraph (b) applies equally to such substitute evidence of receipt, which must be retained either in hard copy form or in another form approved by the Commission.


§ 4.32 [Reserved]

§ 4.33 Recordkeeping.

Each commodity trading advisor registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner at its main business office and in accordance with §1.31. If the commodity trading advisor’s main business office is located outside the United States, its territories or possessions, then upon the request of a Commission representative the trading advisor must provide such books and records as requested at the place designated by the representative in the United States, its territories or possessions within 72 hours after receipt of the request.

(a) Concerning the clients and subscribers of the commodity trading advisor:

(1) The name and address of each client and each subscriber.

(2) The acknowledgement specified in §4.31(b).

(3) All powers of attorney and other documents, or copies thereof, authorizing the commodity trading advisor to direct the commodity interest account of a client or subscriber.

(4) All other written agreements, or copies thereof, entered into by the commodity trading advisor with any client or subscriber.

(5) A list or other record of all commodity interest accounts of clients directed by the commodity trading advisor and of all transactions effected therefor.

(6) Copies of each confirmation or acknowledgment of a commodity interest transaction, and each purchase and sale statement and each monthly statement received from a futures commission merchant, a retail foreign exchange dealer or a swap dealer.

(7) The original or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations) distributed or caused to be distributed by the commodity trading advisor to any existing or prospective client or subscriber, showing the first date of distribution if not otherwise shown on the document.

(b) Concerning the commodity trading advisor:

(1) An itemized daily record of each commodity interest transaction of the commodity trading advisor, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying commodity, swap type and counterparty.
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the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized; Provided, however, that if the trading advisor is a counterparty to a swap, it must comply with the swap data recordkeeping and reporting requirements of part 45 of this chapter, as applicable.

(2) Each confirmation of a commodity interest transaction, each purchase and sale statement and each monthly statement furnished by a futures commission merchant or retail foreign exchange dealer to:

(i) The commodity trading advisor relating to a personal account of the trading advisor; and

(ii) Each principal of the trading advisor relating to a personal account of such principal.

(3) Books and records of all other transactions in all other business dealings in trading commodity interests and of all cash market transactions in which the commodity trading advisor and each principal thereof engages. Those books and records must include, as applicable, books and records of the type specified in paragraphs (a)(1) through (a)(7) of this section and in paragraphs (a)(1) through (a)(6) of § 4.23.

(Approved by the Office of Management and Budget under control number 3038-0005)

(Sees. 2(a)(1), 4(c)(a)(d), 4d, 4f, 4g, 4k, 4m, 4n, 4o, 15 and 17, Commodity Exchange Act (7 U.S.C. 2, 4, 6c(a)(d), 6f, 6g, 6k, 6m, 6n, 12a, 19 and 21; 5 U.S.C. 552 and 552b))

§ 4.34 General disclosures required.

Except as otherwise provided herein, a Disclosure Document must include the following information.

(a) Cautionary Statement. The following Cautionary Statement must be prominently displayed on the cover page of the Disclosure Document:

THE COMMODITY FUTURES TRADING COMMISSION HAS NOT PASSED UPON THE MERITS OF PARTICIPATING IN THIS TRADING PROGRAM NOR HAS THE COMMISSION PASSED ON THE ADEQUACY OR ACCURACY OF THIS DISCLOSURE DOCUMENT.

(b) Risk Disclosure Statement. (1) The following Risk Disclosure Statement must be prominently displayed immediately following any disclosures required to appear on the cover page of the Disclosure Document as provided by the Commission, by any applicable federal or state securities laws and regulations or by any applicable laws of non-United States jurisdictions:

RISK DISCLOSURE STATEMENT

THE RISK OF LOSS IN TRADING COMMODITY INTERESTS CAN BE SUBSTANTIAL. YOU SHOULD THEREFORE CAREFULLY CONSIDER WHETHER SUCH TRADING IS SUITABLE FOR YOU IN LIGHT OF YOUR FINANCIAL CONDITION. IN CONSIDERING WHETHER TO TRADE OR TO AUTHORIZE SOMEONE ELSE TO TRADE FOR YOU, YOU SHOULD BE AWARE OF THE FOLLOWING:

IF YOU PURCHASE A COMMODITY OPTION YOU MAY SUSTAIN A TOTAL LOSS OF THE PREMIUM AND OF ALL TRANSACTION COSTS.

IF YOU PURCHASE OR SELL A COMMODITY FUTURES CONTRACT OR SELL A COMMODITY OPTION OR ENGAGE IN OFF-EXCHANGE FOREIGN CURRENCY TRADING YOU MAY SUSTAIN A TOTAL LOSS OF THE INITIAL MARGIN FUNDS OR SECURITY DEPOSIT AND ANY ADDITIONAL FUNDS THAT YOU DEPOSIT WITH YOUR BROKER TO ESTABLISH OR MAINTAIN YOUR POSITION. IF THE MARKET MOVES AGAINST YOUR POSITION, YOU MAY BE CALLED UPON BY YOUR BROKER TO DEPOSIT A SUBSTANTIAL AMOUNT OF ADDITIONAL MARGIN FUNDS, ON SHORT NOTICE, IN ORDER TO MAINTAIN YOUR POSITION. IF YOU DO NOT PROVIDE THE REQUESTED FUNDS WITHIN THE PRESCRIBED TIME, YOUR POSITION MAY BE LIQUIDATED AT A LOSS, AND YOU WILL BE LIABLE FOR ANY RESULTING DEFICIT IN YOUR ACCOUNT.

UNDER CERTAIN MARKET CONDITIONS, YOU MAY FIND IT DIFFICULT OR IMPOSSIBLE TO LIQUIDATE A POSITION. THIS CAN OCCUR, FOR EXAMPLE, WHEN THE MARKET MAKES A "LIMIT MOVE." THE PLACEMENT OF CONTINGENT ORDERS BY YOU OR YOUR TRADING ADVISOR, SUCH AS A "STOP-LOSS" OR "STOP-LIMIT" ORDER, WILL NOT NECESSARILY LIMIT YOUR LOSSES TO THE INTENDED
AMOUNTS, SINCE MARKET CONDITIONS MAY MAKE IT IMPOSSIBLE TO EXECUTE SUCH ORDERS.

A "SPREAD" POSITION MAY NOT BE LESS RISKY THAN A SIMPLE "LONG" OR "SHORT" POSITION.

THE HIGH DEGREE OF LEVERAGE THAT IS OFTEN OBTAINABLE IN COMMODITY INTEREST TRADING CAN WORK AGAINST YOU AS WELL AS FOR YOU. THE USE OF LEVERAGE CAN LEAD TO LARGE LOSSES AS WELL AS GAINS.

IN SOME CASES, MANAGED COMMODITY ACCOUNTS ARE SUBJECT TO SUBSTANTIAL CHARGES FOR MANAGEMENT AND ADVISORY FEES. IT MAY BE NECESSARY FOR THOSE ACCOUNTS THAT ARE SUBJECT TO THESE CHARGES TO MAKE SUBSTANTIAL TRADING PROFITS TO AVOID DEPLETION OR EXHAUSTION OF THEIR ASSETS. THIS DISCLOSURE DOCUMENT CONTAINS, AT PAGE (insert page number), A COMPLETE DESCRIPTION OF EACH FEE TO BE CHARGED TO YOUR ACCOUNT BY THE COMMODITY TRADING ADVISOR.

THIS BRIEF STATEMENT CANNOT DISCLOSE ALL THE RISKS AND OTHER SIGNIFICANT ASPECTS OF THE COMMODITY INTEREST MARKETS. YOU SHOULD THEREFORE CAREFULLY STUDY THIS DISCLOSURE DOCUMENT AND COMMODITY INTEREST TRADING BEFORE YOU TRADE, INCLUDING THE DESCRIPTION OF THE PRINCIPAL RISK FACTORS OF THIS INVESTMENT, AT PAGE (insert page number).

(2)(i) If the commodity trading advisor may trade foreign futures or options contracts pursuant to the offered trading program, the Risk Disclosure Statement must further state the following:

YOU SHOULD ALSO BE AWARE THAT THIS COMMODITY TRADING ADVISOR MAY ENGAGE IN OFF-EXCHANGE FOREIGN CURRENCY TRADING. SUCH TRADING IS NOT CONDUCTED IN THE INTERBANK MARKET. THE FUNDS DEPOSITED WITH A COUNTERPARTY FOR SUCH TRANSACTIONS WILL NOT RECEIVE THE SAME PROTECTIONS AS FUNDS USED TO MARGIN OR GUARANTEE EXCHANGE-TRADED FUTURES AND OPTION CONTRACTS. IF THE COUNTERPARTY BECOMES INSOLVENT AND YOU HAVE A CLAIM FOR AMOUNTS DEPOSITED OR PROFITS EARNED ON TRANSACTIONS WITH THE COUNTERPARTY, YOUR CLAIM MAY NOT BE TREATED AS A COMMODITY CUSTOMER CLAIM FOR PURPOSES OF SUBCHAPTER IV OF CHAPTER 7 OF THE BANKRUPTCY CODE AND REGULATIONS THEREUNDER. YOU MAY BE A GENERAL CREDITOR AND YOUR CLAIM MAY BE PAID, ALONG WITH THE CLAIMS OF OTHER GENERAL CREDITORS, FROM ANY FUNDS STILL AVAILABLE AFTER PRIORITY CLAIMS ARE PAID. EVEN FUNDS THAT THE COUNTERPARTY KEEPS SEPARATE FROM ITS OWN FUNDS MAY NOT BE SAFE FROM THE CLAIMS OF PRIORITY AND OTHER GENERAL CREDITORS.

FURTHER, YOU SHOULD CAREFULLY REVIEW THE INFORMATION CONTAINED IN THE RISK DISCLOSURE STATEMENT OF THE FUTURES COMMISSION MERCHANT OR RETAIL FOREIGN EXCHANGE DEALER THAT YOU SELECT TO CARRY YOUR ACCOUNT.

(3) If the commodity trading advisor is not also a registered futures commission merchant or a registered retail foreign exchange dealer, the trading advisor must make the following statement in the Risk Disclosure Statement, to be included as the last paragraph thereof:

THIS COMMODITY TRADING ADVISOR IS PROHIBITED BY LAW FROM ACCEPTING FUNDS IN THE TRADING ADVISOR'S NAME FROM A CLIENT FOR TRADING COMMODITY INTERESTS. YOU MUST PLACE ALL FUNDS FOR TRADING IN THIS TRADING PROGRAM DIRECTLY WITH A FUTURES COMMISSION MERCHANT OR RETAIL FOREIGN EXCHANGE DEALER, AS APPLICABLE.
(4) If the commodity trading advisor may engage in swaps, the Risk Disclosure Statement must further state:

SWAPS TRANSACTIONS, LIKE OTHER FINANCIAL TRANSACTIONS, INVOLVE A VARIETY OF SIGNIFICANT RISKS. THE SPECIFIC RISKS PRESENTED BY A PARTICULAR SWAP TRANSACTION NECESSARILY DEPEND UPON THE TERMS OF THE TRANSACTION AND YOUR CIRCUMSTANCES. IN GENERAL, HOWEVER, ALL SWAPS TRANSACTIONS INVOLVE SOME COMBINATION OF MARKET RISK, CREDIT RISK, FUNDING RISK, AND OPERATIONAL RISK.

HIGHLY CUSTOMIZED SWAPS TRANSACTIONS IN PARTICULAR MAY INCREASE LIQUIDITY RISK, WHICH MAY RESULT IN YOUR ABILITY TO WITHDRAW YOUR FUNDS BEING LIMITED. HIGHLY LEVERAGED TRANSACTIONS MAY EXPERIENCE SUBSTANTIAL GAINS OR LOSSES IN VALUE AS A RESULT OF RELATIVELY SMALL CHANGES IN THE VALUE OR LEVEL OF AN UNDERLYING OR RELATED MARKET FACTOR.

(2) The date when the commodity trading advisor first intends to use the Disclosure Document.

(e) Persons to be identified. The names of the following persons:

(1) Each principal of the trading advisor;

(2) The futures commission merchant and/or retail foreign exchange dealer with which the commodity trading advisor will require the client to maintain its account or, if the client is free to choose the futures commission merchant or retail foreign exchange dealer with which it will maintain its account, the trading advisor must make a statement to that effect; and

(3) The introducing broker through which the commodity trading advisor will require the client to introduce its account or, if the client is free to choose the introducing broker through which it will introduce its account, the trading advisor must make a statement to that effect.

(f) Business background. (1) The business background, for the five years preceding the date of the Disclosure Document, of:

(i) The commodity trading advisor; and

(ii) Each principal of the trading advisor who participates in making trading or operational decisions for the trading advisor or supervises persons so engaged.

(2) The trading advisor must include in the description of the business background of each person identified in §4.34(f)(1) the name and main business of that person’s employers, business associations or business ventures and the nature of the duties performed by such person for such employers or in connection with such business associations or business ventures. The location in the Disclosure Document of any required past performance disclosure for such person must be indicated.

(g) Principal risk factors. A discussion of the principal risk factors of this trading program. This discussion must include, without limitation, risks due to volatility, leverage, liquidity, and counterparty creditworthiness, as applicable to the trading program and the types of transactions and investment
activity expected to be engaged in pursuant to such program (including retail forex and swap transactions, if any).

(h) Trading program. A description of the trading program, which must include the method chosen by the commodity trading advisor concerning how futures commission merchants and/or retail foreign exchange dealers carrying accounts it manages shall treat offsetting positions pursuant to §1.46 of this chapter, if the method is other than to close out all offsetting positions or to close out offsetting positions on other than a first-in, first-out basis, and the types of commodity interests and other interests the commodity trading advisor intends to trade, with a description of any restrictions or limitations on such trading established by the trading advisor or otherwise.

(i) Fees. A complete description of each fee which the commodity trading advisor will charge the client.

(1) Wherever possible, the trading advisor must specify the dollar amount of each such fee.

(2) Where any fee is determined by reference to a base amount including, but not limited to, “net assets,” “gross profits,” “net profits,” “net gains,” “pips” or “bid-asked spread,” the trading advisor must explain how such base amount will be calculated. Where any fee is based on the difference between bid and asked prices on retail forex or swap transactions, the trading advisor must explain how such fee will be calculated;

(3) Where any fee is based on an increase in the value of the client’s commodity interest account, the trading advisor must specify how that increase is calculated, the period of time during which the increase is calculated, the fee to be charged at the end of that period and the value of the account at which payment of the fee commences.

(j) Conflicts of interest. (1) A full description of any actual or potential conflicts of interest regarding any aspect of the trading program on the part of:

(i) The commodity trading advisor;

(ii) Any futures commission merchant and/or retail foreign exchange dealer with which the client will be required to maintain its commodity interest account;

(iii) Any introducing broker through which the client will be required to introduce its account to a futures commission merchant and/or retail foreign exchange dealer; and

(iv) Any principal of the foregoing.

(2) Any other material conflict involving any aspect of the offered trading program.

(3) Included in the description of any such conflict must be any arrangement whereby the trading advisor or any principal thereof may benefit, directly or indirectly, from the maintenance of the client’s commodity interest account with a futures commission merchant and/or retail foreign exchange dealer, and/or from the maintenance of the client’s swap positions with a swap dealer or from the introduction of such account through an introducing broker (such as payment for order flow or soft dollar arrangements).

(k) Litigation. (1) Subject to the provisions of §4.34(k)(2), any material administrative, civil or criminal action, whether pending or concluded, within five years preceding the date of the Document, against any of the following persons; Provided, however, that a concluded action that resulted in an adjudication on the merits in favor of such person need not be disclosed:

(i) The commodity trading advisor and any principal thereof;

(ii) Any futures commission merchant or retail foreign exchange dealer with which the client will be required to maintain its commodity interest account; and

(iii) Any introducing broker through which the client will be required to introduce its account to the futures commission merchant and/or retail foreign exchange dealer and/or swap dealer.

(2) With respect to a futures commission merchant, retail foreign exchange dealer, swap dealer or introducing broker, an action will be considered material if:

(i) The action would be required to be disclosed in the notes to the futures commission merchant’s, retail foreign exchange dealer’s, swap dealer’s or introducing broker’s financial statements prepared pursuant to generally accepted accounting principles;
(ii) The action was brought by the Commission; Provided, however, that a concluded action that did not result in civil monetary penalties exceeding $50,000 need not be disclosed unless it involved allegations of fraud or other willful misconduct; or

(iii) The action was brought by any other federal or state regulatory agency, a non-United States regulatory agency or a self-regulatory organization and involved allegations of fraud or other willful misconduct.

Trading for own account. If the commodity trading advisor or any principal thereof trades or intends to trade commodity interests for its own account, the trading advisor must disclose whether clients will be permitted to inspect the records of such person’s trading and any written policies related to such trading.

(m) Performance disclosures. Past performance must be disclosed as set forth in § 4.35.

(n) Supplemental information. If any information, other than that required by Commission rules, the antifraud provisions of the Act, other federal or state laws and regulations, any rules of a self-regulatory agency or laws of a non-United States jurisdiction, is provided, such information:

1. May not be misleading in content or presentation or inconsistent with the required disclosures;

2. Is subject to the antifraud provisions of the Act and Commission rules, and to rules regarding the use of promotional material promulgated by a registered futures association pursuant to section 17(j) of the Act; and

3. Must be placed as follows, unless otherwise specified by Commission rules:

(i) Supplemental performance information (not including proprietary trading results as defined in § 4.35(a)(7), and any hypothetical, extracted, pro forma or simulated trading results included in the Disclosure Document) shall appear as the last disclosure therein following all required and non-required disclosures.

(o) Material information. Nothing set forth in §§ 4.31, 4.34, 4.35 or 4.36 shall relieve a commodity trading advisor from any obligation under the Act or the regulations thereunder, including the obligation to disclose all material information to existing or prospective clients even if the information is not specifically required by such sections.


§ 4.35 Performance disclosures.

(a) General principles—(1) Capsule performance information. Unless otherwise specified, disclosure of the past performance of an account or trading program required under this § 4.35 must include the following information:

(i) The name of the commodity trading advisor or other person trading the account and the name of the trading program;

(ii) The date on which the commodity trading advisor or other person trading the account began trading client accounts and the date when client funds began being traded pursuant to the trading program;

(iii) The number of accounts directed by the trading advisor or other person trading specified, as of the date of the Disclosure Document;

(iv)(A) The total assets under the management of the trading advisor or other person trading the account pursuant to the trading program specified, as of the date of the Disclosure Document; and

(B) The total assets traded pursuant to the trading program specified, as of the date of the Disclosure Document;

(v) The largest monthly draw-down for the account or trading program specified during the most recent five calendar year and year-to-date expressed as a percentage of client funds and indicating the month and year of...
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the draw-down (the capsule must include a definition of “draw-down” that is consistent with §4.10(k));

(vi) The worst peak-to-valley drawdown for the trading program specified during the most recent five calendar year and year-to-date, expressed as a percentage of net asset value and indicating the months and year of the draw-down;

(vii) Subject to §4.35(a)(2) for the offered trading program, the annual and year-to-date rate-of-return for the program specified for the five most recent calendar years and year-to-date, computed on a compounded monthly basis; Provided, however, That performance of the offered trading program must include monthly rates of return for such period; and

(viii) In the case of the offered trading program:

(A)(1) The number of accounts traded pursuant to the offered trading program that were opened and closed during the period specified in §4.35(a)(5) with a positive net lifetime rate of return as of the date the account was closed; and

(2) A measure of the variability of returns for accounts that were both opened and closed during the period specified in §4.35(a)(5) and closed with positive net lifetime rates of return; and

(B)(1) The number of accounts traded pursuant to the offered trading program that were opened and closed during the period specified in §4.35(a)(5) with negative net lifetime rates of return as of the date the account was closed; and

(2) A measure of the variability of returns for accounts that were both opened and closed during the period specified in §4.35(a)(5) and closed with negative net lifetime rates of return.

(C) The measure of variability required by §§4.35(a)(1)(viii)(A)(2) and (B)(2) may be provided as a range of both positive and negative net lifetime returns, or by any other form of disclosure that meets the objective of disclosure of the variability of returns experienced by clients in the trading program whose accounts were opened and closed during the period specified in §4.35(a)(5). The net lifetime rate of return shall be calculated as the compounded product of the monthly rates of return for each month the account is open.

(2) Additional requirements with respect to the offered trading program. (i) The performance of the offered trading program must be identified as such and separately presented first;

(ii) The rate of return of the offered trading program must be presented on a monthly basis for the period specified in §4.35(a)(5), either in a numerical table or in a bar graph;

(iii) A bar graph used to present monthly rates of return for the offered trading program:

(A) Must show percentage rate of return on the vertical axis and one-month increments on the horizontal axis;

(B) Must be scaled in such a way as to clearly show month-to-month differences in rates of return; and

(C) Must separately display numerical percentage annual rates of return for the period covered by the bar graph; and

(iv) The commodity trading advisor must make available to prospective and existing clients upon request a table showing at least quarterly the information required to be calculated pursuant to §4.33(a)(6).

(3) Composite presentation. (i) Unless such presentation would be misleading, the performance of accounts traded pursuant to the same trading program may be presented in composite form on a program-by-program basis, using the format set forth in §4.35(a)(1).

(ii) Accounts that differ materially with respect to rates of return may not be presented in the same composite.

(iii) The commodity trading advisor must discuss all material differences among the accounts included in a composite.

(4) Current information. All performance information presented in the Disclosure Document must be current as of a date not more than three months preceding the date of the Document.

(5) Time period for required performance. All required performance information must be presented for the most recent five calendar years and year-to-date or for the life of the trading program or account, if less than five years.
(6) Calculation of, and recordkeeping concerning, performance information. (i) All performance information presented in a Disclosure Document, including performance information contained in any capsule and performance information not specifically required by Commission rules, must be current as of a date not more than three months preceding the date of the Document, and must be supported by the following amounts, calculated on an accrual basis of accounting in accordance with generally accepted accounting principles, as specified below or by a method otherwise approved by the Commission.

(A) The beginning net asset value for the period, which shall represent the previous period’s ending net asset value;

(B) All additions, whether voluntary or involuntary, during the period;

(C) All withdrawals and redemptions, whether voluntary or involuntary, during the period;

(D) The net performance for the period, which shall represent the change in the net asset value net of additions, withdrawals, redemptions, fees and expenses;

(E) The ending net asset value for the period, which shall represent the beginning net asset value plus or minus additions, withdrawals and redemptions, and net performance; and

(F) The rate of return for the period, computed on a compounded monthly basis, which shall be calculated by dividing the net performance by the beginning net asset value.

(ii) All supporting documents necessary to substantiate the computation of such amounts must be maintained in accordance with §1.31.

(7) Performance of partially-funded accounts. Notwithstanding the foregoing, a commodity trading advisor will be deemed in compliance with this §4.35(a) concerning the performance of partially-funded accounts if the commodity trading advisor presents the performance of such accounts in a manner that is balanced and is not in violation of the antifraud provisions of the Commodity Exchange Act or the Commission’s regulations thereunder.

(8) Proprietary trading results. (i) Proprietary trading results shall not be included in a Disclosure Document unless such performance is prominently labeled as proprietary and is set forth separately after all disclosures in accordance with §4.34(n), together with a discussion of any differences between such performance and the performance of the offered trading program, including, but not limited to, differences in costs, leverage and trading.

(ii) For the purposes of §4.34(n) and this §4.35(a), proprietary trading results means the performance of any account in which fifty percent or more of the beneficial interest is owned or controlled by:

(A) The commodity trading advisor or any of its principals;

(B) An affiliate or family member of the commodity trading advisor; or

(C) Any person providing services to the account.

(9) Required legend. Any past performance presentation, whether or not required by Commission rules, must be preceded with the following statement, prominently displayed:

PAST PERFORMANCE IS NOT NECESSARILY INDICATIVE OF FUTURE RESULTS.

(b) Performance to be disclosed. Except as provided in §4.35(a)(7), the commodity trading advisor must disclose the actual performance of all accounts directed by the commodity trading advisor and by each of its trading principals; Provided, however, that if the trading advisor or its trading principals previously have not directed any accounts, the trading advisor must prominently disclose this fact with one of the following statements, as applicable:

(1) THIS TRADING ADVISOR PREVIOUSLY HAS NOT DIRECTED ANY ACCOUNTS; or

(2) NONE OF THE TRADING PRINCIPALS OF THIS TRADING ADVISOR HAS PREVIOUSLY DIRECTED ANY ACCOUNTS; or

(3) NEITHER THIS TRADING ADVISOR NOR ANY OF ITS TRADING PRINCIPALS HAVE PREVIOUSLY DIRECTED ANY ACCOUNTS.

If the commodity trading advisor is a sole proprietorship, reference to its
§ 4.36 Use, amendment and filing of Disclosure Document.

(a) Subject to paragraph (c) of this section, all information contained in the Disclosure Document must be current as of the date of the Document; Provided, however, that performance information must be current as of a date not more than three months preceding the date of the Document.

(b) No commodity trading advisor may use a Disclosure Document dated more than nine months prior to the date of its use.

(c)(1) If the commodity trading advisor knows or should know that the Disclosure Document is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to:
   (i) All existing clients in the trading program within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect; and
   (ii) Each previously solicited prospective client for the trading program prior to entering into an agreement to direct or to guide such prospective client’s commodity interest account pursuant to the program. The trading advisor may furnish the correction by way of an amended Disclosure Document, a sticker on the Document, or other similar means.

   (2) The trading advisor may not use the Disclosure Document until such correction is made.

(d)(1) The commodity trading advisor must electronically file with the National Futures Association, pursuant to the electronic filing procedures of the National Futures Association, the subsequent amendments to the Disclosure Document for each trading program that it offers or that it intends to offer within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect requiring the amendment.

§ 4.40 [Reserved]

§ 4.41 Advertising by commodity pool operators, commodity trading advisors, and the principals thereof.

(a) No commodity pool operator, commodity trading advisor, or any principal thereof, may advertise in a manner which:

   (1) Employs any device, scheme or artifice to defraud any participant or client or prospective participant or client;

   (2) Involves any transaction, practice or course of business which operates as a fraud or deceit upon any participant or client or any prospective participant or client; or

   (3) Refers to any testimonial, unless the advertisement or sales literature providing the testimonial prominently discloses:

     (i) That the testimonial may not be representative of the experience of other clients;

     (ii) That the testimonial is no guarantee of future performance or success; and

     (iii) If, more than a nominal sum is paid, the fact that it is a paid testimonial.

(b)(1) No person may present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a commodity pool operator, commodity trading advisor, or any principal thereof, unless such performance is accompanied by one of the following:
(i) The following statement: ‘‘These results are based on simulated or hypothetical performance results that have certain inherent limitations. Unlike the results shown in an actual performance record, these results do not represent actual trading. Also, because these trades have not actually been executed, these results may have under- or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated or hypothetical trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to these being shown.’’; or

(ii) A statement prescribed pursuant to rules promulgated by a registered futures association pursuant to section 17(j) of the Act.

(2) If the presentation of such simulated or hypothetical performance is other than oral, the prescribed statement must be prominently disclosed and in immediate proximity to the simulated or hypothetical performance being presented.

(c) The provisions of this section shall apply:

(1) To any publication, distribution or broadcast of any report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice, whether by electronic media or otherwise, including information provided via internet or e-mail, the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations; and

(2) Regardless of whether the commodity pool operator or commodity trading advisor is exempt from registration under the Act.

(Approved by the Office of Management and Budget under control number 3038–0005)

APPENDIX A TO PART 4— FORM CPO–PQR

TEMPLATE: DO NOT SEND TO NFA

COMMODITY FUTURES TRADING COMMISSION

CFTC Form CPO-PQR OMB No.: 3038-XXXX

POOL QUARTERLY REPORT FOR COMMODITY POOL OPERATORS

Instructions for Using the Form CPO-PQR Template

READ THESE INSTRUCTIONS CAREFULLY BEFORE COMPLETING OR REVIEWING THE REPORTING FORM.

This document is not a reporting form. Do not send this document to NFA. It is a template that you may use to assist in filling the electronic reporting form with the NFA at: http://www.nfa.futures.org.

You may fill out the template online and save and/or print it when you are finished or you can download the template and/or print it and fill it out later.

DEFINED TERMS

Words that are underlined in this form are defined terms and have the meanings contained in the Definitions of Terms section.

GENERAL

Read the Instructions and Questions Carefully

Please read the instructions and the questions in this Form CPO-PQR carefully.

In this Form CPO-PQR, “you” means the CPO.

Call the CFTC with Questions

If there is any question about whether particular information must be provided or about the manner in which particular information must be provided, contact the CFTC for clarification.
REPORTING INSTRUCTIONS

1. All CPOs Are Required to Complete and File the Form CPO-PQR

All CPOs are required to complete and file a Form CPO-PQR for each Reporting Period during which they satisfy the definition of CPO and operate at least one Pool. If a pool is operated by Co-CPOs, the CPO with the higher total AUM, aggregated across all pools operated by the CPO should report for that Pool. Further, if a pool is operated by Co-CPOs and one of them is an Investment Adviser, the non-Investment Adviser CPO must file relevant section(s) even though a Form PF was filed for that pool by the Investment Adviser CPO.

2. Only Certain Schedules of this Form CPO-PQR Are Required of Certain CPOs

Only certain Schedules of this Form CPO-PQR are required to be completed and filed by certain CPOs.

Schedule A
Schedule A must be completed and filed by each CPO for every Reporting Period during which they satisfy the definition of CPO and operate at least one Pool. Large CPOs must complete and file a Schedule A within 60 days of the close of the most recent Reporting Period during which they satisfied the definition of Large CPO. All other CPOs must complete and file a Schedule A within 90 days of the close of the calendar year. The information provided herein should be as of the last business day of the reporting period.

Part 1 of Schedule A surveys basic information about the reporting CPO. Part 2 of Schedule A asks for more specific information about each of the CPO’s Pools, including questions about the Pool’s key relationship and about the Pool’s investment positions.

Substituted Compliance for Schedules B and C
To the extent that a CPO is a dual registrant and is required to file Form PF with the SEC, then it may elect to file Form PF for all pools it, or any related person as defined for purposes of Form PF, may operate.

Schedule B
Schedule B must be completed and filed annually by Mid-Sized CPOs. Mid-Sized CPOs must complete and file a Schedule B within 90 days of the close of each calendar year during which they satisfied the definition of Mid-Sized CPO and operated at least one Pool. A CPO that qualifies as a Mid-Sized CPO at any point during the calendar year must complete and file a separate Schedule B for each Pool that it operated during the calendar year.

Schedule B must be completed and filed quarterly by Large CPOs. Large CPOs must complete and file a Schedule B within 60 days of the close of the most recent Reporting Period during which they satisfied the definition of Large CPO and operated at least one Pool. A CPO that qualifies as a Large CPO at any point during the Reporting Period must complete and file a separate Schedule B for each Pool that it operated during the Reporting Period.

Schedule B Substitution
Any Mid-Sized CPO or Large CPO that is: (i) registered with the SEC as an Investment Adviser; and (ii) operated only Pools that satisfy the definition of Private Fund during the calendar year or Reporting Period, respectively, will be deemed to have satisfied its Schedule B filing requirements by completing and filing Sections 1.b. and 1.c. of Form PF for each Pool that it operated during the calendar year or Reporting Period, respectively, in question.
2. Only Certain Schedules of this Form CPO-PQR Are Required of Certain CPOs (cont'd)

Further, to the extent that any Mid-Sized CPO or Large CPO is: (i) registered with the SEC as an Investment Adviser; and (ii) operated any Pools that do not satisfy the definition of Private Fund during the calendar year or Reporting Period, respectively, and does NOT elect to file Form PF under the substituted compliance provisions of Form PF, they will be required to complete and file a Schedule B for each Pool that it operated during the calendar year or Reporting Period, respectively, that did not satisfy the definition of a Private Fund. Schedule B will need to be completed in addition to the Mid-Sized CPO's or Large CPO's filing Form PF requirements.

Schedule B asks for information about each Pool's creditors, counterparties, borrowings, and clearing mechanisms.

Schedule C
Schedule C must be completed and filed only by Large CPOs. Large CPOs must complete and file a Schedule C within 60 days of the close of the most recent Reporting Period during which they satisfy the definition of a Large CPO and operate at least one Pool. A CPO that qualifies as a Large CPO at any point during the Reporting Period must complete and file a separate Part 2 of Schedule C for each Large Pool that it operated during the Reporting Period.

Schedule C Substitution
Any Large CPO that is: (i) registered with the SEC as an Investment Adviser; and (ii) operated only Pools that satisfy the definition of Private Fund during the Reporting Period will be deemed to have satisfied its Schedule C filing requirements by completing and filing the applicable Sections 1 and 2 of Form PF for the Reporting Period in question.

Further, to the extent that any Large CPO is: (i) registered with the SEC as an Investment Adviser; and (ii) operated any Pools that do not satisfy the definition of Private Fund during the Reporting Period and does NOT elect to file Form PF under the substituted compliance provisions of Form PF, they will be required to complete Parts 1 and 2 of Schedule C with respect to the Pool(s) that it operated during the Reporting Period that did not satisfy the definition of a Private Fund. For these Large CPOs, Part 1 of Schedule C will need to be completed with respect to all Pools that they operated during the Reporting Period that did not satisfy the definition of Private Fund, and Part 2 of Schedule C will need to be completed with respect to all Large Pools that they operated during the Reporting Period that did not satisfy the definition of Private Fund. These Schedule C filings will need to be completed in addition to the Large CPO's filing Form PF requirements.

Part 1 of Schedule C asks for information about the aggregated portfolios of the Pools that were not Private Funds that the Large CPO operated during the Reporting Period.

Part 2 of Schedule C asks for certain risk metrics about the Large Pools that were not Private Funds that the Large CPO operated during the Reporting Period.
3. **The CPO May Be Required to Aggregate Information Concerning Certain Types of Pools**

For purposes of determining whether a CPO meets the reporting thresholds for Schedules B and/or C of this Form CPO-PQR, the CPO must: (i) aggregate all Parallel Pool Structures, Parallel Managed Accounts and Master Feeder Arrangements; and (ii) treat any Pool or Parallel Managed Account operated by any of its Affiliated Entities as though it was operated by the CPO.

For purposes of determining whether a Pool qualifies as a Large Pool for Schedule C of this Form CPO-PQR, the CPO must: (i) aggregate all Pools that are part of the same Parallel Fund Structure or Master-Feeder Arrangement; (ii) aggregate any Parallel Managed Accounts with the largest Pool to which that Parallel Managed Account relates; and (iii) treat any Pool or Parallel Managed Account operated by any of your Affiliated Entities as though it was operated by the CPO.

However, for the parts of Form CPO-PQR that request information about individual Pools, you must report aggregate information for Parallel Managed Accounts and Master Feeder Arrangements as if each were an individual Pool, but not Parallel Pools. Assets held in Parallel Managed Accounts should be treated as assets of the Pools with which they are aggregated.

4. **I advise a Pool that invests in other Pools or funds (e.g., a “fund of funds”). How should I treat these investments for purposes of Form CPO-PQR?**

**Investments in other Pools generally.** For purposes of this Form CPO-PQR, you may disregard any Pool’s equity investments in other Pools. However, if you disregard these investments, you must do so consistently (e.g., do not include disregarded investments in the net asset value used for determining whether the fund is a “Qualifying Pool”). For Schedule A, Question 11, even if you disregard these assets, you may report the performance of the entire Pool and are not required to recalculate performance in order to exclude these investments. Do not disregard any liabilities, even if incurred in connection with these investments.

**Pools that invest substantially all of their assets in other Pools or funds.** If you are the CPO for a Pool that: (i) invests substantially all of its assets in the equity of Pools or Private Funds for which you are not the CPO; and (ii) aside from such Pool or Private Fund investments, holds only cash and cash equivalents and instruments acquired for the purpose of hedging currency exposure, then you are only required to complete Schedule A for that Pool. For all other purposes, you should disregard such Pools. For example, where questions request aggregate information regarding the Pools you advise, do not include the assets or liabilities of any such Pool.

Notwithstanding the foregoing, you must include disregarded assets in responding to Schedule A, Question 0).

5. **I am required to aggregate funds or accounts to determine whether I meet a reporting threshold, or I am electing to aggregate funds for reporting purposes. How do I “aggregate” funds or accounts for these purposes?**

Where two or more Parallel Pool Structures or Master-Feeder Arrangements are aggregated in accordance with Instruction 3, you must treat the aggregated funds as if they were all one Pool. Investments that a Feeder Fund makes in a Master Fund should be disregarded, but other investments of the Feeder Fund should be treated as though they were investments of the aggregated fund.
Where you are aggregating dependent parallel managed accounts to determine whether you meet a reporting threshold, assets held in the accounts should be treated as assets of the Pools with which they are aggregated.

**Example 1.** You advise a master-feeder arrangement with one feeder fund. The feeder fund has invested $500 in the master fund and holds a foreign exchange derivative with a notional value of $100. The master fund has used the $500 received from the feeder fund to invest in corporate bonds. Neither fund has any other assets or liabilities. For purposes of determining whether the funds comprise a qualifying Pool, this master-feeder arrangement should be treated as a single Pool whose only investments are $500 in corporate bonds and a foreign exchange derivative with a notional value of $100. If you elect to aggregate the master-feeder arrangement for reporting purposes, the treatment would be the same.

**Example 2.** You advise a parallel fund structure consisting of two pools, named parallel pool A and parallel pool B. You also advise a related dependent parallel managed account. The account and each fund have invested in corporate bonds of Company X and have no other assets or liabilities. The value of parallel pool A’s investment is $400, the value of parallel pool B’s investment is $300 and the value of the account’s investment is $200. For purposes of determining whether either of the parallel pools is a qualifying Pool, the entire parallel fund structure and the related dependent parallel managed account should be treated as a single Pool whose only asset is $900 of corporate bonds issued by Company X. If you elect to aggregate the parallel fund structure for reporting purposes, you would disregard the dependent parallel managed account, so the result would be a single Pool whose only asset is $700 of corporate bonds issued by Company X.

6. I advise a Pool that invests in entities that are not Pools, or are exempt. How should I treat these investments for purposes of Form CPO-PQR?

Except as provided in Instruction 4, investments in funds should be included for all purposes under this Form CPO-PQR. You are not, however, required to “look through” a Pool’s investments in any other entity unless the Form CPO-PQR specifically requests information regarding that entity or the other entity’s primary purpose is to hold assets or incur leverage as part of the Pool’s investment activities.

7. The Form CPO-PQR Must Be Filed Electronically with NFA

All CPOs must file their Forms CPO-PQR electronically using NFA’s EasyFile System. NFA’s EasyFile System can be accessed through NFA’s website at www.nfa.futures.org. You will use the same logon and password for filing your Form CPO-PQR as you would for any other EasyFile filings. Questions regarding your NFA ID# or your use of NFA’s EasyFile system should be directed to the NFA. The NFA’s contact information is available on its website.
8. All Figures Reported in U.S. Dollars

All questions asking for amounts or investments must be reported in U.S. dollars. Any amounts converted to U.S. dollars must use the conversion rate in effect on the Reporting Date.

9. Use of U.S. GAAP

All financial information in this Report must be presented and computed in accordance with GAAP consistently applied.

10. Oath and Affirmation

This Form CPO-PQR will not be accepted unless it is complete and contains an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the document is accurate and complete; provided however, that it is unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in this Form CPO-PQR is not accurate and complete.
DEFINITIONS OF TERMS

Affiliated Entity: The term "Affiliated Entity" means any entity is an affiliate of another entity. An entity is an affiliate of another entity if the entity directly or indirectly controls, is controlled by or is under common control with the other entity.

Assets Under Management or AUM: The term "Assets Under Management" or "AUM" means the amount of all assets that are under the control of the CPO.

BP: The term "BP" means basis points.

Broker: The term "Broker" means any entity that provides clearing, prime brokerage or similar services to the Pool.

CDS: The term "CDS" means credit default swap.

CCP: The term "CCP" means a central counterparty or central clearing house, such as, but not limited to: CC&G, CME Clearing, The Depository Trust & Clearing Corporation (including FICC, NSCC and Euro CCP), EMCF, Eurex Clearing, Fedwire, ICE Clear Europe, ICE Clear U.S., ICE Trust, LCH Clearnet Limited, LCH Clearnet SA, Options Clearing Corporation and SIX x-clear.

Commodity Futures Trading Commission or CFTC: The term "Commodity Futures Trading Commission" or "CFTC" means the United States Commodity Futures Trading Commission.

Commodity Pool or Pool: The term "Commodity Pool" or "Pool" has the same meaning as "commodity pool" as defined in section 1a(10) of the Commodity Exchange Act.

Commodity Pool Operator or CPO: The term "commodity pool operator" or "CPO" has the same meaning as "commodity pool operator" defined in section 1a(11) of the Commodity Exchange Act.

Commodity Trading Advisor or CTA: The term "commodity trading advisor" or "CTA" has the same meaning as "commodity trading adviser" as defined in section 1a(12) of the Commodity Exchange Act.

Feeder Fund: See Master-Feeder Arrangement.

Financial Institution: The term "financial institution" means any of the following: (i) a bank or savings association, in each case as defined in the Federal Deposit Insurance Act; (ii) a bank holding company or financial holding company, in each case as defined in the Bank Holding Company Act of 1956; (iii) a savings and loan holding company, as defined in the Home Owners' Loan Act; (iv) a Federal credit union, State credit union or State-chartered credit union, as those terms are defined in section 101 of the Federal Credit Union Act; (v) a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971; or (vi) an entity chartered or otherwise organized outside the United States that engages in banking activities.

Form CPO-PQR: The term "Form CPO-PQR" means this Form CPO-PQR.

Form PF: The term "Form PF" refers to the Form PF.
GAAP: The term “GAAP” means U.S. Generally Accepted Accounting Principles.

Investment Adviser: The term “Investment Adviser” has the same meaning as “investment adviser” as defined in Section 202(a)(11) of the Investment Advisers Act of 1940.

Large CPO: The term “Large CPO” refers to any CPO that had at least $1.5 billion in aggregated Pool Assets Under Management as of the close of business on any day during the Reporting Period.

Large Pool: The term “Large Pool” means any Pool that has a Net Asset Value individually, or in combination with any Parallel Pool Structure, of at least $500 million as of the close of business on any day during the Reporting Period.

Master Fund: See Master-Feeder Arrangement.

Master-Feeder Arrangement: The phrase “Master-Feeder Arrangement” means an arrangement in which one or more funds (“Feeder Funds”) invest all or substantially all of their assets in a single fund (“Master Fund”). A fund would also be a Feeder Fund investing in a Master Fund for the purposes of this definition if it issued multiple classes or series of shares or interests and each class (or series) invests substantially all of its assets in shares (or other interests in) a single underlying Master Fund.

Mid-Sized CPO: The term “Mid-Sized CPO” refers to any CPO that had at least $150 million in aggregated Pool Assets Under Management as of the close of business on any day during the Reporting Period.

National Futures Association or NFA: The term “National Futures Association” or “NFA” refers to the National Futures Association, a registered futures association under Section 17 of the Commodity Exchange Act.

Negative OTE: The term “Negative OTE” means negative open trade equity.

Net Asset Value or NAV: The term “Net Asset Value” or “NAV” has the same meaning as “net asset value” as defined in Commission Rule 4.10(b).

Non-U.S. Financial Institution: A “non-U.S. Financial Institution” means any of the following Financial Institutions: (i) a Financial Institution chartered outside the United States; (ii) a subsidiary of a U.S. Financial Institution that is separately incorporated or otherwise organized outside the United States; or (iii) a branch or agency that resides in the United States but has a parent that is a Financial Institution chartered outside the United States.

OTC: The term “OTC” means over-the-counter.

Parallel Managed Account: The term “Parallel Managed Account” means any managed account or other pool of assets that the CPO operates and that pursues substantially the same investment objective and strategy and invests side-by-side in substantially the same assets as the identified Pool.
**Parallel Pool Structure:** The term “Parallel Pool Structure” means any structure in which one or more Pools pursues substantially the same investment objective and strategy and invests side by side in substantially the same assets as another Pool.

**Private Fund:** The term “Private Fund” has the same meaning as “private fund” as defined in Form PF.

**Positive OTE:** The term “Positive OTE” means positive open trade equity.

**Reporting Date:** The term “Reporting Date” means the last calendar day of the Reporting Period for which this Form CPO-PQR is required to be completed and filed. For example, the Reporting Date for the first calendar quarter of a year is March 31; the Reporting Date for the second calendar quarter is June 30.

**Reporting Period:** The term “Reporting Period” means any of the individual calendar quarters (ending March 31, June 30, September 30, and December 31) for Large CPOs and the calendar year end for all other CPOs.

**Trading Manager:** The term “Trading Manager” means any entity or individual with sole or partial authority to invest Pool assets or to allocate Pool assets to other managers or investee Pools (including cash management firms). CTAs and other CPOs can be Trading Managers; however, a CPO should not identify itself as a Trading Manager.

**Secured Borrowing:** The term “Secured Borrowing” means obligations for borrowed money in respect of which the borrower has posted collateral or other credit support. For purposes of this definition, repos are secured borrowings.

**Securities and Exchange Commission or SEC:** The term “Securities and Exchange Commission” or “SEC” means the United States Securities and Exchange Commission.

**Side Arrangements and Side Letters:** The term “Side Arrangements” or the term “Side Letters” means any arrangement that is extended to less than 100% of the Pool’s participants.

**U.S. Financial Institution:** The term “U.S. Financial Institution” means any of the following Financial Institutions: (i) a Financial Institution chartered in the United States (whether federally-chartered or state-chartered); (ii) a subsidiary of a Non-U.S. Financial Institution that is separately incorporated or otherwise organized in the United States; or (iii) a branch or agency that resides outside the United States but has a parent that is a Financial Institution chartered in the United States.

**Unsecured Borrowing:** The term “Unsecured Borrowing” means obligations for borrowed money in respect of which the borrower has not posted collateral or other credit support.

**VaR:** The term “VaR” means value at risk.
INSTRUCTIONS FOR COMPLETING SCHEDULE A

Every CPO is required to complete and file Schedule A of this Form CPO-PQR. This Schedule A must be completed for every Reporting Period during which the CPO operated at least one Pool. Part 1 of Schedule A asks for information about the CPO. Part 2 of Schedule A asks for information about each individual Pool that the CPO operated during the Reporting Period. CPOs must complete and file a separate Part 2 for each Pool they operated any time during the Reporting Period.

Unless otherwise specified in a particular question, all information provided in this Schedule A should be accurate as of the Reporting Date.

PART 1 · INFORMATION ABOUT THE CPO

1. CPO INFORMATION
   Provide the following general information concerning the CPO:
   a. CPO’s Name: ____________________________
   b. CPO’s NFA ID#: __________________________
   c. Person to contact concerning this Form CPO-PQR: __________________________
   d. CPO’s chief compliance officer: __________________________
   e. Total number of employees of the CPO: __________________________
   f. Total number of equity holders of the CPO: __________________________
   g. Total number of Pools operated by the CPO: __________________________
   h. Telephone number and email for person identified in c. above: __________________________

2. CPO ASSETS UNDER MANAGEMENT
   Provide the following information concerning the amount of Assets Under Management by the CPO:
   a. CPO’s Total Assets Under Management: __________________________
   b. CPO’s Total Net Assets Under Management: __________________________
PART 2 · INFORMATION ABOUT THE POOLS OPERATED BY THE CPO

REMINDER: The CPO must complete and file a separate Part 2 for each Pool that the CPO operated during the Reporting Period.

3. POOL INFORMATION

Provide the following general information concerning the Pool:

| a. Pool’s name: |  |
| b. Pool’s NFA ID#: |  |
| c. If the Pool is operated by Co-CPOs, the name of the other CPOs: |  |
| d. Under the laws of what state or country is the Pool organized: |  |
| e. On what date does the Pool’s fiscal year end: |  |
| f. Is this Pool a Private Fund? | Yes ☐ No ☐ |
| g. List the English name of each Foreign Financial Regulatory Authority and the country with which the Pool is registered: |
| Foreign Financial Regulatory Authority | Country |
| |  |
| |  |
| |  |
| h. Is this a Master Fund in a Master-Feeder Arrangement? | Yes ☐ No ☐ |
| If “Yes,” provide the name and NFA ID# of each Feeder Fund investing in this Pool: |
| Feeder Fund | NFA ID# |
| |  |
| |  |
| |  |
| i. Is this a Feeder Fund in a Master-Feeder Arrangement? | Yes ☐ No ☐ |
| If “Yes,” provide the name and NFA ID# of the Master Fund in which this Pool invests: |
| Master Fund | NFA ID# |
| |  |
| |  |
| |  |
| j. If this Pool invests in other Pools, a) what is the maximum number of investee pool tiers? |  |
| i. What is the value of this Pool’s investments in equity of other Pools or private funds? |  |
### 4. POOL THIRD PARTY ADMINISTRATORS

Provide the following information concerning the Pool's third party administrator(s):

a. Does the CPO use third party administrators for the Pool?  
   - Yes ☐  
   - No ☐

   If "Yes," provide the following information for each third party administrator:

   i. Name of the administrator:

   ii. NFA ID# of administrator:

   iii. Address of the administrator:

   iv. Telephone number of the administrator:

   v. Starting date of the relationship with the administrator:

   vi. Services performed by the administrator:
   - Preparation of Pool financial statements: ☐
   - Maintenance of the Pool's books and records: ☐
   - Calculation of Pool's performance: ☐
   - Other: ____________________ ☐

b. What percentage of the Pool's Assets Under Management is valued by a third party administrator, or similar entity, that is independent of the CPO?  
   - %

   If the number entered is greater than "0," provide the following information:

   Name(s) of the third party(-ies):

### 5. POOL BROKERS

Provide the following information concerning the Pool's Broker(s):

a. Does the CPO use Brokers for the Pool?  
   - Yes ☐  
   - No ☐

   If "Yes," provide the following information for each Broker:

   i. Name of the Broker:

   ii. NFA ID# of Broker:

   iii. Address of Broker:

   iv. Telephone number of the Broker:

   v. Starting date of the relationship with the Broker:

   vi. Services performed by the Broker:
   - Clearing services for the Pool: ☐
   - Custodian services for some or all Pool assets: ☐
   - Prime brokerage services for the Pool: ☐
   - Other: ____________________ ☐
6. **POOL TRADING MANAGERS**

Provide the following information concerning the Pool’s Trading Manager(s):

a. Has the CPO authorized Trading Managers to invest or allocate some or all of the Pool’s Assets Under Management?  
   - Yes ☐  No ☐

   If “Yes,” provide the following information for each Trading Manager:
   
i. Name of the Trading Manager: [ ]
   
   ii. NFA ID# of the Trading Manager: [ ]
   
   iii. Address of the Trading Manager: [ ]
   
   iv. Telephone number of the Trading Manager: [ ]
   
   v. Starting date of the relationship with the Trading Manager: [ ]
   
   vi. What percentage of the Pool’s Assets Under Management does the Trading Manager have authority to invest or allocate? [ ]

7. **POOL CUSTODIANS**

Provide the following information concerning the Pool’s custodian(s):

a. Does the CPO use custodians to hold some or all of the Pool’s Assets Under Management?  
   - Yes ☐  No ☐

   If “Yes,” provide the following information for each custodian:
   
i. Name of the custodian: [ ]
   
   ii. NFA ID# of the custodian: [ ]
   
   iii. Address of the custodian: [ ]
   
   iv. Telephone number of the custodian: [ ]
   
   v. Starting date of the relationship with the custodian: [ ]
   
   vi. What percentage of the Pool’s Assets Under Management is held by the custodian? [ ]

8. **POOL AUDITOR**

Provide the following information concerning the Pool’s auditor(s):

a. Does the CPO have the Pool’s financial statements audited?  
   - Yes ☐  No ☐

   If “Yes,” provide the following information:
   
i. Is the audit conducted in accordance with GAAP?  
      - Yes ☐  No ☐
   
   ii. Name of the auditing firm: [ ]
   
   iii. Address of the auditing firm: [ ]
### CFTC POOL QUARTERLY REPORT FOR COMMODITY POOL OPERATORS

**Form CPO-FOR Template - Schedule A**

- **iv. Telephone number of the auditing firm:**
  - 
- **v. Starting date of the relationship with the auditing firm:**
  - 

**b. Are the Pool’s audited financial statements distributed to the Pool’s participants?**

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
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</table>

### 9. POOL MARKETERS

**Provide the following information concerning the Pool’s marketer(s):**

- **a. Does the CPO use the services of third parties to market participations in the Pool?**
  - Yes | No
  -     |    

If “Yes,” provide the following information for each marketing firm:

- **i. Name of the marketing firm:**
  - 
- **ii. Address of the marketing firm:**
  - 
- **iii. Telephone number of the marketing firm:**
  - 
- **iv. Starting date of the relationship with the marketing firm:**
  - 
- **v. Address of any website used by the marketing firm to market participations in the Pool:**
  - 

### 10. POOL’S STATEMENT OF CHANGES CONCERNING ASSETS UNDER MANAGEMENT

**Provide the following information concerning the Pool’s activity during the Reporting Period.** For the purposes of this question:

- **a. The Assets Under Management and Net Asset Value at the beginning of the Reporting Period are considered to be the same as the assets under management and Net Asset Value at the end of the previous Reporting Period, in accordance with Commission Rule 4.25(a)(7)(A).**

- **b. The additions to the Pool include all additions whether voluntary or involuntary in accordance with Commission Rule 4.25(a)(7)(B).**

- **c. The withdrawals and redemptions from the Pool include all withdrawals or redemptions whether voluntary or not, in accordance with Commission Rule 4.25(a)(7)(C).**

- **d. The Pool’s Assets Under Management and Net Asset Value on the Reporting Date must be calculated by adding or subtracting from the Assets Under Management and Net Asset Value at the beginning of the Reporting Period, respectively, any additions, withdrawals, redemptions and net performance, as provided in Commission Rule 4.25(a)(7)(E).**

- **i. Pool’s Assets Under Management at the beginning of the Reporting Period:**
  - 
- **ii. Pool’s Net Asset Value at the beginning of the Reporting Period:**
  - 

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11. **POOL'S MONTHLY RATES OF RETURN**

Provide the Pool's monthly rate of return for each month that the Pool has operated. The Pool's monthly rate of return should be calculated in accordance with Commission Rule 4.25(a)(7)(F). Provide the Pool's annual rate of return for the appropriate year in the row marked "Annual."

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</tbody>
</table>

12. **POOL SUBSCRIPTIONS AND REDEMPTIONS**

Provide the following information concerning subscriptions to and redemptions from the Pool during the Reporting Period.

a. Total Pool subscriptions by participants during the Reporting Period:  
   b. Total Pool redemptions by participants during the Reporting Period:  

c. Are any Pool participants or share classes currently below the Pool's high water mark?  
   Yes □ No □

If "Yes," provide the following information:

i. What is the percentage of participants below the Pool's high water mark as of the Reporting Date?  
   ii. What is the weighted average percentage of participants below the Pool's high water mark as of the Reporting Date?  

%  
%
d. Provide the following information regarding the Pool’s restrictions on participant withdrawals and redemptions.

(For Questions iv. and v., please note that the standards for imposing suspensions and restrictions on withdrawals/redemptions may vary among funds. Make a good faith determination of the provisions that would likely be triggered during conditions that you view as significant market stress.)

i. Does the reporting fund provide participants with withdrawal/redemption rights in the ordinary course?

| ☐ Yes | ☐ No |

(If you responded “yes” to Question 12(d)(i), then you must respond to Questions 12(d)(ii)-(v).)

As of the data reporting date, what percentage of the Pool’s net asset value, if any:

ii. May be subjected to a suspension of participant withdrawals/redemptions CPO (this question relates to a CPO’s right to suspend and not just whether a suspension is currently effective)

iii. May be subjected to material restrictions on participant withdrawals/redemptions (e.g., “gates”) CPO (this question relates to a CPO’s right to impose a restriction and not just whether a restriction has been imposed)

iv. Is subject to a suspension of participant withdrawals/redemptions (this question relates to whether a suspension is currently effective and not just a CPO’s right to suspend)

v. Is subject to a material restriction on participant withdrawals/redemptions (e.g., a “gate”) (this question relates to whether a restriction has been imposed and not just a CPO’s right to impose a restriction)

e. Has the Pool imposed a halt or any other material limitation on redemptions during the Reporting Period?

| ☐ Yes | ☐ No |

If “Yes,” provide the following information:

i. On what date was the halt or material limitation imposed?

ii. If the halt or material limitation has been lifted, on what date was it lifted?

iii. What disclosure was provided to participants to notify them that the halt or material limitation was being imposed? What disclosure was provided to participants to notify them that the halt or material limitation was being lifted?

iv. On what date(s) was this disclosure provided?

v. Briefly explain the halt or material limitation(s) on redemptions and the reason for such halt or material limitation(s):

--- This Completes Schedule A of Form CPO-PQR ---
INSTRUCTIONS FOR COMPLETING SCHEDULE B

A CPO is only required to complete and file Schedule B of this Form CPO-PQR if at any point during the Reporting Period the CPO qualified as a Mid-Sized CPO or Large CPO.

Schedule B must be completed and filed annually by Mid-Sized CPOs. Mid-Sized CPOs must complete and file a Schedule B within 90 days of the close of each calendar year during which they satisfied the definition of Mid-Sized CPO and operated at least one Pool. A CPO that qualifies as a Mid-Sized CPO at any point during the calendar year must complete and file a separate Schedule B for each Pool that it operated during the calendar year.

Schedule B must be completed and filed quarterly by Large CPOs. Large CPOs must complete and file a Schedule B within 60 days of the close of the most recent Reporting Period during which they satisfied the definition of Large CPO and operated at least one Pool. A CPO that qualifies as a Large CPO at any point during the Reporting Period must complete and file a separate Schedule B for each Pool that it operated during the Reporting Period.

Notwithstanding the above paragraph, certain Mid-Sized CPOs and Large CPOs that are also registered as Investment Advisers with the SEC may be deemed to have satisfied their Schedule B filing requirements by completing and filing Sections 1.b. and 1.c. of Form PF. Whether a Mid-Sized CPO or Large CPO has satisfied its Schedule B filing requirements will depend upon the type of Pools it operated during the calendar year or Reporting Period, respectively. Refer to the instructions of this Form CPO-PQR to determine whether you are required to complete this Schedule B and, if you are, how frequently you are required to file.

Unless otherwise specified in a particular question, all information provided in this Schedule B should be accurate as of the Reporting Date for all Large CPOs and accurate as of December 31 of each calendar year for all Mid-Sized CPOs.

REMINDER: A CPO that qualified as a Mid-Sized CPO at any point during the calendar year or Large CPO at any point during the Reporting Period must complete and file a separate Schedule B for each Pool that it operated during the calendar year or Reporting Period, respectively, if not filing Form PF with the SEC in lieu thereof.
1. **POOL INFORMATION**

   Provide the following general information concerning the Pool:
   
   a. **Pool's name:**
   
   b. **Pool's NFA ID:**
   
   c. **Does the Pool have a single primary investment strategy or multiple strategies?**
      
      - [ ] Single Primary Strategy
      - [ ] Multiple Strategies
   
   d. Indicate which of the investment strategies below best describe the reporting fund's strategies. For each strategy that you have selected, provide a good faith estimate of the percentage of the reporting fund's net asset value represented by that strategy. If, in your view, the reporting fund's allocation among strategies is appropriately represented by the percentage of deployed capital, you may also provide that information.
      
      (Select the investment strategies that best describe the reporting fund's strategies, even if the descriptions below do not precisely match your characterization of those strategies; select "other" only if a strategy that the reporting fund uses is significantly different from any of the strategies identified below. You may refer to the reporting fund's use of these strategies as of the data reporting date or throughout the reporting period, but you must report using the same basis in future filings.)
      
      (The strategies listed below are mutually exclusive (i.e., do not report the same assets under multiple strategies). If providing percentages of capital, the total should add up to approximately 100%.)

<table>
<thead>
<tr>
<th>Strategy</th>
<th>% of NAV (required)</th>
<th>% of capital (optional)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equity, Market Neutral</td>
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<td></td>
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<tr>
<td>Equity, Long/Short</td>
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<td>Equity, Short Bias</td>
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<td>Equity, Fundamental</td>
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<tr>
<td>Macro, Active Trading (high frequency trading)</td>
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<td>Macro, Commodity</td>
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<td>Macro, Currency</td>
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<tr>
<td>Macro, Global Macro</td>
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<tr>
<td>Relative Value, Fixed Income Asset Backed</td>
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<tr>
<td>Relative Value, Fixed Income Convertible Arbitrage</td>
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<tr>
<td>Relative Value, Fixed Income Corporate</td>
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<tr>
<td>Relative Value, Fixed Income Sovereign</td>
<td></td>
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<tr>
<td>Relative Value, Volatility</td>
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</tr>
</tbody>
</table>
e. Provide the approximate percentage of the Pool’s portfolio that is managed using quantitative trading algorithms or quantitative techniques to select investments. Do not include the use of algorithms used solely for trade execution:

0%  1-10%  11-25%  26-50%  51-75%  76-99%  100%

f. Provide the following information concerning the Pool’s participant concentration. Beneficial owners of Pool participations that are Affiliated Entities should be treated as a single participant:

i. Total number of participants in the Pool:

ii. Percentage of the Pool that is beneficially owned by the five largest participants:

2. POOL BORROWINGS AND TYPES OF CREDITORS

Provide the following information concerning the Pool’s borrowings and types of creditors. Include all Secured Borrowings and Unsecured Borrowings, but not synthetic borrowings. The percentages entered below for questions 2.b., 2.c., 2.d. and 2.e. should total 100%:
3. **POOL COUNTERPARTY CREDIT EXPOSURE**

Provide the following information about the Pool's counterparty credit exposure. Do not include CCPs as counterparties and aggregate all Affiliated Entities as a single group for purposes of this question.

Your responses should take into account: (i) mark-to-market gains and losses on derivatives; (ii) margin posted to the counterparty (for subparagraph 3.b.) or margin posted by the counterparty (for subparagraph 3.c.); and (iii) any loans or loan commitments. Your responses should not take into account: (i) assets that the counterparty is holding in custody on your behalf; (ii) derivative transactions that have been executed but not settled; (iii) margin held in a customer omnibus account at a CCP; or (iv) holdings of debt or equity securities issued by the counterparty.

a. Provide the Pool's aggregate net counterparty credit exposure, measured in dollars: 

b. Identify the five counterparties to which the reporting fund has the greatest mark-to-market net counterparty credit exposure, measured as a percentage of the reporting fund's net asset value.

(For purposes of this question, you should treat affiliated entities as a single group to the extent exposures may be contractually or legally set-off or netted across those entities and/or one affiliate guarantees or may otherwise be obligated to satisfy the obligations of another. CCPs should not be regarded as counterparties for purposes of this question.)

(In your response, you should take into account: (i) mark-to-market gains and losses on derivatives; and (ii) any loans or loan commitments.)

(However, you should not take into account: (i) margin posted by the counterparty; or (i) holdings of debt or equity securities issued by the counterparty.)

<table>
<thead>
<tr>
<th>Legal name of the counterparty (or, if multiple affiliated entities, counterparties)</th>
<th>Indicate below if the counterparty is affiliated with a major financial institution</th>
<th>Exposure (% of reporting fund’s net asset value)</th>
</tr>
</thead>
<tbody>
<tr>
<td>i.</td>
<td>[repeat drop-down list of creditor/counterparty names] Other:</td>
<td></td>
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<tr>
<td></td>
<td>[not applicable]</td>
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<tr>
<td>ii.</td>
<td>[repeat drop-down list of creditor/counterparty names] Other:</td>
<td></td>
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<tr>
<td></td>
<td>[not applicable]</td>
<td></td>
</tr>
<tr>
<td>iii.</td>
<td>[repeat drop-down list of creditor/counterparty names]</td>
<td></td>
</tr>
</tbody>
</table>
c. Identify the five counterparties that have the greatest mark-to-market net counterparty credit exposure to the reporting fund, measured in U.S. dollars.

(For purposes of this question, you should treat affiliated entities as a single group to the extent exposures may be contractually or legally set-off or netted across those entities and/or one affiliate guarantees or may otherwise be obligated to satisfy the obligations of another. CCPs should not be regarded as counterparties for purposes of this question.)

(In your response, you should take into account: (i) mark-to-market gains and losses on derivatives; and (ii) any loans or loan commitments.)

(However, you should not take into account: (i) margin posted to the counterparty; or (ii) holdings of debt or equity securities issued by the counterparty.)

<table>
<thead>
<tr>
<th>Legal name of the counterparty (or, if multiple affiliated entities, counterparties)</th>
<th>Indicate below if the counterparty is affiliated with a major financial institution</th>
<th>Exposure (in U.S. dollars)</th>
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<tbody>
<tr>
<td>i.</td>
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<td>ii.</td>
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<tr>
<td>v.</td>
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</tbody>
</table>
4. POOL TRADING AND CLEARING MECHANISMS

Provide the following information concerning the Pool’s use of trading and clearing mechanisms. For purposes of this question: (i) a trade includes any transaction, irrespective of whether entered into on a bilateral basis, on exchange, or through a trading facility or other system, and (ii) transactions for which margin is held in a customer omnibus account at a CCP should be considered cleared by a CCP.

Trading and Clearing of Derivatives

a. For each of the following types of derivatives that are traded by the Pool, estimate the percentage (in terms of notional value) of the Pool’s activity that is traded on a regulated exchange as opposed to over-the-counter. The percentages entered for each row should total 100%:

<table>
<thead>
<tr>
<th>Derived Type</th>
<th>Traded on a Regulated Exchange</th>
<th>Traded Over-the-Counter</th>
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<tbody>
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<td>Credit derivatives</td>
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<td>Interest rate derivatives</td>
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<td>Commodity derivatives</td>
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<td>Equity derivatives</td>
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<td>Foreign exchange derivatives</td>
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<td>Asset backed securities derivatives</td>
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<tr>
<td>Other derivatives</td>
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</table>

b. For each of the following types of derivatives that are traded by the Pool, estimate the percentage (in terms of notional value) of the Pool’s activity that is cleared by a CCP as opposed to being transacted bilaterally (not cleared by a CCP). The percentages entered for each row should total 100%:

<table>
<thead>
<tr>
<th>Derived Type</th>
<th>Cleared by a CCP</th>
<th>Transacted Bilaterally</th>
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<tbody>
<tr>
<td>Credit derivatives</td>
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<td>Interest rate derivatives</td>
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<td>Asset backed securities derivatives</td>
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<td>Other derivatives</td>
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</tbody>
</table>
c. For each of the following types securities that are traded by the Pool, estimate the percentage (in terms of market value) of the Pool’s activity that is traded on a regulated exchange as opposed to over-the-counter. The percentages entered for each row should total 100%:

<table>
<thead>
<tr>
<th>Equity securities:</th>
<th>Traded on a Regulated Exchange</th>
<th>Traded Over-the-Counter</th>
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<tbody>
<tr>
<td>Debt securities:</td>
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</table>

d. For each of the following types securities that are traded by the Pool, estimate the percentage (in terms of market value) of the Pool’s activity that is cleared by a CCP as opposed to being transacted bilaterally (not cleared by a CCP). The percentages entered for each row should total 100%:

<table>
<thead>
<tr>
<th>Clearing of Repos</th>
<th>Cleared by a CCP</th>
<th>Transacted Bilaterally</th>
<th>Tri-Party Repo</th>
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<tbody>
<tr>
<td>Equity securities:</td>
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<tr>
<td>Debt securities:</td>
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e. For the repo trades into which the Pool has entered, estimate the percentages (in terms of market value) of the Pool’s repo trades that are cleared by a CCP, that are transacted bilaterally (not cleared by a CCP) and that constitute a tri-party repo. Tri-party repo is any repo where the collateral is held at a custodian (not a CCP) that acts as a third party agent to both repo buyer and the repo seller. The percentages entered should total 100%:

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<thead>
<tr>
<th>Repo</th>
<th>Cleared by a CCP</th>
<th>Transacted Bilaterally</th>
<th>Tri-Party Repo</th>
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5. VALUE OF THE POOL’S AGGREGATED DERIVATIVE POSITIONS

Provide the aggregate value of all derivative positions of the Pool. The value of any derivative should be its total gross notional value, except that the value of an option should be its delta adjusted notional value. Do not net long and short positions.

Aggregate value of derivative positions: ________________________________

6. POOL SCHEDULE OF INVESTMENTS

Provide the Pool’s investments in each of the subcategories listed under the following seven headings: (1) Cash; (2) Equities; (3) Alternative Investments; (4) Fixed Income; (5) Derivatives; (6) Options; and (7) Funds. First, determine how the Pool’s investments should be allocated among each of these seven categories. Once you have determined how the Pool’s investments should be allocated, enter the dollar value of the Pool’s total investment in each applicable category on the top, boldfaced line. For example, under the “Cash” heading, the Pool’s total investment should be listed on the line reading “Total Cash.” After the top, boldfaced line is completed, proceed to the subcategories. For each subcategory, determine whether the Pool has investments that equal or exceed 5% of the Pool’s Net Asset Value. If so, provide the dollar value of each such investment in the appropriate subcategory. If the dollar value of any investment in a subcategory equals or exceeds 5% of the Pool’s Net Asset Value, you must itemize the investments in that subcategory.
### CFTC POOL QUARTERLY REPORT FOR COMMODITY POOL OPERATORS

Form CPO-PQR Template - Schedule B

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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Physicals</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. Metals</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Gold</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. Agriculture</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. Currency</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. Energy</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Crude oil</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. Natural gas</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>iii. Power</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e. Other</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Funds and accounts other than private funds (i.e., the remainder of your assets under management)

<table>
<thead>
<tr>
<th>Subheading</th>
<th>Description of Investment</th>
<th>Long/Short</th>
<th>Cost</th>
<th>Fair Value</th>
<th>Year-to-Date Gain (Loss)</th>
</tr>
</thead>
</table>

### ITEMIZATION

#### a. If the dollar value of any investment in any subcategory under the heading “Equities,” "Alternative Investments" or "Fixed Income" equals or exceeds 5% of the Pool’s Net Asset Value, itemize the investment(s) in the table below.

<table>
<thead>
<tr>
<th>Subheading</th>
<th>Description of Investment</th>
<th>Long/Short</th>
<th>Cost</th>
<th>Fair Value</th>
<th>Year-to-Date Gain (Loss)</th>
</tr>
</thead>
</table>

#### b. If the dollar value of any investment in any subcategory under the heading “Derivatives” or “Options” equals or exceeds 5% of the Pool’s Net Asset Value, itemize the investment(s) in the table below.

<table>
<thead>
<tr>
<th>Subheading</th>
<th>Description of Investment</th>
<th>Long/Short</th>
<th>Cost</th>
<th>Fair Value</th>
<th>Year-to-Date Gain (Loss)</th>
</tr>
</thead>
</table>

#### c. If the dollar value of any investment in any subcategory under the heading “Funds” equals or exceeds 5% of the Pool’s Net Asset Value, itemize the investment(s) in the table below.

<table>
<thead>
<tr>
<th>Subheading</th>
<th>Fund Name</th>
<th>Fund Type</th>
<th>Fair Value</th>
<th>Year-to-Date Gain (Loss)</th>
</tr>
</thead>
</table>
7. MISCELLANEOUS

In the space below, provide explanations to clarify any assumptions that you made in responding to any question in Schedule B of this Form CPO-PQR. Assumptions must be in addition to, or reasonably follow from, any instructions or other guidance provided in, or in connection with, Schedule B of this Form CPO-PQR. If you are aware of any instructions or other guidance that may require a different assumption, provide a citation and explain why that assumption is not appropriate for this purpose.

<table>
<thead>
<tr>
<th>Question Number</th>
<th>Explanation</th>
</tr>
</thead>
</table>

-- This Completes Schedule B of Form CPO-PQR --
INSTRUCTIONS FOR COMPLETING SCHEDULE C

INSTRUCTIONS FOR COMPLETING SCHEDULE C

A CPO is only required to complete and file Schedule C of this Form CPO-PQR if at any point during the Reporting Period the CPO qualified as a Large CPO.

Schedule C must be completed and filed only by Large CPOs. Large CPOs must complete and file a Schedule C for every Reporting Period during which they satisfy the definition of a Large CPO and operate at least one Pool. A CPO that qualifies as a Large CPO at any point during the Reporting Period must complete and file a separate Part 2 of Schedule C for each Large Pool that it operated during the Reporting Period.

No Schedule C Filing Requirements

Any Large CPO that is: (i) registered with the SEC as an Investment Adviser; and (ii) operated only Pools that satisfy the definition of Private Fund during the Reporting Period will be deemed to have satisfied its Schedule C filing requirements by completing and filing Section 2 of Form PF for the Reporting Period in question.

Limited Schedule C Filing Requirements

However, any Large CPO that is: (i) registered with the SEC as an Investment Adviser; and (ii) operated any Pools that do not satisfy the definition of Private Fund during the Reporting Period may choose to file the relevant sections of Form PF with respect to those funds. For Large CPOs that do not choose to file Form PF for Pools that are not Private Funds, Part 1 of Schedule C will need to be completed with respect to each Pool that they operated during the Reporting Period that did not satisfy the definition of Private Fund. These Schedule C filings will need to be completed in addition to the Large CPO’s Form PF filing requirements.

Refer to the instructions of this Form CPO-PQR to determine whether you are required to complete this Schedule C.

Part 1 of Schedule C asks the Large CPO to provide information on the aggregated investments of all Pools that are not Private Funds that were operated by the Large CPO during the most recent Reporting Period. Any Large CPO who has completed and filed Section 2 of Form PF for the Private Funds it operated during this Reporting Period, and who is choosing to file Part 1 of Schedule C for Pools that are not Private Funds, must answer Part 1 only with respect to the Pools that are not Private Funds.

Part 2 of Schedule C asks the Large CPO to provide certain risk metrics for each Large Pool that is not a Private Fund that was operated by the Large CPO during the most recent Reporting Period. A Large CPO must complete and file a separate Part 2 of Schedule C for each Large Pool that is not a Private Fund that the Large CPO operated during the most recent Reporting Period. Any Large CPO who has completed and filed Section 2 of the SEC’s Form PF for the Private Funds it operated during this Reporting Period, and who is choosing to file Part 2 of Schedule C for Pools that are not Private Funds, should be sure to complete and file a Part 2 only for its Large Pools that are not Private Funds.

Unless otherwise specified in a particular question, all information provided in this Schedule C should be accurate as of the Reporting Date.
### 1. GEOGRAPHICAL BREAKDOWN OF POOLS' INVESTMENTS

**a.** Provide a geographical breakdown of the investments (by percentage of aggregated Assets Under Management) of all Pools that are not Private Funds that were operated by the Large CPO during the most recent Reporting Period. Except for foreign exchange derivatives, investments should be allocated by the jurisdiction of the organization of the issuer or counterparty. For foreign exchange derivatives, investments should be allocated by the country to whose currency the Pool has exposure through the derivative. The percentages entered below should total 100%.

<table>
<thead>
<tr>
<th>Region</th>
<th>% of NAV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td></td>
</tr>
<tr>
<td>Asia and Pacific (other than the Middle East)</td>
<td></td>
</tr>
<tr>
<td>Europe (EEA)</td>
<td></td>
</tr>
<tr>
<td>Europe (other than EEA)</td>
<td></td>
</tr>
<tr>
<td>Middle East</td>
<td></td>
</tr>
<tr>
<td>North America</td>
<td></td>
</tr>
<tr>
<td>South America</td>
<td></td>
</tr>
<tr>
<td>Supranational</td>
<td></td>
</tr>
</tbody>
</table>

**b.** Provide the value of investments in the following countries held by the hedge funds that you advise (by percentage of the total net asset value of these hedge funds).

(Exclude interest rate derivatives and foreign exchange derivatives from both the numerator and denominator.)

<table>
<thead>
<tr>
<th>Country</th>
<th>% of NAV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td></td>
</tr>
<tr>
<td>China (including Hong Kong)</td>
<td></td>
</tr>
<tr>
<td>India</td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td></td>
</tr>
<tr>
<td>Russia</td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td></td>
</tr>
</tbody>
</table>
2. TURNOVER RATE OF AGGREGATE PORTFOLIO OF POOLS

Provide the turnover rate by volume for the aggregate portfolio of all Pools that are not Private Funds and that were operated by the Large CPO during the most recent Reporting Period. The turnover rate should be calculated as follows:

Divide the lesser of the amounts of the Pools' purchases or sales of assets for the month by the average of the value of the Pools' assets during the month. Calculate the "monthly average" by totaling the values of Pools' assets as of the beginning and the end of the month and dividing that sum by two.

i. Do not net long and short positions. However, in relation to derivatives, packages such as call-spreads may be treated as a single position (rather than as a long position and a short position).

ii. The value of any derivative should be its total gross notional value, except that the value of an option should be its delta adjusted notional value.

iii. “Purchases” include any cash paid upon the conversion of one asset into another and the costs of rights or warrants.

iv. “Sales” include net proceeds of the sale of rights and warrants and net proceeds of assets that have been called or for which payment has been made through redemption or maturity.

v. Include proceeds from a short sale in the amount of sales of assets in the relevant subcategory during the month. Include the costs of covering a short sale in the amount of purchases in the relevant subcategory during the month.

vi. Include premiums paid to purchase options and premiums received from the sale of options in the amount of purchases during the month.

<table>
<thead>
<tr>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open Positions:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
PART 2 • INFORMATION ABOUT THE LARGE POOLS OF LARGE CPOs

REMEMBER: A CPO that qualified as a Large CPO at any point during the most recent Reporting Period must complete and file a separate Part 2 of Schedule C for each Pool that is not a Private Fund that the Large CPO operated during the most recent Reporting Period.

1. LARGE POOL INFORMATION

Provide the following general information concerning the Large Pool:

a. Large Pool's name:

b. Large Pool's NFA ID:

c. If the Pool has a Co-CPO, or Co-CPOs provide the name of CPO reporting the Pool's information:

d. Total unencumbered cash held by the Large Pool at the close of each month during the Reporting Period:

<table>
<thead>
<tr>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unencumbered Cash:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

e. Total number of open positions (approximate) held by the Large Pool at the close of each month during the Reporting Period:

<table>
<thead>
<tr>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open Positions:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2. LIQUIDITY OF LARGE POOL’S PORTFOLIO

Provide the percentage of the Large Pool’s portfolio (excluding cash and cash equivalents) that may be liquidated within each of the periods specified below. Each asset should be assigned only to one period and such assignment should be based on the shortest period during which such asset could reasonably be liquidated. Make good faith assumptions for liquidity based on market conditions during the most recent Reporting Period. Assume no “fire-sale” discounting. If certain positions are important contingent parts of the same trade, then all contingent parts of the trade should be listed in the same period as the least liquid part.

<table>
<thead>
<tr>
<th>Percentage of Portfolio Capable of Liquidation in:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 day or less:</td>
</tr>
<tr>
<td>2 days – 7 days:</td>
</tr>
<tr>
<td>8 days – 30 days:</td>
</tr>
<tr>
<td>31 days – 90 days:</td>
</tr>
<tr>
<td>91 days – 180 days:</td>
</tr>
<tr>
<td>181 days – 365 days:</td>
</tr>
<tr>
<td>longer than 365 days:</td>
</tr>
</tbody>
</table>
3. LARGE POOL COUNTERPARTY CREDIT EXPOSURE

Provide the following information about the Pool's counterparty credit exposure. Do not include CCPs as counterparties and aggregate all Affiliated Entities as a single group for purposes of this question. For purposes of this question, include as collateral any assets purchased in connection with a reverse repo and any collateral that the counterparty has posted to the Large Pool under an arrangement pursuant to which the Large Pool has loaned securities to the counterparty. If you do not separate collateral into initial margin/independent amount and variation margin amounts, or a trade does not require posting of variation margin, then include all of the collateral in initial margin/independent amount.

a. For each of the five counterparties identified in question 3.b. of Schedule B, provide the following information regarding the collateral and other credit support that the counterparty has posted to the Large Pool:

i. Provide the following values of the collateral posted to the Large Pool:

<table>
<thead>
<tr>
<th>Value of collateral posted in the form of cash and cash equivalents:</th>
<th>Initial Margin/ Independent Amounts</th>
<th>Variation Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of collateral posted in the form of securities (other than cash cash equivalents):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value of all other collateral posted:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

ii. Provide the following percentages of margin amounts that have been rehypothecated or may be rehypothecated by the Large Pool:

<table>
<thead>
<tr>
<th>Percentage of initial margin/independent amounts that:</th>
<th>May be Rehypothecated</th>
<th>The Large Pool has Rehypothecated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of variation margin that:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

iii. Provide the face amount of letters of credit or other similar third party credit support posted to the Large Pool: [Blank]
b. For each of the five counterparties identified in question 3.c. of Schedule B, provide the following information regarding the collateral and other credit support that the Large Pool has posted to the counterparty.

i. Provide the following values of the collateral posted by the Large Pool to the counterparty:

<table>
<thead>
<tr>
<th>Collateral Type</th>
<th>Value</th>
<th>Initial Margin/Independent Amounts</th>
<th>Variation Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash and cash equivalents</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Securities (other than cash/cash equivalents)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All other collateral posted</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

ii. Provide the following percentages of margin amounts posted by the Large Pool that have been rehypothecated or may be rehypothecated by the counterparty:

<table>
<thead>
<tr>
<th>Margin Amount</th>
<th>Percentage</th>
<th>May be Rehypothecated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial margin/independent amounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Variation margin</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

iii. Provide the face amount of letters of credit or other similar third party credit support posted by the Large Pool to the counterparty: [IL-_____ _____]

c. Did the pool clear any transactions through a CCP during the reporting period?

☐ Yes  ☐ No

4. LARGE POOL RISK METRICS

Provide the following information concerning the Large Pool’s risk metrics during the Reporting Period:

a. Did the Large CPO regularly calculate the VaR of the Large Pool during the Reporting Period?

☐ Yes  ☐ No

b. If "Yes," provide the following information concerning the VaR calculation(s). If you regularly calculate the VaR of the Large Pool using multiple combinations of confidence interval, horizon and historical observation period, complete a separate question 4.b. of Part 2 of Schedule C for each such combination.

i. What confidence interval was used (e.g. 1 – alpha) (as a percentage):

ii. What time horizon was used (in number of days):
iii. What weighting method was used:
   - [ ] None
   - [ ] Other: __________
   - [ ] Exponential

   If "exponential" provide the weighting factor used: __________

iv. What method was used to calculate VaR:
   - [ ] Historical simulation
   - [ ] Parametric
   - [ ] Monte Carlo simulation
   - [ ] Other: __________

v. Historical look-back period used, if applicable: __________

vi. Under the above parameters, what was VaR for the Large Pool for each of the three months of the Reporting Period, stated as a percent of Net Asset Value:

<table>
<thead>
<tr>
<th></th>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>VaR</td>
<td>__________</td>
<td>__________</td>
<td>__________</td>
</tr>
</tbody>
</table>

c. Are there any risk metrics other than (or in addition to) VaR that you consider to be important to the reporting fund’s risk management?

   (If none, "None.")

   __________

d. For each of the market factors specified below, determine the effect that each specified change would have on the Large Pool’s portfolio and provide the results, stated as a percent of Net Asset Value.

   You may omit a response to any of the specified market factors that the Large CPO does not regularly consider (whether in formal testing or otherwise) in the Large Pool’s risk management. If you omit any market factor, check the box in the first column indicating that this market factor is "Not Relevant" to the Large Pool’s portfolio.

   For each specified change in market factor, separate the effect on the Large Pool’s portfolio into long and short components where (i) the long component represents the aggregate result of all positions with a positive change in valuation under a specified change and (ii) the short component represents the aggregate result of all positions with a negative change in valuation under a specified change.
Observe the following regarding the market factors specified below:

i. A change in "equity prices" means that the prices of all equities move up or down by the specified change, without regard to whether the equities are listed on any exchange or included in any index.

ii. "Risk free interest rates" means rates of interest accruing on sovereign bonds issued by governments having the highest credit quality, such as U.S. Treasury bonds.

iii. A change in "credit spreads" means that all credit spreads against risk free interest rates change by the specified amount.

iv. A change in "currency rates" means that the value of all currencies move up or down by the specified amount.

v. A change in "commodity prices" means that the prices of all physical commodities move up or down by the specified amount.

vi. A change in "implied options volatilities" means the implied volatilities of all the options that the Large Pool holds increase or decrease by the specified number of percentage points; and

vii. A change in "default rates" means that the rate at which debtors on all instruments of the specified type increases or decreases by the specified number of percentage points.

<table>
<thead>
<tr>
<th>Market Factor:</th>
<th>Effect on long component of portfolio (as % of NAV)</th>
<th>Effect on short component of portfolio (as % of NAV)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equity Prices</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Equity prices increase 5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Equity prices decrease 5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Equity prices increase 20%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Equity prices decrease 20%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Not Relevant/not formally tested

<table>
<thead>
<tr>
<th>Not Relevant</th>
<th>Relevant/not formally tested</th>
</tr>
</thead>
</table>
### Market Factor: Risk Free Interest Rates

<table>
<thead>
<tr>
<th>Not Relevant</th>
<th>Relevant/not formally tested</th>
<th>Effect on long component of portfolio (as % of NAV)</th>
<th>Effect on short component of portfolio (as % of NAV)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Risk free interest rates increase 25 bp</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Risk free interest rates decrease 25 bp</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Risk free interest rates increase 75 bp</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Risk free interest rates decrease 75 bp</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Market Factor: Credit Spreads

<table>
<thead>
<tr>
<th>Not Relevant</th>
<th>Relevant/not formally tested</th>
<th>Effect on long component of portfolio (as % of NAV)</th>
<th>Effect on short component of portfolio (as % of NAV)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Credit spreads increase 50 bp</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Credit spreads decrease 50 bp</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Credit spreads increase 250 bp</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Credit spreads decrease 250 bp</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Market Factor: Currency Rates

<table>
<thead>
<tr>
<th>Not Relevant</th>
<th>Relevant/not formally tested</th>
<th>Effect on long component of portfolio (as % of NAV)</th>
<th>Effect on short component of portfolio (as % of NAV)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Currency rates increase 5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Currency rates decrease 5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Currency rates increase 20%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Currency rates decrease 20%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Relevant</td>
<td>Relevant/not formally tested</td>
<td>Market Factor: Commodity Prices</td>
<td>Effect on long component of portfolio (as % of NAV)</td>
</tr>
<tr>
<td>--------------</td>
<td>------------------------------</td>
<td>---------------------------------</td>
<td>---------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Commodity prices increase 10%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Commodity prices decrease 10%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Commodity prices increase 40%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Commodity prices decrease 40%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Not Relevant</th>
<th>Relevant/not formally tested</th>
<th>Market Factor: Options Implied Volatility</th>
<th>Effect on long component of portfolio (as % of NAV)</th>
<th>Effect on short component of portfolio (as % of NAV)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Implied volatilities increase 4 percentage points</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Implied volatilities decrease 4 percentage points</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Implied volatilities increase 10 percentage points</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Implied volatilities decrease 10 percentage points</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Market Factor: Default Rates for ABS
- Default rates increase 1 percentage point
- Default rates decrease 1 percentage point
- Default rates increase 5 percentage points
- Default rates decrease 5 percentage points

### Market Factor: Default Rates for Corporate Bonds
- Default rates increase 1 percentage point
- Default rates decrease 1 percentage point
- Default rates increase 5 percentage points
- Default rates decrease 5 percentage points

#### 5. LARGE POOL BORROWING INFORMATION

Provide the following information concerning the value of the Large Pool’s borrowings for each of the three months of the Reporting Period, types of creditors and the collateral posted to secure borrowings. For the purposes of this question, “borrowings” includes both Secured Borrowings and Unsecured Borrowings. For each type of borrowing specified below, provide the dollar amount of the Large Pool’s borrowings and the percentage borrowed from each of the specified types of creditors. The percentages entered in each month’s column should total 100%.
### a. Unsecured Borrowing:

<table>
<thead>
<tr>
<th>Total Dollar amount:</th>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage borrowed from U.S. Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from Non-U.S. Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from non-U.S. creditors that are not Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from U.S. creditors that are not Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### b. Secured Borrowing:

Classify Secured Borrowings according to the legal agreement governing the borrowing (e.g., Global Master Repurchase Agreement for repos and Prime Brokerage Agreement for prime brokerage). Please note that for repo borrowings, the amount should be the net amount of cash borrowed (after taking into account any initial margin/independent amount, "haircuts" and repayments). Positions under a Global Master Repurchase Agreement should not be netted.

#### i. Via prime brokerage:

<table>
<thead>
<tr>
<th>Total Dollar amount:</th>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of collateral posted in the form of cash and cash equivalents</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value of collateral posted in the form of securities (not cash/cash equivalents)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value of other collateral posted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Face amount of letters of credit (or similar third party credit support) posted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage of posted collateral that may be rehypothecated</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from U.S. Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from Non-U.S. Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from creditors that are not Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### ii. Via repo:

For the questions concerning collateral via repo, include as collateral any assets sold in connection with the repo as well as any variation margin.
### 6. LARGE POOL DERIVATIVE POSITIONS AND POSTED COLLATERAL

Provide the following information concerning the value of the Large Pool's derivative positions and the collateral posted to secure those positions for each of the three months of the Reporting Period. For the value of any...

<table>
<thead>
<tr>
<th>Total Dollar amount:</th>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of collateral posted in the form of cash and cash equivalents</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value of collateral posted in the form of securities (not cash/cash equivalents)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value of other collateral posted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Face amount of letters of credit (or similar third party credit support) posted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage of posted collateral that may be rehypothecated</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from U.S. Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from Non-U.S. Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from creditors that are not Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Total dollar amount:</th>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of collateral posted in the form of cash and cash equivalents</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value of collateral posted in the form of securities (not cash/cash equivalents)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value of other collateral posted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Face amount of letters of credit (or similar third party credit support) posted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage of posted collateral that may be rehypothecated</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from U.S. Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from Non-U.S. Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage borrowed from creditors that are not Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
derivative, except options, should be its total gross notional value. The value of an option should be its delta adjusted notional value. Do not net long and short positions.

<table>
<thead>
<tr>
<th>Aggregate value of all derivative positions:</th>
<th>First Month</th>
<th>Second Month</th>
<th>Third Month</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of collateral posted in the form of</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>cash and cash equivalents</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>As initial margin/independent amounts:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>As variation margin:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value of collateral posted in the form of</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>securities (not cash/cash equivalents)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>As initial margin/independent amounts:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>As variation margin:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Value of other collateral posted

| As initial margin/independent amounts:     |             |              |             |
| As variation margin:                      |             |              |             |

Face amount of letters of credit (or similar third party credit support) posted

Percentage of initial margin/independent amounts that may be rehypothecated:

Percentage of variation margin that may be rehypothecated:

7. LARGE POOL FINANCING LIQUIDITY

Provide the following information concerning the Large Pool’s financing liquidity:

a. Provide the aggregate dollar amount of cash financing drawn by or available to the Large Pool, including all drawn and undrawn, committed and uncommitted lines of credit as well as any term financing.

b. Below, enter the percentage of cash financing (as stated in response to question 7.a.) that is contractually committed to the Large Pool by its creditor(s) for the specified periods of time. Amounts of financing should be divided among the specified periods of time in accordance with the longest period for which the creditor is contractually committed to providing such financing. For purposes of this question, if a creditor (or syndicate or administrative/collateral agent) is permitted to unilaterally vary the economic terms of the financing or to revalue posted collateral in its own discretion and demand additional collateral, then the line of credit should be deemed uncommitted.

<table>
<thead>
<tr>
<th>Percentage of Total Financing:</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 day or less:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 days – 7 days:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
8. LARGE POOL PARTICIPANT INFORMATION

Provide the following information concerning the Large Pool's participants:

a. As of the Reporting Date, what percentage of the Large Pool's Net Asset Value:

<table>
<thead>
<tr>
<th>Percentage of Total Financing:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 day or less:</td>
</tr>
<tr>
<td>2 days – 7 days:</td>
</tr>
<tr>
<td>8 days – 30 days:</td>
</tr>
<tr>
<td>31 days – 90 days:</td>
</tr>
<tr>
<td>91 days – 180 days:</td>
</tr>
<tr>
<td>181 days – 365 days:</td>
</tr>
<tr>
<td>365 days or longer:</td>
</tr>
</tbody>
</table>

b. For within the specified periods of time below, enter the percentage of the Large Pool's Net Asset Value that could have been withdrawn or redeemed by the Large Pool's participants as of the Reporting Date. The Large Pool's Net Asset Value should be divided among the specified periods of time in accordance with the shortest period within which participant assets could be withdrawn or redeemed. Assume that you would impose gates where applicable but that you would not completely suspend withdrawals or redemptions and that there are no redemption fees. Base your answers on the valuation date rather than the date on which proceeds are paid to the participant(s). The percentages entered below should total 100%.

<table>
<thead>
<tr>
<th>Percentage of Large Pool's NAV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is subject to a &quot;side pocket&quot; arrangement:</td>
</tr>
<tr>
<td>May be subject to a suspension of participant withdrawal or redemption by the Large CPO or other governing body:</td>
</tr>
<tr>
<td>May be subject to material restrictions of participant withdrawal or redemption by the Large CPO or other governing body:</td>
</tr>
<tr>
<td>Is subject to a daily margin requirement:</td>
</tr>
</tbody>
</table>
9. DURATION OF LARGE POOL'S FIXED INCOME ASSETS

Reporting fund exposures.

(Give a dollar value for long and short positions as of the last day in each month of the reporting period, by sub-asset class, including all exposure whether held physically, synthetically or through derivatives. Enter “NA” in each space for which there are no relevant positions.)

(Include any closed out and OTC forward positions that have not yet expired/matured. Do not net positions within sub-asset classes. Positions held in side-pockets should be included as positions of the hedge funds. Provide the absolute value of short positions. Each position should only be included in a single sub-asset class.)

(Where “duration/WAT/10-year eq.” is required, provide at least one of the following with respect to the position and indicate which measure is being used: bond duration, weighted average tenor or 10-year bond equivalent. Duration and weighted average tenor should be entered in terms of years to two decimal places.)

<table>
<thead>
<tr>
<th></th>
<th>1st Month</th>
<th>2nd Month</th>
<th>3rd Month</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>LV</td>
<td>SV</td>
<td>LV</td>
</tr>
<tr>
<td>a. Listed equity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Issued by financial institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. Other listed equity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. Unlisted equity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Issued by financial institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. Other unlisted equity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. Listed equity derivatives</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Related to financial institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. Other listed equity derivatives</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. Derivative exposures to unlisted equities</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Related to financial institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. Other derivative exposures to unlisted equities</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e. Corporate bonds issued by financial institutions (other than convertible bonds)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Investment grade</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>□ Duration □ WAT □ 10-year eq.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. Non-investment grade</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>□ Duration □ WAT □ 10-year eq.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
f. Corporate bonds not issued by financial institutions (other than convertible bonds)
   i. Investment grade
      ☐ Duration ☐ WAT ☐ 10-year eq.
   ii. Non-investment grade
      ☐ Duration ☐ WAT ☐ 10-year eq.

g. Convertible bonds issued by financial institutions
   i. Investment grade
      ☐ Duration ☐ WAT ☐ 10-year eq.
   ii. Non-investment grade
      ☐ Duration ☐ WAT ☐ 10-year eq.

h. Convertible bonds not issued by financial institutions
   i. Investment grade
      ☐ Duration ☐ WAT ☐ 10-year eq.
   ii. Non-investment grade
      ☐ Duration ☐ WAT ☐ 10-year eq.

i. Sovereign bonds and municipal bonds
   i. U.S. treasury securities
      ☐ Duration ☐ WAT ☐ 10-year eq.
   ii. Agency securities
      ☐ Duration ☐ WAT ☐ 10-year eq.
   iii. GSE bonds
      ☐ Duration ☐ WAT ☐ 10-year eq.
   iv. Sovereign bonds issued by G10 countries other than the U.S.
      ☐ Duration ☐ WAT ☐ 10-year eq.
   v. Other sovereign bonds (including supranational bonds)
      ☐ Duration ☐ WAT ☐ 10-year eq.
   vi. U.S. state and local bonds
      ☐ Duration ☐ WAT ☐ 10-year eq.
<table>
<thead>
<tr>
<th>Loans</th>
<th>Duration</th>
<th>WAT</th>
<th>10-year eq</th>
</tr>
</thead>
<tbody>
<tr>
<td>Leverage loans</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other loans (not including repos)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Repos</th>
<th>Duration</th>
<th>WAT</th>
<th>10-year eq</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>ABS/structured products</th>
<th>Duration</th>
<th>WAT</th>
<th>10-year eq</th>
</tr>
</thead>
<tbody>
<tr>
<td>MBS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ABCL</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CDO/CLO</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other ABS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other structured products</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Credit derivatives        |          |     |            |
| Single name CDS           |          |     |            |
| Index CDS                 |          |     |            |
| Exotic CDS                |          |     |            |

| Foreign exchange derivatives (investment) |          |     |            |
| Foreign exchange derivatives (hedging)   |          |     |            |

| Non-U.S. currency holdings |          |     |            |

| Interest rate derivatives  |          |     |            |

<p>| Commodities (derivatives)  |          |     |            |
| Crude oil                 |          |     |            |
| Natural gas               |          |     |            |
| Gold                      |          |     |            |
| Power                     |          |     |            |</p>
<table>
<thead>
<tr>
<th>Question Number</th>
<th>Explanation</th>
</tr>
</thead>
</table>

10. MISCELLANEOUS

In the space below, provide explanations to clarify any assumptions that you made in responding to any question in Schedule B of this Form CPO-PQR. Assumptions must be in addition to, or reasonably follow from, any instructions or other guidance provided in, or in connection with, Schedule B of this Form CPO-PQR. If you are aware of any instructions or other guidance that may require a different assumption, provide a citation and explain why that assumption is not appropriate for this purpose.

– This Completes Schedule C of Form CPO-PQR –
This appendix provides guidance concerning alternate methods by which commodity pool operators and commodity trading advisors may calculate the rate of return information required by Rules 4.25(a)(7)(i)(F) and 4.35(a)(6)(i)(F). The methods described herein are illustrative of calculation methods the Commission has reviewed and determined may be appropriate to address potential material distortions in the computation of rate of return due to additions and withdrawals that occur during a performance reporting period. A commodity pool operator or commodity trading advisor may present to the Commission proposals regarding any alternative method of addressing the effect of additions and withdrawals on the rate of return computation, including documentation supporting the rationale for use of that alternate method.

1. Compounded Rate of Return Method

Rate of return for a period may be calculated by computing the net performance divided by the beginning net asset value for each trading day in the period and compounding each daily rate of return to determine the rate of return for the period. If daily compounding is not practicable, the rate of return may be compounded on the basis of each sub-period within which an addition or withdrawal occurs during a month. For example:

<table>
<thead>
<tr>
<th>Account value</th>
<th>Change in value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Start of month</td>
<td>$10,000 +10% ($1,000 profit).</td>
</tr>
<tr>
<td>End of 1st acct. period</td>
<td>11,000</td>
</tr>
<tr>
<td>Start of 2nd acct. period</td>
<td>15,000 -20% ($3,000 loss).</td>
</tr>
<tr>
<td>End of 2nd acct. period</td>
<td>12,000 $2,000 withdrawal.</td>
</tr>
<tr>
<td>Start of 3rd acct. period</td>
<td>10,000 +25% ($2,500 profit).</td>
</tr>
<tr>
<td>End of month</td>
<td>12,500</td>
</tr>
</tbody>
</table>

Compounded ROR = \(\frac{(1.1)(1.2)(1.25)}{1 - 10\%} = 10\%\).

2. Time-weighted method

Time-weighting allows for adjustment to the denominator of the rate of return calculation for additions and withdrawals, weighted for the amount of time such funds were available during the period. Several methods exist for time-weighting, all of which will have the same arithmetic result. These methods include: dividing the net performance by the average weighted account
Commodity Futures Trading Commission

Pt. 4, App. C

sizes for the month; dividing the net performance by the arithmetic mean of the account sizes for each trading day during the period; and taking the number of days funds were available for trading divided by the total number of days in the period.


APPENDIX C TO PART 4—FORM CTA–PR

TEMPLATE: DO NOT SEND TO NFA

COMMODITY FUTURES TRADING COMMISSION

ANNUAL PROGRAM REPORT FOR COMMODITY TRADING ADVISORS

Instructions for Using the Form CTA-PR Template

READ THESE INSTRUCTIONS CAREFULLY BEFORE COMPLETING OR REVIEWING THE REPORTING FORM.

This document is not a reporting form. Do not send this document to NFA. It is a template that you may use to assist in filing the electronic reporting form with the NFA at: http://www.nfa.futures.org.

You may fill out the template online and save and/or print it when you are finished or you can download the template and/or print it and fill it out later.

DEFINED TERMS

Words that are underlined in this form are defined terms and have the meanings contained in the Definitions of Terms section.

GENERAL

Read the Instructions and Questions Carefully

Please read the instructions and the questions in this Form CTA-PR carefully. A question that is answered incorrectly because it was misread or misinterpreted can severely impact your ability to operate as a CTA.

In this Form CTA-PR, “you” means the CTA.

Call CFTC with Questions

If there is any question about whether particular information must be provided or about the manner in which particular information must be provided, contact the CFTC for clarification.
ANNUAL PROGRAM REPORT FOR COMMODITY TRADING ADVISORS

Instructions for Using the Form CTA-PR Template

REPORTING INSTRUCTIONS

1. All CTA's Are Required to Complete and File the Form CTA-PR Annually.

2. The Form CTA-PR Must Be Filed Electronically with NFA

   All CTA's must file their Forms CTA-PR electronically using NFA's EasyFile System. NFA's EasyFile System can be accessed through NFA's website at www.nfa.futures.org. You will use the same logon and password for filing your Form CTA-PR as you would for any other EasyFile filings. Questions regarding your NFA ID# or your use of NFA's EasyFile system should be directed to the NFA. The NFA's contact information is available on its website.

3. All Figures Reported in U.S. Dollars

   All questions asking for amounts or investments must be reported in U.S. dollars. Any amounts converted to U.S. dollars must use the conversion rate in effect on the Reporting Date.

4. Use of U.S. GAAP

   All financial information in this Report must be presented and computed in accordance with Generally Accepted Accounting Principles consistently applied.

5. Oath and Affirmation

   This Form CTA-PR will not be accepted unless it is complete and contains an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the document is accurate and complete; provided however, that is shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in this Form CTA-PR is not accurate and complete.
### Definitions of Terms for the Form CTA-PR Template

#### Definitions of Terms

**Commodity Futures Trading Commission or CFTC**: The term "Commodity Futures Trading Commission" or "CFTC" refers to the United States Commodity Futures Trading Commission.

**Commodity Pool or Pool**: The term "Commodity Pool" or "Pool" has the same meaning as "commodity pool" as defined in section 1a(10) of the Commodity Exchange Act.

**Commodity Trading Advisor**: The term "commodity trading advisor" or "CTA" has the same meaning as "commodity trading adviser" as defined in section 1a(12) of the Commodity Exchange Act.

**Direct**: The term "Direct" as used in the context of trading commodity interest accounts, has the same meaning as "direct" as defined in CFTC Rule 4.10(l).

**Form CTA-PR**: The term "Form CTA-PR" refers to this Form CTA-PR.

**GAAP**: The term "Generally Accepted Accounting Principles" refers to U.S. GAAP.

**National Futures Association or NFA**: The term "National Futures Association" or "NFA" refers to the National Futures Association, a registered futures association under Section 17 of the Commodity Exchange Act.

**Reporting Date**: The term "Reporting Date" means the last calendar day of the calendar year for which this Form CTA-PR is required to be completed and filed.

**Trading Program**: The term "Trading Program" has the same meaning as "trading program" as defined in CFTC Rule 4.10(g).
ANNUAL PROGRAM REPORT FOR COMMODITY TRADING ADVISORS

Form CTA-PR Template

INFORMATION ABOUT THE CTA

1. CTA INFORMATION
   Provide the following general information concerning the CTA:
   a. CTA's Name:
   b. CTA's NFA ID#:
   c. Person to contact concerning this Form CTA-PR:
   d. Total number of Trading Programs offered by the CTA:
   e. Total number of Trading Programs offered by the CTA under which the CTA Directs Pool assets:

2. POOL ASSETS DIRECTED BY THE CTA
   Provide the following information concerning the amount of assets Directed by the CTA:
   a. Total assets Directed by CTA:
   b. Total Pool assets Directed by CTA:
   c. Name(s) of Pools advised by the CTA:
   d. Name of the reporting CPO for each Pool identified in 2.c. above:

ANNUAL PROGRAM REPORT FOR COMMODITY TRADING ADVISORS

Form CTA-PR Template - Oath

OATH

BY FILING THIS Form CTA-PR, THE UNDERSIGNED AGREES THAT THE ANSWERS AND INFORMATION PROVIDED HEREBIN are complete and accurate, and are not misleading in any material respect to the best of the undersigned's knowledge and belief. Furthermore, by filing this Form CTA-PR, the undersigned agrees that he or she knows that it is unlawful to sign this Form CTA-PR if he or she knows or should know that any of the answers and information provided herein is not accurate and complete.

Name of the individual signing this Form CTA-PR on behalf of the CTA:

Capacity in which the above is signing on behalf of the CTA:

[77 FR 11337, Feb. 24, 2012]
PART 5—OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS

§ 5.1 Definitions.

(a) Affiliated person of a futures commission merchant means a person described in section 2(o)(2)(B)(i)(II)(cc)(BB) of the Act;
(b) Aggregate retail forex assets means an amount of liquid assets held in accordance with §5.8 of this part;
(c) Associated person of an affiliated person of a futures commission merchant means any natural person associated with an affiliated person of a futures commission merchant as a partner, officer or employee (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(1) The solicitation or acceptance of retail forex customers’ orders (other than in a clerical capacity); or
(2) The supervision of any person or persons so engaged;

(d)(1) Commodity pool operator, for purposes of this part, means any person who operates or solicits funds, securities, or property for a pooled investment vehicle that is not an eligible contract participant as defined in section 1a(18) of the Act, and that engages in retail forex transactions;

(2) Associated person of a commodity pool operator, for purposes of this part, means any natural person associated with a commodity pool operator as defined in paragraph (d)(1) of this section 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 of funds, securities, or property for a participation in a pooled investment vehicle; or
(ii) The supervision of any person or persons so engaged;

(e)(1) Commodity trading advisor, for purposes of this part, means any person who exercises discretionary trading authority or obtains written authorization to exercise discretionary trading authority over any account for or on behalf of any person that is not an eligible contract participant as defined in section 1a(18) of the Act, in connection with retail forex transactions;
§ 5.1  Associated person of a commodity trading advisor, for purposes of this part, means any natural person associated with a commodity trading advisor as defined in paragraph (e)(1) of this section 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 of a client’s or prospective client’s discretionary account; or

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

(f)(1) Introducing broker, for purposes of this part, means any person who solicits or accepts orders from a customer that is not an eligible contract participant as defined in section 1a(18) of the Act, in connection with retail forex transactions;

(2) Associated person of an introducing broker, for purposes of this part, means any natural person associated with an introducing broker as defined in paragraph (g)(1) of this section as a partner, officer or employee (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(i) The solicitation or acceptance of retail forex customers’ orders (other than in a clerical capacity); or

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

(g) Primarily or substantially means, when used to describe the extent of a futures commission merchant’s engagement in the activities described in section 1a(28)(A)(i)(aa)(AA) of the Act and section 1a(28)(A)(i)(II) of the Act insofar as that section references the activities described in section 1a(28)(A)(i)(I)(aa)(AA), that:

(1) Such activities account for more than fifty percent of the futures commission merchant’s gross revenues, computed in accordance with generally accepted accounting principles, on an annual basis;

(2) The futures commission merchant receives gross revenues, computed in accordance with generally accepted accounting principles, from such activities in excess of $500,000 in any twelve month period; or

(3) The futures commission merchant is a clearing member of a registered derivatives clearing organization.

(h)(1) Retail foreign exchange dealer means any person that is, or that offers to be, the counterparty to a retail forex transaction, except for a person described in item (aa), (bb), (cc)(AA) or (dd) of section 2(c)(2)(B)(ii)(II) of the Act;

(2) Associated person of a retail foreign exchange dealer means any natural person associated with a retail foreign exchange dealer as defined in paragraph (i)(1) of this section as a partner, officer or employee (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(i) The solicitation or acceptance of retail forex customers’ orders (other than in a clerical capacity); or

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

(i) Retail foreign account means the account of a person who is not an eligible contract participant as defined in section 1a(18) of the Act, established with a retail foreign exchange dealer or a futures commission merchant, in which account retail forex transactions (including options on contracts for the purchase or sale of foreign currency) with such retail foreign exchange dealer or futures commission merchant as counterparty are undertaken, or which account is established in order to enter into such transactions.

(j) Retail forex account agreement means the contractual agreement between a futures commission merchant or retail foreign exchange dealer and any person who is not an eligible contract participant as defined in section 1a(18) of the Act, which agreement contains the terms governing the person’s retail forex account with such futures commission merchant or retail foreign exchange dealer.

(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.

(l) Retail forex obligation means the net credit balance at a retail foreign
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exchange dealer or futures commission merchant that would be obtained by combining all money, securities and property deposited by a retail forex customer into a retail forex account or accounts, adjusted for the realized and unrealized net profit or loss, if any, accruing on the open trades, contracts or transactions in the retail forex account or accounts, without including any retail forex customers’ accounts that contain negative net liquidating balances.

(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.

§ 5.2 Prohibited transactions.

(a) Scope. The provisions of this section shall be applicable to any retail forex transaction.

(b) Fraudulent conduct prohibited. It shall be unlawful for any person, by use of the mails or by any means or instrumentality of interstate commerce, directly or indirectly, in or in connection with any retail forex transaction:

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

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

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

(c) Acting as counterparty and exercising discretion prohibited. (1) No person who acts as the counterparty for any retail forex transaction may do so for an account for which the person or any affiliate of the person is authorized (by contract, power of attorney or otherwise) to cause transactions to be effected without the client’s specific authorization.

(2) For purposes of this paragraph (c), an “affiliate” of a person means a person controlling, controlled by or under common control with, the first person.

§ 5.3 Registration of persons engaged in retail forex transactions.

(a) Subject to paragraph (b) of this section, each of the following is subject to the registration provisions under the Act and to part 3 of this chapter:

(1)(i) Any affiliated person of a futures commission merchant, as defined in §5.1(a) of this part, which affiliated person:

(A) Solicits or accepts orders from any person that is not an eligible contract participant in connection with any retail forex transaction; or

(B) Accepts money, securities, or property (or extends credit in lieu thereof) in connection with such solicitation or acceptance of orders in order to engage in any retail forex transaction, is required to register as a retail foreign exchange dealer; and

(ii) Any associated person of an affiliated person of a futures commission merchant, as defined in §5.1(c) of this part, is required to register as an associated person of an affiliated person of a futures commission merchant.

(2)(i) Any commodity pool operator, as defined in §5.1(d)(1) of this part, is required to register as a commodity pool operator;

(ii) Any associated person of a commodity pool operator, as defined in §5.1(d)(2) of this part, is required to register as an associated person of a commodity pool operator;

(3)(i) Any commodity trading advisor, as defined in §5.1(e)(1) of this part, is required to register as a commodity trading advisor;

(ii) Any associated person of a commodity trading advisor, as defined in §5.1(e)(2) of this part, is required to register as an associated person of a commodity trading advisor;

(4)(i) Any person registered as a futures commission merchant;

(A) That is not primarily or substantially engaged in the business activities described in section 1a(28)(A)(1)(aa)(AA) of the Act and
§ 5.4 Application of part 4 of this chapter to commodity pool operators and commodity trading advisors.

Part 4 of this chapter applies to any person required pursuant to the provisions of this part 5 to register as a commodity pool operator or as a commodity trading advisor. Failure by any such person to comply with the requirements of part 4 will constitute a violation of this section and the relevant section of part 4.

§ 5.5 Distribution of “Risk Disclosure Statement” by retail foreign exchange dealers, futures commission merchants and introducing brokers regarding retail forex transactions.

(a) Except as provided in §5.23 of this part, no retail foreign exchange dealer, futures commission merchant, or in the case of an introduced account no introducing broker, may open an account that will engage in retail forex transactions for a retail forex customer, unless the retail foreign exchange dealer, futures commission merchant or introducing broker first:

(1)(i) In the case of a retail foreign exchange dealer or a person required to register as an introducing broker solely by reason of this part, furnishes the retail forex customer with a separate written disclosure statement containing only the language set forth in paragraph (b) of this section and the disclosure required by paragraph (e) of this section; Provided, however, that the disclosure statement may be attached to other documents as the initial page(s) of such documents and as the only material on such page(s); and

(ii) Receives from the retail forex customer an acknowledgment signed and dated by the retail forex customer that he received and understood the disclosure statement.

(2) Receives from the retail forex customer an acknowledgment signed and dated by the retail forex customer that he received and understood the disclosure statement.
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(b) The language set forth in the written disclosure statement required by paragraph (a) of this section shall be as follows:

Risk Disclosure Statement

Off-exchange foreign currency transactions involve the leveraged trading of contracts denominated in foreign currency conducted with a futures commission merchant or a retail foreign exchange dealer as your counterparty. Because of the leverage and the other risks disclosed here, you can rapidly lose all of the funds you deposit for such trading and you may lose more than you deposit.

You should be aware of and carefully consider the following points before determining whether such trading is appropriate for you.

1. Trading is not on a regulated market or exchange—your dealer is your trading partner which is a direct conflict of interest. Before you engage in any retail foreign exchange trading, you should confirm the registration status of your counterparty.

The off-exchange foreign currency trading you are entering into is not conducted on an interbank market, nor is it conducted on a futures exchange subject to regulation as a designated contract market by the Commodity Futures Trading Commission. The foreign currency trades you transact are trades with the futures commission merchant or retail foreign exchange dealer as your counterparty. When you sell, the dealer is the buyer. When you buy, the dealer is the seller. As a result, when you lose money trading, your dealer is making money on such trades, in addition to any fees, commissions, or spreads the dealer may charge.

2. An electronic trading platform for retail foreign currency transactions is not an exchange. It is an electronic connection for accessing your dealer. The terms of availability of such a platform are governed only by your contract with your dealer.

Any trading platform that you may use to enter off-exchange foreign currency transactions is only connected to your futures commission merchant or retail foreign exchange dealer. You are accessing that trading platform only to transact with your dealer. You are not trading with any other entities or customers of the dealer by accessing such platform. The availability and operation of any such platform, including the consequences of the unavailability of the trading platform for any reason, is governed only by the terms of your account agreement with the dealer.

3. Your deposits with the dealer have no regulatory protections.

All of your rights associated with your retail forex trading, including the manner and denomination of any payments made to you, are governed by the contract terms established in your account agreement with the futures commission merchant or retail foreign exchange dealer. Funds deposited by you with a futures commission merchant or retail foreign exchange dealer for trading off-exchange foreign currency transactions are not subject to the customer funds protections provided to customers trading on a contract market that is designated by the Commodity Futures Trading Commission. Your dealer may commingle your funds with its own operating funds or use them for other purposes. In the event your dealer becomes bankrupt, any funds the dealer is holding for you in addition to any amounts owed to you resulting from trading, whether or not any assets are maintained in separate deposit accounts by the dealer, may be treated as an unsecured creditor’s claim.

4. You are limited to your dealer to offset or liquidate any trading positions since the transactions are not made on an exchange or market, and your dealer may set its own prices.

Your ability to close your transactions or offset positions is limited to what your dealer will offer to you, as there is no other market for these transactions. Your dealer may offer any prices it wishes, and it may offer prices derived from outside sources or not in its discretion. Your dealer may establish its prices by offering spreads from third party prices, but it is under no obligation to do so or to continue to do so. Your dealer may offer different prices to different customers at any point in time on its own terms. The terms of your account agreement alone govern the obligations your dealer has to you to offer prices and offer offset or liquidating transactions in your account and make any payments to you. The prices offered by your dealer may or may not reflect prices available elsewhere at any exchange, interbank, or other market for foreign currency.

5. Paid solicitors may have undisclosed conflicts.

The futures commission merchant or retail foreign exchange dealer may compensate introducing brokers for introducing your account in ways which are not disclosed to you. Such paid solicitors are not required to have, and may not have, any special expertise in trading, and may have conflicts of interest based on the method by which they
are compensated. Solicitors working on behalf of futures commission merchants and retail foreign exchange dealers are required to register. You should confirm that they are, in fact, registered. You should thoroughly investigate the manner in which all such solicitors are compensated and be very cautious in granting any person or entity authority to trade on your behalf. You should always consider obtaining dated written confirmation of any information you are relying on from your dealer or a solicitor in making any trading or account decisions.

FINALLY, YOU SHOULD THOROUGHLY INVESTIGATE ANY STATEMENTS BY ANY DEALERS OR SALES REPRESENTATIVES WHICH MINIMIZE THE IMPORTANCE OF, OR CONTRADICT, ANY OF THE TERMS OF THIS RISK DISCLOSURE. SUCH STATEMENTS MAY INDICATE POTENTIAL SALES FRAUD.

THIS BRIEF STATEMENT CANNOT, OF COURSE, DISCLOSE ALL THE RISKS AND OTHER ASPECTS OF TRADING OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS WITH A FUTURES COMMISSION MERCHANT OR RETAIL FOREIGN EXCHANGE DEALER.

I hereby acknowledge that I have received and understood this risk disclosure statement.

Date

Signature of Customer

(c) The acknowledgment required by paragraph (a) of this section must be retained by the retail foreign exchange dealer, futures commission merchant or introducing broker in accordance with §1.31 of this chapter.

(d) This section does not relieve a retail foreign exchange dealer, futures commission merchant or introducing broker from any other disclosure obligation it may have under applicable law.

(e)(1) Immediately following the language set forth in paragraph (b) of this section, the statement required by paragraph (a) of this section shall include, for each of the most recent four calendar quarters during which the counterparty maintained retail forex customer accounts:

(i) The total number of non discretionary retail forex customer accounts maintained by the retail foreign exchange dealer or futures commission merchant;

(ii) The percentage of such accounts that were profitable during the quarter; and

(iii) The percentage of such accounts that were not profitable during the quarter.

(2) Identification of retail forex customer accounts for the purpose of this disclosure and the calculation in determining whether each such account was profitable or not profitable must be made in accordance with §5.18(i) of this part. Such statement of profitable trades shall include the following legend: PAST PERFORMANCE IS NOT NECESSARILY INDICATIVE OF FUTURE RESULTS. Each retail foreign exchange dealer or futures commission merchant shall provide, upon request, to any retail forex customer or prospective retail forex customer the total number of non discretionary retail forex accounts maintained by such foreign exchange dealer or futures commission merchant, the percentage of such accounts that were profitable and the percentage of such accounts that were not profitable, calculated in accordance with §5.18(i) of this part, for each calendar quarter during the most recent five year period during which such retail foreign exchange dealer or futures commission merchant maintained non discretionary retail forex customer accounts.

§ 5.6 Maintenance of minimum financial requirements by retail foreign exchange dealers and futures commission merchants offering or engaging in retail forex transactions.

(a) Each futures commission merchant offering or engaging in retail forex transactions or who files an application for registration as a futures commission merchant that will offer or engage in retail forex transactions and each person registered as a retail foreign exchange dealer or who files an application for registration as a retail foreign exchange dealer who knows or should have known that its adjusted net capital at any time is less than the minimum required by §5.7 of this part or by the capital rule of a registered futures association of which it is a member, must:

(1) Give telephonic notice, to be confirmed in writing by facsimile notice,
that the applicant’s or registrant’s adjusted net capital is less than that required by §5.7 of this part. The notice must be given immediately after the applicant or registrant knows or should know that its adjusted net capital is less than that required by any of the aforesaid rules to which the applicant or registrant is subject; and

2. Provide together with such notice documentation in such form as necessary to adequately reflect the applicant’s or registrant’s capital condition as of any date such person’s adjusted net capital is less than the minimum required. The applicant or registrant must provide similar documentation for other days as the Commission may request.

(b) Each applicant or registrant, who knows or should have known that its adjusted net capital at any time is less than the greater of:

1. $22,000,000;
2. 110 percent of the amount required by §5.7(a)(1)(B) of this part; or
3. 110 percent of the amount of adjusted net capital required by a registered futures association of which the futures commission merchant or retail foreign exchange dealer is a member, must file written notice to that effect within 24 hours of such event.

(c) If an applicant or registrant at any time fails to make or keep current the books and records required by these regulations, such applicant or registrant must, on the same day such event occurs, provide facsimile notice of such fact, specifying the books and records which have not been made or which are not current, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the situation.

(d) Whenever any applicant or registrant discovers or is notified by an independent public accountant, pursuant to §1.16(e)(2) of this chapter, of the existence of any material inadequacy, as specified in §1.16(d)(2) of this chapter, such applicant or registrant must give facsimile notice of such material inadequacy within 24 hours, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the material inadequacy.

(e) Whenever any self-regulatory organization learns that a member registrant has failed to file a notice or written report as required by §5.6 of this part, that self-regulatory organization must immediately report this failure by telephone, confirmed in writing immediately by facsimile notice, as provided in paragraph (h) of this section.

(f) A retail foreign exchange dealer or a futures commission merchant offering or engaging in retail forex transactions shall provide written notice of a substantial reduction in capital as compared to that last reported in a financial report filed with the Commission pursuant to §5.12 of this part. This notice shall be provided as follows:

1. If any event or series of events, including any withdrawal, advance, loan or loss cause, on a net basis, a reduction in net capital of 20 percent or more, notice must be provided within two business days of the event or series of events causing the reduction; and
2. If the equity capital of the retail foreign exchange dealer or futures commission merchant offering or engaging in retail forex transactions consolidated pursuant to §1.17(f) of this chapter would be withdrawn by action of a stockholder or a partner or a limited liability company member or by redemption or repurchase of shares of stock by any of the consolidated entities or through the payment of dividends or any similar distribution, or an unsecured advance or loan would be made to a stockholder, partner, sole proprietor, limited liability company member, employee or affiliate, such that the withdrawal, advance or loan would cause, on a net basis, a reduction in excess adjusted net capital of 30 percent or more, notice must be provided at least two business days prior to the withdrawal, advance or loan that would cause the reduction: Provided, however, That the provisions of paragraphs (f)(1) and (f)(2) of this section do not apply to any retail foreign exchange transaction in the ordinary course of business between a retail foreign exchange dealer
§ 5.7 Minimum financial requirements for retail foreign exchange dealers and futures commission merchants offering or engaging in retail forex transactions.

(a)(1)(i) Each futures commission merchant offering or engaging in retail forex transactions and each retail foreign exchange dealer must maintain adjusted net capital equal to or in excess of the greatest of:

(A) $20,000,000;

(B) $20,000,000 plus five percent of the futures commission merchant’s or retail foreign exchange dealer’s total retail forex obligation in excess of $10,000,000;

(C) any amount required under §1.17 of this chapter, as applicable; or
(D) the amount of adjusted net capital required by a registered futures association of which the futures commission merchant or retail foreign exchange dealer is a member.

(ii) Section 1.17 of this chapter shall apply to retail foreign exchange dealers as if such retail foreign exchange dealers were futures commission merchants, or as applicable, applicants or registrants, as stated in §1.17 for the purpose of determining the adjusted net capital under this section. For the purpose of applying this section, “applicant” or “registrant” shall include retail foreign exchange dealers and futures commission merchants offering or engaging in retail forex transactions and applicants therefore.

(2) No person applying for registration as a retail foreign exchange dealer or a futures commission merchant that will engage in retail forex transactions shall be so registered unless such person affirmatively demonstrates to the satisfaction of the Commission or the registrant’s designated self-regulatory organization that it complies with the financial requirements of this section.

(3) Each registrant must be in compliance with this section at all times and must be able to demonstrate such compliance to the satisfaction of the Commission or the registrant’s designated self-regulatory organization.

(4) A registrant who is not in compliance with this section or is unable to demonstrate such compliance as required by paragraph (a)(3) of this section, shall, as directed by and under the supervision of the Commission or the registrant’s designated self-regulatory organization, either liquidate or transfer all retail forex accounts (including the novation of retail forex contracts and refund or transfer all funds associated with such retail forex accounts and immediately cease offering or engaging in retail forex transactions until such time as the firm is able to demonstrate to the Commission or the registrant’s designated self-regulatory organization such compliance: Provided, however, That if such registrant immediately demonstrates to the satisfaction of the Commission or the registrant’s designated self-regulatory organization the ability to achieve compliance, the Commission or the registrant’s designated self-regulatory organization may in its discretion allow such registrant up to a maximum of 10 business days, or such additional time as determined by the Commission, in which to achieve compliance without having to liquidate positions or transfer accounts and cease doing business as required above. Nothing in this paragraph (a)(4) shall be construed as preventing the Commission or the registrant’s designated self-regulatory organization from taking action against a registrant for noncompliance with any of the provisions of this section.

(b) For the purposes of this section:

(1) Where the applicant or registrant has an asset or liability which is defined in Securities Exchange Act Rule 15c3–1 (§240.15c3–1 of this title) the inclusion or exclusion of all or part of such asset or liability for the computation of adjusted net capital shall be in accordance with §240.15c3–1 of this title, unless specifically stated otherwise in this section or in §1.17 of this chapter.

(2) The adjusted net capital of an applicant or registrant for the purpose of this section shall be determined by the application of §1.17 pursuant to paragraph (a)(1)(ii) of this section, with the following additions:

(i) All positions in retail forex accounts and other financial positions and instruments of the applicant or registrant must be marked to market and adjusted daily by referencing to current market prices or rates of exchange.

(ii) Current assets must exclude any retail forex account which liquidates to a deficit or contains a debit ledger balance only and is not secured in accordance with §1.17(c)(3).

(iii) Current assets must exclude any unsecured receivable accrued from any over-the-counter transaction in foreign currency, options on foreign currency or options on contracts for the purchase or sale of foreign currency, or arising from the deposit of collateral or compensating balances with respect to such transactions, unless such unsecured receivable is from a person who is an eligible contract participant that also is:
(A) A bank or trust company regulated by a United States banking regulator;
(B) A broker-dealer registered with the Securities and Exchange Commission and a member of the Financial Industry Regulatory Authority;
(C) A futures commission merchant registered with the Commission and a member of the National Futures Association;
(D) A retail foreign exchange dealer registered with the Commission and a member of the National Futures Association;
(E) An entity regulated as a foreign equivalent of any of the persons listed in paragraphs (b)(2)(iii)(A) through (D) of this section, if such person is regulated in a money center country as defined in §1.49 of this chapter and recognized by the futures commission merchant’s or retail foreign exchange dealer’s designated self-regulatory organization as a foreign equivalent;
(F) Any other entity approved by the futures commission merchant’s or retail foreign exchange dealer’s designated self-regulatory organization.

(iv) The value attributed to any retail forex transaction that is an option shall be the difference between the option’s exercise value or striking value and the market value of the underlying. In the case of a call, if the market value of the underlying is less than the exercise value or striking value of such call, it shall be given no value; and, in the case of a put, if the market value of the underlying is more than the exercise value or striking value of the put, it shall be given no value.

(v)(A) In computing adjusted net capital, the capital deductions set forth in §1.17(c)(5)(vi) of this chapter shall apply to all retail forex transactions that are options.
(B) In computing adjusted net capital, the capital deductions set forth in §1.17(c)(5)(vi) of this chapter shall apply to retail forex transactions other than options. The capital deductions which apply are six percent for net positions in Euros, British pounds, Canadian dollars, Japanese yen, or Swiss francs and 20 percent for net positions in all other foreign currencies, Provided, however, That there shall be no capital deductions for retail foreign transactions covered (as defined in §1.17(j) of this chapter) by the applicant or registrant by open futures contracts to the extent such futures contracts are not otherwise designated as cover for any other net capital purposes. For purposes of this paragraph (b)(2)(v)(A), such retail forex transactions shall be treated as if they were inventory and cover were therefore applicable. A retail foreign exchange dealer or futures commission merchant may not use an affiliate (unless approved by the firm’s designated self-regulatory organization) or any person that is considered unregulated under the rules of the firm’s designated self-regulatory organization to cover its currency positions for purposes of this section.

(c) An applicant or registrant must prepare, and keep current, ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting the applicant’s or registrant’s asset, liability, income, expense and capital accounts, and in which (except as otherwise permitted in writing by the Commission) all the applicant’s or registrant’s asset, liability and capital accounts are classified into the account classification subdivisions specified on Form 1–FR–FCM. Each applicant or registrant shall prepare and keep current such records.

(d) An applicant or registrant must make and keep as a record in accordance with §5.14 of this part formal computations of its adjusted net capital and of its minimum financial requirements pursuant to this section as of the close of business each month and on other such dates called for by the Commission, the National Futures Association, or another self-regulatory organization of which the firm is a member. Such computations must be completed and made available for inspection by any representative of the Commission, the National Futures Association, a self-regulatory organization of which the firm is a member, or
§ 5.9 Security deposits for retail forex transactions.

(a) Each futures commission merchant engaging, or offering to engage, in retail forex transactions and each retail foreign exchange dealer must collect from each retail forex customer a minimum security deposit for each retail forex transaction equal to the applicable percentage as set by the registered futures association of which they are a member; Provided, that the registered futures association’s security deposit requirement cannot be less than:

(1) 2% of the notional value of the retail forex transaction for major currency pairs and 5% of the notional value of the retail forex transaction for all other currency pairs;

(2) For short options, 2% for major currency pairs and 5% for all other currency pairs of the notional value of the retail forex transaction, plus the premium received by the retail forex customer; or

(3) For long options, the full premium charged and received by the futures commission merchant or retail foreign exchange dealer from the retail forex customer.

(b) Security deposits must be made in the form of cash or other financial instruments that comply with the requirements specified in § 1.25 of this chapter.

(c) A futures commission merchant or retail foreign exchange dealer is required to collect additional security deposits from a retail forex customer, or liquidate the retail forex customer’s positions, if the amount of the retail forex customer’s security deposits
§ 5.10 Risk assessment recordkeeping requirements for retail foreign exchange dealers.

(a) Requirement to maintain and preserve information. (1) Each retail foreign exchange dealer registered with the Commission pursuant to section 2(c)(2)(B)(i)(II)(ff) of the Act shall prepare, maintain and preserve the following information:

(i) An organizational chart which includes the retail foreign exchange dealer and each of its affiliated persons. Included in the organizational chart shall be a designation of which affiliated persons are “Material Affiliated Persons” as that term is used in paragraph (a)(2) of this section, which Material Affiliated Persons file routine financial or risk exposure reports with the Securities and Exchange Commission, a federal banking agency, an insurance commissioner or other similar official or agency of a state, or a foreign regulatory authority, and which Material Affiliated Persons are dealers in financial instruments with off-balance sheet risk and, if a Material Affiliated Person is such a dealer, whether it is also an end-user of such instruments;

(ii) Written policies, procedures, or systems concerning the retail foreign exchange dealer’s:

(A) Method(s) for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons;

(B) Financing and capital adequacy, including information regarding sources of funding, together with a narrative discussion by management of the liquidity of the material assets of the retail foreign exchange dealer, the structure of debt capital, and sources of alternative funding;

(C) Establishing and maintaining internal controls with respect to market risk, credit risk, and other risks created by the retail foreign exchange dealer’s trading activities, including systems and policies for supervising, monitoring, reporting and reviewing trading activities in forex transactions, securities, futures contracts, commodity options, forward contracts and financial instruments; policies for hedging or managing risks created by trading activities or supervising accounts carried for affiliates, including a description of the types of reviews conducted to monitor positions; and policies relating to restrictions or limitations on trading activities: Provided, however, that if the retail foreign exchange dealer has no such written policies, procedures or systems, it must so state in writing;

(iii) Fiscal year-end consolidated and consolidating balance sheets for the highest level Material Affiliated Person within the retail foreign exchange dealer’s organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated balance sheets shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which shall include appropriate explanatory notes. The consolidating balance sheets may be those prepared by the retail foreign exchange dealer’s highest level Material Affiliated Person as part of its internal financial reporting process. Any additional information required to be filed under §5.11(a)(2)(iii) of this part shall also be maintained and preserved; and

(iv) Fiscal year-end consolidated and consolidating income statements and consolidated cash flow statements for the highest level Material Affiliated

§ 5.10 Risk assessment recordkeeping requirements for retail foreign exchange dealers.

(a) Requirement to maintain and preserve information. (1) Each retail foreign exchange dealer registered with the Commission pursuant to section 2(c)(2)(B)(i)(II)(ff) of the Act shall prepare, maintain and preserve the following information:

(i) An organizational chart which includes the retail foreign exchange dealer and each of its affiliated persons. Included in the organizational chart shall be a designation of which affiliated persons are “Material Affiliated Persons” as that term is used in paragraph (a)(2) of this section, which Material Affiliated Persons file routine financial or risk exposure reports with the Securities and Exchange Commission, a federal banking agency, an insurance commissioner or other similar official or agency of a state, or a foreign regulatory authority, and which Material Affiliated Persons are dealers in financial instruments with off-balance sheet risk and, if a Material Affiliated Person is such a dealer, whether it is also an end-user of such instruments;

(ii) Written policies, procedures, or systems concerning the retail foreign exchange dealer’s:

(A) Method(s) for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons;

(B) Financing and capital adequacy, including information regarding sources of funding, together with a narrative discussion by management of the liquidity of the material assets of the retail foreign exchange dealer, the structure of debt capital, and sources of alternative funding;

(C) Establishing and maintaining internal controls with respect to market risk, credit risk, and other risks created by the retail foreign exchange dealer’s trading activities, including systems and policies for supervising, monitoring, reporting and reviewing trading activities in forex transactions, securities, futures contracts, commodity options, forward contracts and financial instruments; policies for hedging or managing risks created by trading activities or supervising accounts carried for affiliates, including a description of the types of reviews conducted to monitor positions; and policies relating to restrictions or limitations on trading activities: Provided, however, that if the retail foreign exchange dealer has no such written policies, procedures or systems, it must so state in writing;

(iii) Fiscal year-end consolidated and consolidating balance sheets for the highest level Material Affiliated Person within the retail foreign exchange dealer’s organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated balance sheets shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which shall include appropriate explanatory notes. The consolidating balance sheets may be those prepared by the retail foreign exchange dealer’s highest level Material Affiliated Person as part of its internal financial reporting process. Any additional information required to be filed under §5.11(a)(2)(iii) of this part shall also be maintained and preserved; and

(iv) Fiscal year-end consolidated and consolidating income statements and consolidated cash flow statements for the highest level Material Affiliated
Person within the retail foreign exchange dealer’s organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated statements shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which shall include appropriate explanatory notes. The consolidating statements may be those prepared by the retail foreign exchange dealer’s highest level Material Affiliated Person as part of its internal financial reporting process. Any additional information required to be filed under § 5.11(a)(2)(iii) shall also be maintained and preserved.

(2) The determination of whether an affiliated person of a retail foreign exchange dealer is a Material Affiliated Person shall involve consideration of all aspects of the activities of, and the relationship between, both entities, including without limitation, the following factors:

(i) The legal relationship between the retail foreign exchange dealer and the affiliated person;

(ii) The overall financing requirements of the retail foreign exchange dealer and the affiliated person, and the degree, if any, to which the retail foreign exchange dealer and the affiliated person are financially dependent on each other;

(iii) The degree to which the retail foreign exchange dealer and the affiliated person directly or indirectly engage in over-the-counter transactions with each other;

(iv) The degree, if any, to which the retail foreign exchange dealer or its customers rely on the affiliated person for operational support or services in connection with the retail foreign exchange dealer’s business;

(v) The level of market, credit or other risk present in the activities of the affiliated person; and

(vi) The extent to which the affiliated person has the authority or the ability to cause a withdrawal of capital from the retail foreign exchange dealer.

(3) For purposes of this section and § 5.11 of this part, the term Material Affiliated Person does not include a natural person.

(4) The information, reports and records required by this section shall be maintained and preserved, and made readily available for inspection, in accordance with the provisions of § 1.31 of this chapter.

(b) Special provisions with respect to Material Affiliated Persons subject to the supervision of certain domestic regulators. A retail foreign exchange dealer shall be deemed to be in compliance with the recordkeeping requirements of paragraphs (a)(1)(i), (iii) and (iv) of this section with respect to a Material Affiliated Person if:

(1) The Material Affiliated Person is required to maintain and preserve information pursuant to § 240.17h–1T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt, and the retail foreign exchange dealer maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of the records and reports maintained and filed on Form 17–H (or such other forms or reports as may be required) by the Material Affiliated Person with the Securities and Exchange Commission pursuant to §§ 240.17h–1T and 240.17h–2T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt;

(2) In the case of a Material Affiliated Person (including a foreign banking organization) that is subject to examination by, or the reporting requirements of, a Federal banking agency, the retail foreign exchange dealer or such Material Affiliated Person maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of all reports submitted by such Material Associated Person to the Federal banking agency pursuant to section 5211 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners’ Loan Act, or section 5 of the Bank Holding Company Act of 1956; or
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(3) In the case of a Material Affiliated Person that is subject to the supervision of an insurance commissioner or other similar official or agency of a state, the retail foreign exchange dealer or such Material Affiliated Person maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of the annual statements with schedules and exhibits prepared by the Material Affiliated Person on forms prescribed by the National Association of Insurance Commissioners or by a state insurance commissioner.

(c)(1) Special provisions with respect to Material Affiliated Persons subject to the supervision of a Foreign Regulatory Authority. A retail foreign exchange dealer shall be deemed to be in compliance with the recordkeeping requirements of paragraphs (a)(1)(iii) and (iv) of this section with respect to a Material Affiliated Person if such retail foreign exchange dealer maintains and makes available, or causes such Material Affiliated Person to make available, for inspection by the Commission in accordance with the provisions of this section copies of any financial or risk exposure reports filed by such Material Affiliated Person with a foreign futures authority or other foreign regulatory authority, provided that:

(i) The retail foreign exchange dealer agrees to use its best efforts to obtain from the Material Affiliated Person and to cause the Material Affiliated Person to provide, directly or through its foreign futures authority or other foreign regulatory authority, any supplemental information the Commission may request and there is no statute or other bar in the foreign jurisdiction that would preclude the retail foreign exchange dealer, the Material Affiliated Person, the foreign futures authority or other foreign regulatory authority from providing such information to the Commission; or

(ii) The foreign futures authority or other foreign regulatory authority with whom the Material Affiliated Person files such reports has entered into an information-sharing agreement with the Commission which is in effect as of the retail foreign exchange dealer’s fiscal year-end and which will allow the Commission to obtain the type of information required herein.

(2) The retail foreign exchange dealer shall maintain a copy of the original report and a copy translated into the English language. For the purposes of this section, the term “Foreign Futures Authority” shall have the meaning set forth in section 1a(26) of the Act.

(d) Exemptions. The Commission may exempt any retail foreign exchange dealer from any provision of this section if it finds that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought. The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

(e) Location of records. A retail foreign exchange dealer required to maintain records concerning Material Affiliated Persons pursuant to this section may maintain those records either at the principal office of the Material Affiliated Person or at a records storage facility, provided that, except as set forth in paragraph (c) of this section, the records are located within the boundaries of the United States and the records are kept and available for inspection in accordance with §1.31 of this chapter. If such records are maintained at a place other than the retail foreign exchange dealer’s principal place of business, the Material Affiliated Person or other entity maintaining the records shall file with the Commission a written undertaking, in a form acceptable to the Commission, signed by a duly authorized person, to the effect that the records will be treated as if the retail foreign exchange dealer were maintaining the records pursuant to this section and that the entity maintaining the records will permit examination of such records at any time, or from time to time during business hours, by representatives or designees of the Commission and promptly furnish the Commission representative or its designee true, correct, complete and current hard copy of all or any part of such records. The election to maintain records at the principal place of business of the Material Affiliated Person...
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§ 5.11 Risk assessment reporting requirements for retail foreign exchange dealers.

(a) Reporting requirements with respect to information required to be maintained by §5.10 of this part. (1) Each retail foreign exchange dealer registered with the Commission pursuant to Section 2(c)(2)(B)(ii) of the Act shall file the following with the regional office of the Commission with which it files periodic financial reports within 60 calendar days after the effective date of such registration:

(i) A copy of the organizational chart maintained by the retail foreign exchange dealer pursuant to §5.10(a)(1)(i) of this part. Where there is a material change in information provided, an updated organizational chart shall be filed within sixty calendar days after the end of the fiscal quarter in which the change has occurred; and

(ii) Copies of the financial, operational, and risk management policies, procedures and systems maintained by the retail foreign exchange dealer pursuant to §5.10(a)(1)(ii) of this part. If the retail foreign exchange dealer has no such written policies, procedures or systems, it must file a statement so indicating. Where there is a material change in information provided, such change shall be reported within sixty calendar days after the end of the fiscal quarter in which the change has occurred.

(2) Each retail foreign exchange dealer registered with the Commission pursuant to section 2(c)(2)(B)(ii) of the Act shall file the following with the regional office with which it files periodic financial reports within 105 calendar days after the end of each fiscal year or, if a filing is made pursuant to a written notice issued under paragraph (a)(2)(iii) of this section, within the time period specified in the written notice:

(i) Fiscal year-end consolidated and consolidating balance sheets for the highest level Material Affiliated Person within the retail foreign exchange dealer’s organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated balance sheets shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which consolidated balance sheets shall include appropriate explanatory notes. The consolidating balance sheets may be those prepared by the retail foreign exchange dealer’s highest level Material Affiliated Person as part of its internal financial reporting process;

(ii) Fiscal year-end annual consolidated and consolidating income statements and consolidated cash flow statements for the highest level Material Affiliated Person within the retail foreign exchange dealer’s organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated statements shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which consolidated statements shall be filed with the Commission within 105 calendar days after the end of the fiscal year or, if a filing is made pursuant to a written notice issued under paragraph (a)(2)(iii) of this section, within the time period specified in the written notice:
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Statements shall include appropriate explanatory notes. The consolidating statements may be those prepared by the retail foreign exchange dealer’s highest level Material Affiliated Person as part of its internal financial reporting process; and

(iii) Upon receiving written notice from any representative of the Commission and within the time period specified in the written notice, such additional information which the Commission determines is necessary for a complete understanding of a particular affiliate’s financial impact on the retail foreign exchange dealer’s organizational structure.

(3) For the purposes of this section, the term Material Affiliated Person shall have the meaning used in §5.10 of this part.

(4) The reports required to be filed pursuant to paragraphs (a)(1) and (2) of this section shall be considered filed when received by the regional office of the Commission with whom the retail foreign exchange dealer files financial reports pursuant to §5.12 of this part.

(b) Exemptions. The Commission may exempt any retail foreign exchange dealer from any provision of this section if it finds that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought. The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

(c) Special provisions with respect to Material Affiliated Persons subject to the supervision of certain domestic regulators. (1) In the case of a Material Affiliated Person that is required to maintain and preserve information pursuant to §240.17h–1T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt, the retail foreign exchange dealer shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to such Material Affiliated Person if the retail foreign exchange dealer maintains in accordance with §5.10 of this part copies of all reports filed by the Material Affiliated Person with the Federal banking agency pursuant to section 5211 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners’ Loan Act, or section 5 of the Bank Holding Company Act of 1956.

(2) In the case of a Material Affiliated Person (including a foreign banking organization) that is subject to examination by, or the reporting requirements of, a Federal banking agency, the retail foreign exchange dealer shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to such Material Affiliated Person if the retail foreign exchange dealer or such Material Affiliated Person maintains in accordance with §5.10 of this part copies of all reports filed by the Material Affiliated Person with the Federal banking agency pursuant to section 5211 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners’ Loan Act, or section 5 of the Bank Holding Company Act of 1956.

(3) In the case of a retail foreign exchange dealer that has a Material Affiliated Person that is subject to the supervision of an insurance commissioner or other similar official or agency of a state, such retail foreign exchange dealer shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to the Material Affiliated Person if:

(i) With respect to a Material Affiliated Person organized as a mutual insurance company or a non-public stock company, the retail foreign exchange dealer or such Material Affiliated Person maintains in accordance with §5.14 of this part copies of the annual statements with schedules and exhibits prepared by the Material Affiliated Person on forms prescribed by the National Association of Insurance Commissioners or by a state insurance commissioner; and

(ii) With respect to a Material Affiliated Person organized as a public stock company, the retail foreign exchange
§ 5.12 Financial reports of retail foreign exchange dealers.

(a)(1) Each person who files an application for registration as a retail foreign exchange dealer with the National Futures Association shall submit, concurrently with the filing of such application, either:

(i) A Form 1-FR-FCM certified by an independent public accountant as of a date not more than 45 days prior to the date on which such report is filed; or

(ii) A Form 1-FR-FCM as of a date not more than 17 business days prior to the date on which such report is filed.
and a Form 1–FR–FCM certified by an independent public accountant as of a date not more than one year prior to
the date on which such report is filed.

(2) Each such person must include with such financial report a statement describing the source of his current as-
sets and representing that his capital has been contributed for the purpose of
operating his business and will con-
tinue to be used for such purpose.

(3) The provisions of paragraph (a)(1)
of this section do not apply to any per-
son succeeding to and continuing the
business of another retail foreign ex-
change dealer.

(b)(1) Each person registered as a re-
tail foreign exchange dealer must file a
Form 1–FR–FCM as of the close of busi-
ness each month. Each Form 1–FR
must be filed no later than 17 business
days after the date for which the report
is made.

(2) In addition to the monthly finan-
cial reports required by paragraph
(b)(1) of this section, each person reg-
istered as a retail foreign exchange
dealer must file a Form 1–FR–FCM as
of the close of its fiscal year, which
must be certified by an independent
public accountant and must be filed no
later than 90 days after the close of the
retail foreign exchange dealer’s fiscal
year.

(3) A Form 1–FR–FCM required to be
certified by an independent public ac-
countant which is filed by a retail for-
eign exchange dealer must be filed in paper form and may not be filed elec-
tronically with the Commission. A
Form 1–FR–FCM required to be cer-
tified by an independent public ac-
countant which is filed by an applicant
for registration as a retail foreign ex-
change dealer with the National Fu-
tures Association must be filed elec-
tronically in accordance with the in-
structions to the form and contain:

(i) A statement of financial condition
as of the date for which the report
is made;

(ii) A statement of income (loss) for
the period between the date of the
most recent statement of financial
condition filed with the Commission
and the date for which the report
is made;

(iii) A statement of changes in own-
ership equity for the period between
the date of the most recent statement
of financial condition filed with the
Commission and the date for which the
report is made;

(iv) A statement of changes in liabil-
ities subordinated to claims of general
creditors for the period between the
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date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

(v) A statement of the computation of the minimum capital requirements pursuant to §5.7 of this part as of the date for which the report is made; and

(vi) In addition to the information expressly required, such further material information as may be necessary to make the required statements and schedules not misleading.

(2) Each Form 1–FR–FCM filed pursuant to this §5.12 which is required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain:

(i) A statement of financial condition as of the date for which the report is made;

(ii) Statements of income (loss), cash flows, changes in ownership equity, and changes in liabilities subordinated to claims of general creditors, for the period between the date of the most recent certified statement of financial condition filed with the Commission and the date for which the report is made: Provided, That for an applicant filing pursuant to paragraph (a) of this section the period must be the year ending as of the date of the statement of financial condition;

(iii) A statement of the computation of the minimum capital requirements pursuant to §5.7 of this part as of the date for which the report is made; provided, That for an applicant filing pursuant to paragraph (a) of this section the period must be the year ending as of the date of the statement of financial condition;

(iv) Appropriate footnote disclosures;

(v) A reconciliation, including appropriate explanations, of the statement of the computation of the minimum capital requirements pursuant to §5.7 of this part, in the certified Form 1–FR–FCM with the applicant’s or registrant’s corresponding uncertified most recent Form 1–FR–FCM filing when material differences exist or, if no material differences exist, a statement so indicating; and

(vi) In addition to the information expressly required, such further material information as may be necessary to make the required statements not misleading.

(3) The statements required by paragraphs (e)(2)(i) and (ii) of this section may be presented in accordance with generally accepted accounting principles in the certified reports filed as of the close of the registrant’s fiscal year pursuant to paragraph (b)(2) of this section or accompanying the application for registration pursuant to paragraph (a)(1) of this section, rather than in the format specifically prescribed by these regulations: Provided, the statement of financial condition is presented in a format as consistent as possible with the Form 1–FR–FCM and a reconciliation is provided reconciling such statement of financial condition to the statement of the computation of the minimum capital requirements pursuant to §5.7 of this part. Such reconciliation must be certified by an independent public accountant in accordance with §1.16 of this chapter.

(4) Attached to each Form 1–FR–FCM filed pursuant to this section must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the Form 1–FR–FCM is true and correct. The individual making such oath or affirmation must be: If the registrant or applicant is a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the chief executive officer or chief financial officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership.

(f) Election of fiscal year. (1) An applicant wishing to establish a fiscal year other than the calendar year may do so by notifying the National Futures Association of its election of such fiscal year, in writing, concurrently with the filing of the Form 1–FR–FCM pursuant to paragraph (a)(1) of this section, but in no event may such fiscal year end more than one year from the date of the Form 1–FR–FCM filed pursuant to paragraph (a)(1) of this section. An applicant that does not so notify the National Futures Association will be deemed to have elected the calendar year as its fiscal year.

(2)(i) A registrant must continue to use its elected fiscal year, calendar or
otherwise, unless a change in such fiscal year has been approved pursuant to this paragraph (f)(2).

(ii) A registrant may file with its designated self-regulatory organization an application to change its fiscal year, a copy of which the registrant must file with the Commission. The application shall be approved or denied in writing by the registrant's designated self-regulatory organization. The registrant must file immediately with the Commission a copy of any notice it receives from its designated self-regulatory organization to approve or deny the registrant's application to change its fiscal year. A written notice of approval shall become effective upon the filing by the registrant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(g) In the event a retail foreign exchange dealer or applicant for registration as a retail foreign exchange dealer finds that it cannot file its Form 1–FR–FCM for any period within the time specified in paragraph (b)(1) or (2) of this section without substantial undue hardship, it may request approval for an extension of time by filing an application for an extension of time with, in the case of a registrant, its designated self-regulatory organization, or, in the case of an applicant, the National Futures Association. The registrant or applicant also must file a copy of its application for an extension of time with the Commission. The application shall be approved or denied in writing by the National Futures Association or designated self-regulatory organization, as applicable. The registrant or applicant must file immediately with the Commission a copy of any notice it receives approving or denying the request for extension of time. A written notice of approval shall become effective upon the filing by the registrant or applicant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(h) Public availability of reports. (1) Forms 1–FR–FCM filed pursuant to this section will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter, except for the information described in paragraph (i)(2) of this section.

(2) The following information in Forms 1–FR–FCM will be publicly available:

(i) The amount of the applicant's or registrant's adjusted net capital; the amount of its minimum net capital requirement under §5.7 of this chapter; the amount of its adjusted net capital in excess of its minimum net capital requirement; and the amount of the retail forex obligation owed to its retail forex customers; and

(ii) The Statement of Financial Condition and the opinion of the independent public accountant in the certified annual financial reports of retail foreign exchange dealers.

(3) All information that is exempt from mandatory public disclosure under paragraph (h)(1) of this section will, however, be available for official use by any official or employee of the United States or any State, by the National Futures Association or any other self-regulatory organization of which the person filing such report is a member, and by any other person to whom the Commission believes disclosure of such information is in the public interest. Nothing in this paragraph (h) will limit the authority of any self-regulatory organization to request or receive any information relative to its members' financial condition.

(i) In the case of an applicant, all filings or other notices provided for in this section will be considered filed when received by the regional office of the Commission with jurisdiction over the state in which the applicant’s principal place of business is located and by the National Futures Association. In the case of a registrant, all filings or other notices provided for in this section will be considered filed when received by the regional office of the Commission with jurisdiction over the state in which the registrant’s principal place of business is located and by the registrant’s designated self-regulatory organization. Any copy that under paragraph (f)(2) or (g) of this section is required to be filed with the Commission shall be filed with the regional office of the Commission with
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§ 5.13 Reporting to customers of retail foreign exchange dealers and futures commission merchants; monthly and confirmation statements.

(a) Monthly statements. Each retail foreign exchange dealer or futures commission merchant must promptly furnish in writing to each retail forex 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 retail forex customer:
   (i) The open retail forex transactions with prices at which acquired;
   (ii) The net unrealized profits or losses in all open retail forex transactions marked to the market; and
   (iii) Any money, securities or other property carried with the retail foreign exchange dealer or futures commission merchant; and
   (iv) A detailed accounting of all financial charges and credits to such retail forex accounts during the monthly reporting period, including money, securities or property received from or disbursed to such customer and realized profits and losses; and

(2) For each retail forex customer engaging in forex options transactions:
   (i) All forex options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;
   (ii) The open forex option positions carried for such customer as of the end of the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;
   (iii) All open forex option positions marked to the market and the amount each position is in the money, if any;
   (iv) Any money, securities or other property carried with the retail foreign exchange dealer or futures commission merchant; and
   (v) A detailed accounting of all financial charges and credits to such retail forex account(s) during the monthly reporting period, including money, securities and property received from or disbursed to such customer, premiums charged and received, and realized profits and losses.

(b) Confirmation statement. Each retail foreign exchange dealer or futures commission merchant must, not later than the next business day after any retail forex or forex option transaction, furnish:

(1) To each retail forex customer, a written confirmation of each retail forex transaction caused to be executed by it for the customer, including offsetting transactions executed during the same business day and the rollover of
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an open retail forex transaction to the next business day.

(2) To each retail forex customer engaging in forex option transactions, a written confirmation of each forex option transaction, containing at least the following information:

(i) The retail forex customer’s account identification number;

(ii) A separate listing of the actual amount of the premium, as well as each mark-up thereon, if applicable, and all other commissions, costs, fees and other charges incurred in connection with the forex option transaction;

(iii) The strike price;

(iv) The underlying retail forex transaction or underlying currency;

(v) The final exercise date of the forex option purchased or sold; and

(vi) The date the forex option transaction was executed.

(3) To each retail forex customer engaging in forex option transactions, upon the expiration or exercise of any forex option, a written confirmation statement thereof, which statement shall include the date of such occurrence, a description of the forex option involved, and, in the case of exercise, the details of the retail forex or physical currency position which resulted therefrom including, if applicable, the final trading date of the retail forex transaction underlying the option.

(4) Notwithstanding the provisions of paragraphs (b)(1) through (3) of this section, a retail forex transaction or forex option transaction that is caused to be executed for a pooled investment vehicle that engages in retail forex transactions need be confirmed only to the operator of such pooled investment vehicle.

(c) Controlled accounts. With respect to any account controlled by any person other than the retail forex customer or forex option customer for whom such account is carried, each retail foreign exchange dealer or futures commission merchant shall promptly furnish in writing to such other person the information required by paragraphs (a) and (b) of this section.

(d) Recordkeeping. Each retail foreign exchange dealer or futures commission merchant shall retain, in accordance with §1.31 of this chapter, a copy of each monthly statement and confirmation required by this section.

(e) Introduced accounts. Each statement provided pursuant to the provisions of this section must, if applicable, show that the account for which the retail foreign exchange dealer or futures commission merchant is providing the statement was introduced by an introducing broker and the names of the retail foreign exchange dealer or futures commission merchant and introducing broker.

(f) Electronic transmission of statements. (1) The statements required by this section may be furnished to a retail forex customer by means of electronic media if the retail forex customer so consents, Provided, however, that a retail foreign exchange dealer or futures commission merchant must, prior to the transmission of any statement by means of electronic media, disclose the electronic medium or source through which statements will be delivered, the duration, whether indefinite or not, of the period during which consent will be effective, any charges for such service, the information that will be delivered by such means, and that consent to electronic delivery may be revoked at any time, and provided, further, that a retail foreign exchange dealer or futures commission merchant must obtain the retail forex customer’s signed consent acknowledging such disclosure prior to the transmission of any statement by means of electronic media.

(2) Any statement required to be furnished to a person other than a retail forex customer in accordance with paragraph (f) of this section may be furnished by electronic media.

(3) A retail foreign exchange dealer or futures commission merchant who furnishes statements to a retail forex customer by means of electronic media must retain a daily confirmation statement for each retail forex customer as of the end of the trading session, reflecting all transactions made during that session for the customer, in accordance with §1.31 of this chapter.

(g) Combination with other statements. Any futures commission merchant required to deliver statements to retail forex customers in accordance with §1.33 of this chapter may combine into
one monthly statement or confirmation statement, as the case may be, the information required by this section and the information required by §1.33, provided that retail forex account information is separately identified from any other trading or account activity of the retail forex customer.

§ 5.14 Records to be kept by retail foreign exchange dealers and futures commission merchants.

(a) No person shall be registered as a retail foreign exchange dealer under the Act unless, commencing on the date his application for such registration is filed, he prepares and keeps current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting his asset, liability, income, expense and capital accounts, and in which (except as otherwise permitted in writing by the Commission) all his asset, liability and capital accounts are classified into either the account classification subdivisions specified on Form 1–FR–FCM or categories that are in accord with generally accepted accounting principles as applicable. Each person so registered shall prepare and keep current such records.

(b) Each applicant or registrant must make and keep as a record in accordance with §1.31 of this chapter formal computations of its adjusted net capital and of its minimum financial requirements pursuant to §1.17 or §5.7 of this chapter, or the requirements of the designated self-regulatory organization to which it is subject, as applicable, as of the close of business each month. Such computations must be completed and made available for inspection by any representative of the National Futures Association, in the case of an applicant, or of the Commission or designated self-regulatory organization, if any, in the case of a registrant, within 17 business days after the date for which the computations are made, commencing the first month end after the date the application for registration is filed.

§ 5.15 Unlawful representations.

It shall be unlawful for any person registered pursuant to the requirements of this part to represent or imply in any manner whatsoever that such person has been sponsored, recommended or approved, or that its abilities or qualifications have been reviewed or evaluated, by the Commission, the Federal government or any agency thereof.

§ 5.16 Prohibition of guarantees against loss.

(a) No retail foreign exchange dealer, futures commission merchant or introducing broker may in any way represent that it will, with respect to any retail foreign exchange transaction in any account carried by a retail foreign exchange dealer or futures commission merchant for or on behalf of any person:

(1) Guarantee such person against loss;

(2) Limit the loss of such person; or

(3) Not call for or attempt to collect security deposits, margin, or other deposits as established for retail forex customers.

(b) No person may in any way represent that a retail foreign exchange dealer, futures commission merchant or introducing broker will engage in any of the acts or practices described in paragraph (a) of this section.

(c) This section shall not be construed to prevent a retail foreign exchange dealer, futures commission merchant or introducing broker from assuming or sharing in the losses resulting from an error or mishandling of an order.

(d) This section shall not affect any guarantee entered into prior to October 18, 2010, but this section shall apply to any extension, modification or renewal thereof entered into after such date.

§ 5.17 Authorization to trade.

No retail foreign exchange dealer, futures commission merchant, introducing broker or any of their associated persons may directly or indirectly effect a retail forex transaction for the account of any customer unless before the transaction the customer, or person designated by the customer to control the account specifically authorized
§ 5.18 Trading and operational standards.

(a) For purposes of this section:

(1) The term "retail forex counterparty" includes, as appropriate:

(i) A retail foreign exchange dealer as defined in § 5.1 of this part;

(ii) A futures commission merchant as defined in section 1a(28) of the Act; and

(iii) An affiliated person of a futures commission merchant as defined in § 5.1 of this part.

(2) The term "related person" when used in reference to a retail forex counterparty means any general partner, officer, director, owner of more than ten percent of the equity interest, associated person or employee of the retail forex counterparty, and any relative or spouse of any of the foregoing persons, or any relative of such spouse, who shares the same home as any of the foregoing persons.

(b) Prior to engaging in a retail forex transaction, each retail forex counterparty shall, at a minimum, establish and enforce internal rules, procedures and controls to:

(1) Ensure, to the extent possible, that each order received from a retail forex customer which order is executable at or near the price that the retail forex counterparty has quoted to the customer is entered for execution before any order in any retail forex transaction for any proprietary account, any other account in which a related person of the retail forex counterparty has an interest, or any account for which such a related person may originate orders without the prior specific consent of the account owner (if such related person has gained knowledge of the retail forex customer’s order prior to the transmission of an order for a proprietary account), an account in which such a related person has an interest, or an account in which such a related person may originate orders without the prior specific consent of the account owner; and

(2) Prevent related persons of forex counterparties from placing orders, directly or indirectly, with another person in a manner designed to circumvent the provisions of paragraph (b)(1) of this section;

(3) Fairly and objectively establish settlement prices for retail forex transactions; and

(4) Record and maintain essential information regarding customer orders and account activity, and to provide such information to customers upon request. Such information shall include:

(A) Transaction records for the customer's account, including:

(i) The date and time each order is received by the retail forex counterparty;

(ii) The price at which each order is placed, or, in the case of an option, the premium paid;

(iii) If the transaction was entered into by means of a trading platform, the price quoted on the trading platform when the order was placed, or, in the case of an option, the premium quoted;

(B) The customer account identification information;

(C) The currency pair;

(D) The size of the transaction;

(E) Whether the order was a buy or sell order;

(F) The type of order, if the order was not a market order;

(G) If a trading platform is used, the date and time the order is transmitted to the trading platform;

(H) If a trading platform is used, the date and time the order is executed;

(I) The size and price at which the order is executed, or in the case of an option, the amount of the premium paid for each option purchased, or the amount credited for each option sold; and

(J) For options, whether the option is a put or call, the strike price, and expiration date.
(ii) Account records that contain the following information:

(A) The funds in the account, net of any commissions and fees;

(B) The net profits and losses on open trades; and

(C) The funds in the account plus or minus the net profits and losses on open trades. (In the case of open option positions, the account balance should be adjusted for the net option value);

(iii) If a trading platform is used, daily logs showing each price change on the platform, the time of the change to the nearest second, and the trading volume at that time and price; and

(iv) Any method or algorithm used to determine the bid or asked price for any retail forex transaction or the prices at which customer orders are executed, including, but not limited to, any markups, fees, commissions or other items which affect the profitability or risk of loss of a retail forex customer’s transaction.

(c) No retail forex counterparty shall disclose that an order of another person is being held by the retail forex counterparty, unless such disclosure is necessary to the effective execution of such order or is made at the request of an authorized representative of the Commission, or a futures association registered with the Commission pursuant to section 17 of the Act.

(d) No retail forex counterparty shall knowingly handle the account of any related person of another retail forex counterparty unless it:

(1) Receives written authorization from a person designated by such other retail forex counterparty with responsibility for the surveillance over such account pursuant to paragraph (b)(2) of this section;

(2) Prepares immediately upon receipt of an order for such account a written record of such order, including the account identification and order number, and records thereon to the nearest minute, by time-stamp or other timing device, the date and time the order is received; and

(3) Transmits on a regular basis to such other retail forex counterparty copies of all statements for such account and of all written records prepared upon the receipt of orders for such account pursuant to paragraph (b)(2) of this section.

(e) No related person of a retail forex counterparty shall have an account, directly or indirectly, with another retail forex counterparty unless:

(1) It receives written authorization to maintain such an account from a person designated by the retail forex counterparty of which it is a related person with responsibility for the surveillance over such account pursuant to paragraph (b)(2) of this section; and

(2) Copies of all statements for such account and of all written records prepared by such other retail forex counterparty upon receipt of orders for such account pursuant to paragraph (d)(2) of this section are transmitted on a regular basis to the retail forex counterparty of which it is a related person.

(f) No retail forex counterparty shall:

(1) Enter into a retail forex transaction, to be executed pursuant to a market or limit order at a price that is not at or near the price at which other retail forex customers, during that same time period, have executed retail forex transactions with the retail forex counterparty; Provided, however, that this paragraph (f)(1) shall not prohibit such practice if in accordance with the rules of a registered futures association, and of which such retail foreign exchange dealer, futures commission merchant or affiliated person of a futures commission merchant is a member;

(2) Adjust or alter prices for a retail forex transaction after the transaction has been confirmed to the retail forex customer; Provided, however, that this paragraph (f)(2) shall not prohibit such practice if in accordance with the rules of a registered futures association, and of which such retail foreign exchange dealer, futures commission merchant or affiliated person of a futures commission merchant is a member;

(3)(i) Provide a retail forex customer a new bid price for a retail forex transaction that is higher than its previous bid without providing a new asked price that is also higher than its previous asked price by a similar amount;

(ii) Provide a retail forex customer a new bid price for a retail forex transaction that is lower than its previous
§ 5.18

bid without providing a new asked price that is also lower than its previous asked price by a similar amount; or

(4) Establish a new position for a retail forex customer (except one that offsets an existing position for that retail forex customer) where the retail forex counterparty holds outstanding orders of other retail forex customers for the same currency pair at a comparable price.

(g)(1) Each retail forex counterparty and each CPO, CTA and IB subject to this part 5 shall maintain a record of all communications received by such person concerning facts giving rise to possible violations of the Act, rules, regulations or orders thereunder, related to their retail forex business. The record shall contain the name of the complainant, if provided, the date of the communication, the agreement, contract or transaction, the substance of the communication, and the name of the person who received the communication.

(2) Each retail forex counterparty and each CPO, CTA and IB subject to this part 5 shall provide to the Division of Enforcement of the Commission, electronically, a copy of the record of each communication received pursuant to paragraph (g)(1) of this section. Such copy shall be provided to the Division of Enforcement of the Commission no later than 30 calendar days after the communication is received. Provided, however, that in the case of a communication concerning facts giving rise to possible fraud under the Act or Commission regulations, such copy shall be provided to the Division of Enforcement of the Commission within three business days after the communication is received.

(h) An introducing broker as defined in § 5.1(f)(1) of this part, applicant for registration as an introducing broker as defined in § 5.1(f)(1) of this part, or person succeeding to and continuing the business of another introducing broker as defined in § 5.1(f)(1) of this part must comply with all provisions applicable to an introducing broker under this chapter; Provided, however, that an introducing broker operating pursuant to, or an applicant for registration as an introducing broker who has filed concurrently with its application for registration, a guarantee agreement meeting the requirements of § 1.10(j) of this chapter is not subject to the minimum capital and related financial reporting requirements of §§ 1.10, 1.12 and 1.17 of this chapter.

(i)(1) Each retail forex counterparty shall prepare and maintain on a quarterly basis (calendar quarter) a calculation of the percentage of nondiscretionary retail forex customer accounts open for any period of time during the quarter that were profitable, and the percentage of such accounts that were not profitable. In calculating whether a retail forex account was profitable or not profitable during the quarter, the FCM or RFED must compute the realized and unrealized gains and/or losses on all retail forex transactions carried in the retail forex account at any time during the quarter, and subtract all fees, commissions, and any other charges posted to the retail forex account during the quarter, and add any interest income and other income or rebates credited to the retail forex account during the quarter. All deposits and/or withdrawals of funds made by a retail forex customer during the quarter must be excluded from the computation of whether the retail forex account was profitable or not profitable during the quarter. Computations that result in a zero or negative number shall be considered a retail forex account that was not profitable. Computations that result in a positive number shall be considered a retail forex account that was profitable. RFEDs and FCMs shall maintain such calculations along with data supporting such calculations for five years in accordance with § 1.31.

(2) In calculating its percentages of nondiscretionary retail forex customer accounts that were profitable or not profitable, the retail forex counterparty may only use those retail forex accounts, as defined in § 5.1(i) of this part, that are nondiscretionary accounts; provided, that the retail forex account is not a proprietary account, as defined in paragraph (i)(3) of this section.
(3) Proprietary account for this section means a retail forex account carried on the books of a retail foreign exchange dealer or a futures commission merchant for one of the following persons, or of which ten percent or more is owned by one of the following persons, or of which an aggregate of ten percent or more of which is owned by more than one of the following persons:

(i) Such retail foreign exchange dealer or futures commission merchant itself;

(ii) If the retail foreign exchange dealer or futures commission merchant is a partnership, a general partner in such partnership;

(iii) If the retail foreign exchange dealer or futures commission merchant is a limited partnership, a limited or special partner in such partnership whose duties include:

(A) The management of the partnership business or any part thereof,

(B) The handling of retail forex transactions of such partnership,

(C) The keeping of records pertaining to retail forex transactions, or

(D) The signing or co-signing of checks or drafts on behalf of such partnership;

(iv) If the retail foreign exchange dealer or futures commission merchant is a corporation or association, an officer, director or owner of ten percent or more of the capital stock, of such organization;

(v) An employee of such retail foreign exchange dealer or futures commission merchant whose duties include:

(A) The management of the business of such retail foreign exchange dealer or futures commission merchant or any part thereof,

(B) The handling of retail forex transactions of such retail foreign exchange dealer or futures commission merchant,

(C) The keeping of records pertaining to retail forex transactions of such retail foreign exchange dealer or futures commission merchant,

(D) The signing or co-signing of checks or drafts on behalf of such retail foreign exchange dealer or futures commission merchant;

(vi) A spouse or minor dependent living in the same household of any of the foregoing persons;

(vii) A business affiliate that directly or indirectly controls such retail foreign exchange dealer or futures commission merchant; or

(viii) A business affiliate that, directly or indirectly is controlled by or is under common control with, such retail foreign exchange dealer or futures commission merchant.

(j) Each retail forex counterparty shall designate one or more principals to serve as a chief compliance officer(s). The chief compliance officer(s) shall certify to the Commission and a registered national futures association annually that the retail forex counterparty has in place processes to establish, maintain, review, modify and test policies and procedures reasonably designed to achieve compliance with the Act, rules, regulations and orders thereunder. The certification shall include a statement that the counterparty has in place compliance processes, and that the chief compliance officer(s) has apprised the chief executive officer of the compliance efforts to date and identify and address significant compliance problems and plans to address those problems.


§ 5.19 Pending legal proceedings.

(a) Every retail foreign exchange dealer or futures commission merchant and each CPO, CTA or IB subject to this part 5 shall submit to the Commission copies of any dispositive or partially dispositive decision for which a notice of appeal has been filed, the notice of appeal and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the retail foreign exchange dealer, futures commission merchant, CPO, CTA or IB is a party or to which its property or assets is subject with respect to retail forex transactions.

(b) Every retail foreign exchange dealer or futures commission merchant and each CPO, CTA or IB subject to this part 5 shall submit to the Commission copies of any dispositive or partially dispositive decision concerning which a notice of appeal has been filed, the notice of appeal, and such further documents as the Commission may
§ 5.20 Special calls for account and transaction information.

(a) Preparation and transmission of information upon special call. All information required upon special call shall be prepared in such form and manner and in accordance with such instructions, and shall be transmitted at such time and to such office of the Commission, as may be specified in the call.

(b) Special calls for information on controlled accounts from retail foreign exchange dealers, futures commission merchants, and introducing brokers. Upon call by the Commission, each retail foreign exchange dealer, futures commission merchant and introducing broker shall file with the Commission the names and addresses of all persons who, by power of attorney or otherwise, exercise trading control over any customer’s account in retail forex transactions.

(c) Special calls for information on open transactions in accounts carried or introduced by retail foreign exchange dealers, futures commission merchants, and introducing brokers. Upon special call the Commission for information relating to retail forex transactions held or introduced on the dates specified in the call, each retail foreign exchange dealer, futures commission merchant, or introducing broker shall furnish to the Commission the following information concerning accounts of traders owning or controlling such retail forex transaction positions, as may be specified in the call:

1. The name, address, and telephone number of the person for whom each account is carried;
2. The principal business or occupation of the person for whom each account is introduced or carried, as specified in the call;
3. The name, address and principal business or occupation of any person who controls the trading of each account;
4. The name and address of any person having a financial interest of ten percent or more in each account;
5. The number of open retail forex transaction positions introduced or carried in each account, as specified in the call; and
6. The total number of retail forex transactions against which delivery has been made.

(d) Delegation of authority to the Director of the Division of Clearing and Intermediary Oversight and the Director of the Division of Market Oversight. The Commission hereby delegates, until the Commission orders otherwise, to the Director of the Division of Clearing and
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§ 5.23 Notice of bulk transfers and bulk liquidations.

(a) Notice and disclosure to retail forex customers of a bulk transfer. (1) A retail foreign exchange dealer, futures commission merchant or introducing broker must obtain the written prior and specific consent of its retail forex customer to the assignment of any position or transfer of any account of the retail forex customer to another retail foreign exchange dealer, futures commission merchant or introducing broker, unless made at the retail forex customer’s request.

(2) Absent a request of the retail forex customer or the consent described in paragraph (a)(1) of this section, assignments of positions and transfers of accounts of retail forex customers may be permitted under rules of the retail forex dealer’s, futures commission merchant’s, or introducing broker’s designated self-regulatory organization that establish notice and other requirements with respect to the assignment of positions and transfers of accounts of retail forex customers. If such rules permit implied consent as a result of the failure of the retail forex customer to object after having received notice of the proposed assignment or transfer, such rules must provide that the notice must include a statement that the retail forex customer is not required to accept the proposed assignment or transfer and may direct the transferee firm to liquidate the positions of the retail forex customer or transfer the account to a firm of the retail forex customer’s selection.

(3) For assignments and transfers made under this section, other than at the retail forex customer’s request, the
transferee retail foreign exchange dealer, futures commission merchant or introducing broker must provide to the retail forex customer the risk disclosure statements and forms of acknowledgment required by part 5 of this chapter and receive the required signed acknowledgments within sixty days of such assignments or transfers. This requirement shall not apply:

(i) If the transferee retail foreign exchange dealer, futures commission merchant or introducing broker has clear written evidence that the retail forex customer has received and acknowledged receipt of the required disclosure statements; or

(ii) If the transfer of accounts is made from one introducing broker to another introducing broker guaranteed by the same retail foreign exchange dealer or futures commission merchant pursuant to a guarantee agreement in accordance with the requirements of §1.10(j) of this chapter and such retail foreign exchange dealer or futures commission merchant maintains the relevant acknowledgments required by part 5 of this chapter.

(b) Notice to the Commission. Each retail foreign exchange dealer, futures commission merchant or introducing broker shall file with the Commission prior notice of any transfer of accounts of any retail forex customer that is not initiated at the request of the customer, where the transfer involves 50 percent or more of the transferor’s total number of retail forex customer accounts.

(c) Contents of notice to the Commission. The notice required by paragraph (b) of this section shall include:

(1) The name, principal business address and telephone number of the transferor futures retail foreign exchange dealer, futures commission merchant or introducing broker;

(2) The name, principal business address and telephone number of each transferee retail foreign exchange dealer, futures commission merchant or introducing broker;

(3) The designated self-regulatory organization for the transferor and transferee firms;

(4) A brief statement as to the reasons for the transfer;

(5) A copy of any notices to customers regarding the transfers; and

(6) A statement of the number of accounts to be transferred.

(d) Notice of the bulk liquidation of retail forex transactions. A retail foreign exchange dealer or futures commission merchant may not initiate the bulk liquidation of properly margined retail forex transactions unless such liquidation complies with the rules and procedures of the retail forex dealer’s or futures commission merchant’s designated self-regulatory organization and the retail forex dealer or futures commission merchant provides the Commission with prior written notice of the liquidation.

(e) Contents of notice of bulk liquidation. The notice required by paragraph (d) of this section shall include:

(1) The name, principal business address and telephone number of the initiating retail foreign exchange dealer or futures commission merchant;

(2) A brief statement of the reasons for the liquidation;

(3) A copy of any notices to customers regarding the liquidation; and

(4) A statement of the number of accounts to be liquidated.

(f) Filing of notices. The notice required by paragraph (b) and (d) of this section shall be filed five business days prior to the transfer or liquidation of the retail forex transaction with the Deputy Director, Compliance and Registration Section, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; the National Futures Association Attn: Vice President-Compliance; and the designated self-regulatory organization for the transferor firm.

(g) No effect on other obligations. The requirements of this section shall not affect the obligations of a retail foreign exchange dealer, futures commission merchant or introducing broker under the rules of a self-regulatory organization or applicable customer account agreement with respect to assignments of positions or transfers of accounts or liquidation of positions.

(h) Corrective notice. If a proposed transfer is not completed in accordance with the notice required to be filed by
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paragraph (b) of this section, a corrective notice shall be filed within five business days of the date such proposed transfer was to occur explaining why the proposed transfer was not completed.

§ 5.24 Applicability of other parts of this chapter

Insofar as it is consistent with the requirements of this part, all other provisions of this chapter that apply to a person shall apply to such person as though such provisions were expressly set forth in this part.

§ 5.25 Applicability of the Act.

Except as otherwise specified in this part and unless the context otherwise requires, the provisions of Sections 4b, 4c(b), 4f, 4g, 4k, 4m, 4n, 4o, 6(c)–(e), 6b, 6c, 8(a)–(e), 8a and 12(f) of the Act shall apply to retail forex transactions that are subject to the requirements of this part as though such provisions were set forth herein and included specific references to retail forex transactions and the persons defined in § 5.1 of this part.

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


SOURCE: 77 FR 66332, Nov. 2, 2012, unless otherwise noted.

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.

Subparts B–C [Reserved]

PART 8 [RESERVED]
disciplinary or access denial action, or other adverse action by an exchange.

(b) Matters excluded. This part does not apply to and the Commission will not accept notices of appeal, or petitions for stay pending review, of:

(1) Any arbitration proceeding, regardless of whether the proceeding was conducted pursuant to the provisions of section 5a(a)(11) of the Act or involved a controversy between members of an exchange;

(2) Except as provided in §§9.11(a), 9.11(b)(1)–(5), 9.11(c), 9.12(a) and 9.13 (concerning the notice, effective date and publication of a disciplinary or access denial action), any summary action authorized under the provisions of §6.27 of this chapter imposing a minor penalty for the violation of exchange rules relating to decorum or attire, or relating to the timely submission of accurate records required for clearing or verifying each day’s transactions or other similar activities; and

(3) Any exchange action arising from a claim, grievance, or dispute involving cash market transactions which are not a part of, or directly connected with, any transaction for the purchase, sale, delivery or exercise of a commodity for future delivery or a commodity option.

The Commission will, upon its own motion or upon motion filed pursuant to §9.21(b), promptly notify the appellant and the exchange that it will not accept the notice of appeal or petition for stay of matters specified in this paragraph. The determination to decline to accept a notice of appeal will be without prejudice to the appellant’s right to seek alternate forms of relief that may be available in any other forum.

(c) Applicability of these part 9 rules. Unless otherwise ordered, these rules will apply in their entirety to all appeals, and matters relating thereto, unless otherwise ordered, these rules will apply in their entirety to all appeals, and matters relating thereto, filed on or after August 6, 1987. Any part 9 proceeding pending before the Commission on August 6, 1987, will continue to be governed by the Commission’s former part 9 rules, 17 CFR part 9 (1987), except that the parties to any part 9 proceeding pending on August 6, 1987, may, within 30 days after August 6, 1987, by written stipulation executed by all parties, and filed with the Proceedings Clerk before the Commission’s final decision is rendered, elect to have the matter governed by the provisions of this part 9, as amended.

[52 FR 25366, July 7, 1987, as amended at 59 FR 5701, Feb. 8, 1994]

§9.2 Definitions.

For purposes of this part:

(a) Access denial action means any proceeding other than a disciplinary action by an exchange that denies or limits the privileges of membership, but excludes any exchange action that solely limits the ability of a member of an exchange to participate in the internal corporate affairs of the exchange.

(b) Disciplinary action means any suspension, expulsion or other penalty (as defined in §8.03(i) of this chapter) imposed on a member of an exchange by the exchange for violations of rules of the exchange, including summary actions.

(c) Exchange means any board of trade which has been designated as a contract market.

(d) Exchange proceeding means any formal or informal proceeding by an exchange which results in a disciplinary action, access denial action or other adverse action.

(e) Mail means properly addressed and postpaid first class mail, and includes overnight delivery service.

(f) Member of an exchange means any person who is admitted to membership or has been granted membership privileges on an exchange, any employee, officer, partner, director or affiliate of such member or person with membership privileges including any associated person, and any other person under the supervision or control of such member or person with membership privileges.

(g) Other adverse action and adverse action include any exchange action, other than an access denial action or disciplinary action, that adversely affects any person, whether or not a member of the exchange, but exclude any exchange action that solely involves the internal corporate affairs of the exchange.

(h) Party includes the person filing a notice of appeal or petition for stay who has been the subject of a disciplinary, access denial or other adverse action by an exchange;
any person participating in a proceeding under this part pursuant to §9.25; and the Division of Market Oversight and/or the Division of Clearing and Intermediary Oversight when participating in a proceeding under this part pursuant to §9.26.

(i) Record of the exchange proceeding means all testimony, exhibits, papers and records produced at or filed in an exchange disciplinary or access denial proceeding or served on a party to that proceeding; all documents, minutes or other exchange records serving as a basis for or reflecting the findings, rationale and conclusions concerning the adverse action taken by an exchange; a transcript of any proceeding before any body of the exchange in connection with the exchange proceeding; and a copy of all exchange rules which form the basis for the exchange proceeding.

(j) Rules of the exchange means any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, or written and publicly available interpretation or stated policy of the exchange, or instrument corresponding thereto.

(k) Summary action means a disciplinary action resulting in the imposition of a penalty on a member of an exchange for violation of rules of the exchange authorized under the provisions of §8.17(b) (penalty for impeding progress of hearing), §8.25 (member responsibility action) or §8.27 (penalty for violation of rules relating to decorum, attire, submission of records or similar activities) of this chapter.

§9.3 Provisions referenced.

Except as otherwise provided in this part, the following provisions of the Commission’s rules relating to reparation contained in part 12 of this chapter apply to this part: §12.3 (Business address; hours); §12.5 (Computation of time); §12.6 (Extensions of time; adjournments; postponements); §12.7 (Ex parte communications); and §12.12 (Signature).

§9.4 Filing and service; official docket.

(a) Filing with the Proceedings Clerk; proof of service. Any document that is required by this part to be filed with the Proceedings Clerk must be filed by delivering it in person or by mail to: Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. To be timely filed under this part, a document must be delivered or mailed to the Proceedings Clerk within the time prescribed for filing. A party must use a means of filing which is at least as expeditious as that used in serving that document upon the other parties. Proof of filing must be made by attaching to the document for filing an affidavit of filing executed by any person 18 years of age or older or a proof of filing executed by an attorney-at-law qualified to practice before the Commission. The proof of filing must certify that the attached document was deposited in the mail, with first-class postage prepaid, addressed to the Proceedings Clerk, Office of Proceedings, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, on the date specified in the affidavit.

(b) Formalities of filing—(1) Number of copies. Unless otherwise specifically provided, an original and two conformed copies of all documents filed with the Commission in accordance with the provisions of this part must be filed with the Proceedings Clerk.

(2) Title page. All documents filed with the Proceedings Clerk must include at the head thereof, or on a title page, the name of the Commission, the title of the proceeding, the docket number (if one has been assigned by the Proceedings Clerk), the subject of the particular document and the name of the person on whose behalf the document is being filed.

(3) Paper, spacing, type. All documents filed with the Proceedings Clerk
must be typewritten, must be on one grade of good white paper no less than 8 or more than 8½ inches wide and no less than 10½ or more than 11½ inches long, and must be bound on the top only. They must be double-spaced, except for long quotations (3 or more lines) and footnotes which should be single-spaced.

(4) Signature. The original copy of all papers must be signed in ink by the person filing the same or by his duly authorized agent or attorney.

(c) Service—(1) General requirements. All documents filed with the Proceedings Clerk must, at or before the time of filing, be served upon all parties. A party must use a means of service which is at least as expeditious as that used in filing that document with the Proceedings Clerk. One copy of all motions, petitions or applications made in the course of the proceeding, all notices of appeal, all briefs, and letters to the Commission or an employee thereof must be served by a party upon all other parties.

(2) Manner of service. Service may be either personal or by mail. Service by mail is complete upon deposit of the document in the mail. Where service is effected by mail, the time within which the person served may respond thereto will be increased by three days.

(3) Designation of person to receive service. The first document filed in a proceeding by or on behalf of any party must state on the first page the name and postal address of the person who is authorized to receive service for the party of all documents filed in the proceeding. Thereafter, service of documents must be made upon the person authorized unless service on a different authorized person or on the party himself is ordered by the Commission, or unless pursuant to §9.8 the person authorized is changed by the party upon due notice to all other parties. Parties must file and serve notification of any changes in the information provided pursuant to this subparagraph as soon as practicable after the change occurs.

(4) Service of orders and decisions. A copy of all notices, rulings, opinions and orders of the Commission will be served on each of the parties and will be deemed served upon deposit in the mail.

(d) Official docket. Upon receipt of a notice of appeal filed in accordance with §9.20, or a petition for stay pending review filed in accordance with §9.24, the Proceedings Clerk will establish and thereafter maintain the official docket of that proceeding and will assign a docket number to the proceeding.

[52 FR 25366, July 7, 1987, as amended at 60 FR 49334, Sept. 25, 1995]

§ 9.5 Motions.

(a) In general. An application for a form of relief not otherwise specifically provided for in this part must be made by a written motion, filed with the Proceedings Clerk. The motion must state the relief sought and the basis for the relief and may set forth the authority relied upon.

(b) Answer to motions. Any party may serve and file a written response to a motion within ten days after service of the motion, or within such longer or shorter period as established by these rules, or as the Commission may direct.

(c) Motions for procedural orders. Motions for procedural orders, including motions for extensions of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of the action.

(d) Dilatory motions. Frivolous or repetitive motions dealing with the same subject matter will not be permitted and such motions will summarily be denied.

§ 9.6 Sanctions for noncompliance.

In the event that any party fails to file any document or make any appearance which is required under this part, the Commission may, in its discretion, and upon its own motion or upon the motion of any party to the proceeding, dismiss the proceeding before it, or, based on the record before it, affirm, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the exchange.

§ 9.7 Settlement.

At any time before there has been a final determination by the Commission with respect to any notice of appeal
filed in accordance with §9.20, the parties may file a stipulation for dismissal based on a settlement agreement. Thereupon, the Commission may issue an order terminating the proceeding before the Commission as to the parties to the settlement agreement. The entry of such an order does not affect the Commission’s authority under the Act.

§ 9.8 Practice before the Commission.

(a) Practice—(1) By non-attorneys. An individual may appear pro se (on his own behalf); a general partner may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

(2) By attorneys. An attorney-at-law who is admitted to practice before the highest Court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with provisions of part 14 of this chapter may represent parties as an attorney in proceedings before the Commission.

(b) Debarment of counsel or representative during the course of a proceeding. Whenever, while a proceeding is pending before the Commission, the Commission finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, the Commission may order that such person be precluded from further acting as counsel or representative in the proceeding. The proceeding will not be delayed or suspended pending disposition of the appeal; Provided, That the Commission may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(c) Withdrawal of representation. Withdrawal from representation of a party will be only by leave of the Commission. Such leave to withdraw may be conditioned on the attorney’s (or representative’s) submission of an affidavit averring that the party represented has actual knowledge of the withdrawal, and such affidavit must include the name and address of a successor counsel (or representative) or a statement that the represented party has determined to proceed pro se, in which case, the statement must include the address where that party can thereafter be served.

§ 9.9 Waiver of rules; delegation of authority.

(a) Standards for waiver; notice to parties. To prevent undue hardship on any party or for other good cause shown the Commission may waive any rule in this part in a particular case and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced thereby and that the ends of justice will be served. Reasonable notice will be given to all parties of any action taken pursuant to this paragraph.

(b) Delegation of authority. (1) The Commission hereby delegates, until the Commission orders otherwise, to the General Counsel, or to any employee under the General Counsel’s supervision as the General Counsel may designate, the authority:

(i) To waive or modify any of the requirements of §§9.20–9.25 and to waive or modify the requirements of the Commission’s rules relating to reparations incorporated by §9.3 insofar as such requirements pertain to changes in time permitted for filing, and to the form, execution, service and filing of documents;

(ii) To enter orders under §§9.5, 9.6 and 9.7;

(iii) To decline to accept any notice of appeal, or petition for stay pending review, of matters excluded from this part by §§9.1(b), 9.2(a) and 9.2(b), and to so notify the appellant and the exchange;

(iv) To stay the effective date of a disciplinary action for a period of time, not to exceed four days, to enable the Commission to rule on a petition for stay filed under §9.24;

(v) To decline to accept any document which has not been timely filed or perfected, as specified in these rules;

(vi) To order the filing of the record of the exchange proceeding notwithstanding the submission of a motion under §9.21(b) that the Commission not accept a notice of appeal; and

(vii) To enter any order which will facilitate or expedite Commission review.
§ 9.10

(2) Within seven days after service of a ruling issued pursuant to paragraph (b)(1) of this section, a party may file with the Proceedings Clerk a petition for Commission reconsideration of the ruling. Unless the Commission orders otherwise, the filing of a petition for reconsideration will not operate to stay the effective date of such ruling.

(3) The General Counsel, or his designee, may submit to the Commission for its consideration any matter which has been delegated pursuant to paragraph (b)(1) of this section.

(4) Nothing in this section will be deemed to prohibit the Commission, at its election, from exercising the authority delegated to the General Counsel, or his designee, under this section.

§ 9.11 Form, contents and delivery of notice of disciplinary or access denial action.

(a) When required. Whenever an exchange decision pursuant to which a disciplinary action or access denial action is to be imposed has become final, the exchange must, within thirty days thereafter, provide written notice of such action to the person against whom the action was taken and to the Commission: Provided, That the exchange is not required to notify the Commission of any summary action, as authorized under the provisions of § 8.27 of this chapter, which results in the imposition of minor penalties for the violation of exchange rules relating to decorum or attire. No final disciplinary or access denial action may be made effective by the exchange except as provided in § 9.12.

(b) Contents of notice. For purposes of this part, the written notice of a disciplinary action or access denial action may be either a copy of a written decision which accords with §§ 8.16, § 8.18, or § 8.19(c) of this chapter (including copies of any materials incorporated by reference) or other written notice which must include:

(1) The name of the person against whom the disciplinary action or access denial action was taken;

(2) A statement of the reasons for the disciplinary action or access denial action together with a listing of any rules which the person who was the subject of the disciplinary action or access denial action was charged with having violated or which otherwise serve as the basis of the exchange action;

(3) A statement of the conclusions and findings made by the exchange with regard to each rule violation charged or, in the event of settlement, a statement specifying those rule violations which the exchange has reason to believe were committed;

(4) The terms of the disciplinary action or access denial action;

(5) The date on which the action was taken and the date the exchange intends to make the disciplinary or access denial action effective; and

(6) Except as otherwise provided in § 9.1(b), a statement informing the party subject to the disciplinary action or access denial action of the availability of Commission review of the exchange action pursuant to section 8c of the Act and this part.

(c) Delivery and filing of the notice. Delivery of the notice must be made either personally to the person who was the subject of the disciplinary action or access denial action or by mail to such person at that person’s last known address. A copy of the notice must be filed on the same date with the Commission, either in person during normal business hours or by mail to: Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. The notice filed with the Commission must additionally include the date on which the notice was delivered to the person disciplined or denied access and state whether delivery was personal or by mail.

(d) Effect of delivery and filing by mail. Filing by mail to the Commission and delivery by mail to the person disciplined or denied access will be complete upon deposit in the mail of a
Commodity Futures Trading Commission

§ 9.20 Notice of appeal.

(a) Time to file. Except as provided in §9.1(b), any person who is the subject of disciplinary or access denial action by an exchange or any person who is otherwise adversely affected by any other action of an exchange may, at any time within thirty days after notice of the disciplinary or access denial action has been delivered to the person disciplined or denied access in accordance with §9.11, or within thirty days after notice

properly addressed and postpaid document. Where delivery to the person disciplined or denied access is effected by such mail, the time within which a notice of appeal or petition for stay may be filed will be increased by three days.

(e) Certification. Copies of the notice and the submission of any additional information provided pursuant to this section must be certified as true and correct by a duly authorized officer, agent or employee of the exchange.

§ 9.12 Effective date of disciplinary or access denial action.

(a) Effective date. Any disciplinary or access denial action taken by an exchange will not become effective until at least fifteen days after the written notice prescribed by §9.11 is delivered to the person disciplined or denied access; Provided, however, That the exchange may cause a disciplinary action to become effective prior to that time if:

(1) As authorized by §8.25 of this chapter, the exchange reasonably believes, and so states in its written decision, that immediate action is necessary to protect the best interests of the marketplace; or

(2) As authorized by §8.17(b) of this chapter, the exchange determines, and so states in its written decision, that the actions of a person who is within the exchange’s jurisdiction have impeded the progress of a disciplinary hearing; or

(3) As authorized by §8.27 of this chapter, the exchange determines that a person has violated exchange rules relating to decorum or attire, or timely submission of accurate records required for clearing or verifying each day’s transactions or other similar activities; or

(4) The person against whom the action is taken has consented to the penalty to be imposed and to the timing of its effectiveness.

(b) Notice of early effective date. If the exchange determines in accordance with paragraph (a)(1) of this section that a disciplinary action will become effective prior to the expiration of fifteen days after written notice thereof, it must notify the person disciplined in writing, either personally or by telegram or other means of written telecommunication to the person’s last known address, stating the reasons for the determination. The exchange must also by telegram or other means of written telecommunication immediately notify the Commission (Attention: Contracts Markets Section, Division of Market Oversight). Where notice is delivered by telegram or other means of written telecommunication, the time within which the person so notified may file a petition for stay pursuant to §9.24(a)(2) will be increased by one day.

§ 9.13 Publication of notice.

Whenever an exchange suspends, expels or otherwise disciplines, or denies any person access to the exchange, it must make public its findings by disclosing at least the information contained in the notice required by §9.11(b). An exchange must make such findings public as soon as the disciplinary action or access denial action becomes effective in accordance with the provisions of §9.12 by posting a notice in a conspicuous place on its premises to which its members and the public regularly have access for a period of five consecutive business days. Thereafter, the exchange must maintain and make available for public inspection a record of the information contained in the disciplinary or access denial notice.

§§ 9.14–9.19 [Reserved]

Subpart C—Initial Procedure With Respect to Appeals

§ 9.20 Notice of initial procedure with respect to appeals.

(a) Time to file. Except as provided in §9.1(b), any person who is the subject of disciplinary or access denial action by an exchange or any person who is otherwise adversely affected by any other action of an exchange may, at any time within thirty days after notice of the disciplinary or access denial action has been delivered to the person disciplined or denied access in accordance with §9.11, or within thirty days after notice

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of another adverse action, file a notice of appeal of such disciplinary, access denial or other adverse action. The Commission may dismiss any appeal for which a notice of appeal is not timely filed.

(b) Contents. The notice of appeal need consist only of a brief statement indicating that the party is requesting Commission review of the exchange action, and must include:

(1) The name and address of the appellant, and any duly authorized agent or officer of the appellant;

(2) The name and docket number of the exchange proceeding;

(3) The date on which the disciplinary, access denial or other adverse action was imposed by the exchange or the date on which the final exchange decision was rendered, and the dates upon which the exchange action has or will become final and effective;

(4) A copy of the notice provided to the appellant by the exchange in accordance with the provisions of §9.11, in the case of a disciplinary or access denial action, or otherwise, in the case of any other adverse exchange action;

(5) The relief sought from the action of the exchange;

(6) The appellant’s request for a copy of the record of the exchange proceeding, or portions of the record not in the appellant’s possession, and a representation that the appellant agrees to pay the exchange reasonable fees, as provided in the rules of the exchange, for printing that copy; and

(7) A nonrefundable filing fee of $100 remitted by check, bank draft or money order, payable to the Commodity Futures Trading Commission.

§ 9.21 Record of exchange proceeding.

(a) Filing of record. Within thirty days after service of the notice of appeal, the exchange must file two copies of the record of the exchange proceeding (as defined in §9.21) with the Proceedings Clerk, and serve a copy on the appellant and any other party to the proceeding, provided that such person has agreed to pay the exchange reasonable fees, as provided in the rules of the exchange, for printing the copy. The record must be bound as a unit, must be chronologically indexed and tabbed, must be certified as correct by a duly authorized official, agent or employee of the exchange, and must contain a certificate of service on the appellant or any other party to the proceeding (or waiver of service for failure to pay costs pursuant to this rule).

(b) Motion that the Commission not accept notice of appeal. Within fifteen days after service of the notice of appeal, the exchange may file a motion that the Commission not accept a notice of appeal of any matter that the exchange contends is excluded from this part by §§9.1(b), 9.2(a) and 9.2(g). Such motion must be accompanied by an affidavit averring facts in support of the motion. The filing of such motion will operate to stay the filing of the record and subsequent submissions pending the Commission’s ruling on such motion. The appellant may serve and file a written response to such motion within ten days after service of the motion.

§ 9.22 Appeal brief.

(a) Time to file. Any person who has filed a notice of appeal in accordance with the provisions of §9.20 must perfect the appeal by filing an appeal brief with the Proceedings Clerk within thirty days after service of the record of the exchange proceeding. The Commission may dismiss any appeal for which an appeal brief is not timely filed.

(b) Contents. Each appeal brief submitted to the Commission pursuant to this section must include, in the order indicated:

(1) A statement of the issues presented for review;

(2) A statement of the case. The statement must first indicate briefly the nature of the case and include a full description of the disciplinary, access denial or other adverse action. There must follow a clear and concise statement of all facts relevant to the consideration of the appeal, including, if known, each alleged act or omission forming the basis of the exchange action, with appropriate references to the record of the exchange proceeding;

(3) An argument. The argument may be preceded by a summary. The argument must contain the contentions of the appellant with respect to the issues.
presented, and the reasons therefor, and citations to relevant authorities and to parts of the record of the exchange proceeding; and
(4) A conclusion stating the precise relief sought.

(c) Length of appeal brief. Without prior leave of the Commission, the appeal brief may not exceed thirty-five pages, exclusive of any table of contents, table of cases, index and appendix containing transcripts of testimony, exhibits, statutes, rules, regulations or similar materials.

§ 9.23 Answering brief.
(a) Time for filing answering brief. Within thirty days after service of the appeal brief, the exchange must file with the Commission an answering brief.
(b) Contents of answering brief. The answering brief generally must follow the same style as prescribed for the appeal brief but may omit a statement of the issues or of the case if the exchange does not dispute the issues or the statement of the case contained in the appeal brief.
(c) Length of answering brief. Without prior leave of the Commission, the answering brief may not exceed thirty-five pages, exclusive of any table of contents, table of cases, index and appendix containing transcripts of testimony, exhibits, statutes, rules, regulations or similar materials.

§ 9.24 Petition for stay pending review.
(a) Time to file. (1) Within ten days after the notice of the disciplinary or access denial action has been delivered in accordance with §9.11 to a person disciplined or denied access, that person may petition the Commission to stay the disciplinary or access denial action pending consideration by the Commission of the notice of appeal and, if granted, the appeal underlying the notice of appeal. The petition for stay must be accompanied by the notice of appeal.
(2) Within ten days after a notice of summary action has been delivered in accordance with §9.12(b) to a person who is the subject of a summary action authorized by §8.25 of this chapter, that person may petition the Commission to stay the effectiveness of the summary action pending completion of the exchange proceeding conducted as authorized by §8.26 of this chapter.
(3) The Commission may deny any petition for stay which is not timely filed or which is not otherwise in accord with these rules.
(b) Contents of petition for stay. A petition filed under this section must state the reasons that the stay is requested and the facts relied upon, as specified in §9.20. Averments of the petition must be supported by affidavits, other sworn statements or copies thereof, or a stipulation as to those facts which are not in dispute. Based upon the petition, the Commission, in its discretion, may order a stay of the disciplinary action or access denial action.
(c) Response to petition. The exchange may serve and file a written response to any petition for a stay within five days after service of the petition.
(d) Standards for granting petition for stay. The Commission will promptly determine whether to grant or deny a petition for stay and may act upon a petition at any time, without waiting for a response thereto. In determining whether to grant or deny the petition for stay, the Commission will consider, among other things, whether the petitioner has established:
(1) Petitioner’s likelihood of success on the merits; and
(2) That denial of the stay would cause irreparable harm to the petitioner; and
(3) That granting the stay would not endanger orderly trading or otherwise cause substantial harm to the exchange or market participants; and
(4) That granting the stay would not be contrary to the Act, and the rules, regulations and orders of the Commission thereunder or otherwise contrary to the public interest.
(e) Ex parte stays. The Commission may act upon a petition for stay, without waiting for the exchange’s response thereto only where petitioner:
(1) Expressly requests an ex parte stay;
(2) Files a proof of service; and
(3) Clearly establishes by affidavit that immediate and irreparable injury, loss or damage will result to the petitioner before the exchange can be heard in opposition.
§ 9.25 Limited participation of interested persons.

On its own motion or upon motion of any person asserting a direct and substantial interest in the outcome of a proceeding conducted under this part, the Commission, in its discretion, may permit the limited participation by such interested person in the proceeding. A motion for leave to participate in the proceeding must identify the interest of that person and must state the reasons why participation in the proceeding by that person is desirable, and must state whether that person requests a copy of the record of the exchange proceeding to the extent permitted by section 8c(a)(2) of the Act and that such person agrees to pay the exchange reasonable fees, as provided in the rules of the exchange, for printing the copy.

[52 FR 25366, July 7, 1987, as amended at 59 FR 5701, Feb. 8, 1994]

§ 9.26 Participation of Commission staff.

Within twenty days after receipt of the answering brief, the Division of Market Oversight and/or the Division of Clearing and Intermediary Oversight may file with the Proceedings Clerk a notice of intention to participate in the proceedings as amicus curiae. Within thirty days after filing the notice of intention to participate, the Division may file a brief as amicus curiae. Without prior leave of the Commission, the brief may not exceed thirty-five pages. The brief must be filed and served on the appellant, exchange and any other parties to the proceeding in the manner specified by these rules. Within ten days after service of the Division’s brief, any party may file a reply to the Division’s brief. After the filing of the notice of intent to participate, no employee of the Division(s) filing the notice may thereafter make any communication relating to the proceeding, other than on the record of the proceeding before the Commission, to any Commission decisional employee.


§§ 9.27–9.29 [Reserved]

Subpart D—Commission Review of Disciplinary, Access Denial or Other Adverse Action

§ 9.30 Scope of review.

On review, the Commission may, in its discretion, consider sua sponte any issues arising from the record before it and may base its determination thereon, or limit the issues to those presented in the statement of issues in the briefs, treating those issues not raised as waived. If the Commission determines to consider any issue not raised by the parties, it may issue an order that notifies the parties of such determination and provides an opportunity for the parties to address any issue considered sua sponte by the Commission.

§ 9.31 Commission review of disciplinary or access denial action on its own motion.

(a) Request for additional information. Where a person disciplined or denied access has not appealed the exchange decision to the Commission, upon review of the notice specified in §9.11, the Division of Market Oversight or the Division Clearing and Intermediary Oversight may request that the exchange file with the Division the record of the exchange proceeding, or designated portions of the record, a brief statement of the evidence and testimony adduced to support the exchange’s findings that a rule or rules of the exchange were violated and such recordings, transcripts and other documents.
§ 9.33 Final decision by the Commission.

(a) Opinion and order. Upon review, the Commission may affirm, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the exchange. The Commission’s decision will be contained in its opinion and order which will be based upon the record before it, including the record of the exchange proceeding, and any oral argument made in accordance with §9.32. Except as provided in paragraph (b) of this section, the opinion and order will constitute the final decision of the Commission, effective upon service on the parties. In the event the Commission is equally divided as to its decision, the Commission will affirm without opinion the decision of the exchange, which will constitute the Commission’s final decision.

(b) Order of summary affirmance. If the Commission finds that the result reached in the decision of the exchange is substantially correct and that none of the arguments on appeal made by the appellant raise important questions of law or policy, the Commission may, by appropriate order, summarily affirm the decision of the exchange without opinion, which will constitute the Commission’s final decision. Unless the Commission expressly indicates otherwise in its order, an order of summary affirmance does not reflect a Commission determination to adopt the exchange final decision, including any rationale contained therein, as its opinion and order, and neither the exchange’s final decision nor the Commission’s order of summary affirmance will serve as a Commission precedent in other proceedings.

(c) Standards of review. In reviewing an exchange disciplinary, access denial or other adverse action, the Commission will consider whether:

(1) The exchange disciplinary, access denial or other adverse action was applicable to the particular exchange proceeding as the Division may specify. The exchange must promptly advise the person who is the subject of the disciplinary or access denial action of the Division’s request. Within thirty days after service of the Division’s request, the exchange must file the information requested with the Division and, upon request, deliver that information to the person who is the subject of the disciplinary or access denial action. Delivery and filing must be in the manner prescribed by §9.11(c). A person subject to the disciplinary action or access denial action requesting a copy of the information furnished to the Division must, if the exchange rules so provide, agree to pay the exchange reasonable fees for printing the copy.

(b) Review on motion of the Commission. The Commission may institute review of an exchange disciplinary or access denial action on its own motion. Other than in extraordinary circumstances, such review will be initiated within 180 days after the Commission has received the notice of exchange action provided for in §9.11. If the Commission should institute review on its own motion, it will issue an order permitting the person who is the subject of the disciplinary or access denial action an opportunity to file an appropriate submission, and the exchange an opportunity to file a reply thereto.

§ 9.32 Oral argument.

(a) On motion of Commission. On its own motion, the Commission may, in its discretion, hear oral argument by the parties any time before the decision of the Commission is filed with the Proceedings Clerk.

(b) On request of party. Any party may file with the Proceedings Clerk a request in writing for the opportunity to present oral argument before the Commission, which the Commission may, in its discretion, grant or deny. A request under this paragraph must be filed concurrently with the party’s brief.

(c) Reporting and transcription. Oral argument before the Commission will be recorded and transcribed unless the Commission directs otherwise. In the event the Commission affords the parties the opportunity to present oral argument before the Commission, the oral argument will proceed in accordance with the provisions of §10.103 (b) and (d) of this chapter.
taken in accordance with the rules of the exchange;

(2) Fundamental fairness was observed in the conduct of the proceeding resulting in the disciplinary, access denial or other adverse action;

(3) (i) In the case of a disciplinary action, the record contains substantial evidence of a violation of the rules of the exchange, or (ii) in the case of an access denial or other adverse action, the record contains substantial evidence supporting the exchange action; and

(4) The disciplinary, access denial or other adverse action otherwise accords with the Act and the rules, regulations and orders of the Commission thereunder.

PART 10—RULES OF PRACTICE

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APPENDIX A TO PART 10—COMMISSION POLICY RELATING TO THE ACCEPTANCE OF SETTLEMENTS IN ADMINISTRATIVE AND CIVIL PROCEEDINGS


SOURCE: 41 FR 2511, Jan. 16, 1976, unless otherwise noted.

Subpart A—General Provisions

§ 10.1 Scope and applicability of rules of practice.

These rules of practice are generally applicable to adjudicatory proceedings before the Commodity Futures Trading Commission under the Commodity Exchange Act. These include proceedings for:

(a) Denial, suspension, revocation, conditioning, restricting or modifying of registration as a futures commission merchant, retail foreign exchange dealer, introducing broker, or associated person, floor broker, floor trader, commodity pool operator, commodity trading advisor or leverage transaction merchant pursuant to sections 6(c), 8a(2), 8a(3), 8a(4) and 8a(11) of the Act, 7 U.S.C. 9 and 15, 12a(2), 12a(3), 12a(4) and 12(a)(11), or denial, suspension, or revocation of designation as a contract market pursuant to sections 6(a) and 6(b) of the Act, 7 U.S.C. 8;

(b) The issuance of cease and desist orders pursuant to sections 6b and 6(d) of the Act, 7 U.S.C. 13a and 13b;

(c) Denial of trading privileges pursuant to section 6(c) of the Act, 7 U.S.C. 9 and 15;

(d) The assessment of civil penalties pursuant to sections 6(c) and 6b of the Act, 7 U.S.C. 9 and 15 and 13a;

(e) The issuance of restitution orders pursuant to section 6(c) of the Act, 7 U.S.C. 9; and

(f) Any other proceedings where the Commission declares them to be applicable.

These rules do not apply to:

(g) Investigations conducted pursuant to sections 8 and 16(a) of the Act, 7 U.S.C. 12 and 20(a), except as specifically made applicable by the Rules Relating to Investigations set forth in part 11 of this chapter;

(h) Reparation proceedings under section 14 of the Act, 7 U.S.C. 18, except as specifically made applicable by the Rules Relating to Reparation Proceedings set forth in part 12 of this chapter;

(i) Public rulemaking, except as specifically made applicable by the Rules Relating to Public Rulemaking Procedures set forth in part 13 of this title.

The rules shall be construed to secure the just, speedy and inexpensive determination of every proceeding with full protection for the rights of all parties therein.


§ 10.2 Definitions.

For purposes of this part:

(a) Act means the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq.;

(b) Adjudicatory proceeding means a judicial-type proceeding leading to the formulation of a final order;

(c) Administrative Law Judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105 (provisions of the rules in this part which refer to Administrative Law Judges may be applicable to other Presiding Officers as well, as set forth in §10.8);

(d) Administrative Procedure Act means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559;

(e) Commission means the Commodity Futures Trading Commission;

(f) Complaint means any document initiating an adjudicatory proceeding, whether designated a complaint or an order for proceeding or otherwise;

(g) Division of Enforcement means that office in the Commission that prosecutes a complaint issued by the Commission;

(h) Hearing means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission;

(i) Proceedings Clerk means that member of the Commission’s staff designated as such in the Commission’s Office of Proceedings.
Order means the whole or any part of a final procedural or substantive disposition of a matter by the Commission or by the Presiding Officer in a matter other than rulemaking;

(k) Party includes a person or agency named or admitted as a party to a proceeding;

(l) Person includes an individual, partnership, corporation, association, exchange or other entity or organization;

(m) Pleading means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(n) Presiding Officer means a member of the Commission, and Administrative Law Judge, or a hearing officer designated by the Commission to conduct a hearing on a specific matter, or the Commission itself, if it is to preside at or accept the introduction of evidence in a particular proceeding (provisions of the rules in this part which refer to Administrative Law Judges may be applicable to other Presiding Officers as well, as set forth in §10.8);

(o) Respondent means a party to an adjudicatory proceeding against whom findings may be made or relief or remedial action may be taken.

§ 10.3 Suspension, amendment, revocation and waiver of rules.

(a) These rules may, from time to time, be suspended, amended or revoked in whole or in part. Notice of such action will be published in the Federal Register.

(b) In the interest of expediting decision or to prevent undue hardship on any party, may waive any rule in subparts A through G of this part when neither party is prejudiced thereby. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

(c) The Presiding Officer, to expedite decision or to prevent undue hardship on any party, may waive any rule in subparts A through G of this part when neither party is prejudiced thereby. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

(d) Notwithstanding any provision of this part, the Commission may in any proceeding commenced pursuant to section 8(c) of the Act require a respondent to show cause why an order should not be entered against the respondent and may specify a day and place for the hearing not less than three days after service upon the respondent of the Commission’s complaint and notice of hearing in such proceeding.

§ 10.4 Business address; hours.

The Office of Proceedings is located at Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. Faxes must be sent to (202) 418–5532, and emails must be sent to PROC_filings@cftc.gov. The office is open from 8:15 a.m. to 4:45 p.m., Eastern Time, Monday through Friday, except on federal holidays.

§ 10.5 Computation of time.

In computing any period of time prescribed by these rules or allowed by the Commission or the Presiding Officer, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday; in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. Intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation only when the period of time prescribed or allowed is less than seven days.
§ 10.6 Changes in time permitted for filing.

Except as otherwise provided by law or by these rules, for good cause shown the Commission or the Presiding Officer before whom a matter is then pending, on their own motion or the motion of a party, at any time they may extend or shorten the time limit prescribed by the rules for filing any document. In any instance in which a time limit is not prescribed for an action to be taken in a proceeding, the Commission or the Presiding Officer may set a time limit for that action.

§ 10.7 Date of entry of orders.

In computing any period of time involving the date of the entry of an order the date of entry shall be the date the order is served by the Proceedings Clerk.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54801, Oct. 26, 1995]

§ 10.8 Presiding officers.

Unless otherwise determined by the Commission, all proceedings within the scope of this part shall be assigned to an Administrative Law Judge for hearing. If the Commission determines that a proceeding within the scope of this part shall be conducted before a Presiding Officer who is not an Administrative Law Judge, all provisions of this part or of part 3 of this chapter that refer to and grant authority to or impose obligations upon an Administrative Law Judge shall be read as referring to and granting authority to and imposing obligations upon the designated Presiding Officer.

(a) Functions and responsibilities of Administrative Law Judge. The Administrative Law Judge shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority to:

(1) Administer oaths and affirmations;
(2) Issue subpoenas;
(3) Rule on offers of proof;
(4) Receive relevant evidence;
(5) Examine witnesses;
(6) Regulate the course of the hearing;
(7) Hold prehearing conferences;
(8) Consider and rule upon all motions;
(9) Make decisions in accordance with §10.84 of these rules;
(10) Certify interlocutory matters to the Commission for its determination in accordance with §10.101 of these rules;
(11) Take such action as is just or appropriate, if a party or agent of a party fails to comply with an order issued by the Administrative Law Judge;
(12) Take any other action required to give effect to these Rules of Practice, including but not limited to requesting the parties to file briefs and statements of position with respect to any issue in the proceeding.

(b) Disqualification of Administrative Law Judge—(1) At his own request. An Administrative Law Judge may withdraw from any proceeding when he considers himself to be disqualified. In such event he immediately shall notify the Commission and each of the parties of his withdrawal and of his reason for such action.

(2) Upon the request of a party. Any party or person who has been granted leave to be heard pursuant to these rules may request an Administrative Law Judge to disqualify himself on the grounds of personal bias, conflict or similar bases. Interlocutory review of an adverse ruling by the Administrative Law Judge may be sought without certification of the matter by the Administrative Law Judge, in accordance with the procedures set forth in §10.101.


§ 10.9 Separation of functions.

(a) An Administrative Law Judge will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.

(b) No officer, employee or agent of the Commission who is engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or any factually related proceeding, participate or advise in the decision of the Administrative Law Judge or the Commission except as witness or...
§ 10.10 Ex parte communications.

(a) Definitions. For purposes of this section:

(1) Commission decisional employee means employees of the Commission who are or may reasonably be expected to be involved in the decisionmaking process in any proceeding, including, but not limited to:
   (i) Members of the personal staffs of the Commissioners;
   (ii) Members of the staffs of the Administrative Law Judges;
   (iii) The Deputy General Counsel for Opinions and Review and staff of the Office of General Counsel.
   (iv) Members of the staff of the Office of Proceedings; and
   (v) Other Commission employees who may be assigned to hear or to participate in the decision of a particular matter;

(2) Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this part;

(3) Interested person includes parties and other persons who might be adversely affected or aggrieved by the outcome of a proceeding; their officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives; and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding;

(4) Party includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, to a proceeding, and a person or agency permitted limited participation or to state views in a proceeding by the Commission.

(b) Prohibitions against ex parte communications. (1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge or Commission decisional employee an ex parte communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an ex parte communication relevant to the merits of a proceeding.

(c) Procedures for handling ex parte communications. A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an ex parte communication prohibited by paragraph (b) of this section shall:

(1) Place on the public record of the proceeding:
   (i) All such written communications;
   (ii) Memoranda stating the substance of all such oral communications; and
   (iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c) (1)(i) and (1)(ii) of this section; and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(d) Sanctions. (1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibitions contained in paragraph (b)(1) of this section, the Commission, Administrative Law Judge or other Commission employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on
that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge or Commission decisional employee who knowingly makes or knowingly cause to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in conduct of the type proscribed by 17 CFR 14.785–3(b)(3).

(e) Applicability of prohibitions and sanctions against ex parte communications. (1) The prohibitions of this section against ex parte communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review or reconsideration by the Commission or to review by any court.

(3) Nothing in this section shall constitute authority to withhold information from Congress.

§ 10.11 Appearance in adjudicatory proceedings.

(a) Appearance—(1) By non-attorneys. An individual may appear pro se (in his own behalf), a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association, an officer or employee of a State Commission or of a department or political subdivision of a State may represent the State Commission or the department or political subdivision of the State in any proceeding.

(2) By attorneys. An attorney-at-law who is admitted to practice before the highest Court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with the provisions of part 14 of this title, may represent parties in proceedings before the Commission.

(b) Debarment of counsel or representative by administrative law judge during the course of a proceeding. (1) Whenever, while a proceeding is pending before him, the Administrative Law Judge finds that a person acting as counsel or representative for any party to the proceeding is guilty of contumacious conduct, the Administrative Law Judge may order that such person be precluded from further acting as counsel or representative in such proceeding.

(2) Whenever the Administrative Law Judge has issued an order precluding a person from further acting as counsel for representative in the proceeding, the Administrative Law Judge shall submit to the Commission a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Commission should take respecting the appearance of such person as counsel or representative in other proceedings before the Commission.

§ 10.12 Service and filing of documents; form and execution.

(a) Service by a party or other participant in a proceeding. (1) When one party serves another with documents under these rules, a copy must be served on all other parties as well as filed with the Proceedings Clerk. Similarly, when a person files a document with the Office of Proceedings, the person must serve a copy of the document on all other parties.
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(2) How service is made. Service shall be made by:
   (i) Personal service;
   (ii) First-class or a more expeditious form of United States mail or an overnight or similar commercial delivery service;
   (iii) Facsimile ("fax"); or
   (iv) Electronic mail ("email").

(3) Service by email or fax shall be permitted at the discretion of the Presiding Officer, with the parties' consent. The consent of a party must specify the email address or fax number to be used. Signed documents that are served by email must be in PDF or other non-alterable form.

(4) Service will be complete at the time of personal service; upon deposit in the mail or with an overnight or similar commercial delivery service of a properly addressed document for which all postage or delivery service fees have been paid; or upon transmission by fax or email. Service by email or by fax will not be effective if the party making service learns that the attempted service did not reach the person to be served.

(5) Where service is effected by mail or a commercial delivery service (but not by fax or email), the time within which the person being served may respond shall be extended by five (5) days.

(6) Statement of service. A statement of service shall be made by filing with the Proceedings Clerk, simultaneously with the filing of the document, a statement signed by the party making service or by his attorney or representative that:
   (i) Confirms that service has been made,
   (ii) Identifies each person served,
   (iii) Sets forth the date of service, and
   (iv) Recites the manner of service.

(b) Service of decisions and orders. A copy of all rulings, opinions and orders shall be served by the Proceedings Clerk on each of the parties.

(c) Designation of person to receive service. The first page of the first document filed in a proceeding by a party or participant must include the name and contact information of a person authorized to receive service on the party or participant’s behalf. Contact information must include a post office address and daytime telephone number, and should also include the person’s fax or email. Thereafter service of documents shall be made upon the person authorized unless service on the party himself is ordered by the Administrative Law Judge or the Commission, or unless no person authorized to receive service can be found, or unless the person authorized to receive service is changed by the party upon due notice to all other parties.

(d) Filing of documents with the Proceedings Clerk. (1) All documents which are required to be served upon a party shall be filed concurrently with the Proceedings Clerk. A document shall be filed by delivering it in person or by first-class mail or a more expeditious form of United States mail or by overnight or similar commercial delivery service to Proceedings Clerk, Office of Proceedings, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581; or faxing the document to (202) 418–5532; or emailing it to PROC Filings@cftc.gov in accordance with the conditions set forth in paragraph (a)(2) of this section.

(2) To be timely filed under this part, a document must be delivered in person; mailed by first-class or a more expeditious form of United States mail or by an overnight or similar commercial delivery service; or faxed or emailed to the Proceedings Clerk within the time prescribed for filing.

(e) Formalities of filing. (1) An original of all documents shall be filed with the Proceedings Clerk. If a party files a document with the Proceedings Clerk by fax or email, they should not also send paper copies.

(2) First page. The first page of all documents filed with the Proceedings Clerk must include the Commission’s name, the docket number, the title of proceeding, the subject of the document, and the name of the person on whose behalf the document is being filed. In subsequent filings, the case title may be abbreviated by listing the name of the first respondent, followed by “et al.” In the complaint, the title of the action shall include the names of all the respondents, but in documents subsequently filed it is sufficient to state the name of the first respondent.
§ 10.22 Complaint and notice of hearing.

(a) Content. The complaint and notice of hearing shall include:

(1) The legal authority and jurisdiction under which the hearing is held;
(2) The matters of fact and law to be considered and determined.

The complaint shall set forth the matters of fact alleged therein in such manner as will permit a specific response to each allegation. The notice shall notify the respondent of his right to a hearing and shall specify the time required by § 10.23 of these rules for the filing of an answer and the consequence of failure to file an answer.

(b) Service. The Proceedings Clerk shall give appropriate notice to each respondent by serving them with a copy of the complaint and notice of hearing. Service may be made in person, by confirmed telegraphic notice, or by registered mail or certified mail, addressed to the last known business or residence address of the person to be served or the address of his duly authorized agent for service. If a respondent is not found at his last known business or residence address and no forwarding address is available, additional service may be made, at the discretion of the Commission, as follows:

(1) By publishing a notice of the filing of the proceeding and a summary of the complaint, approved by the Commission or the Administrative Law Judge, once a week for three consecutive weeks in one or more newspapers having a general circulation where the respondent’s last known business or residence address was located and, if ascertainable, where the respondent is believed to reside or be doing business currently; and
(2) By continuously displaying the complaint on the Commission’s Internet web site during the period referred to in paragraph (b)(1) of this section.


§ 10.23 Answer.

(a) When required. Following service of a complaint and notice of hearing as set forth in §10.22 of these rules, unless otherwise specified in the notice of hearing, each respondent shall file an answer with the Proceedings Clerk within 20 days.

(b) Content of answer. The answer shall include:

(1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of a lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted;

(2) A statement of the facts supporting each affirmative defense.

(c) Effect of failure to file answer. A party who fails to file an answer within 20 days shall be in default and, pursuant to procedures set forth in §10.93 of these rules, the proceeding may be determined against him by the Administrative Law Judge upon his consideration of the complaint, the allegations of which shall then be deemed to be true.

(d) Admission of all allegations of fact. If a respondent’s answer admits the truth of all the material allegations of fact contained in the complaint, it shall constitute a waiver of hearing on those allegations. However, the Administrative Law Judge may conduct a hearing, if so requested, by any of the parties. Following waiver, the parties may submit proposed findings and conclusions and briefs, as provided in §10.82 and may appeal any initial decision to the Commission as provided in §10.102 of these rules.

(e) Motion for more definite statement. Where a reasonable showing is made by a respondent that he cannot frame a responsive answer based on the allegations in the complaint, he may move for a more definite statement of the charges against him before filing an answer. A motion for a more definite statement shall be filed within ten days after service of the complaint and shall specify the defects complained of and the particular allegation as to which a more definite statement is sought.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.24 Amendments and supplemental pleadings.

(a) Complaint and notice of hearing. The Commission may, at any time, amend the complaint and notice of hearing in any proceeding. If the Commission so amends the complaint and notice of hearing, the Administrative Law Judge shall adjust the scheduling of the proceeding to the extent necessary to avoid any prejudice to any of the parties to the proceeding. Upon motion to the Administrative Law Judge and with notice to all other parties and the Commission, the Division of Enforcement may amend a complaint to correct typographical and clerical errors or to make other technical, non-substantive revisions within the scope of the original complaint.

(b) Other pleadings. Except for the complaint and notice of hearing, a party may amend any pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, he may amend it within 20 days after it is served. Otherwise a party may amend a pleading only by leave of the Administrative Law Judge, which shall be freely given when justice so requires.

(c) Response to amended pleadings. Any party may file a response to any amendment to any pleading, including the complaint, within ten days after the date of service upon him of the amendment or within the time provided to respond to the original pleading, whichever is later.

(d) Pleadings to conform to the evidence. When issues not raised by the pleadings but reasonably within the scope of a proceeding initiated by the complaint are tried with the express or implied consent of the parties, they...
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shall be treated in all respects as if they had been raised in the pleadings.


§ 10.25 Form of pleadings.

All averments of claim and defense shall be made in consecutively numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a single set of circumstances.

§ 10.26 Motions and other papers.

(a) Presentation. An application for a form of relief not otherwise specifically provided for in these rules shall be made by motion, filed with the Proceedings Clerk, which shall be in writing unless made on the record during a hearing. The motion shall state: (1) The relief sought; (2) the basis for relief; and (3) the authority relied upon. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. All motions and applications, unless otherwise provided in these rules, shall be directed to the Administrative Law Judge prior to the filing of an initial decision in a proceeding, and to the Commission after the initial decision has been filed.

(b) Answers to motions. Any party may serve and file a written response to a motion within ten days after service of the motion upon him or within such longer or shorter period as established by these rules or as the Administrative Law Judge or the Commission may direct. The absence of a response to a motion may be considered by the Administrative Law Judge or the Commission in deciding whether to grant the requested relief.

(c) Motions for procedural orders. Motions for procedural orders, including motions for extension of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such order may request reconsideration, vacation or modification of the order.

(d) Dilatory motions. Repetitive or numerous motions dealing with the same subject matter shall not be permitted.

(e) Review by the Commission. Interlocutory review by the Commission of a ruling on a motion by an Administrative Law Judge may be sought in accordance with the procedures and under the circumstances set forth in §10.101 of these rules.


Subpart C—Parties and Limited Participation

§ 10.31 Parties.

The parties to an adjudicatory proceeding shall include the Division of Enforcement, each respondent named in the complaint and each person permitted to intervene pursuant to §10.33 of these rules. A respondent shall cease to be a party or purposes of a pending proceeding when (a) a default order is entered against him pursuant to §10.93; or (b) the Commission accepts an offer of settlement pursuant to §10.108 of these rules.

§ 10.32 Substitution of parties.

Upon motion and for good cause shown the Administrative Law Judge may order a substitution of parties.

§ 10.33 Intervention as a party.

(a) Petition for Leave to Intervene. Any person whose interests may be affected substantially by the matters to be considered in a proceeding may petition the Administrative Law Judge for leave to intervene as a party in the proceeding any time after the institution of a proceeding and before such proceeding has been submitted for final consideration. Petitions for leave to intervene shall be in writing and shall set forth with specificity the nature of the petitioner’s interest in the proceeding and the manner in which his interests may be affected substantially. The Administrative Law Judge may direct a petitioner requesting intervention to submit himself for examination as to his interest in the proceeding.

(b) Response to petition. A petition for leave to intervene shall be served by the petitioner upon all parties to the proceeding, who may support or oppose the petition in a document filed within ten days after service of the petition upon them or within such other period

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as the Administrative Law Judge may direct in a particular case.

(c) Leave to intervene—when granted. No person shall be admitted as a party to a proceeding by intervention unless the Administrative Law Judge is satisfied that (1) a substantial interest of the person seeking to intervene may be adversely affected by the matter to be considered in the proceeding; (2) that his intervention will not materially prejudice the rights of any party, through delay or otherwise; (3) that his participation as a party will otherwise be consistent with the public interest; and (4) that leave to be heard pursuant to §10.34 would be inadequate for the protection of his interests. The burden shall be upon the petitioner to satisfy the Administrative Law Judge on these issues.

(d) Rights of intervenor. A person who has been granted leave to intervene shall from that time forward have all the rights and responsibilities of a party to the proceeding.

§ 10.34 Limited participation.

(a) Petitions for leave to be heard. Any person may, in the discretion of the Administrative Law Judge, be given leave to be heard in any proceeding as to any matter affecting his interests. Petitions for leave to be heard shall be in writing, shall set forth (1) the nature and extent of the applicant’s interest in the proceeding; (2) the issues on which he wishes to participate; and (3) in what manner he wishes to participate. The Administrative Law Judge may direct any person requesting leave to be heard to submit himself to examination as to his interest in the proceeding.

(b) Rights of a participant. Leave to be heard pursuant to §10.34(a) may include such rights of a party as the Administrative Law Judge may deem appropriate, except that oral argument before the Commission may be permitted only by the Commission.

§ 10.35 Permission to state views.

Any person may, in the discretion of the Administrative Law Judge be permitted to file a memorandum or make an oral statement of his views, and the Administrative Law Judge may, in his discretion, accept for the record written communications received from any person.
§ 10.42 Discovery.

(a) Prehearing materials—(1) In general. Unless otherwise ordered by an Administrative Law Judge, the parties to a proceeding shall furnish to all other parties to the proceeding on or before a date set by the Administrative Law Judge in the form of a prehearing memorandum or otherwise:
   (i) An outline of its case or defense;
   (ii) The legal theories upon which it will rely;
   (iii) The identity, and the city and state of residence, of each witness, other than an expert witness, who is expected to testify on its behalf, along with a brief summary of the matters to be covered by the witness’s expected testimony;
   (iv) A list of documents which it intends to introduce at the hearing, along with copies of any such documents which the other parties do not already have in their possession and to which they do not have reasonably ready access.

   (2) Expert witnesses. Unless otherwise ordered by the Administrative Law Judge, in addition to the information described in paragraph (a)(1) of this section, any party who intends to call an expert witness shall also furnish to all other parties to the proceeding on or before a date set by the Administrative Law Judge:
      (i) A statement identifying the witness and setting forth his or her qualifications;
      (ii) A list of any publications authored by the witness within the preceding ten years;
      (iii) A list of all cases in which the witness has testified as an expert, at trial or in deposition, within the preceding four years;
      (iv) A complete statement of all opinions to be expressed by the witness and the basis or reasons for those opinions; and
      (v) A list of any documents, data or other written information which were considered by the witness in forming his or her opinions, along with copies of any such documents, data or information which the other parties do not already have in their possession and to which they do not have reasonably ready access.

   (3) The foregoing procedures shall not be deemed applicable to rebuttal evidence submitted by any party at the hearing.

   (4) In any action where a party fails to comply with the requirements of this paragraph (a), the Administrative Law Judge may make such orders in regard to the failure as are just, taking into account all of the relevant facts and circumstances of the failure to comply.

(b) Investigatory materials—(1) In general. Unless otherwise ordered by the Commission or the Administrative Law Judge, the Division of Enforcement shall make available for inspection and copying by the respondents, prior to the scheduled hearing date, any of the following documents that were obtained by the Division prior to the institution of proceedings in connection with the investigation that led to the complaint and notice of hearing:
   (i) All documents that were produced pursuant to subpoenas issued by the Division or otherwise obtained from persons not employed by the Commission, together with each subpoena or written request, or relevant portion thereof, that resulted in the furnishing of such documents to the Division; and
   (ii) All transcripts of investigative testimony and all exhibits to those transcripts.

   (2) Documents that may be withheld. The Division of Enforcement may withhold any document that would disclose:
      (i) The identity of a confidential source;
      (ii) Confidential investigatory techniques or procedures;
      (iii) Separately the market positions, business transactions, trade secrets or names of customers of any persons other than the respondents, unless such information is relevant to the resolution of the proceeding;
      (iv) Information relating to, or obtained with regard to, another matter of continuing investigatory interest to the Commission or another domestic or foreign governmental entity, unless such information is relevant to the resolution of the proceeding; or
      (v) Information obtained from a domestic or foreign governmental entity or from a foreign futures authority
that either is not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed or that it only be disclosed by the Commission or a representative of the Commission as evidence in an enforcement or other proceeding.

(3) Nothing in paragraphs (b)(1) and (b)(2) of this section shall limit the ability of the Division of Enforcement to withhold documents or other information on the grounds of privilege, the work product doctrine or other protection from disclosure under applicable law. When the investigation by the Division of Enforcement that led to the pending proceeding encompasses transactions, conduct or persons other than those involved in the proceeding, the requirements of (b)(1) of this section shall apply only to the particular transaction, conduct and persons involved in the proceeding.

(4) Index of withheld documents. When documents are made available for inspection and copying pursuant to paragraph (b)(1) of this section, the Division of Enforcement shall furnish the respondents with an index of all documents that are withheld pursuant to paragraphs (b)(2) or (b)(3) of this section, except for any documents that are being withheld because they disclose information obtained from a domestic or foreign governmental entity or from a foreign futures authority on condition that the information not be disclosed or that it only be disclosed by the Commission or a representative of the Commission as evidence in an enforcement or other proceeding, in which case the Division shall inform the other parties of the fact that such documents are being withheld at the time it furnishes its index under this paragraph, but no further disclosures regarding those documents shall be required. This index shall describe the nature of the withheld documents in a manner that, to the extent practicable without revealing any information that itself is privileged or protected from disclosure by law or these rules, will enable the other parties to assess the applicability of the privilege or protection claimed.

(5) Arrangements for inspection and copying. Upon request by the respondents, all documents subject to inspection and copying pursuant to this paragraph (b) shall be made available to the respondents at the Commission office nearest the location where the respondents or their counsel live or work. Otherwise, the documents shall be made available at the Commission office where they are ordinarily maintained or at any other location agreed upon by the parties in writing. Upon payment of the appropriate fees set forth in appendix B to part 145 of this chapter, any respondent may obtain a photocopy of any document made available for inspection. Without the prior written consent of the Division of Enforcement, no respondent shall have the right to take custody of any documents that are made available for inspection and copying, or to remove them from Commission premises.

(6) Failure to make documents available. In the event that the Division of Enforcement fails to make available documents subject to inspection and copying pursuant to this paragraph (b), no rehearing or reconsideration of a matter already heard or decided shall be required, unless the respondent demonstrates prejudice caused by the failure to make the documents available.

(7) Requests for confidential treatment, protective orders. If a person has requested confidential treatment of information submitted by him or her, either pursuant to rules adopted by the Commission under the Freedom of Information Act (part 145 of this chapter) or under the Commission’s Rules Relating to Investigations (part 11 of this chapter), the Division of Enforcement shall notify him or her, if possible, that the information is to be disclosed to parties to the proceeding and he or she may apply to the Administrative Law Judge for an order protecting the information from disclosure, consideration of which shall be governed by §10.68(c)(2).

(c) Witness statements—(1) In general. Each party to an adjudicatory proceeding shall make available to the other parties any statement of any person whom the party calls, or expects to call, as a witness that relates to the anticipated testimony of the witness and is in the party’s possession. Such statements shall include the following:
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(i) Transcripts of investigatory, deposition, trial or similar testimony given by the witness,

(ii) Written statements signed by the witness, and

(iii) Substantially verbatim notes of interviews with the witness, and all exhibits to such transcripts, statements and notes. For purposes of this paragraph (c), “substantially verbatim notes” means notes that fairly record the exact words of the witness, subject to minor, inconsequential deviations. Such statements shall include memoranda and other writings authored by the witness that contain information relating to his anticipated testimony. The Division of Enforcement shall produce witness statements pursuant to this paragraph prior to the scheduled hearing date, at a time to be designated by the Administrative Law Judge. Respondents shall produce witness statements pursuant to this paragraph at the close of the Division’s case in chief during the hearing. If necessary, the Administrative Law Judge shall, upon request, grant the Division a continuance of the hearing in order to review and analyze any witness statements produced by the respondents.

(2) Nothing in paragraph (c)(1) of this section shall limit the ability of a party to withhold documents or other information on the grounds of privilege, the work product doctrine or other protection from disclosure under applicable law.

(3) Index of withheld documents. When a party makes witness statements available pursuant to paragraph (c)(1) of this section, he or she shall furnish each of the other parties with an index of all documents that the party is withholding on the grounds of privilege or work product. This index shall describe the nature of the withheld documents in a manner that, to the extent practicable without revealing information that itself is privileged or protected from disclosure by law or these rules, will enable the other parties to assess the applicability of the privilege or protection claimed.

(4) Failure to produce witness statements. In the event that a party fails to make available witness statements subject to production pursuant to this section, no rehearing or reconsideration of a matter already heard or decided shall be required, unless another party demonstrates prejudice caused by the failure to make the witness statements available.

(d) Modification of production requirements. The Administrative Law Judge shall modify any of the requirements of paragraphs (a) through (c) of this section that any party can show is unduly burdensome or is otherwise inappropriate under all the circumstances.

(e) Admissions—(1) Request for admissions. Any party may serve upon any other party, with a copy to the Proceedings Clerk, a written request for admission of the truth of any facts relevant to the pending proceeding set forth in the request. Each matter of which an admission is requested shall be separately set forth. Unless prior written approval is obtained from the Administrative Law Judge, the number of requests shall not exceed 50 in number including all discrete parts and subparts.

(2) Response. A matter shall be considered to be admitted unless, within 15 days after service of the request, or within such other time as the Administrative Law Judge may allow, the party upon whom the request is directed serves upon the requesting party a sworn written answer or objection to the matter. If objection is made, the reasons therefor shall be stated. The response shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer and deny only a part of the matter, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give a lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably available to him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may
§ 10.43 Stipulations.

The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations may be received in evidence at a hearing and when received in evidence shall be binding on the parties thereto.

§ 10.44 Depositions and interrogatories.

(a) When permitted. If it appears that:

(1) A prospective witness will be unable to attend or testify at a hearing on the basis of age, illness, infirmity, imprisonment or on the basis that he is or will be outside of the United States at the time of the hearing (unless it appears that the absence of the witness was procured by the party seeking to take the deposition),

(2) His testimony is material,

(3) It is necessary to take his deposition in the interest of justice, the Administrative Law Judge may by order deny the matter or set forth reasons why he cannot admit or deny it.

(3) Determining sufficiency of answers or objections. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served. If the Administrative Law Judge determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served.

(4) Effect of admission. Any matter admitted under this rule is conclusively established and may be used at a hearing as against the party who made the admission. However, the Administrative Law Judge may permit withdrawal or amendment when the presentation on the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

(f) Objections to authenticity or admissibility of documents—(1) Identification of documents. The Administrative Law Judge, acting on his or her own initiative or upon motion by any party, may direct each party to serve upon the other parties, with a copy to the Proceedings Clerk, a list identifying the documents that it intends to introduce at the hearing and requesting the other parties to file and serve a response disclosing any objection, together with the factual or legal grounds therefor, to the authenticity or admissibility of each document identified on the list. Except for relevance, waste of time or needless presentation of cumulative evidence, all objections not raised may be deemed waived.

(2) Objections to authenticity or admissibility. Within 20 days after service or at such other time as may be designated by the Administrative Law Judge, each party upon whom the list described in paragraph (f)(1) of this section was served shall file a response disclosing any objection, together with
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direct that his deposition be taken either orally or in the form of written interrogatories, and may issue a subpoena to compel the attendance of the witness for deposition.

(b) Application for deposition. Any party desiring to take the deposition of a witness shall make application in writing to the Administrative Law Judge for an order to take deposition. In addition to the showing required in §10.44(a), the application shall include:

(1) The name and post office address of the witness;
(2) The specific matters concerning which the witness is expected to testify and their relevance;
(3) The reasons why the deposition should be taken, supported by affidavits and a physician’s certificate, where appropriate;
(4) The time when, the place where, and the name and address of the person before whom the deposition is to be taken;
(5) A specification of the documents and materials which the deponent is requested to produce;
(6) Application for any subpoenas.

(c) Service and reply. A copy of the application to take deposition shall be served upon every other party to the proceeding and upon the person sought to be deposed. Any party or the deponent may serve and file an opposition to the application within seven days after the application is filed.

(d) Time when, place where, and officer before whom deposition is taken—

(1) Where the deposition is taken. Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in the city or municipality where the deponent is located.

(2) Officer before whom deposition is taken—

(i) Within the United States or a territory of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(ii) Within a foreign country, depositions may be taken before an officer or person designated by the Administrative Law Judge or agreed upon by the parties by stipulation in writing to be filed with the Proceedings Clerk.

(e) Procedures for taking oral depositions—

(1) Oral examination and crossexamination of witnesses shall be conducted in a manner similar to that permitted at a formal hearing. All questions and testimony shall be recorded verbatim, except to the extent that all parties present or represented may agree that a matter shall be off the record.

(2) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, or any other objection to the proceeding shall be noted by the officer upon the deposition, and shall subsequently be determined by the Administrative Law Judge. Evidence objected to shall be taken subject to the objections. However, the parties may stipulate that, except as to objections to the form of questions, all objections to the matters testified to in a deposition are preserved for the hearing, whether or not raised at the time of deposition.

(3) During the taking of a deposition a party or deponent may request and obtain an adjournment to permit an application to be made to the Administrative Law Judge for an order suspending the deposition on grounds of bad faith in the conduct of the examination, annoyance, embarrassment, oppression of a deponent or party, or improper questions. An attorney who requests and obtains an adjournment for this purpose but fails, without good cause, promptly to apply for relief to the Administrative Law Judge may be found guilty of contemptuous conduct in accordance with §10.11(b) of these rules.

(f) Procedures for use of interrogatories. Any party desiring to take the deposition of a witness shall make application in writing to the Administrative Law Judge for an order to take deposition. In addition to the showing required in §10.44(a), the application shall include:

(1) The name and post office address of the witness;
(2) The specific matters concerning which the witness is expected to testify and their relevance;
(3) The reasons why the deposition should be taken, supported by affidavits and a physician’s certificate, where appropriate;
(4) The time when, the place where, and the name and address of the person before whom the deposition is to be taken;
(5) A specification of the documents and materials which the deponent is requested to produce;
(6) Application for any subpoenas.

(c) Service and reply. A copy of the application to take deposition shall be served upon every other party to the proceeding and upon the person sought to be deposed. Any party or the deponent may serve and file an opposition to the application within seven days after the application is filed.

(d) Time when, place where, and officer before whom deposition is taken—

(1) Where the deposition is taken. Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in the city or municipality where the deponent is located.

(2) Officer before whom deposition is taken—

(i) Within the United States or a territory of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(ii) Within a foreign country, depositions may be taken before an officer or person designated by the Administrative Law Judge or agreed upon by the parties by stipulation in writing to be filed with the Proceedings Clerk.

(e) Procedures for taking oral depositions. Any party desiring to take the deposition of a witness shall make application in writing to the Administrative Law Judge for an order to take deposition. In addition to the showing required in §10.44(a), the application shall include:

(1) The name and post office address of the witness;
(2) The specific matters concerning which the witness is expected to testify and their relevance;
(3) The reasons why the deposition should be taken, supported by affidavits and a physician’s certificate, where appropriate:
(4) The time when, the place where, and the name and address of the person before whom the deposition is to be taken;
(5) A specification of the documents and materials which the deponent is requested to produce;
(6) Application for any subpoenas.

(c) Service and reply. A copy of the application to take deposition shall be served upon every other party to the proceeding and upon the person sought to be deposed. Any party or the deponent may serve and file an opposition to the application within seven days after the application is filed.

(d) Time when, place where, and officer before whom deposition is taken—

(1) Where the deposition is taken. Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in the city or municipality where the deponent is located.

(2) Officer before whom deposition is taken—

(i) Within the United States or a territory of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(ii) Within a foreign country, depositions may be taken before an officer or person designated by the Administrative Law Judge or agreed upon by the parties by stipulation in writing to be filed with the Proceedings Clerk.

(e) Procedures for taking oral depositions. Any party desiring to take the deposition of a witness shall make application in writing to the Administrative Law Judge for an order to take deposition. In addition to the showing required in §10.44(a), the application shall include:

(1) The name and post office address of the witness;
(2) The specific matters concerning which the witness is expected to testify and their relevance;
(3) The reasons why the deposition should be taken, supported by affidavits and a physician’s certificate, where appropriate:
(4) The time when, the place where, and the name and address of the person before whom the deposition is to be taken;
(5) A specification of the documents and materials which the deponent is requested to produce;
(6) Application for any subpoenas.

(c) Service and reply. A copy of the application to take deposition shall be served upon every other party to the proceeding and upon the person sought to be deposed. Any party or the deponent may serve and file an opposition to the application within seven days after the application is filed.

(d) Time when, place where, and officer before whom deposition is taken—

(1) Where the deposition is taken. Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in the city or municipality where the deponent is located.

(2) Officer before whom deposition is taken—

(i) Within the United States or a territory of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(ii) Within a foreign country, depositions may be taken before an officer or person designated by the Administrative Law Judge or agreed upon by the parties by stipulation in writing to be filed with the Proceedings Clerk.

(e) Procedures for taking oral depositions. Any party desiring to take the deposition of a witness shall make application in writing to the Administrative Law Judge for an order to take deposition. In addition to the showing required in §10.44(a), the application shall include:

(1) The name and post office address of the witness;
(2) The specific matters concerning which the witness is expected to testify and their relevance;
(3) The reasons why the deposition should be taken, supported by affidavits and a physician’s certificate, where appropriate:
(4) The time when, the place where, and the name and address of the person before whom the deposition is to be taken;
(5) A specification of the documents and materials which the deponent is requested to produce;
(6) Application for any subpoenas.
(2) When a deposition is taken upon written interrogatories and cross-interrogatories, no party shall be present or represented and no person other than the witness, a stenographic reporter, and the officer shall be present. The officer shall propound the interrogatories and cross-interrogatories to the witness, and the interrogatories and responses thereto shall be transcribed and reduced to writing.

(g) Use of depositions at hearing. (1) Any part or all of a deposition, to the extent admissible under rules of evidence applied as though the witness were then present and testifying at the hearing, may be used against any party who had reasonable notice of the taking of the deposition, if the Administrative Law Judge finds that:
   (i) The witness is dead;
   (ii) The witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;
   (iii) The witness is out of the United States at the time of the hearing, unless it appears that the absence of the witness was procured by the party offering the deposition.

(2) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(3) Objection may be made at a hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

Subpart E—Hearings

§ 10.61 Time and place of hearing.

(a) Notice. All parties shall be notified of the time and place of hearing, which shall be fixed with due regard for the public interest and the convenience and necessity of the parties and their representatives.

(b) Requests for change. A request for postponement of a hearing or for a change in the place assigned for hearing will be granted by the Administrative Law Judge only for good cause shown.

§ 10.62 Appearances.

(a) Who may appear. The parties may appear in person, by counsel or by other representatives of their choosing, subject to the provisions of §10.11 of these rules and part 14 of this chapter, dealing with appearance and practice before the Commission.

(b) Effect of failure to appear. (1) If any party to the proceeding, after filing an answer fails to appear at the hearing or any part thereof, he shall to that extent be deemed to have waived the right to an oral hearing in the proceeding. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(2) A failure to appear at a hearing shall not constitute a waiver of a party’s right to propose findings of fact based on the record in the proceeding, to propose conclusions of law or to submit briefs, in the manner provided in §10.82, if the non-appearing party submits prior to the scheduled hearing or within three days thereafter, a notice of appearance indicating his intent to continue to participate in the proceeding. Otherwise, his failure to appear will constitute a default, and a default order may be sought in accordance with procedures set forth in §10.93 of these rules.

§ 10.63 Consolidation; separate hearings.

(a) Consolidation. Two or more proceedings involving a common question of law or fact may be joined for hearing of any or all the matters in issue or may be consolidated by order of the Administrative Law Judge. The Administrative Law Judge may make such rulings concerning the conduct of such proceedings as may tend to avoid unnecessary costs or delay.

(b) Separate Hearings. The Administrative Law Judge, for the convenience of the parties, to avoid prejudice, or to expedite final resolution of the issues, may order a separate hearing of any
§ 10.66 Conduct of the hearing.

(a) Expedition. Hearings shall proceed expeditiously and insofar as practicable hearings shall be held at one place and shall continue, without suspension, until concluded.

(b) Rights of parties. Every party shall be entitled to due notice of hearings, the right to be represented by counsel, and the right to cross-examine witnesses, present oral and documentary evidence, submit rebuttal evidence, raise objections, make arguments and move for appropriate relief. Nothing in this paragraph limits the authority of the Commission or the Administrative Law Judge to exercise authority under other provisions of the Commission’s rules, to enforce the requirement that evidence presented be relevant to the proceeding or to limit cross-examination to the subject matter of the direct examination and matters affecting the credibility of the witness.

(c) Examination of witnesses. All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the Administrative Law Judge. A witness may be cross-examined by each adverse party and, in the discretion of the Administrative Law Judge, may be cross-examined, without regard to the scope of direct examination, as to any matter which is relevant to the issues in the proceeding.

(d) Expert witnesses. The Administrative Law Judge, at his discretion, may order that direct testimony of expert witnesses be made by verified written statement rather than presented orally at the hearing. Any expert witness whose testimony is presented in this manner shall be available for oral cross-examination, and may be examined orally upon re-direct following cross-examination.

(e) Exhibits. The original of each exhibit introduced in evidence or marked for identification shall be filed and retained in the docket of the proceeding, unless the Administrative Law Judge permits the substitution of copies for the original documents. A copy of each exhibit introduced by a party or marked for identification at his request shall be supplied by him to the Administrative Law Judge and to each other party to the proceeding.
§ 10.67 Evidence.

(a) Admissibility. Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded.

(b) Official notice. (1) Official notice may be taken of

(i) Any material fact which might be judicially noticed by a district court of the United States; or

(ii) Any matter in the public official records of the Commission.

(2) If official notice is requested or taken of a material fact, any party, upon timely request, shall be afforded an opportunity to establish the contrary.

(c) Objections. A party shall timely and briefly state the grounds relied upon for any objection made to the introduction of evidence. If a party has had no opportunity to object to a ruling at the time it is made, he shall not thereafter be prejudiced by the absence of an objection.

(d) Exceptions. Formal exception to an adverse ruling is not required. It shall be sufficient that a party, at the time the ruling is sought or entered, makes known to the Administrative Law Judge the action he wishes the Administrative Law Judge to take or his objection to the action being taken and his grounds therefor.

(e) Excluded evidence. When an objection to a question propounded to a witness is sustained, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

(f) Affidavits. Affidavits may be admitted by the Administrative Law Judge only if the evidence is otherwise admissible and the parties agree that affidavits may be used.

(g) Official government records. An official government record or any entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record or by his deputy, accompanied by a certificate that such officer has custody. If the office in which the record is kept is within the United States the certificate may be made by a judge of a court of record in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by any officer in the Foreign Service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office. A written statement signed by an officer having custody of an official record or by his deputy, that after diligent search, no record or entry dealing with a specific matter is found to exist, accompanied by a certificate as provided above, is admissible as evidence that the records of his office contain no such record or entry.

(h) Entries in the regular course of business. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business by a person who had a duty to report or record it.

§ 10.68 Subpoenas.

(a) Application for and issuance of subpoenas—(1) Application for and issuance of subpoena ad testificandum. Any party may apply to the Administrative Law Judge for the issuance of a subpoena ad testificandum for a person to appear and testify (subpoena ad testificandum) at the hearing. All requests for the issuance of a subpoena ad testificandum shall be submitted in duplicate and in writing and shall be served upon all other parties to the proceeding, unless the request is made on the record at the hearing or the requesting party can demonstrate why, in the interest of fairness or justice, the requirement of a written submission or service on one or more of the other parties is not appropriate. A subpoena ad testificandum shall be issued upon a showing by the requesting party of the general relevance of the testimony being sought and the tender of an original and two
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copies of the subpoena being requested, except in those situations described in paragraph (b) of this section, where additional requirements are set forth.

(2) Application for subpoena duces tecum. An application for a subpoena requiring a person to produce specified documentary or tangible evidence (subpoena duces tecum) at any designated time or place may be made by any party to the Administrative Law Judge. All requests for the issuance of a subpoena duces tecum shall be submitted in duplicate and in writing and shall be served upon all other parties to the proceeding, unless the request is made on the record at the hearing or the requesting party can demonstrate why, in the interest of fairness or justice, the requirement of a written submission or service on one or more of the other parties is not appropriate. Except in those situations described in paragraph (b) of this section, where additional requirements are set forth, each application for the issuance of a subpoena duces tecum shall contain a statement or showing of general relevance and reasonable scope of the evidence being sought and be accompanied by an original and two copies of the subpoena duces tecum shall contain a statement or showing of general relevance and reasonable scope of the evidence being sought and be accompanied by an original and two copies of the subpoena being requested, which shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible.

(3) Standards for issuance of subpoena duces tecum. The Administrative Law Judge considering any application for a subpoena duces tecum shall issue the subpoena requested if he is satisfied the application complies with this section and the request is not unreasonable, oppressive, excessive in scope or unduly burdensome. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpoena duces tecum and no detailed or burdensome showing shall be required as a condition to the issuance of any subpoena.

(4) Denial of application. In the event the Administrative Law Judge determines that a requested subpoena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it only upon such conditions as he determines fairness requires.

(b) Special requirements relating to application for and issuance of subpoenas for commission records and for the appearance of commission employees or employees of other agencies—

(1) Form. An application for the issuance of a subpoena shall be made in the form of a written motion served upon all other parties, if the subpoena would require

(i) The production of documents, papers, books, physical exhibits, or other material in the records of the Commission;

(ii) The appearance of a Commissioner or an official or employee of the Commission;

(iii) The appearance of a Commissioner or an official or employee of any other state or federal agency in his official capacity.

(2) Content. The motion shall specifically describe the material to be produced, the information to be disclosed, or the testimony to be elicited from the witness, and shall show

(i) The relevance of the material, information, or testimony to the matters at issue in the proceeding;

(ii) The reasonableness of the scope of the proposed subpoena; and

(iii) That such material, information, or testimony is not available from other sources.

(3) Rulings. The motion shall be decided by the Administrative Law Judge and shall provide such terms or conditions for the production of the material, the disclosure of the information or the appearance of the witness as may appear necessary and appropriate for the protection of the public interest.

(4) Commission review of rulings. Interlocutory review by the Commission of a ruling made under this section may be sought in accordance with the procedures set forth in §10.101 without certification by the Administrative Law Judge.

(c) Motions to quash subpoenas; protective orders—

(1) Application. Within 10 days after a subpoena has been served or at any time prior to the return date thereof, a motion to quash or modify the subpoena or for a protective order limiting the use or disclosure of any information, documents or testimony covered by the subpoena may be filed with the Administrative Law Judge.
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who issued it. At the same time, a copy of the motion shall be served on the party who requested the subpoena and all other parties to the proceeding. The motion shall include a brief statement setting forth the basis for the requested relief. If the Administrative Law Judge to whom the motion has been directed has not acted upon the motion by the return date, the subpoena shall be stayed pending his or her final action.

(2) Disposition. After due notice to the person upon whose request the subpoena was issued, and after opportunity for response by that person, the Administrative Law Judge may (i) quash or modify the subpoena, or (ii) condition denial of the application to quash or modify the subpoena upon just and reasonable terms, including, in the case of a subpoena duces tecum, a requirement that the person in whose behalf the subpoena was issued shall advance the reasonable cost of producing documentary or other tangible evidence. The Administrative Law Judge may issue a protective order sought under paragraph (c)(1) of this section or under any other section of these rules upon a showing of good cause. In considering whether good cause exists to issue a protective order, the Administrative Law Judge shall weigh the harm resulting from disclosure against the benefits of disclosure. Good cause shall only be established upon a showing that the person seeking the protective order will suffer a clearly defined and serious injury if the order is not issued, provided, however, that any such injury shall be balanced against the public’s right of access to judicial records. No protective order shall be granted that will prevent the Division of Enforcement or any respondent from adequate presenting its case.

(d) Attendance and mileage fees. Persons summoned to testify either by deposition or at a hearing under requirement of subpoena are entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. Fees and mileage are paid by the party at whose instance the persons are called.

(e) Service of subpoenas—(1) How effected. Service of a subpoena upon a party shall be made in accordance with §10.12(a) of these rules except that only one copy of a subpoena need be served. Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraphs (e)(2) or (e)(3) of this section, as applicable, and by tendering to him or her the fees for one day’s attendance and mileage as specified in paragraph (d) of this section. When the subpoena is issued at the instance of the Commission, fees and mileage need not be tendered at the time of service.

(2) Service upon a natural person. Delivery of a copy of a subpoena and tender of the fees to a natural person may be effected by

(i) Handing them to the person;

(ii) Leaving them at his office with the person in charge thereof or, if there is no one in charge, by leaving them in a conspicuous place therein;

(iii) Leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein;

(iv) Mailing them by registered or certified mail to him at his last known address; or

(v) Any other method whereby actual notice is given to him and the fees and mileage are timely made available.

(3) Service upon other persons. When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees and mileage may be effected by

(i) Handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person;

(ii) Mailing them by registered or certified mail to any such representative at his last known address; or

(iii) Any other method whereby actual notice is given to any such representative and the fees and mileage are timely made available.

(f) Enforcement of subpoenas. Upon failure of any person to comply with a subpoena issued at the request of a party, that party may petition the Commission in its discretion to institute an action in an appropriate U.S. District Court for enforcement of that subpoena. When instituting an action to enforce a subpoena requested by the
Division of Enforcement, the Commission, in its discretion, may delegate to the Director of the Division or any Commission employee designated by the Director and acting under his or her direction, or to any other employee of the Commission, authority to serve as the Commission’s counsel in such subpoena enforcement action.

§ 10.82 Proposed findings and conclusions; briefs.

In any proceeding involving a hearing or an opportunity for hearing, the parties may file written proposed findings of fact and conclusions of law. Briefs may be filed in support of proposed findings and conclusions either as part of the same document or in a separate document. Any proposed finding or conclusion not briefed may be regarded as waived.

(a) Proposed findings and briefs; time for filing. Where the parties file proposed findings and briefs, the following schedule shall apply, unless otherwise determined by the Administrative Law Judge:

(1) Initial submission. Proposed findings, conclusions and an initial brief shall be served and filed by the Division of Enforcement and intervenors on the side of the Division of Enforcement within 45 days of the close of the hearing;

(2) Answering submission. Proposed findings, conclusions, and an answering brief shall be served and filed by the respondents and intervenors on the side of the respondents within 30 days after service of the initial findings, conclusions and briefs upon the respondents;

(3) Reply. A reply brief may be filed by the Division of Enforcement and intervenors on the side of the Division of Enforcement within 15 days after filing of the answering submission;

(4) Submissions by limited participants. Submissions by a person admitted as a limited participant pursuant to §10.34 of these rules, are permitted under such terms as determined by the Administrative Law Judge.

(b) Alternative procedures for submissions. In his discretion the Administrative Law Judge may lengthen or shorten the periods for the filing of submissions, may direct simultaneous filings, may direct that respondents make the first filing, or may otherwise modify the procedures set forth in paragraph (a) of this section for purposes of a particular proceeding.

(c) Briefs. (1) The initial brief should include:

(i) A short, clear and concise statement of the case;

(ii) Specification of the questions to be resolved; and

(iii) The argument, presenting clearly the points of fact and law relied upon in support of the position taken on each question.

(2) The answering brief shall generally follow the same style as prescribed for the initial brief but may omit a statement of the case if the party does not dispute the statement of the case contained in the initial brief;

(3) Reply briefs should be limited to rebuttal of matters in the prior briefs.

(d) Content and form of proposed findings and conclusions. (1) The findings of fact shall be confined to the material
issues of fact presented on the record, with exact citations to the transcripts of record and exhibits in support of each proposed finding.

(2) The proposed findings and conclusions of the party filing initially shall be set forth in consecutively numbered paragraphs and all counter-statement of proposed findings and conclusions shall, in addition to any other matter, indicate which paragraphs of initial proposals are not disputed.

§ 10.83 Oral arguments.

In his discretion the Administrative Law Judge may hear oral arguments by the parties any time before he files his initial decision with the Proceedings Clerk. The argument shall be recorded and transcribed in written form.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.84 Initial decision.

(a) When initial decision is required. The Administrative Law Judge shall make an initial decision in any proceeding in which a hearing is required to be conducted in conformity with the requirements of the Administrative Procedure Act, as codified, 5 U.S.C. 557. He shall make an initial decision in other proceedings in which the Commission directs him to make such a decision.

(b) Filing of initial decision. After the parties have been afforded an opportunity to file their proposed findings of fact, proposed conclusions of law and supporting briefs pursuant to §10.82, the Administrative Law Judge shall prepare upon the basis of the record in the proceeding and shall file with the Proceedings Clerk his or her decision, a copy of which shall be served by the Proceedings Clerk upon each of the parties.

(c) Effect of initial decision. The initial decision shall become the decision of the Commission 30 days after service thereof, except:

(1) The decision shall not become final as to any party who shall have filed a notice of appeal pursuant to §10.102 of these rules; and

(2) The decision shall not become final as to any party to the proceeding if, within 30 days after the initial decision and order, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the decision.

In the event that the initial decision becomes the final decision of the Commission with respect to a party, that party shall be duly notified thereof by the Proceedings Clerk. The notice shall state that the time for filing a notice of appeal by the party has expired, that the Commission has determined not to review the initial decision on its own initiative and shall specify the date on which a final order in the proceeding shall become effective as against that party.


Subpart G—Disposition Without Full Hearing

§ 10.91 Summary disposition.

(a) Filing of motions, answers. Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for a summary disposition in his favor of all or any part of the proceeding. Such motion shall be filed at or before the first prehearing conference or at such later time as may be allowed by the Administrative Law Judge. Any adverse party within 20 days after service of the motion, may serve opposing papers or may countermove for summary disposition.

(b) Supporting papers. A motion for summary judgment shall include a statement of material facts as to which the moving party contends there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, including investigative transcripts, admissions, stipulations, and depositions. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this section, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which
§ 10.92 Shortened procedure.

(a) How initiated. With the consent of the parties, in lieu of a full oral hearing, the Administrative Law Judge may order a shortened procedure as to the submission of direct evidence may be ordered in a proceeding. An order for shortened procedure shall list the names and addresses of all persons who are parties to the proceeding and shall direct compliance with the procedures established in this section. The order shall be served by the Proceedings Clerk upon all parties.

(b) Filing of statements—(1) Opening statement. Within 20 days after receipt of notice that the shortened procedure will be used, the Division of Enforcement shall serve upon all other parties and file with the Proceedings Clerk, in triplicate, an opening statement, in support of the complaint;

(2) Answering statement. Within 20 days after receipt of the opening statement of the Division, each respondent may serve upon all other parties and file with the Proceedings Clerk, in triplicate, in support of his answer, an answering statement.

(3) Statement in reply. Within ten days after receipt of all answering statements, or within ten days after the expiration of the period within which answering statements may be served, the Division of Enforcement may serve upon all other parties and file with the Proceedings Clerk, in triplicate, a statement in reply, which shall be confined strictly to replying to the facts and arguments set forth in the answering statements.

(c) Joint statements. Parties having a common interest may serve and file joint statements.

(d) Failure to file statement. Any party who, without the express permission of the Administrative Law Judge, should fail to file a statement within the time prescribed by this section after service upon him of an order for shortened procedures shall be in default and shall be deemed to have waived any further hearing.

(e) Content of statements. As used in this section, the term “statement” includes

(1) Statements of fact signed and sworn to by persons having knowledge of those facts;

(2) Documents filed as part of the proof of the alleged facts (which shall be duly authenticated under oath or otherwise in a manner that would render them admissible in evidence at an oral hearing under the rules in this part); and

(3) Briefs containing argument to sustain the contentions of the party submitting the statement.

(f) Verification. The facts asserted in any statement filed under shortened procedure must be sworn to by persons having knowledge thereof and, except under unusual circumstances, the persons should be those who would appear as witnesses to substantiate the facts.
asserted should a full oral hearing become necessary.

(g) **Hearings**—(1) **Request for cross-examination or other hearings.** If cross-examination is desired of any witness whose affidavit or other verified statement has been submitted, the name of the witness and the subject matter of the desired cross-examination shall be stated at the end of the answering statement or statement in reply as the case may be. Oral hearings under other circumstances may also be requested but will be granted only under exceptional circumstances. Any request filed under this subparagraph shall include a justification of the need for oral hearing.

(2) **Hearings issues limited.** The order setting the proceeding for oral hearing, if hearing is found necessary, will specify the matters upon which the parties are not in agreement and concerning which oral evidence is to be introduced. Unless material facts are in dispute, oral hearing will not be held.

(h) **Subsequent procedure.** Post-hearing procedures shall be the same as those in proceedings in which the shortened procedures have not been followed.

§ 10.93 **Obtaining default order.**

When a respondent has failed to (a) file an answer as provided in §10.23 of these rules or (b) failed to appear or file a notice of appearance as provided in §10.62 of these rules or (c) failed to file a statement under the shortened procedures as provided in §10.92 of these rules, the Division of Enforcement may move the Administrative Law Judge to enter findings and conclusions and a default order against that respondent based upon the matters set forth in the complaint, which shall be deemed to be true for purposes of this determination.

§ 10.94 **Setting aside of default.**

In order to prevent injustice and on such conditions as may be appropriate, (a) the Commission may at any time set aside a default order obtained under §10.93; and (b) the Administrative Law Judge may set aside a default order obtained under §10.93 at any time prior to filing of his initial decision in a proceeding in which there are remaining respondents. Any motion to set aside a default shall be made within a reasonable time, and shall state the reasons for the failure to file or appear and specify the nature of the proposed defense in the proceeding.

Subpart **H—Appeals to the Commission; Settlements**

§ 10.101 **Interlocutory appeals.**

Interlocutory review by the Commission of a ruling on a motion by an Administrative Law Judge may be sought in accordance with the following procedures:

(a) **Scope of review.** The Commission will not review a ruling of the Administrative Law Judge prior to the Commission’s consideration of the entire proceeding in the absence of extraordinary circumstances. An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) Appeal from an adverse ruling pursuant to §10.8(b) on a motion to disqualify an Administrative Law Judge;

(2) Appeal from a ruling pursuant to §10.11(b) suspending an attorney from participation in a particular proceeding.

(3) Appeal from a ruling pursuant to §§10.33 and 10.34 denying intervention or limited participation;

(4) Appeal from a ruling pursuant to §10.68(b) requiring the appearance of an officer or employee of the Commission or another government agency or the production of Commission records;

(5) Upon a determination by the Administrative Law Judge, certified to the Commission either in writing or on the record, that

(i) A ruling sought to be appealed involves a controlling question of law or policy;

(ii) An immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and

(iii) Subsequent reversal of the ruling would cause unnecessary delay or expense to the parties.

(b) **Procedure to obtain interlocutory review**—(1) **In general.** An application for
interlocutory review may be filed within five days after notice of the Administrative Law Judge’s ruling on a matter described in paragraphs (a)(1), (a)(2), (a)(3) or (a)(4) of this section, except if a request for certification under paragraph (a)(5) of this section has been filed with the Administrative Law Judge within five days after notice of the Administrative Law Judge’s ruling on the matter. If a request for certification has been filed, an Application for interlocutory review under paragraphs (a)(1) through (a)(5) of this section may be filed within five days after notification of the Administrative Law Judge’s ruling on such request.

(2) An application for review shall:
(i) Designate the ruling or part thereof from which appeal is being taken;
(ii) Present the points of fact and law relied upon in support of the position taken; and
(iii) Not exceed 15 pages.

(3) Any party that opposes the application may file a response, not to exceed 15 pages, within five days after service of the application.

(4) The Commission will determine whether to grant a review based upon the application for review and the response thereto, without oral argument or further written presentation, unless the Commission shall otherwise direct.

(c) Proceedings not stayed. The filing of an application for review and the grant of review shall not stay proceedings before an Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Administrative Law Judge and denied.


§ 10.102 Review of initial decisions.

(a) Notice of appeal—(1) In general. Any party to a proceeding may appeal to the Commission an initial decision or a dismissal or other final disposition of the proceeding by the Administrative Law Judge as to any party. The appeal shall be initiated by serving and filing with the Proceedings Clerk a notice of appeal within 15 days after service of the initial decision or other order terminating the proceeding; where service of the initial decision or other order terminating the proceeding is effected by mail or commercial carrier, the time within which the party served may file a notice of appeal shall be increased by 3 days.

(2) Cross appeals. If a timely notice of appeal is filed by one party, any other party may file a notice of appeal within 15 days after service of the notice or within 15 days after service of the initial decision or other order terminating the proceeding, whichever is later.

(3) Confirmation of filing. The Proceedings Clerk shall confirm the filing of a notice of appeal by mailing a copy thereof to each other party.

(b) Briefs: Time for filing. The appeal shall be perfected through the filing of an appeal brief.

(1) Appeal brief. The appeal brief shall be filed within 30 days after filing of the notice of appeal.

(2) Answering brief. Within 30 days after service of the appeal brief upon any other party that party may file an answering brief.

(3) Reply brief. Within 14 days after service of an answering brief, the party that filed the first brief may file a reply brief.

(4) No further briefs shall be permitted, unless so ordered by the Commission on its own motion.

(5) Cross appeals. In the event that any party files a notice of cross appeal pursuant to paragraph (a)(2) of this section, the Commission shall, to the extent practicable, adjust the briefing schedule and any page limitations otherwise applicable under this section so as to accommodate consolidated briefing by the parties.

If the appeal brief is not filed within the time specified the opposing party may move for dismissal of the appeal.

(c) Briefs. An original of all briefs submitted under this section shall be filed with the Proceedings Clerk.

(d) Briefs: Content and form. (1) The appeal brief should include, in the order indicated:

(i) A statement of the issues presented for review.

(ii) A statement of the case. The statement shall first indicate briefly
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the nature of the case. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record.

(iii) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the party to the appeal with respect to the issues presented, and the reasons therefor, and citations to supporting authorities, statutes and parts of the record.

(iv) A conclusion stating the precise relief sought.

(2) The answering brief generally shall follow the same style as prescribed for the appeal brief but may omit a statement of the issues or of the case if the party does not dispute the issues and statement of the case contained in the appeal brief. Any reply brief shall be confined to matters raised in the answering brief and shall be limited to 15 pages in length.

(3) Any matter not briefed shall be deemed waived, and may not be argued before the Commission.

(e) Appendix to briefs—(1) Designation of contents of appendix. At the time an appellant serves and files its appeal brief, it shall also serve and file a designation of those specific parts of the record to which it wishes to direct the particular attention of the Commission and that it wishes to have included in the appendix, including, but not necessarily limited to, particular pages of the transcript and portions of exhibits filed in the proceeding. The designation shall be set forth in a document wholly separate and apart from the brief, shall enumerate those specific parts of the record that the appellant wishes to have included in the appendix and shall not incorporate by reference citations to the record contained in its brief or in any other document. If an appellee deems it necessary to direct the particular attention of the Commission to specific parts of the record not designated by any appellant, it shall serve and file with its answering brief a designation of additional portions of the record for inclusion in the appendix. Any reply brief filed by the appellant may, if necessary, supplement the appellant’s previous designation. In designating parts of the record for inclusion in the appendix, the principal parts of the record relied upon should be designated, but the parties shall have regard to the fact that the entire record is always available to the Commission for reference and examinations and shall not engage in unnecessary designation. The fact that a part of the record is not included in an appendix shall not prevent any party or the Commission from relying thereon.

(2) Preparation of the appendix. Within 15 days after the last answering brief or reply brief of a party was due to be filed, the Office of Proceedings shall prepare an appendix to the briefs which will contain a list of the relevant docket entries filed in the proceedings before the Administrative Law Judge, the initial decision and order of the Administrative Law Judge, the pleadings filed on behalf of the parties who are participating in the appeal and such other parts of the record designated by the parties to the appeal in accordance with the procedures set forth in paragraph (e)(1) of this section. The Proceedings Clerk shall cause one copy of the appendix to be served on each of the parties to the appeal and shall cause ten copies of the appendix to be placed in the docket of the proceeding for the use of the Commission.

(3) Objections to appendix. Any party who believes that an error or omission has been made in the preparation of the appendix or that the appendix is misleading, prejudicial or otherwise inadequate may on that basis file a motion with the Commission to amend or supplement the appendix within 30 days of the date of the mailing of the appendix.

The Commission has determined that once an appeal goes to the Commission, it is in a better position than the Chief Administrative Law Judge to review motions objecting to the appendix or seeking to supplement the appendix. Consequently, upon the adoption of this amendment, the Commission and not the Chief Administrative Law Judge will consider any objection to the appendix pursuant to paragraph (e)(3) of this section. As provided by the amendment, a motion raising objections to the appendix must be filed within 30 days after the date of the mailing of the appendix.
§ 10.103 Oral argument before the Commission.

(a) Request. Any party may file with the Proceedings Clerk a request in writing for the opportunity to present oral argument before the Commission, which the Commission may in its discretion grant or deny. A request for oral argument must be made within the time provided for filing the initial briefs.

(b) Time allowed. Unless otherwise directed by the Commission, not more than one-half hour will be allowed for oral argument by any participant. Where the same or similar interests are represented by more than one participant, an aggregate of not more than one-half hour will be allowed the interests so represented irrespective of the number of participants, the time to be divided equally among such participants or as they may agree among themselves. In appropriate cases the Commission may, in its discretion, extend, shorten or reallocate the time prescribed herein.

(c) Reporting and transcription. Oral arguments before the Commission shall be reported and transcribed in written form unless the Commission shall direct otherwise.

(d) Commissioners not present at oral argument. A member of the Commission who was not present at the oral argument may participate in the decision of the proceeding. Any Commissioner participating in the decision who was not present at the argument will review the transcript of argument.

§ 10.104 Scope of review; Commission decision.

(a) Scope of review. The Commission will ordinarily consider the whole record on review, and base its determination thereon. However, it may limit the issues to those presented in the statement of issues in the brief.

(b) Decision on review. On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision by the Administrative Law Judge and make any findings or conclusions which in its judgment are proper based on the record in the proceeding. The Commission’s decision shall be contained in its opinion and order. In the event the Commission is equally divided as to its decision the initial decision will be affirmed, without opinion.

(c) Contents of record. The record of the proceeding before the Commission for final decision shall include:

(1) The complaint, notice of hearing, answers and any amendments thereto;

(2) Any application, motion or objection made during the course of the proceeding, briefs in support thereof, rulings thereon and exceptions thereto;

(3) Any admission or stipulations between the parties, and documents or papers filed in connection with prehearing conferences; and the record of prehearing conferences, if recorded;

(4) The transcript of testimony taken at the hearing, together with exhibits received at the hearing;

(5) Any statements filed under the shortened procedure;

(6) Portions of the official public records of the Commission specified in any of the above;

(7) Any proposed findings of fact, conclusions of law and briefs in support thereof, which were filed in connection with the hearing;

(8) Any written communication accepted by the Administrative Law Judge pursuant to §§10.34 and 10.35 relating to limited participation;

(9) The initial decision and the petition for review;

(10) Any other documents which appear on the docket of the proceeding.
§ 10.105 Review by Commission on its own initiative.

The Commission may on its own initiative, within 30 days after the initial decision has been served on all parties, direct review of any initial decision of an Administrative Law Judge. The Commission shall determine the scope of the review and the issues which will be considered and make provisions for the filing of briefs and oral argument, if deemed appropriate by the Commission. Notice that the Commission has directed review on its own initiative shall be served on all parties by the Proceedings Clerk.


§ 10.106 Reconsideration; stay pending judicial review.

(a) Reconsideration. Within 15 days after service of a Commission opinion and order any party may file with the Commission a petition for reconsideration of the opinion and order, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the opinion or order and concerning which the petitioner had no opportunity to argue before the Commission. The filing of a petition for reconsideration shall not operate to stay the effective date of the Commission’s order.

(b) Stay pending judicial appeal—(1) Application for stay. Within 15 days after service of a Commission opinion and order imposing upon any party any of the sanctions listed in §§10.1(a) through 10.1(e), that party may file an application with the Commission requesting that the effective date of the order be stayed pending judicial review. The application shall state the reasons why a stay is warranted and the facts relied upon in support of the stay. Any averments contained in the application must be supported by affidavits or other sworn statements or verified statements made under penalty of perjury in accordance with the provisions of 28 U.S.C. 1746.

(2) Standards for issuance of stay. The Commission may grant an application for a stay pending judicial appeal upon a showing that:

(i) The applicant is likely to succeed on the merits of his appeal;
(ii) Denial of the stay would cause irreparable harm to the applicant; and
(iii) Neither the public interest nor the interest of any other party will be adversely affected if the stay is granted.

(3) Civil monetary penalties and restitution. Notwithstanding the requirements set forth in paragraph (b)(2) of this section, the Commission shall grant any application to stay the imposition of a civil monetary penalty or an order to pay a specific sum as restitution if the applicant has filed with the Proceedings Clerk a surety bond guaranteeing full payment of the penalty or restitution plus interest in the event that the Commission’s opinion and order is sustained or the applicant’s appeal is not perfected or is dismissed for any reason and the Commission has determined that neither the public interest nor the interest of any other party will be affected by granting the application. The required surety bond shall be in the form of an undertaking by a surety company on the approved list of sureties issued by the Treasury Department of the United States, and the amount of interest shall be calculated in accordance with 28 U.S.C. 1961(a) and (b), beginning on the date 30 days after the Commission’s opinion and order was served on the applicant. In the event the Commission denies the applicant’s motion for a stay, the Proceedings Clerk shall return the surety bond to the applicant.

(c) Response. Unless otherwise requested by the Commission, no response to a petition for reconsideration pursuant to paragraph (a) of this section or an application for a stay pursuant to paragraph (b) of this section shall be filed. The Commission shall set the time for filing any response at the time it asks for a response. The Commission shall not grant any such petition or application without providing other parties to the proceeding with an opportunity to respond.

§ 10.107 Leave to adduce additional evidence.

Any time prior to issuance of the final decision the Commission may, upon its own motion or upon application in writing by any party, after notice to the parties and an opportunity for them to be heard, reopen the hearing for the reception of further evidence. The application shall show to the satisfaction of the Commission that the additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence at the hearing. The Commission may hear the additional evidence or may refer the proceeding to the Administrative Law Judge for the taking of the additional evidence.

§ 10.108 Settlements.

(a) When offers may be made. Parties may at any time during the course of the proceeding propose offers of settlement. All offers of settlement shall be in writing.

(b) Content of offer of settlement. Each offer of settlement made by a respondent shall:

(1) Acknowledge service of the Complaint;
(2) Admit the jurisdiction of the Commission with respect to the matters set forth in the Complaint;
(3) Include a waiver of:
   (i) A hearing,
   (ii) All post-hearing procedures,
   (iii) Judicial review, and
   (iv) Any objection to the staff's participation in the Commission's consideration of the offer;
(4) Stipulate the record basis on which an order may be entered, which may consist solely of the complaint and the findings contained in the offer of settlement; and
(5) Consent to the entry of an order reflecting the terms of settlement agreed upon, including, where appropriate:
   (i) Findings by the Commission that the respondent has violated specified provisions of the Act, and
   (ii) The imposition of sanctions.

(c) Submission of offer of settlement. Offers of settlement made by a respondent shall be submitted in writing to the Division of Enforcement, which shall present them to the Commission with the Division's recommendation. The respondent will be informed if the recommendation will be unfavorable, in which event the offer shall not be presented to the Commission unless the respondent so requests. Any offer of settlement not presented to the Commission shall be null and void with respect to any acknowledgement, admission, waiver, stipulation or consent contained in the offer and shall not be used in any manner in the proceeding by any party thereto.

(d) Acceptance of offer by the Commission. The Commission will accept an offer of settlement only by issuing its opinion and order based on the offer. Upon issuance of the opinion and order, the proceeding shall be terminated as to the respondent involved and so noted on the docket by the Proceedings Clerk.

(e) Rejection of offer of settlement; effect of rejection. When the Commission rejects an offer of settlement, the party making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn. A rejected offer of settlement and any documents relating thereto shall not constitute a part of the record in the proceeding; and the offer will be null and void with respect to any acknowledgement, admission, waiver, stipulation or consent contained in the offer and shall not be used in any manner in the proceeding by any party thereto.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.109 Delegation of authority to Chief of the Opinions Section.

The Commodity Futures Trading Commission hereby delegates, until such time as it orders otherwise, the following function to the General Counsel, to be performed by him or by such person or persons under his direction as he may designate from time to time:

(a) With respect to proceedings conducted pursuant to the Commodity Exchange Act, as amended, 7 U.S.C. 1 et seq., and subject to the Commission's Rules of Practice as set forth in part 10 of this chapter, to:
   (1) Consider and decide miscellaneous motions for procedural orders that may
§ 10.110 Basis for issuance of restitution orders.

(a) Appropriateness of restitution as a remedy. In any proceeding in which an order requiring restitution may be entered, the Administrative Law Judge shall, as part of his or her initial decision, determine whether restitution is appropriate. In deciding whether restitution is appropriate, the Administrative Law Judge, in his or her discretion, may consider the degree of complexity likely to be involved in establishing claims, the likelihood that claimants can obtain compensation through their own efforts, the ability of the respondent to pay claimants damages that his or her violations have caused, the availability of resources to administer restitution and any other matters that justice may require.

(b) Restitution order. If the Administrative Law Judge determines that restitution is an appropriate remedy in a proceeding, he or she shall issue an order specifying the following:

(1) All violations that form the basis for restitution;
Commodity Futures Trading Commission

§ 10.111 Recommendation of procedure for implementing restitution.

Except as provided by §10.114, after such time as any order requiring restitution becomes effective (i.e., becomes final and is not stayed), the Division of Enforcement shall petition the Commission for an order directing the Division to recommend to the Commission or, in the Commission’s discretion, the Administrative Law Judge a procedure for implementing restitution. Each party that has been ordered to pay restitution shall be afforded an opportunity to review the Division of Enforcement’s recommendations and be heard.

§ 10.112 Administration of restitution.

Based on the recommendations submitted pursuant to §10.111, the Commission or the Administrative Law Judge, as applicable, shall establish in writing a procedure for identifying and notifying individual persons who may be entitled to restitution, receiving and evaluating claims, obtaining funds to be paid as restitution from the party and distributing such funds to qualified claimants. As necessary or appropriate, the Commission or the Administrative Law Judge may appoint any person, including an employee of the Commission, to administer, or assist in administering, such restitution procedure. Unless otherwise ordered by the Commission, all costs incurred in administering an order of restitution shall be paid from the restitution funds obtained from the party who was so sanctioned; provided, however, that if the administrator is a Commission employee, no fee shall be charged for his or her services or for services performed by any other Commission employee working under his or her direction.

§ 10.113 Right to challenge distribution of funds to customers.

Any order of an Administrative Law Judge directing or authorizing the distribution of funds paid as restitution to individual customers shall be considered a final order for appeal purposes to be subject to Commission review pursuant to §10.102.

§ 10.114 Acceleration of establishment of restitution procedure.

The procedures provided for by §§10.111 through 10.113 may be initiated prior to the issuance of the initial decision of the Administrative Law Judge and may be combined with the hearing in the proceeding, either upon motion by the Division of Enforcement or if the Administrative Law Judge, acting on his own initiative or upon motion by a respondent, concludes that the presentation, consideration and resolution of the issues relating to the restitution procedure will not materially delay the conclusion of the hearing or the issuance of the initial decision.

APPENDIX A TO PART 10—COMMISSION POLICY RELATING TO THE ACCEPTANCE OF SETTLEMENTS IN ADMINISTRATIVE AND CIVIL PROCEEDINGS

It is the policy of the Commission not to accept any offer of settlement submitted by any respondent or defendant in an administrative or civil proceeding, if the settling respondent or defendant wishes to continue to deny the allegations of the complaint or the findings of fact or conclusions of law to be made in the settlement order entered by the Commission or a court. In accepting a settlement and entering an order finding violations of the Act and/or regulations promulgated under the Act, the Commission makes uncontested findings of violations of the Act and/or regulations promulgated under the Act, the Commission makes uncontested findings of fact and conclusions of law. Similarly, in settling a civil proceeding with a defendant the Commission invites the federal court to make conclusions of fact and conclusions of law. The Commission does not believe it would be appropriate for it to be making or inviting a court to make such uncontested findings of violations if the party against whom the findings and conclusions are entered is continuing to deny the alleged misconduct.

The refusal of a settling respondent or defendant to admit the allegations in a Commission-instituted complaint or the findings of fact or conclusions of law in the settlement order entered by the Commission or a court shall be treated as a denial, unless the
party states that he or she neither admits nor denies the allegations or the findings and conclusions. In that event, the proposed offer of settlement, consent or consent order must include a provision stating that, by neither admitting nor denying the allegations, findings or conclusions, the settling respondent or defendant agrees that neither he or she nor any of his or her agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the complaint or findings or conclusions in the order, or creating, or tending to create, the impression that the complaint or the order is without a factual basis; provided, however, that nothing in this provision shall affect the settling respondent’s or defendant’s—

i. Testimonial obligation, or

ii. Right to take legal positions in other proceedings to which the Commission is not a party.

[64 FR 30903, June 9, 1999]

PART 11—RULES RELATING TO INVESTIGATIONS

Sec.
11.1 Scope and applicability of rules.
11.2 Authority to conduct investigations.
11.3 Confidentiality of investigations.
11.4 Subpoenas.
11.5 Transcripts.
11.6 Oath; false statements.
11.7 Rights of witnesses.
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APPENDIX A TO PART 11—INFORMAL PROCEDURE RELATING TO THE RECOMMENDATION OF ENFORCEMENT PROCEEDINGS

AUTHORITY: 7 U.S.C. 4a(j), 9 and 15, 12, 12a(5), 12(f).

SOURCE: 41 FR 29799, July 19, 1976, unless otherwise noted.

§ 11.1 Scope and applicability of rules.

The rules of this part apply to investigatory proceedings conducted by the Commission or its staff pursuant to sections 6(c) and 8 and 12(f) of the Commodity Exchange Act, as amended, 7 U.S.C. 9 and 15 and 12 and 16(f) (Supp. IV, 1974), to determine whether there have been violations of that Act, or the rules, regulations or orders adopted thereunder, or, in accordance with the provisions of section 12(f) of the Act, whether there have been violations of the laws, rules or regulations relating to futures or options matters administered or enforced by a foreign futures authority, or whether an application for designation or registration under the Act should be denied. Except as otherwise specified herein, the rules will apply to the conduct of investigation whether or not the Commission has authorized the use of subpoenas in the particular matter to compel the production of evidence.

[63 FR 5233, Feb. 2, 1998]

§ 11.2 Authority to conduct investigations.

(a) The Director of the Division of Enforcement and members of the Commission staff acting pursuant to his authority and under his direction may conduct such investigations as he deems appropriate to determine whether any persons have violated, are violating, or are about to violate the provisions of the Commodity Exchange Act, as amended, or the rules, regulations or orders adopted by the Commission pursuant to that Act, or, in accordance with the provisions of section 12(f) of the Act, whether any persons have violated, are violating or are about to violate the laws, rules or regulations relating to futures or options matters administered or enforced by a foreign futures authority, or whether an applicant for registration or designation meets the requisite statutory criteria. For this purpose, the Director may obtain evidence through voluntary statements and submissions, through exercise of inspection powers over boards of trade, reporting traders, and persons required by law to register with the Commission, or when authorized by order of the Commission, through the issuance of subpoenas. The Director shall report to the Commission the results of his investigations and recommend to the Commission such enforcement action as he deems appropriate. In particular matters the Director of the Division of Clearing and Intermediary Oversight and the Chief Economist and Director of the Division of Market Oversight, and members of their staffs acting within the scope of their respective responsibilities, are also authorized to investigate, report and recommend to the Commission in accordance with these rules.

(b) The Commission hereby delegates, until the Commission orders otherwise, to its Regional Directors
and to the Director, the Deputy Directors, the Program Coordinator, the Chief Counsel, the Associate Directors, and the Regional Counsel of the Division of Enforcement the authority to grant to any employee of the Division of Enforcement all or a portion of the authority which the Commission, by order, has authorized specified employees of the Commission to perform in connection with a Commission investigation conducted by the Division of Enforcement. With the approval of the Executive Director, the Director of the Division of Enforcement may also grant such authority to any Commission employee under the direction of the Executive Director.

(Secs. 2a(11) and 6(b) of the Act, 7 U.S.C. 4a(j) and 15 (1976), as amended by the Futures Trading Act of 1978, Pub. L. 95-405, sec. 13, 92 Stat. 871 (1978))


§ 11.4 Subpoenas.

(a) Issuance of subpoenas. The Commission or any member of the Commission or of its staff who, by order of the Commission, has been authorized to issue subpoenas in the course of a particular investigation may issue a subpoena directing the person named therein to appear before a designated person at a specified time and place to testify or to produce documentary evidence, or both, relating to any matter under investigation.

(b) Authorization to issue subpoenas. An order of the Commission authorizing one or more members of the Commission or of its staff to issue subpoenas in the course of a particular investigation shall include:

(1) A general description of the scope of the investigation;
(2) The authority under which the investigation is being conducted; and
(3) A designation of the members of the Commission or of its staff authorized by the Commission to issue subpoenas.

(c) Service. Service of subpoenas issued for investigative purposes shall be effected in the following manner:

(1) Service upon a natural person. Delivery of a copy of a subpoena to a natural person may be effected by

(i) Handing it to the person;
(ii) Leaving it at his office with the person in charge thereof or, if there is no one in charge, by leaving it in a conspicuous place therein;
(iii) Leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein;
(iv) Mailing it by registered or certified mail to him at his last known address; or
(v) Any other method whereby actual notice is given to him.

(2) Service upon other persons. When the person to be served is not a natural person, delivery of a copy of the subpoena may be effected by (i) handing it to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; (ii) mailing it by registered or certified mail to any such representative at his last known address; or (iii) any other method whereby actual notice is given to any such representative.
(d) **Witness fees and mileage.** Witnesses appearing pursuant to subpoena shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

(e) Pursuant to the authority granted under Sections 2(a)(11) and 8a(5) of the Act, the Commission hereby delegates to the Director of the Division of Enforcement, with the concurrence of the General Counsel or General Counsel’s delegate, and until such time as the Commission orders otherwise, the authority to invoke, in case of contumacy by, or refusal to obey a subpoena issued to, any person, the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda and other records pursuant to subpoenas issued in accordance with section 6(c) of the Act for the purpose of securing effective enforcement of the provisions of this Act, for the purpose of any investigation or proceeding under this Act, and for the purpose of any action taken under section 12(f) of the Act.

(f) Notwithstanding the delegation of authority to the Director set forth in paragraph (e) of this section, in any case in which the Director believes it appropriate the matter may be submitted to the Commission for its consideration. Nothing in this section shall prohibit the Commission from exercising the authority delegated in paragraph (e) of this section.

[41 FR 29799, July 19, 1976, as amended at 67 FR 37322, May 29, 2002]

§ 11.5 **Transcripts.**

Transcripts of testimony taken in the course of an investigative proceeding shall be recorded solely by an official reporter or other person or by other means authorized by the Commission or by a member of the Commission or its staff conducting the investigation for the Commission.

§ 11.6 **Oath; false statements.**

(a) **Oath.** At the discretion of the member of the Commission or staff member conducting the investigation, testimony of a witness may be taken under oath.

(b) **Penalties for false statements and other false information.** Any person making false statements under oath during the course of a Commission investigation is subject to the criminal penalties for perjury in 18 U.S.C. 1621. Any person who knowingly and willfully makes false or fraudulent statements, whether under oath or otherwise, or who falsifies, conceals or covers up a material fact, or submits any false writing or document, knowing it to contain false, fictitious or fraudulent information, is subject to the criminal penalties set forth in 18 U.S.C. 1001.

§ 11.7 **Rights of witnesses.**

(a) **Orders authorizing issuance of subpoenas.** Any person upon whom a subpoena has been served compelling him to furnish documentary evidence or testimony in an investigation shall, upon his request, be permitted to examine a copy of the Commission’s order pursuant to which the subpoena has been issued. However, a copy of the order shall not be furnished for his retention except with the express approval of either the Director, a Deputy Director, the Program Coordinator, the Chief Counsel, an Associate Director, or a Regional Counsel of the Division of Enforcement, or a Regional Director of the Commission; approval shall not be given unless it has been shown by the person seeking to retain a copy that his retention of a copy would be consistent both with the protection of privacy of persons involved in the investigation and with the unimpeded conduct of the investigation.

(b) **Copies of testimony or data.** A person compelled to submit data or evidence in the course of an investigatory proceeding shall be entitled to retain or, upon payment of appropriate fees as set forth in the Schedule of Fees for records services, 17 CFR part 145b, procure a copy or transcript thereof, except that the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) **Right to counsel.** A person compelled to appear, or who appears in person by request or permission of the
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Commission or its staff during an investigation, may be accompanied, represented, and advised by counsel. Subject to the provisions of §11.8(b) of this part, he may be represented by any attorney-at-law who is admitted to practice before the highest court in any State or territory or the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with the provisions of part 14 of this title, and who has not been excluded from further participation in the particular investigatory proceeding for good cause established in accordance with paragraph (c)(2) of this section.

(1) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any aspect of an investigative proceeding and to have this attorney advise his client before, during and after the conclusion of such examination. At the conclusion of the examination, counsel may request the person presiding to permit the witness to clarify any of his answers which may need clarification in order that his answers not be left equivocal or incomplete on the record. For his use in protecting the interests of his client with respect to that examination counsel may make summary notes during the examination.

(2) With due regard for the rights of a witness, the Commission may for good cause exclude a particular attorney from further participation in any investigation in which the Commission has found the attorney to have engaged in dilatory, obstructionist or contumacious conduct. The person conducting an investigation may report to the Commission instances of apparently dilatory, obstructionist or contumacious conduct on the part of an attorney. After due notice to the attorney, the Commission may take such action as the circumstances warrant based upon a written transcript evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the Commission may permit or direct.

(d) Self-Incrimination; immunity—(1) Self-Incrimination. Except as provided in paragraph (d)(2) of this section, a witness testifying or otherwise giving information in an investigation may refuse to answer questions on the basis of the right against self-incrimination granted by the Fifth Amendment of the Constitution of the United States.

(2) Immunity. If the Commission believes that the testimony or other information sought to be obtained from any individual may be necessary to the public interest and that individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, the Commission, with the approval of the Attorney General, may issue an order requiring the individual to give testimony or provide other information which he previously refused to give on the basis of self-incrimination. Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in an investigation under this part, and the person presiding over the investigation communicates to the witness an order issued by the Commission requiring the witness to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.


§ 11.8 Sequestration.

(a) Sequestration of witnesses. All witnesses and potential witnesses shall be sequestered and prohibited from being present during the examination of any
other witness unless otherwise permitted in the discretion of the person conducting the investigation.

(b) Sequestration of counsel. When a reasonable basis exists to believe that an investigation may be obstructed or impeded, directly or indirectly, by an attorney’s representation of more than one witness during the course of an investigation, the member of the Commission or of the Commission’s staff conducting the investigation may prohibit that attorney from being present during the testimony of any witness other than the witness in whose behalf counsel first appeared in the investigatory proceeding. To the extent practicable, consistent with the integrity of the investigation, the attorney will be advised of the reasons for his having been sequestered.

APPENDIX A TO PART 11—INFORMAL PROCEDURE RELATING TO THE RECOMMENDATION OF ENFORCEMENT PROCEEDINGS

The Division of Enforcement (“Division”), in its discretion, may inform persons who may be named in a proposed enforcement proceeding of the nature of the allegations pertaining to them. The Division, in its discretion, may advise such persons that they may submit a written statement prior to the consideration by the Commission of any staff recommendation for the commencement of such proceeding. Unless otherwise provided for by either the Director, a Deputy Director, the Program Coordinator, the Chief Counsel, an Associate Director, or a Regional Counsel of the Division, or a Regional Director of the Commission, such written statements shall be submitted within 14 days after persons are informed by the Division of Enforcement of the nature of the proposed allegations pertaining to them and shall be no more than 20 pages, double spaced on 8½ by 11 inch paper, setting forth their views of factual, legal or policy matters relevant to the commencement of an enforcement proceeding. Any statement of fact included in the submission must be sworn to by a person with personal knowledge of such fact. Statements shall be forwarded to the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, with copies to the staff conducting the investigation, shall clearly identify the specific investigation, and, if desired, may request that the statement be forwarded to the Commission. Similarly, persons who become involved in an investigation, and submit a written statement on their initiative, should follow the relevant procedures described herein. In the event the Division recommends the commencement of an enforcement proceeding to the Commission, any written statement will be forwarded to the Commission if so requested. The Commission may, in its discretion, consider all, any portion or none of the submission when it considers the staff recommendation to commence an enforcement proceeding.


PART 12—RULES RELATING TO REPARATIONS

Subpart A—General Information and Preliminary Consideration of Pleadings

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Subpart B—Discovery

12.30 Methods of discovery.
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12.33 Admissions.
§ 12.1 Scope and applicability of rules of practice relating to reparations.

(a) Part 12 Reparation Rules. These rules of practice are applicable to reparation applications filed pursuant to section 14 of the Commodity Exchange Act, as amended, 7 U.S.C. section 18. The rules in this part shall be construed liberally so as to secure the just, speedy and inexpensive determination of the issues presented with full protection for the rights of all parties.

(b) Other rules of practice. Unless specifically made applicable, other Rules of Practice promulgated under the Commodity Exchange Act, as amended, shall not apply to reparation matters.

(c) Applicability of these part 12 Reparation Rules. These rules shall apply in their entirety to all reparation complaints and matters relating thereto.

§ 12.2 Definitions.

For purposes of this part:

Act means the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq.; Administrative Law Judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

Commission means the Commodity Futures Trading Commission;

Commission decisional employee means an employee or employees of the Commission who are or may reasonably be
expected to be involved in the decision-making process in any proceeding, including, but not limited to: A Judgment Officer; members of the personal staffs of the Commissioners, but not the Commissioners themselves; members of the staffs of the Administrative Law Judges, but not an Administrative Law Judge; members of the staffs of the Judgment Officers; members of the Office of the General Counsel; members of the staff of the Office of Proceedings; and other Commission employees who may be assigned to hear or to participate in the decision of a particular matter.

Complainant means a person who, individually or jointly with others, has applied to the Commission for a reparation award pursuant to section 14(a) of the Act, but shall not include a cross claimant or any other type of third party claimant. The term “complainant” under these rules applies equally to two or more persons who have applied jointly for a reparation award;

Complaint means any document which constitutes an application for a reparation award pursuant to section 14(a) of the Act, regardless of whether it is denominated as such;

Counterclaim means an application for a reparation award by a respondent against a complainant which satisfies the requirements of §12.19. A counterclaim does not mean a cross claim or other type of third party claim;

Director of the Office of Proceedings means an employee of the Commission who serves as the administrative head of that Office, with responsibility and authority to assure that these part 12 Reparation Rules are administered in a manner which will effectuate the purposes of section 14(b) of the Act. The Director is authorized to convene meetings of all personnel in the Office of Proceedings, including Administrative Law Judges and their personally assigned law clerks. The Director shall have the authority to delegate his duties to administer §§12.15, 12.24, 12.26 and 12.27, and, shall have the authority to assign and, if necessary, reassign the duties of, and set reasonable standards for performance for, all personnel in the Office, including the Judgment Officers, but not including Administrative Law Judges and their personally assigned law clerks;

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include:

(1) A discussion, after consent has been obtained from all of the named parties, between a party and a Judgment Officer or Administrative Law Judge, or the staffs of the foregoing, pertaining solely to the possibility of settling the case without the need for a decision;

(2) Requests for status reports, including questions relating to service of the complaint, and the registration status of any persons, on any matter or proceeding covered by these rules; or

(3) Requests made to the Office of Proceedings or the Office of the General Counsel for interpretation of these rules.

Formal decisional procedure means, where the amount of total damages claimed exceeds $30,000, exclusive of interest and costs, a procedure elected by the complainant or a respondent where the parties may be granted an oral hearing. A formal decisional proceeding is governed by subpart E;

Hearing means that part of a proceeding which involves the submission of proof, either by oral presentation or written submission;

Interested person means any party, and includes any person or agency permitted limited participation or to state views in a reparation proceeding, or other person who might be adversely affected or aggrieved by the outcome of a proceeding (including the officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives of such persons), and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding;

Judgment Officer means an employee of the Commission who is authorized to conduct all reparations proceedings. In appropriate circumstances, the functions of a Judgment Officer may be performed by an Administrative Law Judge;

Office of the General Counsel refers to the members of the Commission’s staff.
who provide assistance to the Commission in its direct review of any proceeding conducted pursuant to these rules;

Office of Proceedings means that Office within the Commission comprised of the Administrative Law Judges, Judgment Officers, the Director of that Office, the Proceedings Clerk, and members of the staffs of the foregoing, which administers these part 12 Reparation Rules, other than the rules authorizing direct review by the Commission;

Order means the whole or any part of a final procedural or substantive disposition of a reparation proceeding by the Commission, an Administrative Law Judge, a Judgment Officer, or the Proceedings Clerk;

Party means a complainant, respondent or any other person or agency named or admitted as a party in a reparation matter;

Person means any individual, association, partnership, corporation or trust;

Pleading means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply to the foregoing;

Proceeding means a case in which the pleadings have been forwarded and in which a procedure has been commenced pursuant to §12.26;

Proceedings Clerk means that member of the Commission’s staff in the Office of Proceedings who shall maintain the Commission’s reparation docket, assign reparation cases to an appropriate decisionmaking official, and act as custodian of the records of proceedings;

Punitive damages means damages awarded (no more than two times the amount of actual damages) in the case of any action arising from a willful and intentional violation in the execution of an order on the floor of a contract market. An order does not have to be actually executed to render a violation subject to punitive damages. As a prerequisite to an award of punitive damages, a complainant must claim actual and punitive damages, prove actual damages, and demonstrate that punitive damages are appropriate;

Registrant means any person who—

(1) Was registered under the Act at the time of the alleged violation;

(2) Is subject to reparation proceedings by virtue of section 4m of the Commodity Exchange Act, regardless of whether such person was ever registered under the Act; or

(3) Is otherwise subject to reparation proceedings under the Act;

Reparation award means the amount of monetary damages a party may be ordered to pay;

Respondent means any person or persons against whom a complainant seeks a reparation award pursuant to section 14(a) of the Act;

Summary decisional procedure means, where the amount of total damages claimed does not exceed $30,000, exclusive of interest and costs, a procedure elected by the complainant or the respondent wherein an oral hearing need not be held and proof in support of each party’s case may be supplied in the form and manner prescribed by §12.208. A summary decisional proceeding is governed by subpart D;

Voluntary decisional procedure means, regardless of the amount of damages claimed, a procedure which the complainant and the respondent have chosen voluntarily to submit their claims and counterclaims, allowable under these rules, for an expeditious resolution by a Judgment Officer. By electing the voluntary decisional procedure, parties agree that a decision issued by a Judgment Officer shall be without accompanying findings of fact and shall be final without right of Commission review or judicial review. A voluntary decisional proceeding is governed by subpart C of these rules.

§ 12.3 Business address; hours.

The Office of Proceedings is located at Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. Faxes must be sent to (202) 418-5532, and emails must be sent to PROC_filings@cftc.gov. The office is open from 8:15 a.m. to 4:45 p.m., Eastern Time, Monday through Friday except on federal holidays.


§ 12.3 Business address; hours.

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[78 FR 12936, Feb. 26, 2013]
§ 12.4 Suspension, amendment, revocation and waiver of rules.

(a) Suspension or change of rules. These rules may, from time to time, be suspended, amended or revoked in whole or in part. Notice of such action will be published in the Federal Register.

(b) Commission waiver of procedures. In the interest of expediting decision or to prevent undue hardship on any party or for other good cause the Commission may order the adoption or expedited procedures, may waive any rule in this part in a particular case, and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced thereby, and that the ends of justice will be served. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

§ 12.5 Computation of time.

(a) In general. In computing any period of time prescribed by these rules or allowed by the Commission, the Director of the Office of Proceedings, a Judgment Officer, or an Administrative Law Judge, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the next day which is not a Saturday, a Sunday or a legal holiday.

Intermediate Saturday, Sundays, and legal holidays shall be excluded from the computation only when the period of time prescribed or allowed is less than seven (7) days.

(b) Date of service of orders. In computing any period of time involving the date of service of an order, the date of service shall be the date the order is served by the Proceedings Clerk, which, unless otherwise indicated, shall be the date stamped on the order by the Proceedings Clerk.


§ 12.6 Extensions of time; adjournments; postponements.

(a) In general. Except as otherwise provided by law or by these rules, for good cause shown, the Commission, or a Judgment Officer, Administrative Law Judge, or the Director of the Office of Proceedings, before whom a matter is then pending, on their own motion or the motion of a party, may at any time extend or shorten the time limit prescribed by the rules for filing any document. In any instance in which a time limit is not prescribed for an action to be taken concerning any matter, the Commission or one of the other officials mentioned above may set a time limit for that action.

(b) Motions for extension of time. Absent extraordinary circumstances, in any instance in which a time limit that has been prescribed for an action to be taken concerning any matter exceeds seven days from the date of the order establishing the time limit, requests for extension of time shall be filed at least five (5) days prior to the expiration of the time limit and shall explain why an extension of time is necessary.


§ 12.7 Ex parte communications in reparation proceedings.

(a) Prohibitions against ex parte communications. (1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge, or Commission decisional employee an ex parte communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge, or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an ex parte communication relevant to the merits of a proceeding.

(b) Procedures for handling ex parte communications. A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an ex parte communication prohibited by paragraph (a) of this section shall:

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(1) Place on the public record of the proceeding:
   (i) All such written communications;
   (ii) Memoranda stating the substance of all such oral communications; and
   (iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (b)(1) (i) and (ii) of this section; and
   (2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(c) Sanctions. (1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (a)(1) of this section, the Commission, Administrative Law Judge, or Judgment Officer may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.
   (2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (a) of this section may be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).
   (3) Any Commissioner, Administrative Law Judge, or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (a) of this section may be deemed to have engaged in unprofessional conduct of the type proscribed by 5 CFR 2635.101(b).

§ 12.8 Separation of functions.

(a) A Judgment Officer, or Administrative Law Judge will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.
   (b) No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of a Judgment Officer, or Administrative Law Judge, except as a witness in the proceeding, without the express written consent of the parties to the proceeding. This provision shall not apply to the Commissioners.

§ 12.9 Practice before the Commission.

(a) Practice—(1) By non-attorneys. An individual may appear pro se (on his own behalf); a general partner may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.
   (2) By attorneys. An attorney-at-law who is admitted to practice before the highest Court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with provisions of part 14 of this chapter may represent parties as an attorney in proceedings before the Commission.
§ 12.10 17 CFR Ch. I (4–1–13 Edition)

(b) Debarment of counsel or representative during the course of a proceeding. (1) Whenever, while a proceeding is pending before him, a Judgment Officer or an Administrative Law Judge finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, such official may order that such person be precluded from further acting as counsel or representative in the proceeding. An immediate appeal to the Commission may be taken from any such order, pursuant to the provisions of § 12.309, but the proceeding shall not be delayed or suspended pending disposition of the appeal; Provided, That the official may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(2) Whenever the Judgment Officer or Administrative Law Judge has issued an order precluding a person from further acting as counsel or representative in a proceeding, such official, within a reasonable time thereafter, shall submit to the Commission a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Commission should take respecting the appearance of such person as counsel or representative.

(c) Withdrawal of representation. Withdrawal from representation of a party shall be only by leave of the decision-making official (or the Commission) before whom the proceeding is then pending. Such leave to withdraw may be conditioned on the attorney’s (or representative’s) submission of an affidavit averring that the party represented has actual knowledge of the withdrawal, and such affidavit shall include the name and address of a successor counsel (or representative) or a statement that the represented party has determined to proceed pro se, in which case, the statement shall include the address where that party can thereafter be served.

§ 12.10 Service.

(a) General requirements—(1) When service is required; number of copies. When one party serves another with documents under these rules, a copy must be served on all other parties as well as filed with the Proceedings Clerk. Similarly, when a person files a document with the Office of Proceedings, the person must serve a copy of the document on all other parties. This rule does not apply to a complaint filed pursuant to § 12.13 of these rules, which shall only be filed with the Commission.

(2) How service is made. Service shall be made by:

(i) Personal service;

(ii) First-class or a more expeditious form of United States mail or an overnight or similar commercial delivery service;

(iii) Facsimile (“fax”); or

(iv) Electronic mail (“email”).

(3) Service by fax or email shall be permitted at the discretion of the Presiding Officer, with the parties’ consent. The consent of a party must specify the email address or fax number to be used. Signed documents that are served by email attachment must be in PDF or other non-alterable form.

(4) Service will be complete at the time of personal service; upon deposit in the mail or with an overnight or similar commercial delivery service of a properly addressed document for which all postage or delivery service fees have been paid; or upon transmission by fax or email. Service by email or by fax will not be effective if the party making service learns that the attempted service did not reach the person to be served.

(5) Where service is effected by mail or commercial delivery service (but not by fax or email), the time within which the person served may respond thereto shall be extended by five (5) days.

(6) Statement of service. A statement of service shall be made by filing with the Proceedings Clerk, simultaneously with the filing of the document, a statement signed by the party making service or by his attorney or representative that:

(i) Confirms that service has been made;

(ii) Identifies each person served;

(iii) Sets forth the date of service; and

(iv) Recites the manner of service.

(b) Service of orders and decisions. A copy of all notices, rulings, opinions,
§ 12.11 Formalities of filing of documents with the Proceedings Clerk.

(a) If a party files by personal delivery or mail, an original of all documents shall be filed with the Proceedings Clerk. If a party files a document by fax or email in accordance with §12.10(a)(2), they should not also send paper copies.

(b) First page. The first page of all documents filed with the Proceedings Clerk must include the Commission’s name, the docket number, the title of the proceeding, the subject of the document and the name of the person on whose behalf the document is being filed. In the complaint, the title of the proceeding shall include the names of all the complainants and respondents, but in documents subsequently filed it is sufficient to state the name of the first complainant and first respondent named in the complaint.

(c) Format. Documents must be legible and printed on normal white paper of eight and one half by eleven inches. Documents emailed in accordance with the requirements of §12.10(a)(2) must be in PDF or other non-alterable form. The typeface, margins, and spacing of all typed documents presented for filing should meet the following requirements: all text should be 12-point type or larger, except for text in footnotes which may be 10-point type; all documents should have at least one-inch margins on all sides; all text must be double-spaced, except for headings, text in footnotes, or block quotations, which may be single-spaced.

(d) Signature. (1) The original of all papers must be signed by the person filing the same or by his duly authorized agent or attorney.

(2) Effect. The signature on any document of any person acting either for himself or as attorney or agent for another constitutes certification by him that:

(i) He has read the document and knows the contents thereof;
(ii) If executed in any representative capacity, it was done with full power and authority to do so;
(iii) To the best of his knowledge, information, and belief, every statement contained in the document is true and not misleading; and
(iv) The document has been filed in good faith and has not been filed to cause delay.

(e) Length and form of briefs. All briefs filed containing more than 15 pages shall include an index and a table of cases and other authorities cited. No brief shall exceed 25 pages in length without prior permission of the Presiding Officer.

(f) All documents which are required to be served upon a party shall be filed concurrently with the Proceedings Clerk. A document shall be filed by delivering it in person or by first-class mail or a more expeditious form of United States mail or by overnight or similar commercial delivery service to Proceedings Clerk, Office of Proceedings, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581; or faxing the document to (202) 418-5532; or emailing it to PROC_Filings@cftc.gov in accordance with the conditions set forth in paragraph (a)(2) of this section.
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(g) To be timely filed under this part, a document must be delivered in person; mailed by first-class or a more expeditious form of United States mail or by an overnight or similar commercial delivery service; or faxed or emailed to the Proceedings Clerk within the time prescribed for filing.

[78 FR 12936, Feb. 26, 2013]

§ 12.12 Signature.

(a) By whom. All documents filed with the Commission shall be signed personally:

(1) By the person or persons on whose behalf they are tendered for filing;

(2) By a general partner, officer or director of a partnership, corporation, association, or other legal entity; or

(3) By an attorney-at-law having authority with respect thereto.

The Proceedings Clerk may require appropriate evidence of the authority of a person subscribing a document on behalf of another person.

(b) Effect. The signature on any document of any person acting either for himself or as attorney or agent for another constitutes certification by him that:

(1) He has read the document subscribed and knows the contents thereof;

(2) If executed in any representative capacity, it was done with full power and authority to do so;

(3) To the best of his knowledge, information, and belief, every statement contained in the document is true and not misleading; and

(4) The document is not being interposed for delay.

§ 12.13 Complaint; election of procedure.

(a) In general. Any person complaining of a violation of any provision of the Act or a rule, regulation or order of the Commission thereunder by any person who is a registrant (as defined in §12.2) may, at any time within two years after the cause of action accrues, apply to the Commission for a reparation award by filing a written complaint which satisfies the requirements of this rule.

(b) Form of complaint. The form of each complaint filed under paragraph (a) of this section shall meet the following requirements:

(1) Content. Each complaint shall include:

(i) The name, residence address, and telephone number (during business hours) of the complainant;

(ii) The name, address, and telephone number, if known, of each person alleged in the complaint to have violated the Act or any rule, regulation or order thereunder;

(iii) If known, the specific provisions of the Act, rule, regulation, or order claimed to have been violated;

(iv) A complete description of complainant’s case, including, but not limited to:

(A) A description of all relevant facts concerning each and every act or omission which it is claimed constitutes a violation of the Act; and

(B) A description of all facts which show or tend to show the manner in which it is claimed that the complainant was injured by the alleged violations;

(v) The amount of damages the complainant claims to have suffered and the method by which those damages have been computed, the amount of punitive damages (no more than two times the amount of such actual damages) the complainant claims, if any, and how complainant plans to demonstrate that punitive damages are appropriate;

(vi) A statement indicating whether an arbitration proceeding or civil court litigation, based on the same set of facts set forth and involving any party named as a respondent in the complaint, has been instituted, and whether such a proceeding has reached a final disposition or is presently pending;

(vii) A statement indicating whether any of the respondents is the subject of receivership or bankruptcy proceedings that are presently pending;

(viii) An election of a decisional procedure pursuant to subpart C, D, or E. (A procedure pursuant to subpart C may be elected only if the total amount of damages claimed, exclusive of interest and costs, does not exceed $30,000. A procedure pursuant to subpart E may be elected only if the total amount claimed as damages, exclusive
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of interest and costs, exceeds $30,000); and

(ix) A filing fee in the amount prescribed by §12.25 of these rules shall be submitted with the complaint at the time of its filing.

(2) Subscription and verification of the complaint. Each complaint shall be signed personally by an individual complainant or by a duly authorized officer or agent of a complainant who is not a natural person. His signature shall be given under oath or affirmation under penalty of law attesting either that he knows the facts set forth in the complaint to be true, or that he believes the facts set forth to be true, in which event the information upon which he formed that belief shall be set forth with particularity.

(3) Time and place of filing of complaint. A complaint shall be filed by delivering a copy thereof, in proper form, to the Commission at its principal offices in Washington, DC, addressed to the Office of Proceedings, attention of the Proceedings Clerk. The complaint may be filed in person, during normal business hours, or by certified mail, or registered mail with return receipt requested. If filing is by mail, it shall be addressed to the Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. The complaint shall not be served on any person or party named therein. Upon the filing of the complaint and the appropriate filing fee, the Proceedings Clerk shall assign a docket number to the matter and shall maintain the official docket.

(4) Bond required if complainant is nonresident; filing date of nonresident's complaint. (i) If a complaint in reparations is filed by a nonresident of the United States, the complaint shall not be considered duly filed in proper form unless it is accompanied by:

(A) A bond in double the amount of the claim either with a surety company approved by the Treasury Department of the United States or two personal sureties, each of whom shall be a citizen of the United States and shall qualify as financially responsible for the entire amount of the bond, which bond shall run to the respondent and be conditioned upon the payment of costs (including reasonable attorney’s fees, for the respondent if the respondent shall prevail) and any reparation award that may be issued by the Commission against the complainant on any counterclaim asserted by respondent; or

(B) A written request that the bond requirement be waived in accordance with section 14(c) of the Commodity Exchange Act, accompanied by sufficient proof that the country of which the complainant is a resident permits the filing of a complaint by a resident of the United States against a citizen of that country without the furnishing of a bond.

(ii) The provisions of paragraphs (b)(4)(i)(A) or (b)(4)(i)(B) of this section must be satisfied within two years after the complainant’s cause of action accrues.

(iii) When mailed from a foreign country, a nonresident’s complaint shall be deemed filed on the date that it is received in proper form by the Commission’s Proceedings Clerk, not on the date of mailing from the country of origin.

§ 12.14 Withdrawal of complaint.

At any time prior to service of notification to the complainant pursuant to §12.15(a) of the Director of the Office of Proceedings’ determination to forward the complaint to a registrant, complainant may file a written notice of withdrawal of the complaint which shall terminate the Commission’s consideration of the complaint without prejudice to complainant’s right to refile a reparations complaint based upon the same set of facts within two years after the cause of action accrues. If the complainant has previously filed a notice of withdrawal of a complaint based upon the same set of facts, the notice of withdrawal of complaint shall terminate the case with prejudice to complainant’s rights to re-file a complaint in reparations based on the same set of facts, but such termination shall be regarded by the Commission as without prejudice to complainant’s right to seek redress in such alternative forums.
§ 12.15 Notification of complaint.

(a) Forwarding of complaint to registrant. If, in the opinion of the Director of the Office of Proceedings, the facts set forth in a complaint warrant such action as to any of the registrants, a copy of the complaint, together with any attachments thereto, shall be forwarded by serving by registered mail or certified mail any such registrant named therein at an address previously designated with the Commission by the registrant for receipt of reparation complaints, as provided in Commission Regulation 17 CFR 3.30, or, if no such designation has been filed with the Commission, at such address as will accomplish actual notice to the respondent. Should the Director determine to forward the complaint, the complainant shall be notified of this determination at the time the complaint is forwarded.

(b) Determination not to forward complaint. The Director may, in his discretion, refuse to forward a complaint as to a particular respondent if it appears that the matters alleged therein are not cognizable in reparations, or that grounds exist pursuant to §12.24 (c) or (d) for refusing to forward the complaint. If the Director of the Office of Proceedings should determine not to forward the complaint to all registrants named in the complaint in accordance with this Section, no proceeding shall be held thereon and the complainant shall be notified to that effect. If the Director determines to forward the complaint as to less than all of the registrants, the complainant shall be so notified. A termination of the complaint as to any registrant shall be regarded by the Commission as without prejudice to the right of the complainant to seek such alternative forms of relief as may be available.

§ 12.16 Response to complaint.

Within 25 days after the complaint has been served by the Office of Proceedings on the registrant, or within such additional time (not to exceed 10 days absent extraordinary circumstances) as the Director of the Office of Proceedings, or his/her delegate may grant, for good cause shown, each registrant shall either—

(a) Satisfy the complaint in accordance with §12.17 of these rules; or
(b) Answer the complaint in the manner prescribed by §12.18 of these rules.

§ 12.17 Satisfaction of complaint.

A respondent may satisfy the complaint (a) by paying to the complainant either the amount to which the complainant claims to be entitled as set forth in the complaint or such other amount as the complainant will accept in satisfaction of his claim; and (b) by submitting to the Commission notice of satisfaction and withdrawal of the complaint, duly executed by the complainant and the respondent.

§ 12.18 Answer; election of procedure.

An answer filed pursuant to §12.16 of these rules shall meet the following requirements:

(a) Content. Each answer shall contain:

(1) The full name, current address and telephone number (during business hours) of each respondent on whose behalf the answer is filed;
(2) A complete description of each registrant’s case, including but not limited to, a precise and detailed statement of the facts which constitute each registrant’s ground for defense;
(3) Admissions, if any, as to the registrant’s liability for the amount (or any portion thereof) claimed as damages;
(4) A statement indicating whether the registrant is (and if the answer is filed on behalf of two or more registrants, which if any of them are) in receivership or subject to bankruptcy proceedings;
(5) A statement indicating whether an arbitration or civil court litigation, based on the same set of facts set forth in the complaint (involving any or all of the parties named therein), is pending;
(6) A counterclaim which the registrant wishes to pursue under §12.19 of these rules;
(7) An election of an alternative decisional procedure pursuant to subparts C, D, or E of these rules. (A proceeding pursuant to subpart D may be
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Response to counterclaim; reply; election of procedure.

(a) Response to counterclaim. If an answer asserts a counterclaim, the complainant shall, within thirty (30) days after service upon him of the answer by the respondent: (1) Satisfy the counterclaim as if it were a complaint, in the manner prescribed by §12.17 of these rules; or (2) file a reply to the counterclaim with the Commission.

(b) Form and content of reply. Should the complainant, under this paragraph, elect to file a reply to a counterclaim, the reply shall be strictly confined to the matters alleged in the counterclaim and shall conform to the form and content and other requirements set forth in §12.18 of these rules.

(c) Election of decisional procedure. If neither the complainant nor the respondent, in the complaint or answer respectively, has previously made an election of the summary decisional
§ 12.21 Voluntary dismissal.

(a) At any time after the Director of the Office of Proceedings has served notification to the parties pursuant to §12.15 of these rules of his determination to forward the complaint to the respondent for a response, either the complainant or the respondent may obtain dismissal of the complaint (or the proceeding, if one has commenced) by filing a stipulation of dismissal, duly executed by all of the complainants and each respondent against whom the complaint has been forwarded (or added as a party in the course of a proceeding); Provided however, That if the stipulation is filed after any respondent has filed an answer, the terms of the stipulation shall include a dismissal of any counterclaims in the answer.

(b) A dismissal of a complaint pursuant to this paragraph shall be with prejudice to complainant's right to refile a claim in reparations based upon the same set of facts as alleged in the dismissed complaint. Unless otherwise stated in the stipulation, a dismissal ordered pursuant to this paragraph shall be regarded by the Commission as without prejudice to the parties' right to seek redress in such alternative forums as may be available for adjudication of their claims.

(c) Upon receiving a written stipulation of dismissal which satisfies the requirements of this rule, the official before whom the matter or proceeding is pending shall issue an order of dismissal, and serve a copy thereof upon each of the parties.

(d) This rule shall be applicable at all stages of a reparation proceeding.

§ 12.22 Default proceedings.

(a) Institution of a default proceeding. Failure timely to respond to a complaint or a counterclaim, as required by §§12.16 and 12.20 of these rules, or, if applicable, to pay a filing fee required by §12.25(b) or (c), shall be treated as an admission of the allegations of the complaint or counterclaim by the nonresponding party, shall constitute a waiver by such party of any decisional procedure afforded by these Rules on the facts set forth in the complaint or counterclaim, and shall result in the institution of a default proceeding.

(b) Default procedure. Upon a party's failure to respond timely to a complaint or counterclaim as prescribed in §§12.16 and 12.20 of these rules, or timely to comply with §12.25(b) or (c), the Director of the Office of Proceedings shall forward the pleadings, and other materials then of record, to a Judge or Administrative Law Judge who may thereafter enter findings and conclusions concerning the questions of violations and damages and, if warranted, enter a reparation award against the nonresponding party. If the facts which are treated as admitted are considered insufficient to support a violation or the amount of reparations sought, the Judge or Administrative Law Judge may order production of supplementary evidence from the party not in default and may enter a default order and an award based thereon.

(c) Finality. A default order issued pursuant to this rule, or pursuant to any other provisions of these part 12 Reparation Rules, shall become the final decision and order of the Commissioner thirty (30) days after service thereof, unless the order is set aside pursuant to §12.23(a) of these rules, or unless the Commission takes review of such order on its own motion on or before the thirtieth day.


§ 12.23 Setting aside of default.

(a) Default order not final. In order to prevent injustice or for good cause shown, and on such conditions as may be appropriate, a non-final default order (including any award therein) may be set aside by the official who issued the order.

1) Procedure for setting aside non-final default order. Any party or person who is the subject of a default order issued pursuant to these rules may, at any time before the order becomes final pursuant to §12.22(c), file and serve a motion to set aside the default, which shall set forth reasons why the act or omission for which the party was defaulted was not willful, why there is a
reasonable likelihood of success for the party’s claim or defense if heard on the merits, and why no prejudice will be sustained by other parties if the default is set aside. A motion to set aside a default order filed pursuant to this paragraph (a)(1) shall be decided, in the first instance, by the official who issued the default order.

(2) Review. A denial of a motion to set aside a non-final default order by the official who issued the order shall be treated as an initial decision, which may be appealed to the Commission in accordance with the requirements of §12.401 of these rules. A grant of a motion to set aside a non-final default order may be appealed only in accordance with the requirements of §12.309 of these rules.

(b) Default order final. A default order that has become final pursuant to §12.22(c) shall not be set aside except upon a motion filed and served by the defaulted party showing that he should be relieved from the default order because of fraud perpetrated on a decisionmaking official or the Commission, mistake, excusable neglect, or because the order is void for want of jurisdiction. Such a motion shall also show that, if the default order were set aside, there would be a reasonable likelihood of success for his claim or defense if heard on the merits and that no party would be prejudiced thereby. Motions to set aside a final default order for fraud, mistake, or excusable neglect shall be filed within one year after the order was issued. All motions to set aside default orders shall be decided, in the first instance, by the official who issued the order. A denial of a motion to set aside a default order that has become final shall be treated as an initial decision, which may be appealed to the Commission in accordance with the requirements of §12.401 of these rules. A grant of a motion to set aside a final default order shall be treated as a non-final order which may be appealed only in accordance with the requirements of §12.309 of these rules.

§ 12.24 Parallel proceedings.

(a) Definition. For purposes of this section, a parallel proceeding shall include:

(1) An arbitration proceeding or civil court proceeding, involving one or more of the respondents as a party, which is pending at the time the reparation complaint is filed and involves claims or counterclaims that are based on the same set of facts which serve as a basis for all of the claims in the reparations complaint, and which either:

(i) Was commenced at the instance of the complainant in reparations; or

(ii) Involves counterclaims by the complainant in reparations alleging violations of the Commodity Exchange Act, or any regulation or order issued thereunder; or

(iii) Is governed by a compulsory counterclaim rule of federal court procedure which required the complainant in reparations to assert all of his claims (including those based on alleged violations of the Commodity Exchange Act, and any regulation or order issued thereunder) as counterclaims in that proceeding;

(2) The appointment by a court of a receivership over the assets, property or proceeds of a respondent named in a reparation complaint where the responsibility of the receivership includes the resolution of claims made by customers; or

(3) A petition filed under any chapter of the Bankruptcy Code, 11 U.S.C. 101 et seq., as amended, commenced pursuant to 11 U.S.C. 301 or 302 by a respondent in a reparation proceeding, or the issuance by a bankruptcy court of an order for relief after the filing against a respondent in a reparation proceeding of an involuntary petition in bankruptcy pursuant to 11 U.S.C. 303.

(b) Notice. At the time a complaint in reparations is filed pursuant to these rules, or at any time thereafter, any party, receiver or trustee, or counsel to any of the foregoing with knowledge of a parallel proceeding shall promptly notify the Commission, by first-class mail addressed to the Office of Proceedings, attention of the Proceedings Clerk, and serve notice on all other parties, including the receiver or trustee. The notice shall include the following information:

(1) The caption of the parallel proceeding:
§ 12.25 Filing fees.

(a) Fees payable upon filing a complaint. (1) A complainant who, in the complaint, has elected the voluntary decisional procedure shall, at the time of filing the complaint, pay a filing fee of $50.00;

(2) A proceeding in which an elected decisional procedure has been commenced shall be ordered dismissed, without prejudice, as to any respondent who becomes the subject of a parallel proceeding described in paragraph (a)(2) or (a)(3) of this section if notice pursuant to paragraph (b) of this section is received before the filing of an initial decision (or before a final decision is issued pursuant to §12.106) as to that respondent. The Proceedings Clerk shall notify all parties, including the receiver or trustee, of the order. The effective date of the order shall be fifteen (15) days from the date of service of the order by the Proceedings Clerk.

§ 12.25 Effect of pending arbitration or civil court litigation.

(1) The Director of the Office of Proceedings shall refuse to institute an elected decisional procedure concerning a reparation complaint filed under this part in which there is a parallel proceeding described in paragraph (a)(1) of this section and shall return the complaint to the complaining person. The effective date of the Director’s termination of the complaint without prejudice shall be fifteen (15) days from the date of service of notice of the action taken pursuant to this paragraph.

(2) If notice of a parallel proceeding described in paragraph (a)(1) of this section is received before the initial decision is filed (or before a final decision under §12.106 of the rules is entered), a proceeding in which a decisional procedure has been commenced shall be dismissed, without prejudice. The effective date of the order of dismissal shall be fifteen (15) days from the date of service of the order by the Proceedings Clerk.

(d) Effect of receivership or bankruptcy proceedings. (1) The Director of the Office of Proceedings shall refuse to institute an elected decisional procedure as to a respondent in any reparation complaint filed pursuant to this part who is the subject of a parallel proceeding described in paragraph (a)(2) or (a)(3) of this section, and shall notify all parties, including the receiver or trustee, that as to that respondent a reparation proceeding shall not be instituted. The effective date of the Director’s action shall be fifteen (15) days from the date of service of the notice thereof.

(2) A proceeding in which an elected decisional procedure has been commenced shall be ordered dismissed, without prejudice, as to any respondent who becomes the subject of a parallel proceeding described in paragraph (a)(2) or (a)(3) of this section if notice pursuant to paragraph (b) of this section is received before the filing of an initial decision (or before a final decision is issued pursuant to §12.106) as to that respondent. The Proceedings Clerk shall notify all parties, including the receiver or trustee, of the order. The effective date of the order shall be fifteen (15) days from the date of service of the order by the Proceedings Clerk.

(e) Exceptions. At the time notice of a parallel proceeding is filed pursuant to paragraph (b) of this section, or any time thereafter, any party, or the receiver or trustee, may file and serve upon other parties a statement in support of or in opposition to any action taken or to be taken pursuant to paragraph (c) or (d) of this section. This statement shall be addressed to the Office of Proceedings, attention of the Proceedings Clerk. Upon receipt of any such statement, the Proceedings Clerk shall immediately forward the statement to the official with responsibility over the case. The notice and the statements filed by the parties shall be reviewed by that official who, on or before the effective date of action taken pursuant to paragraphs (c)(1), (c)(2), (d)(1), and (d)(2), of this section, may take such actions as, in his opinion, are necessary to ensure that the parties to the matter or proceedings are not unduly prejudiced.

(f) No right of appeal to the Commission. Any action taken, or order issued, pursuant to paragraphs (c)(1), (c)(2), (d)(1), or (d)(2), of this section that has become effective shall be deemed a final order which is not subject to appeal pursuant to subpart F of these rules.
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§ 12.26 Commencement of a reparation proceeding.

(a) Commencement of voluntary decisional proceeding. Where complainant and respondent in the complaint and answer have elected the voluntary decisional procedure pursuant to subpart C of these rules and the complainant has paid the filing fee required by §12.25 of these rules, the Director of the Office of Proceedings shall, if in his opinion the facts warrant taking such action, forward the pleadings and all materials of record to the Proceedings Clerk for a proceeding to be conducted in accordance with subpart C of these rules. The Proceedings Clerk shall forthwith notify the parties of such action. Such notification shall be accompanied by an order issued by the Proceedings Clerk requiring the parties to complete all discovery, as provided in subpart B of these rules, within 50 days thereafter. A voluntary decisional proceeding commences upon service of such notification and order. As soon as practicable after service of such notification, the Proceedings Clerk shall assign the case to a Judgment Officer for a final decision.

(b) Commencement of summary decisional proceeding. Where the amount claimed as damages, exclusive of interest and costs, in the complaint or in counterclaim does not exceed $30,000, and either a complainant or a respondent in the complaint, answer, or reply, has elected the summary decisional procedure pursuant to subpart D of these rules, and has paid the filing fee required by §12.25, the Director of the Office of Proceedings shall, if in his opinion the facts warrant taking such action, forward the pleadings and all materials of record to the Proceedings Clerk for a proceeding to be conducted in accordance with subpart D of these rules. The Proceedings Clerk shall forthwith notify the parties of such action. Such notification shall be accompanied by an order issued by the Proceedings Clerk requiring the parties to complete all discovery, as provided in subpart B of these rules, within 50 days thereafter. A summary decisional proceeding commences upon service of such notification. As soon as practicable after service of such notification, the Proceedings Clerk shall assign the case to a Judgment Officer for disposition.

(c) Commencement of formal decisional proceeding. Where the amount claimed as damages in the complaint or as counterclaims exceeds $30,000, exclusive of interest and costs, and either a complainant or a respondent in the complaint, answer or reply, has elected the summary decisional procedure pursuant to subpart D of these rules, or as counterclaims does not exceed $30,000) shall, at the time of filing the answer, pay a filing fee of $250.00.

(b) Fees payable upon filing an answer. (1) If a complainant, in the complaint, has elected the voluntary decisional procedure, a respondent who, in his answer, elects the summary decisional procedure (available only where the amount of damages claimed in the complaint or as counterclaims does not exceed $30,000) shall, at the time of filing the answer, pay a filing fee of $75.00.

(2) If a complainant, in the complaint, has elected the voluntary decisional procedure, a respondent who, in his answer, elects the formal decisional procedure (available only where the amount of damages claimed in the complaint or as counterclaims exceeds $30,000) shall, at the time of filing the answer, pay a filing fee of $200.00.

(c) Fees payable upon filing a reply. In any case in which a counterclaim has been made, unless a complainant in the complaint, or the respondent in an answer, has elected the summary decisional procedure or the formal decisional procedure a complainant, who in his reply elects either of these procedures, shall, at the time of filing the reply, pay a filing fee of $75.00 or $200.00, respectively, depending whether the procedure elected by complainant is pursuant to subparts D or E.

§ 12.27 Termination of consideration of pleadings.

If the Director of the Office of Proceedings should determine not to proceed in a manner set forth in §12.26 (a), (b), or (c), consideration of the complaint and the answer (and reply, if any) shall terminate, and no proceeding shall be held on the allegations in any such pleadings. Such termination shall be regarded by the Commission as without prejudice to the right of the parties to seek such alternative forms of relief as may be available to them. If the consideration of the pleadings should be terminated, the Proceedings Clerk shall immediately notify the parties to that effect by registered or certified mail. A determination by the Director not to proceed in the manner set forth in §12.26 (a), (b), or (c) of these rules is not subject to appeal pursuant to subpart F of these rules.

§ 12.30 Methods of discovery.

(a) In general. Parties may obtain discovery by the following methods in accordance with the procedures and limitations set forth in the section indicated:

1. Production of documents or other items (§12.31);
2. Deposition on written interrogatories (§12.32);
3. Admissions (§12.33).

(b) Scope of discovery. The scope of discovery is as follows:

1. Relevancy. Except as provided below, discovery may be obtained regarding any matter not privileged, which is relevant to the subject matter in the pending proceeding, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible items, and the identity and location of persons having knowledge of any discoverable matters. Tax returns and personal bank account records shall not be discoverable, except upon motion by the party seeking discovery showing the need for disclosure of information contained therein, and that the same information could not be obtained through other means.

2. Protective orders. Upon motion by a party or the person from whom discovery is sought, filed within twenty days after the objectionable discovery notice or request is served, and for good cause shown, the official presiding over discovery may issue any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding, or the inappropriate disclosure of trade secrets or confidential commercial information. Relief through a protective order may include one or more of the following:

(i) That discovery not be had;
(ii) That discovery may be had only on specified terms and conditions;
(iii) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
(iv) That a trade secret or other confidential commercial information not
be disclosed or be disclosed only in a designated way; and

(v) That the parties simultaneously file specified documents or information in sealed envelopes to be opened only as directed by the decisionmaking official.

(3) **Motions for order compelling discovery.** It shall be the duty of a party to obtain an order compelling discovery from another party if the latter party fails to comply with a discovery notice, by filing a motion therefor within twenty days after the time allowed by these rules for compliance with the notice has expired.

(c) **Sanctions for abuse of discovery.** If an Administrative Law Judge or a Judgement Officer finds that any party, without substantial justification, has necessitated the filing of a motion for a protective order or for an order compelling discovery, or any other discovery-related motions, that party shall, if the motion is granted, be ordered to pay, at the termination of the proceeding, the reasonable expenses of the moving party incurred in filing the motion, unless the decisionmaking official finds that circumstances exist which would make an award of such expenses unjust. If a decisionmaking official finds that any party, without substantial justification, has filed a motion for a protective order or for an order compelling discovery, or any discovery-related motions, that party shall, if the motion is denied, be ordered to pay, at the termination of the proceeding, the reasonable expenses of an adverse party incurred in opposing the motion, unless the decisionmaker finds that circumstances exist which would make an award of such expenses unjust.

(d) **Time limit.** Absent an extension of time, all discovery notices or requests shall be served within (30) days (and all discovery shall be completed within (50) days) after the notification and the order required by §12.26 (a), (b), or (c) has been served on the parties. Upon motion by a party and for good cause shown, the time allowed for discovery may be enlarged for one additional period not to exceed thirty (30) days.

§ 12.31 **Production of documents and tangible items.**

(a) **By a party.** Any party, within the time prescribed in §12.30(d) and subject to the limitations in §12.30(a), may serve on any other party, a notice to produce copies of specifically designated categories of documents, papers, books, accounts, letters, photographs, objects, or tangible things which are in the party's possession, custody or control. A copy of the notice shall be served on all other parties to the proceeding. All documents requested in the notice to produce shall be served on the party seeking the discovery within twenty (20) days after service of the notice to produce.

(b) **By a non-party.** Any party may, by filing an appropriate motion showing the need for the materials and an application for a subpoena in accordance with the procedure prescribed in §12.313 and within the time prescribed by §12.30(d) of these rules, seek leave to serve upon a non-party a notice to produce such materials. All materials requested in the notice to produce, and, if applicable, a detailed explanation of why any of the specified materials cannot be produced, shall be served on the party seeking discovery within such time (not to exceed thirty (30) days) as the subpoena shall specify. Enforcement of the order and subpoena may be sought in accordance with §12.313.

§ 12.32 **Depositions on written interrogatories.**

(a) **Notice.** Any party, within the time prescribed by §12.30(d), may serve on any other party or any officer or agent of a party a notice of the taking of a deposition on written interrogatories.

(b) **Number.** The number of written interrogatories served upon any one party shall not exceed thirty. For the purpose of this rule, each sub-interrogatory or divisible part of an interrogatory shall be regarded as one interrogatory. Leave to serve additional interrogatories shall not be granted absent extraordinary circumstances.

(c) Reply. (1) Each interrogatory served shall be answered by the party served or if the party is a corporation, partnership, association, or government agency, by any officer or agent thereof selected by the responding party.

(2) Each interrogatory shall be answered separately and fully in writing, unless objected to, in which event the reasons for objection shall be stated in lieu of an answer. For the purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer. The answers are to be signed and verified by the person making them. The person upon whom a notice to take a deposition on written interrogatories has been served shall serve a copy of the answers and objections within twenty (20) days after service of the interrogatories.

(d) Deposition of a non-party. The deposition on written interrogatories of a non-party may be taken only within the time prescribed by §12.30(d), and only pursuant to an order entered and subpoena issued in accordance with the provisions of §12.313 of these rules; provided however, that the deposition on written interrogatories of a Commission member or employee may only be taken upon a showing that the Commission member or employee has personal knowledge of the matters sought to be discovered (i.e., not obtained pursuant to a Commission investigation), that the information sought to be discovered is material and that the information sought to be discovered is not available from other sources.

(e) Filing of depositions on written interrogatories in a voluntary or summary decisional proceeding. In proceedings commenced pursuant to §12.26 (a) and (b) of these rules, copies of all depositions on written interrogatories shall be filed by the party on whose behalf the discovery was obtained.

§ 12.33 Admissions.

(a) Request for admissions. Any party may, within the time permitted by §12.30(d) of these rules, serve upon any other party a written request for admissions of the truth of any matters set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any document described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. A copy of the request shall be filed with the Proceedings Clerk.

(b) Reply. Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless within twenty (20) days after service of the request, the party upon whom the request is directed files and serves upon the party requesting the admission a verified written answer or objection to the matter. If objection is made, the reasons thereof shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer and deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give a lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably available to him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) Determining sufficiency of answers or objections. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objection party sustains his burden of showing that the objection is justified, the official presiding over discovery shall order that an answer be served. If such official determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served.
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§ 12.34 Discovery by a decisionmaking official.

(a) Applicability. The provisions of this rule shall apply to all decisional proceedings commenced pursuant to §12.26. For the purposes of this rule, the term “decisionmaking official” shall mean a Judgment Officer or Administrative Law Judge assigned to render a decision in the proceeding.

(b) Production of documents and tangible things—(1) Order for production. A decisionmaking official may, upon his own motion, order a party or non-party to produce copies of specifically designated documents, papers, books, accounts, or tangible things (or categories of any of the foregoing) which are in the possession, custody or control of the party, non-party or agent thereof, against whom the order is directed. Except as provided in paragraph (b)(2) of this section, a party or non-party ordered to produce documents or any of the above items under this rule shall file and serve the documents and items listed in the order within twenty (20) days from the date of service of the order, or within such period of time as the decisionmaking official may direct. The decisionmaking official may issue subpoenas to compel the production by parties or non-parties of such documents and tangible things as are described in this section.

(2) Trade secrets, commercially sensitive or confidential information. If any party or person against whom an order to produce has been directed acting in good faith has reason to believe that any documents or other tangible thing ordered to be produced contains a trade secret, or commercially sensitive or other confidential information, the party or person may, in lieu of serving any such document, in accordance with paragraph (b)(1) of this section, file and serve a written request for confidential treatment of such documents. Any such request for confidential treatment shall be accompanied by a verified statement identifying with particularity the information on those documents considered to be trade secrets, commercially sensitive or confidential information, with reasons therefor, and indicating which portions, if any, of those documents may be served on other parties without disclosure of such information. Upon considering a request for confidential treatment in accordance with this subsection, the decisionmaking official may, if he finds that the information identified in the request warrants confidential treatment and is not probative of any material fact in controversy, make copies of the documents produced, delete such information from the copies, and serve the copies as modified upon the other parties, with or without an appropriate protective order limiting dissemination to the parties and their counsel, if any.

(3) Inability to produce. Any party or person who cannot produce documents or other tangible things called for in an order for production, because those documents or things are not in his possession, custody or control, shall file and serve within the time provided in paragraph (b)(1) of this section a verified statement identifying the documents which cannot be produced and setting forth with particularity the reasons for non-production.

(c) Order for written testimony. The decisionmaking official may, upon his own motion, order a party or non-party witness to submit verified statements or written responses to interrogatories, or both, as to all relevant matters within the party’s personal knowledge which are required in response to the order. A party or person ordered to file affidavits and/or verified written responses to interrogatories shall file and serve the documents within such period of time as the decisionmaking official may direct. The official may issue subpoenas to compel the filing by parties
or non-parties of such verified statements and written responses as are described in this subsection.


§ 12.35 Consequences of a party's failure to comply with a discovery order.

If a party fails to comply with an order compelling discovery, or an order issued pursuant to §12.34, the official assigned to render the decision in the case may, upon motion by a party or on his own motion, take such action in regard thereto as is just, including but not limited to the following:

(a) Infer that the documents or things not produced would have been adverse to the party;
(b) Rule that for the purposes of the proceeding the information in or contents of the documents or things not produced be taken as established adversely to the party;
(c) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld documents or other evidence would have shown;
(d) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, to which the order for production related, be stricken;
(e) Dismiss the entire proceeding with prejudice to matters alleged in the complaint, but without prejudice to counterclaims; and
(f) Issue a default order and render a decision against the party, whose rights shall thereafter be determined by §§12.22 and 12.23 of these rules.

§ 12.36 Subpoenas to compel discovery.

An application for a subpoena requiring a party or non-party to comply with a discovery order issued pursuant to §§12.31 and 12.32, may be made, in writing, by any party without notice to other parties, and may be filed simultaneously with the motion for the discovery order. The standards for issuance or denial of such an application, the service requirement, and the method for enforcing such subpoenas shall be determined by the provisions of §12.313 of these rules.

Subpart C—Rules Applicable to Voluntary Decisional Proceedings

§ 12.100 Scope and applicability of rules.

(a) In general. The rules set forth in this subpart are applicable only to proceedings forwarded pursuant to §12.26(a) of the Reparation Rules. The rules of subpart B permitting discovery are applicable in a voluntary decisional proceeding. Unless specifically made applicable, the rules prescribed in subparts D, E, and F shall not apply in a voluntary decisional proceeding.

(b) Waiver by electing the voluntary decisional procedure. By electing the voluntary decisional procedure, parties waive the opportunity for an oral hearing and whatever rights they may have otherwise had; to receive a written statement of the findings of fact upon which the final decision is based; to prejudgment interest in connection with a reparation award; to appeal to the Commission the final decision; and to appeal the final decision to a U.S. Court of Appeals pursuant to section 14(e) of the Commodity Exchange Act, 7 U.S.C. 18(e).

§ 12.101 Functions and responsibilities of the Judgment Officer.

The Judgment Officer shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority:

(a) To rule upon discovery-related motions, and to take such action pursuant to §12.35 as is appropriate if a party fails to comply with a discovery order;
(b) To issue orders for the production of documents and tangible things and orders for written testimony, as provided in §12.34;
(c) To issue subpoenas pursuant to §§12.34 and 12.36;
(d) To issue orders of default for good cause shown against any party who fails to participate in the proceeding, or to comply with any provisions of these rules;
(e) To receive submissions of proof;
(f) Make the final decision in accordance with §12.106 of these rules; and
§ 12.106 Final decision and order.

(a) When a final decision is required. After all submissions of proof have been received, the Judgment Officer shall make the final decision. Upon its issuance, the final decision shall forthwith be filed with the Proceedings Clerk, and immediately served on the parties. The Proceedings Clerk shall also serve a notice, to accompany the final decision, of the effect of a failure by a party ordered to pay a reparation award to file the documents required by §12.407(c) of these rules.

(b) Content of final decision. The final decision shall contain:

(1) A briefly stated conclusion, not accompanied by findings of fact, as to whether the respondent violated any provision of the Act, Commission’s regulations or orders, resulting in damages to the complainant; and

(2) If one or more counterclaims have been permitted in the proceeding, a brief conclusion, not accompanied by findings of fact, as to whether the complainant is liable to the respondent for such counterclaims; and

(3) A determination of the amount of damages, if any, sustained by complainant or respondent in connection with reparation claims or counterclaims, and an order against a party found liable for damages directing that party to pay an award. An award in
favor of the complainant shall not exceed the amount of damages in the complaint (including any amendment thereto), and an award in favor of a respondent shall not exceed the amount of damages claimed in a counterclaim (including any amendment thereto).

A conclusion made pursuant to paragraph (b)(1) of this section shall not be deemed a finding of the Commission for the purposes of Section 8a of the Commodity Exchange Act.

(c) No assessment of prejudgment interest or costs; assessment of post-judgment interest. A party found liable for damages in a voluntary decisional proceeding shall not be assessed prejudgment interest, attorney’s fees, or costs (other than the filing fee and costs assessed as a sanction for abuse of discovery). Post-judgment interest shall be awarded at a rate determined in accordance with 28 U.S.C. 1961(a).

(d) Effect of final decision and order: No appeal. A party may not appeal to the Commission a final decision issued pursuant to subpart C of these rules. In accordance with the election and waivers described in §12.100(b), a final decision may not be appealed to a U.S. Court of Appeals pursuant to section 14(e) of the Commodity Exchange Act, but a final decision shall be recognized as a final order of the Commission for all other purposes including the judicial enforcement of an award made in connection with the final decision pursuant to section 14(d) of the Commodity Exchange Act.

(e) Effective date of final decision. A final decision and order shall become effective thirty (30) days after service, unless the Commission pursuant to §12.403 takes review of the decision on its own motion or before the thirty-first day. Any reparation award ordered in a final decision pursuant to this rule shall be satisfied in full within forty-five (45) days after service thereof, unless the Commission pursuant to §12.403(b) stays the duty of satisfaction. Any party who fails timely to satisfy such an award is subject to the automatic suspension provisions of §12.407(c).

(g) If an oral hearing is ordered, to preside at the hearing, which shall include the authority to receive relevant evidence, to administer oaths and affirmations, to examine witnesses, and to rule on offers of proof;

(h) To issue subpoenas in accordance with the provisions of §§ 12.34, 12.36 and 12.209 of these rules;

(i) To make the initial decision in accordance with §12.210 of these rules; and

(j) To issue such orders as are necessary and appropriate to effectuate the orderly conduct of the proceeding.


§ 12.202 Disqualification of Judgment Officer.

(a) At his own request. A Judgment Officer may withdraw from a summary decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event, he shall immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) Upon the request of a party. Any party may request a Judgment Officer to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory review of an order denying such a request may be sought without certification of the matter by the Judgment Officer only in accordance with the procedures set forth in §12.309 of the Reparation Rules.

§ 12.203 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a summary decisional proceeding, including (but not limited to) amended or supplemental pleadings, motions, discovery notices and responses thereto, documents produced or filed pursuant to §12.34 of these rules, and submissions of proof, shall meet the requirements of §§12.11 and 12.12 of these rules as to form, and shall be filed and served in accordance with §12.10 of the Reparation Rules.

§ 12.204 Amended and supplemental pleadings.

(a) Amendments to pleadings. At any time before the parties have concluded their submission of proof, the Judgment Officer may allow amendments of the pleadings either upon written consent of the parties, or for good cause shown, provided however, that any pleading as amended shall not contain an allegation of damages in excess of $30,000. Any party may file a response to a motion to amend the pleadings within ten (10) days after the date of service upon him of the motion;

(b) Supplemental pleadings. At any time before the parties have concluded their submissions of proof, and upon such terms as are just, the Judgment Officer may, upon motion by a party, permit a party to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to any of the issues in the proceeding: Provided However, That any pleading as supplemented may not contain an allegation of damages in excess of $30,000. Any party may file a response to a motion to supplement the pleadings within ten (10) days after the date of service upon him of the motion.

(c) Pleadings to conform to the evidence. When issues not raised by the pleadings but reasonably within the scope of a summary decisional proceeding are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.


§ 12.205 Motions.

(a) In general. Motions for relief not otherwise specifically provided for in subpart D of these rules, other than discovery-related motions and motions for extensions of time and similar procedural orders, shall not be allowed. Except as otherwise specifically provided in these rules, all motions permitted under these rules shall be directed to the Judgment Officer prior to the filing of the initial decision, and to
the Commission after the initial decision has been filed. Motions for extensions of time and similar procedural orders may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(b) Answer to motions. Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him, or within such shorter period as is established by these rules, or as the Judgment Officer or the Commission may direct.

(c) Dismissal—(1) By the Judgment Officer. A Judgment Officer, acting upon his own motion, may
   (i) Dismiss the entire proceeding without prejudice to counterclaims, if he finds that the matters alleged in the complaint fail to state a claim cognizable in reparations; or
   (ii) Order dismissal of any claim, counterclaim, or party from the proceeding if he finds, after review of the record, that such claim or counterclaim (by itself or as applied to any party) is not cognizable in reparations.

(2) Motion for dismissal by a party. Any party who believes that grounds exist for dismissal of the entire complaint, or of any claim therein, or of any counterclaim or party from the proceeding, may file a motion for dismissal specifying the claims or parties to be dismissed and the reasons therefor. Upon consideration of the whole record, the Judgment Officer may grant or deny such motion, in whole or in part.

(3) Content and effect of order of dismissal. Any order of dismissal entered pursuant to this rule shall contain a brief statement of the findings and conclusions which serve as the basis for the order. An order of dismissal of the entire proceeding pursuant to this rule shall have the effect of an initial decision (see §12.213(d)), and may be appealed to the Commission in accordance with the requirements of §12.401 of these rules.

§ 12.206 Pre-decision conferences.

At any time after a summary decisional proceeding has been commenced pursuant to §12.26(b), the Judgment Officer may, in his discretion, conduct one or more pre-decision conferences to be held in Washington, DC or by telephone, with all parties, for the purposes of:

(a) Discussing the advisability of electing the voluntary decisional procedure;

(b) Encouraging settlement of the entire case, or any part thereof, (such discussions may be ex parte with the consent of all parties);

(c) Simplifying or clarifying issues;

(d) Obtaining stipulations, admissions of fact and of authenticity of documents;

(e) Discussing amendments or supplements to the pleadings;

(f) Encouraging an early settlement of disputes relating to discovery; and

(g) Discussing any matters of relevance in the proceeding.

At or following the conclusion of such a conference, the Judgment Officer may serve a pre-decision memorandum and order setting forth the agreements, if any, reached by the parties, any procedural determinations made by him, and the issues for resolution not disposed of by the admissions or agreements by the parties. Such order, when issued, shall control the subsequent course of the proceeding unless modified to prevent injustice.

§ 12.207 Summary disposition.

(a) Filing of motions, answers. Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law concerning all issues of liability in the proceeding may file a motion for summary disposition at any time until the parties have concluded their submissions of proof. Any adverse party, within ten (10) days after service of the motion, may file and serve opposing papers or may countermove for summary disposition.

(b) Supporting papers. A motion for summary disposition shall include a statement of the material facts as to which the moving party contends there is no genuine issue, supported by briefs containing points and authorities in
support of the contention of the party making the motion. When a motion is made and supported as provided in this section, unless otherwise ordered by the Judgment Officer, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits and other verified material. He may also submit a brief of points and authorities.

(c) Summary disposition upon motion of the Judgment Officer. If the Judgment Officer believes that there may be no genuine issue of material fact to be determined and that one of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, substantially as provided in paragraphs (a) and (b) of this section.

(d) Ruling on summary disposition. The Judgment Officer may grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice show that (1) there is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed in the record; and (3) a party is entitled to a decision in his favor as a matter of law.

(e) Review of ruling; appeal. An application for interlocutory review of an order denying a motion for summary disposition shall not be allowed. An order granting summary disposition as to all of the issues and all of the parties in the proceeding shall have the same effect as an initial decision (see §12.210(d)), and may be appealed to the Commission, in accordance with §12.401 of these rules.

§ 12.208 Submissions of proof.

(a) Documentary evidence. Each party may file and serve verified statements of fact and affidavits of non-party witnesses with personal knowledge of the facts which they aver to be true. Proof in support of the complaint and in support of the respondent's answer may be found in those verified documents, in affidavits of non-party witnesses, in other verified statements of fact, and in other documents and tangible exhibits.

(b) Oral testimony and examination. The Judgment Officer may order an oral hearing for the presentation of testimony and examination of the parties and their witnesses when appropriate and necessary for the resolution of factual issues, upon motion by either a party or the Judgment Officer. An oral hearing held under this section will be convened by conference telephone call as provided in §12.209(b), except that an in-person hearing may be held in Washington, DC, under the circumstances set forth in §12.209(c).

§ 12.209 Oral testimony.

(a) Generally. When the Judgment Officer determines that an oral hearing is necessary and appropriate, such oral hearing will be held either by telephone or in person in Washington, DC, as set forth below. The Judgment Officer, in his or her discretion with consideration for the convenience of the parties and their witnesses, will determine the time and date of such hearing. During an oral hearing, in his or her discretion, the Judgment Officer may regulate appropriately the course and sequence of testimony and examination of the parties and their witnesses and limit the issues.

(b) Telephonic hearings. When a Judgment Officer has determined to hold an oral hearing by telephone, an order to that effect will be issued at least 15 days prior to the hearing notifying the parties of the date and time of the hearing. The order will direct the parties to confirm, at least 48 hours in advance of the hearing, that the correct telephone numbers for the parties and their witnesses are on file with the Office of Proceedings, and warn that failure to provide correct telephone numbers may be deemed waiver of that party's right to participate in the hearing, to present evidence, or to cross-examine other witnesses. If a party is unavailable by telephone at the appointed time, any other party in attendance may present testimony, and the Judgment Officer also may impose any appropriate sanction listed in §12.30. All telephonic hearings will be recorded.
§ 12.210 Initial decision.

(a) In general. Proposed findings of fact and conclusions of law briefs shall not be allowed. As soon as practicable after all submissions of proof have been received, the Judgment Officer shall make the initial decision, which he shall forthwith file with the Proceedings Clerk. Upon filing of an initial decision, the Proceedings Clerk shall immediately serve upon the parties a copy of the initial decision and a notification of the effect of a party's failure to appeal the initial decision to the Commission, as provided in paragraphs (d) and (e) of this section, as well as the effect of a failure by a party who has been ordered to pay a reparation award timely to file the documents required by §12.407(c).

(b) Content of initial decision. In the initial decision in a summary decisional proceeding, the Judgment Officer shall:

1. Include a brief statement of his findings as to the facts, with references to those portions of the record which support his findings;

2. Make a determination whether or not the respondent has violated any provision of the Commodity Exchange Act, or rule, regulation or order thereunder;

3. Make a determination whether the complainant is liable to any respondent who has made a counterclaim in the proceeding;

4. Determine the amount of damages, if any, that the complainant has sustained as a result of respondent's violations, the amount of punitive damages, if any, for which respondent is liable to complainant, which shall not exceed $30,000, exclusive of interest and costs; and the amount, if any, for which complainant is liable to respondents based on counterclaims, which, in aggregate, shall not exceed $30,000, exclusive of interest and costs; and

5. Include an order directing either the respondent or the complainant, depending upon whose liability is greater, to pay an amount based on the difference in the amounts determined pursuant to paragraph (b)(4) of this section, on or before a date fixed in the order.

(c) Costs; prejudgment interest. The Judgment Officer may, in the initial decision, award costs (including the costs of instituting the proceeding), and if appropriate, reasonable attorneys'
(d) **Effect of initial decision.** The initial decision shall become the final decision and order of the Commission thirty (30) days after service thereof, except:

(1) The initial decision shall not become the final decision as to a party who shall have timely filed and perfected an appeal thereof to the Commission in accordance with §12.401 of these rules; and

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after service of the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

(e) **Effect of failure to file and perfect an appeal to the Commission.** Unless the Commission takes review on its own motion, the timely filing and perfection of an appeal to the Commission of the initial decision is mandatory as a prerequisite to appellate judicial review of a final decision and order entered pursuant to these rules.

§ 12.304 Functions and responsibilities of the Administrative Law Judge.

Once he has been assigned the case, the Administrative Law Judge shall be responsible for the fair and orderly conduct of a formal decisional proceeding and shall have the authority:

(a) To issue such orders as are described in §12.34 of these rules;
§ 12.305 Disqualification of Administrative Law Judge.

(a) At his own request. An Administrative Law Judge may withdraw from a formal decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event, he shall immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) Upon the request of a party. Any party may request an Administrative Law Judge to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory review of an order denying such a request may be sought without certification of the matter by an Administrative Law Judge, only in accordance with the procedures set forth in §12.309 of these rules.

§ 12.306 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a formal decisional proceeding including, but not limited to, amended or supplemental pleadings, motions, discovery notices or requests, and responses thereto, documents filed or produced pursuant to §12.34 of these rules, and submissions of proof, shall meet the requirements of §§12.11 and 12.12 of the rules as to form, and shall be filed and served in accordance with §12.10 of the Reparation Rules.

§ 12.307 Amended and supplemental pleadings.

(a) Amendments to pleadings. At any time before the parties have concluded their submissions of proof, the Administrative Law Judge may allow amendments of the pleadings either upon written consent of the parties or for good cause shown. Any party may file a response to a motion to amend the pleadings within ten (10) days after the date of service upon him of the motion.

(b) Supplemental pleadings. At any time before the parties have concluded their submissions of proof, and upon such terms as are just, an Administrative Law Judge may, upon motion by a party, permit a party to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to the issues in the proceeding. Any party may file a response to a motion to supplement the pleadings with ten (10) days after the date of service upon him of the motion.

(c) Pleadings to conform to the evidence. When issues not raised by the pleadings but reasonably within the scope of a formal decisional proceeding are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.
§ 12.308 Motions.

(a) In general. An application for a form of relief not otherwise specifically provided for in this subpart E shall be made by a motion, which shall be in writing (unless made on the record during an oral hearing). The motion shall state the relief sought and the basis for the relief and may set forth the authority relied upon. All motions, unless otherwise provided in these rules, shall be directed to the Administrative Law Judge before the initial decision is filed, and to the Commission after the initial decision is filed.

(b) Answer to motions. Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him, or within such longer or shorter period as established by these rules, or as the Administrative Law Judge or the Commission may direct.

(c) Dismissal—(1) By the Administrative Law Judge. The Administrative Law Judge, acting on his own motion, may, at any time after he has been assigned the case:

(i) Dismiss the entire proceeding, without prejudice to counterclaims, if he finds that none of the matters alleged in the complaint state a claim that is cognizable in reparations; or

(ii) Order dismissal of any claim, counterclaim, or party from the proceeding if he finds that such claim or counterclaim (by itself, or as applied to a party) is not cognizable in reparations.

(2) Motion for dismissal by a party. Any party who believes that grounds exist for dismissal of the entire complaint, of any claim therein, of any counterclaim, or of a party from the proceeding, may file a motion for dismissal specifying the claims, counterclaims, or parties to be dismissed and the reasons therefor. Upon consideration of the whole record, the Administrative Law Judge may grant or deny such motion, in whole or in part.

(3) Content and effect of order of dismissal. Any order of dismissal entered pursuant to this rule shall contain a brief statement of the findings and conclusions which serve as the basis for the order. An order of dismissal of the entire proceeding pursuant to this rule shall have the effect of an initial decision which may be appealed to the Commission in accordance with the requirements set forth in §12.401 of these rules.

(d) Motions for procedural orders. Motions for procedural orders, including motions for extensions of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(e) Dilatory motions. Repetitive or numerous motions dealing with the same subject matter shall not be permitted.

§ 12.309 Interlocutory review by the Commission.

Interlocutory review by the Commission of a ruling on a motion by an Administrative Law Judge may be sought only as prescribed in this rule:

(a) When interlocutory appeal may be taken. An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) The appeal is from a ruling pursuant to §12.102, §12.202, or §12.305 refusing to grant a motion to disqualify a Judgment Officer or Administrative Law Judge;

(2) The appeal is from a ruling pursuant to §12.9 suspending an attorney from participation in a reparation proceeding;

(3) Upon a determination by the Administrative Law Judge certified to the Commission either in writing or on the record, that

(i) A ruling sought to be appealed involves a controlling question of law or policy;

(ii) An immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and

(iii) Subsequent reversal of the ruling would cause unnecessary delay or expense to the parties; or

(4) The appeal is from a ruling which satisfies the conditions of paragraphs (a)(3) (i)-(iii) of this section, despite the absence of certification, and extraordinary circumstances are shown to exist.

(b) Procedure to obtain interlocutory review. An application for interlocutory review may be served and filed within ten (10) days after service of a ruling
described in paragraphs (a)(1), (a)(2), and (a)(4) of this section or of notice that a determination has been made pursuant to paragraph (a)(3) of this section. The application for interlocutory review shall contain:

(1) A statement of the facts necessary to an understanding of the controlling questions determined by the Administrative Law Judge, and to an understanding of the extraordinary circumstances warranting interlocutory review by the Commission;

(2) A statement of the question or issue involved in the ruling upon which the application for review is based;

(3) A statement of the reasons why, in the opinion of the party requesting review, the ruling was erroneous and should be reversed or modified; and

(4) A copy of all papers filed by the parties that relate to the subject matter of the ruling at issue, including the order containing the ruling.

Within seven (7) days after service of the application for interlocutory review, any party may file a response in opposition to the application.

(c) Standard for review. In the absence of extraordinary circumstances, the Commission will not review a ruling of an Administrative Law Judge prior to the Commission’s consideration of the proceeding pursuant to subpart F of these rules. A Commission denial of an application for interlocutory review shall be without prejudice to the applying party’s right to raise any argument made in the application as an issue in an appeal taken pursuant to subpart F of these rules.

(d) Proceedings not stayed. The filing of an application for interlocutory review and a grant of review shall not stay proceedings before an Administrative Law Judge (or a Judgment Officer, if applicable) unless that official or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Administrative Law Judge (or, if applicable, the Judgment Officer) and denied.

(e) Interlocutory review by the Commission on its own motion. Nothing in this rule should be construed as restricting the Commission from acting on its own motion to review an interlocutory basis any ruling of an Administrative Law Judge. Proceedings Officer or a Judgment Officer in any proceeding commenced pursuant to §12.26 of these rules.

§ 12.310 Summary disposition.

(a) Filing of motions, answers. Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law concerning all issues of liability in the proceeding may file a motion for summary disposition at any time before a determination is made by the Administrative Law Judge to order an oral hearing in the proceeding. Any adverse party, within ten (10) days after service of the motion, may file and serve opposing papers or may countermove for summary disposition.

(b) Supporting papers. A motion for summary disposition shall include a statement of all material facts as to which the moving party contends that there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, admissions, stipulations, and interrogatories. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this section, unless otherwise ordered by the Administrative Law Judge, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits and other verified material. He may also submit a brief of points and authorities.

(c) Oral argument. Oral argument may be heard at the discretion of the Administrative Law Judge and shall be heard in Washington, DC, or by telephonic conference call. Such argument shall be recorded, and written transcripts shall be made in the event that a grant or denial of summary disposition is reviewed by the Commission.

(d) Summary disposition upon motion of the Administrative Law Judge. If the Administrative Law Judge believes that there may be no genuine issue of material fact to be determined and that one
of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, and may hear oral argument, substantially as provided in paragraphs (a), (b) and (c) of this section.

(e) Ruling on summary disposition. The Administrative Law Judge shall grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice, show that (1) there is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed in the record; and (3) a party is entitled to a decision as a matter of law.

(f) Review of ruling; appeal. An application for interlocutory review of an order denying a motion for summary disposition shall not be allowed. Interlocutory review of an order granting summary disposition which imposes of less than all of the issues in the proceeding may be sought only in accordance with §12.309 of these rules. An order granting summary disposition which is dispositive of all issues, and as to all parties, in the proceeding may be appealed to the Commission in accordance with the requirements set forth in §12.401 of these rules.

§ 12.311 Disposition of proceeding or issues without oral hearing.

If the Administrative Law Judge determines that the documentary proof and other tangible forms of proof submitted by the parties are sufficient to permit resolution of some or all of the factual issues in the proceeding without the need for oral testimony, he may order that all proof relating to such issues be submitted in documentary and tangible form, and dispose of such issues without an oral hearing. In such an event, proof in support of the complaint, answer, and reply, may be found in those verified documents, in depositions on written interrogatories, in admissible documents obtained through discovery, in other verified statements of fact, documents and tangible evidence.

§ 12.312 Oral hearing.

(a) Notification; prehearing order. If and when the proceeding has reached the stage of an oral hearing, the Administrative Law Judge, giving due regard for the convenience of the parties, shall set a time for hearing, as well as a location prescribed by paragraph (b) of this section, and shall file with the Proceedings Clerk, for immediate service upon the parties:

(1) An order requiring the parties to file and serve, within fifteen days after service of the order, a prehearing memorandum setting forth briefly:

(i) A statement of all issues to be tried at the hearing;

(ii) An identification of each witness expected to be called by that party;

(iii) A summary of the testimony each witness is expected to provide; and

(2) A notice stating the time and location of the hearing.

Prior to the hearing, the Administrative Law Judge may issue an order based on the contents of the parties’ memoranda filed pursuant to paragraph (a)(1) of this section, which, unless modified to prevent injustice, shall control the scope of matters to be tried at the oral hearing. If any change in the time or place of the hearing becomes necessary, it shall be made by the Administrative Law Judge, who, in such event, shall file with the Proceedings Clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript. Hearings shall proceed expeditiously and, absent extraordinary circumstances, shall be held in one location and shall continue, without suspension, until concluded.

(b) Location of hearing. Unless the Director of the Office of Proceedings for reasons of administrative economy or practical necessity determines otherwise, and except as provided in this subparagraph, the location of an oral hearing shall be in one of the following cities: Albuquerque, N.M.; Atlanta, Ga.; Boston, Mass.; Chicago, Ill.; Cincinnati, Ohio; Columbia, S.C.; Denver, Colo.; Houston, Tex.; Kansas City, Mo.; Los Angeles, Cal.; Minneapolis, Minn.; New Orleans, La.; New York, N.Y.; Oklahoma City, Okla.; Phoenix, Ariz.; San Diego, Cal.; San Francisco, Cal.; Seattle, Wash.; St. Petersburg, Fla.;
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and Washington, DC. The Administrative Law Judge may, in any case where a party avers, in an affidavit, that none of the foregoing cities is located within 300 miles of his principal residence, waive this paragraph and, upon giving due regard for the convenience of all of the parties, order that the hearing be held in a more convenient locale.

(1) Who may appear. The parties may appear in person, by counsel, or by other representatives of their choosing, subject to the provisions of §12.9 of these rules concerning practice before the Commission.

(2) Effect of failure to appear. If any party to the proceeding fails to appear at the hearing, or at any part thereof, he shall to that extent be deemed to have waived the opportunity for an oral hearing in the proceeding. The Administrative Law Judge, for just cause, may take such action as is appropriate pursuant to §12.35 of these rules against a party who fails to appear at the hearing. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(c) Public hearings. All oral hearings shall be public except that upon application of a party or affected witness the Administrative Law Judge may direct that specific documents or testimony be received and retained non-publicly in order to prevent unwarranted disclosure of trade secrets or sensitive commercial or financial information or an unwarranted invasion of personal privacy.

(d) Conduct of the hearing. Subject to paragraph (e) of this section, and except as otherwise provided, at an oral hearing every party shall be entitled to:

(1) Conduct direct and cross-examination of parties and witnesses. All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the Administrative Law Judge. Unless otherwise ordered by the Administrative Law Judge, parties shall be entitled to present oral direct testimony and other documentary proof, and to conduct direct examine-
the record and shall be the sole official transcript. Copies of transcripts, except those portions granted non-public treatment, shall be available from the reporter at rates not to exceed the maximum rates fixed by the contract between the Commission and the reporter. As soon as practicable after the close of the hearing, the reporter shall transmit to the Proceedings Clerk the transcript of the testimony and the exhibits introduced in evidence at the hearing, except such portions of the transcript and exhibits as shall have already been delivered to the Administrative Law Judge.

(g) Proposed findings of fact and conclusions law; briefs. An Administrative Law Judge, upon his own motion or upon motion of a party, may permit the filing of post-hearing proposed findings of fact and conclusions of law. Absent an order permitting such findings and conclusions, none shall be allowed. Unless otherwise ordered by the Administrative Law Judge and for good cause shown, the proposed findings and conclusions (including briefs in support thereof), shall not exceed twenty-five (25) pages and shall be filed not later than forty-five (45) days after the close of the oral hearing.

§ 12.313 Subpoenas for attendance at an oral hearing.

(a) In general—(1) Application for issuance of subpoenas. An application for a subpoena requiring a party or other person to appear and testify at an oral hearing (subpoena ad testificandum) or to appear and testify and to produce specified documentary or tangible evidence at the hearing (subpoena duces tecum), shall (unless made orally at a hearing) be filed in writing and in duplicate, but need not be served upon other parties. The application shall be accompanied by the original and one copy of the subpoena.

(2) Standards for issuance or denial of subpoenas. The Administrative Law Judge considering any application for a subpoena shall issue the subpoena if he is satisfied the application complies with this rule and the request is not unreasonable, oppressive, excessive in scope or unduly burdensome. In the event the Administrative Law Judge determines that a requested subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it only upon such conditions as he determines fairness requires.

(b) Special requirements relating to application for an issuance of subpoenas for the appearance of commission employees—(1) Form. An application for the issuance of a subpoena shall be made in the form of a written motion served upon all other parties, if the subpoena would require the appearance of a Commissioner or an official or employee of the Commission.

(2) Content. The motion shall specifically describe the material to be produced, the information to be disclosed, or the testimony to be elicited from the witness, and shall show

(i) The relevance of the material, information, or testimony to the matters at issue in the proceeding;

(ii) The reasonableness of the scope of the proposed subpoena; and

(iii) That such material, information, or testimony is not available from other sources.

(3) Rules. The motion shall be decided by the Administrative Law Judge and his order shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the witnesses as may appear necessary and appropriate for the protection of the public interest.

(c) Service of subpoenas—(1) How effected. Service of a subpoena upon a party shall be made in accordance with §12.10 of these rules. Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraph (c) (2) or (3) of this section, and by tendering to him the fees for one day’s attendance and the mileage as specified in paragraph (e) of this section. When the subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service.

(2) Service upon a natural person. Delivery of a copy of a subpoena and tender of fees and mileage to a natural person may be effected by (i) handing
them to the person; (ii) leaving them at his office with the person in charge thereof or, if there is no one in charge, by leaving the subpoena in a conspicuous place therein; (iii) leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; (iv) mailing them by registered or certified mail to him at his last known address; or (v) any other method whereby actual notice is given to him and the fees and mileage are timely made available.

(3) Service upon other persons. When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees and mileage may be effected by

(i) Handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person;

(ii) Mailing them by registered or certified mail to any such representative at his last known address; or

(iii) Any other method whereby actual notice is given to any such representative and the fees and mileage are timely made available.

(d) Motion to quash subpoena. At or any time before the time specified in the subpoena for compliance therewith, a person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the Administrative Law Judge who issued the subpoena, and serve a copy of the motion on the party who requested the subpoena. Such motion shall include a brief statement of the reasons therefor. After due notice to the person upon whose request the subpoena was issued, and an opportunity for that person to respond, the Administrative Law Judge may (1) quash or modify the subpoena, or (2) condition denial of the application to quash or modify the subpoena upon just and reasonable terms, including, on the case of a subpoena ducès tecum, a requirement that the person on whose behalf the subpoena was issued shall advance the reasonable cost of producing documentary or other tangible evidence.

(e) Attendance and mileage fees. Persons summoned to testify at a hearing under requirement of subpoenas are entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. Fees and mileage shall be paid by the party at whose instance the persons are subpoenaed or called.

(f) Enforcement of subpoenas. Upon failure of any person to comply with a subpoena issued at the request of a party, that party may petition the Commission, in its discretion, to institute an action in an appropriate U.S. District Court for enforcement of the subpoena.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.314 Initial decision.

(a) In general. The Administrative Law Judge as soon as practicable after the parties have completed their submissions of proof, or after the conclusion of an oral hearing if one is held, shall render the initial decision, which he shall forthwith file with the Proceedings Clerk, and a copy of which shall be served immediately by the Proceedings Clerk upon each of the parties. The Proceedings Clerk shall also serve a notice, to accompany the initial decision, of the effect of a party’s failure timely to appeal to the Commission the initial decision, as provided in paragraphs (d) and (e) of this section, and the effect of a failure of a party who has been ordered to pay a reparation award timely to file the documents required by §12.407(c).

(b) Content of initial decision. In the initial decision the Administrative Law Judge shall:

(1) Include a brief statement of his findings as to the facts, with references to those portions of the record which support his findings;

(2) Make a determination whether or not the respondent has violated any provision of the Commodity Exchange Act, or rule, regulation or order thereunder;

(3) Make a determination whether the complainant is liable to any respondent who has made a counterclaim in the proceeding;

(4) Determine the amount of damages, if any, that the complainant has sustained as a result of respondent’s violations, the amount of punitive damages if warranted, and the amount, if any, for which complainant is liable
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to a respondent based on a counterclaim; and
(5) Include an order directing either the respondent or the complainant, depending upon whose liability is greater, to pay an amount based on the difference in the amounts determined pursuant to paragraph (b)(4) of this section, on or before a date fixed in the order.

(c) Costs, prejudgment interest. Except as provided in §§12.30(c) and 12.315 of these rules, the Administrative Law Judge may, in the initial decision, award costs (including the cost of instituting the proceeding and, if appropriate, reasonable attorney’s fees) and, if warranted as a matter of law under the circumstances of the particular case, prejudgment interest, to the party in whose favor a judgment is entered.

(d) Effect of initial decision. The initial decision and order shall become the final decision and order of the Commission, without further order by the Commission, thirty (30) days after service thereof, except that:
(1) The initial decision shall not become the final decision as to a party who shall have timely filed and perfected an appeal thereof to the Commission, in accordance with §12.401 of these rules; and
(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after service of the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

(e) Effect of failure to file and perfect an appeal to the Commission. Unless the Commission takes review of an initial decision on its own motion, the timely filing and perfection of an appeal to the Commission of the initial decision is mandatory as a prerequisite to appellate judicial review of a final decision and order entered pursuant to these rules.

§ 12.315 Consequences of overstating damages claims not in excess of $30,000.

If a party, who has claimed damages in excess of $30,000, is adjudged to be entitled to recover less than the sum or value of $30,000, computed without regard to a damage award to an opposing party may be adjudged to be entitled, and exclusive of interest and costs, the Administrative Law Judge may assess such party the cost of the transcript of an oral hearing, if such a hearing is held, and, depending upon whether such party paid any part of the filing fee for the proceeding, deny the party such costs or impose such costs on that party.


Subpart F—Commission Review of Decisions

§ 12.400 Scope and applicability of rules.

The rules set forth in this subpart are applicable to proceedings forwarded pursuant to §12.26(b) and (c) of these rules. Except as provided in §§12.106(e) and 12.403(b) of these rules, the rules set forth in this subpart are not applicable to proceedings forwarded pursuant to §12.26(a) of the Reparation Rules.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.401 Appeal to the Commission.

(a) How effected. Any aggrieved party to a proceeding forwarded pursuant to §12.26 (b) or (c) of these rules may appeal to the Commission an initial decision or other disposition of the entire proceeding by complying with the requirements of this section. An appealing party shall serve upon all parties and file with the Proceedings Clerk a notice of appeal within fifteen (15) days after service of the initial decision or other order disposing of the entire proceeding. The notice need consist only of a brief statement indicating the filing party’s intent to appeal the initial decision, and shall include the date upon which the initial decision was rendered, the names of all parties, and the docket number of the proceeding. A

§ 12.402 Appeal of disposition of less than all claims or parties in a proceeding.

(a) In general. Where two or more different claims for relief are presented, or where multiple parties are involved, in a proceeding forwarded pursuant to §12.26(b) or (c) of these rules, the Judgment Officer or Administrative Law Judge, may upon his own motion or by motion of a party, direct that an initial decision or other order disposing of one or more, but fewer than all of the claims or parties, shall be final and immediately appealable to the Commission. Such a direction may be made only upon an express determination that there is no just reason for delay. When such a direction is made, a party may appeal the initial decision or order in accordance with the procedure prescribed by §12.401 of these rules.

(b) When decision is not appealable. In the absence of such a direction by the Judgment Officer or an Administrative Law Judge, an initial decision or order disposing of fewer than all of the claims or all of the parties shall be subject to revision by the decisionmaker at any time before a disposition is made of all remaining claims or parties, and no appeal may be taken to the Commission pursuant to this rule.
§ 12.403 Commission review on its own motion.

(a) In general. The Commission may on its own motion, within 30 days after it has been served on all parties, determine to review an initial decision, or other order disposing of all issues in the proceeding as to all claims and all parties, in a proceeding forwarded pursuant to §12.26 (b) and (c) of these rules. In such event, the Commission may determine the scope of the issues on review, and make provisions for the filing of briefs or, if deemed appropriate, such other means for the parties to present their views. The parties shall be duly notified thereof by the Proceedings Clerk.

(b) Commission review of a final decision in a voluntary decisional proceeding. If such action is necessary to prevent manifest injustice, the Commission may, upon its own motion, review a final decision issued pursuant to §12.106 of these rules by appropriate order filed with the Proceedings Clerk within 30 days after service upon the parties of the final decision. In such event, the Commission may determine the scope of the issue on review, make provisions for the filing of briefs or, if deemed appropriate, such other means for the parties to present their views. The parties shall be duly notified thereof by the Proceedings Clerk.

§ 12.404 The record of proceedings.

The record of proceedings on appeal before the Commission shall include: The pleadings; motions and requests filed, and rulings thereon; the transcript of the testimony taken at an oral hearing, together with the exhibits filed therein; the transcript of testimony taken during an oral examination by telephone; any statements or stipulations filed in any proceeding; any documents or papers filed in connection with prehearing conferences; such proposed findings of fact, conclusions, and orders and briefs as may have been permitted to be filed in connection with an oral hearing; such statements of objections, and briefs in support thereof, as may have been filed in the proceedings; and the initial (or final) decision, or other order disposing of issues in the proceeding.

§ 12.405 Leave to adduce additional evidence.

Any time prior to issuance of its final decision pursuant to §12.406, the Commission may, after notice to the parties and an opportunity for them to present their views, reopen the hearing to receive further evidence. The application shall show to the satisfaction of the Commission that the additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence at the hearing. The Commission may receive the additional evidence or may remand the proceeding to the Judgment Officer or Administrative Law Judge to receive the additional evidence.

§ 12.406 Final decision of the Commission.

(a) Opinion and order. Unless the Commission, in accordance with paragraph (b) of this section, orders summary affirmance of the initial decision, the Commission’s opinion and order in a proceeding appealed pursuant to §12.401 of these rules shall constitute the Commission’s final decision, effective upon service. On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision and make any findings or conclusions which in its judgment are warranted based on the record in the proceeding.

(b) Order on summary affirmance. If the Commission, in its opinion, finds that the result reached in the initial decision is substantially correct and that none of the arguments on appeal made by the appealing party raise any important question of law or policy, the Commission may, by appropriate order, summarily affirm the initial decision and order without opinion, which shall constitute the Commission’s final decision, effective upon service. Unless the Commission expressly indicates otherwise in its order, an order of summary affirmance does
§ 12.407 Satisfaction of reparation award; enforcement; sanctions.

(a) Satisfaction of reparation award—
(1) Where initial decision has become the final decision. Any reparation award ordered in an initial decision, or similar dispositive order (but not a final decision issued pursuant to §12.106 of these rules), shall be satisfied in full within forty-five (45) days after service of the initial decision, unless a timely appeal thereof has been perfected pursuant to §12.401, or unless the Commission, pursuant to §12.403(a), has stayed the effective date of the initial decision.

(2) Final decision pursuant to §12.406. Any reparation award ordered in a final decision of the Commission issued pursuant to §12.406 of these rules shall be satisfied in full within fifteen (15) days after service of the final decision, or such other longer period of time as may be specified in the final decision, unless a petition for review is filed in accordance with section 14(e) of the Act, 7 U.S.C. 18(e).

(b) Enforcement of reparation award. If any person against whom a reparation award has been made does not timely comply with paragraph (a) or (b) of this section, the party in whose favor the award is made is entitled to seek enforcement of award in accordance with the procedure prescribed in section 14(d) of the Commodity Exchange Act, 7 U.S.C. 18(d).

(c) Automatic suspension. A person required to pay a reparation award shall be prohibited from trading on all contract markets and if such person is registered, his registration shall be suspended automatically, without further notice, unless such person shall, within fifteen (15) days after the time limit for satisfaction of an award (as prescribed in paragraph (a) or (b) of this section) expires, file with the Proceedings Clerk and serve on the other parties:

(1) A copy of a certified check or the equivalent showing satisfaction of the award; or

(2) A sworn release executed by each recipient of a reparation award, which has not been satisfied by payment with a certified check or the equivalent; or

(3) A verified statement that a judicial appeal has been filed and perfected in accordance with section 14(e) of the Act, 7 U.S.C. 18(e). (This paragraph is applicable only in proceedings commenced pursuant to §12.26(b) or (c), and only if the person has timely filed and perfected an appeal to the Commission as prescribed in §12.401.)

(d) Reinstatement. The sanctions imposed in accordance with paragraph (c) of this section shall remain in effect until the person required to pay the reparation award demonstrates to the satisfaction of the Commission that he has paid the amount required in full including prejudgment interest if awarded and post-judgment interest at the prevailing rate computed in accordance with 28 U.S.C. 1961 from the date directed in the final order to the date of payment, compounded annually. In the event an award of post-judgment interest is inadvertently omitted, such interest nevertheless shall run as calculated in accordance with 28 U.S.C. 1961 and the part 12 Rules.
§ 12.408 Delegation of authority to the General Counsel.

Pursuant to the authority granted under section 2(a)(4) and 2(a)(11) of the Commodity Exchange Act, as amended, 7 U.S.C. 4a(c) and 4a(j), the Commission hereby delegates, until such time as it orders otherwise, the following functions to the General Counsel, to be performed by him or such person or persons under his direction as he may designate from time to time:

(a) With respect to reparation proceedings conducted pursuant to section 14 of the Commodity Exchange Act, as amended, 7 U.S.C. 18, and subject to the Commission’s Reparation Rules as set forth in part 12 of this chapter, to:

(1) Consider and decide miscellaneous procedural motions that may be directed to the Commission pursuant to part 12 of these rules after the initial decision or other order disposing of the entire proceeding has been filed;

(2) Remand, with or without specific instructions, initial decisions or other orders disposing of the entire proceeding to the appropriate officer (Director of the Office of Proceedings, Judgment Officer, or Administrative Law Judge) in the following situations:

(i) Where a default order or award has been made pursuant to part 12 of these rules and a motion to vacate the default or an equivalent request has been made; or

(ii) Where, in his judgment, clarification or supplementation of an initial decision or other order disposing of the entire proceeding prior to Commission review is appropriate; and

(iii) Where, in his judgment, a ministerial act necessary to the proper conduct of the proceeding has not been performed.

(3) Deny applications for interlocutory review by the Commission of a ruling of an Administrative Law Judge in cases in which the Administrative Law Judge has not certified the ruling to the Commission in the manner prescribed by §12.309 of these rules, and the ruling does not concern the disqualification of, or a motion to disqualify, an Administrative Law Judge, or Judgment Officer, or the suspension of, or failure to suspend, an attorney from participating in reparation proceedings;

(4) Dismiss any appeal from an initial decision or other disposition of the entire proceeding by an Administrative Law Judge (or Judgment Officer), in a proceeding where such appeal is not filed or perfected in accordance with §12.401, and deny any application for interlocutory review if it is not filed in accordance with §12.309 of these rules;

(5) Strike any filing that does not meet the requirements of, or is not perfected in accordance with, these part 12 rules; and

(6) Enter any order that, in his judgment, will facilitate or expedite Commission review of an initial decision or other order disposing of the entire proceeding.

(b) Notwithstanding the provisions of paragraph (a) of this section, in any case in which he believes it appropriate, the General Counsel or his designee may submit the matter to the Commission for its consideration.

(c) Within seven (7) days after service of a ruling issued pursuant to this §12.408, a party may file with the Commission a petition for reconsideration of the ruling. Unless the Commission orders otherwise, the filing of a petition for reconsideration shall not operate to stay the effective date of such ruling.

PART 13—PUBLIC RULEMAKING PROCEDURES

Sec.
13.1 Scope.
13.2 Petition for issuance, amendment, or repeal of a rule.
13.3 Notice of proposed rulemaking.
13.4 Public participation in rulemaking.
13.5 Exceptions to notice requirement and public participation.
13.6 Promulgation of rules; publication.

AUTHORITY: Pub. L. 93–463, Sec. 101(a) (11), 88 Stat. 1391, 7 U.S.C. 4a(j), unless otherwise noted.

SOURCE: 41 FR 17537, Apr. 27, 1976, unless otherwise noted.

§ 13.1 Scope.

The rules of part 13 set forth the procedures of the Commodity Futures Trading Commission for the formulation, amendment or repeal of a rule or regulation, insofar as those procedures directly affect the public. Unless otherwise stated, the rules apply to all rulemaking by the Commission, except to the extent the rulemaking involves Commission management or personnel or public property, loans, grants, benefits or contracts.

§ 13.2 Petition for issuance, amendment, or repeal of a rule.

Any person may file a petition with the Secretariat of the Commission for the issuance, amendment or repeal of a rule of general application. The petition shall be directed to Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, and shall set forth the text of any proposed rule or amendment or shall specify the rule the repeal of which is sought. The petition shall further state the nature of the petitioner’s interest and may state arguments in support of the issuance, amendment or repeal of the rule. The Secretariat shall acknowledge receipt of the petition, refer it to the Commission for such action as the Commission deems appropriate, and notify the petitioner of the action taken by the Commission. Except in affirming a prior denial or when the denial is self-explanatory, notice of a denial in whole or in part of a petition shall be accompanied by a brief statement of the grounds of denial.

[41 FR 17537, Apr. 27, 1976, as amended at 60 FR 49355, Sept. 25, 1995]

§ 13.3 Notice of proposed rulemaking.

Whenever the Commission proposes to issue, amend, or repeal any rule or regulation of general application, there shall first be published in the FEDERAL REGISTER a notice of the proposed action. The notice shall include:

(a) A statement of the time, place and nature of the rulemaking procedures, with particular reference to the manner in which interested persons shall be afforded the opportunity to participate in such proceedings;

(b) Reference to the authority under which the rule is proposed; and

(c) Either the terms or substance of the proposed rule or a description of the subjects and issues involved.

§ 13.4 Public participation in rulemaking.

(a) Written comments. Interested persons will be afforded an opportunity to participate in a rulemaking proceeding of which notice has been given pursuant to §13.3 of these rules through the submission of statements, information, opinion, and arguments in the manner stated in the notice.

(b) Hearings. When required or permitted by law the Commission may hold hearings in connection with a rulemaking proceeding at which interested persons may be heard, either by oral presentation or upon written submission, and may adopt such procedures as in its judgment will best serve the purpose of the rulemaking proceeding.

§ 13.5 Exceptions to notice requirement and public participation.

(a) Notice under §13.3 and public participation under §13.4 shall not be required when persons subject to the rules are named and are either personally served or otherwise given actual notice of proposed rulemaking in accordance with law.

(b) Except when notice or hearing is required by statute the provisions of §§13.3 and 13.4 shall not apply.
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(1) To interpretative rules, general statements of policy, or rules of agency organization, procedure or practice; or
(2) When the Commission for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the release issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

§ 13.6 Promulgation of rules; publication.

After consideration of all relevant matters of fact, law, and policy, including all relevant matters presented by interested persons in the proceedings, the Commission will take such action on the proposed rule as it deems appropriate. Any rule adopted will be published in the FEDERAL REGISTER and the announcement of the rule will incorporate a concise statement of the rule’s basis and purpose, as well as any necessary findings. Announcement will also be made in the FEDERAL REGISTER if a proposal is subsequently withdrawn. The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except:

(a) A substantive rule which grants or recognizes an exception or relieves a restriction;
(b) Interpretive rules and statements of policy; or
(c) As otherwise provided by the Commission for good cause found and published with the rule.

PART 14—RULES RELATING TO SUSPENSION OR DISBARMENT FROM APPEARANCE AND PRACTICE

Sec.
14.1 Scope.
14.2 Definitions of appearance and practice.
14.3 Hearings.
14.4 Violation of Commodity Exchange Act.
14.5 Criminal conviction.
14.6 Disbarment or suspension by licensing authority.
14.8 Lack of requisite qualifications, character and integrity.
14.9 Duty to file information concerning adverse judicial or administrative action.
14.10 Reinstatement.

AUTHORITY: Pub. L. 93–463, sec. 101(a) (11), 88 Stat. 1391, 7 U.S.C. 4a(j), unless otherwise noted.
SOURCE: 41 FR 28472, July 12, 1976, unless otherwise noted.

§ 14.1 Scope.

The rules of this part describe the circumstances under which persons may be denied, either temporarily or permanently, the privilege of appearing or practicing before the Commission as an attorney or accountant. An attorney may also be excluded from further participation in a particular adjudicatory proceeding in accordance with the provisions of §10.11(b) of this chapter or from further participation in a particular investigatory proceeding in accordance with the provisions of §11.7(c)(2) of this chapter.

§ 14.2 Definitions of appearance and practice.

(a) Appearance. For the purpose of this part, “appearance” refers to the representation of a person by another who appears in his behalf at any adjudicatory, investigatory or rulemaking proceeding conducted before the Commission, including but not limited to those proceedings encompassed in parts 10 through 13 of the Commission’s rules.

(b) Practice. For the purpose of this part, practicing before the Commission shall include but shall not be limited to:

(1) The preparation of any statement, opinion or other paper by any attorney or accountant filed with or submitted to the Commission on behalf of another person in or in connection with any application, notification, report or other document; and

(2) Transacting any other formal business with the Commission, on behalf of another person, in the capacity of an attorney or accountant.

§ 14.3 Hearings.

Hearings required or permitted to be held under provisions of this part shall be held before an Administrative Law Judge, utilizing the procedures established in the rules of practice (part 10) for adjudicatory proceedings. Any proceeding brought under provisions of
§ 14.4 Violation of Commodity Exchange Act.

The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission, after notice of and opportunity for hearing in the matter, to have violated, caused, or aided and abetted any violation of the Commodity Exchange Act, as amended, 7 U.S.C. 1 et seq., or the rules and regulations adopted thereunder.

§ 14.5 Criminal conviction.

Any person who after licensing or certification to practice his profession by any competent authority has been convicted of any felony or of a misdemeanor involving fraud or involving moral turpitude in matters related to the regulatory responsibilities of the Commission, and whose conviction has not been reversed by an appellate court, may not appear or practice before the Commission. A conviction within the meaning of this section shall be deemed to have occurred when the convicting court enters its judgment or order, regardless of whether an appeal is pending or could be taken, and includes a judgment on a plea of nolo contendere.

§ 14.6 Disbarment or suspension by licensing authority.

Any attorney who has been suspended or disbarred by a Court of the United States or any state or territory or the District of Columbia and any person whose license to practice as an accountant has been revoked or suspended in any state or territory or the District of Columbia may not appear or practice before the Commission during the period when such suspension or revocation is in effect. A suspension or revocation shall be deemed to have occurred when the disbarred, suspending or revoking agency or tribunal enters its order, regardless of whether appeal is pending or could be taken, and includes a judgment or order on a plea of nolo contendere or the procedural equivalent of such a plea. For purposes of this section it shall be irrelevant that any attorney or accountant who has been suspended, disbarred, or otherwise disqualified from practice before a court or in a jurisdiction continues in professional good standing before other courts or in other jurisdictions.


(a) Temporary suspension. The Commission, with due regard to the public interest, and without preliminary hearing, may by order temporarily suspend from appearing or practicing before it any person who, on or after the effective date of this rule has by reason of his misconduct by any court of competent jurisdiction (i) whether by consent, default, upon summary judgment or after trial, in any action brought by the Commission based upon violations of any provision of the Commodity Exchange Act, as amended, 15 U.S.C. 77a to 80b–20 or of rules and regulations adopted thereunder, or (ii) after trial or upon summary judgment in any action brought by the U.S. Securities and Exchange Commission based upon any violation of the federal securities laws (15 U.S.C. 77a to 80b–20) or of rules and regulations adopted thereunder;

2) Found by any court of competent jurisdiction (whether by consent, default, upon summary disposition or after hearing) in any administrative proceeding in which the Commission is a complainant and to which he is a party, to have committed, caused, or aided and abetted a violation of any provision of the Commodity Exchange Act, as amended, or of the rules and regulations promulgated under any of those statutes;

3) Found upon summary judgment or after trial by any court of competent jurisdiction in any action brought by the U.S. Securities and Exchange Commission to which he is a party, or found by the Securities and Exchange
Commodity Futures Trading Commission

§ 14.10 Reinstatement.

Any person who is disqualified from appearing or practicing before the

[41 FR 28472, July 12, 1976, as amended at 60 FR 49335, Sept. 25, 1995]
Commission under any of the provisions of this part may at any time file an application of reinstatement and the applicant may, in the Commission’s discretion, be afforded a hearing on the application. However, denial of the privilege of appearing or practicing before the Commission shall continue unless and until the applicant has been reinstated by order of the Commission.

PART 15—REPORTS—GENERAL PROVISIONS

Sec. 15.00 Definitions of terms used in parts 15 to 19, and 21 of this chapter.
15.01 Persons required to report.
15.02 Reporting forms.
15.03 Reporting levels.
15.04 [Reserved]
15.05 Designation of agent for foreign persons.
15.06 Delegations.

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

§ 15.00 Definitions of terms used in parts 15 to 19, and 21 of this chapter.

As used in parts 15 to 19, and 21 of this chapter:
(a) Cash or Spot, when used in connection with any commodity, means the actual commodity as distinguished from a futures or options contract in such commodity.
(b) Clearing member 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, registered derivatives transaction execution facility, or registered entity under section 1a(29) of the Act.
(c) Clearing organization 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, registered derivatives transaction execution facility or registered entity under section 1a(29) of the Act.
(d) Compatible data processing media means data processing media approved by the Commission or its designee.
(e) Customer means “customer” (as defined in §1.3(k) of this chapter) and “options customer” (as defined in §1.3(jj) of this chapter).
(f) Customer trading program means any system of trading offered, sponsored, promoted, managed or in any other way supported by, or affiliated with, a futures commission merchant, an introducing broker, a commodity trading advisor, a commodity pool operator, or other trader, or any of its officers, partners or employees, and which by agreement, recommendations, advice or otherwise, directly or indirectly controls trading done and positions held by any other person. The term includes, but is not limited to, arrangements where a program participant enters into an expressed or implied agreement not obtained from other customers and makes a minimum deposit in excess of that required of other customers for the purpose of receiving specific advice or recommendations which are not made available to other customers. The term includes any program which is of the character of, or is commonly known to the trade as, a managed account, guided account, discretionary account, commodity pool or partnership account.
(g) Discretionary account means a commodity futures or commodity option trading account for which buying or selling orders can be placed or originated, or for which transactions can be effected, under a general authorization and without the specific consent of the customer, whether the general authorization for such orders or transactions is pursuant to a written agreement, power of attorney, or otherwise.
(h) Exclusively self-cleared contract means a cleared contract for which no persons, other than a reporting market and its clearing organization, are permitted to accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trade.
(i) Foreign clearing member means a “clearing member” (as defined by paragraph (b) of this section) who resides or is domiciled outside of the United States, its territories or possessions.
(j) **Foreign trader** means any trader (as defined in paragraph (s) of this section) who resides or is domiciled outside of the United States, its territories or possessions.

(k) **Futures, futures contract, future delivery or contract for future delivery,** means any contract for the purchase or sale of any commodity for future delivery that is executed on or subject to the rules of a reporting market, including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts.

(l) **Guided account program** means any customer trading program which limits trading to the purchase or sale of a particular contract for future delivery of a commodity or a particular commodity option that is advised or recommended to the participant in the program.

(m) **Managed account program** means a customer trading program which includes two or more discretionary accounts traded pursuant to a common plan, advice or recommendations.

(n) **Open contracts** means “open contracts” (as defined in §1.3(t) of this chapter) and commodity option positions held by any person on or subject to the rules of a board of trade which have not expired, been exercised, or offset.

(o) **Option, options, option contract, or options contract,** unless specifically provided otherwise, means any contract for the purchase or sale of a commodity option that is executed on or subject to the rules of a reporting market, including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts.

(p) **Reportable position** means:

(1) For reports specified in parts 17, 18 and §19.00(a)(2) and (a)(3) of this chapter any open contract position that at the close of the market on any business day equals or exceeds the quantity specified in §15.03 of this part in either:

   (i) Any one futures of any commodity on any one reporting market, excluding futures contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market, which at the close of the market on the last business day of the week exceeds the net quantity limit in spot, single or in all-months fixed in §150.2 of this chapter for the particular commodity and reporting market.

   (ii) Long or short put or call options that exercise into the same future of any commodity, or other long or short put or call commodity options that have identical expirations and exercise into the same commodity, on any one reporting market.

(2) For the purposes of reports specified in §19.00(a)(1) of this chapter, any combined futures and futures-equivalent option open contract position as defined in part 150 of this chapter in any one month or in all months combined, either net long or net short, in any commodity on any one reporting market, excluding futures positions against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market, which at the close of the market on the last business day of the week exceeds the net quantity limit in spot, single or in all-months fixed in §150.2 of this chapter for the particular commodity and reporting market.

(q) **Reporting market** means a designated contract market, registered entity under section 1a(29) of the Act, and unless determined otherwise by the Commission with respect to the facility or a specific contract listed by the facility, a registered derivatives transaction execution facility.

(r) **Special account** means any commodity futures or option account in which there is a reportable position.

(s) **Trader** means a person who, for his own account or for an account which he controls, makes transactions in commodity futures or options, or has such transactions made.


§ 15.01 Persons required to report.

Pursuant to the provisions of the Act, the following persons shall file reports with the Commission with respect to such commodities, on such forms, at such time, and in accordance with such directions as are hereinafter set forth:

(a) **Reporting markets**—as specified in parts 16, 17, and 21 of this chapter.

(b) **Futures commission merchants, clearing members, foreign brokers, introducing brokers, and traders**—as
§ 15.02  Reporting forms.

Forms on which to report may be obtained from any office of the Commission or via the Internet (http://www.cftc.gov). Forms to be used for the filing of reports follow, and persons required to file these forms may be determined by referring to the rule listed in the column opposite the form number.

<table>
<thead>
<tr>
<th>Form No.</th>
<th>Title</th>
<th>Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>40</td>
<td>Statement of Reporting Trader</td>
<td>18.04</td>
</tr>
<tr>
<td>01</td>
<td>Positions of Special Accounts</td>
<td>17.00</td>
</tr>
<tr>
<td>102</td>
<td>Identification of Special Accounts</td>
<td>17.01</td>
</tr>
<tr>
<td>204</td>
<td>Cash Positions of Grain Traders (including OIseeds and Products)</td>
<td>19.00</td>
</tr>
<tr>
<td>304</td>
<td>Cash Positions of Cotton Traders</td>
<td>19.00</td>
</tr>
</tbody>
</table>

(Approved by the Office of Management and Budget under control numbers 3038–0007 and 3038–0009)

[69 FR 76397, Dec. 21, 2004]

§ 15.03  Reporting levels.

(a) Definitions. For purposes of this section:

Broad-based security index is a group or index of securities that does not constitute a narrow-based security index.

HedgeStreet products are contracts offered by HedgeStreet, Inc., a designated contract market, that pay up to $10.00 if in the money upon expiration.

Major foreign currency is the currency, and the cross-rates between the currencies, of Japan, the United Kingdom, Canada, Australia, Switzerland, Sweden and the European Monetary Union.

Narrow-based security index has the same meaning as in section 1a(25) of the Commodity Exchange Act.

Security futures product has the same meaning as in section 1a(32) of the Commodity Exchange Act.

(b) The quantities for the purpose of reports filed under parts 17 and 18 of this chapter are as follows:

<table>
<thead>
<tr>
<th>Commodity</th>
<th>Number of contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agricultural:</td>
<td></td>
</tr>
<tr>
<td>Cocoa</td>
<td>100</td>
</tr>
<tr>
<td>Coffee</td>
<td>50</td>
</tr>
<tr>
<td>Corn</td>
<td>250</td>
</tr>
<tr>
<td>Cotton</td>
<td>100</td>
</tr>
<tr>
<td>Feeder Cattle</td>
<td>50</td>
</tr>
<tr>
<td>Frozen Concentrated Orange Juice</td>
<td>50</td>
</tr>
<tr>
<td>Lean Hogs</td>
<td>100</td>
</tr>
<tr>
<td>Live Cattle</td>
<td>100</td>
</tr>
<tr>
<td>Milk, Class III</td>
<td>50</td>
</tr>
<tr>
<td>Oats</td>
<td>60</td>
</tr>
<tr>
<td>Rough Rice</td>
<td>50</td>
</tr>
<tr>
<td>Soybeans</td>
<td>150</td>
</tr>
<tr>
<td>Soybean Meal</td>
<td>200</td>
</tr>
<tr>
<td>Soybean Oil</td>
<td>200</td>
</tr>
<tr>
<td>Sugar No. 11</td>
<td>500</td>
</tr>
<tr>
<td>Sugar No. 14</td>
<td>100</td>
</tr>
<tr>
<td>Wheat</td>
<td>150</td>
</tr>
</tbody>
</table>

Broad-Based Security Indexes:

Municipal Bond Index | 300
S&P 500 Stock Price Index | 1,000
Other Broad-Based Securities Indexes | 200

Financial:

30-Day Fed Funds | 600
3-Month (13-Week) U.S. Treasury Bills | 150
2-Year U.S. Treasury Notes | 1,000
3-Year U.S. Treasury Notes | 750
5-Year U.S. Treasury Notes | 2,000
10-Year U.S. Treasury Notes | 2,000
30-Year U.S. Treasury Bonds | 1,500
1-Month LIBOR Rates | 600
3-Month Eurodollar Time Deposit Rates | 3,000
3-Month Euribor | 100
2-Year German Federal Government Debt | 500
5-Year German Federal Government Debt | 800
10-Year German Federal Government Debt | 1,000
Goldman Sachs Commodity Index | 100
Major Foreign Currencies | 400
Other Foreign Currencies | 100
U.S. Dollar Index | 50

Natural Resources:

Copper | 100
Crude Oil, Sweet | 350
Commodity Futures Trading Commission

§ 15.05

<table>
<thead>
<tr>
<th>Commodity</th>
<th>Number of contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crude Oil, Sweet—No. 2 Heating Oil Crack Spread</td>
<td>250</td>
</tr>
<tr>
<td>Crude Oil, Sweet—Unleaded Gasoline Crack Spread</td>
<td>150</td>
</tr>
<tr>
<td>Gold</td>
<td>200</td>
</tr>
<tr>
<td>Natural Gas</td>
<td>200</td>
</tr>
<tr>
<td>No. 2 Heating Oil</td>
<td>250</td>
</tr>
<tr>
<td>Platinum</td>
<td>50</td>
</tr>
<tr>
<td>Silver Bullion</td>
<td>150</td>
</tr>
<tr>
<td>Unleaded Gasoline</td>
<td>150</td>
</tr>
<tr>
<td>Unleaded Gasoline—No. 2 Heating Oil Spread Swap</td>
<td>150</td>
</tr>
<tr>
<td>Security Futures Products: Individual Equity Security</td>
<td>1,000</td>
</tr>
<tr>
<td>Narrow-Based Security Index</td>
<td>200</td>
</tr>
<tr>
<td>Hedge Street Products</td>
<td>1,250,000</td>
</tr>
<tr>
<td>TRAKRS</td>
<td>50,000</td>
</tr>
<tr>
<td>All Other Commodities</td>
<td>25</td>
</tr>
</tbody>
</table>

1 For purposes of part 17, positions in HedgeStreet Products and TRAKRS should be reported by rounding down to the nearest 1,000 contracts and dividing by 1,000.


§ 15.04 [Reserved]

§ 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) 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.

(b) Any futures commission merchant who makes or causes to be made any futures contract or option contract for the account of any foreign broker or foreign trader, and any introducing broker who introduces such an account to a futures commission merchant, shall thereupon be deemed to be the agent of the foreign broker 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 or the foreign trader with respect to any futures or option contracts which are or have been maintained in such accounts carried by the futures commission merchant. In the case of a futures commission merchant who makes or causes to be made any futures or option contract for the account of a foreign broker, the futures commission merchant and the introducing broker, if any, shall also be the agent of the customers of the foreign broker (including any customer who is also a foreign broker and its customers) who have positions in the foreign broker’s futures or option contract account carried by the futures commission merchant for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission to the customer with respect to any futures or option contracts which are or have been maintained in such accounts carried by the futures commission merchant. Service or delivery of any communication issued by or on behalf of the Commission to a futures commission merchant or to an introducing broker pursuant to such agency shall constitute valid and effective service or delivery upon the foreign broker, a customer of the foreign broker or the foreign trader. A futures commission merchant or an introducing broker who has been served with, or to whom there has been delivered, a communication issued by or on behalf of the Commission to a foreign broker, a customer of the foreign broker or the foreign trader shall transmit the communication promptly and in a manner which is reasonable.
§ 15.05

under the circumstances, or in a manner specified by the Commission in the communication, to the foreign broker, a customer of the foreign broker or the foreign trader.

(c) It shall be unlawful for any futures commission merchant and for any introducing broker to open or cause to be opened a futures or options contract account for, or to effect or cause to be effected transactions in futures contracts or option contracts for an existing account of, a foreign broker or foreign trader unless the futures commission merchant or introducing broker informs the foreign broker or foreign trader prior thereto, in any reasonable manner which the futures commission merchant or introducing broker deems to be appropriate, of the requirements of this section.

(d) The requirements of paragraphs (b) and (c) of this section shall not apply to any account carried by a futures commission merchant or introduced by an introducing broker if the foreign broker, customer of a foreign broker, or foreign trader for whose benefit such account is carried or introduced 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 futures commission merchant and to the introducing broker, if any, prior to the opening of an account, or placing orders for transactions in futures contracts or option contracts of an existing account, with the futures commission merchant or introducing broker. This agreement must authorize the person domiciled in the United States to serve as the agent of the foreign broker and 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 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 the foreign broker, any of its customers or the foreign trader must 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 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 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 expires, terminates, 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.

(i) Any reporting market that is a registered entity under section 1a(29)(E) of the Act that permits a foreign clearing member or foreign trader to clear or effect contracts, agreements or transactions on the trading facility or its clearing organization, shall be deemed to be the agent of the foreign clearing member or foreign trader with respect to any such contracts, agreements or transactions cleared or executed by the foreign clearing member or the foreign trader. Service or delivery of any communication issued by or on behalf of the Commission to the reporting market shall constitute valid and effective service upon the foreign clearing member or foreign trader. The reporting 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 clearing member or foreign trader.
§ 15.06 Delegations.

(a) The Commission hereby delegates, until the Commission orders otherwise, the authority to approve data processing media, as referenced in §15.00(d), for data submissions to the Director of the Division of Market Oversight, to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(b) [Reserved]

[74 FR 12190, Mar. 23, 2009]

PART 16—REPORTS BY CONTRACT MARKETS AND SWAP EXECUTION FACILITIES

Sec.
16.00 Clearing member reports.
16.01 Publication of market data on futures, swaps and options thereon; trading volume, open contracts, prices, and critical dates.
16.02 Daily trade and supporting data reports.
16.03–16.05 [Reserved]
16.06 Errors or omissions.
16.07 Delegation of authority to the Director of the Division of Market Oversight.

Authority: 7 U.S.C. 2, 6a, 6c, 6g, 6i, and 7, and 7b–3, as amended by Pub. L. 111–203, 124 Stat. 1376.
§ 16.00 Clearing member reports.

(a) Information to be provided. Each reporting market shall submit to the Commission, in accordance with paragraph (b) of this section, a report for each business day, showing for each clearing member, by proprietary and customer account, the following information separately for futures by commodity and by future, and, for options, by underlying futures contract (for options on futures contracts) or by underlying commodity (for other commodity options), and by put, by call, by expiration date and by strike price:

(1) The total of all long open contracts and the total of all short open contracts carried at the end of the day covered by the report, excluding from open futures contracts the number of contracts against which delivery notices have been stopped or against which delivery notices have been issued by the clearing organization of the reporting market;

(2) The quantity of contracts bought and the quantity of contracts sold during the day covered by the report;

(3) [Reserved]

(4) The quantity of purchases of futures for commodities or for derivatives positions and the quantity of sales of futures for commodities or for derivatives positions which are included in the total quantity of contracts bought and sold during the day covered by the report, and the names of the clearing members who made the purchases or sales;

(5) For futures, the quantity of the commodity for which delivery notices have been issued by the clearing organization of the reporting market and the quantity for which notices have been stopped during the day covered by the report.

(b) Form, manner and time of filing reports. Unless otherwise approved by the Commission or its designee, reporting markets shall submit the information required by paragraph (a) of this section as follows:

(1) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission or its designee; provided however, the information shall be made available to the Commission or its designee in hard copy upon request; and

(2) When such data is first available but not later than 12:00 p.m. on the business day following the day to which the information pertains. Unless otherwise specified by the Commission or its designee, the stated time is eastern time for information concerning markets located in that time zone, and central time for information concerning all other markets.

(c) Exclusively self-cleared contracts. Unless determined otherwise by the Commission, paragraph (a) of this section shall not apply to transactions involving exclusively self-cleared contracts.

(Approved by the Office of Management and Budget under control number 3038–0009)

§ 16.01

(i) The option delta, where a delta system is used; (ii) The total gross open contracts for futures, excluding those contracts against which delivery notices have been stopped; (iii) For futures products that specify delivery, open contracts against which delivery notices have been issued on that business day; (iv) The total volume of trading, excluding transfer trades or office trades:

(A) For swaps and options on swaps, trading volume shall be reported in terms of the number of contracts traded for standard-sized contracts (i.e., contracts with a set contract size for all transactions) or in terms of notional value for non-standard-sized contracts (i.e., contracts whose contract size is not set and can vary for each transaction).

(B) [Reserved]

(v) The total volume of futures/options/swaps/swaptions exchanged for commodities or for derivatives positions that are included in the total volume of trading; and

(vi) The total volume of block trades included in the total volume of trading.

(b) Prices. (1) Each reporting market must record the following contract types separately

(i) For futures, by commodity and by futures expiration;

(ii) For options, by underlying futures contracts for options on futures contracts or by underlying commodity for options on commodities, and by put, by call, by expiration date and by strike price;

(iii) For swaps, by product type and contract month or term life of the swap; and

(iv) For options on swaps or classes of options on swaps, by underlying swap contracts for options on swap contracts or by underlying commodity for options on swaps on commodities, and by put, by call, by expiration date and by strike price.

(2) Each reporting market must record for the trading session and for the opening and closing periods of trading as determined by each reporting market:

(i) The opening and closing prices of each futures, option, swap or swaption;

(ii) The price that is used for settlement purposes, if different from the closing price; and

(iii) The lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the reporting market reasonably determines accurately reflects market conditions. Bids and offers vacated or withdrawn shall not be used in making this determination. A bid is vacated if followed by a higher bid or price and an offer is vacated if followed by a lower offer or price.

(3) If there are no transactions, bids, or offers during the opening or closing periods, the reporting market may record as appropriate:

(i) The first price (in lieu of opening price data) or the last price (in lieu of closing price data) occurring during the trading session, clearly indicating that such prices are the first and last prices; or

(ii) Nominal opening or nominal closing prices that the reporting market reasonably determines to accurately reflect market conditions, clearly indicating that such prices are nominal.

(4) Additional information. Each reporting market must record the following information with respect to transactions in commodity futures, commodity options, swaps or options on swaps on that reporting market:

(i) The method used by the reporting market in determining nominal prices and settlement prices; and

(ii) If discretion is used by the reporting market in determining the opening and/or closing ranges or the settlement prices, an explanation that certain discretion may be employed by the reporting market and a description of the manner in which that discretion may be employed. Discretionary authority must be noted explicitly in each case in which it is applied (for example, by use of an asterisk or footnote).

(c) Critical dates. Each reporting market must report to the Commission, for each futures contract, the first notice date and the last trading date, and for each option contract, the expiration date in accordance with paragraph (d) of this section.

(d) Form, manner and time of filing reports. Unless otherwise approved by the Commission or its designee, reporting
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markets must submit to the Commission the information specified in paragraphs (a), (b), and (c) of this section as follows:

(1) Using the format, coding structure and electronic data transmission procedures approved in writing by the Commission or its designee; provided however, that the information must be made available to the Commission or its designee in hard copy upon request;

(2) When each such form of the data is first available, but not later than 7:00 a.m. on the business day following the day to which the information pertains for the delta factor and settlement price and not later than 12:00 p.m. for the remainder of the information. Unless otherwise specified by the Commission or its designee, the stated time is U.S. eastern standard time for information concerning markets located in that time zone, and U.S. central time for information concerning all other markets; and

(3) For information on reports to the Commission for swap or options on swap contracts, refer to part 20 of this chapter.

(e) Publication of recorded information.

(1) Reporting markets must make the information in paragraph (a) of this section readily available to the news media and the general public without charge, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains. The information in paragraphs (a)(2)(iv) through (vi) of this section shall be made readily available in a format that presents the information together.

(2) Reporting markets must make the information in paragraphs (b)(2) and (3) of this section readily available to the news media and the general public, and the information in paragraph (b)(4)(ii) of this section readily available to the general public, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains. Information in paragraph (b)(4)(i) of this section must be made available in the registered entity’s rulebook, which is publicly accessible on its Web site.


§ 16.02 Daily trade and supporting data reports.

Reporting markets shall provide trade and supporting data reports to the Commission on a daily basis. Such reports shall include transaction-level trade data and related order information for each futures or options contract. Reports shall also include time and sales data, reference files and other information as the Commission or its designee may require. All reports must be submitted at the time, and in the manner and format, and with the specific content specified by the Commission or its designee. Upon request, such information shall be accompanied by data that identifies or facilitates the identification of each trader for each transaction or order included in a submitted trade and supporting data report if the reporting market maintains such data.

[74 FR 12190, Mar. 23, 2009]

§§ 16.03–16.05 [Reserved]

§ 16.06 Errors or omissions.

Unless otherwise approved by the Commission or its designee, reporting markets shall file corrections to errors or omissions in data previously filed with the Commission pursuant to §§16.00 and 16.01 in the format and using the coding structure and electronic data submission procedures approved in writing by the Commission or its designee.

[71 FR 37819, July 3, 2006]

§ 16.07 Delegation of authority to the Director of the Division of Market Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the authority set forth in paragraphs (a), (b) and (c) of this section to the Director of the Division of Market Oversight, to be exercised by such Director or by such other employee or employees of such Director as may be designated from time to time by the Director. The Director of the Division of
Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(a) Pursuant to §§16.00(b) and 16.01(d), as applicable, the authority to determine whether reporting markets must submit data in hard copy, and the time that such data may be submitted where the Director determines that a reporting market is unable to meet the requirements set forth in the regulations;

(b) Pursuant to §§16.00(b)(1), 16.01(d)(1), and 16.06, the authority to approve the format, coding structure and electronic data transmission procedures used by reporting markets.

(c) Pursuant to §16.02, the authority to determine the specific content of any daily trade and supporting data report, request that such reports be accompanied by data that identifies or facilitates the identification of each trader for each transaction or order included in a submitted trade and supporting data report, and establish the time for the submission of and the manner and format of such reports.


PART 17—REPORTS BY REPORTING MARKETS, FUTURES COMMISSION MERCHANTS, CLEARING MEMBERS, AND FOREIGN BROKERS

§17.00 Information to be furnished by futures commission merchants, clearing members and foreign brokers.

(a) Special accounts—reportable futures and options positions, delivery notices, and exchanges of futures. (1) Each futures commission merchant, clearing member and foreign broker shall submit a report to the Commission for each business day with respect to all special accounts carried by the futures commission merchant, clearing member or foreign broker, except for accounts carried on the books of another futures commission merchant or clearing member on a fully-disclosed basis. Except as otherwise authorized by the Commission or its designee, such report shall be made in accordance with the format and coding provisions set forth in paragraph (g) of this section. The report shall show each futures position, separately for each reporting market and for each future, and each put and call options position separately for each reporting market, expiration and strike price for each special account as of the close of market on the day covered by the report and, in addition, the quantity of exchanges of futures for commodities or for derivatives positions and the number of delivery notices issued for each such account by the clearing organization of a reporting market and the number stopped by the account. The report shall also show all positions in all contract months and option expirations of that same commodity on the same reporting market for which the special account is reportable.

(2) A report covering the first day upon which a special account is no longer reportable shall also be filed showing the information specified in paragraph (a)(1) of this section.

(b) Interest in or control of several accounts. Except as otherwise instructed by the Commission or its designee and as specifically provided in §150.4 of this chapter, if any person holds or has a financial interest in or controls more than one account, all such accounts shall be considered by the futures commission merchant, clearing member or foreign broker as a single account for
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the purpose of determining special account status and for reporting purposes. For purposes of this section, the following shall apply:

(1) Accounts of eligible entities—Accounts of eligible entities as defined in §150.1 of this chapter that are traded by an independent account controller shall, together with other accounts traded by the independent account controller or in which the independent controller has a financial interest, be considered a single account.

(2) Accounts controlled by two or more persons—Accounts that are subject to day-to-day trading control by two or more persons shall, together with other accounts subject to control by exactly the same persons, be considered a single account.

(3) Account ownership. Multiple accounts owned by a trader shall be considered a single account as provided under §§150.4(b), (c) and (d) of this chapter.

(c) [Reserved]

(d) Net positions. Futures commission merchants, clearing members and foreign brokers shall report positions net long or short in each future of a commodity and each strike price of a put or call option for each expiration month in all special accounts, except as specified in paragraph (e) of this section.

(e) Gross positions. In the following cases, the futures commission merchant, clearing member or foreign broker shall report gross long and short positions in each future of a commodity and each strike price of a put or call option for each expiration month in all special accounts, except as specified in paragraph (e) of this section.

(1) Positions which are reported to an exchange or the clearinghouse of an exchange on a gross basis, which the exchange uses for calculating total open interest in a commodity;

(2) Positions in accounts owned or held jointly with another person or persons;

(3) Positions in multiple accounts subject to trading control by the same trader; and

(4) Positions in omnibus accounts.

(f) Omnibus accounts. If the total open long positions or the total open short positions for any future of a commodity carried in an omnibus account is a reportable position, the omnibus account is in Special Account status and shall be reported by the futures commission merchant or foreign broker carrying the account in accordance with paragraph (a) of this section.

(g) Media and file characteristics. (1) Except as otherwise approved by the Commission or its designee, all required records shall be submitted together in a single file. Each record will be 80 characters long. The specific record format is shown in the table below:

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</table>

1 AN—Alpha-numeric, N—Numeric, S—Signed numeric.

(2) Field definitions are as follows:

(i) Report type. This report format will be used to report three types of data: long and short futures and options positions, futures delivery notices issued and stopped, and exchanges of futures for a commodity or for a derivatives position bought and sold. Valid values for the report type are “RP” for reporting positions, “DN” for reporting notices, and “EP” for reporting exchanges of futures for a commodity or for a derivatives position.

(ii) Reporting firm. The clearing member number assigned by an exchange or clearing house to identify reporting firms. If a firm is not a clearing member, a three-character alpha-numeric identifier assigned by the Commission.

(iii) Account number. A unique identifier assigned by the reporting firm to each special account. The field is zero filled with account number right-justified. Assignment of the account number is subject to the provisions of §§17.00 (b) and (c) and 17.01(a).
(iv) **Report date.** The format is YYYYMMDD, where YYYY is the year, MM is the month, and DD is the day of the month.

(v) **Exchange.** This is a two-character field approved by the Commission to identify the exchange on which a position is held.

(vi) **Put or Call.** Valid values for this field are “C” for a call option and “P” for a put option. For futures, the field is blank.

(vii) **Commodity (1).** An exchange-assigned commodity code for the futures or options contract.

(viii) **Expiration date (1).** The date format is YYYYMMDD and represents the expiration date or delivery date of the reported futures or options contract. For date-specific instruments such as flexible products, the full date must be reported. For other options and futures, this field is used to report the expiration year and month for an options contract or a delivery year and month for a futures contract. The day portion of the field for these contracts contains spaces.

(ix) **Strike price.** This is a signed numeric field for reporting options strike prices. The strike prices should be right-justified and the field zero-filled. Strike prices must be reported in the same formats that are used by an exchange. For futures, the field is left blank.

(x) **Exercise style.** Valid values for this field are “A” for American style options, i.e., those that can be exercised at any time during the life of the options; and “E” for European, i.e., those that can be exercised only at the end of an option’s life. This field is required only for flexible instruments or as otherwise specified by the Commission.

(xi) **Long-Buy-Stopped (Short-Sell-Issued).** When report type is “RP”, report long (short) positions open at the end of a trading day. When report is “DN”, report delivery notices stopped (issued) on behalf of the account. When report type is “EP”, report purchases (sales) of futures for a commodity or for a derivatives position for the account. Report all information in contracts. Position data are reported on a net or gross basis in accordance with paragraphs (d) and (e) of this section.

(xii) **Commodity (2).** The exchange-assigned commodity code for a futures contract or other instrument that a position is exercised into from a date-specific or flexible option.

(xiii) **Expiration date (2).** Similar to other dates, the format is YYYYMMDD and represents the expiration date or delivery month and year of the future or other instrument that a position is exercised into from a date-specific or flexible option.

(xiv) **Record type (1).** Record type is used to correct errors or delete records that have previously been submitted. Valid values are “A”, “C”, “D” or “blank”. An A or “blank” is used in this field for all new records. If the record corrects information for a previously provided record, this field must contain a “C” or “blank” and the record must contain all information on the previously transmitted record. If the record deletes information on a previously provided record, this field must contain a “D” and all information on the previously transmitted record.

(h) **Correction of errors and omissions.** Unless otherwise approved by the Commission or its designee, corrections to errors and omissions in data provided pursuant to §17.00(a) shall be filed on series ‘01 forms or in the format, coding structure and data transmission procedures approved in writing by the Commission or its designee.

(i) **Exclusively self-cleared contracts.** Unless determined otherwise by the Commission, reporting markets that list exclusively self-cleared contracts shall meet the requirements of paragraphs (a) through (h) of this section, as they apply to trading in such contracts by all clearing members, on behalf of all clearing members.

(Approved by the Office of Management and Budget under control number 3038–0009)

[41 FR 3207, Jan. 21, 1976]

**EDITORIAL NOTE:** For Federal Register citations affecting §17.00, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.
§ 17.01 Special account designation and identification.

When a special account is reported for the first time, the futures commission merchant, clearing member, or foreign broker shall identify the account to the Commission on Form 102, in the form and manner specified in §17.02, showing the information in paragraphs (a) through (f) of this section.

(a) Special account designator. A unique identifier for the account, provided that the same designator is assigned for option and futures reporting, and the designator is not changed or assigned to another account without prior approval of the Commission or its designee.

(b) Special account identification. The name, address, business phone, and for individuals, the person’s job title and employer for the following:

(1) The person originating the account, if the special account is a house omnibus or customer omnibus account; or

(2) The person (i.e., individual, corporation, partnership, etc.) who owns the special account, if such person (or an employee or officer) also controls the trading of the special account. And, in addition:

(i) The registration status of the person as a commodity trading advisor or a securities investment advisor; and

(ii) The legal organization of the person and the person’s principal business or occupation;

(iii) Account numbers and account names included in the special account, if different than supplied in paragraph (b)(2) of this section;

(iv) The name and location of all persons not identified in paragraph (b)(2) of this section having a ten percent or more financial interest in the special account, indicating those having discretionary trading over the account; and

(v) For special accounts with five or fewer persons having trading authority, the names and locations of all persons with trading authority that have not been identified in paragraphs (b)(2) or (b)(2)(iv) of this section; or

(3) The account controller, if trading of the special account is controlled by a person or legal entity who is an independent account controller for the account owners as defined in §150.1(e). And, in addition:

(i) The registration status of the person as a commodity trading advisor or a securities investment advisor;

(ii) [Reserved]

(iii) If fewer than ten accounts are under control of the independent advisor, for each account the account number and the name and location of each person having a ten percent or more financial interest in the account; and

(iv) On call by the Commission or its designee, for each account controlled by the independent advisor, the account number and account name and the name and location of each person having a ten percent or more financial interest in the account.

(c) [Reserved]

(d) Commercial use. For futures or options, commodities in which positions or transactions in the account are associated with a commercial activity of the account owner in a related cash commodity or activity (i.e., those considered as hedging, risk-reducing, or otherwise off-setting with respect to the cash commodity or activity).

(e) Account executive. The name and business telephone number of the associated person of the futures commission merchant who has solicited and is responsible for the account or, in the case of an introduced account, the name and business telephone number of the introducing broker who introduced the account.

(f) Reporting firms. The name and address of the futures commission merchant, clearing member, or foreign broker carrying the account, and the name, title and business phone of the authorized representative of the firm filing the Form 102 and the date of the Form 102. The authorized representative shall sign the Form 102 or satisfy such other requirements for authenticating the report as instructed in writing by the Commission or its designee.

(g) Form 102 updates. If, at the time an account is in special account status and a Form 102 filed by a futures commission merchant, clearing member, or foreign broker is then no longer accurate because there has been a change in
§ 17.02 Form, manner and time of filing reports.

Unless otherwise instructed by the Commission or its designee, the reports required to be filed by reporting markets, futures commission merchants, clearing members and foreign brokers under §§ 17.00 and 17.01 shall be filed as specified in paragraphs (a) and (b) of this section.

(a) Section 17.00(a) reports. Reports filed under § 17.00(a) shall be submitted through electronic data transmission procedures approved in writing by the Commission or its designee not later than 9 a.m. on the business day following that to which the information pertains. Unless otherwise specified by the Commission or its designee, the stated time is eastern time for information concerning markets located in that time zone, and central time for information concerning all other markets.

(b) Section 17.01 reports. For data submitted pursuant to § 17.01 on Form 102:

(1) On call by the Commission or its designee, identify the type of special account specified by items 1(a), 1(b), or 1(c) of Form 102, and the name and location of the person to be identified in item 1(d) on the Form 102, and submit such information by facsimile or telephone, in accordance with instructions by the Commission or its designee, on the same day that the special account in question is first reported to the Commission; and

(2) Submit a completed Form 102 within three business days of the first day that the special account in question is reported to the Commission in accordance with instructions by the Commission or its designee.

§ 17.03 Delegation of authority to the Director of the Division of Market Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the authority set forth in the paragraphs below to the Director of the Division of Market Oversight to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(a) Pursuant to § 17.00(a) and (h), the authority to determine whether futures commission merchants, clearing members and foreign brokers can report the information required under paragraphs (a) and (b) of § 17.00 on series '01 forms or using some other format upon a determination that such person is unable to report the information using the format, coding structure or electronic data transmission procedures otherwise required.

(b) Pursuant to § 17.02, the authority to instruct or approve the time at which the information required under §§ 17.00 and 17.01 must be submitted by futures commission merchants, clearing members and foreign brokers provided that such persons are unable to meet the requirements set forth in §§ 17.01(g) and 17.02.

(c) Pursuant to § 17.01(f), the authority to determine whether to permit an authorized representative of a firm filing the Form 102 to use a means of authenticating the report other than by signing the Form 102 and, if so, to determine the alternative means of authentication that shall be used.

(d) Pursuant to § 17.00(a), the authority to approve a format and coding
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§ 18.00 Information to be furnished by traders.

Every trader who owns, holds or controls, or has held, owned or controlled, a reportable futures or options position in a commodity shall within one business day after a special call upon such trader by the Commission or its designee file reports to the Commission concerning transactions and positions open long or open short positions as instructed in this paragraph.

(1) Include both the total open long and the total open short positions of the trader if:

(i) The positions represent transactions on a reporting market which requires long and short positions in the same future or option held in accounts for the same trader to be recorded and reported on a gross basis; or

(ii) The account is an omnibus account of another futures commission merchant, clearing member or foreign broker.

(2) Include only the net long or net short positions of the trader if the positions represent transactions on a reporting market which does not require long and short positions in the same future or option held in accounts for the same trader to be recorded and reported on a gross basis.

(Authority: 7 U.S.C. 2, 4, 5, 6a, 6c, 6f, 6i, 6k, 6m, 6n, 12a and 19, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1524 (June 18, 2008); 5 U.S.C. 552 and 552(b), unless otherwise noted.)

§ 18.04 Reporting omnibus accounts to reporting firms.

(a) Any futures commission merchant, clearing member or foreign broker who establishes an omnibus account with another futures commission merchant, clearing member or foreign broker shall report to that futures commission merchant, clearing member or foreign broker the total open long positions and the total open short positions in each future of a commodity and, for commodity options transactions, the total open long put options, the total open short put options, the total open long call options, and the total open short call options for each commodity options expiration date and each strike price in such account at the close of trading each day. The information required by this section shall be reported in sufficient time to enable the futures commission merchant, clearing member or foreign broker with whom the omnibus account is established to comply with the regulations of this part and the reporting requirements established by the reporting markets.

(b) In determining open long and open short futures positions, and open purchased long and open granted short option positions, in an omnibus account for purposes of complying with §§17.00(f), 1.37(b) and 1.58 of this chapter, a futures commission merchant, clearing member or foreign broker shall total the open long positions of all traders and the open short positions of all traders in each future of a commodity and, for commodity options transactions, shall total the open long put options, the open short put options, the open long call options, and the open short call options of all traders for each commodity option expiration date and each strike price. The futures commission merchant, clearing member or foreign broker shall, if both open long and short positions in the same future or option are carried for the same trader, compute open long or open short positions as instructed in this paragraph.

(Authority: 7 U.S.C. 2, 4, 5, 6a, 6c, 6f, 6i, 6k, 6m, 6n, 12a and 19, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1524 (June 18, 2008); 5 U.S.C. 552 and 552(b), unless otherwise noted.)
§ 18.01 Interest in or control of several accounts.

If any trader holds, has a financial interest in or controls positions in more than one account, whether carried with the same or with different futures commission merchants or foreign brokers, all such positions and accounts shall be considered as a single account for the purpose of determining whether such trader has a reportable position and, unless instructed otherwise in the special call to report under § 18.00 for the purpose of reporting.

§ 18.02 [Reserved]

§ 18.03 Delegation of authority to the Director of the Division of Market and Oversight

The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls on traders for information as set forth in §§ 18.00, 18.04 and 18.05 to the Director of the Division of Market Oversight to be exercised by the Director or by such other employee or employees of the Director as may be designated from time to time by the Director. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.


§ 18.04 Statement of reporting trader.

Every trader who holds or controls a reportable futures and option position shall after a special call upon such trader by the Commission or its designee file with the Commission a “Statement of Reporting Trader” on the Form 40 at such time and place as directed in the call. All traders shall complete part A of the Form 40 and, in addition, shall complete:

Part B—If the trader is an individual, a partnership or a joint tenant.

Part C—If the trader is a corporation or type of trader other than an individual, partnership, or joint tenant.

(a) Information to be furnished by all traders in part A of the Form 40 shall include:

(1) Name and address of reporting trader.

(2) Principal business and occupation of the reporting trader and, in addition, whether transactions are made for, on behalf of, or in association with, a customer trading program of a futures commission merchant, a commodity pool, a producer cooperative, any business activities in which the trader is commercially engaged, or for personal use.

(3) Type of trader.

(4) Registration status with the Commission, if any.

(5) The name and address of each person whose option or futures trading is controlled by the reporting trader. Provided that if the reporting trader is a customer trading program, or the commodity trading advisor thereof, that is a managed or guided account program in which ten or more persons participate, the information furnished may be limited to the name of any commodity pool which participates in the program and the name and address of the CPO.

(6) The name, address and business phone of each person who controls the trading of the reporting trader.

(7) The names and locations of all futures commission merchants, clearing
members, introducing brokers, and foreign brokers through whom accounts owned or controlled by the reporting trader are carried or introduced at the time of filing a Form 40, if such accounts are carried through more than one futures commission merchant, clearing member or foreign broker or carried through more than one office of the same futures commission merchant, clearing member or foreign broker, or introduced by more than one introducing broker clearing accounts through the same futures commission merchant, and the name of the reporting trader’s account executive at each firm or office of the firm.

(8) The names and locations (city and state) of persons who guarantee the futures or option trading accounts of the reporting trader or who have a financial interest of 10 percent or more in the reporting trader or the accounts of the reporting trader.

(9) The following information concerning other option or futures trading accounts which the reporting trader guarantees or other futures or option traders or accounts in which the reporting trader has a financial interest of 10 percent or more:

(i) The names of traders for whom the reporting trader guarantees accounts or in which the reporting trader has a financial interest;

(ii) The names of the accounts that the reporting trader guarantees or in which the reporting trader has a financial interest;

(iii) The names and locations of the brokerage firms at which the accounts are carried.

(10) Information concerning ownership or control by a foreign government, agent of a foreign government, entity specially acknowledged by a statute or regulation of a foreign jurisdiction or entity financed by a foreign government either through ownership of capital assets or provision of operating expenses.

(11) Signature of the trader and date of signing the report. If the reporting trader is an organization, the signature must be that of a partner, officer or trustee authorized to sign on behalf of that organization.

(12) Information to be furnished in part B of the Form 40 shall include:

(1) Business telephone number of the reporting trader.

(2) Employer and job title if the reporting trader is an individual.

(3) The following information if a trader makes transactions or holds positions in a futures or option contract 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 the transactions or positions are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise:

(i) Commercial activity associated with use of the option or futures market (such as and including production, merchandising or processing of a cash commodity, asset or liability risk management by depository institutions, or security portfolio risk management).

(ii) Physical commodities underlying use of the futures or option markets.

(4) The name, address, and type of any organization in which the reporting trader participates in the management if such organization holds another futures or option trading account.

(5) If the reporting trader is a partnership or joint tenant, the name and address of each partner (excluding limited partners in commodity pools) or joint tenant and the name of the partner or joint tenant who ordinarily places orders.

(c) Information to be furnished in part C of the Form 40 shall include:

(1) Whether or not the reporting trader is organized under the laws of any state (including the District of Columbia) or territory or possession of the United States or under the laws of any foreign jurisdiction. Reporting traders organized outside the jurisdiction of the United States must indicate the country of origin.

(2) The names of parent firms and whether or not they are organized under the laws of any state (including the District of Columbia) or territory of possession of the United States and the location of each headquarter’s office.

(3) Names and locations of all subsidiary firms that trade in commodity
§ 18.05  Maintenance of books and records.

(a) Every trader who holds or controls a reportable futures or option position shall keep books and records showing all details concerning all positions and transactions in the commodity:

(1) On all reporting markets;

(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

(5) On foreign boards of trade.

(b) Every such trader shall also keep books and records showing all details concerning all positions and transactions in the cash commodity, its products and byproducts, and all commercial activities that the trader hedges in the futures or option contract in which the trader is reportable.

(c) The trader shall upon request furnish to the Commission any pertinent information concerning such positions, transactions, or activities in a form acceptable to the Commission.

§ 18.06  [Reserved]
§ 19.00 General provisions.

(a) Who must file series '04 reports. The following persons are required to file series '04 reports:

(1) All persons holding or controlling futures and option positions that are reportable pursuant to §15.00(p)(2) of this chapter and any part of which constitute bona fide hedging positions as defined in §1.3(z) of this chapter;

(2) Merchants and dealers of cotton holding or controlling positions for futures delivery in cotton that are reportable pursuant to §15.00(p)(1)(i) of this chapter, or

(3) All persons holding or controlling positions for future delivery that are reportable pursuant to §15.00(p)(1) of this chapter who have received a special call for series '04 reports from the Commission or its designee. Filings in response to a special call shall be made within one business day of receipt of the special call unless otherwise specified in the call. For the purposes of this paragraph, the Commission hereby delegates to the Director of the Division of Market Oversight, or to such other person designated by the Director, authority to issue calls for series '04 reports.

(b) Manner of reporting. The manner of reporting the information required in §19.01 is subject to the following:

(1) Excluding products or byproducts of the cash commodity hedged. If the regular business practice of the reporting trader is to exclude certain products or byproducts in determining his cash positions for bona fide hedging (as defined in §1.3(z) of this chapter), the same shall be excluded in the report. Such persons shall furnish to the Commission upon request detailed information concerning the kind and quantity of product or byproduct so excluded.

(2) Cross hedges. Cash positions that represent a commodity or products or byproducts of a commodity that is different from the commodity for future delivery in which such cash position is being hedged shall be shown both in terms of the commodity for future delivery and in terms of the cash commodity as provided for on the appropriate series '04 form.

(3) Standards and conversion factors. In computing their cash position, every person shall use such standards and conversion factors that are usual in the particular trade or that otherwise reflect the value-fluctuation-equivalents of the cash position in terms of the commodity for future delivery. Such person shall furnish to the Commission upon request detailed information concerning the basis for and derivation of such conversion factors.

(Amended by the Office of Management and Budget under control number 3038–0009)


§ 19.01 Reports on stocks and fixed price purchases and sales pertaining to futures positions in wheat, corn, oats, soybeans, soybean oil, soybean meal or cotton.

(a) Information required. Persons required to file '04 reports under §19.00(a)(1) or §19.00(a)(3) of this chapter shall file CFTC Form 304 reports for cotton and Form 204 reports for other commodities showing the composition of the fixed price cash position of each commodity hedged including:

(1) The quantity of stocks owned of such commodities and their products and byproducts.

(2) The quantity of fixed price purchase commitments open in such cash commodities and their products and byproducts.

(3) The quantity of fixed price sale commitments open in such cash commodities and their products and byproducts; and in addition for cotton,

(4) The quantity of equity in cotton held by the Commodity Credit Corporation under the provisions of the Upland Cotton Program of the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture.

(5) The quantity of certificated cotton owned.

(b) Time and place of filing reports—

Except for reports filed in response to special calls made under §19.00(a)(3), each report shall be made monthly, as of the close of business on the last Friday of the month, and filed at the appropriate Commission office specified in paragraph (b)(1) or (2) of this section not later than the second business day following the date of the report in the
§ 19.02 Reports pertaining to cotton call purchases and sales.

(a) Information required. Persons required to file '04 reports under § 19.06(a)(2) of this chapter shall file CFTC Form 304 reports showing the quantity of call cotton bought or sold on which the price has not been fixed, together with the respective futures on which the purchase or sale is based. As used herein, call cotton refers to spot cotton bought or sold, or contracted for purchase or sale at a price to be fixed later based upon a specified future.

(b) Time and place of filing reports. Each report shall be made weekly as of the close of business on Friday and filed at the Commission's office in New York, NY, not later than the second business day following the date of the report. Reports may be transmitted by facsimile or, alternatively, information on the form may be reported to the appropriate Commission office by telephone and the report mailed to the same office, not later than midnight of its due date.

[57 FR 41391, Sept. 10, 1992]

§§ 19.03–19.10 [Reserved]

PART 20—LARGE TRADER REPORTING FOR PHYSICAL COMMODITY SWAPS

Sec.
20.1 Definitions.
20.2 Covered contracts.
20.3 Clearing organizations.
20.4 Reporting entities.
20.5 Series S filings.
20.6 Maintenance of books and records.
20.7 Form and manner of reporting and submitting information or filings.
20.8 Delegation of authority to the Director of the Division of Market Oversight.
20.9 Sunset provision.
20.10 Compliance schedule.
20.11 Diversified commodity indices.

APPENDIX A TO PART 20—GUIDELINES ON FUTURES EQUIVALENCY

APPENDIX B TO PART 20—EXPLANATORY GUIDANCE ON DATA RECORD LAYOUTS

AUTHORITY: 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6I, 12a, 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

SOURCE: 76 FR 43862, July 22, 2011, unless otherwise noted.

§ 20.1 Definitions.

As used in, and solely for the purposes of, this part:

Business day means "business day" as that term is defined in §1.3 of this chapter.

Cleared product means a paired swap or swaption that a clearing organization offers or accepts for clearing.

Clearing member means any person who is a member of, or enjoys the privilege of, clearing trades in its own name through a clearing organization.

Clearing organization means the person or organization that acts as a medium between clearing members for the purpose of clearing swaps or swaptions or effecting settlements of swaps or swaptions.

Closed swap or closed swaption means a swap or swaption that has been settled, exercised, closed out or terminated.
Commodity Futures Trading Commission

§ 20.1

Commodity reference price means the price series (including derivatives contract and cash market prices or price indices) used by the parties to a swap or swaption to determine payments made, exchanged, or accrued under the terms of the contracts.

Counterparty means, from the perspective of one side to a contract, the person that is the direct legal counterparty corresponding to the other side of the contract.

Clearing member customer means any person for whom a reporting entity clears a swap or swaption position.

Futures equivalent means an economically equivalent amount of one or more futures contracts that represents a position or transaction in one or more paired swaps or swaptions consistent with the conversion guidelines in appendix A of this part.

Open swap or swaption means a swap or swaption that has not been closed.

Paired swap or paired swaption means an open swap or swaption that is:

(1) Directly or indirectly linked, including being partially or fully settled on, or priced at a differential to, the price of any commodity futures contract listed in §20.2; or

(2) Directly or indirectly linked, including being partially or fully settled on, or priced at a differential to, the price of the same commodity for delivery at the same location or locations.

Person means any “person” as that term is defined in §1.3 of this chapter.

Reportable account or consolidated account that is reportable means a consolidated account that includes a reportable position.

Reportable position means:

(i) A position, in any one futures equivalent month, comprised of 50 or more futures equivalent paired swaps or swaptions based on the same commodity underlying a futures contract listed in §20.2, grouped separately by swaps and swaptions, then grouped by gross long contracts on a futures equivalent basis or gross short contracts on a futures equivalent basis;

(ii) For a consolidated account (described in §20.4(a)) that includes a reportable position as defined in paragraph (1)(i) of this definition, all other positions in that account that are based on the commodity that renders the account reportable; and

(iii) The first reporting day on which a consolidated account (described in §20.4(a)) no longer includes a reportable position as described in paragraph (1)(i) of this definition (because on such day, the reporting entity’s consolidated account shall continue to be considered and treated as if it in fact included reportable positions as described in paragraph (1)(i) of this definition); or

(2) At the discretion of a reporting entity, and as an alternative to paragraph (1) of this definition, so long as the same method is consistently applied to all consolidated accounts (as described in §20.4(a)) of the reporting entity, all positions on a gross basis in a consolidated account that are based on the same commodity.

Reporting day means the period of time between a clearing organization or reporting entity’s usual and customary last internal valuation of paired swaps or swaptions and the next such period, so long as the period of time is consistently observed on a daily basis and the Commission is notified, upon its request, of the manner by which such period is calculated and any subsequent changes thereto.

Reporting entity means:

(1) A clearing member; or

(2) A swap dealer in one or more paired swaps or swaptions as that term is defined in section 1a of the Act and any Commission definitional regulations adopted thereunder.

Swap means:

(1) Until the effective date of any definitional rulemaking regarding “swap” by the Commission under section 1a of the Act, an agreement (including terms and conditions incorporated by reference therein) which is a commodity swap (including any option to enter into such swap) within the meaning of “swap agreement” under §35.1(b)(1) of this chapter, or a master agreement for a commodity swap together with all supplements thereto; or

(2) “Swap” as defined in section 1a of the Act and any Commission definitional regulations adopted thereunder, upon the effective date of such regulations.
Swaption means an option to enter into a swap or a swap that is an option.

§ 20.2 Covered contracts.

The futures and option contracts listed by designated contract markets for the purpose of reports filed and information provided under this part are as follows:

COVERED AGRICULTURAL AND EXEMPT FUTURES CONTRACTS—Continued

NYMEX Palladium.
NYMEX Platinum.
NYMEX Sugar No. 11.
NYMEX Uranium.
Diversified Commodity Index (See §20.11).

§ 20.3 Clearing organizations.

(a) Reporting data records. For each reporting day, with respect to paired swaps or swaptions, clearing organizations shall report to the Commission, separately for each clearing member’s proprietary and clearing member customer account, unique groupings of the data elements in paragraph (b) of this section (to the extent that there are such corresponding elements), in a single data record, so that each reported record is distinguishable from every other reported record (because of differing data values, as opposed to the arrangement of the elements).

(b) Populating reported data records with data elements. Data records reported under paragraph (a) of this section shall include the following data elements:

1. An identifier assigned by the Commission to the clearing organization;
2. The identifier assigned by the clearing organization to the clearing member;
3. The identifier assigned by the clearing organization for a cleared product;
4. The reporting day;
5. A proprietary or clearing member customer account indicator;
6. The futures equivalent month;
7. The commodity reference price;
8. Gross long swap positions;
9. Gross short swap positions;
10. A swaption put or call side indicator;
11. A swaption expiration date;
12. A swaption strike price;
13. Gross long non-delta-adjusted swaption positions; and

(c) End of reporting day data. For all futures equivalent months, clearing organizations shall report end of reporting day settlement prices for each cleared product and deltas for every
unique swaption put and call, expiration date, and strike price.

§ 20.4 Reporting entities.

(a) Consolidated accounts. Each reporting entity shall combine all paired swap and swaption positions:

(1) That are principal positions (swaps and swaptions to which the reporting entity is a direct legal counterparty), in a single consolidated account that it shall attribute to itself; and

(2) That are positions of the reporting entity’s counterparty in a single consolidated account that it shall attribute to that specific counterparty.

(b) Reporting data records. Reporting entities shall report to the Commission, for each reporting day, and separately for each reportable position in a consolidated account described in paragraphs (a)(1) and (a)(2) of this section, unique groupings of the data elements in paragraph (c) of this section (to the extent that there are such corresponding elements), in a single data record, so that each reported record is distinguishable from every other reported record (because of differing data values, as opposed to the arrangement of the elements).

(c) Populating reported data records with data elements. Data records reported under paragraph (b) of this section shall include the following data elements:

(1) An identifier assigned by the Commission to the reporting entity;

(2) An identifier indicating that a principal or counterparty position is being reported;

(3) A 102S identifier assigned by the reporting entity to its counterparty whose position is being reported;

(4) The name of the counterparty;

(5) The reporting day;

(6) If cleared, the identifier for the cleared product assigned by the clearing organization;

(7) The commodity underlying the reportable positions;

(8) The futures equivalent month;

(9) A cleared or uncleared indicator;

(10) A clearing organization identifier;

(11) The commodity reference price;

(12) An execution facility indicator;

(13) Long paired swap positions;

(14) Short paired swap positions;

(15) A swaption put or call side indicator;

(16) A swaption expiration date;

(17) A swaption strike price;

(18) Long non-delta-adjusted paired swaption positions;

(19) Short non-delta-adjusted paired swaption positions;

(20) Long delta-adjusted paired swaption positions (using economically reasonable and analytically supported deltas);

(21) Short delta-adjusted paired swaption positions (using economically reasonable and analytically supported deltas);

(22) Long paired swap or swaption notional value; and

(23) Short paired swap or swaption notional value.

§ 20.5 Series S filings.

(a) 102S filing. (1) When a counterparty consolidated account first becomes reportable, the reporting entity shall submit a 102S filing, which shall consist of the name, address, and contact information of the counterparty and a brief description of the nature of such person’s paired swaps and swaptions market activity.

(2) A reporting entity may submit a 102S filing only once for each counterparty, even if such persons at various times have multiple reportable positions in the same or different paired swaps or swaptions; however, reporting entities must update a 102S filing if the information provided is no longer accurate.

(3) Reporting entities shall submit a 102S filing within three days following the first day a consolidated account first becomes reportable or at such time as instructed by the Commission upon special call.

(b) 40S filing. Every person subject to books or records under §20.6 shall after a special call upon such person by the Commission file with the Commission a 40S filing at such time and place as directed in the call. A 40S filing shall consist of the submission of a Form 40, which shall be completed by such person as if any references to futures or option contracts were references to paired swaps or swaptions as defined in §20.1.
§ 20.6 Maintenance of books and records.

(a) Every clearing organization shall keep all records of transactions in paired swaps or swaptions, and methods used to convert paired swaps or swaptions into futures equivalents, in accordance with the requirements of §1.31 of this chapter.

(b) Every reporting entity shall keep all records of transactions in paired swaps or swaptions, and methods used to convert paired swaps or swaptions into futures equivalents, in accordance with the requirements of §1.31 of this chapter.

(c) Every person with equal to or greater than 50 gross all-months-combined futures equivalent positions in paired swaps or swaptions on the same commodity shall:

(1) Keep books and records showing all records for transactions resulting in such positions, which may be kept and reproduced for Commission inspection in the record retention format that such person has developed in the normal course of its business operations; and

(2) Keep books and records showing transactions in the cash commodity underlying such positions or its products and byproducts, and all commercial activities that are hedged or which have risks that are mitigated by such positions, which may be kept in accordance with the recordkeeping schedule and reproduced for Commission inspection in the record retention format that such person has developed in the normal course of its business operations.

(d) All books and records required to be kept by paragraphs (a) through (c) of this section shall be furnished upon request to the Commission along with any pertinent information concerning such positions, transactions, or activities.

§ 20.7 Form and manner of reporting and submitting information or filings.

Unless otherwise instructed by the Commission, a clearing organization or reporting entity shall submit data records and any other information required under this part to the Commission as follows:

(a) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission;

(b) For clearing organizations, not later than 9:00 a.m. eastern time on the next business day following the reporting day or at such other time as instructed by the Commission; and

(c) For clearing members and swap dealers, not later than 12:00 p.m. eastern time on the second (T+2) business day following the reporting day or at such other time as instructed by the Commission.

§ 20.8 Delegation of authority to the Director of the Division of Market Oversight.

(a) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(1) In §20.5(a)(3) for issuing a special call for a 102S filing;

(2) In §20.5(b) for issuing a special call for a 40S filing;

(3) In §20.6(d) for issuing a special call;

(4) In §20.7 for providing instructions or determining the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part; and

(5) In §20.10 for determining the described compliance schedules.

(b) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(c) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§ 20.9 Sunset provision.

(a) Except as otherwise provided in paragraph (b) of this section, the sections of this part shall become ineffective and unenforceable upon a Commission finding that, through the issuance of an order, operating swap data repositories are processing positional data and that such processing will enable...
the Commission to effectively surveil trading in paired swaps and swaptions and paired swap and swaption markets.

(b) The Commission may determine, in its discretion, to maintain the effectiveness and enforceability of any section of this part, or any requirement therein, in an order issued under paragraph (a) of this section, upon finding that such sections, or requirements therein, provide the Commission with positional data or data elements that materially improves the accuracy and surveillance utility of the positional data processed by swap data repositories.

§ 20.10 Compliance schedule.

(a) Clearinghouses, clearing members and persons with books and records obligations shall comply with the requirements of this part upon the effective date of this part.

(b) Swap dealers that are not clearing members shall comply with the requirements of this part upon the effective date of final regulations further defining the term swap dealer.

(c) The Commission may permit, for a period not to exceed six calendar months following the effective date specified in paragraph (a) of this section, the submission of reports pursuant to §§20.3 and 20.4 that differ in content, or are submitted in a form and manner which is other than prescribed by the provisions of this part, provided that the submitter is making a good faith attempt to comply with all of the provisions of this part.

(d) Unless determined otherwise by the Commission, paired swap and swaption position and market reports submitted under parts 15 through 19, or 21 of this chapter, or any order of the Commission, shall continue to be submitted under those parts or orders until swap dealers are required to comply with §20.4.

(e) The Commission may extend the compliance date established in paragraph (b) of this section by an additional six calendar months based on resource limitations or lack of experience in reporting transactions to the Commission for a swap dealer that is not an affiliate of a bank holding company and:

(1) Is not registered with the Commission as a futures commission merchant and is not an affiliate of a futures commission merchant;

(2) Is not registered with the Securities and Exchange Commission as a broker or dealer and is not an affiliate of a broker or dealer; and

(3) Is not supervised by any Federal prudential regulator.

§ 20.11 Diversified commodity indices.

For the purpose of reporting in futures equivalents, paired swaps and swaptions using commodity reference prices that are commonly known diversified indices with publicly available weightings may be reported as if such indices underlie a single futures contract with monthly expirations for each calendar month and year.

APPENDIX A TO PART 20—GUIDELINES ON FUTURES EQUIVALENCY

The following examples illustrate how swaps should be converted into futures equivalents. In general the total notional quantity for each swap should be apportioned to referent futures months based on the fraction of days remaining in the life of the swap during each referent futures month to the total duration of the swap, measured in days. The terms used in the examples are to be understood in a manner that is consistent with industry practice.

**EXAMPLE 1—FIXED FOR FLOATING WTI CRUDE OIL SWAP LINKED TO A DCM CONTRACT**

Reference Price .......................................... Daily official next to expire contract price for the NYMEX Light Sweet Crude Oil Futures Contract ("WTI") in $/bbl through the NYMEX spot month.

Fixed Price .................................................. $80.00 per barrel.

Floating Price .............................................. The arithmetic average of the reference price during the pricing period.

Notional Quantity ........................................ 100,000 bbls/month.

Calculation Period ...................................... One month.

Fixed Price Payer ....................................... Company A.

Floating Price Payer ................................... Company B.

Settlement Type ......................................... Financial.

Swap Term ................................................ Six full months from January 1 to June 30.

Floating Amount ......................................... Floating Price * Notional Quantity.

Fixed Amount ............................................. Fixed Price * Notional Quantity.
NYMEX WTI trading in the next to expire futures contract ceases on the third business day prior to the 25th of the calendar month preceding the contract month. For simplicity in this example, the last trading day in each WTI futures contract is shown as the 22nd of the month.

**Futures Equivalent Position of Swap on January 1**

<table>
<thead>
<tr>
<th>Dates swap in force</th>
<th>Referent futures month</th>
<th>Fraction of days</th>
<th>Company A position (long)</th>
<th>Company B position (short)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1—January 22</td>
<td>February</td>
<td>22/181</td>
<td>73</td>
<td>-73</td>
</tr>
<tr>
<td>January 23—February 22</td>
<td>March</td>
<td>31/181</td>
<td>103</td>
<td>-103</td>
</tr>
<tr>
<td>February 23—March 22</td>
<td>April</td>
<td>28/181</td>
<td>93</td>
<td>-93</td>
</tr>
<tr>
<td>March 23—April 22</td>
<td>May</td>
<td>31/181</td>
<td>103</td>
<td>-103</td>
</tr>
<tr>
<td>April 23—May 22</td>
<td>June</td>
<td>30/181</td>
<td>99</td>
<td>-99</td>
</tr>
<tr>
<td>May 23—June 22</td>
<td>July</td>
<td>31/181</td>
<td>103</td>
<td>-103</td>
</tr>
<tr>
<td>June 23—June 30th</td>
<td>August</td>
<td>8/181</td>
<td>27</td>
<td>-27</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>181/181</td>
<td>601</td>
<td>-601</td>
</tr>
</tbody>
</table>

† Contracts rounded to the nearest integer.

**Futures equivalent position on January 2**

<table>
<thead>
<tr>
<th>Dates swap in force</th>
<th>Referent futures month</th>
<th>Fraction of days</th>
<th>Company A position (long)</th>
<th>Company B position (short)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 2—January 22</td>
<td>February</td>
<td>21/180</td>
<td>70</td>
<td>-70</td>
</tr>
<tr>
<td>January 23—February 22</td>
<td>March</td>
<td>31/180</td>
<td>103</td>
<td>-103</td>
</tr>
<tr>
<td>February 23—March 22</td>
<td>April</td>
<td>28/180</td>
<td>93</td>
<td>-93</td>
</tr>
<tr>
<td>March 23—April 22</td>
<td>May</td>
<td>31/180</td>
<td>103</td>
<td>-103</td>
</tr>
<tr>
<td>April 23—May 22</td>
<td>June</td>
<td>30/180</td>
<td>99</td>
<td>-99</td>
</tr>
<tr>
<td>May 23—June 22</td>
<td>July</td>
<td>31/180</td>
<td>103</td>
<td>-103</td>
</tr>
<tr>
<td>June 23—June 30th</td>
<td>August</td>
<td>8/180</td>
<td>27</td>
<td>-27</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>180/180</td>
<td>597</td>
<td>-597</td>
</tr>
</tbody>
</table>

† Contracts rounded to the nearest integer.

**Example 2—Fixed for Floating Corn Swap**

<table>
<thead>
<tr>
<th>Reference Price</th>
<th>Fixed Price</th>
<th>Floating Price</th>
<th>Calculation Period</th>
<th>Notional Quantity</th>
<th>Fixed Price Payer</th>
<th>Floating Price Payer</th>
<th>Settlement Type</th>
<th>Swap Term</th>
<th>Floating Amount</th>
<th>Fixed Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daily official next to expire contract price for the CBOT Corn Futures Contract in $/bushel through the CBOT spot month.</td>
<td>$5.00 per bushel per month.</td>
<td>The arithmetic average of the reference price during the pricing period.</td>
<td>One month.</td>
<td>1,000,000 bushels/month.</td>
<td>Company A.</td>
<td>Company B.</td>
<td>Financial.</td>
<td>Six full months from January 1 to June 30.</td>
<td>Floating Price * Notional Quantity.</td>
<td>Fixed Price * Notional Quantity.</td>
</tr>
</tbody>
</table>

Last trading day in the nearby CBOT Corn futures contract is the business day preceding the 15th of the contract month. For simplicity in this example, the last trading day in each Corn futures contract is shown as the 14th of the month. Futures contract months for corn are March, May, July, September, and December.
Commodity Futures Trading Commission

Futures Equivalent Position on January 1

<table>
<thead>
<tr>
<th>Dates swap in force</th>
<th>Referent futures month</th>
<th>Fraction of days</th>
<th>Company A position (long)</th>
<th>Company B position (short)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1–March 14</td>
<td>March</td>
<td>73/181</td>
<td>483</td>
<td>-483</td>
</tr>
<tr>
<td>March 15–May 14</td>
<td>May</td>
<td>61/181</td>
<td>404</td>
<td>-404</td>
</tr>
<tr>
<td>May 15–June 30</td>
<td>July</td>
<td>47/181</td>
<td>311</td>
<td>-311</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>181/181</td>
<td>1,198</td>
<td>-1,198</td>
</tr>
</tbody>
</table>

† Contracts rounded to the nearest integer.

**EXAMPLE 3—FIXED FOR FLOATING NY RBOB (PLATTS) CALENDAR SWAP FUTURES**

Reference Price ........................................... Platts Oiogram next to expire contract Price Report for New York RBOB (Barge)
through the NYMEX spot month.

Fixed Price ................................................. $1.8894 per gallon.

Floating Price ............................................. For each contract month, the floating price is equal to the arithmetic average of the
high and low quotations from Platts Oiogram Price Report for New York RBOB
(Barge) for each business day that it is determined during the contract month.

Calculation Period ........................................ One quarter.

Notional Quantity ......................................... 84 million gallons/quarter.

Fixed Price Payer ......................................... Company A.

Floating Price Payer ........................................ Company B.

Settlement Type ........................................... Financial.

Swap Term .................................................. Six full months from January 1 to June 30.

Floating Amount ........................................... Floating Price * Notional Quantity.

Fixed Amount ............................................... Fixed Price * Notional Quantity.

**NYMEX NY RBOB (Platts) Calendar Swap Futures**

Contract month ends on the final business day of the contract month. For simplicity in this example, the last trading day in each futures contract is shown as the final day of the month.

**Futures Equivalent Position on January 1**

Total Notional Quantity = 2 quarters * 84 million = 168 million gallons

42,000 gallons = 1 futures contract

Therefore 168 million/42,000 gallons/futures contract = 4,000 futures equivalent contracts

Total number of days = 31 + 28 + 31 + 30 + 31 + 30 = 181

**FUTURES EQUIVALENT POSITION OF SWAP ON JANUARY 1**

<table>
<thead>
<tr>
<th>Dates swap in force</th>
<th>Referent futures month</th>
<th>Fraction of days</th>
<th>Company A position (long)</th>
<th>Company B position (short)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1–March 31</td>
<td>April</td>
<td>90/181</td>
<td>1989</td>
<td>-1989</td>
</tr>
<tr>
<td>April 1–June 30</td>
<td>July</td>
<td>91/181</td>
<td>2011</td>
<td>-2011</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>181/181</td>
<td>4000</td>
<td>-4000</td>
</tr>
</tbody>
</table>

† Contracts rounded to the nearest integer.

**EXAMPLE 4—CALENDAR SPREAD SWAP**

Reference Price ........................................... The difference between the next to expire contract price for the NYMEX WTI Fu-
tures contract and the deferred contract price for the NYMEX WTI Futures con-
tract.

Fixed Price ................................................. $80 per barrel.

Floating Price ............................................. The arithmetic average of the reference price during the pricing period.

Calculation Period ...................................... One month.

Notional Quantity ......................................... 100,000 bbls/month.

Fixed Price Payer ......................................... Company A.

Floating Price Payer ........................................ Company B.

Settlement Type ........................................... Financial.

Swap Term .................................................. Six full months from January 1 to June 30.

Floating Amount ........................................... Floating Price * Notional Quantity.

Fixed Amount ............................................... Fixed Price * Notional Quantity.
EXHIBIT 4—CALENDAR SPREAD SWAP—Continued

NYMEX WTI trading in the next to expire futures contract ceases on the third business day prior to the 25th of the calendar month preceding the contract month. For simplicity in this example, the last trading day in each WTI futures contract is shown as the 22nd of the month.

FUTURES EQUIVALENT POSITION OF SWAP ON JANUARY 1

<table>
<thead>
<tr>
<th>Dates swap in force</th>
<th>Fraction of days</th>
<th>Applicable next to expire futures month</th>
<th>Company A position (long)</th>
<th>Company B position (short)</th>
<th>Applicable deferred futures month</th>
<th>Company A position (long)</th>
<th>Company B position (short)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1—January 22</td>
<td>22/181</td>
<td>February</td>
<td>73</td>
<td>−73</td>
<td>March</td>
<td>−73</td>
<td>73</td>
</tr>
<tr>
<td>January 23—February 22</td>
<td>31/181</td>
<td>March</td>
<td>103</td>
<td>−103</td>
<td>April</td>
<td>−103</td>
<td>103</td>
</tr>
<tr>
<td>February 23—March 22</td>
<td>28/181</td>
<td>April</td>
<td>93</td>
<td>−93</td>
<td>May</td>
<td>−93</td>
<td>93</td>
</tr>
<tr>
<td>March 23—April 22</td>
<td>31/181</td>
<td>May</td>
<td>103</td>
<td>−103</td>
<td>June</td>
<td>−103</td>
<td>103</td>
</tr>
<tr>
<td>April 23—May 22</td>
<td>30/181</td>
<td>June</td>
<td>99</td>
<td>−99</td>
<td>July</td>
<td>−99</td>
<td>99</td>
</tr>
<tr>
<td>May 23—June 22</td>
<td>31/181</td>
<td>July</td>
<td>103</td>
<td>−103</td>
<td>August</td>
<td>−103</td>
<td>103</td>
</tr>
<tr>
<td>June 23—June 30th</td>
<td>8/181</td>
<td>August</td>
<td>27</td>
<td>−27</td>
<td>September</td>
<td>−27</td>
<td>27</td>
</tr>
<tr>
<td>Total</td>
<td>181/181</td>
<td></td>
<td>601</td>
<td>−601</td>
<td></td>
<td>−601</td>
<td>601</td>
</tr>
</tbody>
</table>

1 Contracts rounded to the nearest integer.

EXAMPLE 5—COLUMBIA GULF, MAINLINE MIDPOINT (“MIDPOINT”) BASIS SWAP

NYMEX Henry Hub Natural Gas Futures Contract trading ceases three business days prior to the first day of the delivery month. For simplicity in this example, the last trading day in the futures contract is shown as the 29th of the month.

FUTURES EQUIVALENT POSITION ON JANUARY 1

Total Notional Quantity = 6 months * 100,000 MMBtu/month = 600,000 MMBtu
1,000 MMBtu = 1 futures contract
Therefore 600,000 MMBtu/1,000 MMBtu/futures contract = 600 futures equivalent contracts
Total number of days = 31 + 28 + 31 + 30 + 31 + 30 = 181
Commodity Futures Trading Commission

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FUTURES EQUIVALENT POSITION OF SWAP ON JANUARY 1

<table>
<thead>
<tr>
<th>Dates swap in force</th>
<th>Fraction of days</th>
<th>Referent futures month</th>
<th>Company A position in Columbia Gulf, Mainline Midpoint (&quot;Mid-point&quot;) natural gas (long) MMBtu</th>
<th>Company B position in NYMEX (Henry Hub) natural gas futures (short)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1—January 28</td>
<td>28/31</td>
<td>February</td>
<td>-28</td>
<td>28</td>
</tr>
<tr>
<td>January 29—January 31</td>
<td>3/31</td>
<td>March</td>
<td>-3</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>31/31</td>
<td></td>
<td>-31</td>
<td>31</td>
</tr>
</tbody>
</table>

††† Note: Because there is no underlying position taken in a basis contract, for reporting purposes, only enter the futures equivalent contract quantities into the corresponding futures.

EXAMPLE 6—WTI SWAPTION (CALL)

Swaption Style ............................................ American.
Option Type ................................................ Call.
Swaption Start Date ................................... Jan 1 of the current year.
Swaption End Date ..................................... June 30 of the current year.
Strike Price ................................................. $80.50/bbl.
Notional Quantity ........................................ 100,000 bbl/month.
Calculation Period ...................................... One month.
Reference Price .......................................... Daily official next to expire contract price for WTI NYMEX Crude Oil Futures Contract in $/bbl through the NYMEX spot month.
Fixed Price .................................................. $80.00 per barrel per month.
Floating Price .............................................. The arithmetic average of the reference price during the pricing period.
Swap Term ................................................. One month from July 1 to July 31 of the current year.
Floating Amount ......................................... Floating Price * Notional Quantity.
Fixed Amount ............................................. Fixed Price * Notional Quantity.

NYMEX WTI trading ceases on the third business day prior to the 25th of the calendar month preceding the delivery month. For simplicity in this example, the last trading day in each WTI futures contract is shown as the 22nd of the month.

<table>
<thead>
<tr>
<th>Futures Equivalent Position on January 1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>Total Notional Quantity = 1 month*100,000 bbls/month=100,000 bbls</td>
</tr>
<tr>
<td>1,000 bbl = 1 futures contract</td>
</tr>
<tr>
<td>Therefore 100,000 bbls/1,000 bbls/contract = 100</td>
</tr>
<tr>
<td>futures equivalent contracts</td>
</tr>
<tr>
<td>Total number of days = 31</td>
</tr>
</tbody>
</table>

GROSS POSITION ON JANUARY 1

<table>
<thead>
<tr>
<th>Dates swap in force</th>
<th>Referent futures month</th>
<th>Fraction of days</th>
<th>Company A position (long)</th>
<th>Company B position (short)</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 1—July 22</td>
<td>August</td>
<td>22/31</td>
<td>70</td>
<td>-70</td>
</tr>
<tr>
<td>July 23—July 31</td>
<td>September</td>
<td>9/31</td>
<td>29</td>
<td>-29</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>31/31</td>
<td>99</td>
<td>-99</td>
</tr>
</tbody>
</table>

† Contracts rounded to the nearest integer.

DELTAs ADJUSTED POSITION AND FUTURES EQUIVALENT POSITION ON JANUARY 1

<table>
<thead>
<tr>
<th>Date</th>
<th>August</th>
<th>September</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delta</td>
<td>Position</td>
<td>Delta</td>
</tr>
<tr>
<td>January 1</td>
<td>2</td>
<td>14</td>
</tr>
</tbody>
</table>

†† Deltas should be calculated in an economically reasonable and analytically supportable basis.

EXAMPLE 7—WTI COLLAR SWAP

Swaption Style ............................................ American.
Swaption Start Date ................................... Jan 1 of the current year.
Swaption End Date ..................................... June 30 of the current year.
Call strike Price ........................................ $70.00 per bbl.
Put strike price ......................................... $90.00 per bbl.
EXAMPLE 7—WTI COLLAR SWAP—Continued

Notional Quantity ........................................ 100,000 barrels per month.
Calculation Period ...................................... One month.
Reference Price .......................................... Daily official next to expire contract price for WTI NYMEX Crude Oil in $/bbl through the NYMEX spot month.
Fixed Price .................................................. $80.00 per barrel.
Floating Price .............................................. The arithmetic average of the reference price during the pricing period.
Settlement Type ......................................... Financial.
Swap Term ................................................. One month from July 1 to July 31 of the current year.
Floating Amount ......................................... Floating Price * Notional Quantity.
Fixed Amount ............................................. Fixed Price * Notional Quantity.

NYMEX WTI trading ceases on the third business day prior to the 25th of the calendar month preceding the delivery month. For simplicity in this example, the last trading day in each WTI futures contract is shown as the 22nd of the month.

<table>
<thead>
<tr>
<th>Dates swap in force</th>
<th>Referent futures month</th>
<th>Fraction of days</th>
<th>Company A position</th>
<th>Company B position</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 1–July 22 ......</td>
<td>August ...........</td>
<td>22/31</td>
<td>70.97</td>
<td>70.97</td>
</tr>
<tr>
<td>July 23–July 31 .....</td>
<td>September ....</td>
<td>9/31</td>
<td>29.03</td>
<td>29.03</td>
</tr>
<tr>
<td>Total ...............</td>
<td>31/31</td>
<td>100</td>
<td>100</td>
<td>—</td>
</tr>
</tbody>
</table>

GROSS POSITION ON JANUARY 1

<table>
<thead>
<tr>
<th>Date</th>
<th>August</th>
<th>September</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delta</td>
<td>Long call</td>
<td>Short put</td>
</tr>
<tr>
<td>January 1 ............</td>
<td>.7</td>
<td>49</td>
</tr>
</tbody>
</table>

† Deltas should be calculated in an economically reasonable and analytically supportable basis.

FUTURES EQUIVALENT POSITION ON JANUARY 1

<table>
<thead>
<tr>
<th>Date</th>
<th>August(†)</th>
<th>September(†)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long</td>
<td>Short</td>
<td>Long</td>
</tr>
<tr>
<td>January 1 ............</td>
<td>70</td>
<td>0</td>
</tr>
</tbody>
</table>

† Contracts rounded to the nearest integer.

APPENDIX B TO PART 20—EXPLANATORY GUIDANCE ON DATA RECORD LAYOUTS

RECORD LAYOUT EXAMPLES FOR §20.3

The following example (in Tables 1, 2 and 3) covers reporting for a particular clearing organization, “Clearing Organization One,” would report, for the 27th of September 2010, the following eleven unique data record submissions. Each data record submission represents a unique position, as indicated by §20.3, held by a clearing member of Clearing Organization One. Paragraph (a) of §20.3 broadly outlines the data elements that determine unique positions for reports on clearing member positions. Paragraphs (b) of §20.3 present all of the data elements that should be submitted in reference to a particular data record for a particular clearing member (in Table 1). Paragraph (c) identifies data elements that would comprise end of day record data on cleared products (in Tables 2 and 3). Therefore, paragraphs (b) and (c) of §20.3 present all of the data elements that should be submitted in reference to a particular data record.

Because CFTC designated Clearing Organization One (in this example) currently has two clearing members, “Clearing Member One” and “Clearing Member Two,” positions...
Commodity Futures Trading Commission

Clearing Member Two currently has six positions with the following varying characteristics: Cleared product IDs; futures equivalent months/years; commodity reference prices; swaption positions that involve both puts and calls; and multiple strike prices. Accordingly, these positions must be reported in separate data records. An illustration of how these records would appear is included in Table 1 below. Clearing Organization One would also have to report the corresponding swaption position deltas, strike prices, expiration dates, and settlement prices and swap settlement prices. An illustration of these submissions is included in Tables 2 and 3 below.

### TABLE 1—DATA RECORDS REPORTED UNDER PARAGRAPHS (a) AND (b) OF § 20.3

<table>
<thead>
<tr>
<th>Data records</th>
<th>CFTC clearing org ID</th>
<th>Clearing org clearing member ID</th>
<th>Clearing org cleared product ID</th>
<th>Reporting day</th>
<th>Proprietary/customer account indicator</th>
<th>Futures equivalent month and year</th>
<th>Commodity reference price</th>
</tr>
</thead>
</table>

| NDR .......... | Yes                  | Yes ........| Yes ........| Yes ........| Yes ........| Yes ........| Yes ........| No ........      |

<table>
<thead>
<tr>
<th>Data records</th>
<th>Long swap position</th>
<th>Short swaption position</th>
<th>Put/call indicator</th>
<th>Swaption expiration date</th>
<th>Swaption strike price</th>
<th>Non-delta adjusted long swaption position</th>
<th>Non-delta adjusted short swaption position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data record 1</td>
<td>0</td>
<td>5000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Data record 2</td>
<td>0</td>
<td>2000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Data record 3</td>
<td>0</td>
<td></td>
<td>C</td>
<td>7/29/2011</td>
<td>5.59</td>
<td>2000</td>
<td>0</td>
</tr>
<tr>
<td>Data record 4</td>
<td>0</td>
<td></td>
<td>C</td>
<td>7/29/2011</td>
<td>5.59</td>
<td>18000</td>
<td>0</td>
</tr>
<tr>
<td>Data record 5</td>
<td>0</td>
<td></td>
<td>P</td>
<td>7/29/2011</td>
<td>5.50</td>
<td>100</td>
<td>30</td>
</tr>
<tr>
<td>Data record 6</td>
<td>0</td>
<td></td>
<td>P</td>
<td>7/29/2011</td>
<td>5.50</td>
<td>900</td>
<td>270</td>
</tr>
<tr>
<td>Data record 7</td>
<td>5000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Data record 8</td>
<td>5000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Data record 9</td>
<td>429</td>
<td>1286</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Data record 10</td>
<td>2281</td>
<td>6843</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Data record 11</td>
<td>1290</td>
<td>3871</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| NDR .......... | No                  | No ..........| Yes ........| Yes ........| Yes ........| Yes ........| No ........| No ........      |

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NOTE: The bottom row of Table 1 indicates whether data elements for which any difference in one of the elements constitutes a reason for a new data record (NDR).

**TABLE 2—EXAMPLE OF DATA RECORDS REQUIRED UNDER § 20.3(C) FOR CLEARED SWAPTION PRODUCTS**

<table>
<thead>
<tr>
<th>Data records</th>
<th>CFTC clearing org ID</th>
<th>Clearing org cleared product ID</th>
<th>Reporting day</th>
<th>Futures equivalent month and year</th>
<th>Commodity reference price</th>
<th>Swaption expiration date</th>
<th>Swaption strike price</th>
<th>Put/call indicator</th>
<th>Delta</th>
<th>Swaption daily settlement price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data record 1</td>
<td>CCO_ID ... CP_02 ...</td>
<td>9/27/2010</td>
<td>Nov-10 ...</td>
<td>NYMEX</td>
<td>7/23/2011</td>
<td>5.59 ...</td>
<td>C ...</td>
<td>5 ...</td>
<td>6.25</td>
<td></td>
</tr>
<tr>
<td>Data record 2</td>
<td>CCO_ID ... CP_02 ...</td>
<td>9/27/2010</td>
<td>Oct-10 ...</td>
<td>NYMEX</td>
<td>7/23/2011</td>
<td>5.59 ...</td>
<td>C ...</td>
<td>5 ...</td>
<td>5.50</td>
<td></td>
</tr>
<tr>
<td>Data record 3</td>
<td>CCO_ID ... CP_02 ...</td>
<td>9/27/2010</td>
<td>Nov-10 ...</td>
<td>NYMEX</td>
<td>7/23/2011</td>
<td>5.50 ...</td>
<td>P ...</td>
<td>2 ...</td>
<td>4.53</td>
<td></td>
</tr>
<tr>
<td>Data record 4</td>
<td>CCO_ID ... CP_02 ...</td>
<td>9/27/2010</td>
<td>Oct-10 ...</td>
<td>NYMEX</td>
<td>7/23/2011</td>
<td>5.50 ...</td>
<td>P ...</td>
<td>2 ...</td>
<td>4.78</td>
<td></td>
</tr>
</tbody>
</table>

**TABLE 3—EXAMPLE OF DATA RECORDS REQUIRED UNDER § 20.3(C) FOR CLEARED SWAP PRODUCTS**

<table>
<thead>
<tr>
<th>Data records</th>
<th>CFTC clearing org ID</th>
<th>Clearing org cleared product ID</th>
<th>Reporting day</th>
<th>Futures equivalent month and year</th>
<th>Commodity reference price</th>
<th>Swap daily settlement price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data record 1</td>
<td>CCO_ID ... CP_04 ...</td>
<td>9/27/2010</td>
<td>Nov-10 ...</td>
<td>NYMEX</td>
<td>20.35</td>
<td></td>
</tr>
<tr>
<td>Data record 2</td>
<td>CCO_ID ... CP_04 ...</td>
<td>9/27/2010</td>
<td>Oct-10 ...</td>
<td>NYMEX</td>
<td>10.50</td>
<td></td>
</tr>
<tr>
<td>Data record 3</td>
<td>CCO_ID ... CP_03 ...</td>
<td>9/27/2010</td>
<td>Mar-11 ...</td>
<td>NYMEX</td>
<td>15.00</td>
<td></td>
</tr>
<tr>
<td>Data record 4</td>
<td>CCO_ID ... CP_03 ...</td>
<td>9/27/2010</td>
<td>Feb-11 ...</td>
<td>NYMEX</td>
<td>21.00</td>
<td></td>
</tr>
<tr>
<td>Data record 5</td>
<td>CCO_ID ... CP_01 ...</td>
<td>9/27/2010</td>
<td>Mar-11 ...</td>
<td>NYMEX</td>
<td>17.50</td>
<td></td>
</tr>
<tr>
<td>Data record 6</td>
<td>CCO_ID ... CP_01 ...</td>
<td>9/27/2010</td>
<td>Feb-11 ...</td>
<td>NYMEX</td>
<td>21.65</td>
<td></td>
</tr>
<tr>
<td>Data record 7</td>
<td>CCO_ID ... CP_01 ...</td>
<td>9/27/2010</td>
<td>Jan-11 ...</td>
<td>NYMEX</td>
<td>12.50</td>
<td></td>
</tr>
</tbody>
</table>

**FIRST RECORD LAYOUT EXAMPLE FOR § 20.4:**

This first example shows the data records generated under §20.4 by a single reporting firm for report date September 27, 2011. Each data record represents a unique part of a reportable position in heating oil and natural gas by the reporting entity and its counterparties. Paragraph (b) of §20.4 outlines the data elements that determine unique positions.

In this example, the reporting entity clears with one clearing organization and therefore the data records do not have to be delineated by clearing organization (there is a reportable position stemming from an uncleared transaction included as well). However, if the reporting entity in this example used multiple clearing organizations, then it would have to further subdivide its data submissions by each clearing organization.

The reporting entity reports fifteen records; six principal positions and nine counterparty positions. The reported positions constitute separate data records because they vary by the following characteristics: swap counterparties; futures equivalent months/years; clearing organization cleared products; swaptions that were either cleared or uncleared; commodity reference prices; and whether the trade was entered into on or off execution facilities. An illustration of how these records would be reported is included in Table 4 below.

For the calculation of notional values, assume for simplicity that the price of heating oil, for all contract months and for both reference prices, is $3/gal. Similarly, assume that the price of natural gas for all contract months is $4.25/MMBtu.

NOTE: The bottom two rows in Table 4 indicate whether, for uncleared and cleared swaps and swaptions, data elements for which any difference in one of the elements constitutes a reason for a new data record (NDR).
<table>
<thead>
<tr>
<th>Data records</th>
<th>Commission reporting entity ID</th>
<th>Principal/counterparty position indicator</th>
<th>102S Swap counterparty ID</th>
<th>Counterparty name</th>
<th>Reporting day</th>
<th>Clearing org cleared product ID</th>
<th>Commodity code</th>
<th>Futures equivalent month and year</th>
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<td>HO</td>
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<td>CPD 04</td>
<td>HO</td>
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<td>Count</td>
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<td>CPD 07</td>
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<td>NG</td>
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</tr>
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<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
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</table>

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<tr>
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<th>CFTC clearing org identifier</th>
<th>Commodity reference identifier</th>
<th>Execution facility</th>
<th>Long swap position</th>
<th>Short swap position</th>
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<td>EX2</td>
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<td>EX3</td>
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<td>Data record 12</td>
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<td>CCO ID</td>
<td>NYMEX NY Harbor No.2</td>
<td>EX1</td>
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<table>
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<th>Non-delta adjusted long swaption position</th>
<th>Non-delta adjusted short swaption position</th>
<th>Delta absolute long swaption position</th>
<th>Delta absolute short swaption position</th>
<th>Long swap or swaption notional value position</th>
<th>Short swap or swaption notional value position</th>
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<td>$5,312,500</td>
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<td>$7,287,500</td>
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<td>$8,500,000</td>
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<td>$5,312,500</td>
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<td>$4,250,000</td>
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<td>$2,687,500</td>
<td>$1,562,500</td>
<td>$1,562,500</td>
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</table>

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For the sake of this example, assume the firm has a long exposure from the potential swap, and that the swap was cleared. The point spread variation from the Clearing house, as well as the long position expiration dates in the table below and year.

<table>
<thead>
<tr>
<th>Data record</th>
<th>Firm</th>
<th>Commodity</th>
<th>Counterparty</th>
<th>Principal/Notional</th>
<th>Data record</th>
<th>Firm</th>
<th>Commodity</th>
<th>Counterparty</th>
<th>Principal/Notional</th>
<th>Data record</th>
<th>Firm</th>
<th>Commodity</th>
<th>Counterparty</th>
<th>Principal/Notional</th>
<th>Data record</th>
<th>Firm</th>
<th>Commodity</th>
<th>Counterparty</th>
<th>Principal/Notional</th>
<th>Data record</th>
<th>Firm</th>
<th>Commodity</th>
<th>Counterparty</th>
<th>Principal/Notional</th>
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<tbody>
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<td></td>
<td>Energy</td>
<td>A, EXAMPLE 1</td>
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<td>5</td>
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<td>Energy</td>
<td>A, EXAMPLE 1</td>
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</tbody>
</table>

The second example, the data records in Tables 5 and 6, respectively. In this second example, the data records generated for a single swap transaction, in one commodity, with a single counterparty, are displayed for a hypothetical swap as detailed in Example 1 of Appendix A. In contrast to the above example, in this example, the same format as Table 3 is used to display the data records generated. This hypothetical swap can be found in Table 5 and Table 6, respectively.

Table 5—Example of Data Records Reported Under § 20.4(c) for January 1, 2011 (APPX A, EXAMPLE 1)

<table>
<thead>
<tr>
<th>Data record</th>
<th>Firm</th>
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<th>Counterparty</th>
<th>Principal/Notional</th>
<th>Data record</th>
<th>Firm</th>
<th>Commodity</th>
<th>Counterparty</th>
<th>Principal/Notional</th>
<th>Data record</th>
<th>Firm</th>
<th>Commodity</th>
<th>Counterparty</th>
<th>Principal/Notional</th>
</tr>
</thead>
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<td>2</td>
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<td>Energy</td>
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</table>

In this second example, the data records generated for a single swap transaction, in one commodity, with a single counterparty, are displayed for a hypothetical swap as detailed in Example 1 of Appendix A. In contrast to the above example, in this example, the same format as Table 3 is used to display the data records generated.
### TABLE 6—EXAMPLE OF DATA RECORDS REPORTED UNDER § 20.4(C) FOR JANUARY 2, 2011 (APPX A, EXAMPLE 1)

<table>
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<tr>
<th>Data records</th>
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<th>102S Swap counterparty ID</th>
<th>Counterparty name</th>
<th>Reporting day</th>
<th>Clearing org cleared product ID</th>
<th>Commodity code</th>
<th>Futures equivalent month and year</th>
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</thead>
<tbody>
<tr>
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<td>PRIN</td>
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<td></td>
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<td>CPID 03</td>
<td>CL</td>
<td>Feb-11</td>
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<td>PRIN</td>
<td></td>
<td></td>
<td>12/2011</td>
<td>CPID 03</td>
<td>CL</td>
<td>Mar-11</td>
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<td>PRIN</td>
<td></td>
<td></td>
<td>12/2011</td>
<td>CPID 03</td>
<td>CL</td>
<td>Apr-11</td>
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<td></td>
<td>12/2011</td>
<td>CPID 03</td>
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<td>May-11</td>
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<td>Jun-11</td>
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<td>CPID 03</td>
<td>CL</td>
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<td>12/2011</td>
<td>CPID 03</td>
<td>CL</td>
<td>Aug-11</td>
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<th>Cleared/uncleared indicator</th>
<th>CFTC clearing org identifier</th>
<th>Commodity reference price</th>
<th>Execution facility</th>
<th>Long swap position</th>
<th>Short swap position</th>
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<tbody>
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</tr>
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</tbody>
</table>

### TABLE 7—EXAMPLE OF DATA RECORDS REPORTED UNDER § 20.4(C) FOR JANUARY 2, 2011 (APPX A, EXAMPLE 1)

<table>
<thead>
<tr>
<th>Data records</th>
<th>Put/call indicator</th>
<th>Swaption expiration date</th>
<th>Swaption strike price</th>
<th>Non-delta adjusted long swaption position</th>
<th>Non-delta adjusted short swaption position</th>
<th>Delta adjusted long swaption position</th>
<th>Delta adjusted short swaption position</th>
<th>Long swap or swaption notional value position</th>
<th>Short swap or swaption notional value position</th>
</tr>
</thead>
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<td></td>
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<td>Data record 5</td>
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<td></td>
</tr>
</tbody>
</table>
### PART 21—SPECIAL CALLS

**Sec. 21.00 Preparation and transmission of information upon special call.**

All information required upon special call shall be prepared in such form and manner and in accordance with such instructions, and shall be transmitted at such time and to such office of the Commission, as may be specified in the call.

**§ 21.01 Special calls for information on controlled accounts from futures commission merchants, clearing members and introducing brokers.**

Upon call by the Commission, each futures commission merchant, clearing member and introducing broker shall file with the Commission the names and addresses of all persons who, by power of attorney or otherwise, exercise trading control over any customer’s account in commodity futures or commodity options on any reporting market.

[74 FR 12192, Mar. 23, 2009]

**§ 21.02 Special calls for information on open contracts in accounts carried or introduced by futures commission merchants, clearing members, members of reporting markets, introducing brokers, and foreign brokers.**

Upon special call by the Commission for information relating to futures or option positions held or introduced on the dates specified in the call, each futures commission merchant, clearing member, member of a reporting market, introducing broker, or foreign broker, and, in addition, for option information, each reporting market, shall furnish to the Commission the following information concerning accounts of traders owning or controlling such futures or option positions, except for accounts carried on a fully disclosed basis by another futures commission merchant or clearing member, as may be specified in the call:

(a) The name, address, and telephone number of the person for whom each account is carried;

<table>
<thead>
<tr>
<th>Data records</th>
<th>Put/call indicator</th>
<th>Swaption expiration date</th>
<th>Swaption strike price</th>
<th>Non-delta adjusted long swaption position</th>
<th>Non-delta adjusted short swaption position</th>
<th>Delta adjusted long swaption position</th>
<th>Delta adjusted short swaption position</th>
<th>Long swap or swaption notional position</th>
<th>Short swap or swaption notional position</th>
</tr>
</thead>
<tbody>
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<td></td>
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<td>$2,565,000</td>
<td></td>
</tr>
</tbody>
</table>
(b) The principal business or occupation of the person for whom each account is introduced or carried, as specified in the call;
(c) The type of each such account;
(d) The name, address and principal business or occupation of any person who controls the trading of each account;
(e) The name and address of any person having a financial interest of ten percent or more in each account;
(f) The number of open futures or option positions introduced or carried in each account, as specified in the call;
(g) The total number of futures contracts exchanged for commodities or for derivatives positions;
(h) The total number of futures contracts against which delivery notices have been issued or received; and
(i) As applicable, the following identifying information:
(1) Whether a trader who holds commodity futures or option positions is classified as a commercial or as a non-commercial trader for each commodity futures or option contract;
(2) Whether the open commodity futures or option contracts are classified as speculative, spreading (straddling), or hedging; and
(3) Whether any of the accounts in question are omnibus accounts and, if so, whether the originator of the omnibus account is another futures commission merchant, clearing member or foreign broker.

(Approved by the Office of Management and Budget under control number 3038-0017)

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

(a) For purposes of this section, the term “accounts of a futures commission merchant, clearing member or foreign broker” means all open contracts and transactions in futures and options on the records of the futures commission merchant, clearing member or foreign broker; the term “beneficial interest” means having or sharing in any rights, obligations or financial interest in any futures or options account; the term “customer” means any futures commission merchant, clearing member, introducing broker, foreign broker, or trader for whom a futures commission merchant, clearing member or reporting market that is a registered entity under section 1a(29) of the Act makes or causes to be made a futures or options contract. Paragraphs (e), (g) and (h) of this section shall not apply to any futures commission merchant, clearing member or customer whose books and records are open at all times to inspection in the United States by any representative of the Commission.

(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.

(c) Upon a determination by the Commission that information concerning accounts may be relevant information in enabling the Commission to determine whether the threat of a market manipulation, corner, squeeze, or other market disorder exists on any reporting market, the Commission may issue a call for information from a futures commission merchant, clearing
member, introducing broker or customer pursuant to the provisions of this section.

(d) In the event the call is issued to a foreign broker, foreign clearing member or foreign trader, its agent, designated pursuant to §15.05 of this chapter, shall, if directed, promptly transmit calls made by the Commission pursuant to this section by electronic mail or a similarly expeditious means of communication.

(e) The futures commission merchant, clearing member, introducing broker, or customer to whom the special call is issued must provide to the Commission the information specified below for the commodity, reporting market and delivery months or option expiration dates named in the call. Such information shall be filed at the place and within the time specified by the Commission.

(1) For each account of a futures commission merchant, clearing member, introducing broker, or foreign broker, including those accounts in the name of the futures commission merchant, clearing member or foreign broker, on the dates specified in the call issued pursuant to this section, such persons shall provide the Commission with the following information:

(i) The name and address of the person in whose name the account is carried or introduced and, if the person is not an individual, the name of the individual to contact regarding the account;

(ii) The total open futures and options contracts in the account;

(iii) The number of futures contracts against which delivery notices have been issued or received and the number against which exchanges of futures for cash have been transacted during the period of time specified in the call;

(iv) Whether the account is carried for and in the name of another futures commission merchant, clearing member, introducing broker, or foreign broker; and

(v) For the accounts which are not carried for and in the name of another futures commission merchant, clearing member, introducing broker, or foreign broker, the name and address of any other person who controls the trading of the account, and the name and address of any person who has a ten percent or more beneficial interest in the account.

(2) Each trader shall provide the Commission with the following information:

(i) The total open futures and options contracts owned or controlled on the dates specified in the call;

(ii) The name and address of any person having a ten percent or more beneficial interest in the open futures or options contracts reported pursuant to this paragraph;

(iii) The name and address of any other person who controls the trading of the open futures or options contracts reported pursuant to this paragraph; and

(iv) The cash commodity transaction and position information required to be maintained pursuant to §18.05 of this chapter as specified in the call which relates to futures or options positions of the trader in the United States.

(f) If the Commission has reason to believe that any person has not responded as required to a call made pursuant to this section, the Commission in writing may inform the reporting market specified in the call and that reporting market shall prohibit the execution of, and no futures commission merchant, clearing member, introducing broker, or foreign broker shall effect a transaction in connection with trades on the reporting market and in the months or expiration dates specified in the call for or on behalf of the futures commission merchant or customer named in the call, unless such trades offset existing open contracts of such futures commission merchant or customer.

(g) Any person named in a special call that believes he or she is or may be adversely affected or aggrieved by action taken by the Commission under paragraph (f) of this section shall have the opportunity for a prompt hearing after the Commission acts. That person may immediately present in writing to the Commission for its consideration any comments or arguments concerning the Commission’s action and may present for Commission consideration any documentary or other evidence that person deems appropriate. Upon request, the Commission may, in
its discretion, determine that an oral hearing be conducted to permit the further presentation of information and views concerning any matters by any or all such persons. The oral hearing may be held before the Commission or any person designated by the Commission, which person shall cause all evidence to be reduced to writing and forthwith transmit the same and a recommended decision to the Commission. The Commission’s directive under paragraph (f) of this section shall remain in effect unless and until modified or withdrawn by the Commission.

(h) If, during the course of or after the Commission acts pursuant to paragraph (f) of this section, the Commission determines that it is appropriate to undertake a proceeding pursuant to section 6(c) of the Act, the Commission shall issue a complaint in accordance with the requirements of section 6(c), and, upon further determination by the Commission that the conditions described in paragraph (c) of this section still exist, a hearing pursuant to section 6(c) of the Act shall commence no later than five business days after service of the complaint. In the event the person served with the complaint under section 6(c) of the Act has, prior to the commencement of the hearing under section 6(c) of the Act, sought a hearing pursuant to paragraph (g) of this section and the Commission has determined to accord him such a hearing, the two hearings shall be conducted simultaneously. Nothing in this section shall preclude the Commission from taking other appropriate action under the Act or the Commission’s regulations thereunder, including action under section 6(c) of the Act, regardless of whether the conditions described in paragraph (c) of this section still exist, and no ruling issued in the course of a hearing pursuant to paragraph (g) or this paragraph shall constitute an estoppel against the Commission in any other action.

(Approved by the Office of Management and Budget under control number 3038-0009)

shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section to the Director.

[76 FR 69430, Nov. 8, 2011]

PART 22—CLEARED SWAPS

Sec.
22.1 Definitions.
22.2 Futures commission merchants: Treatment of Cleared Swaps Customer Collateral.
22.3 Derivatives clearing organizations: Treatment of Cleared Swaps Customer Collateral.
22.4 Futures commission merchants and derivatives clearing organizations: Permitted depositories.
22.5 Futures commission merchants and derivatives clearing organizations: Written acknowledgement.
22.6 Futures commission merchants and derivatives clearing organizations: Naming of Cleared Swaps Customer Accounts.
22.7 Situs of Cleared Swaps Customer Accounts.
22.8 Denomination of Cleared Swaps Customer Collateral and location of depositories.
22.9 Application of other regulatory provisions.
22.10 Information to be provided regarding Cleared Swaps Customers and their Cleared Swaps.
22.11 Information to be maintained regarding Cleared Swaps Customer Collateral.
22.12 Additions to Cleared Swaps Customer Collateral.
22.13 Treatment of Cleared Swaps Customer Collateral on an individual basis.
22.14 Clearing Swaps Customer Account. This term refers to any person entering into a Cleared Swap, but shall exclude:
(1) Any owner or holder of a Cleared Swaps Proprietary Account with respect to the Cleared Swaps in such account; and
(2) A clearing member of a derivatives clearing organization with respect to Cleared Swaps cleared on that derivatives clearing organization. A person shall be a Cleared Swaps Customer only with respect to its Cleared Swaps.
22.15 Clearing Swaps Customer Account. This term refers to any account for the Cleared Swaps of Cleared Swaps Customers and associated Cleared Swaps Customer Collateral that:
(1) A futures commission merchant maintains on behalf of Cleared Swaps Customers (including, in the case of a Collecting Futures Commission Merchant, the Cleared Swaps Customers of a Depositing Futures Commission Merchant) or
(2) A derivatives clearing organization maintains for futures commission merchants on behalf of Cleared Swaps Customers thereof.

For the purposes of this part:
Cleared Swap. This term refers to a transaction constituting a “cleared swap” within the meaning of section 1a(7) of the Act.
(1) This term shall exclude any swap (along with money, securities, or other property received to margin, guarantee, or secure such a swap) that, pursuant to a Commission rule, regulation, or order, is (along with such money, securities, or other property) commingled with a commodity future or option (along with money, securities, or other property received to margin, guarantee, or secure such a future or option) that is segregated pursuant to section 4d(a) of the Act.
(2) This term shall include any trade or contract (along with money, securities or other property received to margin, guarantee, or secure such a trade or contract), that
(i) Would be required to be segregated pursuant to section 4d(a) of the Act, or
(ii) Would be subject to §30.7 of this chapter, but which is, in either case, pursuant to a Commission rule, regulation, or order (or a derivatives clearing organization rule approved in accordance with §39.15(b)(2) of this chapter), commingled with a swap (along with money, securities, or other property received to margin, guarantee, or secure such a swap) in an account segregated pursuant to section 4d(f) of the Act.

SOURCE: 77 FR 6371, Feb. 7, 2012, unless otherwise noted.

§ 22.1 Definitions.

For the purposes of this part:
Cleared Swap. This term refers to a transaction constituting a “cleared swap” within the meaning of section 1a(7) of the Act.
(1) This term shall exclude any swap (along with money, securities, or other property received to margin, guarantee, or secure such a swap) that, pursuant to a Commission rule, regulation, or order, is (along with such money, securities, or other property) commingled with a commodity future or option (along with money, securities, or other property received to margin, guarantee, or secure such a future or option) that is segregated pursuant to section 4d(a) of the Act.

PART 22—CLEARED SWAPS

Sec.
22.1 Definitions.
22.2 Futures commission merchants: Treatment of Cleared Swaps Customer Collateral.
22.3 Derivatives clearing organizations: Treatment of Cleared Swaps Customer Collateral.
22.4 Futures commission merchants and derivatives clearing organizations: Permitted depositories.
22.5 Futures commission merchants and derivatives clearing organizations: Written acknowledgement.
22.6 Futures commission merchants and derivatives clearing organizations: Naming of Cleared Swaps Customer Accounts.
22.7 Situs of Cleared Swaps Customer Accounts.
22.8 Denomination of Cleared Swaps Customer Collateral and location of depositories.
22.9 Application of other regulatory provisions.
22.10 Information to be provided regarding Cleared Swaps Customers and their Cleared Swaps.
22.11 Information to be maintained regarding Cleared Swaps Customer Collateral.
22.12 Additions to Cleared Swaps Customer Collateral.
22.13 Treatment of Cleared Swaps Customer Collateral on an individual basis.
22.14 Clearing Swaps Customer Account. This term refers to any person entering into a Cleared Swap, but shall exclude:
(1) Any owner or holder of a Cleared Swaps Proprietary Account with respect to the Cleared Swaps in such account; and
(2) A clearing member of a derivatives clearing organization with respect to Cleared Swaps cleared on that derivatives clearing organization. A person shall be a Cleared Swaps Customer only with respect to its Cleared Swaps.
22.15 Clearing Swaps Customer Account. This term refers to any account for the Cleared Swaps of Cleared Swaps Customers and associated Cleared Swaps Customer Collateral that:
(1) A futures commission merchant maintains on behalf of Cleared Swaps Customers (including, in the case of a Collecting Futures Commission Merchant, the Cleared Swaps Customers of a Depositing Futures Commission Merchant) or
(2) A derivatives clearing organization maintains for futures commission merchants on behalf of Cleared Swaps Customers thereof.
Commodity Futures Trading Commission

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Cleared Swaps Customer Collateral. (1) This term means all money, securities, or other property received by a futures commission merchant or by a derivatives clearing organization from, for, or on behalf of a Cleared Swaps Customer, which money, securities, or other property:

(i) Is intended to or does margin, guarantee, or secure a Cleared Swap; or

(ii) Constitutes, if a Cleared Swap is in the form or nature of an option, the settlement value of such option.

(2) This term shall also include accruals, i.e., all money, securities, or other property that a futures commission merchant or derivatives clearing organization receives, directly or indirectly, which is incident to or results from a Cleared Swap that a futures commission merchant intermediates for a Cleared Swaps Customer.

Cleared Swaps Proprietary Account. (1) This term means an account for Cleared Swaps and associated collateral that is carried on the books and records of a futures commission merchant for persons with certain relationships with that futures commission merchant, specifically:

(i) Where such account is carried for a person falling within one of the categories specified in paragraph (2) of this definition, or

(ii) Where ten percent or more of such account is owned by a person falling within one of the categories specified in paragraph (2) of this definition, or

(iii) Where an aggregate of ten percent or more of such account is owned by more than one person falling within one or more of the categories specified in paragraph (2) of this definition.

(2) The relationships to the futures commission merchant referred to in paragraph (1) of this definition are as follows:

(i) Such individual himself, or such partnership, corporation or association itself;

(ii) In the case of a partnership, a general partner in such partnership;

(iii) In the case of a limited partnership, a limited or special partner in such partnership whose duties include:

(A) The management of the partnership business or any part thereof;

(B) The handling, on behalf of such partnership, of:

(1) The Cleared Swaps of Cleared Swaps Customers or

(2) The Cleared Swaps Customer Collateral;

(C) The keeping, on behalf of such partnership, of records pertaining to

(1) the Cleared Swaps of Cleared Swaps Customers or

(2) the Cleared Swaps Customer Collateral; or

(D) The signing or co-signing of checks or drafts on behalf of such partnership;

(iv) In the case of a corporation or association, an officer, director, or owner of ten percent or more of the capital stock of such organization;

(v) An employee of such individual, partnership, corporation or association whose duties include:

(A) The management of the business of such individual, partnership, corporation or association or any part thereof;

(B) The handling, on behalf of such individual, partnership, corporation or association, of the Cleared Swaps of Cleared Swaps Customers or the Cleared Swaps Customer Collateral;

(C) The keeping of records, on behalf of such individual, partnership, corporation, or association, pertaining to the Cleared Swaps of Cleared Swaps Customers or the Cleared Swaps Customer Collateral; or

(D) The signing or co-signing of checks or drafts on behalf of such individual, partnership, corporation, or association;

(vi) A spouse or minor dependent living in the same household of any of the foregoing persons;

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

(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 a Cleared Swaps Customer Account and not a Cleared Swaps Proprietary Account of such association, unless the shareholder or member is an officer, director, or manager of the association.

Clearing Member. This term means any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization.

Collecting Futures Commission Merchant. A futures commission merchant that carries Cleared Swaps on behalf of another futures commission merchant and the Cleared Swaps Customers of the latter futures commission merchant, and as part of carrying such Cleared Swaps, collects Cleared Swaps Customer Collateral.

Commingle. To commingle two or more items means to hold such items in the same account, or to combine such items in a transfer between accounts.

Depositing Futures Commission Merchant. A futures commission merchant that carries Cleared Swaps on behalf of its Cleared Swaps Customers through another futures commission merchant and, as part of carrying such Cleared Swaps, deposits Cleared Swaps Customer Collateral with such futures commission merchant.

Permitted Depository. This term shall have the meaning set forth in §22.4 of this part.

Segregate. To segregate two or more items is to keep them in separate accounts, and to avoid combining them in the same transfer between two accounts.

(b) Location of Cleared Swaps Customer Collateral. (1) A futures commission merchant must segregate all Cleared Swaps Customer Collateral that it receives, and must either hold such Cleared Swaps Customer Collateral itself as set forth in paragraph (b)(2) of this section, or deposit such collateral into one or more Cleared Swaps Customer Accounts held at a Permitted Depository, as set forth in paragraph (b)(3) of this section.

(2) If a futures commission merchant holds Cleared Swaps Customer Collateral itself, then the futures commission merchant must:

(i) Physically separate such collateral from its own property;

(ii) Clearly identify each physical location in which it holds such collateral as a “Location of Cleared Swaps Customer Collateral” (the “FCM Physical Location”);

(iii) Ensure that the FCM Physical Location provides appropriate protection for such collateral; and

(iv) Record in its books and records the amount of such Cleared Swaps Customer Collateral separately from its own funds.

(3) If a futures commission merchant holds Cleared Swaps Customer Collateral in a Permitted Depository, then:

(i) The Permitted Depository must qualify pursuant to the requirements set forth in §22.4 of this part, and

(ii) The futures commission merchant must maintain a Cleared Swaps Customer Account with each such Permitted Depository.

(c) Commingling. (1) A futures commission merchant may commingle the Cleared Swaps Customer Collateral that it receives from, for, or on behalf of multiple Cleared Swaps Customers.

(2) A futures commission merchant shall not commingle Cleared Swaps Customer Collateral with either of the following:

(i) Funds belonging to the futures commission merchant, except as expressly permitted in paragraph (e)(3) of this section; or

(ii) Other categories of funds belonging to Futures Customers (as §1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customers (as §30.1 of this chapter defines that term) of the futures commission
§ 22.2

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merchant, including Futures Customer Funds (as § 1.3 of this chapter defines such term) or the foreign futures or foreign options secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation, or order, or by a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter.

(d) Limitations on use. (1) No futures commission merchant shall use, or permit the use of, the Cleared Swaps Customer Collateral of one Cleared Swaps Customer to purchase, margin, or settle the Cleared Swaps or any other trade or contract of, or to secure or extend the credit of, any person other than such Cleared Swaps Customer. Cleared Swaps Customer Collateral shall not be used to margin, guarantee, or secure trades or contracts of the entity constituting a Cleared Swaps Customer other than in Cleared Swaps, except to the extent permitted by a Commission rule, regulation or order.

(2) A futures commission merchant may not impose or permit the imposition of a lien on Cleared Swaps Customer Collateral, including any residual financial interest of the futures commission merchant in such collateral, as described in paragraph (e)(4) of this section.

(3) A futures commission merchant may not include, as Cleared Swaps Customer Collateral,

(i) Money invested in the securities, memberships, or obligations of any derivatives clearing organization, designated contract market, swap execution facility, or swap data repository, or

(ii) Money, securities, or other property that any derivatives clearing organization holds and may use for a purpose other than those set forth in § 22.3 of this part.

(e) Exceptions. Notwithstanding the foregoing:

(1) Permitted investments. A futures commission merchant may invest money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter.

(2) Permitted withdrawals. Such share of Cleared Swaps Customer Collateral as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle a Cleared Swaps Customer’s Cleared Swaps with a derivatives clearing organization, or with a Collecting Futures Commission Merchant, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with such Cleared Swaps.

(3) Deposits of own money, securities, or other property. (i) In order to ensure that it is always in compliance with paragraph (f) of this section, a futures commission merchant may place in an FCM Physical Location or deposit in a Cleared Swaps Customer Account its own money, securities, or other property (provided, that such securities or other property are unencumbered and are of the types specified in § 1.25 of this chapter).

(ii) Money, securities, or other property deposited by a futures commission merchant pursuant to 22.13(b) and available to a derivatives clearing organization or Collecting Futures Commission Merchant to meet the obligations of the futures commission merchant’s Cleared Swaps Customers collectively, shall be maintained in an account separate from the Cleared Swaps Customer Account.

(4) Residual financial interest. (i) If, in accordance with paragraph (e)(3)(i) of this section, a futures commission merchant places in an FCM Physical Location or deposits in a Cleared Swaps Customer Account its own money, securities, or other property, then such money, securities, or other property (including accruals thereon) shall constitute Cleared Swaps Customer Collateral.

(ii) The futures commission merchant shall have a residual financial interest in any portion of such money, securities, or other property in excess of that necessary for compliance with paragraph (f)(4) of this section.

(iii) The futures commission merchant may withdraw money, securities, or other property from the FCM Physical Location or Cleared Swaps Customer Account, to the extent of its residual financial interest therein. At the time of such withdrawal, the futures commission merchant shall ensure that
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the withdrawal does not cause its residual financial interest to become less than zero.

(f) Requirements as to amount. (1) For purposes of this §22.2(f), the term “account” shall reference the entries on the books and records of a futures commission merchant pertaining to the Cleared Swaps Customer Collateral of a particular Cleared Swaps Customer.

(2) The futures commission merchant must reflect in the account that it maintains for each Cleared Swaps Customer the market value of any Cleared Swaps Customer Collateral that it receives from such customer, as adjusted by:

(i) Any uses permitted under §22.2(d) of this part;
(ii) Any accruals on permitted investments of such collateral under §22.2(e) of this part that, pursuant to the futures commission merchant’s customer agreement with that customer, are creditable to such customer;
(iii) Any charges lawfully accruing to the Cleared Swaps Customer, including any commission, brokerage fee, interest, tax, or storage fee; and
(iv) Any appropriately authorized distribution or transfer of such collateral.

(3) If the market value of Cleared Swaps Customer Collateral in the account of a Cleared Swaps Customer is positive after adjustments, then that account has a credit balance. If the market value of Cleared Swaps Customer Collateral in the account of a Cleared Swaps Customer is negative after adjustments, then that account has a debit balance.

(4) The futures commission merchant must maintain in segregation, in its FCM Physical Locations and/or its Cleared Swaps Customer Accounts at Permitted Depositories, an amount equal to the sum of any credit balances that the Cleared Swaps Customers of the futures commission merchant have in their accounts, excluding from such sum any debit balances that the Cleared Swaps Customers of the futures commission merchant have in their accounts.

(5) Notwithstanding the foregoing, the futures commission merchant must include, in calculating the sum referenced in paragraph (f)(4) of this section, any debit balance that a Cleared Swaps Customer may have in its account, to the extent that such balance is secured by “readily marketable securities” that the Cleared Swaps Customer deposited with the futures commission merchant.

(i) For purposes of this section, “readily marketable” shall be defined as having a “ready market” as such latter term is defined in Rule 15c3–1(c)(11) of the Securities and Exchange Commission (§241.15c3–1(c)(11) of this title).

(ii) In order for a debit balance to be deemed secured by “readily marketable securities,” the futures commission merchant must maintain a security interest in such securities, and must hold a written authorization to liquidate the securities at the discretion of the futures commission merchant.

(iii) To determine the amount secured by “readily marketable securities,” the futures commission merchant shall:

(A) Determine the market value of such securities; and
(B) Reduce such market value by applicable percentage deductions (i.e., “securities haircuts”) as set forth in Rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission (§240.15c3–1(c)(2)(vi) of this title). The portion of the debit balance, not exceeding 100 per cent, that is secured by the reduced market value of such readily marketable securities shall be included in calculating the sum referred to in paragraph (f)(4) of this section.

(g) Segregated account; Daily computation and record. (1) Each futures commission merchant must compute as of the close of each business day, on a currency-by-currency basis:

(i) The aggregate market value of the Cleared Swaps Customer Collateral in all FCM Physical Locations and all Cleared Swaps Customer Accounts held at Permitted Depositories (the “Collateral Value”); and
(ii) The sum referenced in paragraph (f)(4) of this section (the “Collateral Requirement”); and
(iii) The amount of the residual financial interest that the futures commission merchant holds in such Cleared Swaps Customer Collateral,
which shall equal the difference between the Collateral Value and the Collateral Requirement.

(2) The futures commission merchant must complete the daily computations required by this section prior to noon on the next business day and must keep such computations, together with all supporting data, in accordance with the requirements of §1.31 of this chapter.


§ 22.3 Derivatives clearing organizations: Treatment of cleared swaps customer collateral.

(a) General. A derivatives clearing organization shall treat and deal with the Cleared Swaps Customer Collateral deposited by a futures commission merchant as belonging to the Cleared Swaps Customers of such futures commission merchant and not other persons, including, without limitation, the futures commission merchant.

(b) Location of Cleared Swaps Customer Collateral. (1) The derivatives clearing organization must segregate all Cleared Swaps Customer Collateral that it receives from futures commission merchants, and must either hold such Cleared Swaps Customer Collateral itself as set forth in paragraph (b)(2) of this section, or deposit such collateral into one or more Cleared Swaps Customer Accounts held at a Permitted Depository, as set forth in paragraph (b)(3) of this section.

(2) If a derivatives clearing organization holds Cleared Swaps Customer Collateral itself, then the derivatives clearing organization must:

(i) Physically separate such collateral from its own property, the property of any futures commission merchant, and the property of any other person that is not a Cleared Swaps Customer of a futures commission merchant;

(ii) Clearly identify each physical location in which it holds such collateral as “Location of Cleared Swaps Customer Collateral” (the “DCO Physical Location”);

(iii) Ensure that the DCO Physical Location provides appropriate protection for such collateral; and

(iv) Record in its books and records the amount of such Cleared Swaps Customer Collateral separately from its own funds, the funds of any futures commission merchant, and the funds of any other person that is not a Cleared Swaps Customer of a futures commission merchant.

(3) If a derivatives clearing organization holds Cleared Swaps Customer Collateral in a Permitted Depository, then:

(i) The Permitted Depository must qualify pursuant to the requirements set forth in §22.4 of this part; and

(ii) The derivatives clearing organization must maintain a Cleared Swaps Customer Account with each such Permitted Depository.

(c) Commingling. (1) A derivatives clearing organization may commingle the Cleared Swaps Customer Collateral that it receives from multiple futures commission merchants on behalf of their Cleared Swaps Customers.

(2) A derivatives clearing organization shall not commingle the Cleared Swaps Customer Collateral that it receives from a futures commission merchant on behalf of Cleared Swaps Customers with any of the following:

(i) The money, securities, or other property belonging to the derivatives clearing organization;

(ii) The money, securities, or other property belonging to any futures commission merchant; or

(iii) Futures Customer Funds (as §1.3 of this chapter defines such term) or the foreign futures or foreign options secured amount (as §1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation, or order, (or by a derivatives clearing organization rule approved in accordance with §39.15(b)(2) of this chapter).

(d) Exceptions; Permitted Investments. Notwithstanding the foregoing and §22.15, a derivatives clearing organization may invest the money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with §1.25 of this chapter.

§ 22.4 Futures Commission Merchants and derivatives clearing organizations: Permitted Depositories.

In order for a depository to be a Permitted Depository:
(a) The depository must (subject to §22.9) be one of the following types of entities:
(1) A bank located in the United States;
(2) A trust company located in the United States;
(3) A Collecting Futures Commission Merchant registered with the Commission (but only with respect to a Depositing Futures Commission Merchant providing Cleared Swaps Customer Collateral); or
(4) A derivatives clearing organization registered with the Commission;
and
(b) The futures commission merchant or the derivatives clearing organization must hold a written acknowledgement letter from the depository as required by §22.5 of this part.

§ 22.5 Futures commission merchants and derivatives clearing organizations: Written acknowledgement.

(a) Before depositing Cleared Swaps Customer Collateral, the futures commission merchant or derivatives clearing organization shall obtain and retain in its files a separate written acknowledgement letter from each depository in accordance with §§1.20 and 1.26 of this chapter, with all references to “Futures Customer Funds” modified to apply to Cleared Swaps Customer Collateral, and with all references to section 4d(a) or 4d(b) of the Act and the regulations thereunder modified to apply to section 4d(f) of the Act and the regulations thereunder.
(b) The futures commission merchant or derivatives clearing organization shall adhere to all requirements specified in §§1.20 and 1.26 of this chapter regarding retaining, permitting access to, filing, or amending the written acknowledgement letter, in all cases as if the Cleared Swaps Customer Collateral comprised Futures Customer Funds subject to segregation pursuant to section 4d(a) or 4d(b) of the Act and the regulations thereunder.
(c) Notwithstanding paragraph (a) of this section, an acknowledgement letter need not be obtained from a derivatives clearing organization that has made effective, pursuant to section 5c(c) of the Act and the regulations thereunder, rules that provide for the segregation of Cleared Swaps Customer Collateral, in accordance with all relevant provisions of the Act and the regulations thereunder.

§ 22.6 Futures commission merchants and derivatives clearing organizations: Naming of Cleared Swaps Customer Accounts.

The name of each Cleared Swaps Customer Account that a futures commission merchant or derivatives clearing organization maintains with a Permitted Depository shall:
(a) Clearly identify the account as a “Cleared Swaps Customer Account” and
(b) Clearly indicate that the collateral therein is “Cleared Swaps Customer Collateral” subject to segregation in accordance with the Act and this part.

§ 22.7 Permitted depositories: Treatment of Cleared Swaps Customer Collateral.

A Permitted Depository shall treat all funds in a Cleared Swaps Customer Collateral as Cleared Swaps Customer Collateral. A Permitted Depository shall not hold, dispose of, or use any such Cleared Swaps Customer Collateral as belonging to any person other than:
(a) The Cleared Swaps Customers of the futures commission merchant maintaining such Cleared Swaps Customer Account or;
(b) The Cleared Swaps Customers of the futures commission merchant for which the derivatives clearing organization maintains such Cleared Swaps Customer Account.

§ 22.8 Situs of Cleared Swaps Customer Accounts.

The situs of each of the following shall be located in the United States:
(a) Each FCM Physical Location or DCO Physical Location;
(b) Each “account,” within the meaning of §22.2(f)(1), that a futures commission merchant maintains for each Cleared Swaps Customer; and

(c) Each Cleared Swaps Customer Account on the books and records of a derivatives clearing organization with respect to the Cleared Swaps Customers of a futures commission merchant.

§ 22.9 Denomination of Cleared Swaps Customer Collateral and location of depositories.

(a) Subject to paragraph (b) of this section, futures commission merchants and derivatives clearing organizations may hold Cleared Swaps Customer Collateral in the denominations, at the locations and depositories, and subject to the segregation requirements specified in §1.49 of this chapter.

(b) Notwithstanding the requirements in §1.49 of this chapter, a futures commission merchant’s obligations to a Cleared Swaps Customer may be denominated in a currency in which funds have accrued to the Cleared Swaps Customer as a result of a Cleared Swap carried through such futures commission merchant, to the extent of such accruals.

(c) Each depository referenced in paragraph (a) of this section shall be considered a Permitted Depository for purposes of this part. Provided, however, that a futures commission merchant shall only be considered a Permitted Depository to the extent that it is acting as a Collecting Futures Commission Merchant (as §22.1 of this part defines such term).


§ 22.10 Application of other regulatory provisions.

Sections 1.27, 1.28, 1.29, and 1.30 of this chapter shall apply to the Cleared Swaps Customer Collateral in accordance with the terms therein.

[77 FR 66335, Nov. 2, 2012]

§ 22.11 Information to be provided regarding Cleared Swaps Customers and their Cleared Swaps.

(a) Each Depositing Futures Commission Merchant shall:

(1) The first time that the Depositing Futures Commission Merchant intermediates a Cleared Swap for a Cleared Swaps Customer with a Collecting Futures Commission Merchant, provide information sufficient to identify such Cleared Swaps Customer to the relevant Collection Futures Commission Merchant; and

(2) At least once each business day thereafter, provide information to the relevant Collecting Futures Commission Merchant sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that the Depositing Futures Commission Merchant intermediates for such Cleared Swaps Customer.

(b) If an entity serves as both a Depositing Futures Commission Merchant and a Collecting Futures Commission Merchant, then:

(1) The information that such entity must provide to its Collecting Futures Commission Merchant pursuant to paragraph (a)(1) of this section shall also include information sufficient to identify each Cleared Swaps Customer of the Depositing Futures Commission Merchant for which such entity serves as a Collecting Futures Commission Merchant; and

(2) The information that such entity must provide to its Collecting Futures Commission Merchant pursuant to paragraph (a)(2) of this section shall also include information sufficient to identify each Cleared Swaps Customer referenced in paragraph (b)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that such entity intermediates as a Collecting Futures Commission Merchant, on behalf of its Depositing Futures Commission Merchant, for such Cleared Swaps Customer.

(c) Each futures commission merchant that intermediates a Cleared Swap for a Cleared Swaps Customer, on or subject to the rules of a derivatives clearing organization, directly as a Clearing Member shall:

(1) The first time that such futures commission merchant intermediates a Cleared Swap for a Cleared Swaps Customer, provide information to the relevant derivatives clearing organization sufficient to identify such Cleared Swaps Customer; and
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Information to be maintained regarding Cleared Swaps Customer Collateral.

(a) Each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from an entity serving as a Depositing Futures Commission Merchant shall, no less frequently than once each business day, calculate and record:

(1) the amount of collateral required at such Collecting Futures Commission Merchant for each Cleared Swaps Customer of the entity acting as Depositing Futures Commission Merchant (including, without limitation, each Cleared Swaps Customer of any Depositing Futures Commission Merchant for which such entity also serves as a Collecting Futures Commission Merchant); and

(2) the sum of the individual collateral amounts referenced in paragraph (a)(1) of this section.

(b) Each Collecting Futures Commission Merchant shall calculate the collateral amounts referenced in paragraph (a) of this section with respect to the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for each Cleared Swaps Customer referenced in paragraph (a)(1) of this section.

(c) Each derivatives clearing organization receiving Cleared Swaps Customer Collateral from a futures commission merchant shall, no less frequently than once each business day, calculate and record:

(1) the amount of collateral required at such derivatives clearing organization for each Cleared Swaps Customer of the futures commission merchant; and

(2) the sum of the individual collateral amounts referenced in paragraph (c)(1) of this section.

(d) If the futures commission merchant referenced in paragraph (c) of this section is a Collecting Futures Commission Merchant, then the derivatives clearing organization shall also perform and record the results of the calculation required in paragraph (c) of this section for each Cleared Swaps Customer.

(2) At least once each business day thereafter, provide information to the relevant derivatives clearing organization sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that such futures commission merchant intermediates for such Cleared Swaps Customer.

(d) If the futures commission merchant referenced in paragraph (c) of this section is a Collecting Futures Commission Merchant, then:

(1) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(1) of this section shall also include information sufficient to identify each Cleared Swaps Customer of any entity that acts as a Depositing Futures Commission Merchant in relation to the Collecting Futures Commission Merchant (including, without limitation, each Cleared Swaps Customer of any Depositing Futures Commission Merchant for which such entity also serves as a Collecting Futures Commission Merchant); and

(2) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (d)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for such Cleared Swaps Customer.

(e) Each derivatives clearing organization shall:

(1) Take appropriate steps to confirm that the information it receives pursuant to paragraphs (c)(1) or (c)(2) of this section is accurate and complete, and

(2) Ensure that the futures commission merchant is providing the derivatives clearing organization the information required by paragraphs (c)(1) or (c)(2) of this section on a timely basis.


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Information to be maintained regarding Cleared Swaps Customer Collateral.

(a) Each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from an entity serving as a Depositing Futures Commission Merchant shall, no less frequently than once each business day, calculate and record:

(1) the amount of collateral required at such Collecting Futures Commission Merchant for each Cleared Swaps Customer of the entity acting as Depositing Futures Commission Merchant (including, without limitation, each Cleared Swaps Customer of any Depositing Futures Commission Merchant for which such entity also serves as a Collecting Futures Commission Merchant); and

(2) the sum of the individual collateral amounts referenced in paragraph (a)(1) of this section.

(b) Each Collecting Futures Commission Merchant shall calculate the collateral amounts referenced in paragraph (a) of this section with respect to the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for each Cleared Swaps Customer referenced in paragraph (a)(1) of this section.

(c) Each derivatives clearing organization receiving Cleared Swaps Customer Collateral from a futures commission merchant shall, no less frequently than once each business day, calculate and record:

(1) the amount of collateral required at such derivatives clearing organization for each Cleared Swaps Customer of the futures commission merchant; and

(2) the sum of the individual collateral amounts referenced in paragraph (c)(1) of this section.

(d) If the futures commission merchant referenced in paragraph (c) of this section is a Collecting Futures Commission Merchant, then the derivatives clearing organization shall also perform and record the results of the calculation required in paragraph (c) of this section for each Cleared Swaps Customer.

(2) At least once each business day thereafter, provide information to the relevant derivatives clearing organization sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that such futures commission merchant intermediates for such Cleared Swaps Customer.

(d) If the futures commission merchant referenced in paragraph (c) of this section is a Collecting Futures Commission Merchant, then:

(1) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(1) of this section shall also include information sufficient to identify each Cleared Swaps Customer of any entity that acts as a Depositing Futures Commission Merchant in relation to the Collecting Futures Commission Merchant (including, without limitation, each Cleared Swaps Customer of any Depositing Futures Commission Merchant for which such entity also serves as a Collecting Futures Commission Merchant); and

(2) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (d)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for such Cleared Swaps Customer.

(e) Each derivatives clearing organization shall:

(1) Take appropriate steps to confirm that the information it receives pursuant to paragraphs (c)(1) or (c)(2) of this section is accurate and complete, and

(2) Ensure that the futures commission merchant is providing the derivatives clearing organization the information required by paragraphs (c)(1) or (c)(2) of this section on a timely basis.

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Customer of an entity acting as a Depositing Futures Commission Merchant in relation to the Collecting Futures Commission Merchant (including, without limitation, any Cleared Swaps Customer for which such entity is also acting as a Collecting Futures Commission Merchant).

(e) Each futures commission merchant shall calculate the collateral amounts referenced in paragraph (c) of this section with respect to the portfolio of rights and obligations arising from the Cleared Swaps that the futures commission merchant intermediates (including, without limitation, as a Collecting Futures Commission Merchant on behalf of a Depositing Futures Commission Merchant), for each Cleared Swaps Customer referenced in paragraphs (c)(1) and (d) of this section.

(f) The collateral requirement referenced in paragraph (a) of this section with respect to a Collecting Futures Commission Merchant shall be no less than that imposed by the relevant derivatives clearing organization with respect to the same portfolio of rights and obligations for each relevant Cleared Swaps Customer.

§ 22.13 Additions to Cleared Swaps Customer Collateral.

(a)(1) At the election of the derivatives clearing organization or Collecting Futures Commission Merchant, the collateral requirement referred to in §22.12(a), (c), and (d) applicable to a particular Cleared Swaps Customer or group of Cleared Swaps Customers may be increased based on an evaluation of the credit risk posed by such Cleared Swaps Customer or group, in which case the derivatives clearing organization or Collecting Futures Commission Merchant shall collect and record such higher amount as provided in §22.12.

(2) Nothing in paragraph (a)(1) of this section is intended to interfere with the right of a futures commission merchant to increase the collateral requirements at such futures commission merchant with respect to any of its Cleared Swaps Customers, Futures Customers (as §1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customers (as §30.1 of this chapter defines that term).

(b) Any collateral deposited by a futures commission merchant (including a Depositing Futures Commission Merchant) pursuant to §22.2(e)(3)(i) of this part, which collateral is identified as such futures commission merchant’s own property may be used by the derivatives clearing organization or Collecting Futures Commission Merchant, as applicable, to margin, guarantee or secure the Cleared Swaps of any or all of such Cleared Swaps Customers.

(c) A futures commission merchant may transmit to a derivatives clearing organization any collateral posted by a Cleared Swaps Customer in excess of the amount required by the derivatives clearing organization if:

(1) the rules of the derivatives clearing organization expressly permit the futures commission merchant to transmit collateral in excess of the amount required by the derivatives clearing organization; and

(2) the derivatives clearing organization provides a mechanism by which the futures commission merchant is able to, and maintains rules pursuant to which the futures commission merchant is required to, identify each Business Day, for each Cleared Swaps Customer, the amount of collateral posted in excess of the amount required by the derivatives clearing organization.

§ 22.14 Futures Commission Merchant failure to meet a Cleared Swaps Customer Margin Call in full.

(a) A Depositing Futures Commission Merchant which receives a call for either initial margin or variation margin with respect to a Cleared Swaps Customer Account from a Collecting Futures Commission Merchant, which call such Depositing Futures Commission Merchant does not meet in full, shall, with respect to each Cleared Swaps Customer of such Depositing Futures Commission Merchant whose Cleared Swaps contribute to such margin call,

(1) Transmit to the Collecting Futures Commission Merchant an amount equal to the lesser of:

(i) The amount called for; or

(i) The remaining Cleared Swaps Collateral on deposit at such Depositing Futures Commission Merchant for that Cleared Swaps Customer; and

(ii) The amount transmitted on behalf of each such Cleared Swaps Customer.

(b) If the entity acting as Depositing Futures Commission Merchant referenced in paragraph (a) of this section is also a Collecting Futures Commission Merchant, then:

(1) Such entity shall include in the transmission required in paragraph (a)(1) of this section any amount that it receives, pursuant to paragraph (a)(1) of this section, from a Depositing Futures Commission Merchant for which such entity acts as a Collecting Futures Commission Merchant; and

(2) Such entity shall present its Collecting Futures Commission Merchant with the information that it receives, pursuant to paragraph (a)(2) of this section, from a Depositing Futures Commission Merchant for which such entity acts as a Collecting Futures Commission Merchant.

(c) A futures commission merchant which receives a call for either initial or variation margin with respect to a Cleared Swaps Customer Account from a derivatives clearing organization, which call such futures commission merchant does not meet in full, shall, with respect to each Cleared Swaps Customer of such futures commission merchant whose Cleared Swaps contribute to such margin call:

(1) Transmit to the derivatives clearing organization an amount equal to the lesser of

(i) The amount called for; or

(ii) The remaining Cleared Swaps Collateral on deposit at such futures commission merchant for each such Cleared Swaps Customer; and

(2) Advise the derivatives clearing organization of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such Cleared Swaps Customer.

(d) If the futures commission merchant referenced in paragraph (c) is a Collecting Futures Commission Merchant, then:

(e) If,

(1) On the business day prior to the business day on which the Depositing Futures Commission Merchant fails to meet a margin call with respect to a Cleared Swaps Customer Account, such Collecting Futures Commission Merchant referenced in paragraph (a) of this section held, with respect to such account, Cleared Swaps Collateral of a value no less than the amount specified in §22.12(a)(2) of this part, after the application of haircuts specified by policies applied by such Collecting Futures Commission Merchant in its relationship with the Depositing Futures Commission Merchant, and

(2) As of the close of business on the business day on which the margin call is not met, the market value of the Cleared Swaps Collateral held by the derivatives clearing organization or Collecting Futures Commission Merchant is, due to changes in such market value, less than the amount specified in §22.12(c)(2) of this part, then the amount of such collateral attributable to each Cleared Swaps Customer pursuant to §22.12(a)(1) of this part shall be reduced by the percentage difference between the amount specified in §22.12(a)(2) of this part and such market value.

(f) If,

(1) On the business day prior to the business day on which the futures commission merchant fails to meet a margin call with respect to a Cleared Swaps Customer Account, the derivatives clearing organization referenced in paragraph (c) of this section held, with respect to such account, Cleared Swaps Collateral of a value no less than the amount specified in §22.12(c)(2) of this part, then the derivatives clearing organization referenced in paragraph (c) of this section held, with respect to such account, Cleared Swaps Collateral of a value no less than the amount specified in §22.12(c)(2) of this part, after the application of haircuts specified by the rules...
and procedures of such derivatives clearing organization, and

(2) As of the close of business on the business day on which the margin call is not met, the market value of the Cleared Swaps Collateral held by the derivatives clearing organization is, due to changes in such market value, less than the amount specified in §22.12(c)(2) of this part, then the amount of collateral attributable to each Cleared Swaps Customer pursuant to §22.12(c)(1) of this part shall be reduced by the percentage difference between the amount specified in §22.12(c)(2) and such market value.

(g) A derivatives clearing organization or Collecting Futures Commission Merchant is entitled to reasonably rely upon any information provided by a defaulting futures commission merchant under §22.14. If the defaulting futures commission merchant does not provide such information on the date of the futures commission merchant’s default, a derivatives clearing organization or Collecting Futures Commission Merchant may rely on the information previously provided to it by the defaulting futures commission merchant.

§22.15 Treatment of Cleared Swaps Customer Collateral on an individual basis.

Subject to §22.3(d), each derivatives clearing organization and each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from a futures commission merchant shall treat the value of collateral required with respect to the portfolio of rights and obligations arising out of the Cleared Swaps intermediated for each Cleared Swaps Customer, and collected from the futures commission merchant, as belonging to such Cleared Swaps Customer, and such amount shall not be used to margin, guarantee, or secure the Cleared Swaps or other obligations of the futures commission merchant, or of any other Cleared Swaps Customer, Futures Customer (as §1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customer (as §30.1 of this chapter defines that term). Nothing contained herein shall be construed to limit, in any way, the right of a derivatives clearing organization or Collecting Futures Commission Merchant to liquidate any or all positions in a Cleared Swaps Customer Account in the event of a default of a clearing member or Depositing Futures Commission Merchant.

§22.16 Disclosures to Cleared Swaps Customers.

(a) A futures commission merchant shall disclose, to each of its Cleared Swaps Customers, the governing provisions, as described in paragraph (c) of this section, relating to use of Cleared Swaps Customer Collateral, transfer, neutralization of the risks, or liquidation of Cleared Swaps in the event of a default by the futures commission merchant relating to the Cleared Swaps Customer Account, as well as any change in such governing provisions.

(b) If the futures commission merchant referenced in paragraph (a) of this section is a Depositing Futures Commission Merchant, then such futures commission merchant shall disclose, to each of its Cleared Swaps Customers, the governing provisions, as described in paragraph (c) of this section, relating to use of Cleared Swaps Customer Collateral, transfer, neutralization of the risks, or liquidation of Cleared Swaps in the event of a default by:

(1) Such futures commission merchant or

(2) Any relevant Collecting Futures Commission Merchant relating to the Cleared Swaps Customer Account, as well as any change in such governing provisions.

(c) The governing provisions referred to in paragraphs (a) and (b) of this section are the rules of each derivatives clearing organization, or the provisions of the customer agreement between the Collecting Futures Commission Merchant and the Depositing Futures Commission Merchant, or on or through which the Depositing Futures Commission Merchant will intermediate Cleared Swaps for such Cleared Swaps Customer.
PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

Subpart A [Reserved]

Sec. 23.1–23.20 [Reserved]

Subpart B—Registration

23.21 Registration of swap dealers and major swap participants.
23.22 Associated persons of swap dealers and major swap participants.
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(c) Each affiliate of an insured depository institution described in section 716(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203 section 716(c), 124 Stat. 1376 (2010)) is required to be registered as a swap dealer if the affiliate is a swap dealer or as a major swap participant if the affiliate is a major swap participant.

§ 23.22 Associated persons of swap dealers and major swap participants.

(a) Definition. For the purpose of this section, the term “person” means an “associated person of a swap dealer or major swap participant” as defined in section 1a(4) of the Act and §1.3(aa)(6).

(b) Fitness. No swap dealer or major swap participant may permit a person who is subject to a statutory disqualification under section 8a(2) or 8a(3) of the Act to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knows, or in the exercise of reasonable care should know, of the statutory disqualification; Provided, however, that the prohibition set forth in this paragraph (b) shall not apply to any person listed as a principal or registered as an associated person of a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant, or any person registered as a floor broker or floor trader, notwithstanding that the person is subject to a disqualification from registration under section 8a(2) or 8a(3) of the Act.

§§ 23.23–23.40 [Reserved]
§ 23.201 Required records.

(a) Transaction and position records. Each swap dealer and major swap participant shall keep full, complete, and systematic records, together with all pertinent data and memoranda, of all its swaps activities. Such records shall include:

(1) Transaction records. Records of each transaction, including all documents on which transaction information is originally recorded. Such records shall be kept in a form and manner identifiable and searchable by transaction and by counterparty, and shall include:

(i) All documents customarily generated in accordance with market practice that demonstrate the existence and nature of an order or transaction, including, but not limited to, records of all orders (filled, unfilled, or cancelled); correspondence; journals; memoranda; ledgers; confirmations; risk disclosure documents; statements of purchase and sale; contracts; invoices; warehouse receipts; documents of title; and

(ii) The daily trading records required to be kept in accordance with §23.202.

(2) Position records. Records of each position held by each swap dealer and major swap participant, identified by product and counterparty, including records reflecting whether each position is “long” or “short” and whether the position is cleared. Position records shall be linked to transaction records in a manner that permits identification of the transactions that established the position.

(3) Records of transactions executed on a swap execution facility or designated contract market or cleared by a derivatives clearing organization. Records of each transaction executed on a swap execution facility or designated contract market or cleared by a derivatives clearing organization maintained in compliance with the Act and Commission regulations.

(b) Business records. Each swap dealer and major swap participant shall keep full, complete, and systematic records of all activities related to its business as a swap dealer or major swap participant, including but not limited to:

(1) Governance. (i) Minutes of meetings of the governing body and relevant committee minutes, including handouts and presentation materials;

(ii) Organizational charts for its governing body and relevant committees, business trading unit, clearing unit, risk management unit, and all other relevant units or divisions;
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(iii) Biographies or resumes of managers, senior supervisors, officers, and directors;

(iv) Job descriptions for manager, senior supervisor, officer, and director positions, including job responsibilities and scope of authority;

(v) Internal and external audit, risk management, compliance, and consultant reports (including management responses); and

(vi) Business and strategic plans for the business trading unit.

(2) Financial records. (i) Records reflecting all assets and liabilities, income and expenses, and capital accounts as required by the Act and Commission regulations; and

(ii) All other financial records required to be kept under the Act and Commission regulations.

(3) Complaints. (i) A record of each complaint received by the swap dealer or major swap participant concerning any partner, member, officer, employee, or agent. The record shall include the complainant’s name, address, and account number; the date the complaint was received; the name of all persons identified in the complaint; a description of the nature of the complaint; the disposition of the complaint, and the date the complaint was resolved.

(ii) A record indicating that each counterparty of the swap dealer or major swap participant has been provided with a notice containing the physical address, email or other widely available electronic address, and telephone number of the department of the swap dealer or major swap participant to which any complaints may be directed.

(4) Marketing and sales materials. All marketing and sales presentations, advertisements, literature, and communications, and a record documenting that the swap dealer or major swap participant has complied with, or adopted policies and procedures reasonably designed to establish compliance with, all applicable Federal requirements, Commission regulations, and the rules of any self-regulatory organization of which the swap dealer or major swap participant is a member.

(c) Records of data reported to a swap data repository. With respect to each swap, each swap dealer and major swap participant shall identify, retain, and produce for inspection all information and data required to be reported in accordance with part 45 of this chapter, along with a record of the date and time the swap dealer or major swap participant made the report.


(a) Daily trading records for swaps. Each swap dealer and major swap participant shall make and keep daily trading records of all swaps it executes, including all documents on which transaction information is originally recorded. Each swap dealer and major swap participant shall ensure that its records include all information necessary to conduct a comprehensive and accurate trade reconstruction for each swap. Each swap dealer and major swap participant shall maintain each transaction record in a manner identifiable and searchable by transaction and counterparty.

(1) Pre-execution trade information. Each swap dealer and major swap participant shall 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. Such records shall include, but are not limited to:

(i) Reliable timing data for the initiation of the trade that would permit complete and accurate trade reconstruction; and

(ii) A record of the date and time, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device, for each

quotation provided to, or received from, the counterparty prior to execution.

(2) Execution trade information. Each swap dealer and major swap participant shall make and keep trade execution records, including:

(i) All terms of each swap, including all terms regarding payment or settlement instructions, initial and variation margin requirements, option premiums, payment dates, and any other cash flows;

(ii) The trade ticket for each swap (which, together with the time of execution of each swap, shall be immediately recorded electronically for further processing);

(iii) The unique swap identifier, as required by §45.4(a), for each swap;

(iv) A record of the date and time of execution of each swap, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device;

(v) The name of the counterparty with which each such swap was executed, including its unique counterparty identifier, as required by §45.4(b);

(vi) The date and title of the agreement to which each swap is subject, including but not limited to, any swap trading relationship documentation and credit support arrangements;

(vii) The product name of each swap, including its unique product identifier, as required by §45.4(c);

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

(ix) Fees or commissions and other expenses, identified by transaction; and

(x) Any other information relevant to the swap.

(3) Post-execution trade information. Each swap dealer and major swap participant shall make and keep records of post-execution trade information containing an itemized record of all relevant post-trade processing and events.

(i) Records of post-trade processing and events shall include all of the following, as applicable:

(A) Confirmation;

(B) Termination;

(C) Novation;

(D) Amendment;

(E) Assignment;

(F) Netting;

(G) Compression;

(H) Reconciliation;

(I) Valuation;

(J) Margining;

(K) Collateralization; and

(L) Central clearing.

(ii) Each swap dealer and major swap participant shall make and keep a record of all swap confirmations, along with the date and time, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device; and

(iii) Each swap dealer and major swap participant shall make and keep a record of each swap portfolio reconciliation, including the number of portfolio reconciliation discrepancies and the number of swap valuation disputes (including the time-to-resolution of each valuation dispute and the age of outstanding valuation disputes, categorized by transaction and counterparty);

(iv) Each swap dealer and major swap participant shall make and keep a record of each swap portfolio compression exercise in which it participates, the swaps included in the compression, the identity of the counterparties participating in the exercise, the results of the compression, and the name of the third-party entity performing the compression, if any; and

(v) Each swap dealer and major swap participant shall make and keep a record of each swap that it centrally clears, categorized by transaction and counterparty.

(4) Ledgers. Each swap dealer and major swap participant shall make and keep ledgers (or other records) reflecting the following:

(i) Payments and interest received;

(ii) Moneys borrowed and moneys loaned;

(iii) The daily calculation of the value of each outstanding swap;

(iv) The daily calculation of current and potential future exposure for each counterparty;

(v) The daily calculation of initial margin to be posted by the swap dealer or major swap participant for each counterparty and the daily calculation of initial margin to be posted by each counterparty;
(vi) The daily calculation of variation margin payable to or receivable from each counterparty;

(vii) The daily calculation of the value of all collateral, before and after haircuts, held by or posted by the swap dealer or major swap participant;

(viii) All transfers of collateral, identifying in sufficient detail the amounts and types of collateral transferred; and

(ix) All charges against and credits to each counterparty’s account, including funds deposited, withdrawn, or transferred, and charges or credits resulting from losses or gains on transactions.

(b) Daily trading records for related cash and forward transactions. Each swap dealer and major swap participant shall make and keep daily trading records of all related cash or forward transactions it executes, including all documents on which the related cash or forward transaction information is originally recorded. Each swap dealer and major swap participant shall ensure that its records include all information necessary to conduct a comprehensive and accurate trade reconstruction for each related cash or forward transaction. Each swap dealer and major swap participant shall maintain each transaction record in a manner identifiable and searchable by transaction and by counterparty. Such records shall include, but are not limited to:

(1) A record of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the conclusion of a related cash or forward transaction, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media;

(2) Reliable timing data for the initiation of the transaction that would permit complete and accurate trade reconstruction;

(3) A record of the date and time, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device, from the counterparty prior to execution;

(4) A record of the date and time of execution of each related cash or forward transaction, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device;

(5) All terms of each related cash or forward transaction;

(6) The price at which the related cash or forward transaction was executed; and

(7) A record of the daily calculation of the value of the related cash or forward transaction and any other relevant financial information.

§ 23.203 Records; retention and inspection.

(a) Location of records—(1) Records. All records required to be kept by a swap dealer or major swap participant by the Act and by Commission regulations shall be kept at the principal place of business of the swap dealer or major swap participant or such other principal office as shall be designated by the swap dealer or major swap participant. If the principal place of business is outside of the United States, its territories or possessions, then upon the request of a Commission representative, the swap dealer or major swap participant must provide such records as requested at the place in the United States, its territories, or possessions designated by the representative within 72 hours after receiving the request.

(2) Contact information. Each swap dealer and major swap participant shall maintain for each of its offices a listing, by name or title, of each person at that office who, without delay, can explain the types of records the swap dealer or major swap participant maintains at that office and the information contained in those records.

(b) Record retention. (1) The records required to be maintained by this chapter shall be maintained in accordance with the provisions of §1.31, except as provided in paragraphs (b)(2) and (3) of this section. All records required to be kept by the Act and by Commission regulations shall be kept for a period of five years from the date the record was made and shall be readily accessible during the first two (2) years of the
five-year period. All such records shall be open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable prudential regulator. Records relating to swaps defined in section 1a(47)(A)(v) shall be open to inspection by any representative of the Commission, the United States Department of Justice, the Securities and Exchange Commission, or any applicable prudential regulator.

(2) 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. Such records shall be readily accessible until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and during the first two years of the 5-year period following such date. Provided, however, that records of oral communications communicated by telephone, voicemail, mobile device, or other digital or electronic media pursuant to § 23.202(a)(1) and (b)(1) shall be kept for a period of one year. All such records shall be open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable prudential regulator.

(3) Records of any swap data reported in accordance with part 45 of this chapter shall be maintained in accordance with the requirements of §45.2 of this chapter.

§ 23.204 Reports to swap data repositories.

(a) Reporting of swap transaction data to swap data repositories. Each swap dealer and major swap participant shall report all information and data in accordance with part 45 of this chapter.

(b) Electronic reporting of swap transaction data. Each swap dealer and major swap participant shall have the electronic systems and procedures necessary to transmit electronically all information and data required to be reported in accordance with the real-time public recording requirements in part 43 of this chapter.

§ 23.205 Real-time public reporting.

(a) Real-time public reporting of swap transaction and pricing data. Each swap dealer and major swap participant shall report all information and swap transaction and pricing data required to be reported in accordance with the real-time public recording requirements in part 43 of this chapter.

(b) Electronic reporting of swap transaction data. Each swap dealer and major swap participant shall have the electronic systems and procedures necessary to transmit electronically all information and data required to be reported in accordance with part 43 of this chapter.

§ 23.206 Delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight to establish an alternative compliance schedule to comply with daily trading records.

(a) The Commission hereby delegates to the Director of the Division of Swap Dealer and Intermediary Oversight or such other employee or employees as the Director may designate from time to time, the authority to establish an alternative compliance schedule for requirements of §23.202 that are found to be technologically or economically impracticable for an affected swap dealer or major swap participant that seeks, in good faith, to comply with the requirements of §23.202 within a reasonable time period beyond the date on which compliance by such swap dealer or major swap participant is otherwise required.

(b) A request for an alternative compliance schedule under this section shall be acted upon by the Director of the Division of Swap Dealer and Intermediary Oversight within 30 days from the time such a request is received, or it shall be deemed approved.

(c) Relief granted under this section shall not cause a registrant to be out of compliance or deemed in violation of any registration requirements.

(d) Notwithstanding any other provision of this section, in any case in
which a Commission employee delegated authority under this section believes it appropriate, he or she may submit to the Commission for its consideration the question of whether an alternative compliance schedule should be established. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section.

Subpart H—Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing With Counterparties, Including Special Entities

SOURCE: 77 FR 9822, Feb. 17, 2012, unless otherwise noted.

§ 23.400 Scope.

The sections of this subpart shall apply to swap dealers and, unless otherwise indicated, major swap participants. These rules are not intended to limit or restrict the applicability of other provisions of the Act and rules and regulations thereunder, or other applicable laws, rules and regulations. The provisions of this subpart shall apply in connection with transactions in swaps as well as in connection with swaps that are offered but not entered into.

§ 23.401 Definitions.

(a) Counterparty. The term “counterparty,” as appropriate in this subpart, includes any person who is a prospective counterparty to a swap.

(b) Major swap participant. The term “major swap participant” means any person defined in Section 1a(33) of the Act and § 1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a major swap participant, including an associated person defined in Section 1a(4) of the Act.

(c) Special Entity. The term “Special Entity” means:

(1) A Federal agency;

(2) A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State;

(3) Any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(4) Any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(5) Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)); or

(6) Any employee benefit plan defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying a swap dealer or major swap participant of its election prior to entering into a swap with the particular swap dealer or major swap participant.

(d) Swap dealer. The term “swap dealer” means any person defined in Section 1a(49) of the Act and § 1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a swap dealer, including an associated person defined in Section 1a(4) of the Act.

§ 23.402 General provisions.

(a) Policies and procedures to ensure compliance and prevent evasion. (1) Swap dealers and major swap participants shall have written policies and procedures reasonably designed to:

(i) Ensure compliance with the requirements of this subpart; and

(ii) Prevent a swap dealer or major swap participant from evading or participating in or facilitating an evasion of any provision of the Act or any regulation promulgated thereunder.

(2) Swap dealers and major swap participants shall implement and monitor compliance with such policies and procedures as part of their supervision and risk management requirements specified in subpart J of this part.

(b) Know your counterparty. Each swap dealer shall implement policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap

dealer prior to the execution of the transaction that are necessary for conducting business with such counterparty. For purposes of this section, the essential facts concerning a counterparty are:

(1) Facts required to comply with applicable laws, regulations and rules;

(2) Facts required to implement the swap dealer’s credit and operational risk management policies in connection with transactions entered into with such counterparty; and

(3) Information regarding the authority of any person acting for such counterparty.

(c) True name and owner. Each swap dealer or major swap participant shall obtain and retain a record which shall show the true name and address of each counterparty whose identity is known to the swap dealer or major swap participant prior to the execution of the transaction, the principal occupation or business of such counterparty as well as the name and address of any other person guaranteeing the performance of such counterparty and any person exercising any control with respect to the positions of such counterparty.

(d) Reasonable reliance on representations. A swap dealer or major swap participant may rely on the written representations of a counterparty to satisfy its due diligence requirements under this subpart, unless it has information that would cause a reasonable person to question the accuracy of the representation. If agreed to by the counterparties, such representations may be contained in counterparty relationship documentation and may satisfy the relevant requirements of this subpart for subsequent swaps offered to or entered into with a counterparty, provided however, that such counterparty undertakes to timely update any material changes to the representations.

(e) Manner of disclosure. A swap dealer or major swap participant may provide the information required by this subpart by any reliable means agreed to in writing by the counterparty; provided however, for transactions initiated on a designated contract market or swap execution facility, written agreement by the counterparty regarding the reliable means of disclosure is not required.

(f) Disclosures in a standard format. If agreed to by a counterparty, the disclosure of material information that is applicable to multiple swaps between a swap dealer or major swap participant and a counterparty may be made in counterparty relationship documentation or other written agreement between the counterparties.

(g) Record retention. Swap dealers and major swap participants shall create a record of their compliance with the requirements of this subpart and shall retain records in accordance with subpart F of this part and §1.31 of this chapter and make them available to applicable prudential regulators upon request.

§§ 23.403–23.409 [Reserved]

§ 23.410 Prohibition on fraud, manipulation, and other abusive practices.

(a) It shall be unlawful for a swap dealer or major swap participant—

(1) To employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;

(2) To engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or

(3) To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(b) Affirmative defense. It shall be an affirmative defense to an alleged violation of paragraph (a)(2) or (3) of this section for failure to comply with any requirement in this subpart if a swap dealer or major swap participant establishes that the swap dealer or major swap participant:

(1) Did not act intentionally or recklessly in connection with such alleged violation; and

(2) Complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation.

(c) Confidential treatment of counterparty information. (1) It shall be unlawful for any swap dealer or major swap participant to:
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§ 23.431 Disclosures of material information.

(a) At a reasonably sufficient time prior to entering into a swap, a swap dealer or major swap participant shall disclose to any counterparty to the swap (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess:

(1) The material risks of the particular swap, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks;

(2) The material characteristics of the particular swap, which shall include the material economic terms of

(c) Special Entity election. In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall verify whether a counterparty is eligible to elect to be a Special Entity under §23.401(c)(6) and, if so, notify such counterparty of its right to make such an election.

(d) Safe harbor. A swap dealer or major swap participant may rely on written representations of a counterparty to satisfy the requirements of this section, as provided in §23.402(d). A swap dealer or major swap participant will have a reasonable basis to rely on such written representations for purposes of the requirements in paragraphs (a) and (b) of this section if the counterparty specifies in such representations the provision(s) of Section 1a(18) of the Act or paragraph(s) of §1.3 of this chapter that describe its status as an eligible contract participant and, in the case of a Special Entity, the paragraph(s) of the Special Entity definition in §23.401(c) that define its status as a Special Entity.

(e) This section shall not apply with respect to:

(1) A transaction that is initiated on a designated contract market; or

(2) A transaction initiated on a swap execution facility, if the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

§ 23.430 Verification of counterparty eligibility.

(a) Eligibility. A swap dealer or major swap participant shall verify that a counterparty meets the eligibility standards for an eligible contract participant, as defined in Section 1a(18) of the Act and §1.3 of this chapter, before offering to enter into or entering into a swap with that counterparty.

(b) Special Entity. In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall also verify whether the counterparty is a Special Entity.
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the swap, the terms relating to the operation of the swap, and the rights and obligations of the parties during the term of the swap; and

(3) The material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with a particular swap, which shall include:

(i) With respect to disclosure of the price of the swap, the price of the swap and the mid-market mark of the swap as set forth in paragraph (d)(2) of this section; and

(ii) Any compensation or other incentive from any source other than the counterparty that the swap dealer or major swap participant may receive in connection with the swap.

(b) Scenario Analysis. Prior to entering into a swap with a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) that is not made available for trading, as provided in Section 2(h)(8) of the Act, on a designated contract market or swap execution facility, a swap dealer shall:

(1) Notify the counterparty that it can request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with the swap;

(2) Upon request of the counterparty, provide a scenario analysis, which is designed in consultation with the counterparty and done over a range of assumptions, including severe downside stress scenarios that would result in a significant loss;

(3) Disclose all material assumptions and explain the calculation methodologies used to perform any requested scenario analysis; provided however, that the swap dealer is not required to disclose confidential, proprietary information about any model it may use to prepare the scenario analysis; and

(4) In designing any requested scenario analysis, consider any relevant analyses that the swap dealer undertakes for its own risk management purposes, including analyses performed as part of its “New Product Policy” specified in §23.600(c)(3).

(c) Paragraphs (a) and (b) of this section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or a swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

(d) Daily mark. A swap dealer or major swap participant shall:

(1) For cleared swaps, notify a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of the counterparty’s right to receive, upon request, the daily mark from the appropriate derivatives clearing organization.

(2) For uncleared swaps, provide the counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) with a daily mark, which shall be the mid-market mark of the swap. The mid-market mark of the swap shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments. The daily mark shall be provided to the counterparty during the term of the swap as of the close of business or such other time as the parties agree in writing.

(3) For uncleared swaps, disclose to the counterparty:

(i) The methodology and assumptions used to prepare the daily mark and any material changes during the term of the swap; provided however, that the swap dealer or major swap participant is not required to disclose to the counterparty confidential, proprietary information about any model it may use to prepare the daily mark; and

(ii) Additional information concerning the daily mark to ensure a fair and balanced communication, including, as appropriate, that:

(A) The daily mark may not necessarily be a price at which either the counterparty or the swap dealer or major swap participant would agree to replace or terminate the swap;

(B) Depending upon the agreement of the parties, calls for margin may be based on considerations other than the daily mark provided to the counterparty; and

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§ 23.432 Clearing disclosures.
(a) For swaps required to be cleared—right to select derivatives clearing organization. A swap dealer or major swap participant shall notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant) with which it entered into a swap that is subject to mandatory clearing under Section 2(h) of the Act, that the counterparty has the sole right to select the derivatives clearing organization at which the swap will be cleared.
(b) For swaps not required to be cleared—right to clearing. A swap dealer or major swap participant shall notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant) with which it entered into a swap that is not subject to the mandatory clearing requirements under Section 2(h) of the Act that the counterparty:
(1) May elect to require clearing of the swap; and
(2) Shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

§ 23.433 Communications—fair dealing.
With respect to any communication between a swap dealer or major swap participant and any counterparty, the swap dealer or major swap participant shall communicate in a fair and balanced manner based on principles of fair dealing and good faith.

§ 23.434 Recommendations to counterparties—institutional suitability.
(a) A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant, must:
(1) Undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap; and
(2) Have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty. To establish a reasonable basis for a recommendation, a swap dealer must have or obtain information about the counterparty, including the counterparty’s investment profile, trading objectives, and ability to absorb potential losses associated with the recommended swap or trading strategy involving a swap.
(b) Safe harbor. A swap dealer may fulfill its obligations under paragraph (a)(2) of this section with respect to a particular counterparty if:
(1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap;
(2) The counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer with regard to the relevant swap or trading strategy involving a swap;
(3) The swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the swap or trading strategy involving a swap for the counterparty; and
(4) In the case of a counterparty that is a Special Entity, the swap dealer complies with §23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of §23.440(a).
(c) A swap dealer will satisfy the requirements of paragraph (b)(1) of this section if it receives written representations, as provided in §23.402(d), that:
(1) In the case of a counterparty that is not a Special Entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; or
§ 23.440 Requirements for swap dealers acting as advisors to Special Entities.

(a) Acts as an advisor to a Special Entity. For purposes of this section, a swap dealer “acts as an advisor to a Special Entity” when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity.

(b) Safe harbors. A swap dealer will not “act as an advisor to a Special Entity” within the meaning of paragraph (a) of this section if:

(1) With respect to a Special Entity that is an employee benefit plan as defined in §23.401(c)(3):
   (i) The Special Entity represents in writing that it has a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) that is responsible for representing the Special Entity in connection with the swap transaction;
   (ii) The fiduciary represents in writing that it will not rely on recommendations provided by the swap dealer; and
   (iii) The Special Entity represents in writing that:
      (A) That it will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction is evaluated by a fiduciary before the transaction occurs; or
      (B) That any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction will be evaluated by a fiduciary before that transaction occurs; or
   (2) With respect to any Special Entity:
      (i) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity;
      (ii) The Special Entity represents in writing that:
         (A) The Special Entity will not rely on recommendations provided by the swap dealer; and
         (B) The Special Entity will rely on advice from a qualified independent representative within the meaning of §23.450; and
      (iii) The swap dealer discloses to the Special Entity that it is not undertaking to act in the best interests of the Special Entity as otherwise required by this section.

(c) A swap dealer that acts as an advisor to a Special Entity shall comply with the following requirements:

(1) Duty. Any swap dealer that acts as an advisor to a Special Entity shall have a duty to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity.

(2) Reasonable efforts. Any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity, including information relating to:

   (i) The financial status of the Special Entity, as well as the Special Entity’s future funding needs;
   (ii) The tax status of the Special Entity;
   (iii) The hedging, investment, financing, or other objectives of the Special Entity;
   (iv) The experience of the Special Entity with respect to entering into swaps, generally, and swaps of the type and complexity being recommended;
   (v) Whether the Special Entity has the financial capability to withstand changes in market conditions during the term of the swap; and
   (vi) Such other information as is relevant to the particular facts and circumstances of the Special Entity, market conditions, and the type of swap or trading strategy involving a swap being recommended.

(d) Reasonable reliance on representations of the Special Entity. As provided in §23.402(d), the swap dealer may rely
on written representations of the Special Entity to satisfy its requirement in paragraph (c)(2) of this section to make "reasonable efforts" to obtain necessary information.

§§ 23.441–23.449 [Reserved]

§ 23.450 Requirements for swap dealers and major swap participants acting as counterparties to Special Entities.

(a) Definitions. For purposes of this section:

(1) The term "principal relationship" means where a swap dealer or major swap participant is a principal of the representative of a Special Entity or the representative of a Special Entity is a principal of the swap dealer or major swap participant. The term "principal" means any person listed in §3.1(a)(1) through(3) of this chapter.

(2) The term "statutory disqualification" means grounds for refusal to register or to revoke, condition, or restrict the registration of any registrant or applicant for registration as set forth in Sections 8a(2) and 8a(3) of the Act.

(b)(1) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity, other than a Special Entity defined in §23.401(c)(3), shall have a reasonable basis to believe that the Special Entity has a representative that:

(i) Has sufficient knowledge to evaluate the transaction and risks;

(ii) Is not subject to a statutory disqualification;

(iii) Is independent of the swap dealer or major swap participant;

(iv) Undertakes a duty to act in the best interests of the Special Entity it represents;

(v) Makes appropriate and timely disclosures to the Special Entity;

(vi) Evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriate-ness of the swap; and

(vii) In the case of a Special Entity as defined in §23.401(c)(2) or (4), is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory organization subject to the jurisdiction of the Commission or the Securities and Exchange Commission; provided however, that this paragraph (b)(1)(vii) of this section shall not apply if the representative is an employee of the Special Entity.

(2) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity as defined in §23.401(c)(3) shall have a reasonable basis to believe that the Special Entity has a representative that is a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(c) Independent. For purposes of paragraph (b)(1)(iii) of this section, a representative of a Special Entity will be deemed to be independent of the swap dealer or major swap participant if:

(1) The representative is not, and, within one year of representing the Special Entity in connection with the swap, was not an associated person of the swap dealer or major swap participant within the meaning of Section 1a(4) of the Act;

(2) There is no principal relationship between the representative of the Special Entity and the swap dealer or major swap participant;

(3) The representative:

(i) Provides timely and effective disclosures to the Special Entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the Special Entity; and

(ii) Complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest;

(4) The representative is not directly or indirectly, through one or more persons, controlled by, in control of, or under common control with the swap dealer or major swap participant; and

(5) The swap dealer or major swap participant did not refer, recommend, or introduce the representative to the Special Entity within one year of the representative's representation of the Special Entity in connection with the swap.

(d) Safe harbor. (1) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that the Special Entity, other than a Special Entity defined in
§ 23.451  Political contributions by certain swap dealers.

(a) Definitions. For the purposes of this section:

(1) The term “contribution” means any gift, subscription, loan, advance, or deposit of money or anything of value made;

(2) The term “covered associate” means:

(i) Any general partner, managing member, or executive officer, or other person with a similar status or function;

(ii) Any employee who solicits a governmental Special Entity for the swap dealer and any person who supervises,

§ 23.451  Political contributions by certain swap dealers.

(a) Definitions. For the purposes of this section:

(1) The term “contribution” means any gift, subscription, loan, advance, or deposit of money or anything of value made;

(2) The term “covered associate” means:

(i) Any general partner, managing member, or executive officer, or other person with a similar status or function;

(ii) Any employee who solicits a governmental Special Entity for the swap dealer and any person who supervises,
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directly or indirectly, such employee; and

(iii) Any political action committee controlled by the swap dealer or by any person described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section.

(3) The term “governmental Special Entity” means any Special Entity defined in § 23.401(c)(2) or (4).

(4) The term “official” of a governmental Special Entity means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate, or successful candidate for elective office of a governmental Special Entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity.

(5) The term “payment” means any gift, subscription, loan, advance, or deposit of money or anything of value.

(6) The term “regulated person” means:

(i) A person that is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory agency subject to the jurisdiction of the Commission or the Securities and Exchange Commission;

(ii) A general partner, managing member, or executive officer of such person, or other individual with a similar status or function; or

(iii) An employee of such person who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee.

(7) The term “solicit” means a direct or indirect communication by any person with a governmental Special Entity for the purpose of obtaining or retaining an engagement related to a swap.

(b) Prohibitions and exceptions. (1) As a means reasonably designed to prevent fraud, no swap dealer shall offer to enter into or enter into a swap or a trading strategy involving a swap with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity was made by the swap dealer or by any covered associate of the swap dealer; provided however, that:

(2) This prohibition does not apply:

(i) If the only contributions made by the swap dealer to an official of such governmental Special Entity were made by a covered associate:

(A) To officials for whom the covered associate was entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed $350 to any one official per election; or

(B) To officials for whom the covered associate was not entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed $150 to any one official per election;

(ii) To a swap dealer as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the swap dealer, provided that this exclusion shall not apply if the natural person, after becoming a covered associate, solicits the governmental Special Entity on behalf of the swap dealer to offer to enter into or to enter into a swap or trading strategy involving a swap; or

(iii) To a swap that is:

(A) Initiated on a designated contract market or swap execution facility; and

(B) One in which the swap dealer does not know the identity of the counterparty to the transaction prior to execution.

(3) No swap dealer or any covered associate of the swap dealer shall:

(i) Provide or agree to provide, directly or indirectly, payment to any person to solicit a governmental Special Entity to offer to enter into, or to enter into, a swap with that swap dealer unless such person is a regulated person; or

(ii) Coordinate, or solicit any person or political action committee to make, any:

(A) Contribution to an official of a governmental Special Entity with which the swap dealer is offering to enter into, or has entered into, a swap; or
(B) Payment to a political party of a state or locality with which the swap dealer is offering to enter into or has entered into a swap or a trading strategy involving a swap.

(c) Circumvention of rule. No swap dealer shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of paragraph (b) of this section.

(d) Requests for exemption. The Commission, upon application, may conditionally or unconditionally exempt a swap dealer from the prohibition under paragraph (b) of this section. In determining whether to grant an exemption, the Commission will consider, among other factors:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the Act;

(2) Whether the swap dealer:

(i) Before the contribution resulting in the prohibition was made, implemented policies and procedures reasonably designed to prevent violations of this section;

(ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and

(iii) After learning of the contribution:

(A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and

(B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the swap dealer, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (e.g., federal, state or local); and

(6) The contributor’s apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding the contribution.

(e) Prohibitions inapplicable. (1) The prohibitions under paragraph (b) of this section shall not apply to a contribution made by a covered associate of the swap dealer if:

(i) The swap dealer discovered the contribution within 120 calendar days of the date of such contribution;

(ii) The contribution did not exceed the amounts permitted by paragraphs (b)(2)(i)(A) or (B) of this section; and

(iii) The covered associate obtained a return of the contribution within 60 calendar days of the date of discovery of the contribution by the swap dealer.

(2) A swap dealer may not rely on paragraph (e)(1) of this section more than twice in any 12-month period.

(3) A swap dealer may not rely on paragraph (e)(1) of this section more than once for any covered associate, regardless of the time between contributions.

Subpart I—Swap Documentation

SOURCE: 77 FR 21307, Apr. 9, 2012, unless otherwise noted.

§ 23.500 Definitions.

For purposes of this subpart I, the following terms shall be defined as provided.

(a) Acknowledgment means a written or electronic record of all of the terms of a swap signed and sent by one counterparty to the other.

(b) Bilateral portfolio compression exercise means an exercise in which two swap counterparties wholly terminate or change the notional value of some or all of the swaps submitted by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure of risk) of the terminated swaps in the exercise.

(c) Confirmation means the consummation (electronically or otherwise) of legally binding documentation
(electronic or otherwise) that memorializes the agreement of the counterparties to all of the terms of a swap transaction. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise). A confirmation is created when an acknowledgment is manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty.

(d) Execution means, with respect to a swap transaction, an agreement by the counterparties (whether orally, in writing, electronically, or otherwise) to the terms of the swap transaction that legally binds the counterparties to such terms under applicable law.

(e) Financial entity means a counterparty that is not a swap dealer or a major swap participant and that is one of the following:

(1) A commodity pool as defined in Section 1a(5) of the Act;
(2) A private fund as defined in Section 202(a) of the Investment Advisors Act of 1940;
(3) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974;
(4) A person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in Section 4(k) of the Bank Holding Company Act of 1956; and
(5) A security-based swap dealer or a major security-based swap participant.

(f) Fully offsetting swaps means swaps of equivalent terms where no net cash flow would be owed to either counterparty after the offset of payment obligations thereunder.

(g) Material terms means all terms of a swap required to be reported in accordance with part 45 of this chapter.

(h) Multilateral portfolio compression exercise means an exercise in which multiple swap counterparties wholly terminate or change the notional value of some or all of the swaps submitted by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure of risk) of the terminated swaps in the compression exercise.

(i) Portfolio reconciliation means any process by which the two parties to one or more swaps:

(1) Exchange the terms of all swaps in the swap portfolio between the counterparties;
(2) Exchange each counterparty’s valuation of each swap in the swap portfolio between the counterparties as of the close of business on the immediately preceding business day; and
(3) Resolve any discrepancy in material terms and valuations.

(j) Prudential regulator 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 Association, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant.

(k) Swap portfolio means all swaps currently in effect between a particular swap dealer or major swap participant and a particular counterparty.

(l) Swap transaction means any event that results in a new swap or in a change to the terms of a swap, including execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap.

(m) Valuation means the current market value or net present value of a swap.

§ 23.501 Swap confirmation.

(a) Confirmation. Subject to the compliance schedule in paragraph (c) of this section:

(1) Each swap dealer and major swap participant entering into a swap transaction with a counterparty that is a swap dealer or major swap participant shall execute a confirmation for the swap transaction as soon as technologically practicable, but in any event by the end of first business day following the day of execution.
(2) Each 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 shall send an acknowledgment of such swap transaction as soon as technologically practicable, but in any event by the end of the first business day following the day of execution.

(3)(i) Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that it enters into with a counterparty that is a financial entity as soon as technologically practicable, but in any event by the end of the first business day following the day of execution.

(ii) Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that it enters into with a counterparty that is not a swap dealer, major swap participant, or a financial entity not later than the end of the second business day following the day of execution.

(iii) Such procedures shall include a requirement that, upon a request by a prospective counterparty prior to execution of any such swap, the swap dealer or major swap participant furnish to the prospective counterparty prior to execution a draft acknowledgment specifying all terms of the swap transaction other than the applicable pricing and other relevant terms that are to be expressly agreed at execution.

(4) Swaps executed on a swap execution facility, designated contract market, or submitted for clearing by a derivatives clearing organization.

(i) Any swap transaction executed on a swap execution facility or designated contract market, or submitted for clearing by a derivatives clearing organization shall be deemed to satisfy the requirements of this section, provided that:

(A) The swap transaction is submitted for clearing as soon as technologically practicable, but in any event no later than the times established for confirmation under paragraphs (a)(1) or (3) of this section, and

(B) Confirmation of all terms of the transaction takes place at the same time as the swap transaction is accepted for clearing pursuant to the rules of the derivatives clearing organization.

(iii) If a swap dealer or major swap participant receives notice that a swap transaction has not been confirmed by a swap execution facility or a designated contract market, or accepted for clearing by a derivatives clearing organization, the swap dealer or major swap participant shall execute a confirmation for such swap transaction as soon as technologically practicable by a swap execution facility or a designated contract market, or accepted for clearing by a derivatives clearing organization,

(iii) If a swap dealer or major swap participant receives notice that a swap transaction has not been confirmed by a swap execution facility or a designated contract market, or accepted for clearing by a derivatives clearing organization, the swap dealer or major swap participant shall execute a confirmation for such swap transaction as soon as technologically practicable, but in any event no later than the times established for confirmation under paragraphs (a)(1) or (3) of this section as if such swap transaction were executed at the time the swap dealer or major swap participant receives such notice.

(5) For purposes of this section:

(i) “Day of execution” means the calendar day of the party to the swap transaction that ends latest, provided that if a swap transaction is—

(A) Entered into after 4:00 p.m. in the place of a party; or

(B) Entered into on a day that is not a business day in the place of a party, then such swap transaction shall be deemed to have been entered into by that party on the immediately succeeding business day of that party, and the day of execution shall be determined with reference to such business day; and

(ii) “Business day” means any day other than a Saturday, Sunday, or legal holiday.

(b) Recordkeeping. (1) Each swap dealer and major swap participant shall make and retain a record of:

(i) The date and time of transmission to, or receipt from, a counterparty of any acknowledgment; and

(ii) The date and time of transmission to, or receipt from, a counterparty of any confirmation.
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(2) All records required to be maintained pursuant to this section shall be maintained in accordance with §23.203 and shall be made available promptly upon request to any representative of the Commission or any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v), to any representative of the Commission, the Securities and Exchange Commission, or any applicable prudential regulator.

(c) Compliance schedule. The requirements of paragraph (a) of this section are subject to the following compliance schedule:

(1) For purposes of paragraph (a)(1) of this section, each swap dealer and major swap participant entering into a swap transaction that is or involves a credit swap or interest rate swap with a counterparty that is a swap dealer or major swap participant shall execute a confirmation for the swap transaction as soon as technologically practicable, but in any event by:

(i) The end of the second business day following the day of execution for the period from the effective date of this section to February 28, 2014; and

(ii) The end of the first business day following the day of execution from and after March 1, 2014.

(2) For purposes of paragraph (a)(1) of this section, each swap dealer and major swap participant entering into a swap transaction that is or involves an equity swap, foreign exchange swap, or other commodity swap with a counterparty that is not a swap dealer or a major swap participant shall send an acknowledgment of such swap transaction as soon as technologically practicable, but in any event by:

(i) The end of the third business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the second business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the first business day following the day of execution from and after September 1, 2014.

(3) For purposes of paragraph (a)(2) of this section, each swap dealer and major swap participant entering into a swap transaction that is or involves a credit swap or interest rate swap with a counterparty that is not a swap dealer or a major swap participant shall send an acknowledgment of such swap transaction as soon as technologically practicable, but in any event by:

(i) The end of the second business day following the day of execution for the period from the effective date of this section to February 28, 2014; and

(ii) The end of the first business day following the day of execution from and after March 1, 2014.

(4) For purposes of paragraph (a)(2) of this section, each swap dealer and major swap participant entering into a swap transaction that is or involves an equity swap, foreign exchange swap, or other commodity swap with a counterparty that is not a swap dealer or a major swap participant shall send an acknowledgment of such swap transaction as soon as technologically practicable, but in any event by:

(i) The end of the third business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the second business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the first business day following the day of execution from and after September 1, 2014.

(5) For purposes of paragraph (a)(3)(i) of this section, each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that is or involves a credit swap or interest rate swap that it enters into with a counterparty that is a financial entity as soon as technologically practicable, but in any event by:

(i) The end of the second business day following the day of execution for the period from the effective date of this section to February 28, 2014; and

(ii) The end of the first business day following the day of execution from and after March 1, 2014.

(6) For purposes of paragraph (a)(3)(i) of this section, each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to
§ 23.502 Portfolio reconciliation.

(a) Swaps with swap dealers or major swap participants. Each swap dealer and major swap participant shall engage in

ensure that it executes a confirmation for each swap transaction that is or involves an equity swap, foreign exchange swap, or other commodity swap that it enters into with a counterparty that is a financial entity as soon as technologically practicable, but in any event by:

(i) The end of the third business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the second business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the first business day following the day of execution from and after September 1, 2014.

(7) For purposes of paragraph (a)(3)(ii) of this section, each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that is or involves a credit swap or interest rate swap that it enters into with a counterparty that is not a swap dealer, major swap participant, or a financial entity not later than:

(i) The end of the fifth business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the third business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the second business day following the day of execution from and after September 1, 2014.

(8) For purposes of paragraph (a)(3)(ii) of this section, each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that is or involves an equity swap, foreign exchange swap, or other commodity swap that it enters into with a counterparty that is not a swap dealer, major swap participant, or a financial entity not later than:

(i) The end of the seventh business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the fourth business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the second business following the day of execution from and after September 1, 2014.

(9) For purposes of paragraph (c) of this section:

(i) “Credit swap” means any swap that is primarily based on instruments of indebtedness, including, without limitation: Any swap primarily based on one or more broad-based indices related to instruments of indebtedness; and any swap that is an index credit swap or total return swap on one or more indices of debt instruments;

(ii) “Equity swap” means any swap that is primarily based on equity securities, including, without limitation: Any swap primarily based on one or more broad-based indices of equity securities; and any total return swap on one or more equity indices;

(iii) “Foreign exchange swap” has the meaning set forth in section 1a(25) of the CEA. It does not include swaps primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as “cross-currency swaps”); and

(iv) “Interest rate swap” means any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates; or any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as “cross-currency swaps”); and

(v) “Other commodity swap” means any swap not included in the credit, equity, foreign exchange, or interest rate asset classes, including, without limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity.

[77 FR 55960, Sept. 11, 2012]
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portfolio reconciliation as follows for all swaps in which its counterparty is also a swap dealer or major swap participant.

(1) Each swap dealer or major swap participant shall agree in writing with each of its counterparties on the terms of the portfolio reconciliation.

(2) The portfolio reconciliation may be performed on a bilateral basis by the counterparties or by a qualified third party.

(3) The portfolio reconciliation shall be performed no less frequently than:

(i) Once each business day for each swap portfolio that includes 500 or more swaps;

(ii) Once each week for each swap portfolio that includes more than 50 but fewer than 500 swaps on any business day during any week; and

(iii) Once each calendar quarter for each swap portfolio that includes no more than 50 swaps at any time during the calendar quarter.

(4) Each swap dealer and major swap participant shall resolve immediately any discrepancy in a material term of a swap identified as part of a portfolio reconciliation or otherwise.

(5) Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to resolve any discrepancy in a valuation identified as part of a portfolio reconciliation or otherwise as soon as possible, but in any event within five business days, provided that the swap dealer and major swap participant establishes, maintains, and follows written policies and procedures reasonably designed to identify how the swap dealer or major swap participant will comply with any variation margin requirements under section 4s(e) of the Act and regulations under this part pending resolution of the discrepancy in valuation. A difference between the lower valuation and the higher valuation of less than 10 percent of the higher valuation need not be deemed a discrepancy.

(b) Swaps with entities other than swap dealers or major swap participants. Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it engages in portfolio reconciliation as follows for all swaps in which its counterparty is neither a swap dealer nor a major swap participant.

(1) Each swap dealer or major swap participant shall agree in writing with each of its counterparties on the terms of the portfolio reconciliation, including agreement on the selection of any third-party service provider.

(2) The portfolio reconciliation may be performed on a bilateral basis by the counterparties or by one or more third parties selected by the counterparties in accordance with paragraph (b)(1) of this section.

(3) The required policies and procedures shall provide that portfolio reconciliation will be performed no less frequently than:

(i) Once each calendar quarter for each swap portfolio that includes more than 100 swaps at any time during the calendar quarter; and

(ii) Once annually for each swap portfolio that includes no more than 100 swaps at any time during the calendar year.

(4) Each swap dealer or major swap participant shall establish, maintain, and follow written procedures reasonably designed to resolve any discrepancies in the material terms or valuation of each swap identified as part of a portfolio reconciliation or otherwise with a counterparty that is neither a swap dealer nor major swap participant in a timely fashion. A difference between the lower valuation and the higher valuation of less than 10 percent of the higher valuation need not be deemed a discrepancy.

(c) Reporting. Each swap dealer and major swap participant shall promptly notify the Commission and any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v) of the Act, the Commission, the Securities and Exchange Commission, and any applicable prudential regulator, of any swap valuation dispute in excess of $20,000,000 (or its equivalent in any other currency) if not resolved within:

(1) Three (3) business days, if the dispute is with a counterparty that is a swap dealer or major swap participant; or

(2) Five (5) business days, if the dispute is with a counterparty that is not
a swap dealer or major swap participant.
(d) Reconciliation of cleared swaps. Nothing in this section shall apply to a swap that is cleared by a derivatives clearing organization.
(e) Recordkeeping. A record of each swap portfolio reconciliation consistent with §23.202(a)(3)(iii) shall be maintained in accordance with §23.203.

§ 23.503 Portfolio compression.
(a) Portfolio compression with swap dealers and major swap participants—(1) Bilateral offset. Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures for terminating each fully offsetting swap between a swap dealer or major swap participant and another swap dealer or major swap participant in a timely fashion, when appropriate.
(2) Bilateral compression. Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures for periodically engaging in bilateral portfolio compression exercises, when appropriate, with each counterparty that is also a swap dealer or major swap participant.
(3) Multilateral compression. Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures for periodically engaging in multilateral portfolio compression exercises, when appropriate, with each counterparty that is also a swap dealer or major swap participant. Such policies and procedures shall include:
   (i) Policies and procedures for participation in all multilateral portfolio compression exercises required by Commission regulation or order; and
   (ii) Evaluation of multilateral portfolio compression exercises that are initiated, offered, or sponsored by any third party.
(b) Portfolio compression with counterparties other than swap dealers and major swap participants. Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures for periodically terminating fully offsetting swaps and for engaging in portfolio compression exercises with respect to swaps in which its counterparty is an entity other than a swap dealer or major swap participant, to the extent requested by any such counterparty.
(c) Portfolio compression of cleared swaps. Nothing in this section shall apply to a swap that is cleared by a derivatives clearing organization.
(d) Recordkeeping. (1) Each swap dealer and major swap participant shall make and maintain a complete and accurate record of each bilateral offset and each bilateral or multilateral portfolio compression exercise in which it participates.
   (2) All records required to be maintained pursuant to this section shall be maintained in accordance with §23.203 and shall be made available promptly upon request to any representative of the Commission or any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v) of the Act, to any representative of the Commission, the Securities and Exchange Commission, or any applicable prudential regulator.

§ 23.504 Swap trading relationship documentation.
(a)(1) Applicability. The requirements of this section shall not apply to:
   (i) Swaps executed prior to the date on which a swap dealer or major swap participant is required to be in compliance with this section;
   (ii) Swaps executed on a board of trade designated as a contract market under section 5 of the Act or to swaps executed anonymously on a swap execution facility under section 5h of the Act, provided that such swaps are cleared by a derivatives clearing organization and all terms of the swaps conform to the rules of the derivatives clearing organization and §39.12(b)(6) of this chapter; and
   (iii) Swaps cleared by a derivatives clearing organization.
   (2) Policies and procedures. Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that the swap dealer or major swap participant executes written swap trading relationship documentation with its counterparty

[77 FR 55960, Sept. 11, 2012]
that complies with the requirements of this section. The policies and procedures shall be approved in writing by senior management of the swap dealer and major swap participant, and a record of the approval shall be retained. Other than confirmations of swap transactions under §23.501, the swap trading relationship documentation shall be executed prior to or contemporaneously with entering into a swap transaction with any counterparty.

(b) Swap trading relationship documentation. (1) The swap trading relationship documentation shall be in writing and shall include all terms governing the trading relationship between the swap dealer or major swap participant and its counterparty, including, without limitation, terms addressing payment obligations, netting of payments, events of default or other termination events, calculation and netting of obligations upon termination, transfer of rights and obligations, governing law, valuation, and dispute resolution.

(2) The swap trading relationship documentation shall include all confirmations of swap transactions under §23.501.

(3) The swap trading relationship documentation shall include credit support arrangements, which shall contain, in accordance with applicable requirements under Commission regulations or regulations adopted by prudential regulators and without limitation, the following:

(i) Initial and variation margin requirements, if any;

(ii) Types of assets that may be used as margin and asset valuation haircuts, if any;

(iii) Investment and rehypothecation terms for assets used as margin for uncleared swaps, if any; and

(iv) Custodial arrangements for margin assets, including whether margin assets are to be segregated with an independent third party, in accordance with §23.701(e), if any.

(4) (i) The swap trading relationship documentation between swap dealers, between major swap participants, between a swap dealer and major swap participant, and between a swap dealer or major swap participant and a financial entity, and, if requested by any other counterparty, between a swap dealer or major swap participant and such counterparty, shall include written documentation in which the parties agree on the process, which may include any agreed upon methods, procedures, rules, and inputs, for determining the value of each swap at any time from execution to the termination, maturity, or expiration of such swap for the purposes of complying with the margin requirements under section 4s(e) of the Act and regulations under this part, and the risk management requirements under section 4s(j) of the Act and regulations under this part. To the maximum extent practicable, the valuation of each swap shall be based on recently-executed transactions, valuations provided by independent third parties, or other objective criteria.

(ii) Such documentation shall include either:

(A) Alternative methods for determining the value of the swap for the purposes of complying with this paragraph in the event of the unavailability or other failure of any input required to value the swap for such purposes; or

(B) A valuation dispute resolution process by which the value of the swap shall be determined for the purposes of complying with this paragraph (b)(4).

(iii) A swap dealer or major swap participant is not required to disclose to the counterparty confidential, proprietary information about any model it may use to value a swap.

(iv) The parties may agree on changes or procedures for modifying or amending the documentation required by this paragraph at any time.

(5) The swap trading relationship documentation of a swap dealer or major swap participant shall include the following:

(i) A statement of whether the swap dealer or major swap participant is an insured depository institution (as defined in 12 U.S.C. 1813) or a financial company (as defined in section 201(a)(11) of the Dodd-Frank Act, 12 U.S.C. 5361(a)(11));

(ii) A statement of whether the counterparty is an insured depository institution or financial company;
§ 23.505  End user exception documentation.

(a) For swaps excepted from a mandatory clearing requirement. Each swap dealer and major swap participant shall obtain documentation sufficient to provide a reasonable basis on which to believe that its counterparty meets the statutory conditions required for an exception from a mandatory clearing requirement, as defined in section 2h(7) of the Act and §39.6 of this chapter. Such documentation shall include:

(1) The identity of the counterparty;

(2) That the counterparty has elected not to clear a particular swap under section 2h(7) of the Act and §39.6 of this chapter;

(3) That the counterparty is a non-financial entity, as defined in section 2h(7)(C) of the Act;

(4) That the counterparty is hedging or mitigating a commercial risk; and

(5) That the counterparty generally meets its financial obligations associated with non-cleared swaps. Provided, that a swap dealer or major swap participant need not obtain documentation of paragraphs (a)(3), (4), or (5) of this section if it obtains documentation that its counterparty has reported the information listed in §39.6(b)(3) in accordance with §39.6(b)(4) of this chapter.

(b) Recordkeeping. Each swap dealer and major swap participant shall maintain all documents required to be created pursuant to this section in accordance with §23.203 and shall make them available promptly upon request to any representative of the Commission or any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v) of the Act, to any representative of the Commission, the Securities and Exchange Commission, or any applicable prudential regulator.

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any representative of the Commission, the Securities and Exchange Commission, or any applicable prudential regulator.

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§ 23.506 Swap processing and clearing.

(a) Swap processing. (1) Each swap dealer and major swap participant shall ensure that it has the capacity to route swap transactions not executed on a swap execution facility or designated contract market to a derivatives clearing organization in a manner acceptable to the derivatives clearing organization for the purposes of clearing; and

(2) Each swap dealer and major swap participant shall coordinate with each derivatives clearing organization to which the swap dealer, major swap participant, or its clearing member submits transactions for clearing, to facilitate prompt and efficient swap transaction processing in accordance with the requirements of §39.12(b)(7) of this chapter.

(b) Swap clearing. With respect to each swap that is not executed on a swap execution facility or a designated contract market, each swap dealer and major swap participant shall:

(1) If such swap is subject to a mandatory clearing requirement pursuant to section 2(h)(1) of the Act and an exception pursuant to 2(h)(7) is not applicable, submit such swap for clearing to a derivatives clearing organization as soon as technologically practicable after execution of the swap, but no later than the close of business on the day of execution; or

(2) If such swap is not subject to a mandatory clearing requirement pursuant to section 2(h)(1) of the Act but is accepted for clearing by any derivatives clearing organization and the swap dealer or major swap participant and its counterparty agree that such swap will be submitted for clearing, submit such swap for clearing not later than the next business day after execution of the swap, or the agreement to clear, if later than execution.

§ 23.600 Risk Management Program for swap dealers and major swap participants.

SOURCE: 77 FR 20205, Apr. 3, 2012, unless otherwise noted.

Subpart J—Duties of Swap Dealers and Major Swap Participants

(a) Definitions. For purposes of subpart J, the following terms shall be defined as provided.

(1) Affiliate. This term means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

(2) Business trading unit. This term means any department, division, group, or personnel of a swap dealer or major swap participant or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of any pricing (excluding price verification for risk management purposes), trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a registrant.

(3) Clearing unit. This term means any department, division, group, or personnel of a registrant or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of any proprietary or customer clearing activities on behalf of a registrant.

(4) Governing body. This term means:

(1) A board of directors;

(2) A body performing a function similar to a board of directors;

(3) Any committee of a board or body; or

(4) The chief executive officer of a registrant, or any such board, body, committee, or officer of a division of a registrant, provided that the registrant’s swaps activities for which registration with the Commission is required are wholly contained in a separately identifiable division.

(5) Prudential regulator. This term has the same meaning as 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,
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the Farm Credit Association, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant.

(6) Senior management. This term means, with respect to a registrant, any officer or officers specifically granted the authority and responsibility to fulfill the requirements of senior management by the registrant’s governing body.

(7) Swaps activities. This term means, with respect to a registrant, such registrant’s activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives.

(b) Risk management program—(1) Purpose. Each swap dealer and major swap participant shall establish, document, maintain, and enforce a system of risk management policies and procedures designed to monitor and manage the risks associated with the swaps activities of the swap dealer or major swap participant. For purposes of this regulation, such policies and procedures shall be referred to collectively as a “Risk Management Program.”

(2) Written policies and procedures. Each swap dealer and major swap participant shall maintain written policies and procedures that describe the Risk Management Program of the swap dealer or major swap participant.

(3) Approval by governing body. The Risk Management Program and the written risk management policies and procedures shall be approved, in writing, by the governing body of the swap dealer or major swap participant.

(4) Furnishing to the Commission. Each swap dealer and major swap participant shall furnish a copy of its written risk management policies and procedures to the Commission, or to a futures association registered under section 17 of the Act, if directed by the Commission, upon application for registration and thereafter upon request.

(5) Risk management unit. As part of its Risk Management Program, each swap dealer and major swap participant shall establish and maintain a risk management unit with sufficient authority; qualified personnel; and financial, operational, and other resources to carry out the risk management program established pursuant to this regulation. The risk management unit shall report directly to senior management and shall be independent from the business trading unit.

(c) Elements of the Risk Management Program. The Risk Management Program of each swap dealer and major swap participant shall include, at a minimum, the following elements:

(1) Identification of risks and risk tolerance limits. (i) The Risk Management Program should take into account market, credit, liquidity, foreign currency, legal, operational, settlement, and any other applicable risks together with a description of the risk tolerance limits set by the swap dealer or major swap participant and the underlying methodology in written policies and procedures. The risk tolerance limits shall be reviewed and approved quarterly by senior management and annually by the governing body. Exceptions to risk tolerance limits shall be subject to written policies and procedures.

(ii) The Risk Management Program shall take into account risks posed by affiliates and the Risk Management Program shall be integrated into risk management at the consolidated entity level.

(iii) The Risk Management Program shall include policies and procedures for detecting breaches of risk tolerance limits set by the swap dealer or major swap participant, and alerting supervisors within the risk management unit and senior management, as appropriate.

(2) Periodic Risk Exposure Reports. (i) The risk management unit of each swap dealer and major swap participant shall provide to senior management and to its governing body quarterly written reports setting forth the market, credit, liquidity, foreign currency, legal, operational, settlement, and any other applicable risk exposures of the swap dealer or major swap participant, and alerting supervisors within the risk management unit and senior management, as appropriate.

(ii) The Risk Management Program shall include policies and procedures for detecting breaches of risk tolerance limits set by the swap dealer or major swap participant, and alerting supervisors within the risk management unit and senior management, as appropriate.

(iii) The Risk Management Program shall include policies and procedures for detecting breaches of risk tolerance limits set by the swap dealer or major swap participant, and alerting supervisors within the risk management unit and senior management, as appropriate.
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Management Program. For purposes of this regulation, such reports shall be referred to as “Risk Exposure Reports.” The Risk Exposure Reports also shall be provided to the senior management and the governing body immediately upon detection of any material change in the risk exposure of the swap dealer or major swap participant.

(ii) Furnishing to the Commission. Each swap dealer and major swap participant shall furnish copies of its Risk Exposure Reports to the Commission within five (5) business days of providing such reports to its senior management.

(3) New product policy. The Risk Management Program of each swap dealer and major swap participant shall include a new product policy that is designed to identify and take into account the risks of any new product prior to engaging in transactions involving the new product. The new product policy should include the following elements:

(i) Consideration of the type of counterparty with which the new product will be transacted; the product’s characteristics and economic function; and whether the product requires a novel pricing methodology or presents novel legal and regulatory issues.

(ii) Identification and analysis of all relevant risks associated with the new product and how they will be managed. The risk analysis should include an assessment, if relevant, of any product, market, credit, liquidity, foreign currency, legal, operational, settlement, and any other risks associated with the new product. Product risk characteristics may include, if relevant, volatility, non-linear price characteristics, jump-to-default risk, and any correlation between the value of the product and the counterparty’s creditworthiness.

(iii) An assessment, signed by a supervisor in the risk management unit, as to whether the new product would materially alter the overall entity-wide risk profile of the swap dealer or major swap participant. If the new product would materially alter the overall risk profile of the swap dealer or major swap participant, the new product must be pre-approved by the governing body before any transactions are effectuated.

(iv) A requirement that the risk management unit review the risk analysis to identify any necessary modifications to the Risk Management Program and implement such modifications prior to engaging in transactions involving the new product.

(v) Notwithstanding the foregoing, a swap dealer’s or major swap participant’s new product policy may include provisions permitting limited preliminary approval of new products—

(A) At a risk level that would not be material to the swap dealer or major swap participant; and

(B) Solely in order to provide the swap dealer or major swap participant with the opportunity to facilitate development of appropriate operational and risk management processes for such product.

(4) Specific risk management considerations. The Risk Management Program of each swap dealer and major swap participant shall include, but not be limited to, policies and procedures necessary to monitor and manage the following risks:

(i) Market risk. Market risk policies and procedures shall take into account, among other things:

(A) Daily measurement of market exposure, including exposure due to unique product characteristics, volatility of prices, basis and correlation risks, leverage, sensitivity of option positions, and position concentration, to comply with market risk tolerance limits;

(B) Timely and reliable valuation data derived from, or verified by, sources that are independent of the business trading unit, and if derived from pricing models, that the models have been independently validated by qualified, independent external or internal persons; and

(C) Periodic reconciliation of profits and losses resulting from valuations with the general ledger.

(ii) Credit risk. Credit risk policies and procedures shall take into account, among other things:

(A) Daily measurement of overall credit exposure to comply with counterparty credit limits;
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(B) Monitoring and reporting of violations of counterparty credit limits performed by personnel that are independent of the business trading unit; and
(C) Regular valuation of collateral used to cover credit exposures and safeguarding of collateral to prevent loss, disposal, rehypothecation, or use unless appropriately authorized.

(iii) Liquidity risk. Liquidity risk policies and procedures shall take into account, among other things:
(A) Daily measurement of liquidity needs;
(B) Assessing procedures to liquidate all non-cash collateral in a timely manner and without significant effect on price; and
(C) Application of appropriate collateral haircuts that accurately reflect market and credit risk.

(iv) Foreign currency risk. Foreign currency risk policies and procedures shall take into account, among other things:
(A) Daily measurement of the amount of capital exposed to fluctuations in the value of foreign currency to comply with applicable limits; and
(B) Establishment of safeguards against adverse currency fluctuations.

(v) Legal risk. Legal risk policies and procedures shall take into account, among other things:
(A) Determinations that transactions and netting arrangements entered into have a sound legal basis; and
(B) Establishment of documentation tracking procedures designed to ensure the completeness of relevant documentation and to resolve any documentation exceptions on a timely basis.

(vi) Operational risk. Operational risk policies and procedures shall take into account, among other things:
(A) Secure and reliable operating and information systems with adequate, scalable capacity, and independence from the business trading unit;
(B) Safeguards to detect, identify, and promptly correct deficiencies in operating and information systems; and
(C) Reconciliation of all data and information in operating and information systems.

(vii) Settlement risk. Settlement risk policies and procedures shall take into account, among other things:
(A) Establishment of standard settlement instructions with each counterparty;
(B) Procedures to track outstanding settlement items and aging information in all accounts, including nostro and suspense accounts; and
(C) Procedures to ensure timely payments to counterparties and to resolve any late payments.

(5) Use of central counterparties. Each swap dealer and major swap participant shall establish policies and procedures relating to its use of central counterparties. Such policies and procedures shall:
(i) Require the use of central counterparties where clearing is required pursuant to Commission regulation or order, unless the counterparty has properly invoked a clearing exemption under Commission regulations;
(ii) Set forth the conditions for the voluntary use of central counterparties for clearing when available as a means of mitigating counterparty credit risk; and
(iii) Require diligent investigation into the adequacy of the financial resources and risk management procedures of any central counterparty through which the swap dealer or major swap participant clears.

(6) Compliance with margin and capital requirements. Each swap dealer and major swap participant shall satisfy all capital and margin requirements established by the Commission or prudential regulator, as applicable.

(7) Monitoring of compliance with Risk Management Program. Each swap dealer and major swap participant shall establish policies and procedures to detect violations of the Risk Management Program; to encourage employees to report such violations to senior management, without fear of retaliation; and to take specified disciplinary action against employees who violate the Risk Management Program.

(d) Business trading unit. Each swap dealer and major swap participant shall establish policies and procedures that, at a minimum:
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(1) Require all trading policies be approved by the governing body of the swap dealer or major swap participant;

(2) Require that traders execute transactions only with counterparties for whom credit limits have been established;

(3) Provide specific quantitative or qualitative limits for traders and personnel able to commit the capital of the swap dealer or major swap participant;

(4) Monitor each trader throughout the trading day to prevent the trader from exceeding any limit to which the trader is subject, or from otherwise incurring unauthorized risk;

(5) Require each trader to follow established policies and procedures for executing and confirming all transactions;

(6) Establish means to detect unauthorized trading activities or any other violation of policies and procedures;

(7) Ensure that all trade discrepancies are documented and, other than immaterial, clerical errors, are brought to the immediate attention of management of the business trading unit;

(8) Ensure that broker statements and payments to brokers are periodically audited by persons independent of the business trading unit;

(9) Ensure that use of trading programs is subject to policies and procedures governing the use, supervision, maintenance, testing, and inspection of the program; and

(10) Require the separation of personnel in the business trading unit from personnel in the risk management unit.

(e) Review and testing. (1) Risk Management Programs shall be reviewed and tested on at least an annual basis, or upon any material change in the business of the swap dealer or major swap participant that is reasonably likely to alter the risk profile of the swap dealer or major swap participant.

(2) The annual reviews of the Risk Management Program shall include an analysis of adherence to, and the effectiveness of, the risk management policies and procedures, and any recommendations for modifications to the Risk Management Program. The annual testing shall be performed by qualified internal audit staff that are independent of the business trading unit being audited or by a qualified third party audit service reporting to staff that are independent of the business trading unit. The results of the quarterly reviews of the Risk Management Program shall be promptly reported to and reviewed by, the chief compliance officer, senior management, and governing body of the swap dealer or major swap participant.

(f) Distribution of risk management policies and procedures. The Risk Management Program shall include procedures for the timely distribution of its written risk management policies and procedures including the date of the review or test; the results; any deficiencies identified; the corrective action taken; and the date that corrective action was taken. Such documentation shall be provided to Commission staff, upon request.

(g) Recordkeeping. (1) Each swap dealer and major swap participant shall maintain copies of all written approvals required by this section.

(2) All records or reports that a swap dealer or major swap participant is required to maintain pursuant to this regulation shall be maintained in accordance with Commission Regulation §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

§ 23.601 Monitoring of position limits.

(a) Each swap dealer and major swap participant shall establish and enforce written policies and procedures that are reasonably designed to monitor for and prevent violations of applicable position limits established by the Commission, a designated contract market,
or a swap execution facility, and to monitor for and prevent improper reliance upon any exemptions or exclusions from such position limits. For purposes of this regulation, such policies and procedures shall be referred to as “Position Limit Procedures.” The Position Limit Procedures shall be incorporated into the Risk Management Program of the swap dealer or major swap participant.

(b) For purposes of the Position Limit Procedures, each swap dealer and major swap participant shall convert all swap positions into equivalent futures positions using the methodology set forth in Commission regulations.

(c) Each swap dealer and major swap participant shall provide training to all relevant personnel on applicable position limits on an annual basis and shall promptly notify personnel upon any change to applicable position limits. Each swap dealer and major swap participant shall maintain records of such training and notifications including the substance of the training, the identity of those receiving training, and the identity of those notified of changes to applicable position limits.

(d) Each swap dealer and major swap participant shall diligently monitor its trading activities and diligently supervise the actions of its partners, officers, employees, and agents to ensure compliance with the Position Limit Procedures of the swap dealer or major swap participant.

(e) The Position Limit Procedures of each swap dealer and major swap participant shall implement an early warning system designed to detect and alert its senior management when position limits are in danger of being breached (such as when trading has reached a percentage threshold of the applicable position limit, and when position limits have been exceeded). Any detected violation of applicable position limits shall be reported promptly to the firm’s governing body. Any detected violation of applicable position limits, other than on-exchange violations reported to the Commission by a designated contract market or a swap execution facility, shall be reported promptly to the Commission. Each swap dealer and major swap participant shall maintain a record of any early warning received, any position limit violation detected, any action taken as a result of either, and the date action was taken.

(f) Each swap dealer and major swap participant that transacts in instruments for which position limits have been established by the Commission, a designated contract market, or a swap execution facility shall test its Position Limit Procedures for adequacy and effectiveness at least once each calendar quarter and maintain records of such tests; the results thereof; any action that is taken as a result thereof including, without limitation, any recommendations for modifications to the firm’s Position Limit Procedures; and the date action was taken.

(g) Each swap dealer and major swap participant shall document its compliance with applicable position limits established by the Commission, a designated contract market, or a swap execution facility in a written report on a quarterly basis. Such report shall be promptly reported to and reviewed by the chief compliance officer, senior management, and governing body of the swap dealer or major swap participant, and shall include, without limitation, a list of all early warnings received, all position limit violations, the action taken in response, the results of the quarterly position limit testing required by this regulation, any deficiencies in the Position Limit Procedures, the status of any pending amendments to the Position Limit Procedures, and any action taken to amend the Position Limit Procedures to ensure compliance with all applicable position limits. Each swap dealer and major swap participant shall retain a copy of this report.

(h) On an annual basis, each swap dealer and major swap participant shall audit its Position Limit Procedures as part of the audit of its Risk Management Program required by Commission regulations.

(i) All records required to be maintained pursuant to these regulations shall be maintained in accordance with Commission Regulation §1.31 and shall
be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

§ 23.602 Diligent supervision.

(a) Supervision. Each swap dealer and major swap participant shall establish and maintain a system to supervise, and shall diligently supervise, all activities relating to its business performed by its partners, members, officers, employees, and agents (or persons occupying a similar status or performing a similar function). Such system shall be reasonably designed to achieve compliance with the requirements of the Commodity Exchange Act and Commission regulations.

(b) Supervisory System. Such supervisory system shall provide, at a minimum, for the following:

(1) The designation, where applicable, of at least one person with authority to carry out the supervisory responsibilities of the swap dealer or major swap participant for all activities relating to its business as a swap dealer or major swap participant.

(2) The use of reasonable efforts to determine that all supervisors are qualified and meet such standards of training, experience, competence, and such other qualification standards as the Commission finds necessary or appropriate.

§ 23.603 Business continuity and disaster recovery.

(a) Business continuity and disaster recovery plan required. Each swap dealer and major swap participant shall establish and maintain a written business continuity and disaster recovery plan that outlines the procedures to be followed in the event of an emergency or other disruption of its normal business activities. The business continuity and disaster recovery plan shall be designed to enable the swap dealer or major swap participant to continue or to resume any operations by the next business day with minimal disturbance to its counterparties and the market, and to recover all documentation and data required to be maintained by applicable law and regulation.

(b) Essential components. The business continuity and disaster recovery plan of a swap dealer or major swap participant shall include the following components:

(1) Identification of the documents, data, facilities, infrastructure, personnel and competencies essential to the continued operations of the swap dealer or major swap participant and to fulfill the obligations of the swap dealer or major swap participant.

(2) Identification of the supervisory personnel responsible for implementing each aspect of the business continuity and disaster recovery plan and the emergency contacts required to be provided pursuant to this regulation.

(3) A plan to communicate with the following persons in the event of an emergency or other disruption, to the extent applicable to the operations of the swap dealer or major swap participant: employees; counterparties; swap data repositories; execution facilities; trading facilities; clearing facilities; regulatory authorities; data, communications and infrastructure providers and other vendors; disaster recovery specialists and other persons essential to the recovery of documentation and data, the resumption of operations, and compliance with the Commodity Exchange Act and Commission regulations.

(4) Procedures for, and the maintenance of, back-up facilities, systems, infrastructure, alternative staffing and other resources to achieve the timely recovery of data and documentation and to resume operations as soon as reasonably possible and generally within the next business day.

(5) Maintenance of back-up facilities, systems, infrastructure and alternative staffing arrangements in one or more areas that are geographically separate from the swap dealer’s or major swap participant’s primary facilities, systems, infrastructure and personnel (which may include contractual arrangements for the use of facilities, systems and infrastructure provided by third parties).

(6) Back-up or copying, with sufficient frequency, of documents and data essential to the operations of the swap dealer or major swap participant or to fulfill the regulatory obligations of the swap dealer or major swap participant
and storing the information off-site in either hard-copy or electronic format.

(7) Identification of potential business interruptions encountered by third parties that are necessary to the continued operations of the swap dealer or major swap participant and a plan to minimize the impact of such disruptions.

(c) Distribution to employees. Each swap dealer and major swap participant shall distribute a copy of its business continuity and disaster recovery plan to relevant employees and promptly provide any significant revision thereto. Each swap dealer and major swap participant shall maintain copies of the business continuity and disaster recovery plan at one or more accessible off-site locations. Each swap dealer and major swap participant shall train relevant employees on applicable components of the business continuity and disaster recovery plan.

(d) Commission notification. Each swap dealer and major swap participant shall promptly notify the Commission of any emergency or other disruption that may affect the ability of the swap dealer or major swap participant to fulfill its regulatory obligations or would have a significant adverse effect on the swap dealer or major swap participant, its counterparties, or the market.

(e) Emergency contacts. Each swap dealer and major swap participant shall provide to the Commission the name and contact information of two employees who the Commission can contact in the event of an emergency or other disruption. The individuals identified shall be authorized to make key decisions on behalf of the swap dealer or major swap participant and have knowledge of the firm’s business continuity and disaster recovery plan. The swap dealer or major swap participant shall provide the Commission with any updates to this information promptly.

(f) Review and modification. A member of the senior management of each swap dealer and major swap participant shall review the business continuity and disaster recovery plan annually or upon any material change to the business. Any deficiencies found or corrective action taken shall be documented.

(g) Testing and audit. Each business continuity and disaster recovery plan shall be tested annually by qualified, independent internal personnel or a qualified third party service. The date the testing was performed shall be documented, together with the nature and scope of the testing, any deficiencies found, any corrective action taken, and the date that corrective action was taken. Each business continuity and disaster recovery plan shall be audited at least once every three years by a qualified third party service. The date the audit was performed shall be documented, together with the nature and scope of the audit, any deficiencies found, any corrective action taken, and the date that corrective action was taken.

(b) Business continuity and disaster recovery plans required by other regulatory authorities. A swap dealer or major swap participant shall comply with the requirements of this regulation in addition to any business continuity and disaster recovery requirements that are imposed upon the swap dealer or major swap participant by its prudential regulator or any other regulatory or self-regulatory authority.

(i) Recordkeeping. The business continuity and disaster recovery plan of the swap dealer and major swap participant and all other records required to be maintained pursuant to this section shall be maintained in accordance with Commission Regulation §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

§ 23.604 [Reserved]

§ 23.605 Conflicts of interest policies and procedures.

(a) Definitions. For purposes of this section, the following terms shall be defined as provided.

(1) Affiliate. This term means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

(2) Business trading unit. This term means any department, division, group, or personnel of a swap dealer or major swap participant or any of its affiliates, whether or not identified as such.
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that performs, or personnel exercising direct supervisory authority over the performance of, any pricing (excluding price verification for risk management purposes), trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a swap dealer or major swap participant or any of its affiliates.

(3) **Clearing unit.** This term means any department, division, group, or personnel of a swap dealer or major swap participant or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of, any proprietary or customer clearing activities on behalf of a swap dealer or major swap participant or any of its affiliates.

(4) **Derivative.** This term means:
   (i) A contract for the purchase or sale of a commodity for future delivery;
   (ii) A security futures product;
   (iii) A swap;
   (iv) Any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act;
   (v) Any commodity option authorized under section 4c of the Act;
   (vi) Any leverage transaction authorized under section 19 of the Act.

(5) **Non-research personnel.** This term means any employee of the business trading unit or clearing unit, or any other employee of the swap dealer or major swap participant, other than an employee performing a legal or compliance function, who is not directly responsible for, or otherwise not involved in, research or analysis intended for inclusion in a research report.

(6) **Public appearance.** This term means any participation in a conference call, seminar, forum (including an interactive electronic forum) or other public speaking activity before 15 or more persons (individuals or entities), or interview or appearance before one or more representatives of the media, radio, television or print media, or the writing of a print media article, in which a research analyst makes a recommendation or offers an opinion concerning a derivatives transaction. This term does not include a password-protected Webcast, conference call or similar event with 15 or more existing customers, provided that all of the event participants previously received the most current research report or other documentation that contains the required applicable disclosures, and that the research analyst appearing at the event corrects and updates during the public appearance any disclosures in the research report that are inaccurate, misleading, or no longer applicable.

(7) **Research analyst.** This term means the employee of a swap dealer or major swap participant who is primarily responsible for, and any employee who reports directly or indirectly to such research analyst in connection with, preparation of the substance of a research report relating to any derivative, whether or not any such person has the job title of “research analyst.”

(8) **Research department.** This term means any department or division that is principally responsible for preparing the substance of a research report relating to any derivative on behalf of a swap dealer or major swap participant, including a department or division contained in an affiliate of a swap dealer or major swap participant.

(9) **Research report.** This term means any written communication (including electronic) that includes an analysis of the price or market for any derivative, and that provides information reasonably sufficient upon which to base a decision to enter into a derivatives transaction. This term does not include:
   (i) Communications distributed to fewer than 15 persons;
   (ii) Commentaries on economic, political, or market conditions;
   (iii) Statistical summaries of multiple companies’ financial data, including listings of current ratings;
   (iv) Periodic reports or other communications prepared for investment company shareholders or commodity pool participants that discuss individual derivatives positions in the context of a fund’s past performance or the basis for previously-made discretionary decisions;
   (v) Any communications generated by an employee of the business trading unit that is conveyed as a solicitation for entering into a derivatives transaction, and is conspicuously identified as such; and
(vi) Internal communications that are not given to current or prospective customers.

(b) Policies and procedures. Each swap dealer and major swap participant subject to this rule must adopt and implement written policies and procedures reasonably designed to ensure that the swap dealer or major swap participant and its employees comply with the provisions of this rule.

(c) Research analysts and research reports—(1) Restrictions on relationship with research department. (i) Non-research personnel shall not direct a research analyst’s decision to publish a research report of the swap dealer or major swap participant, and non-research personnel shall not direct the views and opinions expressed in a research report of the swap dealer or major swap participant.

(ii) No research analyst may be subject to the supervision or control of any employee of the swap dealer’s or major swap participant’s business trading unit or clearing unit, and no employee of the business trading unit or clearing unit may have any influence or control over the evaluation or compensation of a research analyst.

(iii) Except as provided in paragraph (c)(1)(iv) of this section, non-research personnel, other than the board of directors and any committee thereof, shall not review or approve a research report of the swap dealer or major swap participant before its publication.

(iv) Non-research personnel may review a research report before its publication as necessary only to verify the factual accuracy of information in the research report, to provide for non-substantive editing, to format the layout or style of the research report, or to identify any potential conflicts of interest, provided that:

(A) Any written communication between non-research personnel and research department personnel concerning the content of a research report must be documented and made either through authorized legal or compliance personnel acting as an intermediary or in a conversation conducted in the presence of such personnel.

(2) Restrictions on communications. Any written or oral communication by a research analyst to a current or prospective counterparty relating to any derivative must not omit any material fact or qualification that would cause the communication to be misleading to a reasonable person.

(3) Restrictions on research analyst compensation. A swap dealer or major swap participant may not consider as a factor in reviewing or approving a research analyst’s compensation his or her contributions to the swap dealer’s or major swap participant’s trading or clearing business. Except for communicating client or customer feedback, ratings, and other indicators of research analyst performance to research department management, no employee of the business trading unit or clearing unit of the swap dealer or major swap participant may influence the review or approval of a research analyst’s compensation.

(4) Prohibition of promise of favorable research. No swap dealer or major swap participant may directly or indirectly offer favorable research, or threaten to change research, to an existing or prospective counterparty as consideration or inducement for the receipt of business or compensation.

(5) Disclosure requirements. (i) Ownership and material conflicts of interest. A swap dealer or major swap participant must disclose in research reports and a research analyst must disclose in public appearances:

(A) Whether the research analyst maintains a financial interest in any derivative of a type, class, or category that the research analyst follows, and the general nature of the financial interest; and

(B) Any other actual, material conflicts of interest of the research analyst that the research analyst has knowledge at the time of publication of the research report or at the time of the public appearance.
(ii) 

Prominence of disclosure. Disclosures and references to disclosures must be clear, comprehensive, and prominent. With respect to public appearances by research analysts, the disclosures required by this paragraph (c)(5) must be conspicuous.

(iii) Records of public appearances. Each swap dealer and major swap participant must maintain records of public appearances by research analysts sufficient to demonstrate compliance by those research analysts with the applicable disclosure requirements under this paragraph (c)(5).

(iv) Third-party research reports. (A) For the purposes of this paragraph (c)(5)(iv), “independent third-party research report” shall mean a research report, in respect of which the person or entity producing the report:

1. Has no affiliation or business or contractual relationship with the distributing swap dealer or major swap participant or that swap dealer’s or major swap participant’s affiliates, that is reasonably likely to inform the content of its research reports; and

2. Makes content determinations without any input from the distributing swap dealer or major swap participant or that swap dealer’s or major swap participant’s affiliates.

(B) Subject to paragraph (c)(5)(iv)(C) of this section, if a swap dealer or major swap participant distributes or makes available any independent third-party research report, the swap dealer or major swap participant must accompany the research report with, or provide a Web address that directs the recipient to, the current applicable disclosures, as they pertain to the swap dealer or major swap participant, required by this section. Each swap dealer and major swap participant must establish written policies and procedures reasonably designed to ensure the completeness and accuracy of all applicable disclosures.

(C) The requirements of paragraph (c)(5)(iv)(B) of this section shall not apply to independent third-party research reports made available by a swap dealer or major swap participant to its customers:

1. Upon request; or

(2) Through a Web site maintained by the swap dealer or major swap participant.

(6) Prohibition of retaliation against research analysts. No swap dealer or major swap participant, and no employee of a swap dealer or major swap participant who is involved with the swap dealer’s or major swap participant’s pricing, trading, or clearing activities, may, directly or indirectly, retaliate against or threaten to retaliate against any research analyst employed by the swap dealer or major swap participant or its affiliates as a result of an adverse, negative, or otherwise unfavorable research report or public appearance written or made, in good faith, by the research analyst that may adversely affect the swap dealer’s or major swap participant’s present or prospective pricing, trading, or clearing activities.

(d) Clearing activities. (1) No swap dealer or major swap participant shall directly or indirectly interfere with or attempt to influence the decision of the clearing unit of any affiliated clearing member of a derivatives clearing organization to provide clearing services and activities to a particular customer, including but not limited to a decision relating to the following:

1. Whether to offer clearing services and activities to a particular customer;

2. Whether to accept a particular customer for the purposes of clearing derivatives;

3. Whether to submit a customer’s transaction to a particular derivatives clearing organization;

4. Whether to set or adjust risk tolerance levels for a particular customer;

5. Whether to accept certain forms of collateral from a particular customer; or

6. Whether to set a particular customer’s fees for clearing services based upon criteria that are not generally available and applicable to other customers of the swap dealer or major swap participant.

(2) Each swap dealer and major swap participant shall create and maintain an appropriate informational partition, as specified in section 4m(j)(5)(A) of the Act, between business trading units of
§ 23.606 General information: availability for disclosure and inspection.

(a) Disclosure of information. (1) Each swap dealer and major swap participant shall make available for disclosure to and inspection by the Commission and its prudential regulator, as applicable, all information required by, or related to, the Commodity Exchange Act and Commission regulations, including:
   (i) The terms and condition of its swaps;
   (ii) Its swaps trading operations, mechanisms, and practices;
   (iii) Financial integrity and risk management protections relating to swaps; and
   (iv) Any other information relevant to its trading in swaps.

   (2) Such information shall be made available promptly, upon request, to Commission staff and the staff of the applicable prudential regulator, at such frequency and in such manner as is set forth in the Commodity Exchange Act, Commission regulations, or the regulations of the applicable prudential regulator.

(b) Ability to provide information. (1) Each swap dealer and major swap participant shall establish and maintain reliable internal data capture, processing, storage, and other operational systems sufficient to capture, process, record, store, and produce all information necessary to satisfy its duties under the Commodity Exchange Act and Commission regulations. Such systems shall be designed to produce the information within the time frames set forth in the Commodity Exchange Act and Commission regulations or upon request, as applicable.

   (2) Each swap dealer and major swap participant shall establish, implement, maintain, and enforce written procedures for the capture, processing, recording, storage, and production of all information necessary to satisfy its duties under the Commodity Exchange Act and Commission regulations.

(c) Record retention. All records or reports that a swap dealer or major swap participant is required to maintain pursuant to this regulation shall be maintained in accordance with Commission Regulation §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

§ 23.607 Antitrust considerations.

(a) No swap dealer or major swap participant shall adopt any process or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden on trading or clearing, unless necessary or appropriate to achieve the purposes of the Commodity Exchange Act.

(b) Consistent with its obligations under paragraph (a) of this section,
§ 23.610 Clearing member acceptance for clearing.

(a) Each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall coordinate with each derivatives clearing organization on which it clears to establish systems that enable the clearing member, or the derivatives clearing organization acting on its behalf, to accept or reject each trade submitted to the derivatives clearing organization.

(i) For transactions subject to automated execution, the clearing member shall use automated means to screen orders for compliance with the risk-based limits; and

(ii) For transactions subject to non-automated execution, the clearing member shall establish and maintain systems of risk controls reasonably designed to ensure compliance with the limits.

(3) Monitor for adherence to the risk-based limits in real-time and overnights;

(4) Conduct stress tests under extreme but plausible conditions of all positions at least once per week;

(5) Evaluate its ability to meet initial margin requirements at least once per week;

(6) Evaluate its ability to meet variation margin requirements in cash at least once per week;

(7) Evaluate its ability to liquidate the positions it clears in an orderly manner, and estimate the cost of the liquidation; and

(8) Test all lines of credit at least once per year.

(b) Each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall:

(1) Establish written procedures to comply with this regulation; and

(2) Keep full, complete, and systematic records documenting its compliance with this regulation.

(3) All records required to be maintained pursuant to these regulations shall be maintained in accordance with Commission Regulation §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

§ 23.610 Clearing member acceptance for clearing.

(a) Each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall coordinate with each derivatives clearing organization on which it clears to establish systems that enable the clearing member, or the derivatives clearing organization acting on its behalf, to accept or reject each trade submitted to the derivatives clearing organization.
clearing organization for clearing by or for the clearing member as quickly as would be technologically practicable if fully automated systems were used; and

(b) Each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall accept or reject each trade submitted by or for it as quickly as would be technologically practicable if fully automated systems were used; a clearing member may meet this requirement by:

(1) Establishing systems to pre-screen orders for compliance with criteria specified by the clearing member;

(2) Establishing systems that authorize a derivatives clearing organization to accept or reject on its behalf trades that meet, or fail to meet, criteria specified by the clearing member; or

(3) Establishing systems that enable the clearing member to communicate to the derivatives clearing organization acceptance or rejection of each trade as quickly as would be technologically practicable if fully automated systems were used.

[77 FR 21308, Apr. 9, 2012]

§ 23.611 Delegation of authority to the Director of the Division of Clearing and Risk to establish an alternative compliance schedule to comply with clearing member acceptance for clearing.

(a) The Commission hereby delegates to the Director of the Division of Clearing and Risk or such other employee or employees as the Director may designate from time to time, the authority to establish an alternative compliance schedule for requirements of § 23.610 for swaps that are found to be technologically or economically impracticable for an affected swap dealer or major swap participant that seeks, in good faith, to comply with the requirements of § 23.610 within a reasonable time period beyond the date on which compliance by such swap dealer or major swap participant is otherwise required.

(b) A request for an alternative compliance schedule under this section shall be acted upon by the Director of the Division of Clearing and Risk within 30 days from the time such a request is received, or it shall be deemed approved.

(c) An exception granted under this section shall not cause a registrant to be out of compliance or deemed in violation of any registration requirements.

(d) Notwithstanding any other provision of this section, in any case in which a Commission employee delegated authority under this section believes it appropriate, he or she may submit to the Commission for its consideration the question of whether an alternative compliance schedule should be established. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section.

[77 FR 21308, Apr. 9, 2012]

APPENDIX A TO SUBPART H—GUIDANCE ON THE APPLICATION OF §§23.434 AND 23.440 FOR SWAP DEALERS THAT MAKE RECOMMENDATIONS TO COUNTERPARTIES OR SPECIAL ENTITIES

The following provides guidance on the application of §§23.434 and 23.440 to swap dealers that make recommendations to counterparties or Special Entities.

Section 23.434—Recommendations to Counterparties—Institutional Suitability

A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant, must undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap—general suitability (§23.434(a)(1))—and have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty—specific suitability (§23.434(a)(2)). To satisfy the general suitability obligation, a swap dealer must undertake reasonable diligence that will vary depending on, among other things, the complexity of and risks associated with the swap or swap trading strategy and the swap dealer’s familiarity with the swap or swap trading strategy. At a minimum, a swap dealer’s reasonable diligence must provide it with an understanding of the potential risks and rewards associated with the recommended swap or swap trading strategy.

Recommendation. Whether a communication between a swap dealer and a
counterparty is a recommendation will turn on the facts and circumstances of the particular situation. There are, however, certain factors the Commission will consider in reaching such a determination. The facts and circumstances determination of whether a communication is a “recommendation” requires an analysis of the content, context, and manner of presentation of the communication or set of communications. The determination of whether a “recommendation” has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether, given its content, context, and manner of presentation, a particular communication from a swap dealer to a counterparty reasonably would be viewed as a “call to action,” or suggestion that the counterparty enter into a swap. An analysis of the content, context, and manner of presentation of a communication requires examination of the underlying substantive information transmitted to the counterparty and consideration of any other facts and circumstances, such as any accompanying explanatory message from the swap dealer. Additionally, the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a “recommendation.”

Safe harbor. A swap dealer may satisfy the safe harbor requirements of §23.450(b) to fulfill its counterparty-specific suitability duty under §23.434(a)(2) if: (1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap; (2) the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer; (3) the swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the recommendation; and (4) in the case of a counterparty that is a Special Entity, the swap dealer complies with §23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of §23.440(a).

To reasonably determine that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks of a recommendation, the swap dealer can rely on the written representations of the counterparty, as provided in §23.434(c). Section 23.434(c)(1) provides that a swap dealer will satisfy §23.434(b)(1)’s requirement with respect to a counterparty other than a Special Entity if it receives representations that the counterparty has complied in good faith with the counterparty’s policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so. Section §23.434(c)(2) provides that a swap dealer will satisfy §23.434(b)(1)’s requirement with respect to a Special Entity if it receives representations that satisfy the terms of §23.450(d) regarding a Special Entity’s qualified independent representative.

Prong (4) of the safe harbor clarifies that §23.434’s application is broader than §23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities. Section 23.440 is triggered when a swap dealer recommends any swap or trading strategy that involves a swap to any counterparty. However, §23.440 is limited to a swap dealer’s recommendations (1) to a Special Entity (2) of swaps that are tailored to the particular needs or characteristics of the Special Entity. Thus, a swap dealer that recommends a swap to a Special Entity that is tailored to the particular needs or characteristics of the Special Entity may comply with its suitability obligation by satisfying the safe harbor in §23.434(b); however, the swap dealer must also comply with §23.440 in such circumstances.

Section 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities

A swap dealer “acts as an advisor to a Special Entity” under §23.440 when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. A swap dealer that “acts as an advisor to a Special Entity” has a duty to make a reasonable determination that a recommendation is in the “best interests” of the Special Entities and must undertake “reasonable efforts” to obtain information necessary to make such a determination.

Whether a swap dealer “acts as an advisor to a Special Entity” will depend on: (1) Whether the swap dealer has made a recommendation to a Special Entity; and (2) whether the recommendation concerns a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. To determine whether a communication between a swap dealer and counterparty is a recommendation, the Commission will apply the same factors as under §23.434, the suitability rule. However, unlike the suitability rule, which covers recommendations regarding any type of swap or trading strategy involving a swap, the “acts as an advisor rule” and “best interests” duty will be triggered only if the recommendation is of a swap or trading strategy involving a swap that is...
"tailored to the particular needs or characteristics of the Special Entity."

Whether a swap is tailored to the particular needs or characteristics of the Special Entity will depend on the facts and circumstances. Swaps with terms that are tailored or customized to a specific Special Entity's needs or objectives, or swaps with terms that are designed for a targeted group of Special Entities that share common characteristics, e.g., school districts, are likely to be viewed as tailored to the particular needs or characteristics of the Special Entity. Generally, however, the Commission would not view a swap that is "made available for trading" on a designated contract market or swap execution facility, as provided in Section 2(h)(8) of the Act, as tailored to the particular needs or characteristics of the Special Entity.

Safe harbor. Under §23.440(b)(2), when dealing with a Special Entity (including a Special Entity that is an employee benefit plan as defined in §23.401(c)(3)), a swap dealer will not "act as an advisor to a Special Entity" if: (1) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy that is tailored to the particular needs or characteristics of the Special Entity; (2) the Special Entity represents in writing, in accordance with §23.402(d), that it will not rely on the swap dealer's recommendations and will rely on advice from a qualified independent representative within the meaning of §23.440; and (3) the swap dealer discloses that it is not undertaking to act in the best interests of the Special Entity.

A swap dealer that elects to communicate with a Special Entity that does not "act as an advisor to a Special Entity" must appropriately manage its communications. To clarify the type of communications that they will make under the safe harbor, the Commission expects that swap dealers may specifically represent that they will not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy, and that for such advice the Special Entity should consult its own advisor. Nothing in the final rule would preclude such a representation from being included in counterparty relationship documentation. However, such a representation would not act as a safe harbor under the rule where, contrary to the representation, the swap dealer does express an opinion to the Special Entity as to whether it should enter into a recommended swap or trading strategy.

If a swap dealer complies with the terms of the safe harbor, the following types of communications would not be subject to the "best interests" duty: (1) Providing information that is general transaction, financial, educational, or market information; (2) offering a swap or trading strategy involving a swap, including swaps that are tailored to the needs or characteristics of a Special Entity; (3) providing a term sheet, including terms for swaps that are tailored to the needs or characteristics of a Special Entity; (4) responding to a request for a quote from a Special Entity; (5) providing trading ideas for swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity; and (6) providing marketing materials upon request or on an unsolicited basis about swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity.

The safe harbor in §23.440(b)(2) allows a wide range of communications and interactions between swap dealers and Special Entities without invoking the "best interests" duty, including discussions of the advantages or disadvantages of different swaps or trading strategies. The Commission notes, however, that depending on the facts and circumstances, some of the examples on the list could be "recommendations" that would trigger a suitability obligation under §23.449. However, the Commission has determined that such activities would not, by themselves, prompt the "best interests" duty in §23.440, provided that the parties comply with the other requirements of §23.440(b)(2).

All of the swap dealer's communications, however, must be made in a fair and balanced manner based on principles of fair dealing and good faith in compliance with §23.433.

Swap dealers engage in a wide variety of communications with counterparties in the normal course of business, including but not

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1 The guidance in this appendix regarding the safe harbor to §23.440 is limited to the safe harbor for any Special Entity under §23.440(b)(2). A swap dealer may separately comply with the safe harbor under §23.440(b)(1) for its communications to a Special Entity that is an employee benefit plan as defined in §23.401(c)(3).
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limited to the six types of communications listed above. Whether any particular communication will be deemed to be a “recommendation” within the meaning of §§23.434 or 23.440 will depend on the facts and circumstances of the particular communication considered in light of the guidance in this appendix with respect to the meaning of the term “recommendation.” Swap dealers that choose to manage their communications to comply with the safe harbors provided in §§23.434 and 23.440 will be able to limit the duty they owe to counterparties, including Special Entities, provided that the parties exchange the appropriate representations.

PART 30—FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

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APPENDIX D TO PART 30—COMMISSION CERTIFICATION WITH RESPECT TO FOREIGN FUTURES AND OPTIONS CONTRACTS

AUTHORITY: 7 U.S.C. 1a, 2, 6, 6c, and 12a, unless otherwise noted.


§ 30.2 Applicability of the Act and rules.

(a) Except as specified in this part or unless the context otherwise requires, the provisions of sections 1a, 2, 4, 4c, 4f, 4g, 4k, 4l, 4m, 4n, 4o, 6, 6c, 8, 8a, 9, 12, 13, and 14 of the Act and parts 1, 3, 4, 10, 11, 12, 13, 14, 21, 155, 166 and 190 of this chapter shall apply to the persons and transactions that are subject to the requirements of this part as though they were set forth herein and included specific references to foreign board of trade, foreign futures, foreign options,
§ 30.3 Prohibited transactions.

(a) It shall be unlawful for any person to engage in the offer and sale of any foreign futures contract or foreign options transaction for or on behalf of a foreign futures or foreign options customer, except in accordance with the provisions of this part: Provided, that, with the exception of the disclosure and antifraud provisions set forth in §§30.6 and 30.9 of this part, the provisions of this part shall not apply to transactions executed on a foreign board of trade, and carried for or on behalf of a customer at a designated contract market, subject to an agreement with and rules of a contract market which permit positions in a commodity interest which have been established on one market to be liquidated on another market.

(b) Except as otherwise provided in §30.4 of this part or pursuant to an exemption granted under §30.10 of this part, it shall be unlawful for any person to engage in the offer and sale of any foreign futures contract or foreign option transaction for or on behalf of any foreign futures or foreign options customer other than by or through a futures commission merchant on a fully-disclosed basis.

$ 30.4 Registration required.

Except as provided in §30.5 of this part, it shall be unlawful for any person, with respect to a foreign futures or foreign options customer:

(a) To solicit or accept orders for or involving any foreign futures contract or foreign options transaction and, in connection therewith, to 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, unless such person shall have registered, under the Act, with the Commission as a futures commission merchant and such registration shall not have expired nor been suspended nor revoked; provided that, a foreign futures and options broker (as defined in §30.3(e)) is not required to register as a futures commission merchant; one, in order to accept orders from or to carry a U.S. futures commission merchant’s foreign futures and options customer omnibus account, as that term is defined in §30.1(d); two, in order to accept orders from or to carry a U.S. futures commission merchant’s proprietary account, as that term is defined in paragraph (y) of §1.3 of this chapter; and/or three, in order to accept orders from or to carry a U.S. affiliate account which is proprietary to the foreign futures and options broker, as “proprietary account” is defined in paragraph (y) of §1.3 of this chapter. Such foreign futures and options broker remains subject to all other applicable provisions of the Act and of the rules, regulations and orders thereunder. Foreign futures and options brokers that have U.S. bank branches, offices or divisions engaging in the activity listed in this paragraph are not required to register as futures commission merchants if they comply with the conditions listed in §30.10(b)(1) through (6).

(b) Except an individual who elects to be and is registered as an associated person of a futures commission merchant, to solicit or accept orders for or involving any foreign futures contract or foreign options transaction, and who in connection therewith, does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trade or contracts that result or may result therefrom, unless such person shall have registered, under the Act, with the Commission as an introducing broker and such registration shall not have expired nor been suspended nor revoked;

(c) To engage in a business which is of the nature of an investment trust,
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Any person not located in the United States, its territories or possessions, who is required in accordance with the provisions of this part to be registered with the Commission, other than a person required to be registered as a futures commission merchant, may apply for an exemption from registration under this part by filing with the National Futures Association a Form 7–R completed and filed in accordance with the instructions thereto and designating an agent for service of process, as specified below. A person who receives confirmation of an exemption pursuant to this section must engage in all transactions subject to regulation under part 30 through a registered futures commission merchant or a foreign broker who has received confirmation of an exemption pursuant to § 30.10 in accordance with the provisions of § 30.3(b).
(a) Agent for service of process. Any person who seeks exemption from registration under this part shall enter into a written agency agreement with the futures commission merchant located in the United States through which business is done, with any registered futures association, or any other person located in the United States in the business of providing services as an agent for service of process, pursuant to which agreement such futures commission merchant or other person is authorized to serve as the agent of such person for purposes of accepting delivery and service of communications issued by or on behalf of the Commission, U.S. Department of Justice, any self-regulatory organization, or any foreign futures or foreign options customer. If the written agency agreement is entered into with any person other than the futures commission merchant through which business is done, the future commission merchant or foreign broker who has received confirmation of an exemption pursuant to §30.10 with whom business is conducted must be expressly identified in such agency agreement. Service or delivery of any communication issued by or on behalf of the Commission, U.S. Department of Justice, any self-regulatory organization or any foreign futures or foreign options customer, pursuant to the agreement shall nonetheless constitute valid and effective service or delivery upon such person with respect to any transaction entered into on or before the date of the termination of the agreement.

(b) Termination of agreement. Whenever the agreement referred to in paragraph (a) of this section is terminated or is otherwise no longer in effect, the futures commission merchant or any other person that is party to the agreement shall immediately notify the National Futures Association and the futures commission merchant through which business is done, as appropriate. Upon notice, a futures commission merchant shall not accept from the person that has entered into such agreement any order, other than liquidating order(s), for, or on behalf of a foreign futures or foreign options customer. Notwithstanding the termination of the agreement referred to in paragraph (a) of this section, service or delivery of any communication issued by or on behalf of the Commission, U.S. Department of Justice, any self-regulatory organization, or any foreign futures or foreign options customer pursuant to the agreement shall nonetheless constitute valid and effective service or delivery upon such person with respect to any transaction entered into on or before the date of the termination of the agreement.

(c) Applicability of other rules. Any person who is located outside of the United States, its territories or possessions, and who, in accordance with the provisions of paragraph (a) of this section, is exempt from registration as an introducing broker, commodity pool operator or commodity trading advisor under this part, shall nonetheless comply with the provisions of §30.6 of this part and §§1.37 and 1.57 of this chapter as if registered in such capacity.

(d) Access to records. Any person exempt from registration with the Commission in accordance with the provisions of paragraph (a) of this section must, upon the request of any representative of the Commission or U.S. Department of Justice, provide such records as such person is required to maintain under this part as requested at the place in the United States designated by the representative within 72 hours after the person receives the request.

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option customer, other than for a customer specified in § 1.55(f) of this chapter, unless the futures commission merchant or introducing broker first furnishes the customer with a separate written disclosure statement containing only the language set forth in § 1.55(b) of this chapter or as otherwise approved under § 155(c) of this chapter (except for nonsubstantive additions such as captions), which has been acknowledged in accordance with § 1.55 of this chapter: Provided, however, that the risk disclosure statement may be attached to other documents as the cover page or the first page of such documents and as the only material on such page.

(b) Commodity pool operators and commodity trading advisors. (1) With respect to persons who satisfy the requirements of qualified eligible persons, as defined in § 4.7(a) of this chapter:

(i) A commodity pool operator registered or required to be registered pursuant to § 30.5, may not, directly or indirectly, engage in any of the activities described in § 30.4(c) unless the pool operator, at or before the time it engages in such activities, first provides each prospective participant with the Disclosure Document required to be furnished to customers or potential customers pursuant to § 4.21 of this chapter and files the Disclosure Document in accordance with § 4.26 of this chapter;

(ii) A commodity trading advisor registered or required to be registered under this part, or exempt from registration pursuant to § 30.5, may not, directly or indirectly, engage in any of the activities described in § 30.4(d) unless the trading advisor, at or before the time it engages in such activities, first provides each prospective client with the Disclosure Document required to be furnished customers or potential customers pursuant to § 4.31 of this chapter and files the Disclosure Document in accordance with § 4.36 of this chapter.

(c) The acknowledgment required by paragraphs (a) and (b) of this section must be retained by the futures commission merchant, introducing broker, commodity pool operator or commodity trading advisor in accordance with § 1.31 of this chapter.

(d) This section does not relieve a futures commission merchant or introducing broker of its obligations under § 33.7 of this chapter: Provided, however, That a new disclosure statement is not required to be furnished if the futures commission merchant or introducing broker has previously delivered such statement to the foreign options customer in connection with the opening of a commodity option account under part 33 of this chapter.

(e) This section does not relieve a futures commission merchant, introducing broker, commodity pool operator or commodity trading advisor from any other disclosure obligation it may have under applicable law or regulation.


§ 30.7 Treatment of foreign futures or foreign options secured amount.

(a) Except as provided in this section, a futures commission merchant must
maintain in a separate account or accounts money, securities and property in an amount at least sufficient to cover or satisfy all of its current obligations to foreign futures or foreign options customers denominated as the foreign futures or foreign options secured amount. Such money, securities and property may not be commingled with the money, securities or property of such futures commission merchant, with any proprietary account of such futures commission merchant, or used to secure or guarantee the obligations of, or extend credit to, such futures commission merchant or any proprietary account of such futures commission merchant.

(b) A futures commission merchant may deposit together with the secured amount required to be on deposit in the separate account or accounts referred to in paragraph (a) of this section money, securities or property held for or on behalf of other customers of the futures commission merchant for the purpose of entering into foreign futures or foreign options transactions. In such a case, the amount that must be deposited in such separate account or accounts must be no less than the greater of (1) the foreign futures and foreign options secured amount plus the amount that would be required to be on deposit if all such customers were foreign futures or foreign options customers under this part 30, or (2) the foreign futures or foreign options secured amount plus the amount required to be held in a separate account or accounts for or on behalf of customers pursuant to any law, rule, regulation or order thereunder, or any rule of any self-regulatory organization authorized thereunder, in the jurisdiction in which the depository or the customer, as appropriate, is located.

(c)(1) The separate account or accounts referred to in paragraph (a) of this section must be maintained under an account name that clearly identifies them as such, with any of the following depositories:

(i) A bank or trust company located in the United States;

(ii) A bank or trust company located outside the United States that has in excess of $1 billion of regulatory capital;

(iii) A futures commission merchant registered as such with the Commission;

(iv) A derivatives clearing organization;

(v) The clearing organization of any foreign board of trade;

(vi) A member of any foreign board of trade;

(vii) Such member or clearing organization’s designated depositories.

(2) Each futures commission merchant must obtain and retain in its files for the period provided in §1.31 of this chapter an acknowledgment from such depository that it was informed that such money, securities or property are held for or on behalf of foreign futures and foreign options customers and are being held in accordance with the provisions of these regulations.

(d) In no event may money, securities or property representing the foreign futures or foreign options secured amount be held or commingled and deposited with customer funds in the same account or accounts required to be separately accounted for and segregated pursuant to section 4d of the Act and the regulations thereunder.

(e) Each futures commission merchant which invests money, securities or property on behalf of foreign futures or foreign options customers shall keep a record showing the following:

(1) The date on which such investments were made;

(2) The name of the person through whom such investments were made;

(3) The amount of money so invested;

(4) A description of the obligations in which such investments were made;

(5) The identity of the depositories or other places where such obligations are maintained;

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

(7) The name of the person to or through whom such investments were disposed of.

(f) Each futures commission merchant must compute as of the close of each business day:

(1) The total amount of money, securities and property on deposit in separate account(s) in accordance with this section;
§ 30.10 Petitions for exemption.

(a) Any person adversely affected by any requirement of this part may file a petition with the Secretary of the Commission, which petition must set forth with particularity the reasons why that person believes that he should be exempt from such requirement. The Commission may, in its discretion, grant such an exemption if that person demonstrates to the Commission’s satisfaction that the exemption is not otherwise contrary to the public interest or to the purposes of the provision from which exemption is sought. The petition will be granted or denied on the basis of the papers filed. The petition may be granted subject to such terms and conditions as the Commission may find appropriate.

(b) Any foreign person that files a petition for an exemption under this section shall be eligible for such an exemption notwithstanding its presence in the United States through U.S. bank branches or divisions if, in conjunction with a petition for confirmation of relief granted under an existing Commission order issued pursuant to this section, it complies with the following conditions:

(1) No U.S. bank branch, office or division will engage in the trading of futures or options on futures within or from the United States, except for its own proprietary account;

(2) No U.S. bank branch, office or division will refer any foreign futures or foreign options customer to the foreign person or otherwise be involved in the foreign person’s business in foreign futures or foreign option transactions;

(3) No U.S. bank branch, office or division will solicit any foreign futures or foreign option business or purchase or sell foreign futures or foreign option contracts on behalf of any foreign futures or foreign option customers or otherwise engage in any activity subject to regulation under this part or engage in any clerical duties related thereto. If any U.S. division, office or branch desires to engage in such activities, it will only do so through an appropriate Commission registrant;
(4) The foreign person will maintain outside the United States all contract documents, books and records regarding foreign futures and foreign option transactions;

(5) The foreign person and each of its U.S. bank branches, offices or divisions agree to provide upon request of the Commission, the National Futures Association or the U.S. Department of Justice, access to their books and records for the purpose of ensuring compliance with the foregoing undertakings and consent to make such records available for inspection at a location in the United States within 72 hours after service of the request; and

(6) Although it will continue to engage in normal commercial activities, no U.S. bank branch, office or division of the foreign person will establish relationships in the United States with the applicant’s foreign futures or foreign option customers for the purpose of facilitating or effecting transactions in foreign futures or foreign option contracts.


§ 30.11 Applicability of state law.

Pursuant to section 12(e)(2) of the Act, the provisions of any state law, including any rule or regulation thereunder, may be applicable to any person required to be registered under this part who solicits foreign futures and foreign options customers and who shall fail or refuse to obtain such registration, unless such person is exempt from such registration in accordance with the provisions of § 30.4, § 30.5 or § 30.10 of this part.

§ 30.12 Direct foreign order transmittal.

(a) Authorized customers defined. For the purposes of this section, an “authorized customer” of a futures commission merchant shall mean any foreign futures or foreign options customer and who shall fail or refuse to obtain such registration, unless such person is exempt from such registration in accordance with the provisions of § 30.4, § 30.5 or § 30.10 of this part.

(b) Procedures for futures commission merchants. It shall be unlawful for any futures commission merchant to permit an authorized customer to place orders for execution in the futures commission merchant’s foreign futures and options customer omnibus account directly with a person exempt from registration under paragraphs (c) and (d) of this section, unless, such futures commission merchant:

1. Meets one of the following capital requirements, as determined by the futures commission merchant’s most recent required filing of a Form 1-FR-FCM with the Commission:

   (i) Possesses $20,000,000 in adjusted net capital, as defined by § 1.17(c)(5) of this chapter; or

   (ii) Possesses the greater of three times the amount of adjusted net capital required by § 1.17(a)(1)(i)(A) of this chapter or three times the amount of adjusted net capital required by § 1.17(a)(1)(i)(B) of this chapter; and

2. Has established control procedures that will serve as guidelines for permitting direct contacts between any authorized customer of the futures commission merchant and any person exempt from registration under paragraphs (c) or (d) of this section, and has in place appropriate risk management procedures to monitor its own risk relative to its authorized customers’ risk aggregated across all markets, including, but not limited to, procedures to ensure that each authorized customer

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satisfies the participation criteria set forth in paragraph (a) of this section and to specify the manner in which trades may be executed through its customer omnibus account pursuant to this section;

(3) Furnishes a written disclosure statement to each such authorized customer advising the customer of the additional risks the customer may be assuming in placing orders directly with the foreign broker. The disclosure statement must read as follows:

Direct Order Transmittal Client Disclosure Statement

This statement applies to the ability of authorized customers of [FCM] to place orders for foreign futures and options transactions directly with non-US entities (each, an “Executing Firm”) that execute transactions on behalf of [FCM’s] foreign futures and options customer omnibus accounts.

Please be aware of the following should you be permitted to place the type of orders specified above.

• The orders you place with an Executing Firm are for [FCM’s] foreign futures and options customer omnibus accounts maintained with a foreign clearing firm. Consequently, [FCM] may limit or otherwise condition the orders you place with the Executing Firm.

• You should be aware of the relationship of the Executing Firm and [FCM]. [FCM] may not be responsible for the acts, omissions, or errors of the Executing Firm, or its representatives, with which you place your orders. In addition, the Executing Firm may not be affiliated with [FCM]. If you choose to place orders directly with an Executing Firm, you may be doing so at your own risk.

• It is your responsibility to inquire about the applicable laws and regulations that govern the foreign exchanges on which transactions will be executed on your behalf. Any orders placed by you for execution on that exchange will be subject to such rules and regulations, its customs and usages, as well as any local laws that may govern transactions on that exchange. These laws, rules, regulations, customs and usages may offer different or diminished protection from those that govern transactions on US exchanges. In particular, funds received from customers to margin foreign futures transactions may not be provided the same protections as funds received to margin futures transactions on domestic exchanges. Before you trade, you should familiarize yourself with these foreign rules which will apply to your particular transaction. United States regulatory authorities may be unable to compel the enforcement of the rules of regulatory authorities or markets in non-US jurisdictions where transactions may be effected.

• It is your responsibility to determine whether the Executing Firm has consented to the jurisdiction of the courts in the United States. In general, neither the Executing Firm nor any individuals associated with the Executing Firm will be registered in any capacity with the Commodity Futures Trading Commission. Similarly, your contacts with the Executing Firm may not be sufficient to subject the Executing Firm to the jurisdiction of courts in the United States in the absence of the Executing Firm’s consent. Accordingly, neither the courts of the United States nor the Commission’s reparation program may be available as a forum for resolution of any disagreements you may have with the Executing Firm, and your recourse may be limited to actions outside the United States.

• Unless you object within five (5) days, by giving notice as provided in your customer agreement after receipt of this disclosure, [FCM] will assume your consent to the aforementioned conditions.

(c) Exemption for foreign futures and options brokers. Any person not located in the United States, its territories or possessions, who is otherwise required in accordance with this part to be registered with the Commission as a futures commission merchant or as an introducing broker will be exempt from such registration, notwithstanding that such person accepts orders for foreign futures and foreign options transactions from authorized customers of a registered futures commission merchant that meets the requirements of paragraph (b)(1) of this section, provided, that:

(1) The orders are executed for or on behalf of the foreign futures and options customer omnibus account of a registered futures commission merchant;

(2) The person does not solicit or accept any money, securities or property (or extend credit in lieu thereof) directly from any U.S. foreign futures and options customer to margin, guarantee or secure any trades or contracts that result or may result therefrom; and

(3) The person is a foreign futures and options broker, as defined by §30.1(e).

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1 You should contact your account executive regarding your eligibility to participate in the direct order transmittal process.
§ 30.13 Commission certification.

With respect to foreign futures and options contracts on a non-narrow-based security index:

(a) Request for certification. A foreign board of trade may request that the Commission certify that a futures contract on a non-narrow-based security index that trades, or is proposed to be traded thereon, conforms to the requirements of section 2(a)(1)(C)(ii) of the Act and therefore, that futures contract may be offered or sold to persons located within the United States in accordance with section 2(a)(1)(C)(iv) of the Act. A submission requesting such certification must:

(1) Be filed electronically with the Secretary of the Commission;

(2) Include the following information in English:

(i) The terms and conditions of the contract and all other relevant rules of the exchange and, if applicable, of the foreign board of trade on which the underlying securities are traded, which have an effect on the overall trading of the contract, including circuit breakers, price limits, position limits or other controls on trading;

(ii) Surveillance agreements between the foreign board of trade and the exchange(s) on which the underlying securities are traded;

(iii) Assurances from the foreign board of trade of its ability and willingness to share information with the Commission, either directly or indirectly;

(iv) When applicable, information regarding foreign blocking statutes and their impact on the ability of United States government agencies to obtain information concerning the trading of such contracts;

(v) Information and data denoted in U.S. dollars where appropriate (and the conversion date and rate used) relating to:

(A) The method of computation, availability, and timeliness of the index;

(B) The total capitalization, number of stocks (including the number of unaffiliated issuers if different from the number of stocks), and weighting of the stocks by capitalization and, if applicable, by price in the index as well as the combined weighting of the five highest-weighted stocks in the index;

(C) Procedures and criteria for selection of individual securities for inclusion in, or removal from, the index, how often the index is regularly reviewed, and any procedures for changes in the index between regularly scheduled reviews;

(D) Method of calculation of the cash-settlement price and the timing of its public release;

(E) Average daily volume of trading, measured by share turnover and dollar value, in each of the underlying securities for a six-month period of time and, separately, the dollar value of the average daily trading volume of the securities comprising the lowest weighted 25% of the index for the past six calendar months, calculated pursuant to §41.11 of this chapter; and

(vi) A written statement that the contract conforms to the criteria enumerated in section 2(a)(1)(C)(ii) of the Act, including:

(A) A statement that the contract is cash-settled;
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(B) An explanation of why the contract is not readily subject to manipulation or to be used to manipulate the underlying security;

(C) A statement that the index is not a narrow-based security index as defined in section 1a(25) of the Act and the analysis supporting that statement;

(vii) A written representation that the foreign board of trade will notify the Commission of any material changes in any of the above information;

(viii) When applicable, a request to make the futures contract available for trading in accordance with the terms and conditions of, and through the electronic trading devices identified in, a Commission staff no-action letter stating, subject to compliance with certain conditions, that it will not recommend that the Commission take enforcement action if the foreign board of trade provides its members or participants in the U.S. access to its electronic trading system without seeking designation as a designated contract market ("Foreign Board of Trade No-Action Letter"), or pursuant to any foreign board of trade registration order issued by the Commission ("Foreign Board of Trade Registration Order"), and a certification from the foreign board of trade that it is in compliance with the terms and conditions of that no-action letter or Foreign Board of Trade Registration Order; and

(ix) An explanation of the means by which U.S. persons may access these products on the foreign board of trade.

(b) Termination of review. The Commission, at any time during its review, may notify the requesting foreign board of trade that it is terminating its review under this section if it appears to the Commission that the submission is materially incomplete or fails in form or content to meet the requirements of this section.

(1) Such termination shall not prejudice the foreign board of trade from re-submitting a revised version of the contract, which addresses the deficiencies or issues identified by the Commission.

(2) The Commission shall also terminate review under this section if requested in writing to do so by the foreign board of trade.

(c) Notice of denial of certification. The Commission, at any time during its review under paragraph (a) of this section, may notify the requesting foreign board of trade that it has determined that the security index futures contract or underlying index does not conform with the requirements of section 2(a)(1)(C)(ii) of the Act.

(1) This notification will briefly specify the nature of the issues raised and the specific requirement of subsections 2(a)(1)(C)(i)(I)–(III) of the Act with which the security index futures contract does not conform or to which it appears not to conform or the conformance to which cannot be ascertained from the submission.

(2) Such notification shall not prejudice the foreign board of trade from re-submitting a revised version of the contract, which addresses the deficiencies or issues identified by the Commission.

(d) Notice of certification. Upon review, if the Commission determines that the futures contract and the underlying index meet the requirements enumerated in section 2(a)(1)(C)(ii), the Commission will issue a letter to the foreign board of trade certifying that the security index contract traded on that board conforms to the requirements of section 2(a)(1)(C)(ii) of the Act and therefore, that futures contract may be offered or sold to persons located within the U.S. in accordance with section 2(a)(1)(C)(iv) of the Act and, if applicable, may be made available for trading in accordance with the terms and conditions of, and through the electronic trading devices identified in, the Foreign Board of Trade No-Action Letter or the Foreign Board of Trade Registration Order.

(e) Expedited review. A foreign board of trade may request an expedited Commission review and determination of whether a futures contract on a security index that trades, or is proposed to be traded thereon, conforms to the requirements of section 2(a)(1)(C)(ii) of the Act and therefore, may be offered or sold to persons in the U.S. under section 2(a)(1)(C)(iv) of the Act. A submission requesting such expedited consideration should be filed in English.
with the Commission and should include: Information, statements and data complying with the form and content requirements in paragraph (a) of this section.

(f) Eligibility for expedited review. In order to qualify for expedited review under paragraph (e) of this section, the foreign board of trade must either:

(1) Have previously requested, and received, at least one no-action letter from the Office of General Counsel ("Foreign Security Index No-Action Letter") or Commission certification regarding a non-narrow based security index futures contract traded on that foreign board of trade and submit a written statement representing that the board remains fully compliant with the terms and conditions of such letter or certification; or

(2) Have received a Foreign Board of Trade No-Action Letter or Foreign Board of Trade Registration Order and submit a written statement representing that the board remains fully compliant with the terms and conditions of such letter or order.

(g) Deemed to be in conformance. Unless notified pursuant to paragraph (h), (i), or (j) of this section, any non-narrow-based foreign security index futures contract submitted for expedited review under paragraph (e) of this section shall be deemed to be in conformance with the requirements of section 2(a)(1)(C)(ii) of the Act and therefore, such futures contract may be offered or sold to persons located in the U.S. in accordance with section 2(a)(1)(C)(iv) forty-five days after receipt by the Commission, or at the conclusion of such extended period as described under paragraph (h) of this section, provided that the foreign board of trade does not amend the terms or conditions of the contract or supplement the request for expedited consideration, except as requested by the Commission or for correction of typographical errors. Any voluntary substantive amendment by the foreign board of trade will be treated as a new submission under this section.

(h) Extension of review. The Commission may extend the forty-five day review period set forth in paragraph (g) of this section for:

(1) An additional period up to forty-five days, if the request raises novel or complex issues that require additional time for review, in which case, the Commission will notify the foreign board of trade within the initial forty-five day review period and will briefly describe the nature of the specific issues for which additional time for review will be required; or

(2) Such extended period as the requesting foreign board of trade requests of the Commission in writing.

(i) Termination of review. The Commission, at any time during its review under paragraph (e) of this section or extension thereof as described under paragraph (h) of this section, may notify the requesting foreign board of trade that it is terminating its review under paragraph (e) of this section if it appears to the Commission that the submission is materially incomplete or fails in form or substance to meet the requirements of this section.

(1) Such termination shall not prejudice the foreign board of trade from resubmitting a revised version of the contract, which addresses the deficiencies or issues identified by the Commission.

(2) The Commission shall also terminate review under this section if requested in writing to do so by the foreign board of trade.

(j) Notice of denial of certification. The Commission, at any time during its review pursuant to paragraph (e), may notify the requesting foreign board of trade that it has determined that the security index futures contracts or underlying index does not conform with the requirements of section 2(a)(1)(C)(ii) of the Act.

(1) This notification will briefly specify the nature of the issues raised and the specific requirement of subsections 2(a)(1)(C)(ii)(I)–(III) of the Act with which the security index futures contract does not conform or to which it appears not to conform or the conformance to which cannot be ascertained from the submission.

(2) Such notification shall not prejudice the foreign board of trade from resubmitting a revised version of the contract, which addresses the deficiencies or issues identified by the Commission.
(k) Foreign trading systems. A foreign board of trade, who is a recipient of a Foreign of Trade No-Action Letter (and is compliant with the requirements of such letter) or Foreign Board of Trade Registration Order and is requesting Commission certification of its non-narrow-based security index futures contract, may request that such contract submitted under paragraph (e) of this section be made available for trading under that letter or pursuant to the registration order, upon expiration of the applicable review period provided for under either paragraph (g) or (h) of this section. Absent Commission notification to the contrary, the foreign board of trade may make that contract available for trading on the Foreign Trading System upon expiration of the review period provided under paragraph (g) or (h) of this section.

(l) Changes in facts and circumstances. Any certification of a non-narrow based security index futures contracts submitted under paragraph (a) or (e) of this section shall be considered to be based on the facts and representations contained in the foreign board of trade’s submissions to the Commission. Accordingly, the foreign board of trade shall promptly notify the Commission of any changes in material facts or representations.

(m) Additional contracts on previously-reviewed index: A new non-narrow-based security index futures contract may be offered or sold in the U.S. in reliance on a prior Foreign Security Index No-Action Letter or Commission certification, provided that the new contract is based on an index that was the subject of such Foreign Security Index No-Action Letter or Commission certification; and substantially identical to the contract overlying such index. In this context, the foreign board of trade may submit the contract to the Commission for an accelerated review of fifteen business days for confirmation that the subject contract is substantially identical to the existing contract. Unless the Commission notifies the foreign board of trade within those fifteen business days that the review will be conducted pursuant to either the full or expedited review procedure, the foreign board of trade may make available such contract for offer or sale within the U.S.

(n) Grandfathered no-action letters. Any non-narrow based security index futures contract that is the subject of an existing no-action letter issued by the Office of General Counsel, as of the date of the adoption of rule 30.13, shall be deemed to be in conformance with the criteria of section 2(a)(1)(C)(ii) of the Act, provided that the foreign board of trade submits a written statement representing that the contract remains fully compliant with the requirements of such letter.

(o) Delegation. The Commission hereby delegates, until such time as it orders otherwise, to the Director of Market Oversight or his designee, in consultation with the General Counsel or his designee, the authority reserved to the Commission under paragraph (m) of this section. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated pursuant to this paragraph (o).

(76 FR 59245, Sept. 26, 2011)

APPENDIX A TO PART 30—INTERPRETATIVE STATEMENT WITH RESPECT TO THE COMMISSION’S EXEMPTIVE AUTHORITY UNDER §30.10 OF ITS RULES

Part 30 of the Commission’s regulations establishes the regulatory structure governing the offer and sale in the United States of futures and options contracts made or to be made on or subject to the rules of a foreign board of trade. Section 30.10 of these regulations provides that, upon petition, the Commission may exempt any person from any requirement of this part. Specifically, section 30.10 states:

Any person adversely affected by any requirement of this part may file a petition with the Secretary of the Commission, which petition must set forth with particularity the reasons why that person believes that he should be exempt from such requirement. The Commission may, in its discretion, grant such an exemption if that person demonstrates to the Commission’s satisfaction that the exemption is not otherwise contrary to the public interest or to the purposes of the provision from which exemption is sought. The petition will be granted or denied on the basis of the papers filed. The petition may be granted subject to such terms and conditions as the Commission may find appropriate.
As the provisions of this section make clear, any person subject to regulation under part 30 may petition the Commission for an exemption. In adopting these regulations, however, the Commission noted in particular that persons located outside the United States that solicit or accept orders directly from United States customers for foreign futures-related activities or be offered in the country in which they are located may apply under section 30.10 for exemption from some or all of the requirements that would otherwise be applicable to such persons. This interpretative statement sets forth the elements that the Commission intends to evaluate in determining whether a particular regulatory program may be found to be comparable to the Commission’s program.

The Commission wishes to emphasize, however, that this interpretative statement is not all inclusive, and that information with respect to other aspects of a particular regulatory program may be submitted by a petitioner or requested by the Commission. In this connection, the Commission would have broad discretion to determine that the policies of any program element generally are met, notwithstanding the fact that the offshore program does not contain an element identical to that of the Commission’s regulatory program and conversely may assess how particular elements are in fact applied by offshore authorities. Thus, for example, in order to find that a particular program is comparable, the regulations thereunder would have to be applicable to all United States customers, notwithstanding any exemptions that might otherwise be available to particular classes of customer located offshore. A petitioner, therefore, must set forth with particularity the factual basis for a finding of comparability and the reasons why such policies and purposes are met, notwithstanding differences of degree and kind in its regulatory program.

No exemptions of a general nature will be granted unless the persons to which the exemption is to be applied consent to submit, to jurisdiction in the United States by designating an agent for service of process pursuant to the provisions of rule 30.5 with respect to any activities of such persons otherwise subject to regulation under this part and to notify the National Futures Association of the commencement or termination of business in the United States. In this connection, to be exempted, such person must further agree to respond to a request to confirm that it continues to do business in the United States.

Persons located outside the United States may seek an exemption on their own behalf or an exemption may be sought on behalf of the implementation and enforcement of the regulatory program in question, or the self-regulatory organizations of which such persons are members. The appropriate petitioner is a matter of judgment and may be determined by the parties seeking the exemption. The Commission, however, notes that it will be able to address petitions more efficiently if they are filed by the governmental agency or self-regulatory organization responsible for the regulatory program.

In this connection, as will be discussed in more detail below, any exemption of a general nature based on comparability will be conditioned upon appropriate information sharing arrangements between the Commission and the relevant governmental agency and/or self-regulatory organization. Representations from the appropriate governmental agency with respect to the applicability of any blocking statutes that may prevent the sharing of information requested under private arrangements would also be considered. Finally, in considering an exemption request, the Commission will take into account the extent to which United States persons or contracts regulated by the Commission are permitted to engage in futures-related activities or be offered in the country from which an exemption is sought.

In the Commission’s review, the minimum elements of a comparable regulatory program would include: (1) Registration, authorization or other form of licensing, fitness review or qualification of persons through which customer orders are solicited and accepted; (2) minimum financial requirements for those persons that accept customer funds; (3) protection of customer funds from misapplication; (4) recordkeeping and reporting requirements; (5) minimum sales practice standards, including disclosure of the risks of futures and options transactions and, in particular, the risk of transactions undertaken outside the jurisdiction of domestic law; and (6) compliance.

Qualification. Under domestic law, registration identifies to the Commission, the public and other governmental agencies the individuals and entities that are properly authorized to solicit and accept customer orders and are in good standing. Equally important, the procedure provides the Commission, through the National Futures Association, the opportunity to determine whether applicants are unfit to deal with the public. In this connection, the standards for determining whether a person through its principals is fit for registration with the Commission are set forth in section 8a(2)-8a(4) of the Act. Timely access to information as to a firm’s good standing and the application by relevant authorities of membership and licensing criteria, as well as the criteria themselves, will be considered by the Commission in assessing comparability.
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Minimum Financial Requirements. Minimum financial requirements have long been recognized as the linchpin of the Commission’s regulatory scheme. Reporting and recordkeeping requirements assist in determining that a registrant is acting in accordance with the provisions of the Act and the rules, regulations and orders of the Commission thereunder. Similarly, reporting requirements ensure that customers are timely advised of the transactions that have been executed on their behalf, thus ensuring that they are aware of their positions in the market and may object to any transactions that they believe are in error. The Commission will consider the types of records maintained, the ability through those records to trace funds and transactions, and the period of retention and accessibility of records under the information sharing arrangements discussed below in considering comparability.

Sales Practice Standards. In 1982, Congress reaffirmed the importance of minimum sales practice standards to protect customers from fraud or misrepresentation by requiring any futures association registered by the Commission to adopt and enforce rules governing the sales practices of its members. The Commission has consistently provided that written disclosure of the risks involved and options trading is essential to ensure that potential customers are aware of these risks and are not otherwise misled and that other appropriate disclosure is made. The Commission will review the type and manner of disclosure given and the mechanisms for assuring the disclosure requirements are met and, in particular, the treatment of discretionary accounts which, for example, Commission rule 166.2 requires particularized documentation of intent to confer discretion in the case of foreign futures and options transactions.

Compliance. Finally, in assessing comparability of a program, the Commission will examine the procedures employed by the governmental authority or the appropriate self-regulatory organization to audit for compliance with, and to take action as appropriate against those persons that violate, the requirements of that program.

Information Sharing. As noted above, any exemption of a general nature would also require an information sharing arrangement between the Commission and the appropriate governmental or self-regulatory organization to ensure Commission access to information on an as needed basis as may be necessary to fulfill its regulatory responsibilities. The information subject to these arrangements generally would be of a type necessary in the first instance to monitor domestic markets and to protect domestic customers trading on foreign markets.

Firm-specific information that is potentially relevant to protection of domestic customers engaged in foreign transactions could include the following: (1) Registration qualification status; (2) names of principals; (3) current capital; (4) location of customer funds; (5) address of main office and branches; (6) exchange and self-regulatory organization memberships; (7) the existence of any derogatory information such as that required to be disclosed on the Commission’s Form 7-R; (8) notice of limitations imposed on activities; (9) notice of undersegregation or undercapitalization; (10) notice of misuse of customer funds; and (11) notice of sanctions or of expulsion from exchange or self-regulatory organization membership. The Commission believes that much of the above information would be public in the ordinary course in most jurisdictions. From time to time, the Commission also may need immediate access to financial information concerning risks posed to domestic firms by the carrying of foreign positions.
In addition to information that relates to the financial stability and creditworthiness of the firm, the Commission should have access to transaction-specific information that confirms the execution of orders and prices and facilitates tracing of customer funds. Such data could include records reflecting: (1) That an order has been received by a firm on behalf of one or more United States customers; (2) that an order has been executed on an exchange on behalf of one or more United States customers; (3) that funds to margin, guarantee or secure United States customer transactions have been received by a firm and deposited in an appropriate depository; and (4) the price at which a transaction was executed and general access to pricing information.

Again, such information is likely to be most essential in cases of insolvency where repatriation of funds is at issue. Tracing of customer funds would be particularly true in the case of integrated markets. The Commission may also seek relevant position data information, including the identity of the position holder and related positions, in connection with surveillance of potential “market disruption.” This is particularly true in the case of integrated markets.

The Commission wishes to emphasize that the information sharing arrangements discussed herein are not necessarily a substitute for, nor would they preclude, a more formal agreement or arrangement with respect to the sharing of information.

Marketing Activities by Firms Granted Rule 30.10 Relief


APPENDIX B TO PART 30—INTERPRETATIVE STATEMENT WITH RESPECT TO THE SECURED AMOUNT REQUIREMENT SET FORTH IN § 30.7

1. Rule 30.7 requires FCMs who accept money, securities or property from foreign futures and foreign options customers to maintain in a separate account or accounts such money, securities and property in an amount at least sufficient to cover or satisfy all of its current obligations to those customers. This amount is denominated as the "foreign futures or foreign options secured amount" and that term is defined in Rule 1.3(rr). The separate accounts must be maintained under an account name that clearly identifies the funds as belonging to foreign futures and foreign options customers at a depository that meets the requirements of Rule 30.7(c). Further, each FCM must obtain and retain in its files for the period prescribed in Rule 30.7(d) an acknowledgment from the depository that the depository was informed that such money, securities or property are held for or on behalf of foreign futures and foreign options customers and are being held in accordance with the provisions of these regulations.

2. In a series of orders issued pursuant to Rule 30.10, the Commission required that certain foreign firms exempt from registration as FCMs essentially comply with the standards of Rule 30.7. Specifically, the Commission stated that “[the secured amount] requirement is intended to ensure that funds within the meaning of (Rules 30.6 and 30.7).” Rule 30.1(c). “Foreign futures” means “any contract for the purchase or sale of any commodity for future delivery made, or to be made, on or subject to the rules of any foreign board of trade.” Rule 30.1(a). “Foreign option” means “any transaction or agreement which is or is held out to be of the character of, or is commonly known to the trade as, an option, ‘privilege,’ ‘indemnity,’ ‘bid,’ ‘offer,’ ‘put,’ ‘call,’ ‘advance guaranty,’ or ‘decline guaranty,’ made or to be made on or subject to the rules of any foreign board of trade.” Rule 30.1(b).

Under Rule 30.10, the Commission may exempt a foreign firm acting in the capacity of an FCM from registration under the Commodity Exchange Act (“Act”) and compliance with certain Commission rules based upon the firm’s compliance with comparable regulatory requirements imposed by the firm’s home-country regulator or self-regulatory organization (“SRO”). Once the Commission determines that the foreign jurisdiction’s regulatory structure offers comparable regulatory oversight, the Commission may issue an Order granting general relief subject to certain conditions. Firms seeking confirmation of relief (referred to herein as “Rule 30.10 firms”) must make certain representations set forth in the Rule 30.10 order issued to the regulator or SRO from the firm’s home country. For a list of those foreign regulators and SROs that have been issued a Rule 30.10 order, see appendix C to part 30. In certain cases, where a foreign regulator or SRO has requested that firms subject to its jurisdiction be granted broader relief to engage in transactions on exchanges other than in its home jurisdiction (referred to herein as “expanded relief”), the relief has been granted where the relevant authority
provided by U.S. customers for foreign futures and options transactions, whether held at a U.S. FCM under Rule 30.7(c) or a firm exempted from registration as an FCM under CPTC Rule 30.10, will receive equivalent protection at all intermediaries and exchange clearing organizations." 3 The Commission further interpreted Rule 30.7 to require each FCM and Rule 30.10 firm to take appropriate action (i.e., set aside funds in a “mirror” account) in the event that it becomes aware of facts leading it to conclude that foreign futures and foreign options customer funds are not being handled consistent with the requirements of Commission rules or relevant order for relief by any subsequent intermediary or exchange clearing organization. 3

Upon further analysis and reconsideration of this matter, the Commission has determined to revise its prior interpretation of the Rule 30.7 secured amount requirement. The Commission notes that the initial depository’s ability to identify customer funds afforded foreign futures and foreign options customers a measure of protection in the event that the intermediating FCM or foreign firm becomes insolvent. Moreover, Rule 30.6(a) requires that foreign futures and foreign options customers receive a Rule 1.55 written disclosure explaining that the treatment of customer funds outside the U.S. may not afford the same level of protection offered in the U.S. These protections exist whether the intermediating firm is a U.S. FCM or a firm exempt from such registration under Rule 30.10. 4

has represented that it will monitor its firms for compliance with the terms of the order in connection with such offshore transactions. Although Rule 30.10 orders generally exempt foreign intermediaries from compliance with the secured amount requirement under Rule 30.7, firms seeking confirmation of the expanded relief must represent that, with respect to transactions entered into on behalf of U.S. customers on any non-U.S. exchange located outside their home country, they will treat U.S. customer funds in a manner consistent with the provisions of Rule 30.7. For the most recent order granting expanded relief, see 63 FR 50248 (September 15, 1998) (Singapore Exchange Derivatives Trading Limited).

3 63 FR 50248, 50251, n.19 (emphasis added).

4 Although orders for expanded relief exempt foreign firms from compliance with Rule 1.55, sales practice standards and the treatment of customer funds constitute two of the specific elements examined in evaluating whether the particular foreign regulatory program provides a basis for permitting substituted compliance for purposes of exemptive relief pursuant to Rule 30.10 appendix A to part 30.

4. The Commission further notes, however, that, in February 1998, Rule 30.6 was amended to permit an FCM to open a commodity account for a foreign futures or foreign options customer without providing the Rule 1.55 risk disclosure statement or obtaining an acknowledgment of receipt of such statement, provided that the customer is, at the time at which the account is opened, one of several types of sophisticated customers enumerated in Rule 1.55(f) (“Rule 1.55(f) customers”). 5 While the amendment to Rule 30.6(a) extinguished the obligation to provide a standardized risk disclosure statement to Rule 1.55(f) customers at the time of the account opening, the Commission stated that FCMS have obligations to these customers independent of such a duty that would be material in the circumstances of a given transactions. 6

5. After careful consideration of the issue, the Commission has determined that intermediaries should advise all customers (regardless of their level of sophistication) to consider making appropriate inquiries relating to the treatment of customer funds by depositories located outside the jurisdiction of the intermediating firm. Accordingly, the Commission has determined that an FCM, at a minimum, must provide each foreign futures or foreign option customer with a written disclosure tracking the language in either: (1) Rule 1.55(b)(7), 7 or (2) Paragraphs 6

63 FR 50248 (September 15, 1998). The list of sophisticated customers referenced in Rule 1.55(f) closely tracks, with one exception, the list of “eligible swap participants” in Rule 35.1.

7 Rule 1.55(b)(7) reads as follows: Foreign futures transactions involve executing and clearing trades on a foreign exchange. This is the case even if the foreign exchange is formally “linked” to a domestic exchange whereby a trade executed on one exchange liquidates or establishes a position on the other exchange. No domestic organization regulates the activities of a foreign exchange, including the execution, delivery and clearing of transactions on such exchange, and no domestic regulator has the power to compel enforcement of the rules of the foreign exchange or the laws of the foreign country. Moreover, such laws or regulations will vary depending on the foreign country in which the transaction occurs. For these reasons, customers who trade on foreign exchanges may not be afforded certain of the protections which apply to domestic transactions, including the right to use alternative dispute resolution. In particular, funds received from customers to margin foreign futures transactions may not be provided the same protections as funds received

Continued
and 8 of appendix A to Rule 1.55(c). § Rule 30.10 firms must provide each foreign futures or foreign options customer with a written disclosure tracking the language in either Rule 1.55(b)(7) or paragraphs 6 and 8 of appendix A to Rule 1.55(c), or a comparable disclosure statement prescribed by the firm’s home country regulator. The Commission further notes that, in any instance where a firm provides a Rule 1.55(f) customer with a written disclosure, it is not necessary for the firm to obtain an acknowledgment of receipt. In addition, those FCMs that already have provided customers with a disclosure tracking either Rule 1.55(b)(7) or paragraphs 6 and 8 of appendix A to Rule 1.55(c) read as follows:

6. Deposited cash and property.
You should familiarize yourself with the protections accorded money or property you deposit for domestic and foreign transactions, particularly in the event of a firm insolvency or bankruptcy. The extent to which you may recover your money or property may be governed by specified legislation or local rules. In some jurisdictions, property which has been specifically identifiable as your own will be pro-rated in the same manner as cash for purposes of distribution in the event of a shortfall.

8. Transactions in other jurisdictions.
Transactions on markets in other jurisdictions, including markets formally linked to a domestic market, may expose you to additional risk. Such markets may be subject to regulation which may offer different or diminished investor protection. Before you trade you should enquire about any rules relevant to your particular transactions. Your local regulatory authority will be unable to compel the enforcement of the rules of the regulatory authorities or markets in other jurisdictions where your transactions have been effected. You should ask the firm with which you deal for details about the types of redress available in both your home jurisdiction and other relevant jurisdictions before you start to trade.

6. For the reasons set forth above, the Commission is revising its interpretation of the secured amount requirement set forth in Rule 30.7. The Commission believes that the Rule 30.7 acknowledgment required of FCMs, or other appropriate acknowledgment required by Rule 30.10 firms, only applies to the maintenance of the account or accounts containing foreign futures and foreign options customer funds by the initial depository, and not to the manner in which any subsequent depository holds or subsequently transmits those funds. If an FCM receives from the initial depository the acknowledgment described in Rule 30.7, furnishes to each foreign futures or foreign options customer with a comparable disclosure statement prescribed by its home regulator.

7. If an FCM or Rule 30.10 firm fails to receive the required acknowledgment from the initial depository or provide the above written disclosure statement (and in certain circumstances, receive from customers and acknowledgment of receipt), then it must set aside funds with an acceptable depository and receive from such depository the required acknowledgment.

8. The Commission’s interpretation of the Rule 30.7 secured amount requirement will apply to all regulated activities with all new and existing foreign futures and foreign options customers as of October 11, 2000. The Commission’s interpretation does not alter any other requirement set forth in Rule 30.7 or any other section of part 30.

[65 FR 66558, Oct. 11, 2000]

APPENDIX C TO PART 30—FOREIGN PETITIONS GRANTED RELIEF FROM THE APPLICATION OF CERTAIN OF THE PART 30 RULES PURSUANT TO §30.10

Firms designated by the Sydney Futures Exchange Limited.
FR date and citation: November 7, 1988, 53 FR 48856.
FR date and citation: April 13, 1993, 58 FR 19210.
In its analysis of a request for certification by a foreign board of trade relating to a security index futures contract traded on that foreign board of trade pursuant to §30.13, the Commission will evaluate the contract to ensure that it complies with the three criteria of section 2(a)(1)(C)(ii) of the Act.

(1) Because security index futures contracts are cash settled, the Commission also evaluates the contract terms and conditions relating to cash settlement. In that regard, the Commission examines, among other things, whether the cash price series is reliable, acceptable, publicly available and timely; that the cash settlement price is reflective of the underlying cash market; and that the cash settlement price is not readily susceptible to manipulation. In making its determination, the Commission considers the design and maintenance of the index, the method of index calculation, the nature of the component security prices used to calculate the index, the breadth and frequency of index dissemination, and any other relevant factors.

(2) In considering the susceptibility of an index to manipulation, the Commission examines several factors, including the structure of the primary and secondary markets for the component equities, the liquidity of the component stocks, the method of index calculation, the total capitalization of stocks underlying the index, the number, weighting and capitalization of individual stocks in the index, and the existence of surveillance sharing agreements between the board of trade and the securities exchange(s) on which the underlying securities are traded.

(3) To verify that the index is not narrow-based, the Commission considers the number and weighting of the component securities and the aggregate value of average daily trading volume of the lowest weighted quartile of securities. Under the Act, a security index is narrow-based if it meets any one of the following criteria:

Firms designated by the Singapore Derivatives Trading Limited.

Firms designated by the Montreal Exchange.
FR date and citation: March 17, 1989, 54 FR 11182.

Firms designated by the Toronto Futures Exchange.
FR date and citation: March 22, 1990, 55 FR 10614.

Firms designated by the Tokyo Grain Exchange.
FR date and citation: February 23, 1993, 58 FR 10957.

Firms designated by the MEFF Sociedad Rectora de Productos Financieros Derivados de Renta Fija ("MEFF Renta Fija").
FR date and citation: June 9, 1995, 60 FR 30466.

Firms designated by the New Zealand Futures and Options Exchange ("NZFOE").

Firms designated by the MEFF Sociedad Rectora de Productos Financieros Derivados de Renta Variable ("MEFF Renta Variable").

Firms designated by the Financial Services Authority ("FSA").
FR date and citation: October 10, 2003, 68 FR 58597.

Firms designated by the Australian Stock Exchange Limited ("ASXL").
FR date and citation: July 1, 2003, 68 FR 39006.

Firms designated by the Taiwan Futures Exchange.
FR date and citation: March 28, 2007, 72 FR 14413.

Firms designated by the Tokyo Commodity Exchange.
FR date and citation: February 9, 2006, 71 FR 6799.

Firms designated by the Bolsa de Mercadorias & Futuros.
FR date and citation: July 8, 2002, 67 FR 45056.

Firms designated by Eurex Deutschland.
FR date and citation: May 8, 2002, 67 FR 30785.

[54 FR 809, Jan. 10, 1989]

EDITORIAL NOTE: For Federal Register citations affecting appendix C to part 30, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

APPENDIX D TO PART 30—COMMISSION CERTIFICATION WITH RESPECT TO FOREIGN FUTURES AND OPTIONS CONTRACTS ON A NON-NARROW-BASED SECURITY INDEX

In its analysis of a request for certification by a foreign board of trade relating to a security index futures contract traded on that foreign board of trade pursuant to §30.13, the Commission will evaluate the contract to ensure that it complies with the three criteria of section 2(a)(1)(C)(ii) of the Act.

(1) Because security index futures contracts are cash settled, the Commission also evaluates the contract terms and conditions relating to cash settlement. In that regard, the Commission examines, among other things, whether the cash price series is reliable, acceptable, publicly available and timely; that the cash settlement price is reflective of the underlying cash market; and that the cash settlement price is not readily susceptible to manipulation. In making its determination, the Commission considers the design and maintenance of the index, the method of index calculation, the nature of the component security prices used to calculate the index, the breadth and frequency of index dissemination, and any other relevant factors.

(2) In considering the susceptibility of an index to manipulation, the Commission examines several factors, including the structure of the primary and secondary markets for the component equities, the liquidity of the component stocks, the method of index calculation, the total capitalization of stocks underlying the index, the number, weighting and capitalization of individual stocks in the index, and the existence of surveillance sharing agreements between the board of trade and the securities exchange(s) on which the underlying securities are traded.

(3) To verify that the index is not narrow-based, the Commission considers the number and weighting of the component securities and the aggregate value of average daily trading volume of the lowest weighted quartile of securities. Under the Act, a security index is narrow-based if it meets any one of the following criteria:
§ 31.3 Fraud in connection with certain transactions in silver or gold bullion or bulk coins, or other commodities.

It shall be unlawful for any person, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly:

(a) To employ any device, scheme, or artifice to defraud.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading.

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in, or in connection with (1) an offer to make or the making of, any transaction for the purchase, sale or delivery of silver bullion, gold bullion, bulk silver coins, bulk gold coins, or any other commodity pursuant to a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or pursuant to any contract, account, arrangement, scheme, or device that serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract, or (2) the maintenance or carrying of any such contract.

The provisions of this section shall not apply to any transaction expressly prohibited by section 19(a) of the Act.

(Secs. 2(a), 8a, and 19 of the Commodity Exchange Act and secs. 2 and 23 of Pub. L. 95–405 (92 Stat. 865, 870–871); 7 U.S.C. 2 and 12a)

§ 31.4 Definitions.

For the purposes of this part:

(a) [Reserved]

(b) [Reserved]

(c) Promotional material includes:

(1) Any text of a standard oral presentation, or any communication for
§ 31.4

publication in any newspaper, magazine or similar medium or for broadcast over television, radio, or other electronic medium which is disseminated or directed to a leverage customer or prospective leverage customer;

(2) Any standardized form of report, letter, circular, memorandum, or publication which is disseminated or directed to a leverage customer or prospective leverage customer; or

(3) Any other written literature or advice disseminated or directed to a leverage customer or prospective leverage customer for the purpose of soliciting the entry into a leverage contract;

(d) Leverage customer means any person who, directly or indirectly, enters into, purchases, sells, or otherwise acquires for value any interest in a leverage contract with, from or to a leverage transaction merchant: Provided, however, That an owner or holder of a proprietary leverage account as defined in paragraph (e) of this section shall not be deemed to be a customer within the meaning of §§31.11(a)–(j) and 31.26, and such an owner or holder of such a proprietary leverage account shall otherwise be deemed to be a leverage customer within the meaning of all other sections of these rules.

(e) Proprietary leverage account means a leverage account carried on the books and records of an individual, a partnership, corporation or other type 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:

(i) Such individual himself, or such partnership, corporation or association itself;

(ii) In the case of a partnership, a general partner in such partnership;

(iii) In the case of a limited partnership, a limited or special partner in such partnership whose duties include:

(A) The management of the partnership business or any part thereof;

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

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

(D) The signing or co-signing of checks or drafts on behalf of such partnership;

(iv) In the case of a corporation or association, an officer, director or owner of ten percent or more of the capital stock, of such organization;

(v) An employee of such individual, partnership, corporation or association whose duties include:

(A) The management of the business of such individual, partnership, corporation or association or any part thereof,

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

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

(D) The signing or co-signing of checks or drafts on behalf of such individual, partnership, corporation or association;

(vi) A spouse or minor dependent living in the same household of any of the foregoing persons;

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

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

(f) Commercial leverage account means an account of a commercial enterprise, such as a producer, processor, dealer or end user of a leverage commodity which is the subject of a leverage contract, or the products or by-products thereof;

(g) Leverage commodity means a commodity (gold bullion, silver bullion, bulk gold coins, bulk silver coins, or platinum) which is the subject of a leverage contract offered for purchase or sale, or purchased or sold, by a particular leverage transaction merchant, the value of which is reflected in a
widely accepted and broadly disseminated commercial or retail cash price series for cash market transactions, which price series reasonably reflects the price for the leverage commodity which the customer can expect to pay or receive in normal commercial or retail market channels, including, if applicable, specified premiums or discounts; each leverage commodity is defined by reference to the following distinguishing characteristics:

(1) The nominal size, composition and tolerable ranges of the delivery pack or the actual size, composition and tolerable range of the component of the delivery pack;

(2) Minimum guaranteed quality, deliverable countries of origin, deliverable markings or imprints, and deliverable refiners or mints;

(3) The method of pricing; and

(4) The delivery specifications or alternatives including type and location of delivery facilities, packaging, transportation, registration and associated costs.

(h) **Ask price of a leverage contract** means the price at which a leverage transaction merchant sells or is willing to sell a long leverage contract to a leverage customer or the price at which a leverage transaction merchant re-sells or is willing to resell a short leverage contract to a leverage customer;

(i) **Bid price of a leverage contract** means the price at which a leverage transaction merchant purchases or is willing to purchase a short leverage contract from a leverage customer, or the price at which a leverage transaction merchant repurchases or is willing to repurchase a long leverage contract from a leverage customer;

(j) **Bid-ask spread of a leverage contract** means the difference between a leverage transaction merchant’s ask price and bid price;

(k) **Initial charges for a leverage contract** includes all fees and commissions payable to a leverage transaction merchant which are incurred when a leverage contract is initially entered into by a leverage customer;

(l) **Carrying charges for a leverage contract** includes all service and interest charges paid periodically by a leverage customer to a leverage transaction merchant, or accrued by a leverage transaction merchant, while a long leverage contract remains open, or all service and interest charges paid periodically by a leverage transaction merchant to a leverage customer, while a short leverage contract remains open;

(m) **Termination charges for a leverage contract** includes all fees and commission payable to a leverage transaction merchant which are associated with the liquidation, repurchase, resale or settlement by delivery on a leverage contract;

(n) **Liquidation of a leverage contract** means the unilateral termination of a leverage contract by a leverage transaction merchant due to a leverage customer’s failure to meet one or more margin calls or to make other required deposits on a timely basis or as otherwise permitted under §31.18;

(o) **Repurchase or resale of a leverage contract** means the voluntary termination of a leverage contract by mutual agreement between the leverage customer and the leverage transaction merchant, which agreement is effected by entering into a transaction which is the opposite of the initial transaction. A repurchase by a leverage transaction merchant takes place if the initial transaction by the leverage customer was a purchase of a long leverage contract from the leverage transaction merchant, and a resale by a leverage transaction merchant takes place if the initial transaction by the leverage customer was a sale of a short leverage contract to the leverage transaction merchant;

(p) **Delivery on a leverage contract** means the making (in the case of an initial sale by a leverage customer) or taking (in the case of an initial purchase by a leverage customer) of delivery by a leverage customer of the commodity subject to a leverage contract;

(q) **Initial leverage margin** means the amount of funds, excluding initial charges, which a leverage customer is required to deposit with a leverage transaction merchant when entering into a leverage contract;

(r) **Minimum leverage margin** means the amount of funds which a leverage transaction merchant requires a leverage customer to maintain on deposit.
for each open leverage contract in the leverage customer’s account.

(s) *Maintenance leverage margin* means the level to which the funds in a leverage customer’s account must be restored after a margin call to the leverage customer has been effected by the leverage transaction merchant.

(t) *Leverage account equity* means:

1. For all long leverage contracts in a leverage customer’s account, the amount equal to the aggregate value of such leverage contracts in the leverage customer’s account, based on the leverage transaction merchant’s current bid prices for such contracts, less the amount owed to the leverage transaction merchant by the leverage customer pursuant to such contracts; and

2. For all short leverage contracts in a leverage customer’s account, the aggregate amount owed to the leverage customer by the leverage transaction merchant pursuant to all such contracts less the amount equal to the value of all such leverage contracts in the leverage customer’s account, based on the leverage transaction merchant’s current ask prices for such contracts;

(u)–(v) [Reserved]

(w) *Leverage contract* means a contract, standardized as to terms and conditions, for the long-term (ten years or longer) purchase (“long leverage contract”) or sale (“short leverage contract”) by a leverage customer of a leverage commodity which provides for:

1. Participation by the leverage transaction merchant as a principal in each leverage transaction;

2. Initial and maintenance margin payments by the leverage customer;

3. Periodic payment by the leverage customer or accrual by the leverage transaction merchant of a variable carrying charge or fee on the unpaid balance of a long leverage contract, and periodic payment or crediting by the leverage transaction merchant to the leverage customer of a variable carrying charge or fee on the initial value of the contract plus any margin deposits made by the leverage customer in connection with a short leverage contract;

4. Delivery of a commodity in an amount and form which can be readily purchased and sold in normal commercial or retail channels;

5. Delivery of the leverage commodity after satisfaction of the balance due on the contract; and

6. Determination of the contract purchase and repurchase, or sale and resale prices by the leverage transaction merchant; and

(x) *Leverage transaction* means the purchase or sale of any leverage contract, the repurchase or resale of any leverage contract, the delivery of the leverage commodity, or the liquidation or rescission of any such leverage contract by or to the leverage transaction merchant.

(Secs. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982))


§ 31.5 Unlawful conduct.

(a) On and after April 13, 1984, it shall be unlawful for any person:

1. To offer to enter into, enter into or confirm the execution of a leverage contract to or with a leverage customer, or to solicit or accept a leverage customer’s order for a leverage contract, or to accept any leverage customer funds from a leverage customer to enter into or maintain a leverage contract, unless the leverage commodity which is the subject of the leverage contract has been registered with the Commission in accordance with § 31.6;

2. Except as provided in paragraph (a)(3) of this section, to offer to enter into, enter into or confirm the execution of a leverage contract to or with a leverage customer, or to solicit or accept a leverage customer’s order for a leverage contract, or to accept any leverage customer funds from a leverage customer to enter into or maintain a leverage contract, unless that person is registered with the Commission in accordance with § 31.7 of this chapter and that registration has not expired, been suspended (and the period of suspension has not expired) or been revoked; or

3. Except as provided in paragraph (a)(2) of this section, if such person is a natural person, to offer to enter into, enter into or confirm the execution of
§31.6 Registration of leverage commodities.

(a) Registration of leverage commodities. Each leverage commodity upon which a leverage contract is offered for sale or purchase or is sold or purchased by a particular leverage transaction merchant must be separately registered with the Commission. Registration will be granted only when the following conditions are met:

1. The person requesting registration of a leverage commodity is a registered leverage transaction merchant;
2. The commodity to be registered is a leverage commodity as defined in §31.4(g);
3. There exists a widely accepted and broadly disseminated commercial or retail cash price series for the commodity;
4. The commodity can be readily purchased or sold in normal commercial or retail channels by leverage customers making or taking delivery on a leverage contract;
5. The terms and conditions of the leverage contracts based on the leverage commodity are consistent with the Act and the regulations thereunder, and are not contrary to the public interest; and
6. The terms and conditions of the leverage contracts based on the leverage commodity do not include substantial characteristics of other interests,

(d) Denial, suspension, or revocation of registration of a leverage commodity. The failure or refusal of any leverage transaction merchant to comply with any of the provisions of the Act or any of the Commission’s rules, regulations, or orders thereunder shall be cause for refusing to register a leverage commodity, for suspending registration of a leverage commodity for a period not to exceed six months, and for revoking registration of such leverage commodity with respect to that leverage transaction merchant. Any such denial, suspension, or revocation proceedings shall be conducted in accordance with the procedures set forth in sections 6 and 6(b) of the Act.

such as options, certificates of deposit, or other regulated instruments.

(b) Application for registration. Applications to register leverage commodities should be filed with the Commission at its Washington, DC headquarters. Attention: Secretariat. Three copies of each such submission should be filed. The Commission may return any application which does not comply with the form and content requirements of this section. Each applicant must:

(1) Provide evidence that the person applying for registration of the leverage commodity is registered or has applied to the National Futures Association for registration as a leverage transaction merchant;

(2) Provide an explanation of the distinguishing characteristics of the leverage commodity for which registration is sought, including a complete description of the cash market for the leverage commodity, and for the spot, forward, and futures markets for the generic commodity;

(3) Specify a commercial or retail cash price series including prevailing premiums or discounts governing cash market transactions in the quantities specified by the leverage contract and justify the use of such price series with respect to the particular leverage commodity for which registration is sought;

(4) Provide evidence and a complete evaluation of how the distinguishing characteristics of the leverage commodity would be expected to affect the ability of leverage customers electing to make or take delivery of the commodity at an economic price in normal cash market channels;

(5) Include a description of the commodity inspection and/or certification procedures typically required for commercial or retail sales of the specified commodity. Such description must be accompanied by information regarding the availability of any normally required certification or inspection service at the delivery points including those of the leverage transaction merchant; and

(6) Include copies of all leverage contracts which are to be offered by the leverage transaction merchant on the leverage commodity.

(c) Continuing registration of leverage commodities. A registered leverage transaction merchant must submit to the Commission for its review, at least forty-five (45) days before their effective date, any proposed changes in the specifications of the leverage commodity and the terms and conditions of the leverage contract from those submitted as part of the registration application unless such contract specifically provides that such terms and conditions are subject to change. Three copies of each such submission must be furnished to the Commission at its Washington, DC headquarters. Attention: Secretariat. The Commission may return any submission which does not comply with the form and content requirements of this section. Each such submission must, in the following order:

(1) Explain how any such changes might affect the ability of leverage customers to realize the leverage commodity’s economic value and how such amendments might affect the ability of leverage customers making or taking delivery to buy or sell the leverage commodity;

(2) Explain the effect of such changes upon the continued appropriateness of the commercial or retail cash price series submitted pursuant to paragraph (b)(3) of this section, or, as an alternative, submit a new price series and a justification of its use; and

(3) Indicate whether, if such changes are applied to existing leverage commodities, there will be a change in the economic value of such commodities and, if so, quantify the extent of such changes.

(d) Authority to disapprove amendments. The Commission may disapprove, alter, or amend changes to the distinguishing characteristics of the registered leverage commodity, or to the terms and conditions of the leverage contracts offered thereon, after appropriate notice and opportunity for hearing, when the Commission determines that such a change is in violation of any of the provisions of the Act or any of the regulations thereunder, or that it is necessary or appropriate to ensure the financial solvency of leverage transactions or prevent manipulation or fraud. Upon notification by
§ 31.7  Maintenance of minimum financial, cover and segregation requirements by leverage transaction merchants.

(a) Each person registered as a leverage transaction merchant or who files an application for registration as a leverage transaction merchant, who knows or should have known that its adjusted net capital at any time is less than the minimum required by §31.9, or that its cover at any time is less than the minimum required by §31.8, or that the amount of leverage customer funds in segregation is less than is required by §31.12 or by the capital, cover or segregation rules of any designated self-regulatory organization to which such person is subject, if any, must:

1. Give telegraphic notice as set forth in §1.12(g) of this chapter that such applicant’s or registrant’s adjusted net capital is less than is required by §31.9, or its cover is less than is required by §31.8, or the amount of leverage customer funds in segregation is less than is required by §31.12 or by such other capital, cover or segregation rule, identifying the applicable capital, cover or segregation rule. This notice must be given within 24 hours after such applicant or registrant knows or should have known that its adjusted net capital or its cover or the amount of leverage customer funds in segregation is less than is required by any of the aforesaid rules to which such applicant or registrant is subject; and

2. Within 24 hours after giving such notice file a statement of financial condition, a statement of the computation of the minimum capital requirements pursuant to §31.9 (computed in accordance with the applicable capital rule), a schedule of coverage requirements and coverage provided, and a schedule of segregation requirements and funds on deposit in segregation, all as of the date such applicant’s or registrant’s adjusted net capital or its cover or the amount of leverage customer funds in segregation became less than the minimum required.

(b) Each person registered as a leverage transaction merchant, or who files an application for registration as a leverage transaction merchant, who knows or should have known that its adjusted net capital at any time is less than 120 percent of the amount required by §31.9 must file written notice to that effect as set forth in §1.12(g) of this chapter within five business days of such event. Such applicant or registrant must also file a Form 2-FR or such other financial statement designated by the Commission and/or the designated self-regulatory organization, if any, as of the close of business for the month during which such event takes place and as of the close of business for each month thereafter until three successive months have elapsed.
during which the applicant’s or registrant’s adjusted net capital is at all times equal to or in excess of the minimums set forth in this paragraph (b). Each financial report required by this paragraph (b) must be filed within 30 calendar days after the end of the month for which such report is being made.

(c) The requirements of §§1.12(c), 1.12(d), 1.12(e) and 1.12(g) of this chapter shall apply to registered leverage transaction merchants and to persons who have applied for registration as leverage transaction merchants, as if in those paragraphs the term “leverage transaction merchant or applicant therefor” were substituted for the phrase “applicant or registrant.”

(See. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982))


§ 31.8 Cover of leverage contracts.

(a)(1) Each leverage transaction merchant must at all times maintain cover of at least 90 percent of the amount of physical commodities subject to open long leverage contracts entered into with leverage customers, and must at all times also maintain cover of at least 90 percent of the amount of physical commodities subject to open short leverage contracts entered into with leverage customers. At least 25 percent of the amount of physical commodities subject to open long leverage contracts must be covered by the types of permissible cover set forth in paragraphs (a)(2)(i) and (ii) of this section.

(2) Permissible cover for a long leverage contract is limited to:

(i) Warehouse receipts for the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.

(ii) A long spot futures contract on the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.

(iii) Purchase, in physical form, of the leverage commodity subject to the leverage contract, or of the same alternative commodities provided for in paragraph (a)(2)(ii) of this section, with settlement within two business days must be covered by the types of permissible cover set forth in paragraphs (a)(2)(i) and (ii) of this section.

(b) Permissible cover for a long leverage contract is limited to:

(i) Warehouse receipts for the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.

(ii) A long spot futures contract on the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.

(iii) Purchase, in physical form, of the leverage commodity subject to the leverage contract, or of the same alternative commodities provided for in paragraph (a)(2)(ii) of this section, with settlement within two business days must be covered by the types of permissible cover set forth in paragraphs (a)(2)(i) and (ii) of this section.

(2) Permissible cover for a long leverage contract is limited to:

(i) Warehouse receipts for the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.

(ii) A long spot futures contract on the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.

(iii) Purchase, in physical form, of the leverage commodity subject to the leverage contract, or of the same alternative commodities provided for in paragraph (a)(2)(ii) of this section, with settlement within two business days must be covered by the types of permissible cover set forth in paragraphs (a)(2)(i) and (ii) of this section.

(2) Permissible cover for a long leverage contract is limited to:

(i) Warehouse receipts for the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.

(ii) A long spot futures contract on the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.

(iii) Purchase, in physical form, of the leverage commodity subject to the leverage contract, or of the same alternative commodities provided for in paragraph (a)(2)(ii) of this section, with settlement within two business days must be covered by the types of permissible cover set forth in paragraphs (a)(2)(i) and (ii) of this section.

(iv) A long spot futures contract on the leverage commodity subject to the leverage contract held in commercial banks located in the United States or in approved contract market depositories: Provided, That the balance of the principal and accrued interest on any loan against such warehouse receipts does not exceed 70 percent of the current market value of the commodity represented by each receipt.
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leverage contract, or of the same alternative commodities provided for in paragraph (a)(2)(ii) of this section, if the leverage transaction merchant has stopped a delivery notice which is non-transferable with respect to that futures contract and has otherwise complied with any procedures, including payment, necessary for taking delivery, even though the leverage transaction merchant does not have possession or control of a warehouse receipt for two business days: Provided, however, That the amount of physical commodities subject to such long spot futures contracts at no time constitutes more than 10 percent of the amount of physical commodities subject to open long leverage contracts entered into with leverage customers: And, provided further, That the leverage transaction merchant maintains, in accordance with §31.14 of this part, detailed records of its deliveries on futures contracts, which will be subject to inspection, copying and audit by the Commission and a designated self-regulatory organization.

(v)(A) Purchases for future delivery on or subject to the rules of the contract market of the same generic commodity subject to the leverage contract, or of the same alternative commodities provided for in paragraph (a)(2)(ii) of this section; or

(B) Purchases of call commodity options for the same generic commodity subject to the leverage contract, or of the same alternative commodities provided for in paragraph (a)(2)(ii) of this section, on or subject to the rules of a contract market in accordance with the provisions of part 33 of this chapter: Provided, That the market value of the actual commodity or futures contract which is the subject of such option is less than the value of the underlying commodity based on the strike price of the option.

(b) Such leverage transaction merchant must be in compliance with paragraph (a) of this section at all times and must be able to demonstrate such compliance to the satisfaction of the Commission and/or the designated self-regulatory organization. A leverage transaction merchant who is not in compliance with paragraph (a) of this section or in unable to demonstrate such compliance must immediately cease engaging in the business of offering to enter into, entering into, or confirming the execution of, any leverage contract until such time as the leverage transaction merchant is able to demonstrate such compliance. Nothing in this paragraph (b) shall be construed as preventing the Commission or the designated self-regulatory organization from taking action against a leverage transaction merchant for non-compliance with any of the provisions of this section.

(c) The amount of cover which is actually maintained by a leverage transaction merchant, and the amount of cover which must be maintained by a leverage transaction merchant in order to comply with the requirements of this section, shall be computed as of the close of each business day by the leverage transaction merchant. A written record of this computation shall be made and kept, together with all supporting data, in accordance with the provisions of §1.31 of this chapter. This daily computation shall be made by noon on the next business day and shall be computed in a format identical to the Schedule of Coverage Requirements and Coverage Provided contained in Form 2–FR. In computing the amount of cover actually maintained, the leverage transaction merchant
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§ 31.9

§ 31.9 Minimum financial requirements.

(a) Each leverage transaction merchant must at all times maintain adjusted net capital equal to or in excess of $2,500,000, plus 20 percent of the market value of the amount of physical commodities subject to leverage contracts entered into by the leverage transaction merchant which are uncovered, plus 2 1/2 percent of the market value of the amount of physical commodities subject to short leverage contracts entered into by the leverage transaction merchant which are covered.

(1) For purposes of determining compliance with the provisions of paragraph (a) of this section, each leverage transaction merchant must compute the market value of the physical commodities subject to leverage contracts which it has entered into by using the widely accepted and broadly disseminated commercial or retail cash price series submitted with the leverage transaction merchant’s application for registration of the leverage commodity in accordance with §31.6, and cannot include any mark-ups or discounts of the leverage transaction merchant.

(2) The requirements of paragraph (a) of this section shall not be applicable if the applicant or registrant is a member of a designated self-regulatory organization and conforms to minimum financial standards and related reporting requirements set by such designated self-regulatory organization in its bylaws, rules, regulations or resolutions approved by the Commission pursuant to section 19 of the Act and §31.28 of this part.

(3) No person applying for registration as a leverage transaction merchant shall be so registered unless such person affirmatively demonstrates to the satisfaction of the Commission that it complies with the financial requirements of this section. Each leverage transaction merchant must be in compliance with this section at all times and must be able to demonstrate such compliance to the satisfaction of the Commission and/or the designated self-regulatory organization.

(4) A leverage transaction merchant who is not in compliance with this section, or is unable to demonstrate such
compliance as required by paragraph (a)(3) of this section, must immediately cease engaging in the business of offering to enter into, entering into, or confirming the execution of, any leverage contract until such time as the leverage transaction merchant is able to demonstrate such compliance. Nothing in this paragraph shall be construed as preventing the Commission or the designated self-regulatory organization from taking action against a leverage transaction merchant for non-compliance with any of the provisions of this section. Any leverage transaction merchant required immediately to cease doing business under this paragraph shall remain liable on all leverage contracts previously entered into until all rights of and obligations owing to the customers thereunder have been fulfilled.

(b) For the purposes of this section:

(1) Where the applicant or registrant has an asset or liability which is defined in Securities Exchange Act rule 15c3-1 (§240.15c3-1 of this title), the inclusion or exclusion of all or part of such asset or liability for the computation of adjusted net capital shall be in accordance with §240.15c3-1 of this title, unless specifically stated otherwise in this section;

(2) (i) The term “customer” means customer as defined in §31.4(d);

(ii) The term “proprietary account” means a commodity futures, option or leverage account carried on the books of the applicant or registrant itself, or for general partners of the applicant or registrant; and

(iii) The term “noncustomer account” means a leverage account carried on the books of the applicant or registrant which is not included in the definition of customer (as defined in paragraph (b)(2)(i) of this section) or proprietary account (as defined in paragraph (b)(2)(ii) of this section);

(3) The term “Business day” means any day other than a Saturday, Sunday or legal holiday;

(4) The term “net capital” has the same meaning as in §1.17(d) of this chapter: Provided, however, That the term “leverage transaction merchant” shall be substituted for the term “futures commission merchant” in §1.17 of this chapter. In determining net capital, the provisions set forth in §1.17(c)(1) of this chapter shall apply:

(5) The term “current assets” has the same meaning as in §1.17(c)(2) of this chapter: Provided, however, That the safety factors set forth in §1.17(c)(5) of this chapter shall apply to leverage contract accounts as well as commodity futures and option accounts;

(6) The provisions set forth in §1.17(c)(3) of this chapter shall apply;

(7) The term “liabilities” has the same meaning as in §1.17(c)(4) of this chapter;

(8) In computing adjusted net capital, the safety factors set forth in §1.17(c)(5) of this chapter shall apply: Provided, however, That the safety factors set forth in §1.17(c)(5)(II) (B) and (C) of this chapter shall not apply to inventory, to the extent such inventory represents cover for leverage contracts entered into by a leverage transaction merchant: And, provided further, That the safety factors set forth in §1.17(c)(5) (X) and (XII) of this chapter shall not apply to any futures contracts or commodity options traded on contract markets held in proprietary accounts which represent cover for leverage contracts entered into by a leverage transaction merchant;

(9) The safety factors set forth in §1.17(c)(5) (VIII) and (IX) of this chapter for undermargined commodity futures and commodity option customer and noncustomer accounts shall apply in a like manner to undermargined leverage customer and noncustomer accounts, respectively, and the term “leverage transaction merchant” shall be substituted for the terms “applicable boards of trade” or “clearing organization”; and

(10) The provisions set forth in §1.17 (d), (e), (f), (h) and (j) of this chapter shall apply.

(c) No person shall be registered as a leverage transaction merchant unless, commencing on the date the person applies for such registration, the person prepares, and keeps current, ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each
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§ 31.11 Disclosure.

(a) Except as provided in paragraph (i) of this section, prior to the opening of a leverage customer account, a leverage transaction merchant soliciting an order for any leverage contract shall furnish to the prospective leverage customer a dated Disclosure Document and receive from such prospective leverage customer a signed and dated copy of the risk disclosure statement contained in such document which acknowledges that the customer received and understood the Disclosure Document. The Disclosure Document shall contain then current information with respect to the leverage contract being offered by the person soliciting the order therefor, and shall contain:

(1) The following bold-faced risk disclosure statement in at least ten-point type on the first page of the Disclosure Document:


§ 31.10 Repurchase and resale of leverage contracts by leverage transaction merchants.

(a) No leverage transaction merchant shall offer to sell or sell a long leverage contract involving a leverage commodity to any leverage customer at any time when such leverage transaction merchant is not offering to repurchase from any of its leverage customers any long leverage contract, and is not offering to resell to any of its leverage customers any short leverage contract, involving the same leverage commodity previously purchased or sold by the leverage transaction merchant to or from a leverage customer.

(b) No leverage transaction merchant shall offer to purchase or purchase a short leverage contract involving a leverage commodity from any leverage customer at any time when such leverage transaction merchant is not offering to resell to any of its leverage customers any short leverage contract, and is not offering to repurchase from any of its leverage customers any long leverage contract, involving the same leverage commodity previously purchased or sold by the leverage transaction merchant from or to a leverage customer.

[50 FR 36414, Sept. 6, 1985]
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FOR A LONG LEVERAGE TRANSACTION AND A SHORT LEVERAGE TRANSACTION WHICH INCLUDES A FORMULA FOR CALCULATING AN ESTIMATE OF THE LEVERAGE CONTRACT’S BREAK-EVEN VALUE IS ATTACHED TO THIS DOCUMENT. THIS IS IN THE SAME FORMAT AS THE CONFIRMATION STATEMENT YOU WILL RECEIVE TO CONFIRM YOUR ACTUAL TRANSACTION. BE CERTAIN THAT YOU UNDERSTAND THE INFORMATION PROVIDED BY THIS STATEMENT BEFORE YOU ENTER INTO A LEVERAGE TRANSACTION.

YOU SHOULD ALSO UNDERSTAND THAT THE CHARGES FOR SIMILAR LEVERAGE CONTRACTS WHICH ARE REFLECTED ON THE FILLED-IN CONFIRMATION STATEMENT AS ESTIMATED MAY VARY AMONG LEVERAGE FIRMS, AND THAT SUCH FIRMS HAVE COMPLETE DISCRETION IN SETTING THEIR CHARGES AND THE PRICE OF THE LEVERAGE CONTRACTS THEY OFFER. PRIOR TO ENTERING INTO A LEVERAGE CONTRACT A PROSPECTIVE LEVERAGE CUSTOMER SHOULD COMPARE THE CHARGES AND PRICES OF SUCH FIRMS WITH EACH OTHER AND WITH THE COMMISSIONS FOR AND PRICES OF FUTURES CONTRACTS TRADED ON DESIGNATED EXCHANGES.

YOU SHOULD ALSO BE AWARE THAT YOU ARE SUBJECT TO MARGIN CALLS. THE LEVERAGE FIRM RESERVES THE RIGHT TO LIQUIDATE YOUR POSITION IF YOU DO NOT RESPOND TO A MARGIN CALL WITHIN THE TIME SPECIFIED IN YOUR LEVERAGE AGREEMENT. IN ANY EVENT, IF THE EQUITY IN YOUR CONTRACT AT ANY TIME FALLS BELOW 50% OF THE MINIMUM MARGIN, YOUR CONTRACT MAY BE LIQUIDATED WITHOUT PRIOR NOTICE. YOU MUST, HOWEVER, BE NOTIFIED OF LIQUIDATION WITHIN NO MORE THAN 24 HOURS THEREAFTER AND PERMITTED TO REESTABLISH YOUR CONTRACT FOR A PERIOD OF 5 BUSINESS DAYS. LEVERAGE CONTRACTS PURCHASED FROM A LEVERAGE TRANSACTION MERCHANT ARE RE-ESTABLISHED AT THE THEN PREVAILING BID PRICE AND LEVERAGE CONTRACTS SOLD TO A LEVERAGE TRANSACTION MERCHANT ARE RE-ESTABLISHED AT THE THEN PREVAILING ASK PRICE WITHOUT COMMISSIONS, FEES OR OTHER MARK-UPS OR CHARGES UNDER RULES SET BY THE COMMODITY FUTURES TRADING COMMISSION, AS MORE COMPLETELY DESCRIBED IN THIS DISCLOSURE DOCUMENT. IN CASE OF LIQUIDATION, ALL OF YOUR FUNDS MAY BE USED TO SETTLE THE DEFICIT IN THE ACCOUNT, AND YOU MAY BE LIABLE FOR ADDITIONAL FUNDS TO SETTLE IN FULL.

IF YOU ARE A FIRST-TIME LEVERAGE CUSTOMER, YOU MAY RESCIND YOUR FIRST LEVERAGE TRANSACTION SUBJECT ONLY TO ACTUAL PRICE LOSSES BUT OTHERWISE WITHOUT PENALTY FOR THREE BUSINESS DAYS FOLLOWING AND INCLUDING THE DAY OF RECEIPT OF THE CONFIRMATION.

YOU SHOULD BE AWARE THAT IN ORDER TO REALIZE ANY VALUE FROM A LONG LEVERAGE CONTRACT, THE LEVERAGE TRANSACTION MERCHANT WHICH SOLD YOU THE LEVERAGE CONTRACT MUST REPURCHASE IT, OR YOU MUST PAY THE LEVERAGE TRANSACTION MERCHANT THE FULL PURCHASE PRICE FOR THE LEVERAGE CONTRACT, TAKE DELIVERY OF THE LEVERAGE COMMODITY, AND THEN SELL THE LEVERAGE COMMODITY, POSSIBLY AT A LOWER PRICE THAN THE PRICE PAID TO PURCHASE THE LEVERAGE COMMODITY FROM THE LEVERAGE TRANSACTION MERCHANT. YOU SHOULD ALSO BE AWARE THAT IN ORDER TO REALIZE ANY VALUE FROM A SHORT LEVERAGE CONTRACT, THE LEVERAGE TRANSACTION MERCHANT TO WHICH YOU SOLD THE LEVERAGE CONTRACT MUST RESELL IT TO YOU, OR YOU MUST ACQUIRE THE LEVERAGE COMMODITY IN ORDER TO MAKE DELIVERY TO THE LEVERAGE TRANSACTION MERCHANT, POSSIBLY AT A HIGHER PRICE THAN THE PRICE YOU WILL RECEIVE FROM THE LEVERAGE TRANSACTION MERCHANT.

THERE IS NO MARKET FOR THE LEVERAGE CONTRACT ITSELF OTHER THAN TO HAVE IT REPURCHASED BY OR RESOLD TO THE LEVERAGE TRANSACTION MERCHANT. A LEVERAGE TRANSACTION MERCHANT IS UNDER NO OBLIGATION TO OFFER TO REPURCHASE OR RESELL A LEVERAGE CONTRACT AT ALL TIMES, ALTHOUGH THE LEVERAGE TRANSACTION MERCHANT MUST OFFER TO REPURCHASE ANY LONG LEVERAGE CONTRACT PREVIOUSLY PURCHASED BY A LEVERAGE CUSTOMER AND MUST ALSO OFFER TO RESELL ANY SHORT LEVERAGE CONTRACT PREVIOUSLY SOLD BY A LEVERAGE CUSTOMER AT ANY TIME DURING WHICH THE LEVERAGE TRANSACTION MERCHANT IS OFFERING TO ENTER INTO NEW LONG OR SHORT LEVERAGE CONTRACTS WITH CUSTOMERS INVOLVING THE SAME LEVERAGE COMMODITY. AS NOTED ABOVE, HOWEVER, A LEVERAGE TRANSACTION MERCHANT HAS COMPLETE DISCRETION IN SETTING THE PRICE AND ANY CHARGES RELATED THERETO.

THE COMMODITY FUTURES TRADING COMMISSION HAS NOT PASSED UPON THE MERITS OF THESE LEVERAGE CONTRACTS AS AN INVESTMENT VEHICLE
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NOR UPON THE ACCURACY OR ADEQUACY OF THIS DISCLOSURE DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A VIOLATION OF THE COMMODITY EXCHANGE ACT AND THE REGULATIONS THEREUNDER.

(2) Immediately following the statement required by paragraph (a)(1) of this section, a section, captioned "Provisions of Leverage Contract" in at least ten point type, containing the terms and conditions of the leverage contract being offered. This information must be provided in the order specified in paragraphs (a)(2) (i) through (xi) of this section, with a clear demarcation or separation between each item according to the paragraph of the section to which it corresponds, and include:

(i) The duration or expiration date of the leverage contract;
(ii) The distinguishing characteristics of the contract and of the leverage commodity, including, in particular, those characteristics of the leverage commodity enumerated in §31.4(g)(1)–(4) of this part;
(iii) A description of the following charges for each leverage contract:
   (A) Initial charges;
   (B) Carrying charges;
   (C) Termination charges;
(iv) A description of the bid and ask prices of each leverage contract;
(v) An explanation of the margins applicable to each leverage contract, including, as required, initial margins, minimum margins and maintenance margins;
(vi) A description of the leverage customer's responsibilities with respect to margin calls, including the timing of such calls and, if applicable, the circumstances under which, time after which, and the order in which the leverage transaction merchant may, consistent with §31.18 liquidate a customer's position in the leverage contract;
(vii) A description of the manner in which a leverage customer may seek to have a leverage contract repurchased or resold by the leverage transaction merchant, including an explanation of the procedure to be followed by the leverage transaction merchant to effect such repurchase or resale and the manner in which the repurchase or resale price is determined;
(viii) A statement to the effect that other persons may be unwilling to buy from the leverage customer the leverage commodity that is deliverable on the leverage contract without first requiring an inspection or assay at the expense of the leverage customer; a statement to the effect that the leverage transaction merchant may be unwilling to accept delivery and pay for such leverage commodity without first requiring an inspection or assay at the expense of the leverage customer; and a description of any other requirements for the delivery of a leverage commodity by a leverage customer to a leverage transaction merchant in connection with a short leverage contract;
(ix) A clear explanation of any force majeure clauses pertaining to each leverage contract;
(x) A description of any material risks not included in the statements required by paragraph (a)(1) of this section; and
(xi) An identification of the commercial or retail cash price series filed in accordance with §31.6, along with clearly specified premiums and discounts, if applicable, which the leverage customer or prospective leverage customer can use to evaluate a leverage contract and a widely available source from which such price quotes may be obtained on a timely basis.

(3) A filled-in version of the customer Confirmation Statement in the format specified by the Commission for a representative single long leverage contract and a representative single short leverage contract which includes a formula which can be used to estimate the break-even price.

(4)(i) The name, address of the main business office, main business telephone number and form of organization of the leverage transaction merchant. If the address of the main business office is a post office box number, the leverage transaction merchant must state where its books and records will be kept;
(ii) The name of each principal of the leverage transaction merchant;
(iii) The business background, for the five years preceding the date of the statement, of:
(A) The leverage transaction merchant; and
(B) Each principal of the leverage transaction merchant.
The leverage transaction merchant must include in the description of the business background of each such person the name and main business of that person’s employers, business associations or business ventures and the nature of the person’s duties performed for the employers or in connection with the associations or ventures.

(5)(i) A statement whether any principal of the leverage transaction merchant has entered into or intends to enter into long or short leverage contracts for his own account and, if so, whether leverage customers will be permitted to inspect the records of that person’s trades; and

(ii) If principals of the leverage transaction merchant will not enter into or do not intend to enter into long or short leverage contracts for their own account, the leverage transaction merchant must so state with respect to each principal.

(6)(i) Any material administrative or civil action involving any activity or conduct, or related to any statute, set forth in sections 8a(2) or 8a(3) of the Act, or any material criminal action brought within the five years preceding the date of the document against the leverage transaction merchant or any principal of the leverage transaction merchant; and

(ii) If there has been no such action against any of the foregoing persons, the leverage transaction merchant must make a statement to that effect with respect to each such person.

(b)(1) If the leverage transaction merchant knows or should know that the Disclosure Document is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to:

(i) All existing leverage customers within 30 calendar days after the date upon which the leverage transaction merchant first knows or has reason to know of the defect; and

(ii) Each prospective leverage customer prior to opening an account for such person.

The leverage transaction merchant may furnish the correction by means of an amended document, a sticker on the document, a notice in a monthly statement or by other similar means.

(2) The leverage transaction merchant may not use the document until such correction is made.

(c) The leverage transaction merchant must date each document and amendment thereto as of the date it is first used.

(d) Subject to the provisions of paragraph (b) of this section, all information contained in the document must be current as of the date of the document.

(e)(1) The leverage transaction merchant must file with the National Futures Association three copies and with the Commission at its Washington, DC headquarters, Attn: Secretariat, one copy of the document for each leverage contract that it offers or that it intends to offer not less than 21 calendar days prior to the date the leverage transaction merchant first intends to furnish the document to a prospective leverage customer. The leverage transaction merchant must specify with the filing the date it first intends to deliver the document to a prospective leverage customer;

(2) Subject to paragraphs (h) and (m) of this section, the leverage transaction merchant must file with the National Futures Association three copies and with the Commission at its Washington, DC headquarters, Attn: Secretariat, one copy of all subsequent amendments to the document for each leverage contract that it offers or that it intends to offer within 30 calendar days after the date upon which the leverage transaction merchant first knows or has reason to know of the defect requiring the amendment.

(f) This section does not relieve a leverage transaction merchant from any obligation under the Act or the regulations thereunder, including the obligation to disclose all material information to existing or prospective leverage customers even if the information is not specifically required by this section.

(g) If any contract term set forth in accordance with paragraph (a)(2) of this section provides that such term is subject to change, the leverage transaction merchant must ensure that this fact, the conditions under which the
change may take place, and the foreseeable consequences of the change are clearly stated in the Disclosure Document, in describing that contract term.

(h) A leverage transaction merchant must transmit a notification to each leverage customer within 24 hours of making any change not otherwise permitted under the contract terms set forth in accordance with paragraph (a)(2) of this section. A notification of any change in the interest rate charged by the leverage transaction merchant must also be transmitted to each leverage customer within twenty-four hours of each change: Provided, however, That no notification is required if the change in interest rate is one percent or less as compared to the rate charged at the prior month-end and the new interest rate is made available to customers by means of a toll-free telephone call, and such availability is set forth in the Disclosure Document. The notification required by this paragraph must be transmitted by first class mail or other, at least equivalent, means of communication.

(i) A person soliciting or accepting an order for a leverage contract is not required to deliver a Disclosure Document leverage to a leverage customer, as required by paragraph (a) of this section, if a disclosure document meeting all of the requirements of this section previously has been delivered by the person to the leverage customer: Provided, however, That such a Disclosure Document must be delivered:

(1) Upon the request of a leverage customer, or
(2) If the previously delivered Disclosure Document has become outdated or has become inaccurate in any material respect.

(j) Prior to the entry into a leverage contract, the person soliciting the order therefor shall inform the leverage customer or the prospective leverage customer, to the extent these amounts are known or can reasonably be approximated, of all charges for the initiation, carrying and termination of a leverage contract and the leverage transaction merchant’s bid-ask spread on the leverage contract as set forth in paragraph (a)(2)(v) and (a)(2)(vi) of this section.

(k)(1) Not later than the next business day after the entry into a long leverage contract with a customer, each leverage transaction merchant shall furnish to such customer, by first-class mail or other, at least equivalent, means of communication, a written Confirmation Statement in a format specified by the Commission containing:

(i) For a leverage customer’s first leverage transaction, the following bold-faced statement in at least ten-point type:

IF YOU ARE A FIRST-TIME LEVERAGE CUSTOMER, YOU MAY RESCIND YOUR FIRST LEVERAGE TRANSACTION SUBJECT ONLY TO ACTUAL PRICE LOSSES BUT OTHERWISE WITHOUT PENALTY FOR THREE BUSINESS DAYS FOLLOWING AND INCLUDING RECEIPT OF THIS CONFIRMATION. ACTUAL LOSSES ON A LEVERAGE CONTRACT PURCHASED FROM A LEVERAGE TRANSACTION MERCHANT ARE CALCULATED BY SUBTRACTING THE ASK PRICE OF THE LEVERAGE CONTRACT AT THE TIME OF THE CUSTOMER’S RESCISSION FROM THE ASK PRICE AT WHICH THE LEVERAGE CONTRACT WAS PURCHASED AND WHICH APPEARS ON THIS CONFIRMATION. TO RESCIND THIS CONTRACT SEND A TELEGRAM TO (name and address of LTM) OR YOU MAY TELEPHONE (name of LTM) AT (telephone number). IF YOU RESCIND BY TELEPHONE, YOU MUST ALSO SEND IMMEDIATE WRITTEN AFFIRMATION BY TELEGRAM, CERTIFIED LETTER OR BY AT LEAST EQUIVALENT MEANS TO THE ADDRESS PROVIDED ABOVE; and

(ii) For every leverage transaction, the following information:

(A) The date the leverage contract was entered into;
(B) The transaction identification number;
(C) The name of the leverage commodity;
(D) The expiration date of the leverage contract;
(E) The total cost of the leverage contracts covered in the Confirmation Statement, which equals the leverage transaction merchant’s ask price in dollars per unit multiplied by the number of units multiplied by the number of contracts;
(F) The total unpaid balance for this transaction;
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(G) The total initial charges for the transaction;
(H) The total initial margin for the transaction, in dollars and as a percentage of the contract price;
(I) The total amount due (or paid) to initiate the transaction, which equals the total initial charges plus the total initial margin in dollars;
(J) The current equity in the individual customer’s account as of the date of this transaction, but excluding this transaction;
(K) The total variable carrying charges to be billed each period, in dollars and as an annual percentage rate, based on the carrying charge rate prevailing at the time the contract is entered into;
(L) The total bid/ask spread, based on prices prevailing at the time the contract is entered into;
(M) The total termination charges incurred if the contract is repurchased, liquidated by the leverage transaction merchant or settled by delivery, based on charges prevailing at the time the contract is entered into;
(N) Any other charges associated with terminating the transaction, based on charges prevailing at the time the contract is entered into;
(O) Any special charges associated with liquidating the transaction, based on charges prevailing at the time the contract is entered into;
(P) The total delivery charges incurred if the customer takes delivery on the contract, based on charges prevailing at the time the contract is entered into;
(Q) The following formula enabling a customer to calculate the estimated total contract value to break-even: Initial contract value plus the bid-ask spread plus the initial charges plus any other charges plus the termination charges plus the carrying charges for the period the contract is intended to be held open;
(R) The total minimum margin, in dollars and as a percentage of contract price, based on the rate prevailing at the time the contract is entered into;
(S) The total maintenance margin, in dollars and as a percentage of contract price, based on the rate prevailing at the time the contract is entered into;
(T) The commercial or retail cash price series filed in accordance with §31.6 available to the leverage customer to evaluate the leverage contract (including any applicable premiums or discounts), and where quotes of this series can be obtained on a timely basis; and
(2) Not later than the next business day after entry into a short leverage contract with a customer, each leverage transaction merchant shall furnish to such customer by first-class mail or other, at least equivalent, means of communication, a written Confirmation Statement in a format specified by the Commission containing:
(i) For a leverage customer’s first leverage transaction, the following bold-faced statement in at least ten-point type:
IF YOU ARE A FIRST-TIME LEVERAGE CUSTOMER, YOU MAY RESCIND YOUR FIRST LEVERAGE TRANSACTION SUBJECT ONLY TO ACTUAL PRICE LOSSES BUT OTHERWISE WITHOUT PENALTY FOR THREE BUSINESS DAYS FOLLOWING AND INCLUDING RECEIPT OF THIS CONFIRMATION. ACTUAL LOSSES ON A LEVERAGE CONTRACT SOLD TO A LEVERAGE TRANSACTION MERCHANT ARE CALCULATED BY SUBTRACTING THE BID PRICE AT WHICH THE CONTRACT WAS SOLD TO THE LEVERAGE TRANSACTION MERCHANT AND WHICH APPEARS ON THIS CONFIRMATION FROM THE BID PRICE OF THE LEVERAGE CONTRACT AT THE TIME OF THE CUSTOMER’S RESCIS-SION. TO RESCIND THIS CONTRACT SEND A TELEGRAM TO (name and address of LTM) OR YOU MAY TELEPHONE (name of LTM) AT (telephone number). IF YOU RE-SCIND BY TELEPHONE, YOU MUST ALSO SEND IMMEDIATE WRITTEN AFFIRMA-TION BY TELEGRAM, CERTIFIED LETTER OR BY AT LEAST EQUIVALENT MEANS TO THE ADDRESS PROVIDED ABOVE: and
(ii) For every leverage transaction, the following information:
(A) The date the leverage contract was entered into;
(B) The transaction identification number;
(C) The name of the leverage commodity;
(D) The expiration date of the leverage contract;
(E) The total cost of the leverage contracts covered in the Confirmation Statement, which equals the leverage transaction merchant’s bid price in
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dollars per unit multiplied by the number of units multiplied by the number of contracts;
(F) The total initial charges for the transaction;
(G) The total initial margin for the transaction, in dollars and as a percentage of the contract price;
(H) The total amount due (or paid) to initiate the transaction, which equals the total initial charges plus the total initial margin in dollars;
(I) The current equity in the individual customer’s account as of the date of this transaction, but excluding this transaction;
(J) The total variable carrying charges to be credited each period, in dollars and as an annual percentage rate, based on the carrying charge rate prevailing at the time the contract is entered into;
(K) The total bid/ask spread, based on prices prevailing at the time the contract is entered into;
(L) The total termination charges incurred if the contract is resold, liquidated by the leverage transaction merchant or settled by delivery, based on charges prevailing at the time the contract is entered into;
(M) Any other charges associated with terminating the transaction, based on charges prevailing at the time the contract is entered into;
(N) Any special charges associated with liquidating the transaction, based on charges prevailing at the time the contract is entered into;
(O) The total delivery (including assay) charges incurred if the customer makes delivery on the contract, based on charges prevailing at the time the contract is entered into;
(P) The following formula enabling a customer to calculate the estimated total contract value to break-even: Initial contract value plus carrying charges for the period the contract is intended to be held open, minus the bid-ask spread, minus the initial charges, minus any other charges, minus the termination charges;
(Q) The total minimum margin, in dollars and as a percentage of contract price, based on the rate prevailing at the time the contract is entered into;
(R) The commercial or retail cash price series filed in accordance with §31.6 available to the leverage customer to evaluate the leverage contract (including any applicable premiums or discounts), and where quotes of this series can be obtained on a timely basis.
(l) Each leverage transaction merchant shall furnish, upon request, by first-class mail or other generally accepted means of communication, to all leverage customers with open leverage contracts and to prospective leverage customers who are being solicited to enter leverage contracts with it, a true copy of portions of the quarterly unaudited or annual audited financial statement most recently filed with the Commission pursuant to §31.13, except that the portions of those statements which will generally be accorded non-public treatment by the Commission need not be so furnished.
(m)(1) Notwithstanding any other provision in this section, if a leverage transaction merchant is not offering to enter into, entering into or confirming the execution of, soliciting or accepting a leverage customer’s order for, or accepting any leverage customer funds from a leverage customer to enter into or maintain any short leverage contract, the leverage transaction merchant may delete or disregard references to short leverage contracts in its Disclosure Document as follows:
(i) The third sentence of the first paragraph of the required bold-faced risk disclosure statement in paragraph (a)(1) of this section;
(ii) The words “and a short leverage transaction” in the fourth sentence of the first paragraph of the required bold-faced risk disclosure statement in paragraph (a)(1) of this section;
(iii) The words “and leverage contracts sold to a leverage transaction merchant are re-established at the then prevailing ask price” in the fifth sentence of the third paragraph of the required bold-faced risk disclosure statement in paragraph (a)(1) of this section;
(iv) The second sentence of the fifth paragraph of the required bold-faced
risk disclosure statement in paragraph (a)(1) of this section;
(v) The words “or resold to” in the first sentence of the sixth paragraph of the required bold-faced risk disclosure statement in paragraph (a)(1) of this section;
(vi) The words “or resell,” “and must also offer to resell any short leverage contract previously sold by a leverage customer,” and “or short” in the second sentence of the sixth paragraph of the required bold-faced risk disclosure statement in paragraph (a)(1) of this section;
(vii) The words “or resold” and “or resale” (twice) in paragraph (a)(2)(vii) of this section;
(viii) All of the words following the first semicolon in paragraph (a)(2)(viii) of this section;
(ix) The words “and a representative single short leverage contract” in paragraph (a)(3) of this section; and
(x) The words “or short” in paragraphs (a)(5)(i) and (a)(5)(ii) of this section.

(2) Any leverage transaction merchant using a Disclosure Document that deletes or disregards references to short leverage contracts as permitted by paragraph (m)(1) of this section must file, in accordance with the provisions of paragraph (e)(2) of this section, a new Disclosure Document meeting all of the requirements of paragraphs (a) through (i) of this section at least 30 calendar days before it begins to offer any short leverage contract.

§31.12 Segregation.

(a) Any person that accepts leverage customer funds from a leverage customer to enter into or maintain a leverage contract shall treat and deal with such leverage customer funds as belonging to that leverage customer. Such leverage customer funds: (1) Shall be separately accounted for and segregated as belonging to the leverage customer, (2) shall be kept in the United States, (3) shall not be commingled with the funds of any other person, and (4) shall not be used to secure or extend the credit of any leverage customer or person other than the one for whom the leverage customer funds are held: Provided, however, That the leverage customer funds treated as belonging to a leverage customer may for convenience be commingled with other leverage customer funds and deposited in the same account or accounts with a futures commission merchant or with a bank or trust company located in the United States under conditions set forth in paragraph (b) of this section. Any leverage customer funds when so deposited with a futures commission merchant, bank or trust company, shall be deposited under an account name which clearly indicates that the account contains leverage customer funds that are segregated as required by this section. Each person so depositing any leverage customer funds shall obtain and retain in its files for the period provided in §1.31 of this chapter an acknowledgment from the futures commission merchant, bank or trust company wherein the leverage customer funds have been deposited that the futures commission merchant, bank or trust company has been informed that the leverage customer funds deposited with it are being treated by the depositing person as belonging to leverage customers and are being held in accordance with the provisions of this section. The futures commission merchant, bank or trust company shall allow inspection of such segregated accounts, including all documents pertaining thereto, at any reasonable time by any representative of the Commission or designated self-regulatory organization, if any. Notwithstanding the foregoing, a leverage transaction merchant may exclude from its segregation requirements commissions and other charges lawfully accruing in connection with leverage contracts provided such charges have actually been made to leverage customers’ accounts and are shown on the customers’ statements.

(b) No leverage customer funds deposited in accordance with paragraph (a) of this section shall be held, disposed of, used or treated as belonging to the depositing person or any person other
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than the leverage customers from whom the leverage customer funds were received: Provided, however, That leverage customer funds may be used to purchase obligations of the United States, general obligations of any state or of any political subdivision thereof, obligations fully guaranteed as to principal and interest by the United States, or unencumbered warehouse receipts for inventory held in approved contract market depositories or in commercial banks located in the United States which represent cover for leverage contracts purchased by such leverage customers, or may be deposited in a commodity account with a futures commission merchant to margin futures contracts or to purchase commodity options traded on or subject to the rules of a contract market which are permissible cover as described in §31.8(a) (2) and (3) for leverage contracts entered into by such leverage customers. Any use of leverage customer funds as described in this paragraph (b) shall be made through an account or accounts used for the deposit of leverage customer funds, and proceeds from any sale, liquidation or other disposition of obligations or warehouse receipts obtained by such use shall be redeposited in these accounts. Each person that uses leverage customer funds to purchase obligations or warehouse receipts of the type described in this paragraph (b) shall separately account for and segregate the obligations or warehouse receipts as belonging to leverage customers. The obligations or warehouse receipts shall be deposited with a futures commission merchant, bank or trust company in the United States and shall be deposited under an account name which clearly indicates that it contains obligations or warehouse receipts treated as belonging to leverage customers, segregated as required by this section. Each person so depositing any leverage customer funds shall obtain and retain in its files for the period provided in §1.31 of this chapter an acknowledgment from the futures commission merchant wherein the leverage customer funds have been deposited that:

1. The futures commission merchant has been informed that the commodity account is being treated by the depositing person as belonging to leverage customers, segregated as required by this section. Each person so depositing any obligations or warehouse receipts shall obtain and retain in its files for the period provided in §1.31 of this chapter an acknowledgment from the futures commission merchant wherein the obligations or warehouse receipts have been deposited that the futures commission merchant, bank or trust company has been informed that the obligations or warehouse receipts are being treated by the depositing person as belonging to leverage customers and are being held in accordance with the provisions of this section. The futures commission merchant, bank or trust company shall allow inspection of such obligations or warehouse receipts at any reasonable time by any representative of the Commission or designated self-regulatory organization, if any. Each person that uses leverage customer funds to margin futures contracts or to purchase commodity options traded on or subject to the rules of a contract market which represent permissible cover for leverage contracts entered into by such leverage customers shall use a commodity account separate from any other commodity account containing futures contracts which do not represent cover. The leverage customer funds deposited in a commodity account with a futures commission merchant to margin futures contracts or to purchase commodity options traded on or subject to the rules of a contract market which represent permissible cover for leverage contracts entered into by such leverage customers shall be deposited under an account name which clearly indicates that it contains obligations treated as belonging to leverage customers, segregated as required by this section. Each person so depositing any leverage customer funds shall obtain and retain in its files for the period provided in §1.31 of this chapter an acknowledgment from the futures commission merchant wherein the leverage customer funds have been deposited that:

(1) The futures commission merchant has been informed that the commodity account is being treated by the depositing person as belonging to leverage customers and is being held in accordance with the provisions of this section.

(2) The customers on whose behalf the account is maintained by the leverage transaction merchant shall not be liable for any margin calls or other required deposits related to such account, and
(3) Upon liquidation of the open contracts in the account the futures commission merchant’s claim in the account balance will be subordinate to that of leverage customers.

(c) Each person that uses leverage customer funds to purchase obligations or unencumbered warehouse receipts as permitted by paragraph (b) of this section shall keep a written record which includes the following:

(1) The date on which the purchase was made;
(2) The name of the person through which the purchase was made;
(3) The amount of funds so used;
(4) A description of such obligations or warehouse receipts, including the receipt number and the issuer’s name;
(5) The identity of the futures commission merchant, bank or trust company wherein the obligations or warehouse receipts are segregated;
(6) The date on which the obligation, warehouse receipt, or portion thereof, is liquidated or otherwise disposed of;
(7) The amount of money, if any, received upon such liquidation or disposition; and
(8) The name of the person to or through which the obligation or warehouse receipt was disposed.

(d) Persons that use leverage customer funds to purchase obligations or unencumbered warehouse receipts described in paragraph (b) of this section shall include such obligations or unencumbered warehouse receipts in segregated accounts at values which do not exceed the lesser of current market value or a value calculated on the basis of a commercial or retail cash price series used to compute the market value of the physical commodities subject to leverage contracts in accordance with §31.9(a)(1).

(e) The provisions of paragraphs (a) and (b) of this section shall not operate to prevent any person that uses leverage customer funds to purchase government obligations as described therein from receiving and retaining as its own any increment or interest resulting from such government obligations: Provided, however, That the leverage transaction merchant fulfills its obligation to pay carrying charges on a short leverage contract, including any margin deposit made in connection with such a contract, in accordance with §31.25(b).

(f) The amount of leverage customer funds which are and which must be in a segregated account in order to comply with the requirements of this section shall be computed as of the close of each business day by each person required to segregate such leverage customer funds. A written record of this computation shall be made and kept, together with all supporting data, in accordance with the provisions of §1.31 of this chapter. This daily computation shall be made by noon on the next business day and shall be identical in format to the Schedule of Segregation Requirements and Funds in Segregation contained in Form 2–FR.

(g) Each leverage transaction merchant shall maintain, as provided in §1.31, a record of all securities and property received from leverage customers in lieu of money to purchase, guarantee or secure the entry into a leverage contract. Such record shall show separately for each leverage customer a description of the securities or property received; the name and address of such leverage 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; the dates of deposits and withdrawals from such depositories; and the date of return of such securities or property to such leverage customer, or other disposition thereof, together with the facts and circumstances of such other disposition.

(h) The requirements of paragraphs (a) through (g) of this section shall not be applicable if the leverage transaction merchant is a member of a designated self-regulatory organization and conforms to minimum segregation standards and related reporting requirements set by such designated self-regulatory organization in its bylaws, rules, regulations or resolutions approved by the Commission pursuant to
§ 31.13 Financial reports of leverage transaction merchants.

(a) Each leverage transaction merchant who files an application for registration with the National Futures Association under §3.17 of this chapter shall submit concurrently with the filing of such application either:

(1) A Form 2–FR certified by an independent public accountant as of a date not more than 45 days prior to the date on which such report is filed; or

(2) A Form 2–FR as of a date not more than 45 days prior to the date on which such report is filed and an Form 2–FR certified by an independent public accountant as of a date not more than 1 year prior to the date on which such report is filed. Each such person must include with such financial report a statement describing the source of his current assets and representing that his capital has been contributed for the purpose of operating his business and will continue to be used for such purpose.

(b)(1) Each leverage transaction merchant must file, in accordance with the requirements of paragraph (e) of this section, a Form 2–FR for each fiscal quarter of each fiscal year. The Form 2–FR filed as of the close of the leverage transaction merchant’s fiscal year must be certified by an independent public accountant. Each Form 2–FR must be filed no later than 45 days after the date for which the report is made: Provided, however, That any Form 2–FR which must be certified by an independent public accountant must be filed no later than 90 days after the close of the leverage transaction merchant’s fiscal year.

(2) The provisions of paragraph (b)(1) of this section may be met by any person registered as a leverage transaction merchant who is a member of a designated self-regulatory organization and conforms to minimum financial standards and related reporting requirements set by such designated self-regulatory organization in its bylaws, rules, regulations, or resolutions and approved after April 13, 1984, by the Commission pursuant to section 19 of the Act and §31.28 of this part: Provided, however, That each such registrant shall promptly file with the Commission a true and exact copy of each financial report which it files with such designated self-regulatory organization.

(c) Each Form 2–FR which must be certified by an independent public accountant in accordance with the provisions of paragraphs (a)(1), (a)(2) and (b)(1) of this section, must be certified in accordance with §1.16 of this chapter, and must be accompanied by the accountant’s report on material inadequacies in accordance with the provisions of §1.16(o)(5) of this chapter. In all other respects, the independent public accountant shall act in accordance with the provisions of §1.16 (except paragraph (f)) of this chapter.

(d) Upon receiving written notice from any representative of the Commission or any self-regulatory organization of which it is a member, a leverage transaction merchant shall, on a monthly basis or at such other times as specified, furnish the Commission and the self-regulatory organization, if any, with a Form 2–FR or such other financial information as requested by the representative of the Commission or the self-regulatory organization. Each such Form 2–FR or such other information must be furnished within the time specified in the written notice.

(e) The reports provided for in this section will be considered filed when received by the regional office of the Commodity Futures Trading Commission.
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Commission with jurisdiction over the state wherein the principal place of business of the leverage transaction merchant is located, in accordance with §140.2 of this chapter, and by the designated self-regulatory organization, if any.

(f) Each Form 2–FR filed pursuant to this section which is not required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain:

(1) A statement of financial condition as of the date for which the report is made;

(2) A statement of changes in ownership equity for the period between the date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

(3) A statement of changes in liabilities subordinated to claims of general creditors for the period between the date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

(4) A statement of the computation of the minimum capital requirements pursuant to §31.9, a schedule of coverage requirements and coverage provided, and a schedule of segregation requirements and funds on deposit in segregation, as of the date for which the report is made;

(5) Appropriate footnote disclosures; and

(g) Each Form 2–FR filed pursuant to this §31.13 which is required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain:

(1) A statement of financial condition as of the date for which the report is made;

(2) Statements of: income (loss); cash flows; changes in ownership equity; and changes in liabilities subordinated to claims of general creditors, for the period between the date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

(3) A statement of the computation of the minimum capital requirements pursuant to §31.9, a schedule of coverage requirements and coverage provided, and a schedule of segregation requirements and funds on deposit in segregation, as of the date for which the report is made;

(4) Appropriate footnote disclosures; and

(h) The statements required by paragraphs (g) (1) and (2) of this section may be presented in accordance with generally accepted accounting principles in the certified reports filed as of the close of the registrant’s fiscal year pursuant to paragraph (b) of this section, or accompanying the application for registration pursuant to paragraph (a) of this section, rather than in the format specifically prescribed by these regulations: Provided, however, That the statement of financial condition is presented in a format as consistent as possible with the Form 2–FR and a reconciliation is provided reconciling such statement of financial condition to the statement of the computation of the minimum capital requirements pursuant to §31.9. Such reconciliation must be certified by an independent public accountant in accordance with §1.16 of this chapter.

(i) Attached to each Form 2–FR filed pursuant to this section must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the Form 2–FR is true and correct. If the leverage transaction merchant is a sole proprietorship, then the oath or affirmation must be made by the proprietor; if a partnership, by a general partner; or, if a corporation, by the chief executive officer or chief financial officer.

(j) Any leverage transaction merchant wishing to establish a fiscal year other than the calendar year may do so
by notifying the National Futures Association of its election of such fiscal year in writing, concurrently with the filing of Form 2-FR pursuant to paragraph (a) of this section, but in no event may such fiscal year end more than one year from the date of the Form 2-FR filed pursuant to paragraph (a) of this section. A leverage transaction merchant which does not notify the National Futures Association will be deemed to have elected the calendar year as its fiscal year. A leverage transaction merchant must continue to use its elected fiscal year, calendar or otherwise, unless a change in such fiscal year is approved upon written application to the designated self-regulatory organization.

(k) In the event any leverage transaction merchant finds that it cannot file its report for any period within the time specified in paragraphs (b) or (d) of this section without substantial undue hardship, it may file with the designated self-regulatory organization an application for an extension of time to a specified date which may not be more than 90 days after the date as of which the financial report was to have been filed. The application must state the reasons for the requested extension and must contain an agreement to file the report on or before the specified date. The application must be received by the designated self-regulatory organization before the time specified in paragraphs (b) or (d) of this section for filing the report. Within 10 calendar days after receipt of the application for an extension of time, the designated self-regulatory organization shall: (1) Notify the leverage transaction merchant of the grant or denial of the requested extension; or (2) indicate that additional time is required to analyze the request, in which case the amount of time needed will be specified.

(l)(1) In the event a leverage transaction merchant finds that it cannot file its certified financial report and schedules for any year within the time specified in paragraph (b) of this section without substantial undue hardship, it may file with the designated self-regulatory organization an application for an extension of time to a specified date not more than 90 days after the date as of which the certified financial report and schedules were to have been filed. The application must be submitted by the leverage transaction merchant and must:

(i) State the reasons for the requested extension;

(ii) Indicate that the inability to make a timely filing is due to circumstances beyond the control of the leverage transaction merchant, if such is the case, and describe briefly the nature of such circumstances;

(iii) Be accompanied by the latest available formal computation of its adjusted net capital and minimum financial requirements computed in accordance with §31.9;

(iv) Be accompanied by the latest available computation of required segregation and by a computation of the amount of leverage customer funds segregated pursuant to §31.12 as of the date of the latest available computation;

(v) Be accompanied by the latest available computation of required cover and by a computation of cover provided pursuant to §31.8 as of the date of the latest available computation;

(vi) Contain an agreement to file the report on or before the date specified by the leverage transaction merchant in the application;

(vii) Be received by the designated self-regulatory organization prior to the date on which the report is due; and

(viii) Be accompanied by a letter from the independent public accountant answering the following questions:

(A) What specifically are the reasons for the extension request?

(B) On the basis of that part of your audit to date, do you have any indication that may cause you to consider commenting on any material inadequacies in the accounting system, internal accounting controls or procedures for safeguarding customer or firm assets?

(C) Do you have any indication from the part of your audit completed to date that would lead you to believe that the firm was or is not meeting the minimum capital requirements specified in §31.9 or the cover or segregation requirements of these regulations, or has any significant financial or record-keeping problems?
§ 31.14 Recordkeeping.

(a) All books, records and other documents required to be kept by this part shall be kept in accordance with the provisions of §1.31 of this chapter. In addition, information concerning leverage transactions shall be made available upon request of the Executive Director, the Director of the Division of Clearing and Intermediary Oversight, the Director of the Division of Market Oversight or the Director of the Division of Enforcement, or other designees, at a time and place and in such form and manner as may be specified in the request.

(b) Each leverage transaction merchant shall:

(1) Keep full, complete, and systematic records, together with all pertinent data and memorandum, of all transactions relating to leverage contracts, commodity futures, commodity options and cash commodities and furnish true and correct information and reports as to the contents or the meaning thereof when and as requested by any authorized representative of the Commission, designated self-regulatory organization, if any, or the U.S. Department of Justice. Included among such records shall be: All leverage contract orders; signature cards; journals; ledgers; canceled checks; bank statements; loan agreements; invoices; copies of confirmations; copies of statements of purchase, sale, repurchase, resale, liquidation, rescission and delivery; copies of month-end statements; monthly trial balances, and a monthly listing as described in paragraph (d) of this section; reports, letters and copies of disclosure statements signed by leverage customers as described in §31.11; promotional material, circulars,
Commodity Futures Trading Commission § 31.14

memoranda, publications, writings, and all other literature or written advice distributed to leverage customers or prospective leverage customers; and all other records, data and memoranda which have been prepared in the course of the business of the leverage transaction merchant concerning leverage contracts, commodity futures, commodity options, and cash commodities;

(2) Keep a record in permanent form which shall show for each leverage customer’s account carried by such leverage transaction merchant:
   (i) The true name and address of the person for whom such account is carried;
   (ii) The principal occupation and/or type of business of the person for whom such account is carried;
   (iii) The name and address of any other person who assumes or purports to assume any financial responsibility for or operational control of such account; and
   (iv) The names of the persons who have solicited and are responsible for each leverage customer’s account.

(c) Each leverage transaction merchant shall, as a minimum requirement, prepare regularly and promptly, and keep systematically and in permanent form, the following:

(1) A financial ledger which will show separately for each leverage customer’s account all charges against and credits to such leverage customer’s account, including but not limited to all charges and credits for purchases, repurchases, sales, resales, liquidations, rescissions and settlements by delivery of leverage contracts (including the corresponding transaction identification numbers) and all funds transferred, deposited into, or withdrawn from the leverage customer’s account.

(2) A record of transactions which will show separately for each leverage customer’s account in chronological sequence all leverage contracts entered into, or withdrawn from the leverage customer’s account.

(d) Each leverage transaction merchant shall prepare, as of the close of the last business day of each calendar month, a listing of all open leverage contracts carried for leverage customers. Such listing shall be by leverage commodity and contract and separately by long leverage contracts and short leverage contracts, and shall include the following details with respect to each leverage contract:

(1) The customer account identification number;
(2) The name of the leverage commodity and contract;
(3) The date of execution and the maturity date;
(4) The transaction identification number;
§ 31.15 Reporting to leverage customers.

Each leverage transaction merchant shall furnish in writing directly to each leverage customer:

(a) Promptly upon the repurchase, resale, liquidation, rescission or delivery of a leverage contract, a statement showing the financial result of the transactions involved, including the gain or loss on the leverage contract as well as the commission and other charges;

(b) As of the close of the last business day of each calendar month or as of any regular monthly date selected a statement which clearly shows:
   (1) All leverage contracts which were terminated for or by the leverage customer during the monthly reporting period by leverage commodity and contract, the number of contracts involved, the transaction identification number for each leverage contract, whether the terminating transaction involved repurchase, resale, liquidation, rescission, or delivery, the date the contract was initially entered into, the value of the contract when initiated, the date the contract was terminated, the value of the contract when terminated, and the realized profit or loss on the contract;
   (2) The open leverage contract positions carried for the leverage customer by leverage commodity and contract, whether the position is a long or short leverage contract, the dates on which such contracts were executed and their maturity dates, the number of contracts, the total value of the contracts when initiated, and the unrealized profit or loss on each such contract marked to the market on the basis of the leverage transaction merchant’s bid price for a long leverage contract and ask price for a short leverage contract.

[Secs. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982)]


§ 31.16 Monthly reporting requirements.

(a) Monthly activity. Each leverage transaction merchant shall file written monthly reports with the National Futures Association in the format specified by the National Futures Association, by the tenth business day of the month following the month covered by the report and shall include the following information separately for each
Commodity Futures Trading Commission

§ 31.18 Margin calls.

(a) No leverage transaction merchant shall liquidate a leverage contract because of a margin deficiency without effecting personal contact with the leverage customer. If a leverage transaction merchant is unable to effect personal contact with a leverage customer, a telegram sent to the leverage customer at the address furnished by the customer to the leverage transaction merchant shall be sufficient contact.

(b) A leverage transaction merchant shall allow a leverage customer a reasonable time after contact is effected in which to respond to a margin call. Twenty-four hours, excluding Saturdays, Sundays, and holidays, will be a reasonable time: Provided, however, That in the event the leverage customer’s leverage account equity falls below 50 percent of aggregate minimum margin with respect to the leverage contracts therein, the leverage transaction merchant may liquidate sufficient contracts to restore minimum margin without prior notice: Provided, further, That the leverage customer must be notified of such liquidation within no more than 24 hours thereafter and must be permitted to re-establish his contract for a period of 5 business days at the then prevailing bid price in the case of a long leverage contract and at the then prevailing ask price in the case of a short leverage contract.

(c) For the purposes of this section, the term “order” shall include, but not be limited to, any order for the purchase, sale, repurchase, resale, rescission, settlement by delivery, or liquidation of a leverage contract.

(d) Each leverage transaction merchant shall establish and maintain a record of the bid and ask prices of each leverage contract on each leverage commodity that the leverage transaction merchant offers to sell or sells, or offers to purchase or purchases. The record shall include the times these prices were in effect to the nearest ten seconds.

[Secs. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982)]

contract, without commissions, fees or other mark-ups or charges. If a termination charge was assessed by the leverage transaction merchant upon liquidation of a contract in accordance with the first proviso of this paragraph, such a charge must be rescinded upon re-establishment of the contract in accordance with the second proviso of this paragraph.

(c) A record of all margin calls, including all contacts with leverage customers and attempts to contact leverage customers with respect to such calls, shall be kept by the leverage transaction merchant in accordance with the provisions of §31.14.

(d) Leverage contracts liquidated by a leverage transaction merchant because of a margin deficiency must be liquidated in declining order of loss, commencing with the leverage contract with the greatest loss.

(Secs. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982))

§ 31.20 Prohibition of guarantees against loss.

(a) No leverage transaction merchant shall in any way represent that it will, with respect to any leverage contract in any account carried by the leverage transaction merchant for or on behalf of any person: (1) Guarantee such person against loss; (2) Limit the loss of such person; or (3) Not call for or attempt to collect initial, minimum or maintenance leverage margin established for customers.

(b) No person shall in any way represent that a leverage transaction merchant will engage in any of the acts or practices described in paragraphs (a)(1), (a)(2) or (a)(3) of this section.

(c) This section shall not be construed to prevent a leverage transaction merchant from assuming or sharing in the losses resulting from an error or mishandling of an order.

(d) This section shall not affect any guarantee entered into prior to the effective date of this section, but this section shall apply to any extension, modification or renewal thereof entered into after such date.

(Secs. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982))

§ 31.21 Leverage contracts entered into prior to April 13, 1984; subsequent transactions.

Nothing contained in these regulations shall be construed to affect any lawful activities that occurred prior to April 13, 1984. All leverage contracts offered or entered into on or after April
§ 31.22 Prohibited trading in leverage contracts.

No futures commission merchant or introducing broker shall offer to enter into, enter into, confirm the execution of, or solicit or accept orders for any leverage contract.

§ 31.23 Limited right to rescind first leverage contract.

(a) A leverage customer who is entering a leverage contract or contracts for the first time with a particular leverage transaction merchant may rescind such contract or contracts during a period of not less than three business days from and including the day on which the leverage customer receives the Confirmation Statement pursuant to the following provisions:

(1) Such customer may be assessed actual price losses accruing to the customer’s position from the time at which the customer entered into a leverage contract to the time that the leverage contract was rescinded. Such losses do not extend to any other charges or fees, such as account initiation, carrying, margin or account termination.

(2) In the case of a leverage customer whose initial leverage transaction was a purchase of a leverage contract from a leverage transaction merchant (long leverage contract), actual losses accruing to the position may be calculated only by subtracting the ask price of the leverage contract offered by the leverage transaction merchant at the time when the leverage contract was rescinded from the ask price at which the leverage contract was purchased by the leverage customer and which appears on the Confirmation Statement. In the case of a leverage customer whose initial leverage transaction was a sale of a leverage contract to a leverage transaction merchant (short leverage contract), actual losses are calculated by subtracting the bid price at which the leverage contract was sold by the leverage customer and which appears on the Confirmation Statement from the bid price of the leverage contract offered by the leverage transaction merchant at the time when the leverage contract was rescinded.

(b) A leverage transaction merchant must be credited with carrying charges.

§ 31.24 Bid and ask prices; carrying charges.

(a) A leverage transaction merchant must apply a carrying charge rate on a short leverage contract that is within one percent per annum of the carrying charge rate that it applies to a long leverage contract (close-out of a long transaction), and a leverage transaction merchant must use the same ask price at any particular point in time to sell a leverage contract to a leverage customer (initiation of a short transaction) and to repurchase a leverage contract from a leverage customer (close-out of a long transaction), and a leverage transaction merchant must use the same bid price at any particular point in time to purchase a leverage contract from a leverage customer (initiation of a short transaction) and to repurchase a leverage contract from a leverage customer (initiation of a long transaction) with respect to contracts involving the same leverage commodity.

(b) A leverage transaction merchant must apply a carrying charge rate on a short leverage contract that is within one percent per annum of the carrying charge rate that it applies to a long leverage contract. In the case of a short leverage contract, the leverage customer must be credited with carrying charges.
charges computed on the total initial value of the contract, using the bid price when the contract was executed, plus any margin deposits made by the leverage customer in connection with the contract, and the same carrying charge rate must be applied to the total initial value of the contract and to the margin deposits. In the case of a long leverage contract, the leverage customer must be assessed carrying charges only on the unpaid balance of the contract, which is the total initial value of the contract, using the ask price when the contract was executed, minus any margin deposits made in connection with the contract: Provided, however, That in the case of a long leverage contract, interest on unpaid carrying charges may be assessed at the same rate as the interest rate component of the carrying charges and, if such an assessment were made and if the leverage transaction merchant offers short leverage contracts, payment of interest on carrying charges that have been credited to the leverage customer’s account and not withdrawn must be made at the same rate as the interest rate component of the carrying charges.

[50 FR 36416, Sept. 6, 1985, as amended at 54 FR 41882, Oct. 5, 1989]

§ 31.26 Quarterly reporting requirement.

Each leverage transaction merchant must file, in accordance with the instructions of, and in the format specified by, the National Futures Association a quarterly report with the National Futures Association by the fifteenth business day of the month following the quarter covered by the report. The report must list all leverage contracts which were either repurchased, resold, liquidated or settled by delivery by or to the leverage transaction merchant during the quarter and, with respect to each leverage contract, must include the following information:

(a) The leverage commodity and contract involved;
(b) Whether a long or short leverage contract was involved;
(c) The date the leverage contract was entered into;
(d) The maturity date of the leverage contract at initiation;
(e) The price at which the leverage contract was entered into;
(f) Whether the leverage contract was repurchased, resold, liquidated or settled by delivery;
(g) The date the leverage contract was repurchased, resold, liquidated or settled by delivery;
(h) The price at which the leverage contract was repurchased, resold or liquidated;
(i) The leverage customer account identification number;
(j) Whether the leverage customer had a commercial or noncommercial leverage account;
(k) Whether the leverage customer was the owner or holder of a proprietary leverage account as defined in §31.4(e); and
(l) The profit or loss incurred by the leverage customer on the contract. In the case of a long leverage contract, profit or loss shall be determined by subtracting, from the total value of the contract based on the leverage transaction merchant’s bid price at the time of repurchase or liquidation, the total value of the contract based on the ask price at which the contract was entered into, minus any amounts paid or owed by the leverage customer to the leverage transaction merchant, including initial, carrying and termination charges, plus any amounts paid or credited by the leverage transaction merchant to the leverage customer, in connection with the leverage contract. In the case of a short leverage contract, profit or loss shall be determined by subtracting, from the total value of the contract based on the bid price at which the contract was entered into, the total value of the contract based on the leverage transaction merchant’s ask price at the time of resale or liquidation, minus any amounts paid or owed by the leverage customer to the leverage transaction merchant, including initial and termination charges, plus any amounts paid or credited by the leverage transaction merchant to
§ 31.28 Self-regulatory organization adoption and surveillance of minimum financial, cover, segregation and sales practice requirements.

(a) Each self-regulatory organization must adopt and submit for Commission approval, rules prescribing minimum financial, cover, segregation and sales practice, and related reporting requirements for all its members who are registered leverage transaction merchants. Each self-regulatory organization shall submit for Commission approval any modification or other amendments to such rules. Such requirements must be the same as, or more stringent than, those contained in this part 31 and the definition of adjusted net capital must be the same as that prescribed in §31.9(b)(4) of this part.

(b) Each self-regulatory organization which has members who are registered leverage transaction merchants shall have in effect and enforce rules submitted to the Commission pursuant to paragraph (a) of this section and approved by the Commission.

(c) Any two or more self-regulatory organizations may file with the Commission a plan for delegating to a designated self-regulatory organization, for any registered leverage transaction merchant which is a member of more than one such self-regulatory organization, the responsibility of:

(1) Monitoring and auditing for compliance with the minimum financial, cover, segregation and sales practice, and related reporting requirements adopted by such self-regulatory organizations in accordance with paragraph (a) of this section; and

(2) Receiving the reports necessitated by such minimum financial, cover, segregation and sales practice, and related reporting requirements.

(d) Any plan filed under this section may contain provisions for the allocation of expenses reasonably incurred by the designated self-regulatory organization among the self-regulatory organizations participating in such a plan.

(e) A plan’s designated self-regulatory organization must report to that plan’s other self-regulatory organizations any violation of such other self-regulatory organizations’ rules and regulations for which the responsibility to monitor, audit or examine has been delegated to such designated self-regulatory organization under this section.

(f) The self-regulatory organizations may, among themselves, establish programs to provide access to any necessary information.

(g) After appropriate notice and opportunity for comment, the Commission may, by written notice, approve such a plan, or any part of the plan, if it finds that the plan, or any part of it:

(1) Is necessary or appropriate to serve the public interest;

(2) Is for the protection and in the interest of leverage customers;

(3) Reduces multiple monitoring and auditing for compliance with the minimum financial, cover, segregation and sales practice, and related reporting requirements of the self-regulatory organizations submitting the plan for any leverage transaction merchant which is a member of more than one self-regulatory organization;

(4) Reduces multiple reporting of the information necessitated by such minimum financial, cover, segregation and sales practice, and related reporting requirements by any leverage transaction merchant which is a member of more than one self-regulatory organization;

(5) Fosters cooperation and coordination among the self-regulatory organizations; and

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§ 31.29 Arbitration or other dispute settlement procedures.

Each self-regulatory organization which has members who are registered as leverage transaction merchants must be able to demonstrate its capability to promulgate rules and conduct proceedings which provide a fair, equitable and expeditious procedure, through arbitration or otherwise, for the voluntary settlement of a leverage customer’s claim or grievance brought against any member leverage transaction merchant or any employee of a member leverage transaction merchant. Such rules shall be consistent with the rules set forth in part 180 of this chapter governing contract market arbitration and dispute settlement procedures.


APPENDIX A TO PART 31—SCHEDULE OF FEES FOR REGISTRATION OF LEVERAGE COMMODITIES

(a) Each application for registration of a leverage commodity must be accompanied by a check or money order made payable to the Commodity Futures Trading Commission in an amount to be determined annually by the Commission and published in the Federal Register.

(b) Checks or money orders should be sent to the attention of the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. No checks or money orders may be accepted by personnel other than those in the Office of the Secretariat.

(c) Failure to submit the fee with an application for registration of a leverage commodity will result in the return of the application. Fees will not be returned after receipt.

(d) Any firm with an application for registration of a leverage commodity pending on the date that this fee schedule becomes effective must submit its application fee within 10 days of that date. Otherwise, the
Commodity Futures Trading Commission

PART 32—REGULATION OF COMMODITY OPTION TRANSACTIONS

§ 32.1 Scope.

The provisions of this part shall apply to all commodity option transactions, except for commodity option transactions on a contract of sale of a commodity for future delivery conducted or executed on or subject to the rules of either a designated contract market or a foreign board of trade.

§ 32.2 Commodity option transactions; general authorization.

Subject to §§ 32.1, 32.4, and 32.5, which shall in any event apply to all commodity option transactions, it shall be unlawful for any person or group of persons to offer to enter into, enter into, confirm the execution of, maintain a position in, or otherwise conduct activity related to any transaction in interstate commerce that is a commodity option transaction, unless:

(a) Such transaction is conducted in compliance with and subject to the provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap, or

(b) Such transaction is conducted pursuant to § 32.3.

§ 32.3 Trade options.

(a) Subject to paragraphs (b), (c), and (d) of this section, the provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap shall not apply to, and any person or group of persons may offer to enter into, enter into, confirm the execution of, maintain a position in, or otherwise conduct activity related to, any transaction in interstate commerce that is a commodity option transaction, Provided that:

(1) Such commodity option transaction must be offered by a person that has a reasonable basis to believe that the transaction is offered to an offeree as described in paragraph (a)(2) of this section. In addition, the offeror must be either:

(i) An eligible contract participant, as defined in section 1a(18) of the Act, as further jointly defined or interpreted by the Commission and the Securities and Exchange Commission or expanded by the Commission pursuant to section 1a(18)(C) of the Act; or

(ii) A producer, processor, or commercial user of, or a merchant handling the commodity that is the subject of the commodity option transaction, or the products or by-products thereof, and such offeror is offering or entering into the commodity option transaction solely for purposes related to its business as such;

(2) The offeree must be a producer, processor, or commercial user of, or a merchant handling the commodity that is the subject of the commodity option transaction, or the products or by-products thereof, and such offeror is offering or entering into the commodity option transaction solely for purposes related to its business as such; and

(3) The commodity option must be intended to be physically settled, so that, if exercised, the option would result in the sale of an exempt or agricultural commodity for immediate or deferred shipment or delivery.

(b) In connection with any commodity option transaction entered into pursuant to paragraph (a) of this section, every counterparty shall comply
with the swap data recordkeeping requirements of part 45 of this chapter, as otherwise applicable to any swap transaction, and shall:

(1) Comply with the swap data reporting requirements of part 45 of this chapter to the extent that the commodity option involves at least one counterparty (whether as offeror or offeree) that has—

(i) Become obligated to comply with the reporting requirements of part 45,

(ii) As a reporting party,

(iii) During the twelve month period preceding the date on which the trade option is entered into,

(iv) In connection with any non-trade option swap trading activity; or

(2) For any counterparty that enters into one or more commodity options pursuant to §32.3(a) in a calendar year that do not involve a counterparty described in paragraph (b)(1) of this section, file with the Commission by March 1 of the following year an “Annual Notice Filing for Counterparties to Unreported Trade Options” on Form TO, as set forth in appendix A to this part, to be completed and submitted in accordance with the instructions therefor and as further directed by the Commission.

(c) In connection with any commodity option transaction entered into pursuant to paragraph (a) of this section, the following provisions shall apply to every trade option counterparty to the same extent that such provisions would apply to such person in connection with any other swap:

(1) Part 20 (Swaps Large Trader Reporting) of this chapter;

(2) Part 151 (Position Limits) of this chapter;

(3) Subpart J of part 23 (Duties of Swap Dealers and Major Swap Participants) of this chapter;

(4) Sections 23.200, 23.201, 23.203, and 23.204 of subpart F of part 23 (Reporting and Recordkeeping Requirements for Swap Dealers and Major Swap Participants) of this chapter; and

(5) Section 4s(e) of the Act (Capital and Margin Requirements for Swap Dealers and Major Swap Participants).

(d) In addition, any person or group of persons offering to enter into, entering into, confirming the execution of, maintaining a position in, or otherwise conducting activity related to a commodity option transaction in interstate commerce pursuant to paragraph (a) of this section shall remain subject to part 180 (Prohibition Against Manipulation) and §23.410 (Prohibition on Fraud, Manipulation, and other Abusive Practices) of this chapter and the antifraud, anti-manipulation, and enforcement provisions of CEA sections 2, 4b, 4c, 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6, 6c, 6d, 9, and 13.

(e) The Commission may, by order, upon written request or upon its own motion, exempt any person, either unconditionally or on a temporary or other conditional basis, from any provisions of this part, and the provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap, other than §32.4, part 180 (Prohibition Against Manipulation), and §23.410 (Prohibition on Fraud, Manipulation, and other Abusive Practices) of this chapter, and the antifraud, anti-manipulation, and enforcement provisions of CEA sections 2, 4b, 4c, 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6, 6c, 6d, 9, 13, if it finds, in its discretion, that it would not be contrary to the public interest to grant such exemption.

§32.4 Fraud in connection with commodity option transactions.

In or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction, it shall be unlawful for any person directly or indirectly:

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

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

(c) To deceive or attempt to deceive any other person by any means whatsoever.
§ 32.5 Option transactions entered into prior to the effective date of this part.

Nothing contained in this part shall be construed to affect any lawful activities that occurred prior to the effective date of this part.
APPENDIX A TO 17 CFR PART 32

CFTC FORM TO

Annual Notice Filing for Counterparties to Unreported Trade Options

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")\(^{88}\) and the regulations thereunder,\(^{89}\) or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (15 USC 78f), section 9(a)(3) of the Act (15 USC 78a-3), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 USC 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission’s authority for soliciting this information is granted in sections 4(c)(2) and 8 of the CEA and related regulations (see, e.g., 17 CFR § 32.3(b)). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (see, e.g., 7 U.S.C. §§ 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission’s market and trade practice surveillance activities to provide information concerning the size and composition of the commodity derivatives markets. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public on an aggregate basis in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.\(^{91}\)

\(^{88}\) A trade option is generally a commodity option purchased by a commercial party that, upon exercise, results in the sale of a physical commodity for immediate (spot) or deferred (forward) shipment or delivery. See CFTC regulation 32.3(a) (17 CFR 32.3(a)) for more details. An unreported trade option is a trade option that is not required to be reported to a swap data repository by either counterparty pursuant to CFTC regulation 32.3(b)(1) and part 45 of the Commission’s regulations (17 CFR 32.3(b)(1); 17 CFR part 45).

\(^{89}\) 7 U.S.C. section 1, et seq.

\(^{90}\) Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations, 17 CFR Chapter 1 et seq.

\(^{91}\) Note that, under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget.
Commodity Futures Trading Commission  Pt. 32, App. A

GENERAL INSTRUCTIONS

Who Must File a Form TO – 17 CFR § 32.3(b)(2) requires every counterparty to an unreported trade option to submit an annual filing to the Commission for the purpose of providing notice that it has entered into one or more unreported trade options in the prior calendar year. As noted above, an unreported trade option is a trade option that is not required to be reported to a swap data repository by either counterparty pursuant to CFTC regulation 32.3(b)(1) and part 45 of the Commission’s regulations.

When to file – Form TO is an annual filing requirement due to the Commission no later than March 1 for the prior calendar year. For example, if a market participant enters into one or more unreported trade options between January 1, 2013 and December 31, 2013, the market participant must submit a completed Form TO to the Commission on or before March 1, 2014.

Where to file – Generally, Form TO should be submitted via the CFTC’s web based Form TO submission process at http://www.cftc.gov/, or as otherwise instructed by the Commission or its designee. If submission through the web-based Form TO is impossible, the reporting counterparty shall contact the Commission at [techsupport@cftc.gov] or 202-418-5000 for further instructions.

What to File – All reporting counterparties filing a Form TO must complete all questions.

Signature – Each Form TO submitted to the Commission must be signed or otherwise authenticated by either (1) the reporting counterparty submitting the form or (2) an individual that is duly authorized by the reporting counterparty to provide the information and representations contained in the form.
CFTC FORM TO

Name and Contact Information for Reporting Counterparty:

1. Reporting Counterparty
   Name and Address (including City, State, Country, Zip/Postal Code):
   Reporting Counterparty website (if any):
   Reporting Counterparty Unique Identifier (if any):
   ☐ Legal Entity Identifier “LEI” (if any)
   ☐ National Futures Association ID Number (if any)
   ☐ Other Party Identifier (Please Specify)

2. Reporting Counterparty Contact Person\(^\text{*2}\)
   Name and Job Title and/or Relationship with Reporting Counterparty:
   Phone Number and Email Address:

Commodity Category Indication:

3. In the prior calendar year, the Reporting Counterparty entered into one or more unreported trade options in the following commodity categories:

   Agricultural\(^{93}\) ☐ YES ☐ NO
   Metals\(^{94}\) ☐ YES ☐ NO
   Energy\(^{95}\) ☐ YES ☐ NO
   Other (Please Specify) ☐ YES ☐ NO

Approximate Size of Unreported Trade Options Exercised in the Prior Calendar Year:

4. Please indicate, by commodity category, the approximate total value (quantity received/delivered multiplied by price paid/received) of physical commodities that the reporting counterparty purchased and/or delivered in connection with the exercise of unreported trade options in the prior calendar year.\(^{96}\)

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\(^{92}\) This should be an individual able to answer specific questions about the reporting counterparty’s unreported trade options activity if contacted by Commission staff.

\(^{93}\) Agricultural commodity is defined in the Commission’s regulations at 17 CFR 1.3(zz).

\(^{94}\) Including, but not limited to, gold, silver, platinum, palladium, copper, aluminum, and rare earth metals.

\(^{95}\) Including, but not limited to, petroleum products, natural gas, and electricity.

\(^{96}\) For the purposes of answering this question, a reporting counterparty should not include the value of commodities that were the subject of trade options that remained open at the end of the prior calendar year or any trade options that expired unexercised during the prior calendar year.
Commodity Futures Trading Commission § 33.1

5.

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Signature/Authentication, Name, and Date

By checking this box and submitting this Form TO (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting counterparty identified below to provide the information and representations submitted on this Form TO, and that the information and representations are true and correct.

Reporting Counterparty Authorized Representative (Name and Position):

________________________ (Name)

________________________ (Position)

Submitted on behalf of:

________________________ (Reporting Counterparty)

Date of Submission:

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PART 33—REGULATION OF COMMODITY OPTION TRANSACTIONS THAT ARE OPTIONS ON CONTRACTS OF SALE OF A COMMODITY FOR FUTURE DELIVERY

Sec. 33.1 Definitions.
33.2 Applicability of Act and rules; scope of part 33.
33.3 Unlawful commodity option transactions.
33.4 Designation as a contract market for the trading of commodity options.
33.5 Application for designation as a contract market for the trading of commodity options.
33.6 Suspension or revocation of designation as a contract market for the trading of commodity options.
33.7 Disclosure.
33.8 Promotional material.
33.9 Unlawful activities.
33.10 Fraud in connection with commodity option transactions.
33.11 Exemptions.

Authority: 7 U.S.C. 1a, 2, 4, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 8, 9, 10, 11, 12a, 12c, 13a, 13a-1, 13b, 19, and 21, otherwise noted.

Source: 46 FR 54529, Nov. 3, 1981, unless otherwise noted.

§ 33.1 Definitions.

As used in this part:

(a) Purchase price means the total amount paid or to be paid, directly or indirectly, by a person to acquire a commodity option.
§ 33.2 Applicability of Act and rules; scope of part 33.

(a) Except as otherwise specified in this part and unless the context otherwise requires:

(1) Each board of trade designated, or applying for designation, by the Commission as a contract market for the purpose of trading commodity options pursuant to this part shall be deemed for such purpose to be a “board of trade,” “exchange,” and a “contract market” and, with respect to commodity option transactions conducted pursuant to such designation, shall comply with and be subject to all of the provisions of the Act relating to boards of trade, exchanges, or contract markets as though such provisions were set forth herein; and

(2) The provisions of sections 1a, 2(a)(1), 2(a)(8)(B), 4, 4a, 4c(a), 4d, 4e, 4f, 4g, 4h, 4i, 4j, 4k, 4m, 4n, 5, 5a(a), 5b, 6, 6a, 6b, 6c, 7, 8(a)–(e), 8a, 8b, 8c, and 16 of the Act shall apply to commodity option transactions that are subject to the requirements of this part as though such provisions were set forth herein and included specific references to commodity option transactions. Nothing contained in this section shall be construed to confer designation as a contract market absent issuance of an order of the Commission so designating an applicant board of trade.

(b) The provisions of this part apply to commodity option transactions that are options on contracts of sale of a commodity for future delivery except for commodity option transactions that are options on contracts of sale of a commodity for future delivery conducted or executed on or subject to the rules of a foreign board of trade.

(Approved by the Office of Management and Budget under control number 3038–0007)


§ 33.3 Unlawful commodity option transactions.

(a) It shall be unlawful for any person to offer to enter into, enter into, confirm the execution of, or maintain a position in, any commodity option transaction subject to the provisions of this part unless the commodity option involved is traded (1) on or subject to the rules of a contract market which has been designated to trade commodity options pursuant to this part and (2) by or through a member thereof in accordance with the provisions of this part.

(b) It shall be unlawful for:

(1) Any person to solicit or accept orders from an option customer (other than in a clerical capacity) for any commodity option transaction, or to supervise any person or persons so engaged, unless such person is:

(i) Registered as a futures commission merchant under the Act, and either:

(A) Is a member of the contract market on which the option is traded, or

(B) Is a member of a futures association registered under section 17 of the Act which has adopted rules which the Commission has approved under section 17(j) of the Act and, in addition to the requirements of that section, has determined to provide for the regulation of the commodity option related activity of its member futures commission merchants in a manner equivalent to that required of contract markets under these regulations; or

(ii) Registered as an introducing broker under the Act, and either:

(A) Is a member of the futures association registered under section 17 of the Act which has adopted rules which the
§ 33.4 Designation as a contract market for the trading of commodity options.

The Commission may designate any board of trade located in the United States as a contract market for the trading of options on contracts of sale for future delivery when the applicant complies with and carries out the requirements of the Act (as provided in §33.2), the regulations in this part, and the following conditions and requirements with respect to the commodity option for which the designation is sought:

(a) Such board of trade—

(1) Applies for designation as a contract market for the purpose of trading "put" and/or "call" options which:

(i) Are not capable of being transferred, assigned or otherwise disposed of other than on or subject to the rules of the board of trade; and

(ii) With respect to options on futures contracts, may be exercised only by the establishment, by book entry, in the clearing organization of positions in the underlying futures contract.

(2) [Reserved]

(3) Any person registered or required to be registered as a futures commission merchant or as an introducing broker under the Act who meets the requirements of paragraphs (b)(1)(i) or (b)(1)(ii), respectively, of this section, and such registration shall not have expired, been suspended (and the period of suspension has not expired) or been revoked.

(2) Any person registered or required to be registered as a futures commission merchant or as an introducing broker under the Act to permit another person to become or remain associated with such person as a partner, officer, employee, agent or representative (or in any status or position involving similar functions) in any capacity involving the solicitation or acceptance of an order from an option customer (other than in a clerical capacity) for any commodity option transaction, or the supervision of any person or persons so engaged, if such person knows or should have known that such other person is or was not registered as required by this part or that such registration has expired, been suspended (and the period of suspension has not expired) or been revoked.

(3) If designation for the trading of options on futures contracts is sought, is designated as a contract market for the underlying contract of sale for future delivery which is the subject of the option for which designation is sought, and submits, if so requested by the Commission, the information called for by §1.50 of this chapter (relating to continued compliance with the conditions and requirements for designation as a contract market) for the specified futures contract underlying the option for which the designation is sought, and the applicant complies with the conditions and requirements for designation as a contract market for such contract for future delivery as set forth in sections 5 and 5a(a) of the Act and as set forth in these regulations.
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(4) [Reserved]
(5) Demonstrates that:
   (i) The commodity option for which it is requesting designation is likely to serve a legitimate economic purpose;
   (ii)–(iv) [Reserved]
(b) Such board of trade adopts rules which:
   (1) Prescribe in regard to strike prices:
      (i) The dollar amount of the intervals between strike prices;
      (ii) The strike prices at which trading in a new option expiration will be introduced;
      (iii) The point, in terms of the price of the underlying futures contract, at which a new strike price will be introduced in any option which is already trading;
   (iv) [Reserved]
   (2) Prescribe an expiration date of the option that is not less than one business day before the earlier of the last trading day or the first notice day of any futures contract on the same or a related commodity; Provided, however, That where the underlying futures contract is cash-settled, the option may expire simultaneously with the expiration of the futures contract.
   (3) Require that upon exercise of each option, notification thereof be given to the option grantor.
   (4) Require, with respect to all written option customer complaints, that each member futures commission merchant which engages in the offer or sale of commodity options regulated under this part:
      (i) Retain all such complaints;
      (ii) Make and retain a record of the date the complaint was received, the associated person who serviced, or the introducing broker who introduced, the account, a general description of the matter complained of, and what, if any, action was taken by the futures commission merchant in regard to the complaint; and
   (5) Require each member futures commission merchant which engages in the offer or sale of option contracts regulated under this part to adopt and enforce written procedures pursuant to which it will be able to supervise adequately each option customer’s account, including but not limited to, the solicitation of any such account: Provided, That as used in this paragraph (b)(5), the term “option customer” does not include another futures commission merchant.
(6) [Reserved]
(7) Require each member futures commission merchant which engages in the offer or sale of option contracts regulated under this part to enforce the disclosure requirements set forth in §33.7.
(8)–(9) [Reserved]
(10) Prohibit fraudulent or high-pressure sales communications by member futures commission merchants relating to the offer or sale of option contracts regulated under this part.
(11) Establish appropriate criteria which are reasonably designed to secure performance, upon exercise, of the option contracts.
(c) Such board of trade establishes procedures and conducts sales practice audits of member futures commission merchants which engage in the offer or sale of option contracts regulated under this part. These sales practice audits must be of sufficient scope to enforce the contract market’s rules, including investigation for the improper handling of discretionary accounts, inadequate internal supervision, fraudulent or high-pressure sales communications, compliance with disclosure requirements, improper handling and disposition of option customer complaints, and, where applicable, the futures commission merchant’s offer or sale of deep-out-of-the-money options.
(d) A board of trade must submit an analysis and justification of the individual terms and conditions of the option contract. In determining whether to approve option contract terms and conditions, the Commission may consider the analysis and justification submitted for such terms and conditions, including, without limitation:
   (1) [Reserved]
   (2) The conditions precedent to the exercise of the commodity option and the method by which the option may be exercised;
   (3) The nature of the clearing mechanism to be utilized for the commodity option, and the differences, if any, among the clearing mechanisms for options on futures contracts and futures contracts;
§ 33.7 Disclosure.

(a)(1) Except as provided in §1.65 of this chapter, no futures commission merchant, or in the case of an introduced account no introducing broker,

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(4) Specific notice periods, including the periods from the date notice of intent to exercise an option is given until exercise is accomplished;

(5) The default provisions and procedures of the commodity option, if any; and

(6) Permitted deviations from or substitutes for compliance with the terms and conditions set forth in paragraphs (d) (1) through (5) of this section.

(e) Such board of trade provides for the general quotation and dissemination of volume and last sale price information on a timely basis with respect to the commodity option for which designation is sought and with respect to the underlying futures contract.

(f) Such board of trade demonstrates that clearance and processing of option transactions on or subject to the rules of the board of trade will not adversely affect the clearance and processing of any transactions for future delivery on or subject to the rules of the board of trade.

(Approved by the Office of Management and Budget under control number 3038–0007)

§ 33.6 Suspension or revocation of designation as a contract market for the trading of commodity options.

The Commission may, after notice and opportunity for a hearing on the record, suspend or revoke the designation of any board of trade as a contract market in a commodity option for which it is designated if the Commission determines that:

(a) The board of trade, or any director, officer, agent, or employee thereof, is violating or has violated any of the provisions of this part.

(b) Cause exists which, under §33.3 or §33.4, would warrant the denial of a designation;

(c) The option market is not used on more than an occasional basis for other than speculative purposes by producers, processors, merchants or commercial users engaged in handling or utilizing the commodity (including the products, by-products or source commodity thereof) underlying an option, in interstate commerce; or

(d) Option trading on the contract market in that contract is contrary to the protection of option customers or the underlying futures or cash markets, or is otherwise contrary to the public interest: Provided, That pending completion of any proceeding under this section, the Commission may suspend such designation for the duration of the proceedings, if in the Commission’s judgment, the continuation of such trading presents a substantial risk to the public interest.

(Approved by the Office of Management and Budget under control number 3038–0007)
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may open or cause the opening of a commodity option account for an option customer, other than for a customer specified in §1.55(f) of this chapter, unless the futures commission merchant or introducing broker first:

(i) Furnishes the option customer with a separate written disclosure statement as set forth in this section or another statement approved under §1.55(c) of this chapter and set forth in appendix A to §1.55 which the Commission finds satisfies this requirement, or includes either such statement in a booklet containing the customer account agreement and other disclosure statements required by Commission rules; provided, however, that if the statement contained in §33.7 is used it must follow the statement required by §1.55; and

(ii) Subject to the provisions of §1.55(d) of this chapter, receives from the option customer an acknowledgment signed and dated by the option customer that he received and understood the disclosure statement.

(2) The disclosure statement and the acknowledgment shall be retained by the futures commission merchant or the introducing broker in accordance with §1.31 of this chapter. The disclosure statement must be as set forth in paragraph (b) of this section, typed or printed in type of not less than 10-point size, and, where indicated, in all capital letters.

(b) The disclosure statement must read as follows:

Options Disclosure Statement


BOTH THE PURCHASER AND THE GRANTOR SHOULD KNOW THAT THE OPTION IF EXERCISED, RESULTS IN THE ESTABLISHMENT OF A FUTURES CONTRACT (AN "OPTION ON A FUTURES CONTRACT").


A PERSON SHOULD NOT PURCHASE ANY COMMODITY OPTION UNLESS HE OR SHE IS ABLE TO SUSTAIN A TOTAL LOSS OF THE PREMIUM AND TRANSACTION COSTS OF PURCHASING THE OPTION. A PERSON SHOULD NOT GRANT ANY COMMODITY OPTION UNLESS HE OR SHE IS ABLE TO MEET ADDITIONAL CALLS FOR MARGIN WHEN THE MARKET MOVES AGAINST HIS OR HER POSITION AND, IN SUCH CIRCUMSTANCES, TO SUSTAIN A VERY LARGE FINANCIAL LOSS.

A PERSON WHO PURCHASES AN OPTION SUBJECT TO STOCK-STYLE MARGINING SHOULD BE AWARE THAT, IN ORDER TO REALIZE ANY VALUE FROM THE OPTION, IT WILL BE NECESSARY EITHER TO OFFSET THE OPTION POSITION OR TO EXERCISE THE OPTION. OPTIONS SUBJECT TO FUTURES-STYLE MARGINING ARE MARKED TO MARKET, AND GAINS AND LOSSES ARE PAID AND COLLECTED DAILY. IF AN OPTION PURCHASER DOES NOT UNDERSTAND HOW TO OFFSET OR EXERCISE AN OPTION, THE PURCHASER SHOULD REQUEST AN EXPLANATION FROM THE FCM OR IB. CUSTOMERS SHOULD BE AWARE THAT IN A NUMBER OF CIRCUMSTANCES, SOME OF WHICH
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WILL BE DESCRIBED IN THIS DISCLOSURE STATEMENT, IT MAY BE DIFFICULT OR IMPOSSIBLE TO OFFSET AN EXISTING OPTION POSITION ON AN EXCHANGE.

THE GRANTOR OF AN OPTION SHOULD BE AWARE THAT, IN MOST CASES, A COMMODITY OPTION MAY BE EXERCISED AT ANY TIME FROM THE TIME IT IS GRANTED UNTIL IT EXPIRES. THE PURCHASER OF AN OPTION SHOULD BE AWARE THAT SOME OPTION CONTRACTS MAY PROVIDE ONLY A LIMITED PERIOD OF TIME FOR EXERCISE OF THE OPTION. THE PURCHASER OF A PUT OR CALL SUBJECT TO STOCK-STYLE OR FUTURES-STYLE MARGINING IS SUBJECT TO THE RISK OF LOSING THE ENTIRE PURCHASE PRICE OF THE OPTION—that is, THE PREMIUM CHARGED FOR THE OPTION PLUS ALL TRANSACTION COSTS.

THE COMMODITY FUTURES TRADING COMMISSION REQUIRES THAT ALL CUSTOMERS RECEIVE AND ACKNOWLEDGE RECEIPT OF A COPY OF THIS DISCLOSURE STATEMENT BUT DOES NOT INTEND THIS STATEMENT AS A RECOMMENDATION OR ENDORSEMENT OF EXCHANGE-TRADED COMMODITY OPTIONS.

(1) Some of the risks of option trading.

Specific market movements of the underlying future cannot be predicted accurately.

The grantor of a call option who does not have a long position in the underlying futures contract is subject to risk of loss should the price of the underlying futures contract be higher than the strike price upon exercise or expiration of the option by an amount greater than the premium received for granting the call option.

The grantor of a call option who has a long position in the underlying futures contract is subject to the full risk of a decline in price of the underlying position reduced by the premium received for granting the call. In exchange for the premium received for granting a call option, the option grantor gives up all of the potential gain resulting from an increase in the price of the underlying futures contract above the option strike price upon exercise or expiration of the option.

The grantor of a put option who does not have a short position in the underlying futures contract subject to risk of loss should the price of the underlying futures contract decrease below the strike price upon exercise or expiration of the option by an amount in excess of the premium received for granting the put option.

The grantor of a put option on a futures contract who has a short position in the underlying futures contract is subject to the full risk of a rise in the price in the underlying position reduced by the premium received for granting the put. In exchange for the premium received for granting a put option on a futures contract, the option grantor gives up all of the potential gain resulting from a decrease in the price of the underlying futures contract below the option strike price upon exercise or expiration of the option.

(2) Description of commodity options.

Prior to entering into any transaction involving a commodity option, an individual should thoroughly understand the nature and type of option involved and the underlying futures contract. The futures commission merchant or introducing broker is required to provide, and the individual contemplating an option transaction should obtain:

(i) An identification of the futures contract underlying the option and which may be purchased or sold upon exercise of the option or, if applicable, whether exercise of the option will be settled in cash;

(ii) The procedure for exercise of the option contract, including the expiration date and latest time on that date for exercise. (The latest time on an expiration date when an option may be exercised may vary; therefore, option market participants should ascertain from their futures commission merchant or their introducing broker the latest time the firm accepts exercise instructions with respect to a particular option.);

(iii) A description of the purchase price of the option including the premium, commissions, costs, fees and other charges. (Since commissions and other charges may vary widely among futures commission merchants and among introducing brokers, option customers may find it advisable to consult more than one firm when opening an option account.).
(iv) A description of all costs in addition to the purchase price which may be incurred if the commodity option is exercised, including the amount of commissions (whether termed sales commissions or otherwise), storage, interest, and all similar fees and charges which may be incurred;

(v) An explanation and understanding of the option margining system;

(vi) A clear explanation and understanding of any clauses in the option contract and of any items included in the option contract explicitly or by reference which might affect the customer’s obligations under the contract. This would include any policy of the futures commission merchant or the introducing broker or rule of the exchange on which the option is traded that might affect the customer’s ability to fulfill the option contract or to offset the option position in a closing purchase or closing sale transaction (for example, due to unforeseen circumstances that require suspension or termination of trading); and

(vii) If applicable, a description of the effect upon the value of the option position that could result from limit moves in the underlying futures contract.

(3) The mechanics of option trading. Before entering into any exchange-traded option transaction, an individual should obtain a description of how commodity options are traded. Option customers should clearly understand that there is no guarantee that option positions may be offset by either a closing purchase or closing sale transaction on an exchange. In this circumstance, option grantors could be subject to the full risk of their positions until the option position expires, and the purchaser of a profitable option might have to exercise the option to realize a profit.

For an option on a futures contract, an individual should clearly understand the relationship between exchange rules governing option transactions and exchange rules governing the underlying futures contract. For example, an individual should understand what action, if any, the exchange will take in the option market if trading in the underlying futures market is restricted or the futures prices have made a “limit move.”

The individual should understand that the option may not be subject to daily price fluctuation limits while the underlying futures may have such limits, and, as a result, normal pricing relationships between options and the underlying future may not exist when the future is trading at its price limit. Also, underlying futures positions resulting from exercise of options may not be capable of being offset if the underlying future is at a price limit.

(4) Margin requirements. An individual should know and understand whether the option he or she is contemplating trading is subject to a stock-style or futures-style system of margining. Stock-style margining requires the purchaser to pay the full option premium at the time of purchase. The purchaser has no further financial obligations, and the risk of loss is limited to the purchase price and transaction costs. Futures-style margining requires the purchaser to pay initial margin only at the time of purchase. The option position is marked to market, and gains and losses are collected and paid daily. The purchaser’s risk of loss is limited to the initial option premium and transaction costs.

An individual granting options under either a stock-style or futures-style system of margining should understand that he or she may be required to pay additional margin in the case of adverse market movements.

(5) Profit potential of an option position. An option customer should carefully calculate the price which the underlying futures contract would have to reach for the option position to become profitable. Under a stock-style margining system, this price would include the amount by which the underlying futures contract would have to rise above or fall below the strike price to cover the sum of the premium and all other costs incurred in entering into and exercising or closing (offsetting) the commodity option position. Under a future-style margining system, option positions would be marked to market, and gains and losses would be paid and collected daily, and an option position would become profitable once
the variation margin collected exceeded the cost of entering the contract position.

Also, an option customer should be aware of the risk that the futures price prevailing at the opening of the next trading day may be substantially different from the futures price which prevailed when the option was exercised.

(6) Deep-out-of-the-money options. A person contemplating purchasing a deep-out-of-the-money option (that is, an option with a strike price significantly above, in the case of a call, or significantly below, in the case of a put, the current price of the underlying futures contract) should be aware that the chance of such an option becoming profitable is ordinarily remote.

On the other hand, a potential grantor of a deep-out-of-the-money option should be aware that such options normally provide small premiums while exposing the grantor to all of the potential losses described in section (1) of this disclosure statement.

(7) Glossary of terms—(i) Contract market. Any board of trade (exchange) located in the United States which has been designated by the Commodity Futures Trading Commission to list a futures contract or commodity option for trading.

(ii) Exchange-traded option; put option; call option. The options discussed in this disclosure statement are limited to those which may be traded on a contract market. These options (subject to certain exceptions) give an option purchaser the right to buy in the case of a call option, or to sell in the case of a put option, a futures contract underlying the option at the stated strike price prior to the expiration date of the option. Each exchange-traded option is distinguished by the underlying futures contract, strike price, expiration date, and whether the option is a put or a call.

(iii) Underlying futures contract. The futures contract which may be purchased or sold upon the exercise of an option on a futures contract.

(iv) [Reserved]

(v) Class of options. A put or a call covering the same underlying futures contract.

(vi) Series of options. Options of the same class having the same strike price and expiration date.

(vii) Exercise price. See strike price.

(viii) Expiration date. The last day when an option may be exercised.

(ix) Premium. The amount agreed upon between the purchaser and seller for the purchase or sale of a commodity option.

(x) Strike price. The price at which a person may purchase or sell the underlying futures contract upon exercise of a commodity option. This term has the same meaning as the term “exercise price.”

(xi) Short option position. See opening sale transaction.

(xii) Long option position. See opening purchase transaction.

(xiii) Types of options transactions—

(A) Opening purchase transaction. A transaction in which an individual purchases an option and thereby obtains a long option position.

(B) Opening sale transaction. A transaction in which an individual grants an option and thereby obtains a short option position.

(C) Closing purchase transaction. A transaction in which an individual with a long option position liquidates the position. This is accomplished by a closing purchase transaction for an option of the same series as the option previously granted. Such a transaction may be referred to as an offset transaction.

(D) Closing sale transaction. A transaction in which an individual with a short option position liquidates the position. This is accomplished by a closing sale transaction for an option of the same series as the option previously purchased. Such a transaction may be referred to as an offset transaction.

(xiv) Purchase price. The total actual cost paid or to be paid, directly or indirectly, by a person to acquire a commodity option. This price includes all commissions and other fees, in addition to the option premium.

(xv) Grantor, writer, seller. An individual who sells an option. Such a person is said to have a short position.

(xvi) Purchaser. An individual who buys an option. Such a person is said to have a long position.
§ 33.8 Promotional material.

Each futures commission merchant and each introducing broker shall retain, in accordance with § 1.31 of this chapter, all promotional material it provides, directly or indirectly, to option customers as well as the true source of authority for the information contained therein.

[48 FR 35303, Aug. 3, 1983]

§ 33.9 Unlawful activities.

It shall be unlawful for any person:

(a) Required to be registered with the Commission in accordance with the Act or these regulations expressly or impliedly to represent that the Commission, by declaring effective the registration of such person or otherwise, has directly or indirectly approved such person, or any commodity option transaction solicited or accepted by such person;

(b) In or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of any commodity option transaction, expressly or impliedly to represent that compliance with the provisions of the Act or these regulations constitutes a guarantee of the fulfillment of the commodity option transaction;

(c) Upon acceptance of an order for a commodity option transaction, to fail unreasonably to secure prompt execution of such order or upon rejection of an order to fail to notify the person whose order has been rejected of such rejection;

(d) To manipulate or attempt to manipulate the market price of any commodity option on or subject to the rules of any contract market: Provided,
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§ 34.2 Scope.
The provisions of this part shall apply to any hybrid instrument which may be subject to the Act, and which has been entered into on or after October 23, 1974.

§ 34.1 Definitions.
(a) Hybrid instrument. Hybrid instrument means an equity or debt security or depository instrument as defined in §34.3(a)(1) with one or more commodity-dependent components that have payment features similar to commodity futures or commodity option contracts or combinations thereof.
(b) Commodity-independent component. Commodity-independent component means the component of a hybrid instrument, the payments of which do not result from indexing to, or calculation by reference to, the price of a commodity.
(c) Commodity-independent value. Commodity-independent value means the present value of the payments attributable to the commodity-independent component calculated as of the time of issuance of the hybrid instrument.
(d) Commodity-dependent component. A commodity-dependent component means a component of a hybrid instrument, the payment of which results from indexing to, or calculation by reference to, the price of a commodity.
(e) Commodity-dependent value. For purposes of application of Rule 34.3(a)(2), a commodity-dependent value means the value of a commodity dependent-component, which when decomposed into an option payout or payouts, is measured by the absolute net value of the put option premia with strike prices less than or equal to the reference price plus the absolute net value of the call option premia with strike prices greater than or equal to the reference price, calculated as of the time of issuance of the hybrid instrument.
(f) Option premium. Option premium means the value of an option on the referenced commodity of the hybrid instrument, and calculated using the same method as that used to determine the issue price of the instrument, or where such premia are not explicitly calculated in determining the issue price.

PART 34—REGULATION OF HYBRID INSTRUMENTS

Sec. 34.1 Scope.
34.2 Definitions.
34.3 Hybrid instrument exemption.

AUTHORITY: 7 U.S.C. 2, 6, 6c and 12a.

SOURCE: 58 FR 5586, Jan. 22, 1993, unless otherwise noted.
§ 34.3 Hybrid instrument exemption.

(a) A hybrid instrument is exempt from all provisions of the Act and any person or class of persons offering, entering into, rendering advice or rendering other services with respect to such exempt hybrid instrument is exempt for such activity from all provisions of the Act (except in each case section 2(a)(1)(B)), provided the following terms and conditions are met:

(1) The instrument is:

(i) An equity or debt security within the meaning of section 2(1) of the Securities Act of 1933; or

(ii) A demand deposit, time deposit or transaction account within the meaning of 12 CFR 204.2 (b)(1), (c)(1) and (e), respectively, offered by an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act; an insured credit union as defined in section 101 of the Federal Credit Union Act; or a Federal or State branch or agency of a foreign bank as defined in section 1 of the International Banking Act;

(2) The sum of the commodity-dependent values of the commodity-dependent components is less than the commodity-independent value of the commodity-independent component;

(3) Provided that:

(i) An issuer must receive full payment of the hybrid instrument’s purchase price, and a purchaser or holder of a hybrid instrument may not be required to make additional out-of-pocket payments to the issuer during the life of the instrument or at maturity; and

(ii) The instrument is not marketed as a futures contract or a commodity option, or, except to the extent necessary to describe the functioning of the instrument or to comply with applicable disclosure requirements, as having the characteristics of a futures contract or a commodity option; and

(iii) The instrument does not provide for settlement in the form of a delivery instrument that is specified as such in the rules of a designed contract market;

(4) The instrument is initially issued or sold subject to applicable federal or state securities or banking laws to persons permitted thereunder to purchase or enter into the hybrid instrument.

PART 35—SWAPS IN AN AGRICULTURAL COMMODITY (AGRICULTURAL SWAPS)

AUTHORITY: 7 U.S.C. 2, 6(c), and 6c(b); and title VII, sec. 723(c)(3), Pub. L. 111–203, 124 Stat. 1376, unless otherwise noted.

SOURCE: 76 FR 49299, Aug. 10, 2011, unless otherwise noted.

§ 35.1 Agricultural swaps, generally.

(a) Any person or group of persons may offer to enter into, enter into, confirm the execution of, maintain a position in, or otherwise conduct activity related to, any transaction in interstate commerce that is a swap in an agricultural commodity subject to all provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap; and

(b) In addition to paragraph (a) of this section, any transaction in interstate commerce that is a swap in an agricultural commodity may be transacted on a swap execution facility, designated contract market, or otherwise in accordance with all provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap; and

PART 36—EXEMPT MARKETS

Sec.
36.1 Scope.
36.2 Exempt boards of trade.
36.3 Exempt commercial markets.
§ 36.1 Scope.
The provisions of this part apply to any board of trade or electronic trading facility that operates as:

(a) An exempt commercial market operating under:
(1) Until July 16, 2012, a grandfather relief order issued by the Commission pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), or
(2) Any other applicable relief granted by the Commission; or
(b) An exempt board of trade operating under:
(1) Until July 16, 2012, a grandfather relief order issued by the Commission pursuant to Section 734(c)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), or
(2) Any other applicable relief granted by the Commission.

§ 36.2 Exempt boards of trade.

(a) Eligible commodities. Commodities eligible to be traded by an exempt board of trade are:
(1) Commodities having—
(i) A nearly inexhaustible deliverable supply;
(ii) A deliverable supply that is sufficiently large, and a cash market sufficiently liquid, to render any contract traded on the commodity highly unlikely to be susceptible to the threat of manipulation; or
(iii) No cash market.
(2) The commodities that meet the criteria of paragraph (a)(1) of this section are:
(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
(ii) Such other commodity or commodities as the Commission may determine by rule, regulation or order.
(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:
(1) The name and address of the exempt board of trade; and
(2) The name and telephone number of a contact person.

(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:
(A) Cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis; or
(B) The market’s prices are routinely disseminated in a widely distributed industry publication and are routinely consulted by industry participants in pricing cash market transactions.

(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:
(A) It has reason to believe that cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on
the market on a more than occasional basis:

(B) It has reason to believe that the market's prices are routinely disseminated in a widely distributed industry publication and are routinely consulted by industry participants in pricing cash market transactions; or

(C) The exempt board of trade holds out the market to the public as performing a price discovery function for the cash market for the commodity.

(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:

(1) Contract terms and conditions, or a product description, and trading conventions, mechanisms and practices;

(2) Trading volume by commodity and, if available, open interest; and

(3) The opening and closing prices or price ranges, the daily high and low prices, a volume-weighted average price that is representative of trading on the board of trade, or such other daily price information as proposed by the board of trade and approved by the Commission.

(B) The exempt board of trade shall make such information readily available to the news media and the general public without charge no later than the business day following the day to which the information pertains.

(v) Modification of price discovery determination. An exempt board of trade that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section may petition the Commission at any time to modify or vacate that determination. The petition shall contain an appropriate justification for the request. The Commission, after notice and opportunity for a hearing through the submission of written data, views and arguments, shall by order grant, grant subject to conditions, or deny such request.

(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.


§ 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
§ 36.3 the exemption set forth in this section, and meeting the average five trades per day or more threshold test of this section, which would allow the Commission to compile the information set forth in paragraph (c)(2)(i)(A) of this section and create a permanent record thereof.

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

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

(iv) Provide to the Commission on a quarterly basis, within 15 calendar days of the close of each quarter, a list of each agreement, contract or transaction executed on the electronic trading facility in reliance on the exemption set forth in this section and indicate for each such agreement, contract or transaction the contract terms and conditions, the contract’s average daily trading volume, and the most recent open interest figures.

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

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

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

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

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

(B) To evaluate a systemic market event; or

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

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

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

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

(d) Significant price discovery contracts—(1) Criteria for significant price discovery determination. The Commission may determine, in its discretion, that an electronic trading facility operating a market in reliance on the exemption set forth in this section, 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.

(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. 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,
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the manner in which the trading facility will conduct trade practice, market and financial surveillance;

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

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

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

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

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

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

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

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

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

(iii) Procedure. Before making a final determination whether an agreement, contract or transaction has ceased to perform a significant price discovery function, the Commission shall publish notice in the Federal Register that it intends to undertake such a determination and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Written submissions shall be filed with the Secretary of the Commission in the
APPENDIX A TO PART 36—GUIDANCE ON SIGNIFICANT 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.

2. Not all listed factors must be present to support a determination that a contract performs a significant price discovery function. Moreover, the statutory language neither prioritizes the factors nor specifies the degree to which a significant price discovery contract must conform to the various factors. Congress has indicated that it intends that the Commission should not make a determination that an agreement, contract or transaction performs a significant price discovery function on the basis of the Price Linkage factor unless the agreement, contract or transaction also has sufficient volume to impact other regulated contracts or to become an independent price reference or benchmark that is regularly utilized by the public. The Commission believes that the Arbitrage and Material Price Reference factors can be considered separately from each other. That is, the Commission could make a determination that a contract serves a significant price discovery function based on the presence of one of these factors and the absence of the other. The presence of any of these factors, however, would not necessarily be sufficient to establish the contract as a significant price discovery contract. The fourth factor, Liquidity, would be considered in conjunction with the arbitrage and linkage factors as a significant amount of liquidity presumably would be necessary for a contract to perform a significant price discovery function in conjunction with these factors.

3. These factors do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, this guidance is intended to illustrate which factors, or combinations of factors, the Commission will look to when determining that a contract is performing a significant price discovery function, and under what circumstances the presence of a particular factor or factors would be sufficient to support such a determination.

(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.

1. Liquidity is a broad concept that captures the ability to transact immediately with little or no price concession. Traditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity. So, for example, a market in which trades occur multiple times per minute at prices that differ by only fractions of a cent normally would be considered highly liquid, since presumably a trader could quickly execute a trade at a price that was approximately the same as the price for other recently executed trades. Other factors also will affect the characterization of liquidity, such as whether a large trade—e.g., 100 contracts versus 1 contract—could be executed without a significant price concession. For example, having to wait a day to
sell 1000 bushels of corn may be considered an illiquid market while waiting a day to sell a home may be considered quite liquid. Thus, quantifying the levels of immediacy and liquidity that won’t define or it may involve multiple contracts. A contract traded on another market may involve a one-to-one linkage, in that the value of the linked contract is based on a single contract’s price. The link may involve multiple contracts. A contract traded on another market may involve a one-to-one linkage, in that the value of the linked contract is based on a single contract’s price. An example of a multiple contract linkage might be where the settlement price is calculated as an index of prices obtained from a basket of contracts traded on other exchanges.

2. For a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract(s). The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract(s). Where such price characteristics are observed on an ongoing basis, the Commission would expect to determine that the linked contract is a significant price discovery contract.

3. As an example, where the Commission has observed price linkage, it will next consider whether transactions were occurring on a daily basis for the linked contract in material volumes. (Conversely, where volume has increased noticeably in a particular contract, the Commission would look for linkage) The ultimate level of volume that would be considered material for purposes of deeming a contract a significant price discovery contract will likely differ from one contract to another depending on the characteristics of the underlying commodity and the overall size of the physical market in which it is traded. At a minimum, however, the Commission will consider a linked contract which has volume equal to 5% of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a significant price discovery contract.

4. In combination with this volume level, the Commission will also examine the relationship between prices of the linked contract and the contract to which it is linked to determine whether a contract is serving a significant price discovery function. As a threshold, the Commission will consider a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement, or other daily prices over the most recent quarter to be sufficiently close for a linked contract potentially to be deemed a significant price discovery contract. For example, if, over the most recent quarter, it was found that 95 percent of the closing, settlement, or other daily prices of the contract, which have been calculated using transaction prices should be similar. For example, if the trading of a contract occurs on average five times a day, there will be on average five observed prices for the contract per day. If the market is liquid in terms of traders having to make little in the way of price concessions to execute these trades, the prices of this contract should be similar to those observed for similar or related contracts traded in liquid markets elsewhere. Thus, in making determinations that contracts have material liquidity, the Commission will look to transaction prices, both in terms of how often prices are observed and the extent to which observed prices tend to correlate with other contemporaneous prices.

3. The Commission anticipates that material liquidity will frequently be a consideration in evaluating whether a contract is a significant price discovery contract; however, there may be circumstances in which other factors so dominate the conclusion that a contract is serving a significant price discovery function that a finding of material liquidity in the contract would not be necessary. Circumstances in which this might arise are discussed with respect to the assessment of other factors below.

4. Finally, material liquidity itself would not be sufficient to make a determination that a contract is a significant price discovery contract, but combined with other factors it can serve as a guidepost indicating which contracts are functioning as significant price discovery contracts. As further discussed below, material liquidity, as reflected through the prices of linked or arbitrated contracts, will be a primary consideration in determining whether such contracts are significant price discovery contracts.

(B) PRICE LINKAGE—The extent to which the agreement, contract or transaction uses or otherwise relies on a daily market 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.

1. A price-linked contract is a contract that relies on a contract traded on another
prices, were within 2.5 percent of the contemporaneously determined closing, settlement, or other daily prices of a contract to which it was linked, the Commission potential would consider the contract to perform a significant price discovery function.

(C) ARBITRAGE CONTRACTS—The extent to which the price for the agreement, contract or transactions or executed on the electronic trading facility, so as to permit positions or executing trades in the between the markets by simultaneously maintaining 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.

1. Arbitrage contracts are those contracts that can be combined with other contracts to exploit expected economic relationships in anticipation of a profit. In assessing whether a contract can be incorporated into an arbitrage strategy, the Commission will weigh the terms and conditions of a contract in comparison to contracts that potentially could be used in an arbitrage strategy; will consult with industry or other sources regarding a contract’s viability in an arbitrage strategy; and will rely on direct observation confirming the use of a contract in arbitrage strategies.

2. As with linked contracts, the mere fact that a contract could be employed in an arbitrage strategy will not be sufficient to make a determination that a contract is a significant price discovery contract. In addition, the level of liquidity will be considered. To assess whether designation as a significant price discovery contract is warranted, the Commission will examine the relationship between transaction prices of an arbitrage contract and the prices of the contract(s) to which it is related. The Commission believes that where material liquidity exists, prices for the arbitrage contract would be observed to move substantially in conjunction with the prices of the related contract(s) to which it is economically linked. Where such price characteristics are observed on an ongoing basis, it is likely that the linked contract performs a significant price discovery function.

3. The Commission will apply the same threshold liquidity and price relationship standards for arbitrage contracts as it does for linked contracts. That is, the Commission will view the average of five trades per day or more threshold as the level of activity that would potentially meet the material volume criterion. With respect to prices, the Commission will consider an arbitrage contract potentially to be a significant price discovery contract if, over the most recent quarter, greater than 95 percent of the closing or settlement prices of the contract, which have been calculated using transaction prices, fall within 2.5 percent of the closing or settlement price of the contract or contracts to which it could be arbitrated.

(D) 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.

1. The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and, therefore, serving a significant price discovery function. The primary source of direct evidence is that cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a frequent and recurring basis. The Commission expects that normally only contracts with material liquidity will be referenced by the cash market; however, the Commission notes that it may be possible for a contract to have very low liquidity and yet still be used as a price reference. In such cases, the simple fact that participants in the underlying cash market broadly have elected to use the contract price as a price reference would be a strong indicator that the contract is a significant price discovery contract.

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 pricing 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.

3. The second source of evidence is that the price of the contract is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions. As with contract prices that are directly incorporated into cash market
prices, the Commission assumes that industry publications choose to publish prices because of the value they transfer to industry participants for the purpose of formulating prices in the cash market.

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.

5. Under a Material Price Reference analysis, the Commission expects that material liquidity in the contract likely will be the primary motivation for a publisher to publish particular prices. In other words, the fact that the price of a contract is being used as a reference by industry participants suggests, prima facie, that the contract performs a significant price discovery function. But the Commission recognizes that trading levels could nonetheless be low for the contract while still serving a significant price discovery function and that evidence of routine publication and consultation by industry participants may be sufficient to establish the contract as a significant price discovery contract. On the other hand, while cash market participants may regularly reference a published price, the Commission assumes that industry publications choose to publish prices because of the value they transfer to industry participants for the purpose of formulating prices in the cash market.

6. Because price referencing normally occurs out of the view of the electronic trading facility, the Commission may have difficulty ascertaining the extent to which cash market participants actually reference or consult a contract’s price when transacting. The Commission expects, however, that as a contract begins to be relied upon to set a reference price, market participants will be increasingly willing to purchase price information. To the extent, then, that an electronic trading facility begins to sell its price information regarding a contract to market participants or industry publications, the contract will meet a threshold standard to indicate that the contract potentially is a significant price discovery contract.


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.

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 in paragraph (b) for any core principle in this appendix will meet the selected requirements of the applicable core principle. Paragraph (b) is for illustrative purposes only and does not state the exclusive means for satisfying a core principle.

CORE PRINCIPLE I—CONTRACTS NOT READILY SUSCEPTIBLE TO MANIPULATION. The electronic trading facility shall list only significant price discovery contracts that are not readily susceptible to manipulation.

(a) Guidance. Upon determination by the Commission that a contract listed for trading on an electronic trading facility is a significant price discovery contract, the electronic trading facility must self-certify the terms and conditions of the significant price discovery contract under §36.3(d)(4) within 90 calendar days of the date of the Commission’s order if the contract is the electronic trading facility’s first significant price discovery contract; or 30 days from the date of the Commission’s order if the contract is not the electronic trading facility’s first significant price discovery contract. Once the Commission determines that a contract performs a significant price discovery function, subsequent rule changes must be self-certified to
the Commission by the electronic trading facility pursuant to §40.6 of this chapter or submitted to the Commission for review and approval pursuant to §40.5 of this chapter.

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 authority 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 practices.

(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.

(ii) **Transaction history.** A transaction history consists of an electronic history of each transaction, including:

(A) All the data that are input into the trade entry or matching system for the transaction to match and clear;
(B) Timing and sequencing data adequate to reconstruct trading; and
(C) The identification of each account to which fills are allocated.

(iii) **Electronic analysis capability.** An electronic analysis capability permits sorting and presenting data included in the transaction history so as to reconstruct trading and to identify possible trading violations with respect to market abuse.

(iv) **Safe storage capability.** Safe storage capability provides for a method of storing the data included in the transaction history in a manner that protects the data from unauthorized alteration, as well as from accidental erasure or other loss. Data should be retained in the form and manner specified by the Commission or, where no acceptable manner of retention is specified, in accordance with the recordkeeping standards of §1.31 of this chapter.

(d) Arrangements and resources for the disclosure of the obtained information and documents to the Commission upon request. The electronic trading facility shall maintain records of all information and documents related to each significant price discovery contract in a form and manner acceptable to the Commission. Where no acceptable manner of maintenance is specified, records should be maintained in accordance with the recordkeeping standards of §1.31 of this chapter.

(3) 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.**

(b) **Acceptable practices for uncleared trades.**

(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.**

(1) **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 clearing organization 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.

(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. 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 should set the spot-month limit for its significant price discovery contract at the same level as that specified for the economically-equivalent contract.

(iii) 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 20 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.

(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.

(b) Implementation of position Accountability provisions. 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.

(i) Enforcement provisions. The electronic trading facility should have appropriate procedures in place to monitor its position limit and accountability provisions and to address violations.

(ii) 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.

(iii) 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.

An 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...
A 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 supplementary material 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.

Acceptable practices. An 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.

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.

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.

Guidance. 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.

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. 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.

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—ANTI TRUST 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.

PART 37—SWAP EXECUTION FACILITIES

Subparts A–G [Reserved]

Subpart H—Financial Integrity of Transactions

Sec. 37.700–37.701 [Reserved]

§ 37.702 General financial integrity.

(b) For transactions cleared by a derivatives clearing organization:

(1) By ensuring that the swap execution facility has the capacity to route transactions to the derivatives clearing organization in a manner acceptable to the derivatives clearing organization for purposes of clearing; and

(2) By coordinating with each derivatives clearing organization to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing in accordance with the requirements of §39.12(b)(7) of this chapter.

§ 37.703 [Reserved]

Subparts I–K [Reserved]
PART 38—DESIGNATED CONTRACT MARKETS

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§ 38.3 Procedures for designation.

(a) Application procedures. (1) A board of trade seeking designation as a contract market must file electronically, in a format and manner specified by the Secretary of the Commission, the Form DCM provided in appendix A of this part, with the Secretary of the Commission at its Washington, DC headquarters at submissions@cftc.gov and the Division of Market Oversight at DMOSubmissions@cftc.gov. The Commission will review the application for designation as a contract market pursuant to the 180-day timeline and procedures specified in section 6(a) of the Act. The Commission shall approve or deny the application or, if deemed appropriate, designate the applicant as a contract market subject to conditions.

(2) The application must include information sufficient to demonstrate compliance with the core principles specified in section 5(d) of the Act. Form DCM consists of instructions, general questions and a list of exhibits (documents, information and evidence)
required by the Commission in order to determine whether an applicant is able to comply with the core principles. An application will not be considered to be materially complete unless the applicant has submitted, at a minimum, the exhibits required in Form DCM. If the application is not materially complete, the Commission shall notify the applicant that the application will not be deemed to have been submitted for purposes of starting the 180-day review period set forth in paragraph (a)(1) of this section.

(3) The applicant must identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of this chapter.

(4) Section 40.8 of this chapter sets forth those sections of the application that will be made publicly available, notwithstanding a request for confidential treatment pursuant to § 145.9 of this chapter.

(5) If any information contained in the application or in any exhibit is or becomes inaccurate for any reason, an amendment to the application or a submission filed under part 40 of this chapter must be filed promptly correcting such information.

(b) Reinstatement of dormant designation.

Before listing or relisting products for trading, a dormant designated contract market as defined in § 40.1 of this chapter must reinstate its designation under the procedures of paragraphs (a)(1) and (2) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(c) Delegation of authority.

(1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, upon consultation with the General Counsel or the General Counsel’s designee, authority to notify the applicant seeking designation under section 6(a) of the Act that the application is materially incomplete and the running of the 180-day period is stayed.

(2) The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph.

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

(d) Request for transfer of designation—

(1) Request for transfer of designation, listed contracts and open interest. A designated contract market that wants to request the transfer of its designation from its current legal entity to a new legal entity, as a result of a corporate reorganization or otherwise, must file a request with the Commission for approval to transfer the designation, listed contracts and positions comprising all associated open interest. Such request must be filed electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters at submissions@cftc.gov and the Division of Market Oversight at DMOSubmissions@cftc.gov.

(2) Timing of submission. The request must be filed no later than three months prior to the anticipated corporate change; provided that the designated contract market may file a request with the Commission later than three months prior to the anticipated corporate change if the designated contract market does not know and reasonably could not have known of the anticipated change three months prior to the anticipated corporate change. In such event, the designated contract market shall be required to immediately file the request with the Commission as soon as it knows of such change, with an explanation as to the timing of the request.

(3) Required information. The request shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A narrative description of the corporate change, including the reason for the change and its impact on the designated contract market, including its governance and operations, and its impact on the rights and obligations of market participants holding the open interest positions;
(iii) A discussion of the transferee’s ability to comply with the Act, including the core principles applicable to designated contract markets, and the Commission’s regulations thereunder;

(iv) The governing documents of the transferee including, but not limited to, articles of incorporation and by-laws;

(v) The transferee’s rules marked to show changes from the current rules of the designated contract market;

(vi) A list of contracts, agreements, transactions or swaps for which the designated contract market requests transfer of open interest;

(vii) A representation by the transferee that it:

(A) Will be the surviving legal entity and successor-in-interest to the transferor designated contract market and will retain and assume, without limitation, all the assets and liabilities of the transferor;

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission’s regulations thereunder, including part 38 and Appendices thereto;

(C) Will assume, maintain and enforce all rules implementing and complying with these core principles, including the adoption of the transferor’s rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of the Commission’s regulations; and

(D) Will comply with all self-regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all self-regulatory programs.

(viii) A representation by the transferee that:

(A) All open interest in all contracts listed on the transferor will be transferred to and represent equivalent open interest in all such contracts listed on the transferee;

(B) It will assume responsibility for and maintain compliance with the core principles for all contracts previously listed for trading through the transferor, whether by certification or approval; and

(C) That none of the proposed rule changes will affect the rights and obligations of any market participant with open positions transferred to it and that the proposed rule changes do not modify the manner in which such contracts are settled or cleared.

(ix) A representation by the transferee that market participants will be notified of all changes to the transferor’s rulebook prior to the transfer and will be further notified of the concurrent transfer of the contract market designation, and the related transfer of all listed contracts and all associated open interest, to the transferee upon Commission approval and issuance of an order permitting this transfer.

(4) Commission determination. The Commission will review a request as soon as practicable and such request will be approved or denied pursuant to a Commission order and based on the Commission’s determination as to the transferee’s ability to continue to operate the designated contract market in compliance with the Act and the Commission’s regulations thereunder.

(e) Request for withdrawal of application for designation. An applicant for designation may withdraw its application submitted pursuant to paragraphs (a)(1) and (2) of this section by filing such a request with the Commission. Such request must be filed electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters at submissions@cftc.gov, and the Division of Market Oversight at DMOSubmissions@cftc.gov. Withdrawal of an application for designation shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the application for designation was pending with the Commission.

(f) Request for vacation of designation. A designated contract market may vacate its designation under section 7 of the Act by filing a request electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters at submissions@cftc.gov and the Division of Market Oversight at DMOSubmissions@cftc.gov. Vacation of designation shall not affect any action
taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the facility was designated by the Commission.

[77 FR 36697, June 19, 2012]

§ 38.4 Procedures for listing products and implementing contract market rules.

(a) Request for Commission approval of rules and products. (1) An applicant for designation, or a designated contract market, may request that the Commission approve under section 5c(c) of the Act, any or all of its rules and contract terms and conditions, and subsequent amendments thereto, prior to their implementation or, notwithstanding the provisions of section 5c(c)(4) of the Act, at any time thereafter, under the procedures of §40.3 or §40.5 of this chapter, as applicable. A designated contract market may label a future, swap or options product in its rules as “Listed for trading pursuant to Commission approval,” if the future, swap or options product and its terms or conditions have been approved by the Commission, and it may label as “Approved by the Commission” only those rules that have been so approved.

(2) Notwithstanding the timeline under §§40.3(c) and 40.5(c) of this chapter, the operating rules, and terms and conditions of futures, swaps and option products that have been submitted for Commission approval at the same time as an application for contract market designation or an application under §38.3(b) of this part to reinstate the designation of a dormant designated contract market, as defined in §40.1 of this chapter, or while one of the foregoing is pending, will be deemed approved by the Commission no earlier than when the facility is deemed to be designated or reinstated.

(b) Self-certification of rules and products. Rules of a designated contract market and subsequent amendments thereto, including both operational rules and the terms or conditions of futures, swaps and option products listed for trading on the facility, not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section, must be submitted to the Commission with a certification that the rule, rule amendment or futures, swap or options product complies with the Act and rules thereunder pursuant to the procedures of §40.6 of this chapter, as applicable. Provided, however, any rule or rule amendment that would, for a delivery month having open interest, materially change a term or condition of a swap or a contract for future delivery in an agricultural commodity enumerated in section 1a(9) of the Act, or of an option on such contract or commodity, must be submitted to the Commission prior to its implementation for review and approval under §40.4 of this chapter.

(c) An applicant for designation, or a designated contract market, may request that the Commission consider under the provisions of section 15(b) of the Act any of the contract market’s rules or policies, including both operational rules and the terms or conditions of products listed for trading.


§ 38.5 Information relating to contract market compliance.

(a) Requests for information. Upon request by the Commission, a designated contract market must file with the Commission information related to its business as a designated contract market, including information relating to data entry and trade details, in the form and manner and within the time specified by the Commission in its request.

(b) Demonstration of compliance. Upon request by the Commission, a designated contract market must file with the Commission a written demonstration, containing supporting data, information and documents, in the form and manner and within the time specified by the Commission, that the designated contract market is in compliance with one or more core principles as specified in the request, or that is requested by the Commission to show that the designated contract market satisfies its obligations under the Act.

(c) Equity interest transfers—(1) Equity interest transfer notification. A designated contract market shall file with the Commission a notification of each
transaction that the designated contract market enters into involving the transfer of ten percent or more of the equity interest in the designated contract market.

(2) **Timing of notification.** The equity transfer notice described in paragraph (1) shall be filed electronically with the Secretary of the Commission at its Washington, DC headquarters at submissions@cftc.gov and the Division of Market Oversight at DMOSubmissions@cftc.gov, at the earliest possible time but in no event later than the open of business ten business days following the date upon which the designated contract market enters into a firm obligation to transfer the equity interest.

(3) **Rule filing.** Notwithstanding the foregoing, any aspect of an equity interest transfer described in paragraph (c)(1) of this section that necessitates the filing of a rule as defined in part 40 of this chapter shall comply with the requirements of 5c(c) of the Act and part 40 of this chapter, and all other applicable Commission regulations.

(d) **Delegation of authority.** The Commission hereby delegates, until it orders otherwise, the authority set forth in paragraph (b) of this section to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(77 FR 36699, June 19, 2012)

§ 38.6 **Enforceability.**

An agreement, contract or transaction entered into on or pursuant to the rules of a designated contract market shall not be void, voidable, subject to rescission or otherwise invalidated or rendered unenforceable as a result of:

(a) A violation by the designated contract market of the provisions of section 5 of the Act or this part 38; or

(b) 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 a designated contract market to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

§ 38.7 **Prohibited use of data collected for regulatory purposes.**

A designated contract market may not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; provided however, that a designated contract market may use such data or information for business or marketing purposes if the person from whom it collects or receives such data or information clearly consents to the designated contract market’s use of such data or information in such manner. A designated contract market, where necessary, for regulatory purposes, may share such data or information with one or more designated contract markets or swap execution facilities registered with the Commission. A designated contract market may not condition access to its trading facility on a market participant’s consent to the use of proprietary data or personal information for business or marketing purposes.

(77 FR 36699, June 19, 2012)

§ 38.8 **Listing of swaps on a designated contract market.**

(a) A designated contract market that lists for the first time a swap contract for trading on its contract market must, either prior to or at the time of such listing, file with the Commission a written demonstration detailing how the designated contract market is addressing its self-regulatory obligations and is fulfilling its statutory and regulatory obligations with respect to swap transactions.

(b)(1) Prior to listing swaps for trading on or through a designated contract market, each designated contract market must obtain from the Commission a unique, alphanumeric code assigned to the designated contract market by the Commission for the purpose
§ 38.9 Boards of trade operating both a designated contract market and a swap execution facility.

(a) A board of trade that operates a designated contract market and that intends to also operate a swap execution facility must separately register, pursuant to the swap execution facility registration requirements set forth in part 37 of this chapter, and on an ongoing basis, comply with the core principles under section 5h of the Act, and the swap execution facility rules under part 37 of this chapter.

(b) A board of trade that operates both a designated contract market and a swap execution facility, and that uses the same electronic trade execution system for executing and trading swaps that it uses in its capacity as a designated contract market, must clearly identify to market participants for each swap whether the execution or trading of such swap is taking place on the designated contract market or on the swap execution facility.

[77 FR 36699, June 19, 2012]

§ 38.10 Reporting of swaps traded on a designated contract market.

With respect to swaps traded on and/or pursuant to the rules of a designated contract market, each designated contract market must maintain and report specified swap data as provided under parts 43 and 45 of this chapter.

[77 FR 36700, June 19, 2012]
market must require that the member or market participant consent to its jurisdiction.

(b) **Impartial access by members, persons with trading privileges and independent software vendors.** A designated contract market must provide its members, persons with trading privileges, and independent software vendors with impartial access to its markets and services, including:

1. Access criteria that are impartial, transparent, and applied in a non-discriminatory manner;
2. Comparable fee structures for members, persons with trading privileges, and independent software vendors receiving equal access to, or services from, the designated contract market.

(c) **Limitations on access.** A designated contract market must establish and impartially enforce rules governing denials, suspensions, and revocations of a member’s and a person with trading privileges’ access privileges to the designated contract market, including when such actions are part of a disciplinary or emergency action by the designated contract market.

§ 38.153 Capacity to detect and investigate rule violations.

A designated contract market must have arrangements and resources for effective enforcement of its rules. Such arrangements must include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the designated contract market’s members and by persons under investigation. A designated contract market’s arrangements and resources must also facilitate the direct supervision of the designated contract market and the analysis of data collected to determine whether a rule violation occurred.

§ 38.154 Regulatory services provided by a third party.

(a) **Use of third-party provider permitted.** A designated contract market may choose to utilize a registered futures association or another registered entity, as such terms are defined under the Act, (collectively, “regulatory service provider”), for the provision of services to assist in complying with the core principles, as approved by the Commission. Any designated contract market that chooses to utilize a regulatory service provider must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A designated contract market will at all times remain responsible for the performance of any regulatory services received, for compliance with the designated contract market’s obligations under the Act and Commission regulations, and for the regulatory service provider’s performance on its behalf.

(b) **Duty to supervise third party.** A designated contract market that elects to utilize a regulatory service provider must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A designated contract market will at all times remain responsible for the performance of any regulatory services received, for compliance with the designated contract market’s obligations under the Act and Commission regulations, and for the regulatory service provider’s performance on its behalf.

Commodity Futures Trading Commission

§ 38.152 Abusive trading practices prohibited.

A designated contract market must prohibit abusive trading practices on its markets by members and market participants. Designated contract markets that permit intermediation must prohibit customer-related abuses including, but not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that must be prohibited by all designated contract markets include front-running, wash trading, pre-arranged trading (except for certain transactions specifically permitted under part 38 of this chapter), fraudulent trading, money passes, and any other trading practices that a designated contract market deems to be abusive. In addition, a designated contract market also must prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.
regulatory concern. A designated contract market also must conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. Such reviews must be documented carefully and made available to the Commission upon request.

(c) Regulatory decisions required from the designated contract market. A designated contract market that elects to utilize a regulatory service provider must retain exclusive authority in decisions involving the cancellation of trades, the issuance of disciplinary charges against members or market participants, and the denial of access to the trading platform for disciplinary reasons. A designated contract market may also retain exclusive authority in other areas of its choosing. A designated contract market must document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the designated contract market chose a different course of action.

§ 38.155 Compliance staff and resources.

(a) Sufficient compliance staff. A designated contract market must establish and maintain sufficient compliance department resources and staff to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The designated contract market’s compliance staff also must be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in §38.158(b) of this part.

(b) Ongoing monitoring of compliance staff resources. A designated contract market must monitor the size and workload of its compliance staff annually, and ensure that its compliance resources and staff are at appropriate levels. In determining the appropriate level of compliance resources and staff, the designated contract market should consider trading volume increases, the number of new products or contracts to be listed for trading, any new responsibilities to be assigned to compliance staff, the results of any internal review demonstrating that work is not completed in an effective or timely manner, and any other factors suggesting the need for increased resources and staff.

§ 38.156 Automated trade surveillance system.

A designated contract market must maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations. The automated system must load and process daily orders and trades no later than 24 hours after the completion of the trading day. In addition, the automated trade surveillance system must have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; compute trade gains, losses, and futures-equivalent positions; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.

§ 38.157 Real-time market monitoring.

A designated contract market must conduct real-time market monitoring of all trading activity on its electronic trading platform(s) to identify disorderly trading and any market or system anomalies. A designated contract market must have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its electronic trading platform(s) or errors in orders submitted by members and market participants. Any trade price adjustments or trade cancellations must be transparent to the market and subject to standards that are clear, fair, and publicly available.

§ 38.158 Investigations and investigation reports.

(a) Procedures. A designated contract market must establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation must be commenced upon the receipt of a request from Commission staff or
upon the discovery or receipt of information by the designated contract market that indicates a reasonable basis for finding that a violation may have occurred or will occur.

(b) Timeliness. Each compliance staff investigation must be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff.

(c) Investigation reports when a reasonable basis exists for finding a violation. Compliance staff must submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report must include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff’s analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued.

(d) Investigation reports when no reasonable basis exists for finding a violation. If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a violation, it must prepare a written report including the reason(s) the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff’s analysis and conclusions.

(e) Warning letters. No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period.

§ 38.250 Ability to obtain information.

A designated contract market must have the ability and authority to obtain any necessary information to perform any function required under this subpart C of the Commission’s regulations, including the capacity to carry out international information-sharing agreements as the Commission may require. Appropriate information-sharing agreements can be established with other designated contract markets and swap execution facilities, or the Commission can act in conjunction with the designated contract market to carry out such information sharing.

§ 38.159 Ability to obtain information.

A designated contract market must have the ability and authority to obtain any necessary information to perform any function required under this subpart C of the Commission’s regulations, including the capacity to carry out international information-sharing agreements as the Commission may require. Appropriate information-sharing agreements can be established with other designated contract markets and swap execution facilities, or the Commission can act in conjunction with the designated contract market to carry out such information sharing.

§ 38.200 Core Principle 3.

The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

§ 38.201 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.150 of this part.

Subpart D—Contracts Not Readily Subject to Manipulation

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.250 Core Principle 4.

The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including:

(a) Methods for conducting real-time monitoring of trading; and

(b) Comprehensive and accurate trade reconstructions.

§ 38.159 Ability to obtain information.

A designated contract market must have the ability and authority to obtain any necessary information to perform any function required under this subpart C of the Commission’s regulations, including the capacity to carry out international information-sharing agreements as the Commission may require. Appropriate information-sharing agreements can be established with other designated contract markets and swap execution facilities, or the Commission can act in conjunction with the designated contract market to carry out such information sharing.
§ 38.251 General requirements.

A designated contract market must:

(a) Collect and evaluate data on individual traders’ market activity on an ongoing basis in order to detect and prevent manipulation, price distortions and, where possible, disruptions of the physical-delivery or cash-settlement process;

(b) Monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand;

(c) Demonstrate an effective program for conducting real-time monitoring of market conditions, price movements and volumes, in order to detect abnormalities and, when necessary, make a good-faith effort to resolve conditions that are, or threaten to be, disruptive to the market; and

(d) Demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purposes of detecting trading abuses and violations of exchange-set position limits, including those that may have occurred intraday.

§ 38.252 Additional requirements for physical-delivery contracts.

For physical-delivery contracts, the designated contract market must demonstrate that it:

(a) Monitors a contract’s terms and conditions as they relate to the underlying commodity market and to the convergence between the contract price and the price of the underlying commodity and show a good-faith effort to resolve conditions that are interfering with convergence; and

(b) Monitors the supply of the commodity and its adequacy to satisfy the delivery requirements and make a good-faith effort to resolve conditions that threaten the adequacy of supplies or the delivery process.

§ 38.253 Additional requirements for cash-settled contracts.

(a) For cash-settled contracts, the designated contract market must demonstrate that it:

(1) Monitors the pricing of the index to which the contract will be settled; and

(2) Monitors the continued appropriateness of the methodology for deriving the index and makes a good-faith effort to resolve conditions, including amending contract terms where necessary, where there is a threat of market manipulation, disruptions, or distortions.

(b) If a contract listed on a designated contract market is settled by reference to the price of a contract or commodity traded in another venue, including a price or index derived from prices on another designated contract market, the designated contract market must have rules or agreements that allow the designated contract market access to information on the activities of its traders in the reference market.

§ 38.254 Ability to obtain information.

(a) The designated contract market must have rules that require traders in its contracts to keep records of their trading, including records of their activity in the underlying commodity and related derivatives markets, and make such records available, upon request, to the designated contract market.

(b) A designated contract market with participants trading through intermediaries must either use a comprehensive large-trader reporting system (LTRS) or be able to demonstrate that it can obtain position data from other sources in order to conduct an effective surveillance program.

§ 38.255 Risk controls for trading.

The designated contract market must establish and maintain risk control mechanisms to prevent and reduce the potential risk of price distortions and market disruptions, including, but not limited to, market restrictions that pause or halt trading in market conditions prescribed by the designated contract market.

§ 38.256 Trade reconstruction.

The designated contract market must have the ability to comprehensively and accurately reconstruct all trading on its trading facility. All audit-trail data and reconstructions
must be made available to the Commission in a form, manner, and time that is acceptable to the Commission.

§ 38.257 Regulatory service provider.

A designated contract market must comply with the regulations in this subpart through a dedicated regulatory department, or by delegation of that function to a registered futures association or a registered entity (collectively, “regulatory service provider”), as such terms are defined in the Act and over which the designated contract market has supervisory authority.

§ 38.258 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.250 of this part.

Subpart F—Position Limitations or Accountability

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.300 Core Principle 5.

To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators. For any contract that is subject to a position limitation established by the Commission, pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

§ 38.301 Position limitations and accountability.

A designated contract market must meet the requirements of parts 150 and 151 of this chapter, as applicable.

Subpart G—Emergency Authority

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.350 Core Principle 6.

The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority:

(a) To liquidate or transfer open positions in any contract;

(b) To suspend or curtail trading in any contract; and

(c) To require market participants in any contract to meet special margin requirements.

§ 38.351 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.350.

Subpart H—Availability of General Information

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.400 Core Principle 7.

The board of trade shall make available to market authorities, market participants, and the public accurate information concerning:

(a) The terms and conditions of the contracts of the contract market; and

(b)(1) The rules, regulations and mechanisms for executing transactions on or through the facilities of the contract market, and

(2) The rules and specifications describing the operation of the contract market’s:

(i) Electronic matching platform, or

(ii) Trade execution facility.

§ 38.401 General requirements.

(a) General. (1) A designated contract market must have procedures, arrangements and resources for disclosing to the Commission, market participants and the public accurate information pertaining to:

(i) Contract terms and conditions;

(ii) Rules and regulations pertaining to the trading mechanisms; and
§ 38.450

(iii) Rules and specifications pertaining to operation of the electronic matching platform or trade execution facility.

(2) Through the procedures, arrangements and resources required in paragraph (a) of this section, the designated contract market must ensure public dissemination of information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information, in accordance with the timeline provided in paragraph (c) of this section.

(3) A designated contract market shall meet the requirements of this paragraph (a), by placing the information described in this paragraph (a) on the designated contract market’s Web site within the time prescribed in paragraph (c) of this section.

(b) Accuracy requirement. With respect to any communication with the Commission, and any information required to be transmitted or made available to market participants and the public, including on its Web site or otherwise, a designated contract market must provide information that it believes, to the best of its knowledge, is accurate and complete, and must not omit material information.

(c) Notice of regulatory submissions. (1) A designated contract market, in making available on its Web site information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information, must place such information and submissions on its Web site concurrent with the filing of such information or submissions with the Secretary of the Commission.

(2) To the extent that a designated contract market requests confidential treatment of any information filed with the Secretary of the Commission, the designated contract market must post on its Web site the public version of such filing or submission.

(d) Rulebook. A designated contract market must ensure that the rulebook posted on its Web site is accurate, complete, current and readily accessible to the public. A designated contract market must publish or post in its rulebook all new or amended rules, both substantive and non-substantive, on the date of implementation of such new or amended rule, on the date a new product is listed, or on the date any changes to previously-disclosed information take effect.

Subpart I—Daily Publication of Trading Information

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.450 Core Principle 8.

The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

§ 38.451 Reporting of trade information.

A designated contract market must meet the reporting requirements set forth in part 16 of this chapter.

Subpart J—Execution of Transactions

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.500 Core Principle 9.

The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade. The rules of the board of trade may authorize, for bona fide business purposes:

(a) Transfer trades or office trades;

(b) An exchange of:

(1) Futures in connection with a cash commodity transaction;

(2) Futures for cash commodities; or

(3) Futures for swaps; or

(c) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.
§ 38.550 Core Principle 10.
The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information:
(a) To assist in the prevention of customer and market abuses; and
(b) To provide evidence of any violations of the rules of the contract market.

§ 38.551 Audit trail required.
A designated contract market must capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses. Such data must be sufficient to reconstruct all transactions within a reasonable period of time and to provide evidence of any violations of the rules of the designated contract market. An acceptable audit trail must also permit the designated contract market to track a customer order from the time of receipt through fill, allocation, or other disposition, and must include both order and trade data.

§ 38.552 Elements of an acceptable audit trail program.
(a) Original source documents. A designated contract market’s audit trail must include original source documents. Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded, whether recorded manually or electronically. Records for customer orders (whether filled, unfilled, or cancelled, each of which shall be retained or electronically captured) must reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry. For open-outcry trades, the time of report of execution of the order shall also be captured.
(b) Transaction history database. A designated contract market’s audit trail program must include an electronic transaction history database.

An adequate transaction history database includes a history of all trades executed via open outcry or via entry into an electronic trading system, and all orders entered into an electronic trading system, including all order modifications and cancellations. An adequate transaction history database also includes:
1. All data that are input into the trade entry or matching system for the transaction to match and clear;
2. The customer type indicator code;
3. Timing and sequencing data adequate to reconstruct trading; and
4. Identification of each account to which fills are allocated.

(c) Electronic analysis capability. A designated contract market’s audit trail program must include electronic analysis capability with respect to all audit trail data in the transaction history database. Such electronic analysis capability must ensure that the designated contract market has the ability to reconstruct trading and identify possible trading violations with respect to both customer and market abuse.

(d) Safe storage capability. A designated contract market’s audit trail program must include the capability to safely store all audit trail data retained in its transaction history database. Such safe storage capability must include the capability to store all data in the database in a manner that protects it from unauthorized alteration, as well as from accidental erasure or other loss. Data must be retained in accordance with the recordkeeping requirements of Core Principle 18 and the associated regulations in subpart S of this part.

§ 38.553 Enforcement of audit trail requirements.
(a) Annual audit trail and recordkeeping reviews. A designated contract market must enforce its audit trail and recordkeeping requirements through at least annual reviews of all members and persons and firms subject to designated contract market recordkeeping rules to verify their compliance with the contract market’s audit trail and recordkeeping requirements. Such reviews must include, but are not limited to, the following:
§ 38.600  
(1) For electronic trading, audit trail and recordkeeping reviews must include reviews of randomly selected samples of front-end audit trail data for order routing systems; a review of the process by which user identifications are assigned and user identification records are maintained; a review of usage patterns associated with user identifications to monitor for violations of user identification rules; and reviews of account numbers and customer type indicator codes in trade records to test for accuracy and improper use.

(2) For open outcry trading, audit trail and recordkeeping reviews must include reviews of members’ and market participants’ compliance with the designated contract market’s trade timing, order ticket, and trading card requirements.

(b) Enforcement program required. A designated contract market must establish a program for effective enforcement of its audit trail and recordkeeping requirements for both electronic and open-outcry trading, as applicable. An effective program must identify members and persons and firms subject to designated contract market recordkeeping rules that have failed to maintain high levels of compliance with such requirements, and levy meaningful sanctions when deficiencies are found. Sanctions must be sufficient to deter recidivist behavior. No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period.

Subpart L—Financial Integrity of Transactions

§ 38.601 Mandatory clearing.

(a) Transactions executed on or through the designated contract market must be cleared through a Commission-registered derivatives clearing organization, in accordance with the provisions of part 39 of this chapter. Notwithstanding the foregoing, transactions in security futures products executed on or through the designated contract market may alternatively be cleared through a clearing agency, registered pursuant to section 17A of the Securities Exchange Act of 1934.

(b) A designated contract market must coordinate with each derivatives clearing organization to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing in accordance with the requirements of §39.12(b)(7) of this chapter.


§ 38.602 General financial integrity.

A designated contract market must provide for the financial integrity of its transactions by establishing and maintaining appropriate minimum financial standards for its members and non-intermediated market participants.

§ 38.603 Protection of customer funds.

A designated contract market must have rules concerning the protection of customer funds. These rules shall address appropriate minimum financial standards for intermediaries, the segregation of customer and proprietary funds, the custody of customer funds, the investment standards for customer funds, intermediary default procedures and related recordkeeping. A designated contract market must review the default rules and procedures of the derivatives clearing organization that clears for such designated contract market to wind down operations,
Commodity Futures Trading Commission

§ 38.650  Core Principle 12.

The board of trade shall establish and enforce rules:

(a) To protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

(b) To promote fair and equitable trading on the contract market.

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.604  Financial surveillance.

A designated contract market must monitor members’ compliance with the designated contract market’s minimum financial standards and, therefore, must routinely receive and promptly review financial and related information from its members, as well as continuously monitor the positions of members and their customers. A designated contract market must have rules that prescribe minimum capital requirements for member futures commission merchants and introducing brokers. A designated contract market must:

(a) Continually survey the obligations of each futures commission merchant created by the positions of its customers;

(b) As appropriate, compare those obligations to the financial resources of the futures commission merchant; and

(c) Take appropriate steps to use this information to protect customer funds.

§ 38.605  Requirements for financial surveillance program.

A designated contract market’s financial surveillance program for futures commission merchants, retail foreign exchange dealers, and introducing brokers must comply with the requirements of § 3.52 of this chapter to assess the compliance of such entities with applicable contract market rules and Commission regulations.

§ 38.606  Financial regulatory services provided by a third party.

A designated contract market may comply with the requirements of § 38.604 (Financial Surveillance) and § 38.605 (Requirements for Financial Surveillance Program) of this part through the regulatory services of a registered futures association or a registered entity (collectively, “regulatory service provider”), as such terms are defined under the Act. A designated contract market must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and appropriate surveillance systems. A designated contract market will at all times remain responsible for compliance with its obligations under the Act and Commission regulations, and for the regulatory service provider’s performance on its behalf. Regulatory services must be provided under a written agreement with a regulatory service provider that shall specifically document the services to be performed as well as the capacity and resources of the regulatory service provider with respect to the services to be performed.

§ 38.607  Direct access.

A designated contract market that permits direct electronic access by customers (i.e., allowing customers of futures commission merchants to enter orders directly into a designated contract market’s trade matching system for execution) must have in place effective systems and controls reasonably designed to facilitate the FCM’s management of financial risk, such as automated pre-trade controls that enable member futures commission merchants to implement appropriate financial risk limits. A designated contract market must implement and enforce rules requiring the member futures commission merchants to use the provided systems and controls.

Subpart M—Protection of Markets and Market Participants
§ 38.651 Protection of markets and market participants.

A designated contract market must have and enforce rules that are designed to promote fair and equitable trading and to protect the market and market participants from abusive practices including fraudulent, non-competitive or unfair actions, committed by any party. The designated contract market must have methods and resources appropriate to the nature of the trading system and the structure of the market to detect trade practice and market abuses and to discipline such behavior, in accordance with Core Principles 2 and 4, and the associated regulations in subparts C and E of this part, respectively. The designated contract market also must provide a competitive, open and efficient market and mechanism for executing transactions in accordance with Core Principle 9 and the associated regulations under subpart J of this part.

Subpart N—Disciplinary Procedures

Source: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.700 Core Principle 13.

The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

§ 38.701 Enforcement staff.

A designated contract market must establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the contract market. A designated contract market must also monitor the size and workload of its enforcement staff annually, and ensure that its enforcement resources and staff are at appropriate levels. The enforcement staff may not include either members of the designated contract market or persons whose interests conflict with their enforcement duties. A member of the enforcement staff may not operate under the direction or control of any person or persons with trading privileges at the contract market. A designated contract market's enforcement staff may operate as part of the designated contract market's compliance department.

§ 38.702 Disciplinary panels.

A designated contract market must establish one or more disciplinary panels that are authorized to fulfill their obligations under the rules of this subpart. Disciplinary panels must meet the composition requirements of part 40 of this chapter, and must not include any members of the designated contract market's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

§ 38.703 Notice of charges.

If compliance staff authorized by a designated contract market or a designated contract market disciplinary panel determines that a reasonable basis exists for finding a violation and that adjudication is warranted, it must direct that the person or entity alleged to have committed the violation be served with a notice of charges and must proceed in accordance with the rules of this section. A notice of charges must adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated (or about to be violated); and prescribe the period within which a hearing on the charges may be requested. The notice must also advise that the charged respondent is entitled, upon request, to a hearing on the charges.

§ 38.704 Right to representation.

Upon being served with a notice of charges, a respondent must have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except any member of the designated contract market's board of directors or disciplinary panel,
any employee of the designated contract market, or any person substantially related to the underlying investigations, such as material witness or respondent.

§ 38.705 Answer to charges.

A respondent must be given a reasonable period of time to file an answer to a notice of charges. The rules of a designated contract market governing the requirements and timeliness of a respondent’s answer to charges must be fair, equitable, and publicly available.

§ 38.706 Denial of charges and right to hearing.

In every instance where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent must be given an opportunity for a hearing in accordance with the requirements of § 38.707 of this part.

§ 38.707 Hearings.

(a) A designated contract market must adopt rules that provide for the following minimum requirements for any hearing conducted pursuant to a notice of charges:

(1) The hearing must be fair, must be conducted before members of the disciplinary panel, and must be promptly convened after reasonable notice to the respondent. The formal rules of evidence need not apply; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing. No member of the disciplinary panel for the matter may have a financial, personal, or other direct interest in the matter under consideration.

(2) In advance of the hearing, the respondent must be entitled to examine all books, documents, or other evidence in the possession or under the control of the designated contract market. The designated contract market may withhold documents that are privileged or constitute attorney work product, documents that were prepared by an employee of the designated contract market but will not be offered in evidence in the disciplinary proceedings, documents that may disclose a technique or guideline used in examinations, investigations, or enforcements proceedings, and documents that disclose the identity of a confidential source.

(3) The designated contract market’s enforcement and compliance staffs must be parties to the hearing, and the enforcement staff must present their case on those charges and sanctions that are the subject of the hearing.

(4) The respondent must be entitled to appear personally at the hearing, must be entitled to cross-examine any persons appearing as witnesses at the hearing, and must be entitled to call witnesses and to present such evidence as may be relevant to the charges.

(5) The designated contract market must require persons within its jurisdiction who are called as witnesses to participate in the hearing and to produce evidence. It must make reasonable efforts to secure the presence of all other persons called as witnesses whose testimony would be relevant.

(6) If the respondent has requested a hearing, a copy of the hearing must be made and must become a part of the record of the proceeding. The record must be one that is capable of being accurately transcribed; however, it need not be transcribed unless the transcript is requested by Commission staff or the respondent, the decision is appealed pursuant to the rules of the designated contract market, or is reviewed by the Commission pursuant to section 8c of the Act or part 9 of this chapter. In all other instances a summary record of a hearing is permitted.

(b) [Reserved]

§ 38.708 Decisions.

Promptly following a hearing conducted in accordance with § 38.707 of this part, the disciplinary panel must render a written decision based upon the weight of the evidence contained in the record of the proceeding and must provide a copy to the respondent. The decision must include:

(a) The notice of charges or a summary of the charges;

(b) The answer, if any, or a summary of the answer;

(c) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(d) A statement of findings and conclusions with respect to each charge,
§ 38.709 and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(e) An indication of each specific rule that the respondent was found to have violated; and

(f) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

§ 38.709 Final decisions.

Each designated contract market must establish rules setting forth when a decision rendered pursuant to this section will become the final decision of such designated contract market.

§ 38.710 Disciplinary sanctions.

All disciplinary sanctions imposed by a designated contract market or its disciplinary panels must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, must take into account the respondent’s disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction must also include full customer restitution, except where the amount of restitution, or to whom it should be provided, cannot be reasonably determined.

§ 38.711 Warning letters.

Where a rule violation is found to have occurred, no more than one warning letter may be issued per rolling 12-month period for the same violation.

§ 38.712 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.700 of this part.

Subpart O—Dispute Resolution

Source: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.750 Core Principle 14.

The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

§ 38.751 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.750 of this part.

Subpart P—Governance Fitness Standards

Source: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.800 Core Principle 15.

The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

§ 38.801 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.800 of this part.

Subpart Q—Conflicts of Interest

Source: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.850 Core Principle 16.

The board of trade shall establish and enforce rules:

(a) To minimize conflicts of interest in the decision-making process of the contract market; and

(b) To establish a process for resolving conflicts of interest described in paragraph (a) of this section.
§ 38.851 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.850 of this part.

Subpart R—Composition of Governing Boards of Contract Markets

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.900 Core Principle 17.

The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

Subpart S—Recordkeeping

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.950 Core Principle 18.

The board of trade shall maintain records of all activities relating to the business of the contract market:

(a) In a form and manner that is acceptable to the Commission; and

(b) For a period of at least 5 years.

§ 38.951 Additional sources for compliance.

A designated contract market must maintain such records, including trade records and investigatory and disciplinary files, in accordance with the requirements of §1.31 of this chapter, and in accordance with part 45 of this chapter, if applicable.

Subpart T—Antitrust Considerations

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.1000 Core Principle 19.

Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not:

(a) Adopt any rule or taking any action that results in any unreasonable restraint of trade; or

(b) Impose any material anticompetitive burden on trading on the contract market.

§ 38.1001 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.1000 of this part.

Subpart U—System Safeguards

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.1050 Core Principle 20.

Each designated contract market shall:

(a) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

(b) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(c) Periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, transmission of matched orders to a designated clearing organization for clearing, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

§ 38.1051 General requirements.

(a) A designated contract market’s program of risk analysis and oversight with respect to its operations and automated systems must address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity–disaster recovery planning and resources;
§ 38.1051 17 CFR Ch. I (4–1–13 Edition)

(3) Capacity and performance planning;
(4) Systems operations;
(5) Systems development and quality assurance; and
(6) Physical security and environmental controls.

(b) In addressing the categories of risk analysis and oversight required under paragraph (a) of this section, a designated contract market should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(c) A designated contract market must maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations. Such responsibilities and obligations include, without limitation, order processing and trade matching; transmission of matched orders to a designated clearing organization for clearing; price reporting; market surveillance; and maintenance of a comprehensive audit trail. The designated contract market’s business continuity-disaster recovery plan and resources generally should enable resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations.

(d) A designated contract market that is not determined by the Commission to be a critical financial market satisfies the requirement to be able to resume trading and clearing during the next business day following a disruption by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations; or
(2) Contractual arrangements with other designated contract markets or disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of the designated contract market’s products, and ongoing fulfillment of all of the designated contract market’s responsibilities and obligations with respect to those products, in the event that a disruption renders the designated contract market temporarily or permanently unable to satisfy this requirement on its own behalf.

(e) A designated contract market must notify Commission staff promptly of all:

(1) Electronic trading halts and significant systems malfunctions;
(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and
(3) Activation of the designated contract market’s business continuity-disaster recovery plan.

(f) A designated contract market must give Commission staff timely advance notice of all material:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and
(2) Planned changes to the designated contract market’s program of risk analysis and oversight.

(g) A designated contract market must provide to the Commission upon request current copies of its business continuity-disaster recovery plan and other emergency procedures, its assessments of its operational risks, and other documents requested by Commission staff for the purpose of maintaining a current profile of the designated contract market’s automated systems.

(h) A designated contract market must conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It must also conduct regular, periodic testing and review of
its business continuity-disaster recovery capabilities. Both types of testing should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the designated contract market, but should not be persons responsible for development or operation of the systems or capabilities being tested. Pursuant to Core Principle 18 (Recordkeeping) and §§38.950 and 38.951 of this part, the designated contract market must keep records of all such tests, and make all test results available to the Commission upon request.

(i) To the extent practicable, a designated contract market should:

(1) Coordinate its business continuity-disaster recovery plan with those of the members and other market participants upon whom it depends to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the designated contract market’s business continuity-disaster recovery plan;

(2) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan and the business continuity-disaster recovery plans of the members and other market participants upon whom it depends to provide liquidity; and

(3) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

(j) Part 46 of this chapter governs the obligations of those registered entities that the Commission has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Section 40.9 of this chapter establishes the requirements for core principle compliance in that respect.

Subpart V—Financial Resources

Source: 77 FR 36700, June 19, 2012, unless otherwise noted.
(c) Computation of financial resource requirement. A designated contract market must, on a quarterly basis, based upon its fiscal year, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a) of this section. The designated contract market shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review this methodology and require changes as appropriate.

(d) Valuation of financial resources. At appropriate intervals, but not less than quarterly, a designated contract market must compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect market and credit risk ("haircuts") must be applied as appropriate.

(e) Liquidity of financial resources. The financial resources allocated by the designated contract market to meet the requirements of paragraph (a) of this section must include unencumbered, liquid financial assets (i.e., cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the designated contract market may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(f) Reporting requirements. (1) Each fiscal quarter, or at any time upon Commission request, a designated contract market must:

(i) Report to the Commission:
   (A) The amount of financial resources necessary to meet the requirements of paragraph (a) of this section; and

   (B) The value of each financial resource available, computed in accordance with the requirements of paragraph (d) of this section; and

(ii) Provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows of the designated contract market or of its parent company.

   (2) The calculations required by this paragraph shall be made as of the last business day of the designated contract market's fiscal quarter.

   (3) The designated contract market must provide the Commission with:

      (i) Sufficient documentation explaining the methodology used to compute its financial requirements under paragraph (a) of this section;

      (ii) Sufficient documentation explaining the basis for its determinations regarding the valuation and liquidity requirements set forth in paragraphs (d) and (e) of this section; and

      (iii) Copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the designated contract market's conclusions.

(4) The reports shall be filed not later than 40 calendar days after the end of the designated contract market's first three fiscal quarters, and not later than 60 calendar days after the end of the designated contract market's fourth fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the designated contract market.

(g) Delegation of authority. (1) The Commission hereby delegates, until it orders otherwise, the authority to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, to:

      (i) Determine whether a particular financial resource under paragraph (b)(2) may be used to satisfy the requirements of paragraph (a)(1) and (2) of this section;

      (ii) Review and make changes to the methodology used to compute the requirements of paragraph (c) of this section;

      (iii) Request financial reporting from a designated contract market (in addition to quarterly reports) under paragraph (f)(1) of this section; and

      (iv) Grant an extension of time for a designated contract market to file its quarterly financial report under paragraph (f)(4) of this section.

(2) The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph
prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

Subpart W—Diversity of Board of Directors

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.1150 Core Principle 22.

The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

Subpart X—Securities and Exchange Commission

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

§ 38.1200 Core Principle 23.

The board of trade shall keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

§ 38.1201 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.1200 of this part.
Appendix A to Part 38 – Form DCM

COMMODITY FUTURES TRADING COMMISSION

FORM DCM

CONTRACT MARKET
APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

DESIGNATION INSTRUCTIONS

Intentional misstatements or omissions of material fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) or grounds for disqualification from designation.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form DCM have the same meaning as in the Commodity Exchange Act, as amended ("CEA" or "Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder.

For the purposes of this Form DCM, the term "Applicant" shall include any board of trade applying for designation as a contract market, any board of trade amending a pending application, or any designated contract market that is applying for an amendment to its order of designation.

GENERAL INSTRUCTIONS

1. This Form DCM, which includes instructions, a Cover Sheet, and required Exhibits (together, “Form DCM”) is to be filed with the Commission by all Applicants, pursuant to Section 5 of the CEA and the Commission’s regulations thereunder. Applicants may prepare their own Form DCM but must follow the format prescribed herein. Upon the filing of an application for designation or a designation amendment in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and arguments concerning such application. No application for designation or designation amendment shall be effective unless the Commission, by order, grants such designation or amended designation.

2. Individuals’ names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. Signatures on all copies of the Form DCM filed with the Commission can be executed electronically. If this Form DCM is filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company’s behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent, i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If this Form DCM is being filed as an application for designation, all applicable items must be answered in full. If any item is inapplicable, indicate by “none,” “not applicable,” or “N/A,” as appropriate.

5. Under Section 5 of the CEA and the Commission’s regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form DCM from any Applicant seeking designation as a contract market and from any designated contract market. Disclosure by the Applicant of the information specified on this Form DCM is mandatory prior to the start of the processing of an
Commodity Futures Trading Commission  Pt. 38, App. A

application for, or an amendment to, designation as a contract market. The information provided in this Form DCM will be used for the principal purpose of determining whether the Commission should grant or deny designation to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. A Form DCM which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form DCM, however, shall not constitute a finding that the Form DCM has been filed as required or that the information submitted is true, current, or complete.

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this Form DCM will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. Part 38 of the Commission’s regulations requires that if any information contained in this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment to Form DCM, or a submission under Part 49 of the Commission’s regulations, in either case correcting such information must be filed promptly with the Commission.

2. Applicants, when filing this Form DCM for purposes of amending an application, must re-file the Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable. The submission of an amendment represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

WHERE TO FILE

This Form DCM must be filed electronically with the Secretary of the Commission in a format specified by the Secretary of the Commission.

COMMODITY FUTURES TRADING COMMISSION
FORM DCM
CONTRACT MARKET
APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION
COVER SHEET

Exact name of Applicant as specified in charter

Address of principal executive offices

☐ If this is an APPLICATION for designation, complete in full and check here.
If this is an AMENDMENT to an application, or to an existing designation, list all items that are amended and check here.

________________________________________  ______________________________________

________________________________________  ______________________________________

GENERAL INFORMATION

1. Name under which the business of the designated contract market is or will be conducted, if different than name specified above (include acronyms, if any):

________________________________________

2. If name of designated contract market is being amended, state previous designated contract market name:

________________________________________

3. Contact information, including mailing address if different than address specified above:

   Number and Street

   City  State  Country  Zip Code

   Main Phone number  Fax

   Website URL  E-mail Address

4. List of principal office(s) and address(es) where designated contract market activities are/will be conducted:

   Office  Address

   ____________________________________________

   ____________________________________________

   ____________________________________________

5. If Applicant is a successor to a previously designated contract market, please complete the following:

   a. Date of succession

      ________________________________

   b. Full name and address of predecessor designee

      Name

      ____________________________________________

      Number and Street
Commodity Futures Trading Commission

City State Country Zip Code

Main Phone Number Website URL

BUSINESS ORGANIZATION

6. Applicant is a:

☐ Corporation
☐ Partnership
☐ Limited Liability Company
☐ Other form of organization (specify):

7. Date of incorporation or formation:

8. State of incorporation or jurisdiction of organization:

9. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

Print Name and Title

Name of Applicant

Number and Street

City State Zip Code

SIGNATURES

10. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this day of , 20 . The Applicant and the undersigned represent hereby that all information contained herein is true, current, and complete. It is understood that all required items and Exhibits are considered integral parts of this Form DCM and that the submission of any amendment represents that all un-amended items and Exhibits remain true, current, and complete as previously filed.

Name of Applicant

Signature of Duly Authorized Person

Print Name and Title of Signatory
COMMODITY FUTURES TRADING COMMISSION

FORM DCM

APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

EXHIBITS INSTRUCTIONS

The following Exhibits must be filed with the Commission by each Applicant applying for designation as a contract market, or by a designated contract market amending its designation, pursuant to Section 5 of the CEA and the Commission’s regulations thereunder. The Exhibits must be labeled according to the items specified in this Form DCM.

The application must include a Table of Contents listing each Exhibit required by this Form DCM and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify “none,” “not applicable,” or “N/A,” as appropriate.

LIST OF EXHIBITS

EXHIBITS – BUSINESS ORGANIZATION

1. Attach as Exhibit A, the name of any person(s) who own(s) ten percent (10%) or more of the Applicant’s stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of Applicant.

   Provide as part of Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as Exhibit B, a list of the present officers, directors, governors and, in the case of an Applicant that is not a corporation, the members of all standing committees grouped by committee, or persons performing functions similar to any of the foregoing, of the designated contract market or of any entity that performs the regulatory activities of the Applicant, indicating for each:

   1. Name
   2. Title
   3. Dates of commencement and termination of present term of office or position
   4. Length of time each present officer, director, or governor has held the same office or position
   5. Brief account of the business experience of each officer and director over the last five (5) years
   6. Any other business affiliations in the derivatives and securities industry
   7. For directors, list any committees on which they serve and any compensation received by virtue of their directorship

8. A description of:

   (1) Any order of the Commission with respect to such person pursuant to Section 5e of the CEA;
   (2) Any conviction or injunction against such person within the past ten (10) years;
   (3) Any disciplinary action with respect to such person within the last five (5) years;
   (4) Any disqualification under Sections 8d and 8s of the CEA;
   (5) Any disciplinary action under Section 8c of the CEA; and
   (6) Any violation pursuant to Section 9 of the CEA.

3. Attach as Exhibit C, a narrative that sets forth the fitness standards for the Board of Directors and its composition including the number and percentage of public directors.
4. Attach as Exhibit D, a narrative or graphic description of the organizational structure of the Applicant. Include a list of all affiliates of the Applicant and indicate the general nature of the affiliation. Note: If the designated contract market activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity, corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision or separate entity, as applicable. Additionally, provide any relevant jurisdictional information, including any and all jurisdictions in which you or any affiliated entity are doing business, and registration status, including pending applications (e.g., country, regulator, registration category, date of registration). Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.

5. Attach as Exhibit E, a description of the personnel qualifications for each category of professional employees employed by the Applicant or the division, subdivision, or other separate entity within the Applicant as described in Item 4.

6. Attach as Exhibit F, an analysis of staffing requirements necessary to carry out operations of the Applicant as a designated contract market and the name and qualifications of each key staff person.

7. Attach as Exhibit G, a copy of the constitution, articles of incorporation, formation or association with all amendments thereto, partnership or limited liability agreements, and existing by-laws, operating agreement, rules or instruments corresponding thereto, of the Applicant. Include any additional governance fitness information not included in Exhibit C. Provide a certificate of good standing dated within one week of the date of this Form DCM.

8. Attach as Exhibit H, a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency where the proceeding(s) are pending, the date(s) instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS — FINANCIAL INFORMATION

9. Attach as Exhibit I:
   1. (i) Balance sheet, (ii) Statement of income and expenses, (iii) Statement of cash flows, and (iv) Statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant, or of its parent company, if applicable. If a balance sheet and any statement(s) certified by an independent public accountant are available, that balance sheet and statement(s) should be submitted as Exhibit I.
   2. Provide a narrative of how the value of the financial resources of the Applicant is at least equal to a total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis, and whether such financial resources include unencumbered, liquid financial assets (i.e. cash and/or highly liquid securities) equal to at least six months’ operating costs.
   3. Attach copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the Applicant’s conclusions regarding the liquidity of its financial assets.
   4. Representations regarding sources and estimates for future ongoing operational resources.

10. Attach as Exhibit J, a balance sheet and an income and expense statement for each affiliate of the designated contract market that also engages in designated contract market activities as of the end of the most recent fiscal year of each such affiliate, and each affiliate of the designated contract market that engages in swap execution facility activities.

11. Attach as Exhibit K, the following:
1. A complete list of all dues, fees and other charges imposed, or to be imposed, by or on behalf of Applicant for its designated contract market services that are provided on an exclusive basis and identify the service or services provided for each such due, fee, or other charge.

2. A description of the basis and methods used in determining the level and structure of the dues, fees and other charges listed in paragraph (a) of this item.

3. If the Applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar exclusive services, so state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differentiations.

EXHIBITS — COMPLIANCE

12. Attach as Exhibit L, a narrative and any other form of documentation that may be provided under other Exhibits herein that describe the manner in which the Applicant is able to comply with each core principle. Such documentation must include a regulatory compliance chart setting forth each core principle and providing citations to the Applicant’s relevant rules, policies, and procedures that address each core principle. To the extent that the application raises issues that are novel, or for which compliance with a core principle is not self-evident, include an explanation of how that item and the application satisfy the core principles. Applicant must include a description of how it meets the definition of “Board of Trade” as defined in §1a(2) of the CEA.

13. Attach as Exhibit M, a copy of the Applicant’s rules (as defined in § 40.1 of the Commission’s regulations) 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. Include rules citing applicable federal position limits and aggregation standards in Part 150 or 151, as applicable, of the Commission’s regulations and any exchange set position limit rules. Include rules on publication of daily trading information with regards to the requirements of Part 16 of the Commission’s regulations. The Applicant should include an explanation, and any other forms of documentation the Applicant thinks will be helpful to its explanation, demonstrating how its rules, technical manuals, other guides or instructions for users of, or participants in, the market, or minimum financial standards for members or market participants as provided in this Exhibit M help support the designated contract market’s compliance with the core principles.

14. Attach as Exhibit N, executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third party regulatory service provider or member or user agreements that enable or empower the Applicant to comply with applicable core principles. Identify: (1) the services that will be provided; and (2) the core principles addressed by such agreement.

15. Attach as Exhibit O, a copy of any compliance manual, and any other documents, that describe with specificity the manner in which the Applicant will conduct trade practice, market and financial surveillance.

16. Attach as Exhibit P, a description of the Applicant’s disciplinary and enforcement protocols, tools, and procedures and the arrangements for alternative dispute resolution.

17. Attach as Exhibit Q, a description of the Applicant’s trading system and trade matching algorithm, and examples of how that algorithm works in various trading scenarios involving various types of orders.

18. Attach as Exhibit R, a list of rules prohibiting specific trade practice violations.

19. Attach as Exhibit S, a discussion of how trading data will be maintained by the designated contract market.
APPENDIX B TO PART 38—GUIDANCE ON, AND ACCEPTABLE PRACTICES IN, COMPLIANCE WITH CORE PRINCIPLES

1. This appendix provides guidance on complying with core principles, both initially and on an ongoing basis, to obtain and maintain designation under section 5(d) of the Act and this part 38. Where provided, guidance is set forth in paragraph (a) following the relevant heading and can be used to demonstrate to the Commission compliance with the selected requirements of a core principle, under §§ 38.3 and 38.5 of this part. The guidance for the core principle is illustrative only of the types of matters a designated contract market may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues set forth in this appendix would help the Commission in its consideration of whether the designated contract market is in compliance with the selected requirements of a core principle; provided however, that the guidance is not intended to diminish or replace, in any event, the obligations and requirements of applicants and designated contract markets to comply with the regulations provided under this part.

2. Where provided, acceptable practices meeting selected requirements of core principles are set forth in paragraph (b) following guidance. Designated contract markets that follow specific practices outlined in the acceptable practices for a core principle in this appendix will meet the selected requirements of the applicable core principle; provided however, that the acceptable practice is not intended to diminish or replace, in any event, the obligations and requirements of applicants and designated contract markets to comply with the regulations provided under this part 38. The acceptable practices are for illustrative purposes only and do not state the exclusive means for satisfying a core principle.

Core Principle 1 of section 5(d) of the Act: DESIGNATION AS CONTRACT MARKET.—(A) IN GENERAL.—To be designated, and maintain a designation, as a contract market, a board of trade shall comply with—

(i) Any core principle described in this subsection; and

(ii) Any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

(B) REASONABLE DISCRETION OF CONTRACT MARKET.—Unless otherwise determined by the Commission by rule or regulation, a board of trade described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection. (a) Guidance. [Reserved.] (b) Acceptable Practices. [Reserved.] Core Principle 2 of section 5(d) of the Act: COMPLIANCE WITH RULES—(A) IN GENERAL.—The board of trade shall establish, monitor, and enforce compliance with the rules of the contract market, including—

(i) Access requirements;

(ii) The terms and conditions of any contracts to be traded on the contract market; and

(iii) Rules prohibiting abusive trade practices on the contract market.

(B) CAPACITY OF CONTRACT MARKET.—The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

(C) REQUIREMENT OF RULES.—The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this subsection, including the capacity to carry

[77 FR 36709, June 19, 2012]
out such international information-sharing agreements as the Commission may require.

(a) Guidance. (1) Investigations and investigation reports—Warning letters. The rules of a designated contract market may authorize compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action.

(2) Additional rules required. A designated contract market should adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart C of this chapter.

(b) Acceptable Practices. [Reserved.]

Core Principle 3 of section 5(d) of the Act: CONTRACTS NOT READILY SUBJECT TO MANIPULATION.—The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

(a) Guidance. (1) Designated contract markets may list new products for trading by self-certification under § 40.2 of this chapter or may submit products for Commission approval under § 40.3 of this chapter.

(2) Guidance in appendix C to this part may be used as guidance in meeting this core principle for both new products listings and existing listed contracts.

(b) Acceptable Practices. [Reserved.]

Core Principle 4 of section 5(d) of the Act: PREVENTION OF MARKET DISRUPTION.—The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including—

(A) Methods for conducting real-time monitoring of trading; and

(B) Comprehensive and accurate trade reconstructions.

(a) Guidance. The detection and prevention of market manipulation, disruptions, and distortions should be incorporated into the design of programs for monitoring trading activity. Monitoring of intraday trading should include the capacity to detect developing market anomalies, including abnormal price movements and unusual trading volumes, and position-limit violations. The designated contract market should have rules in place that allow it broad powers to intervene to prevent or reduce market disruptions. Once a threatened or actual disruption is detected, the designated contract market should take steps to prevent the disruption or reduce its severity.

(2) Additional rules required. A designated contract market should adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart E of this part.

(b) Acceptable Practices. (1) General Requirements. Real-time monitoring for market anomalies and position-limit violations are the most effective, but the designated contract market may also demonstrate that it has an acceptable program if some of the monitoring is accomplished on a T+1 basis. An acceptable program must include automated trading alerts to detect market anomalies and position-limit violations as they develop and before market disruptions occur. In some cases, a designated contract market may demonstrate that its manual processes are effective.

(2) Physical-delivery contracts. For physical-delivery contracts, the designated contract market must demonstrate that it is monitoring the adequacy and availability of the deliverable supplies, which, if such information is available, includes the size and ownership of those supplies and whether such supplies are likely to be available to short traders and saleable by long traders at the market value of those supplies under normal cash marketing conditions. Further, for physical-delivery contracts, the designated contract market must continually monitor the appropriateness of a contract’s terms and conditions, including the delivery instrument, the delivery locations and location differentials, and the commodity characteristics and related differentials. The designated contract market must demonstrate that it is making a good-faith effort to resolve conditions that are interfering with convergence of its physical-delivery contract to the price of the underlying commodity or causing price distortions or market disruptions, including, when appropriate, changes to contract terms.

(3) Cash-settled contracts. At a minimum, an acceptable program for monitoring cash-settled contracts must include access, either directly or through an information-sharing agreement, to traders’ positions and transactions in the reference market for traders of a significant size in the designated contract market near the settlement of the contract.

(4) Ability to obtain information. With respect to the designated contract market’s ability to obtain information, a designated contract market may limit the application of the requirement to keep and provide such records only to those that are reportable under its large-trader reporting system or otherwise hold substantial positions.

(5) Risk controls for trading. An acceptable program for preventing market disruptions must demonstrate appropriate trade risk controls, in addition to pauses and halts. Such controls must be adapted to the unique characteristics of the markets to which they apply and must be designed to avoid market disruptions without unduly interfering with that market’s price discovery function. The designated contract market may choose from among controls that include: pre-trade limits on order size, price collars or bands around the current price, message throttles,
and daily price limits, or design other types of controls. Within the specific array of controls that are selected, the designated contract market also must set the parameters for those controls, so long as the types of controls and their specific parameters are reasonably likely to serve the purpose of preventing market disruptions and price distortions. If a contract is linked to, or is a substitute for, other contracts, either listed on its market or on other trading venues, the designated contract market must, to the extent practicable, coordinate its risk controls with any similar controls placed on those other contracts. If a contract is based on the price of an equity security or the level of an equity index, such risk controls must, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

Core Principle 5 of section 5(d) of the Act: Position Limitations or Accountability—(A) In General.—To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) Maximum Allowable Position Limitation.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

(a) Guidance. [Reserved.]

(b) Acceptable Practices. [Reserved.]

Core Principle 6 of section 5(d) of the Act: Emergency Authority.—The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority—

(A) To liquidate or transfer open positions in any contract;

(B) To suspend or curtail trading in any contract;

(C) To require market participants in any contract to meet special margin requirements.

(a) Guidance. In consultation and cooperation with the Commission, a designated contract market should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the DCM’s market or as part of a coordinated, cross-market intervention. DCM rules should include procedures and guidelines to avoid conflicts of interest in accordance with the provisions of §40.9 of this chapter, and include alternate lines of communication and approval procedures to address emergencies associated with real-time events. To address perceived market threats, the designated contract market should have rules that allow it to take certain actions in the event of an emergency, as defined in §40.1(h) of this chapter, including: imposing or modifying position limits, price limits, and intraday market restrictions; imposing special margin requirements; ordering the liquidation or transfer of open positions in any contract; ordering the fixing of a settlement price; extending or shortening the expiration date or the trading hours; suspending or curtailing trading in any contract; transferring customer contracts and the margin or altering any contract’s settlement terms or conditions; and, where applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services. In situations where a contract is fungible with a contract on another platform, emergency action to liquidate or transfer open interest must be as directed, or agreed to, by the Commission or the Commission’s staff. The DCM has the authority to independently respond to emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the DCM are made in good faith to protect the integrity of the markets. The Commission should be notified promptly of the DCM’s exercise of its emergency action, explaining how conflicts of interest were minimized, including the extent to which the DCM considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contract market and similar markets on other trading venues. Information on all regulatory actions carried out pursuant to a DCM’s emergency authority should be included in a timely submission of a certified rule pursuant to part 49 of this chapter.

(b) Acceptable Practices. A designated contract market must have procedures and guidelines for decision-making and implementation of emergency intervention in the market. At a minimum, the DCM must have the authority to liquidate or transfer open positions in the market, suspend or curtail trading in any contract, and require market participants in any contract to meet special margin requirements. In situations where a contract is fungible with a contract on another platform, emergency action to liquidate or transfer open interest must be directed, or agreed to, by the Commission or the Commission’s staff. The DCM must promptly notify the Commission of the exercise of its emergency authority, documenting its decision-making process, including how conflicts of interest were minimized, and the reasons for using its emergency authority. The DCM must also have rules that
allow it to take such market actions as may be directed by the Commission.

Core Principle 7 of section 5(d) of the Act: AVAILABILITY OF GENERAL INFORMATION.—The board of trade shall make available to market authorities, market participants, and the public accurate information concerning:

(A) The terms and conditions of the contracts of the contract market; and
(B) (i) The rules, regulations, and mechanisms for executing transactions on or through the facilities of the contract market; and
(ii) The rules and specifications describing the operation of the contract market's—
(I) Electronic matching platform; or
(II) Trade execution facility.

(a) Guidance. [Reserved.]
(b) Acceptable Practices. [Reserved.]

Core Principle 8 of section 5(d) of the Act: DAILY PUBLICATION OF TRADING INFORMATION.—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

(a) Guidance. [Reserved.]
(b) Acceptable Practices. [Reserved.]

Core Principle 9 of section 5(d) of the Act: EXECUTION OF TRANSACTIONS.—(A) In general.—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.

(B) RULES.—The rules of the board of trade may authorize, for bona fide business purposes—
(i) Transfer trades or office trades;
(ii) An exchange of—
(I) Futures in connection with a cash commodity transaction;
(II) Futures for cash commodities; or
(III) Futures for swaps; or
(ii) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

(a) Guidance. [Reserved.]
(b) Acceptable Practices. [Reserved.]

Core Principle 10 of section 5(d) of the Act: TRADE INFORMATION.—The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information—

(A) To assist in the prevention of customer and market abuses; and
(B) To provide evidence of any violations of the rules of the contract market.

(a) Guidance. [Reserved.]
(b) Acceptable Practices. [Reserved.]

Core Principle 11 of section 5(d) of the Act: FINANCIAL INTEGRITY OF TRANSACTIONS.—The board of trade shall establish and enforce—

(A) Rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and
(B) Rules to ensure—
(i) The financial integrity of any—
(I) Futures commission merchant; and
(II) Introducing broker; and
(ii) The protection of customer funds.

(a) Guidance. [Reserved.]
(b) Acceptable Practices. [Reserved.]

Core Principle 12 of section 5(d) of the Act: PROTECTION OF MARKETS AND MARKET PARTICIPANTS.—The board of trade shall establish and enforce rules—

(A) To protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and
(B) To promote fair and equitable trading on the contract market.

(a) Guidance. [Reserved.]
(b) Acceptable Practices. [Reserved.]

Core Principle 13 of section 5(d) of the Act: DISCIPLINARY PROCEDURES.—The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

(a) Guidance. (1) Notice of charges. If the rules of the designated contract market so provide, a notice may also advise: (i) That failure to request a hearing within the period prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and (ii) That failure to answer or to deny expressly a charge may be deemed to be an admission of such charge.

(2) Admission or failure to deny charges. The rules of a designated contract market may provide that if a respondent admits or fails to deny any of the charges, a disciplinary panel may find that the violations alleged in the notice of charges for which the respondent admitted or failed to deny any of the charges have been committed. If the designated contract market's rules so provide, then:

(i) The disciplinary panel should impose a sanction for each violation found to have been committed:
(ii) The disciplinary panel should promptly notify the respondent in writing of any sanction to be imposed pursuant to paragraph
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(2)(1) of this section and shall advise the respondent that it may request a hearing on such sanctions within the period of time, which shall be stated in the notice;

(iii) The rules of a designated contract market may provide that if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

(3) Settlement offers. (i) The rules of a designated contract market may permit a respondent to submit a written offer of settlement at any time after an investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of a settlement offer unless the respondent agrees.

(ii) The rules of a designated contract market may provide that, in its discretion, a disciplinary panel may permit the respondent to accept a sanction without either admitting or denying the rule violations upon which the sanction is based.

(iii) If an offer of settlement is accepted, the panel accepting the offer should issue a written decision specifying the rule violations it has reason to believe were committed, including the basis or reasons for the panel’s conclusions, and any sanction to be imposed, which should include full customer restitution where customer harm is demonstrated, except where the amount of restitution and to whom it should be provided cannot be reasonably determined. If an offer of settlement is accepted without the agreement of the enforcement staff, the decision should adequately support the disciplinary panel’s acceptance of the settlement. Where applicable, the decision should also include a statement that the respondent has accepted the sanctions imposed without either admitting or denying the rule violations.

(iv) The respondent may withdraw his or her offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent should not be deemed to have made any admissions by reason of the offer of settlement and should not be otherwise prejudiced by having submitted the offer of settlement.

(4) Hearings. The rules of a designated contract market may provide that a sanction may be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

(5) Right to appeal. The rules of a designated contract market may permit the parties to a proceeding to appeal promptly an adverse decision of a disciplinary panel in all or in certain classes of cases. Such rules may require a party’s notice of appeal to be in writing and to specify the findings, conclusions, or sanctions to which objection are taken. If the rules of a designated contract market permit appeals, then both the respondent and the enforcement staff should have the opportunity to appeal and the designated contract market should provide for the following:

(i) The designated contract market should establish an appellate panel that should be authorized to hear appeals of respondents. In addition, the rules of a designated contract market may provide that the appellate panel may, on its own initiative, order review of a decision by a disciplinary panel within a reasonable period of time after the decision has been rendered.

(ii) The composition of the appellate panel should be consistent with the requirements set forth in part 40 of this chapter and paragraph (4) of the acceptable practices for Core Principle 16, and should not include any members of the designated contract market’s compliance staff, or any person involved in adjudicating any other stage of the same proceeding. The rules of a designated contract market should provide for the appeal proceeding to be conducted before all of the members of the appellate panel or a panel thereof.

(iii) Except for good cause shown, the appeal or review should be conducted solely on the record before the disciplinary panel, the written exceptions filed by the parties, and the oral or written arguments of the parties.

(iv) Promptly following the appeal or review proceeding, the appellate panel should issue a written decision and should provide a copy to the respondent. The decision issued by the appellate panel should adhere to all the requirements of §38.708 of this part, to the extent that a different conclusion is reached from that issued by the disciplinary panel.

(6) Summary fines for violations of rules regarding timely submission of records, decorum, or other similar activities. A designated contract market may adopt a summary fine schedule for violations of rules relating to the timely submission of accurate records required for clearing or verifying each day’s transactions, decorum, attire, or other similar activities. A designated contract market may permit its compliance staff, or a designated panel of contract market officials, to summarily impose minor sanctions against persons within the designated contract market’s jurisdiction for violating such rules. A designated contract market’s summary fine schedule may allow for warning letters to be issued for first-time violations or violators. If adopted, a summary fine schedule should provide for progressively larger fines for recurring violations.

(7) Emergency disciplinary actions. (1) A designated contract market may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable
believe that such immediate action is necessary to protect the best interest of the marketplace.

(ii) Any emergency disciplinary action should be taken in accordance with a designated contract market's procedures that provide for the following:

(A) If practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity. The notice should state the action, briefly state the reasons for the action, and state the effective time and date, and the duration of the action.

(B) The respondent should have the right to be represented by legal counsel or any other representative of its choosing in all proceedings subsequent to the emergency action taken. The respondent should be given the opportunity for a hearing as soon as reasonably practicable and the hearing should be conducted before the disciplinary panel pursuant to the requirements of §38.707 of this part.

(C) Promptly following the hearing provided for in this rule, the designated contract market should render a written decision based upon the weight of the evidence contained in the record of the proceeding and should provide a copy to the respondent. The decision should include a description of the summary action taken; the reasons for the summary action; a summary of the evidence produced at the hearing; a statement of findings and conclusions; a determination that the summary action should be affirmed, modified, or reversed; and a declaration of any action to be taken pursuant to the determination, and the effective date and duration of such action.

(b) Acceptable Practices.

Core Principle 14 of section 5(d) of the Act: DISPUTE RESOLUTION.—The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

(a) Guidance. A designated contract market should provide customer dispute resolution procedures that are: appropriate to the nature of the market; fair and equitable; and available on a voluntary basis, either directly or through another self-regulatory organization, to customers that are non-eligible contract participants.

(b) Acceptable Practices.

(i) Fair and equitable procedure. Every contract market shall provide customer dispute resolution procedures that are fair and equitable. An acceptable customer dispute resolution mechanism would:

(A) Provide the customer with an opportunity to have his or her claim decided by an objective and impartial decisionmaker;

(ii) Provide each party with the right to be represented by counsel at the commencement of the procedure, at the party's own expense;

(iii) Provide each party with adequate notice of the claims presented against such party, an opportunity to present all claims, defenses and permitted counterclaims, and an opportunity for a prompt hearing;

(iv) Authorize prompt, written, final settlement awards that are not subject to appeal within the designated contract market; and

(v) Notify the parties of the fees and costs that may be assessed.

(2) Voluntary Procedures. The use of dispute settlement procedures shall be voluntary for customers other than eligible contract participants as defined in section 1a(18) of the Dodd-Frank Act, and may permit counterclaims as provided in §166.6 of this chapter.

(3) Member-to-Member Procedures. If the designated contract market also provides procedures for the resolution of disputes that do not involve customers (i.e., member-to-member disputes), the procedures for resolving such disputes must be independent of and shall not interfere with or delay the resolution of customers' claims or grievances.

(4) Delegation. A designated contract market may delegate to another self-regulatory organization or to a registered futures association its responsibility to provide for customer dispute resolution mechanisms, provided, however, that in the event of such delegation, the designated contract market shall in all respects treat any decision issued by such other organization or association with respect to such dispute as if the decision were its own, including providing for the appropriate enforcement of any award issued against a delinquent member.

Core Principle 15 of section 5(d) of the Act: GOVERNANCE FITNESS STANDARDS.—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

(a) Guidance. (1) A designated contract market should have appropriate eligibility criteria for the categories of persons set forth in the Core Principle that should include standards for fitness and for the collection and verification of information supporting compliance with such standards. Minimum standards of fitness for persons who have member voting privileges, governing obligations or responsibilities, or who exercise disciplinary authority are those bases for refusal to register a person under section 8a(2) of the Act. In addition, persons who have governing obligations or responsibilities, or who exercise disciplinary authority, should not have a significant history of serious disciplinary offenses, such as
those that would be disqualifying under §1.63 of this chapter. Members with trading privileges but having no, or only nominal, equity, in the facility and non-member market participants, other industry participants, and other constituencies. Acceptable practices for minimizing conflicts of interest shall include the following elements:

1. Board composition for contract markets:
   (i) At least thirty-five percent of the directors on a contract market’s board of directors shall be public directors; and
   (ii) The executive committee (or similarly empowered bodies) shall be at least thirty-five percent public.

2. Public director
   (i) To qualify as a public director of a contract market, an individual must first be found, by the board of directors, on the record, to have no material relationship with the contract market. A “material relationship” is one that reasonably could affect the independent judgment or decisionmaking of the director.
   (ii) In addition, a director shall be considered to have a “material relationship” with the contract market if any of the following circumstances exist:
      (A) The director is an officer or employee of the contract market or an officer or employee of its affiliate. In this context, “affiliate” includes parents or subsidiaries of the contract market or entities that share a common parent with the contract market;
      (B) The director is a member of the contract market, or an officer or director of a member. “Member” is defined according to section 1a(34) of the Commodity Exchange Act and Commission Regulation 1.3(q);
      (C) The director, or a firm with which the director is an officer, director, or partner, receives more than $100,000 in combined annual payments from the contract market, or any affiliate of the contract market (as defined in subsection (2)(ii)(A)), for legal, accounting, or consulting services. Compensation for services as a director of the contract market or as a director of an affiliate of the contract market does not count toward the $100,000 payment limit, nor does deferred compensation for services prior to becoming a director, so long as such compensation is in no way contingent, conditioned, or revocable;
      (D) Any of the relationships above apply to a member of the director’s “immediate family,” i.e., spouse, parents, children and siblings.
   (iii) All of the disqualifying circumstances described in subsection (2)(ii) shall be subject to a one-year look back.
   (iv) A contract market’s public directors may also serve as directors of the contract market’s affiliate (as defined in subsection (2)(ii)(A)) if they otherwise meet the definition of public director in this section (2).
   (v) A contract market shall disclose to the Commission which members of its board are public directors, and the basis for those determinations.

3. Regulatory oversight committee
(i) A board of directors of any contract market shall establish a Regulatory Oversight Committee ("ROC") as a standing committee, consisting of only public directors as defined in section (2), to assist it in minimizing actual and potential conflicts of interest. The ROC shall oversee the contract market’s regulatory program on behalf of the board. The board shall delegate sufficient authority, dedicate sufficient resources, and allow sufficient time for the ROC to fulfill its mandate.

(ii) The ROC shall:

(A) Monitor the contract market’s regulatory program for sufficiency, effectiveness, and independence;

(B) Oversee all facets of the program, including trade practice and market surveillance; audits, examinations, and other regulatory responsibilities with respect to member firms (including ensuring compliance with financial integrity, financial reporting, sales practice, recordkeeping, and other requirements); and the conduct of investigations;

(C) Review the size and allocation of the regulatory budget and resources; and the number, hiring and termination, and compensation of regulatory personnel;

(D) Supervise the contract market’s chief regulatory officer, who will report directly to the ROC;

(E) Prepare an annual report assessing the contract market’s self-regulatory program for the board of directors and the Commission, which sets forth the regulatory program’s expenses, describes its staffing and structure, catalogues disciplinary actions taken during the year, and reviews the performance of disciplinary committees and panels;

(F) Recommend changes that would ensure fair, vigorous, and effective regulation; and

(G) Review regulatory proposals and advise the board as to whether and how such changes may impact regulation.

(4) Disciplinary panels

All contract markets shall minimize conflicts of interest in their disciplinary processes through disciplinary panel composition rules that preclude any group or class of industry participants from dominating or exercising disproportionate influence on such panels. Contract markets can further minimize conflicts of interest by including in all disciplinary panels. Contract market rules provide for appeal to the board of directors, or to a committee of the board, then that appellate body shall also include at least one person who would qualify as a public director as defined in subsections (2)(ii) and (2)(iii) above.

Core Principle 17 of section 5(d) of the Act: COMPOSITION OF GOVERNING BOARDS OF CONTRACT MARKETS.—The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

(a) Guidance. [Reserved.]

(b) Acceptable Practices. [Reserved.]

Core Principle 18 of section 5(d) of the Act: RECORDKEEPING.—The board of trade shall maintain records of all activities relating to the business of the contract market—

(A) In a form and manner that is acceptable to the Commission; and

(B) For a period of at least 5 years.

(a) Guidance. [Reserved.]

(b) Acceptable Practices. [Reserved.]

Core Principle 19 of section 5(d) of the Act: ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not—

(A) Adopt any rule or taking any action that results in any unreasonable restraint of trade; or

(B) Impose any material anticompetitive burden on trading on the contract market.

(a) Guidance. An entity seeking designation as a contract market may request that the Commission consider under the provisions of section 15(b) of the Act, any of the entity’s rules, including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading, at the time of designation or thereafter. 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.]

Core Principle 20 of section 5(d) of the Act: SYSTEM SAFEGUARDS.—The board of trade shall—

(A) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

(B) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(C) Periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

(a) Guidance. [Reserved.]

(b) Acceptable Practices. [Reserved.]
Core Principle 21 of section 5(d) of the Act:
FINANCIAL RESOURCES.—
(A) IN GENERAL.—The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.
(B) DETERMINATION OF ADEQUACY.—The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.
(a) Guidance. [Reserved.]
(b) Acceptable Practices. [Reserved.]
Core Principle 22 of section 5(d) of the Act:
DIVERSITY OF BOARD OF DIRECTORS.—
The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.
(a) Guidance. [Reserved.]
(b) Acceptable Practices. [Reserved.]
Core Principle 23 of section 5(d) of the Act:
SECURITIES AND EXCHANGE COMMISSION.—The board of trade shall keep any such records relating to swaps defined in section 1a(47)(A)(v) open to inspection and examination by the Securities and Exchange Commission.
(a) Guidance. A designated contract market should have arrangements and resources for collecting and maintaining accurate records pertaining to any swaps agreements defined in section 1a(47)(A)(v) of the Act, and should leave them open to inspection and examination for a period of five years.
(b) Acceptable Practices. [Reserved.]

[77 FR 36717, June 19, 2012]

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

Subpart A—General Provisions Applicable to Derivatives Clearing Organizations

§ 39.1 Scope.
The provisions of this subpart A apply to any derivatives clearing organization as defined under section 1a(15) of the Act and §1.3(d) of this chapter which is registered or deemed to be registered with the Commission as a derivatives clearing organization, is required to register as such with the Commission pursuant to section 5b(a) of the Act, or which voluntarily applies to register as such with the Commission pursuant to section 5b(b) or otherwise.

§ 39.2 Definitions.
For the purposes of this part,
Back test means a test that compares a derivatives clearing organization’s initial margin requirements with historical price changes to determine the extent of actual margin coverage.
Customer means a person trading in any commodity named in the definition of commodity in section 1a(9) of the Act or in §1.3 of this chapter, or in any swap as defined in section 1a(47) of...
the Act or in §1.3 of this chapter; Provided, however, an owner or holder of a house account as defined in 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 house account shall otherwise be deemed to be a customer within the meaning of the Act and §§1.37 and 1.46 of this chapter and all other sections of these rules, regulations, and orders which do not implement sections 4d and 4f of the Act.

Customer account or customer origin means a clearing member account held on behalf of customers, as that term is defined in this section, and which is subject to section 4d(a) or section 4d(f) of the Act.

House account or house origin means a clearing member account which is not subject to section 4d(a) or 4d(f) of the Act.

Key personnel means derivatives clearing organization personnel who play a significant role in the operations of the derivatives clearing organization, the provision of clearing and settlement services, risk management, or oversight of compliance with the Act and Commission regulations and orders. Key personnel include, but are not limited to, those persons who are or perform the functions of any of the following: chief executive officer; president; chief compliance officer; chief operating officer; chief risk officer; chief financial officer; chief technology officer; and emergency contacts or persons who are responsible for business continuity or disaster recovery planning or program execution.

Stress test means a test that compares the impact of potential extreme price moves, changes in option volatility, and/or changes in other inputs that affect the value of a position, to the financial resources of a derivatives clearing organization, clearing member, or large trader, to determine the adequacy of such financial resources.

Systemically important derivatives clearing organization means a financial market utility that is a derivatives clearing organization registered under section 5b of the Act, which has been designated by the Financial Stability Oversight Council to be systemically important and for which the Commission acts as the Supervisory Agency pursuant to section 803(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

§39.3 Procedures for registration.

(a) Application procedures. (1) An organization desiring to be registered as a derivatives clearing organization shall file electronically an application for registration with the Secretary of the Commission in the format and manner specified by the Commission. The Commission will review the application for registration as a derivatives clearing organization pursuant to the 180-day timeframe and procedures specified in section 6(a) of the Act. The Commission may approve or deny the application or, if deemed appropriate, register the applicant as a derivatives clearing organization subject to conditions.

(2) Application. Any person seeking to register as a derivatives clearing organization, any applicant amending its pending application, or any registered derivatives clearing organization seeking to amend its order of registration (applicant), shall submit to the Commission a completed Form DCO, which shall include a cover sheet, all applicable exhibits, and any supplemental materials, including amendments thereto, as provided in the appendix to this part 39 (application). An applicant, when filing a Form DCO for purposes of amending its pending application or requesting an amendment to an existing registration, is only required to submit exhibits and updated information that are relevant to the requested amendment and are necessary to demonstrate compliance with the core principles affected by the requested amendment. The Commission will not commence processing an application unless the applicant has filed the application as required by this section. Failure to file a completed application will preclude the Commission from determining that an application is materially complete, as provided in section 6(a) of the Act. Upon its own initiative, an applicant may file with its completed application additional information that may be necessary or helpful to the Commission in processing the application.
(3) Submission of supplemental information. The filing of a completed application is a minimum requirement and does not create a presumption that the application is materially complete or that supplemental information will not be required. At any time during the application review process, the Commission may request that the applicant submit supplemental information in order for the Commission to process the application. The applicant shall file electronically such supplemental information with the Secretary of the Commission in the format and manner specified by the Commission.

(4) Application amendments. An applicant shall promptly amend its application if it discovers a material omission or error, or if there is a material change in the information provided to the Commission in the application or other information provided in connection with the application.

(5) Public information. The following sections of all applications to become a registered derivatives clearing organization will be public: first page of the Form DCO cover sheet, proposed rules, regulatory compliance chart, narrative summary of proposed clearing activities, documents establishing the applicant’s legal status, documents setting forth the applicant’s corporate and governance structure, and any other part of the application not covered by a request for confidential treatment, subject to §145.9 of this chapter.

(b) Stay of application review. (1) The Commission may stay the running of the 180-day review period if an application is materially incomplete, in accordance with section 6(a) of the Act.

(2) Delegation of authority. (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Risk or the Director’s designee, with the concurrence of the General Counsel or the General Counsel’s designee, the authority to notify an applicant seeking designation under section 6(a) of the Act that the application is materially incomplete and the running of the 180-day period is stayed.

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

(iii) Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in paragraph (b)(2)(i) of this section.

(c) Withdrawal of application for registration. An applicant for registration may withdraw its application submitted pursuant to paragraph (a) of this section by filing electronically such a request with the Secretary of the Commission in the format and manner specified by the Commission. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application for registration was pending with the Commission.

(d) Reinstatement of dormant registration. Before listing or reliciting products for clearing, a dormant registered derivatives clearing organization as defined in §40.1 of this chapter must reinstate its registration under the procedures of paragraph (a) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(e) Request for vacation of registration. A registered derivatives clearing organization may vacate its registration under section 7 of the Act by filing electronically such a request with the Secretary of the Commission in the format and manner specified by the Commission. Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the entity was registered by the Commission.

(f) Request for transfer of registration and open interest. (1) In anticipation of a corporate change that will result in the transfer of all or substantially all of a derivatives clearing organization’s assets to another legal entity, the derivatives clearing organization shall submit a request for approval to transfer the derivatives clearing organization’s registration and positions comprising open interest for clearing and settlement.
(2) Timing of submission and other procedural requirements. (i) The request shall be submitted no later than three months prior to the anticipated corporate change, or as otherwise permitted under §39.19(c)(4)(viii)(C) of this part.
(ii) The derivatives clearing organization shall submit a request for transfer by filing electronically such a request with the Secretary of the Commission in the format and manner specified by the Commission.
(iii) The derivatives clearing organization shall submit a confirmation of change report pursuant to §39.19(c)(4)(viii)(D) of this part.

(3) Required information. The request shall include the following:
(i) The underlying agreement that governs the corporate change;
(ii) A narrative description of the corporate change, including the reason for the change and its impact on the derivatives clearing organization’s financial resources, governance, and operations, and its impact on the rights and obligations of clearing members and market participants holding the positions that comprise the derivatives clearing organization’s open interest;
(iii) A discussion of the transferee’s ability to comply with the Act, including the core principles applicable to derivatives clearing organizations, and the Commission’s regulations thereunder;
(iv) The governing documents of the transferee, including but not limited to articles of incorporation and bylaws;
(v) The transferee’s rules marked to show changes from the current rules of the derivatives clearing organization;
(vi) A list of products for which the derivatives clearing organization requests transfer of open interest;
(vii) A representation by the derivatives clearing organization that it is in compliance with the Act, including the core principles applicable to derivatives clearing organizations, and the Commission’s regulations thereunder; and
(viii) A representation by the transferee that it understands that the derivatives clearing organization is a regulated entity that must comply with the Act, including the core principles applicable to derivatives clearing organizations, and the Commission’s regulations thereunder, in order to maintain its registration as a derivatives clearing organization; and further, that the transferee will continue to comply with all self-regulatory requirements applicable to a derivatives clearing organization under the Act and the Commission’s regulations thereunder.

(4) Commission determination. The Commission will review a request as soon as practicable, and based on the Commission’s determination as to the transferee’s ability to continue to operate the derivatives clearing organization in compliance with the Act and the Commission’s regulations thereunder, such request will be approved or denied pursuant to a Commission order.

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

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

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

(c) Acceptance of new products for clearing. (1) A dormant derivatives clearing organization within the meaning of §40.1 of this chapter may not accept for clearing a new product until its registration as a derivatives clearing organization is reinstated under
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§ 39.5  Review of swaps for Commission determination on clearing requirement.

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

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

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

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

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

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

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

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

(B) A statement that includes, but is not limited to, information that will assist the Commission in making a quantitative and qualitative assessment of the following factors:

(A) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data;
(B) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;
(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the derivatives clearing organization available to clear the contract;
(D) The effect on competition, including appropriate fees and charges applied to clearing; and
(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property;
(iii) Product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing any life cycle events associated with the swap, and the extent to which the swap is electronically confirmable;
(iv) Participant eligibility standards, if different from the derivatives clearing organization’s general participant eligibility standards;
(v) Pricing sources, models, and procedures, demonstrating an ability to obtain sufficient price data to measure credit exposures in a timely and accurate manner, including any agreements with clearing members to provide price data and copies of executed agreements with third-party price vendors, and information about any price reference index used, such as the name of the index, the source that calculates it, the methodology used to calculate the price reference index and how often it is calculated, and when and where it is published publicly;
(vi) Risk management procedures, including measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures, and default management procedures;
(vii) Applicable rules, manuals, policies, or procedures;
(viii) A description of the manner in which the derivatives clearing organization has provided notice of the submission to its members and a summary of any views on the submission expressed by the members (a copy of the notice to members shall be included with the submission); and
(ix) Any additional information specifically requested by the Commission.
(4) The Commission must have received the submission by the open of business on the business day preceding the acceptance of the swap, or group, category, type, or class of swaps for clearing.
(5) The submission will be made available to the public and posted on the Commission Web site for a 30-day public comment period. A derivatives clearing organization that wishes to request confidential treatment for portions of its submission may do so in accordance with the procedures set out in §145.9(d) of this chapter.
(6) The Commission will review the submission and determine whether the swap, or group, category, type, or class of swaps described in the submission is required to be cleared. The Commission will make its determination not later than 90 days after a complete submission has been received, unless the submitting derivatives clearing organization agrees to an extension. The determination of when such submission is complete shall be at the sole discretion of the Commission. In making a determination that a clearing requirement shall apply, the Commission may impose such terms and conditions to the clearing requirement as the Commission determines to be appropriate.

(c) Commission-initiated reviews. (1) The Commission, on an ongoing basis, will review swaps that have not been accepted for clearing by a derivatives clearing organization to make a determination as to whether the swaps should be required to be cleared. In undertaking such reviews, the Commission will use information obtained pursuant to Commission regulations from swap data repositories, swap dealers, and major swap participants, and any other available information.
(2) Notice regarding any determination made under paragraph (c)(1) of this section will be made available to
§ 39.8 Fraud in connection with the clearing of transactions on a derivatives clearing organization.

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

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

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

(c) Willfully to deceive or attempt to deceive any person by any means whatsoever.
§ 39.9 Scope.
The provisions of this subpart B apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and §1.3(d) of this chapter, which is registered or deemed to be registered with the Commission as a derivatives clearing organization, is required to register as such with the Commission pursuant to section 5b(a) of the Act, or which voluntarily registers as such with the Commission pursuant to section 5b(b) or otherwise.

§ 39.10 Compliance with core principles.
(a) To be registered and to maintain registration as a derivatives clearing organization, a derivatives clearing organization shall comply with each core principle set forth in section 5b(c)(2) of the Act and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act; and
(b) Subject to any rule or regulation prescribed by the Commission, a registered derivatives clearing organization shall have reasonable discretion in establishing the manner by which it complies with each core principle.
(c) Chief compliance officer—(1) Designation. Each derivatives clearing organization shall establish the position of chief compliance officer, designate an individual to serve as the chief compliance officer, and provide the chief compliance officer with the full responsibility and authority to develop and enforce, in consultation with the board of directors or the senior officer, appropriate compliance policies and procedures, to fulfill the duties set forth in the Act and Commission regulations.
   (i) The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual who would be disqualified from registration under sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.
   (ii) The chief compliance officer shall report to the board of directors or the senior officer of the derivatives clearing organization. The board of directors or the senior officer shall approve the compensation of the chief compliance officer.
   (iii) The chief compliance officer shall meet with the board of directors or the senior officer at least once a year.
   (iv) A change in the designation of the individual serving as the chief compliance officer of the derivatives clearing organization shall be reported to the Commission in accordance with the requirements of §39.19(c)(4)(ix) of this part.
(2) Chief compliance officer duties. The chief compliance officer’s duties shall include, but are not limited to:
   (i) Reviewing the derivatives clearing organization’s compliance with the core principles set forth in section 5b of the Act, and the Commission’s regulations thereunder;
   (ii) In consultation with the board of directors or the senior officer, resolving any conflicts of interest that may arise;
   (iii) Establishing and administering written policies and procedures reasonably designed to prevent violation of the Act;
   (iv) Taking reasonable steps to ensure compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations prescribed under section 5b of the Act;
   (v) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through any compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint; and
   (vi) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.
(3) Annual report. The chief compliance officer shall, not less than annually, prepare and sign a written report that covers the most recently completed fiscal year of the derivatives clearing organization, and provide the annual report to the board of directors or the senior officer. The annual report shall, at a minimum:
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(i) Contain a description of the derivatives clearing organization’s written policies and procedures, including the code of ethics and conflict of interest policies;

(ii) Review each core principle and applicable Commission regulation, and with respect to each:
   (A) Identify the compliance policies and procedures that are designed to ensure compliance with the core principle;
   (B) Provide an assessment as to the effectiveness of these policies and procedures;
   (C) Discuss areas for improvement, and recommend potential or prospective changes or improvements to the derivatives clearing organization’s compliance program and resources allocated to compliance;

(iii) List any material changes to compliance policies and procedures since the last annual report;

(iv) Describe the financial, managerial, and operational resources set aside for compliance with the Act and Commission regulations; and

(v) Describe any material compliance matters, including incidents of non-compliance, since the date of the last annual report and describe the corresponding action taken.

(4) Submission of annual report to the Commission. (i) Prior to submitting the annual report to the Commission, the chief compliance officer shall provide the annual report to the board of directors or the senior officer of the derivatives clearing organization for review. Submission of the report to the board of directors or the senior officer shall be recorded in the board minutes or otherwise, as evidence of compliance with this requirement.

(ii) The annual report shall be submitted electronically to the Secretary of the Commission in the format and manner specified by the Commission not more than 90 days after the end of the derivatives clearing organization’s fiscal year, concurrently with submission of the fiscal year-end audited financial statement that is required to be furnished to the Commission pursuant to §39.19(c)(3)(ii) of this part. The report shall include a certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual report is accurate and complete.

(iii) The derivatives clearing organization shall promptly submit an amended annual report if material errors or omissions in the report are identified after submission. An amendment must contain the certification required under paragraph (c)(4)(ii) of this section.

(iv) A derivatives clearing organization may request from the Commission an extension of time to submit its annual report in accordance with §39.19(c)(3) of this part.

(5) Recordkeeping. (i) The derivatives clearing organization shall maintain:
   (A) A copy of all compliance policies and procedures and all other policies and procedures adopted in furtherance of compliance with the Act and Commission regulations;
   (B) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (c)(4)(i) of this section; and
   (C) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are created, sent, or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report.

(ii) The derivatives clearing organization shall maintain records in accordance with §1.31 of this chapter and §39.20 of this part.

§ 39.11 Financial resources.

(a) General. A derivatives clearing organization shall maintain financial resources sufficient to cover its exposures with a high degree of confidence and to enable it to perform its functions in compliance with the core principles set out in section 5b of the Act. A derivatives clearing organization shall identify and adequately manage its general business risks and hold sufficient liquid resources to cover potential business losses that are not related to clearing members’ defaults, so that
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the derivatives clearing organization can continue to provide services as an ongoing concern. Financial resources shall be considered sufficient if their value, at a minimum, exceeds the total amount that would:

(1) Enable the derivatives clearing organization to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the derivatives clearing organization in extreme but plausible market conditions; Provided that if a clearing member controls another clearing member or is under common control with another clearing member, the affiliated clearing members shall be deemed to be a single clearing member for purposes of this provision; and

(2) Enable the derivatives clearing organization to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(b) Types of financial resources. (1) Financial resources available to satisfy the requirements of paragraph (a)(1) of this section may include:

(i) Margin to the extent permitted under parts 1, 22, and 190 of this chapter and under the rules of the derivatives clearing organization;

(ii) The derivatives clearing organization’s own capital;

(iii) Guaranty fund deposits;

(iv) Default insurance;

(v) Potential assessments for additional guaranty fund contributions, if permitted by the derivatives clearing organization’s rules; and

(vi) Any other financial resource deemed acceptable by the Commission.

(2) Financial resources available to satisfy the requirements of paragraph (a)(2) of this section may include:

(i) The derivatives clearing organization’s own capital; and

(ii) Any other financial resource deemed acceptable by the Commission.

(3) A financial resource may be allocated, in whole or in part, to satisfy the requirements of either paragraph (a)(1) or paragraph (a)(2) of this section, but not both paragraphs, and only to the extent the use of such financial resource is not otherwise limited by the Act, Commission regulations, the derivatives clearing organization’s rules, or any contractual arrangements to which the derivatives clearing organization is a party.

(c) Computation of financial resources requirement. (1) A derivatives clearing organization shall, on a monthly basis, perform stress testing that will allow it to make a reasonable calculation of the financial resources needed to meet the requirements of paragraph (a)(1) of this section. The derivatives clearing organization shall have reasonable discretion in determining the methodology used to compute such requirements, provided that the methodology must take into account both historical data and hypothetical scenarios. The Commission may review the methodology and require changes as appropriate.

(2) A derivatives clearing organization shall, on a monthly basis, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a)(2) of this section. The derivatives clearing organization shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

(d) Valuation of financial resources. (1) At appropriate intervals, but not less than monthly, a derivatives clearing organization shall compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect credit, market, and liquidity risks (haircuts) shall be applied as appropriate and evaluated on a monthly basis.

(2) If assessments for additional guaranty fund contributions are permitted by the derivatives clearing organization’s rules, in calculating the financial resources available to meet its obligations under paragraph (a)(1) of this section:

(i) The derivatives clearing organization shall have rules requiring that its clearing members have the ability to meet an assessment within the time frame of a normal end-of-day variation settlement cycle;

(ii) The derivatives clearing organization shall monitor the financial and operational capacity of its clearing
members to meet potential assessments;

(iii) The derivatives clearing organization shall apply a 30 percent haircut to the value of potential assessments, and

(iv) The derivatives clearing organization shall only count the value of assessments, after the haircut, to meet up to 20 percent of those obligations.

(e) Liquidity of financial resources. (1)

(i) The derivatives clearing organization shall effectively measure, monitor, and manage its liquidity risks, maintaining sufficient liquid resources such that it can, at a minimum, fulfill its cash obligations when due. The derivatives clearing organization shall hold assets in a manner where the risk of loss or of delay in its access to them is minimized.

(ii) The financial resources allocated by the derivatives clearing organization to meet the requirements of paragraph (a)(1) of this section shall be sufficiently liquid to enable the derivatives clearing organization to fulfill its obligations as a central counterparty during a one-day settlement cycle. The derivatives clearing organization shall maintain cash, U.S. Treasury obligations, or high quality, liquid, general obligations of a sovereign nation, in an amount greater than or equal to an amount calculated as follows:

(A) Calculate the average daily settlement pay for each clearing member over the last fiscal quarter;

(B) Calculate the sum of those average daily settlement pays; and

(C) Using that sum, calculate the average of its clearing members’ average pays.

(iii) The derivatives clearing organization may take into account a committed line of credit or similar facility for the purpose of meeting the remainder of the requirement under paragraph (e)(1)(ii) of this section.

(2) The financial resources allocated by the derivatives clearing organization to meet the requirements of paragraph (a)(2) of this section must include unencumbered, liquid financial assets (i.e., cash and/or highly liquid securities) equal to at least six months’ operating costs. If any portion of such financial resources is not sufficiently liquid, the derivatives clearing organization may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(3)(i) Assets in a guaranty fund shall have minimal credit, market, and liquidity risks and shall be readily accessible on a same-day basis;

(ii) Cash balances shall be invested or placed in safekeeping in a manner that bears little or no principal risk; and

(iii) Letters of credit shall not be a permissible asset for a guaranty fund.

(f) Reporting requirements. (1) Each fiscal quarter, or at any time upon Commission request, a derivatives clearing organization shall:

(i) Report to the Commission;

(A) The amount of financial resources necessary to meet the requirements of paragraph (a);

(B) The value of each financial resource available, computed in accordance with the requirements of paragraph (d) of this section; and

(C) The manner in which the derivatives clearing organization meets the liquidity requirements of paragraph (e) of this section;

(ii) Provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows, of the derivatives clearing organization or of its parent company; and

(iii) Report to the Commission the value of each individual clearing member’s guaranty fund deposit, if the derivatives clearing organization reports having guaranty funds deposits as a financial resource available to satisfy the requirements of paragraph (a)(1) of this section.

(2) The calculations required by this paragraph shall be made as of the last business day of the derivatives clearing organization’s fiscal quarter.

(3) The derivatives clearing organization shall provide the Commission with:

(i) Sufficient documentation explaining the methodology used to compute its financial resources requirements under paragraph (a) of this section,

(ii) Sufficient documentation explaining the basis for its determinations regarding the valuation and liquidity requirements set forth in paragraphs (d) and (e) of this section, and
§ 39.12 Participant and product eligibility.

(a) Participant eligibility. A derivatives clearing organization shall establish appropriate admission and continuing participation requirements for clearing members of the derivatives clearing organization that are objective, publicly disclosed, and risk-based.

(1) Fair and open access for participation. The participation requirements shall permit fair and open access;

(i) A derivatives clearing organization shall not adopt restrictive clearing member standards if less restrictive requirements that achieve the same objective and that would not materially increase risk to the derivatives clearing organization or clearing members could be adopted;

(ii) A derivatives clearing organization shall allow all market participants who satisfy participation requirements to become clearing members;

(iii) A derivatives clearing organization shall not exclude or limit clearing membership of certain types of market participants unless the derivatives clearing organization can demonstrate that the restriction is necessary to address credit risk or deficiencies in the participants’ operational capabilities that would prevent them from fulfilling their obligations as clearing members.

(iv) A derivatives clearing organization shall not require that clearing members be swap dealers.

(v) A derivatives clearing organization shall not require that clearing members maintain a swap portfolio of any particular size, or that clearing members meet a swap transaction volume threshold.

(vi) No derivatives clearing organization shall require as a condition of accepting a swap for clearing that a futures commission merchant enter into an arrangement with a customer that:

(A) Discloses to the futures commission merchant or any swap dealer or major swap participant the identity of a customer’s original executing counterparty;

(B) Limits the number of counterparties with whom a customer may enter into trades;

(C) Restricts the size of the position a customer may take with any individual counterparty, apart from an overall limit for all positions held by the customer at the futures commission merchant;

(D) Impairs a customer’s access to execution of a trade on terms that have a reasonable relationship to the best terms available; or

(E) Prevents compliance with the time frames set forth in §1.74(b), §23.610(b), or §39.12(b)(7) of this chapter.

(2) Financial resources. (i) The participation requirements shall require clearing members to have access to sufficient financial resources to meet obligations arising from participation in the derivatives clearing organization in extreme but plausible market conditions. A derivatives clearing organization may permit such financial resources to include, without limitation, a clearing member’s capital, a guarantee from the clearing member’s parent, or a credit facility funding arrangement. For purposes of this paragraph, “capital” means adjusted net capital as defined in §1.17 of this chapter, for futures commission merchants, and net capital as defined in §240.15c3–1 of this title, for broker-dealers, or any similar risk adjusted capital calculation for all other clearing members.

(ii) The participation requirements shall set forth capital requirements that are based on objective, transparent, and commonly accepted standards that appropriately match capital to risk. Capital requirements shall be scalable to the risks posed by clearing members.

(iii) A derivatives clearing organization shall not set a minimum capital requirement of more than $50 million.
for any person that seeks to become a clearing member in order to clear swaps.

(3) Operational requirements. The participation requirements shall require clearing members to have adequate operational capacity to meet obligations arising from participation in the derivatives clearing organization. The requirements shall include, but are not limited to: the ability to process expected volumes and values of transactions cleared by a clearing member within required timeframes, including at peak times and on peak days; the ability to fulfill collateral, payment, and delivery obligations imposed by the derivatives clearing organization; and the ability to participate in default management activities under the rules of the derivatives clearing organization and in accordance with §39.16 of this part.

(4) Monitoring. A derivatives clearing organization shall establish and implement procedures to verify, on an ongoing basis, the compliance of each clearing member with each participation requirement of the derivatives clearing organization.

(5) Reporting. (i) A derivatives clearing organization shall require all clearing members, including non-futures commission merchants, to provide to the derivatives clearing organization periodic financial reports that contain any financial information that the derivatives clearing organization determines is necessary to assess whether participation requirements are being met on an ongoing basis.

(A) A derivatives clearing organization shall require clearing members that are futures commission merchants to provide the financial reports that are specified in §1.10 of this chapter to the derivatives clearing organization.

(B) A derivatives clearing organization shall require clearing members that are not futures commission merchants to make the periodic financial reports provided pursuant to paragraph (a)(5)(i) of this section available to the Commission upon the Commission’s request or, in lieu of imposing this requirement, a derivatives clearing organization may provide such financial reports directly to the Commission upon the Commission’s request.

(ii) A derivatives clearing organization shall adopt rules that require clearing members to provide to the derivatives clearing organization, in a timely manner, information that concerns any financial or business developments that may materially affect the clearing members’ ability to continue to comply with participation requirements.

(6) Enforcement. A derivatives clearing organization shall have the ability to enforce compliance with its participation requirements and shall establish procedures for the suspension and orderly removal of clearing members that no longer meet the requirements.

(b) Product eligibility. (1) A derivatives clearing organization shall establish appropriate requirements for determining the eligibility of agreements, contracts, or transactions submitted to the derivatives clearing organization for clearing, taking into account the derivatives clearing organization’s ability to manage the risks associated with such agreements, contracts, or transactions. Factors to be considered in determining product eligibility include, but are not limited to:

(i) Trading volume;

(ii) Liquidity;

(iii) Availability of reliable prices;

(iv) Ability of market participants to use portfolio compression with respect to a particular swap product;

(v) Ability of the derivatives clearing organization and clearing members to gain access to the relevant market for purposes of creating, liquidating, transferring, auctioning, and/or allocating positions;

(vi) Ability of the derivatives clearing organization to measure risk for purposes of setting margin requirements; and

(vii) Operational capacity of the derivatives clearing organization and clearing members to address any unusual risk characteristics of a product.

(2) A derivatives clearing organization shall adopt rules providing that all swaps with the same terms and conditions, as defined by product specifications established under derivatives clearing organization rules, submitted to the derivatives clearing organization for clearing are economically equivalent within the derivatives
clearing organization and may be offset with each other within the derivatives clearing organization.

(3) A derivatives clearing organization shall provide for non-discriminatory clearing of a swap executed bilaterally or on or subject to the rules of an unaffiliated swap execution facility or designated contract market.

(4) A derivatives clearing organization shall not require that one of the original executing parties be a clearing member in order for a product to be eligible for clearing.

(5) A derivatives clearing organization shall provide for non-discriminatory clearing of a swap executed bilaterally or on or subject to the rules of an unaffiliated swap execution facility or designated contract market.

(6) A derivatives clearing organization shall select product unit sizes and other terms and conditions that maximize liquidity, facilitate transparency in pricing, promote open access, and allow for effective risk management. To the extent appropriate to further these objectives, a derivatives clearing organization shall select product units for clearing purposes that are smaller than the product units in which trades submitted for clearing were executed.

(7) Time frame for clearing—(i) Coordination with markets and clearing members. (A) Each derivatives clearing organization shall coordinate with each designated contract market and swap execution facility that lists for trading a product that is cleared by the derivatives clearing organization in developing rules and procedures to facilitate prompt, efficient, and accurate processing of all transactions submitted to the derivatives clearing organization for clearing.

(B) Each derivatives clearing organization shall coordinate with each clearing member that is a futures commission merchant, swap dealer, or major swap participant to establish systems that enable the clearing member, or the derivatives clearing organization acting on its behalf, to accept or reject each trade submitted to the derivatives clearing organization for clearing by or for the clearing member or a customer of the clearing member as quickly as would be technologically practicable if fully automated systems were used.

(7) Time frame for clearing—(ii) Transactions executed competitively on or subject to the rules of a designated contract market or swap execution facility. A derivatives clearing organization shall have rules that provide that the derivatives clearing organization will accept or reject for clearing as quickly after execution as would be technologically practicable if fully automated systems were used, all contracts that are listed for clearing by the derivatives clearing organization and are executed competitively on or subject to the rules of a designated contract market or a swap execution facility. The derivatives clearing organization shall accept all trades:

(A) For which the executing parties have clearing arrangements in place with clearing members of the derivatives clearing organization;

(B) For which the executing parties identify the derivatives clearing organization as the intended clearinghouse; and

(C) That satisfy the criteria of the derivatives clearing organization, including but not limited to applicable risk filters; provided that such criteria are non-discriminatory across trading venues and are applied as quickly as would be technologically practicable if fully automated systems were used.

(iii) Swaps not executed on or subject to the rules of a designated contract market or a swap execution facility or executed non-competitively on or subject to the rules of a designated contract market or a swap execution facility. A derivatives clearing organization shall have rules
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that provide that the derivatives clearing organization will accept or reject for clearing as quickly after submission to the derivatives clearing organization as would be technologically practicable if fully automated systems were used, all swaps that are listed for clearing by the derivatives clearing organization and are not executed on or subject to the rules of a designated contract market or a swap execution facility or executed non-competitively on or subject to the rules of a designated contract market or a swap execution facility. The derivatives clearing organization shall accept all trades:

(A) That are submitted by the parties to the derivatives clearing organization, in accordance with §23.506 of this chapter;

(B) For which the executing parties have clearing arrangements in place with clearing members of the derivatives clearing organization;

(C) For which the executing parties identify the derivatives clearing organization as the intended clearinghouse; and

(D) That satisfy the criteria of the derivatives clearing organization, including but not limited to applicable risk filters; provided that such criteria are non-discriminatory across trading venues and are applied as quickly as would be technologically practicable if fully automated systems were used.

(8) Confirmation. A derivatives clearing organization shall provide each clearing member carrying a cleared swap with a definitive written record of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the swap. The confirmation of all terms of the transaction shall take place at the same time as the swap is accepted for clearing.

[76 FR 69430, Nov. 8, 2011, as amended at 77 FR 21309, Apr. 9, 2012]

§ 39.13 Risk management.

(a) General. A derivatives clearing organization shall ensure that it possesses the ability to manage the risks associated with discharging the responsibilities of the derivatives clearing organization through the use of appropriate tools and procedures.

(b) Documentation requirement. A derivatives clearing organization shall establish and maintain written policies, procedures, and controls, approved by its board of directors, which establish an appropriate risk management framework that, at a minimum, clearly identifies and documents the range of risks to which the derivatives clearing organization is exposed, addresses the monitoring and management of the entirety of those risks, and provides a mechanism for internal audit. The risk management framework shall be regularly reviewed and updated as necessary.

(c) Chief risk officer. A derivatives clearing organization shall have a chief risk officer who shall be responsible for implementing the risk management framework, including the procedures, policies and controls described in paragraph (b) of this section, and for making appropriate recommendations to the derivatives clearing organization’s risk management committee or board of directors, as applicable, regarding the derivatives clearing organization’s risk management functions.

(d) [Reserved]

(e) Measurement of credit exposure. A derivatives clearing organization shall:

(1) Measure its credit exposure to each clearing member and mark to market such clearing member’s open house and customer positions at least once each business day; and

(2) Monitor its credit exposure to each clearing member periodically during each business day.

(f) Limitation of exposure to potential losses from defaults. A derivatives clearing organization, through margin requirements and other risk control mechanisms, shall limit its exposure to potential losses from defaults by its clearing members to ensure that:

(1) The operations of the derivatives clearing organization would not be disrupted; and

(2) Non-defaulting clearing members would not be exposed to losses that non-defaulting clearing members cannot anticipate or control.

(g) Margin requirements—(1) General. Each model and parameter used in setting initial margin requirements shall be risk-based and reviewed on a regular basis.
(2) Methodology and coverage. (i) A derivatives clearing organization shall establish initial margin requirements that are commensurate with the risks of each product and portfolio, including any unusual characteristics of, or risks associated with, particular products or portfolios, including but not limited to jump-to-default risk or similar jump risk.

(ii) A derivatives clearing organization shall use models that generate initial margin requirements sufficient to cover the derivatives clearing organization’s potential future exposures to clearing members based on price movements in the interval between the last collection of variation margin and the time within which the derivatives clearing organization estimates that it would be able to liquidate a defaulting clearing member’s positions (liquidation time); provided, however, that a derivatives clearing organization shall use:

(A) A minimum liquidation time that is one day for futures and options;

(B) A minimum liquidation time that is one day for swaps on agricultural commodities, energy commodities, and metals;

(C) A minimum liquidation time that is five days for all other swaps; or

(D) Such longer liquidation time as is appropriate based on the specific characteristics of a particular product or portfolio; provided further that the Commission, by order, may establish shorter or longer liquidation times for particular products or portfolios.

(iii) The actual coverage of the initial margin requirements produced by such models, along with projected measures of the models’ performance, shall meet an established confidence level of at least 99 percent, based on data from an appropriate historic time period, for:

(A) Each product for which the derivatives clearing organization uses a product-based margin methodology;

(B) Each spread within or between products for which there is a defined spread margin rate;

(C) Each account held by a clearing member at the derivatives clearing organization, by house origin and by each customer origin; and

(D) Each swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to §39.15(b)(2) of this part, by beneficial owner.

(iv) A derivatives clearing organization shall determine the appropriate historic time period based on the characteristics, including volatility patterns, as applicable, of each product, spread, account, or portfolio.

(3) Independent validation. A derivatives clearing organization’s systems for generating initial margin requirements, including its theoretical models, must be reviewed and validated by a qualified and independent party, on a regular basis. Such qualified and independent parties may be independent contractors or employees of the derivatives clearing organization, but shall not be persons responsible for development or operation of the systems and models being tested.

(4) Spread and portfolio margins. (i) A derivatives clearing organization may allow reductions in initial margin requirements for related positions if the price risks with respect to such positions are significantly and reliably correlated. The price risks of different positions will only be considered to be reliably correlated if there is a theoretical basis for the correlation in addition to an exhibited statistical correlation. That theoretical basis may include, but is not limited to, the following:

(A) The products on which the positions are based are complements of, or substitutes for, each other;

(B) One product is a significant input into the other product(s);

(C) The products share a significant common input; or

(D) The prices of the products are influenced by common external factors.

(ii) A derivatives clearing organization shall regularly review its margin reductions and the correlations on which they are based.

(5) Price data. A derivatives clearing organization shall have a reliable source of timely price data in order to measure the derivatives clearing organization’s credit exposure accurately. A derivatives clearing organization shall also have written procedures and sound valuation models for addressing
circumstances where pricing data is not readily available or reliable.

(6) **Daily review.** On a daily basis, a derivatives clearing organization shall determine the adequacy of its initial margin requirements.

(7) **Back tests.** A derivatives clearing organization shall conduct back tests, as defined in §39.2 of this part, using an appropriate time period but not less than the previous 30 days, as follows:

(i) On a daily basis, a derivatives clearing organization shall conduct back tests with respect to products or swap portfolios that are experiencing significant market volatility, to test the adequacy of its initial margin requirements, as follows:

(A) For that product if the derivatives clearing organization uses a product-based margin methodology;

(B) For each spread involving that product if there is a defined spread margin rate;

(C) For each account held by a clearing member at the derivatives clearing organization that contains a significant position in that product, by house origin and by each customer origin; and

(D) For each such swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to §39.15(b)(2) of this part, by beneficial owner.

(ii) On at least a monthly basis, a derivatives clearing organization shall conduct back tests to test the adequacy of its initial margin requirements, as follows:

(A) For each product for which the derivatives clearing organization uses a product-based margin methodology;

(B) For each spread for which there is a defined spread margin rate;

(C) For each account held by a clearing member at the derivatives clearing organization, by house origin and by each customer origin; and

(D) For each swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to §39.15(b)(2) of this part, by beneficial owner.

(8) **Customer margin.** (i) **Gross margin.** A derivatives clearing organization shall collect initial margin on a gross basis for each clearing member's customer account(s) equal to the sum of the initial margin amounts that would be required by the derivatives clearing organization for each individual customer within that account if each individual customer were a clearing member.

(B) For purposes of calculating the gross initial margin requirement for each clearing member's customer account(s), to the extent not inconsistent with other Commission regulations, a derivatives clearing organization may require its clearing members to report the gross positions of each individual customer to the derivatives clearing organization, or it may permit each clearing member to report the sum of the gross positions of its customers to the derivatives clearing organization.

(C) For purposes of this paragraph (g)(8), a derivatives clearing organization may rely, and may permit its clearing members to rely, upon the sum of the gross positions reported to the clearing members by each domestic or foreign omnibus account that they carry, without obtaining identifying information identifying the positions of each individual customer underlying such omnibus accounts.

(D) A derivatives clearing organization may not, and may not permit its clearing members to, net positions of different customers against one another.

(E) A derivatives clearing organization may collect initial margin for its clearing members' house accounts on a net basis.

(ii) **Customer initial margin requirements.** A derivatives clearing organization shall require its clearing members to collect customer initial margin, as defined in §1.3 of this chapter, from their customers, for non-hedge positions, at a level that is greater than 100 percent of the derivatives clearing organization's initial margin requirements with respect to particular products or swap portfolios. The Commission may review such percentage levels.
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and require different percentage levels if the Commission deems the levels insufficient to protect the financial integrity of the clearing members or the derivatives clearing organization.

(iii) Withdrawal of customer initial margin. A derivatives clearing organization shall require its clearing members to ensure that their customers do not withdraw funds from their accounts with such clearing members unless the net liquidating value plus the margin deposits remaining in a customer’s account after such withdrawal are sufficient to meet the customer initial margin requirements with respect to all products and swap portfolios held in such customer’s account which are cleared by the derivatives clearing organization.

(9) Time deadlines. A derivatives clearing organization shall establish and enforce time deadlines for initial and variation margin payments to the derivatives clearing organization by its clearing members.

(10) Types of assets. A derivatives clearing organization shall limit the assets it accepts as initial margin to those that have minimal credit, market, and liquidity risks. A derivatives clearing organization may take into account the specific risk-reducing properties that particular assets have in a particular portfolio. A derivatives clearing organization may accept letters of credit as initial margin for futures and options on futures but shall not accept letters of credit as initial margin for swaps.

(11) Valuation. A derivatives clearing organization shall use prudent valuation practices to value assets posted as initial margin on a daily basis.

(12) Haircuts. A derivatives clearing organization shall apply appropriate reductions in value to reflect credit, market, and liquidity risks (haircuts), to the assets that it accepts in satisfaction of initial margin obligations, taking into consideration stressed market conditions, and shall evaluate the appropriateness of such haircuts on at least a quarterly basis.

(13) Concentration limits or charges. A derivatives clearing organization shall apply appropriate limitations or charges on the concentration of assets posted as initial margin, as necessary, in order to ensure its ability to liquidate such assets quickly with minimal adverse price effects, and shall evaluate the appropriateness of any such concentration limits or charges, on at least a monthly basis.

(14) Pledged assets. If a derivatives clearing organization permits its clearing members to pledge assets for initial margin while retaining such assets in accounts in the names of such clearing members, the derivatives clearing organization shall ensure that such assets are unencumbered and that such a pledge has been validly created and validly perfected in the relevant jurisdiction.

(h) Other risk control mechanisms— (1) Risk limits. (i) A derivatives clearing organization shall impose risk limits on each clearing member, by house origin and by each customer origin, in order to prevent a clearing member from carrying positions for which the risk exposure exceeds a specified threshold relative to the clearing member's and/or the derivatives clearing organization’s financial resources. The derivatives clearing organization shall have reasonable discretion in determining:

(A) The method of computing risk exposure;

(B) The applicable threshold(s); and

(C) The applicable financial resources under this provision; provided however, that the ratio of exposure to capital must remain the same across all capital levels. The Commission may review such methods, thresholds, and financial resources and require the application of different methods, thresholds, or financial resources, as appropriate.

(ii) A derivatives clearing organization may permit a clearing member to exceed the threshold(s) applied pursuant to paragraph (h)(1)(i) of this section provided that the derivatives clearing organization requires the clearing member to post additional initial margin that the derivatives clearing organization deems sufficient to appropriately eliminate excessive risk exposure at the clearing member. The Commission may review the amount of additional initial margin and require a different amount of additional initial margin, as appropriate.

(2) Large trader reports. A derivatives clearing organization shall obtain from
its clearing members or from a relevant designated contract market or swap execution facility, copies of all reports that are required to be filed with the Commission by, or on behalf of, such clearing members pursuant to parts 17 and 20 of this chapter. A derivatives clearing organization shall review such reports on a daily basis to ascertain the risk of the overall portfolio of each large trader, including futures, options, and swaps cleared by the derivatives clearing organization, which are held by all clearing members carrying accounts for each such large trader, and shall take additional actions with respect to such clearing members, when appropriate, as specified in paragraph (h)(6) of this section, in order to address any risks posed by any such large trader.

(3) Stress tests. A derivatives clearing organization shall conduct stress tests, as defined in §39.2 of this part, as follows:

(i) On a daily basis, a derivatives clearing organization shall conduct stress tests with respect to each large trader who poses significant risk to a clearing member or the derivatives clearing organization, including futures, options, and swaps cleared by the derivatives clearing organization, which are held by all clearing members carrying accounts for each such large trader. The derivatives clearing organization shall have reasonable discretion in determining which traders to test and the methodology used to conduct such stress tests. The Commission may review the selection of accounts and the methodology and require changes, as appropriate.

(ii) On at least a weekly basis, a derivatives clearing organization shall conduct stress tests with respect to each clearing member account, by house origin and by each customer origin, and each swap portfolio, including any portfolio containing futures and/or options and held in a commingled account pursuant to §39.15(b)(2) of this part, by beneficial owner, under extreme but plausible market conditions. The derivatives clearing organization shall have reasonable discretion in determining the methodology used to conduct such stress tests. The Commission may review the methodology and require changes, as appropriate.

(4) Portfolio compression. A derivatives clearing organization shall make portfolio compression exercises available, on a regular and voluntary basis, for its clearing members that clear swaps, to the extent that such exercises are appropriate for those swaps that it clears; provided, however, a derivatives clearing organization is not required to develop its own portfolio compression services, and is only required to make such portfolio compression exercises available, if applicable portfolio compression services have been developed by a third party.

(5) Clearing members' risk management policies and procedures. (i) A derivatives clearing organization shall adopt rules that:

(A) Require its clearing members to maintain current written risk management policies and procedures, which address the risks that such clearing members may pose to the derivatives clearing organization;

(B) Ensure that it has the authority to request and obtain information and documents from its clearing members regarding their risk management policies, procedures, and practices, including, but not limited to, information and documents relating to the liquidity of their financial resources and their settlement procedures; and

(C) Require its clearing members to make information and documents regarding their risk management policies, procedures, and practices available to the Commission upon the Commission’s request.

(ii) A derivatives clearing organization shall review the risk management policies, procedures, and practices of each of its clearing members, which address the risks that such clearing members may pose to the derivatives clearing organization, on a periodic basis and document such reviews.

(6) Additional authority. A derivatives clearing organization shall take additional actions with respect to particular clearing members, when appropriate, based on the application of objective and prudent risk management standards including, but not limited to:

(i) Imposing enhanced capital requirements;
§ 39.14 Settlement procedures.

(a) Definitions—(1) Settlement. For purposes of this section, “settlement” means:

(i) Payment and receipt of variation margin for futures, options, and swaps;

(ii) Payment and receipt of option premiums;

(iii) Deposit and withdrawal of initial margin for futures, options, and swaps;

(iv) All payments due in final settlement of futures, options, and swaps on the final settlement date with respect to such positions; and

(v) All other cash flows collected from or paid to each clearing member, including but not limited to, payments related to swaps such as coupon amounts.

(2) Settlement bank. For purposes of this section, “settlement bank” means a bank that maintains an account either for the derivatives clearing organization or for any of its clearing members, which is used for the purpose of any settlement described in paragraph (a)(1) above.

(b) Daily settlements. Except as otherwise provided by Commission order, a derivatives clearing organization shall effect a settlement with each clearing member at least once each business day, and shall have the authority and operational capacity to effect a settlement with each clearing member, on an intraday basis, either routinely, when thresholds specified by the derivatives clearing organization are breached, or in times of extreme market volatility.

(c) Settlement banks. A derivatives clearing organization shall employ settlement arrangements that eliminate or strictly limit its exposure to settlement bank risks, including the credit and liquidity risks arising from the use of such bank(s) to effect settlements with its clearing members, as follows:

(1) A derivatives clearing organization shall have documented criteria that must be met by any settlement bank used by the derivatives clearing organization or its clearing members, including criteria addressing the capitalization, creditworthiness, access to liquidity, operational reliability, and regulation or supervision of such bank(s).

(2) A derivatives clearing organization shall monitor each approved settlement bank on an ongoing basis to ensure that such bank continues to meet the criteria established pursuant to paragraph (c)(1) of this section.

(3) A derivatives clearing organization shall monitor the full range and concentration of its exposures to its own and its clearing members’ settlement bank(s) and assess its own and its clearing members’ potential losses and liquidity pressures in the event that the settlement bank with the largest share of settlement activity were to fail. A derivatives clearing organization shall take any one or more of the following actions, to the extent that any such action or actions are reasonably necessary in order to eliminate or strictly limit such exposures:

(i) Maintain settlement accounts at one or more additional settlement banks; and/or

(ii) Approve one or more additional settlement banks that its clearing members could choose to use; and/or

(iii) Impose concentration limits with respect to one or more of its own or its clearing members’ settlement banks; and/or

(iv) Take any other appropriate actions.

(d) Settlement finality. A derivatives clearing organization shall ensure that settlements are final when effected by ensuring that it has entered into legal agreements that state that settlement fund transfers are irrevocable and unconditional no later than when the derivatives clearing organization’s accounts are debited or credited; provided, however, a derivatives clearing organization’s legal agreements with its settlement banks may provide for the correction of errors. A derivatives clearing organization’s legal agreements with its settlement banks shall state clearly when settlement fund
transfers will occur and a derivatives clearing organization shall routinely confirm that its settlement banks are effecting fund transfers as and when required by such legal agreements.

(e) Recordkeeping. A derivatives clearing organization shall maintain an accurate record of the flow of funds associated with each settlement.

(f) Netting arrangements. A derivatives clearing organization shall possess the ability to comply with each term and condition of any permitted netting or offset arrangement with any other clearing organization.

(g) Physical delivery. With respect to products that are settled by physical transfers of the underlying instruments or commodities, a derivatives clearing organization shall:

(1) Establish rules that clearly state each obligation that the derivatives clearing organization has assumed with respect to physical deliveries, including whether it has an obligation to make or receive delivery of a physical instrument or commodity, or whether it indemnifies clearing members for losses incurred in the delivery process; and

(2) Ensure that the risks of each such obligation are identified and managed.

\[\text{§ 39.15 Treatment of funds.}\]

(a) Required standards and procedures. A derivatives clearing organization shall establish standards and procedures that are designed to protect and ensure the safety of funds and assets belonging to clearing members and their customers.

(b) Segregation of funds and assets—(1) Segregation. A derivatives clearing organization shall comply with the applicable segregation requirements of section 4d of the Act and Commission regulations thereunder, or any other applicable Commission regulation or order requiring that customer funds and assets be segregated, set aside, or held in a separate account.

(2) Commingling of futures, options, and swaps—(i) Cleared swaps account. In order for a derivatives clearing organization and its clearing members to commingle customer positions in futures, options, and swaps, and any money, securities, or property received to margin, guarantee or secure such positions, in an account subject to the requirements of section 4d(f) of the Act, the derivatives clearing organization shall file rules for Commission approval pursuant to §40.5 of this chapter. Such rule submission shall include, at a minimum, the following:

(A) Identification of the futures, options, and swaps that would be commingled, including product specifications or the criteria that would be used to define eligible futures, options, and swaps;

(B) Analysis of the risk characteristics of the eligible products;

(C) Identification of whether the swaps would be executed bilaterally and/or executed on a designated contract market and/or a swap execution facility;

(D) Analysis of the liquidity of the respective markets for the futures, options, and swaps that would be commingled, the ability of clearing members and the derivatives clearing organization to offset or mitigate the risk of such futures, options, and swaps in a timely manner, without compromising the financial integrity of the account, and, as appropriate, proposed means for addressing insufficient liquidity;

(E) Analysis of the availability of reliable prices for each of the eligible products;

(F) A description of the financial, operational, and managerial standards or requirements for clearing members that would be permitted to commingle such futures, options, and swaps;

(G) A description of the systems and procedures that would be used by the derivatives clearing organization to oversee such clearing members’ risk management of any such commingled positions;

(H) A description of the financial resources of the derivatives clearing organization, including the composition and availability of a guaranty fund with respect to the futures, options, and swaps that would be commingled;

(I) A description and analysis of the margin methodology that would be applied to the commingled futures, options, and swaps, including any margin reduction applied to correlated positions, and any applicable margin rules with respect to both clearing members and customers;
§ 39.16 Default rules and procedures.

(a) General. A derivatives clearing organization shall adopt rules and procedures designed to allow for the efficient, fair, and safe management of events during which clearing members become insolvent or default on the obligations of such clearing members to the derivatives clearing organization.

(b) Default management plan. A derivatives clearing organization shall maintain a current written default management plan that delineates the roles and responsibilities of its board of directors, its risk management committee, any other committee that a derivatives clearing organization may have that has responsibilities for default management, and the derivatives clearing organization’s management, in addressing a default, including any related funds at the same time from the carrying clearing member of the derivatives clearing organization to another clearing member of the derivatives clearing organization, without requiring the close-out and re-booking of the positions prior to the requested transfer, subject to the following conditions:

1. The customer has instructed the carrying clearing member to make the transfer;
2. The customer is not currently in default to the carrying clearing member;
3. The transferred positions will have appropriate margin at the receiving clearing member;
4. Any remaining positions will have appropriate margin at the carrying clearing member; and
5. The receiving clearing member has consented to the transfer.

(e) Permitted investments. Funds and assets belonging to clearing members and their customers that are invested by a derivatives clearing organization shall be held in instruments with minimal credit, market, and liquidity risks. Any investment of customer funds or assets by a derivatives clearing organization shall comply with §1.25 of this chapter, as if all such funds and assets comprise customer funds subject to segregation pursuant to section 4d(a) of the Act and Commission regulations thereunder.
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§ 39.17

necessary coordination with, or notification of, other entities and regulators. Such plan shall address any differences in procedures with respect to highly liquid products and less liquid products. A derivatives clearing organization shall conduct and document a test of its default management plan at least on an annual basis.

(c) Default procedures. (1) A derivatives clearing organization shall adopt procedures that would permit the derivatives clearing organization to take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a default on the obligations of a clearing member to the derivatives clearing organization.

(2) A derivatives clearing organization shall adopt rules that set forth its default procedures, including:

(i) The derivatives clearing organization’s definition of a default;

(ii) The actions that the derivatives clearing organization may take upon a default, which shall include the prompt transfer, liquidation, or hedging of the customer or house positions of the defaulting clearing member, as applicable, and which may include, in the discretion of the derivatives clearing organization, the auctioning or allocation of such positions to other clearing members;

(iii) Any obligations that the derivatives clearing organization imposes on its clearing members to participate in auctions, or to accept allocations, of the customer or house positions of the defaulting clearing member, provided that:

(A) The derivatives clearing organization shall permit a clearing member to outsource to a qualified third party, authority to act in the clearing member’s place in any auction, subject to appropriate safeguards imposed by the derivatives clearing organization;

(B) The derivatives clearing organization shall permit a clearing member to outsource to a qualified third party, authority to act in the clearing member’s place in any allocations, subject to appropriate safeguards imposed by the derivatives clearing organization; and

(C) Any allocation shall be proportional to the size of the participating or accepting clearing member’s positions in the same product class at the derivatives clearing organization;

(iv) The sequence in which the funds and assets of the defaulting clearing member and its customers and the financial resources maintained by the derivatives clearing organization would be applied in the event of a default;

(v) A provision that the funds and assets of a defaulting clearing member’s customers shall not be applied to cover losses with respect to a house default;

(vi) A provision that the excess house funds and assets of a defaulting clearing member shall be applied to cover losses with respect to a customer default, if the relevant customer funds and assets are insufficient to cover the shortfall; and

(3) A derivatives clearing organization shall make its default rules publicly available as provided in §39.21 of this part.

(d) Insolvency of a clearing member.

(1) A derivatives clearing organization shall adopt rules that require a clearing member to provide prompt notice to the derivatives clearing organization if it becomes the subject of a bankruptcy petition, receivership proceeding, or the equivalent;

(2) No later than upon receipt of such notice, a derivatives clearing organization shall review the continuing eligibility of the clearing member for clearing membership; and

(3) No later than upon receipt of such notice, a derivatives clearing organization shall take any appropriate action, in its discretion, with respect to such clearing member or its house or customer positions, including but not limited to liquidation or transfer of positions, suspension, or revocation of clearing membership.

§ 39.17 Rule enforcement.

(a) General. Each derivatives clearing organization shall:

(1) Maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with the rules of the derivatives clearing organization and the resolution of disputes;

(2) Have the authority and ability to discipline, limit, suspend, or terminate
§ 39.18 System safeguards.

(a) Definitions. For purposes of this section:

Recovery time objective means the time period within which an entity should be able to achieve recovery and resumption of clearing and settlement of existing and new products, after those capabilities become temporarily inoperable for any reason up to or including a wide-scale disruption.

Relevant area means the metropolitan or other geographic area within which a derivatives clearing organization has physical infrastructure or personnel necessary for it to conduct activities necessary to the clearing and settlement of existing and new products. The term “relevant area” also includes communities economically integrated with, adjacent to, or within normal commuting distance of that metropolitan or other geographic area.

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

(b) General—(1) Program of risk analysis. Each derivatives clearing organization shall establish and maintain a program of risk analysis and oversight with respect to its operations and automated systems to identify and minimize sources of operational risk through:

(i) The development of appropriate controls and procedures; and

(ii) The development of automated systems that are reliable, secure, and have adequate scalable capacity.

(2) Resources. Each derivatives clearing organization shall establish and maintain resources that allow for the fulfillment of each obligation and responsibility of the derivatives clearing organization in light of the risks identified pursuant to paragraph (b)(1) of this section.

(3) Verification of adequacy. Each derivatives clearing organization shall periodically verify that resources described in paragraph (b)(2) of this section are adequate to ensure daily processing, clearing, and settlement.

(c) Elements of program. A derivatives clearing organization’s program of risk analysis and oversight with respect to its operations and automated systems, as described in paragraph (b) of this section, shall address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity and disaster recovery planning and resources;

(3) Capacity and performance planning;

(4) Systems operations;

(5) Systems development and quality assurance; and

(6) Physical security and environmental controls.

(d) Standards for program. In addressing the categories of risk analysis and oversight required under paragraph (c) of this section, a derivatives clearing organization shall follow generally accepted standards and industry best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(e) Business continuity and disaster recovery—(1) Plan and resources. A derivatives clearing organization shall maintain a business continuity and disaster recovery plan, emergency procedures, and physical, technological, and personnel resources sufficient to enable the timely recovery and resumption of operations and the fulfillment of each...
obligation and responsibility of the derivatives clearing organization following any disruption of its operations.

(2) Responsibilities and obligations. The responsibilities and obligations described in paragraph (e)(1) of this section shall include, without limitation, daily processing, clearing, and settlement of transactions cleared.

(3) Recovery time objective. The derivatives clearing organization’s business continuity and disaster recovery plan described in paragraph (e)(1) of this section, shall have the objective of, and the physical, technological, and personnel resources described therein shall be sufficient to, enable the derivatives clearing organization to resume daily processing, clearing, and settlement no later than the next business day following the disruption.

(f) Location of resources; outsourcing. A derivatives clearing organization may maintain the resources required under paragraph (e)(1) of this section either:

(1) Using its own employees as personnel, and property that it owns, licenses, or leases (own resources); or

(2) Through written contractual arrangements with another derivatives clearing organization or other service provider (outsourcing).

(i) Retention of responsibility. A derivatives clearing organization that enters into such a contractual arrangement shall retain complete liability for any failure to meet the responsibilities specified in paragraph (e) of this section, although it is free to seek indemnification from the service provider. The outsourcing derivatives clearing organization must employ personnel with the expertise necessary to enable it to supervise the service provider’s delivery of the services.

(ii) Testing. The testing referred to in paragraph (j) of this section shall include all of the derivatives clearing organization’s own and outsourced resources, and shall verify that all such resources will work effectively together.

(g) Notice of exceptional events. A derivatives clearing organization shall notify staff of the Division of Clearing and Risk promptly of:

(1) Any hardware or software malfunction, cyber security incident, or targeted threat that materially impairs, or creates a significant likelihood of material impairment, of automated system operation, reliability, security, or capacity; or

(2) Any activation of the derivatives clearing organization’s business continuity and disaster recovery plan.

(h) Notice of planned changes. A derivatives clearing organization shall give staff of the Division of Clearing and Risk timely advance notice of all:

(1) Planned changes to automated systems that are likely to have a significant impact on the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the derivatives clearing organization’s program of risk analysis and oversight.

(i) Recordkeeping. A derivatives clearing organization shall maintain, and provide to Commission staff promptly upon request, pursuant to § 1.31 of this chapter, current copies of its business continuity plan and other emergency procedures, its assessments of its operational risks, and records of testing protocols and results, and shall provide any other documents requested by Commission staff for the purpose of maintaining a current profile of the derivatives clearing organization’s automated systems.

(j) Testing. (1) Purpose of testing. A derivatives clearing organization shall conduct regular, periodic, and objective testing and review of:

(i) Its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity; and

(ii) Its business continuity and disaster recovery capabilities, using testing protocols adequate to ensure that the derivatives clearing organization’s backup resources are sufficient to meet the requirements of paragraph (e) of this section.

(2) Conduct of testing. Testing shall be conducted by qualified, independent professionals. Such qualified, independent professionals may be independent contractors or employees of the derivatives clearing organization, but shall not be persons responsible for development or operation of the systems or capabilities being tested.

(3) Reporting and review. Reports setting forth the protocols for, and results of, such tests shall be communicated
§ 39.19 Reporting.

(a) General. Each derivatives clearing organization shall provide to the Commission the information specified in this section and any other information that the Commission deems necessary to conduct its oversight of a derivatives clearing organization.

(b) Submission of reports. (1) Unless otherwise specified by the Commission or its designee, each derivatives clearing organization shall submit the information required by this section to the Commission electronically and in a format and manner specified by the Commission.

(2) Time zones. Unless otherwise specified by the Commission or its designee, any stated time in this section is Central time for information concerning derivatives clearing organizations located in that time zone, and Eastern time for information concerning all other derivatives clearing organizations.

(c) Reporting requirements. Each registered derivatives clearing organization shall provide to the Commission or other person as may be required or permitted by this paragraph the information specified below:

(1) Daily reporting. (i) A report containing the information specified by this paragraph (c)(1), which shall be compiled as of the end of each trading day and shall be submitted to the Commission by 10 a.m. on the following business day:

(A) Initial margin requirements and initial margin on deposit for each clearing member, by house origin and by each customer origin;

(B) Daily variation margin, separately listing the mark-to-market amount collected from or paid to each clearing member, by house origin and by each customer origin;

(C) All other daily cash flows relating to clearing and settlement including, but not limited to, option premiums and payments related to swaps such as coupon amounts, collected from or paid to each clearing member, by house origin and by each customer origin;

(D) End-of-day positions for each clearing member, by house origin and by each customer origin;

(ii) The report shall contain the information required by paragraph (c)(1)(i) of this section for:

(A) All futures positions, and options positions, as applicable;

(B) All swaps positions; and

(C) All securities positions that are held in a customer account subject to section 4d of the Act or are subject to a cross-margining agreement.

(2) Quarterly reporting. A report of the derivatives clearing organization’s financial resources as required by § 39.11(f) of this part; provided that, additional reports may be required by paragraph (c)(4)(i) of this section or § 39.11(f) of this part.

(3) Annual reporting—(i) Annual report of chief compliance officer. The annual report of the chief compliance officer required by § 39.10 of this part.

(ii) Audited financial statements. Audited year-end financial statements of the derivatives clearing organization or, if there are no financial statements available for the derivatives clearing organization itself, the consolidated
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audited year-end financial statements of the derivatives clearing organization’s parent company.

(iii) [Reserved]

(iv) Time of report. The reports required by this paragraph (c)(3) shall be submitted concurrently to the Commission not more than 90 days after the end of the derivatives clearing organization’s fiscal year; provided that, a derivatives clearing organization may request from the Commission an extension of time to submit a report, provided the derivatives clearing organization’s failure to submit the report in a timely manner could not be avoided without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission.

(4) Event-specific reporting—

(i) Decrease in financial resources. If there is a decrease of 25 percent in the total value of the financial resources available to satisfy the requirements under §39.11(a)(1) of this part, either from the last quarterly report submitted under §39.11(f) of this part or from the value as of the close of the previous business day, the derivatives clearing organization shall report such decrease to the Commission no later than one business day following the day the 25 percent threshold was reached. The report shall include:

(A) The total value of the financial resources:

(1) As of the close of business the day the 25 percent threshold was reached, and

(2) If reporting a decrease in value from the previous business day, the total value of the financial resources immediately prior to the 25 percent decline;

(B) A breakdown of the value of each financial resource reported in each of paragraphs (c)(4)(i)(A)(1) and (2) of this section, calculated in accordance with the requirements of §39.11(d) of this part, including the value of each individual clearing member’s guaranty fund deposit if the derivatives clearing organization reports guaranty fund deposits as a financial resource; and

(C) A detailed explanation for the decrease.

(ii) Decrease in ownership equity. No later than two business days prior to an event which the derivatives clearing organization knows or reasonably should know will cause a decrease of 20 percent or more in ownership equity from the last reported ownership equity balance as reported on a quarterly or audited financial statement required to be submitted by paragraph (c)(2) or (c)(3)(ii), respectively, of this section; but in any event no later than two business days after such decrease in ownership equity for events that caused the decrease about which the derivatives clearing organization did not know and reasonably could not have known prior to the event. The report shall include:

(A) Pro forma financial statements reflecting the derivatives clearing organization's estimated future financial condition following the anticipated decrease for reports submitted prior to the anticipated decrease and current financial statements for reports submitted after such a decrease; and

(B) Details describing the reason for the anticipated decrease or decrease in the balance.

(iii) Six-month liquid asset requirement. Immediate notice when a derivatives clearing organization knows or reasonably should know of a deficit in the six-month liquid asset requirement of §39.11(e)(2).

(iv) Change in current assets. No later than two business days after current liabilities exceed current assets; the notice shall include a balance sheet that reflects the derivatives clearing organization’s current assets and current liabilities and an explanation as to the reason for the negative balance.

(v) Request to clearing member to reduce its positions. Immediate notice, of a derivatives clearing organization’s request to a clearing member to reduce its positions because the derivatives clearing organization has determined that the clearing member has exceeded its exposure limit, has failed to meet an initial or variation margin call, or has failed to fulfill any other financial obligation to the derivatives clearing organization. The notice shall include:

(A) The name of the clearing member;

(B) The time the clearing member was contacted;
(C) The number of positions by which the derivatives clearing organization requested the reduction;
(D) All products that are the subject of the request; and
(E) The reason for the request.

(vi) Determination to transfer or liquidate positions. Immediate notice, of a determination that any position a derivatives clearing organization carries for one of its clearing members must be liquidated immediately or transferred immediately, or that the trading of any account of a clearing member shall be only for the purpose of liquidation because that clearing member has failed to meet an initial or variation margin call or has failed to fulfill any other financial obligation to the derivatives clearing organization. The notice shall include:
(A) The name of the clearing member;
(B) The time the clearing member was contacted;
(C) The products that are subject to the determination;
(D) The number of positions that are subject to the determination; and
(E) The reason for the determination.

(vii) Default of a clearing member. Immediate notice, upon the default of a clearing member. An event of default shall be determined in accordance with the rules of the derivatives clearing organization. The notice of default shall include:
(A) The name of the clearing member;
(B) The products the clearing member defaulted upon;
(C) The number of positions the clearing member defaulted upon; and
(D) The amount of the financial obligation.

(viii) Change in ownership or corporate or organizational structure.—(A) Reporting requirement. Any anticipated change in the ownership or corporate or organizational structure of the derivatives clearing organization or its parent(s) that would:
(I) Result in at least a 10 percent change of ownership of the derivatives clearing organization,
(2) Create a new subsidiary or eliminate a current subsidiary of the derivatives clearing organization, or
(3) Result in the transfer of all or substantially all of the assets of the derivatives clearing organization, including its registration as a derivatives clearing organization to another legal entity.
(B) Required information. The report shall include: a chart outlining the new ownership or corporate or organizational structure; a brief description of the purpose and impact of the change; and any relevant agreements effecting the change and corporate documents such as articles of incorporation and bylaws. With respect to a corporate change for which a derivatives clearing organization submits a request for approval to transfer its derivatives clearing organization registration and open interest under §39.3(f) of this part, the informational requirements of this paragraph (c)(4)(viii)(B) shall be satisfied by the derivatives clearing organization’s compliance with §39.3(f)(3).
(C) Time of report. The report shall be submitted to the Commission no later than three months prior to the anticipated change; provided that the derivatives clearing organization may report the anticipated change to the Commission later than three months prior to the anticipated change if the derivatives clearing organization does not know and reasonably could not have known of the anticipated change three months prior to the anticipated change. In such event, the derivatives clearing organization shall immediately report such change to the Commission as soon as it knows of such change.
(D) Confirmation of change report. The derivatives clearing organization shall report to the Commission the consummation of the change no later than two business days following the effective date of the change.
(ix) Change in key personnel. No later than two business days following the departure, or addition of persons who are key personnel as defined in §39.1(b), a report that includes, as applicable, the name of the person who will assume the duties of the position on a temporary basis until a permanent replacement fills the position.
(x) Change in credit facility funding arrangement. No later than one business
day after a derivatives clearing organization changes an existing credit facility funding arrangement it may have in place, or is notified that such arrangement has changed, including but not limited to a change in lender, change in the size of the facility, change in expiration date, or any other material changes or conditions.

(x) Sanctions. Notice of action taken, no later than two business days after the derivatives clearing organization imposes sanctions against a clearing member.

(xii) Financial condition and events. Immediate notice after the derivatives clearing organization knows or reasonably should have known of:

(A) The institution of any legal proceedings which may have a material adverse financial impact on the derivatives clearing organization;

(B) Any event, circumstance or situation that materially impedes the derivatives clearing organization’s ability to comply with this part and is not otherwise required to be reported under this section; or

(C) A material adverse change in the financial condition of any clearing member that is not otherwise required to be reported under this section.

(xvi) System safeguards. A report of:

(A) Exceptional events as required by §39.18(g) of this part; or

(B) Planned changes as required by §39.18(h) of this part.

(5) Requested reporting. (i) Upon request by the Commission, a derivatives clearing organization shall file with the Commission a written demonstration, containing such supporting data, information and documents, that the derivatives clearing organization is in compliance with one or more core principles and relevant provisions of this part, in the format and manner specified, and within the time provided, by the Commission in the request.

(ii) Upon request by the Commission, a derivatives clearing organization shall file with the Commission a written demonstration, containing such supporting data, information and documents, that the derivatives clearing organization is in compliance with one or more core principles and relevant provisions of this part, in the format and manner specified, and within the time provided, by the Commission in the request.

(iii) Upon request by the Commission, a derivatives clearing organization shall file with the Commission, for each customer origin of each clearing member, the end-of-day gross positions of each beneficial owner, in the format and manner specified, and within the time provided, by the Commission in the request. Nothing in this paragraph shall affect the obligation of a derivatives clearing organization to comply with the daily reporting requirements of paragraph (c)(1) of this section.

§ 39.20 Recordkeeping.

(a) Requirement to maintain information. Each derivatives clearing organization shall maintain records of all activities related to its business as a derivatives clearing organization. Such records shall include, but are not limited to, records of:

(1) All cleared transactions, including swaps;

(2) All information necessary to record allocation of bunched orders for cleared swaps;

(3) All information required to be created, generated, or reported under this part 39, including but not limited to the results of and methodology used for all tests, reviews, and calculations in connection with setting and evaluating margin levels, determining the value and adequacy of financial resources, and establishing settlement prices;

(4) All rules and procedures required to be submitted pursuant to this part 39 and part 40 of this chapter, including all proposed changes in rules, procedures or operations subject to §40.10 of this chapter; and

(5) Any data or documentation required by the Commission or by the derivatives clearing organization to be
§ 39.21 Public information.

(a) General. Each derivatives clearing organization shall provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the derivatives clearing organization. In furtherance of this objective, each derivatives clearing organization shall have clear and comprehensive rules and procedures.

(b) Availability of information. Each derivatives clearing organization shall make information concerning the rules and the operating and default procedures governing the clearing and settlement systems of the derivatives clearing organization available to market participants.

(c) Public disclosure. Each derivatives clearing organization shall disclose publicly and to the Commission information concerning:

1. The terms and conditions of each contract, agreement, and transaction cleared and settled by the derivatives clearing organization;
2. Each clearing and other fee that the derivatives clearing organization charges its clearing members;
3. The margin-setting methodology;
4. The size and composition of the financial resource package available in the event of a clearing member default;
5. Daily settlement prices, volume, and open interest for each contract, agreement, or transaction cleared or settled by the derivatives clearing organization;
6. The derivatives clearing organization’s rules and procedures for defaults in accordance with §39.16 of this part; and
7. Any other matter that is relevant to participation in the clearing and settlement activities of the derivatives clearing organization.

(d) Publication of information. The derivatives clearing organization shall make its rulebook, a list of all current clearing members, and the information listed in paragraph (c) of this section readily available to the general public, in a timely manner, by posting such information on the derivatives clearing organization’s Web site, unless otherwise permitted by the Commission. The information required in paragraph (c)(5) of this section shall be made available to the public no later than the business day following the day to which the information pertains.

§ 39.22 Information sharing.

Each derivatives clearing organization shall enter into, and abide by the terms of, each appropriate and applicable domestic and international information-sharing agreement, and shall use relevant information obtained from each such agreement in carrying out the risk management program of the derivatives clearing organization.

§ 39.23 Antitrust considerations.

Unless necessary or appropriate to achieve the purposes of the Act, a derivatives clearing organization shall not adopt any rule or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden.

§ 39.24–39.26 [Reserved]

§ 39.27 Legal risk considerations.

(a) Legal authorization. A derivatives clearing organization shall be duly organized, legally authorized to conduct business, and remain in good standing at all times in the relevant jurisdictions. If the derivatives clearing organization provides clearing services outside the United States, it shall be duly organized to conduct business and remain in good standing at all times in
the relevant jurisdictions, and be authorized by the appropriate foreign licensing authority.

(b) Legal framework. A derivatives clearing organization shall operate pursuant to a well-founded, transparent, and enforceable legal framework that addresses each aspect of the activities of the derivatives clearing organization. As applicable, the framework shall provide for:

(1) The derivatives clearing organization to act as a counterparty, including novation;

(2) Netting arrangements;

(3) The derivatives clearing organization’s interest in collateral;

(4) The steps that a derivatives clearing organization would take to address a default of a clearing member, including but not limited to, the unimpeded ability to liquidate collateral and close out or transfer positions in a timely manner;

(5) Finality of settlement and funds transfers that are irrevocable and unconditional when effected (no later than when a derivatives clearing organization’s accounts are debited and credited); and

(6) Other significant aspects of the derivatives clearing organization’s operations, risk management procedures, and related requirements.

(c) Conflict of laws. If a derivatives clearing organization provides clearing services outside the United States:

(1) The derivatives clearing organization shall identify and address any material conflict of law issues. The derivatives clearing organization’s contractual agreements shall specify a choice of law.

(2) The derivatives clearing organization shall be able to demonstrate the enforceability of its choice of law in relevant jurisdictions and that its rules, procedures, and contracts are enforceable in all relevant jurisdictions.
APPENDIX TO PART 39—FORM DCO DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATIONS

OMB No. 3038-0076

COMMODITY FUTURES TRADING COMMISSION

FORM DCO
DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATION

GENERAL INSTRUCTIONS

Intentional misstatements or omissions of fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) or grounds for disqualification from registration.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form DCO have the same meaning as in the Commodity Exchange Act ("Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder. All references to Commission regulations are found at 17 CFR Ch. 1.

For the purposes of this Form DCO, the term "Applicant" shall include any applicant for registration as a derivatives clearing organization or any registered derivatives clearing organization that is applying for an amendment to its derivatives clearing organization registration.

GENERAL INSTRUCTIONS

1. This Form DCO, which includes a Cover Sheet and required Exhibits (together, “Form DCO” or “application”), is to be filed with the Commission by all applicants for registration as a derivatives clearing organization, including applicants when amending a pending application, and by any registered derivatives clearing organization applying for an amendment to its registration, pursuant to Section 5b of the Act and the Commission’s regulations thereunder. Upon the filing of an application for registration, an amendment to an application, or a registration amendment in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and comments concerning such application. No application for registration or registration amendment will be effective unless the Commission, by order, grants such registration or amended registration.

2. Individuals’ names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. With respect to the executing signature, it must be manually signed by a duly authorized representative of the Applicant as follows: If the Form DCO is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it must be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company’s behalf; if filed by a partnership, it must be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of such organization or association by the managing agent, i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If this Form DCO is being filed as an application for registration, all applicable items must be answered in full. If any item or Exhibit is inapplicable, this response must be affirmatively indicated by the designation "none," "not applicable," or "N/A," as appropriate.

5. Under Section 5b of the Act and the Commission’s regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form DCO from any Applicant seeking registration as a derivatives clearing organization and from any registered derivatives clearing organization. Disclosure by the
Applicant of the information specified in this Form DCO is mandatory prior to the start of the processing of an application for, or amendment to, registration as a derivatives clearing organization. The information provided in this Form DCO will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant.

The Commission may determine that additional information is required from the Applicant in order to process its application. An Applicant is therefore encouraged to supplement this Form DCO with any additional information that may be significant to its operation as a derivatives clearing organization and to the Commission's review of its application. A Form DCO which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form DCO, however, shall not constitute a finding that the Form DCO has been filed as required or that the information submitted is true, current or complete.

6. Except as provided in 17 CFR 39.3(a)(5), in cases where the Applicant submits a request for confidential treatment with the Secretary of the Commission pursuant to the Freedom of Information Act and 17 CFR 145.9, information supplied in this application will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. 17 CFR 39.3(a)(4) requires an Applicant to promptly amend its application if it discovers a material omission or error in the application, or if there is a material change in the information contained in the application, including any supplement or amendment thereto.

2. Applicants, when filing this Form DCO for purposes of amending an application, must re-file a Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable.

REGISTRATION AMENDMENTS

1. Applicants, when filing this Form DCO for purposes of requesting an amendment to an existing registration, are only required to submit Exhibits and updated information that are relevant to the requested amendment and are necessary to demonstrate compliance with the core principles affected by the requested amendment.

2. Applicants must file a Cover Sheet, including an executing signature, and attach thereto Exhibits or other materials, as applicable.

WHERE TO FILE

This Form DCO must be filed electronically with the Secretary of the Commission in a format specified by the Secretary of the Commission.
COMMODITY FUTURES TRADING COMMISSION

FORM DCO
DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATION

COVER SHEET

<table>
<thead>
<tr>
<th>Exact name of Applicant as specified in charter</th>
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<table>
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<tr>
<th>Address of principal executive offices</th>
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- If this is an **APPLICATION** for registration, complete in full and check here.
- If this is an **AMENDMENT** to an application, list below all items that are being amended and check here.
- If this is an **APPLICATION FOR AN AMENDMENT** to an existing registration, list below all items to be amended and check here.

<table>
<thead>
<tr>
<th>GENERAL INFORMATION</th>
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- Name under which business is or will be conducted, if different than name specified above (include acronyms, if any):

<table>
<thead>
<tr>
<th>If name of derivatives clearing organization is being amended, state previous derivatives clearing organization name:</th>
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<th>Additional contact information:</th>
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<tr>
<th>Website URL</th>
<th>Main Phone Number</th>
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| List of principal office(s) and address(es) where derivatives clearing organization activities are/will be conducted: |

<table>
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<th>Office</th>
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BUSINESS ORGANIZATION

If Applicant is a successor to a previously registered derivatives clearing organization, please complete the following:

a. Date of succession ________________

b. Full name and address of predecessor registrant

Name

Street Address

City State Country Zip Code

Applicant is a:

☐ Corporation

☐ Partnership (specify whether general or limited)

☐ Limited Liability Company

☐ Other form of organization (specify) ___________________ 

Date of formation: ________________________

Jurisdiction of organization:

List all other jurisdictions in which Applicant is qualified to do business (including non-US jurisdictions):

List all other regulatory licenses or registrations of Applicant (or exemptions from any licensing requirement) including with non-US regulators:

FEIN or other Tax ID#: __________________

Fiscal Year End: ________________________
ADDITIONAL CONTACT INFORMATION

- Provide contact information specifying name, title, phone numbers, mailing address and e-mail address for the following individuals:

  a. The primary contact for questions and correspondence regarding the application

     | Name and Title | Office Phone Number | Mobile Phone Number | Mailing address | E-mail Address |
     |----------------|---------------------|---------------------|-----------------|---------------|
  
  b. The individual responsible for handling questions regarding the Applicant’s financial statements

     | Name and Title | Office Phone Number | Mobile Phone Number | Mailing address | E-mail Address |
     |----------------|---------------------|---------------------|-----------------|---------------|
  
  c. The individual responsible for serving as the Chief Risk Officer of the Applicant pursuant to § 39.13 of the Commission’s regulations

     | Name and Title | Office Phone Number | Mobile Phone Number | Mailing address | E-mail Address |
     |----------------|---------------------|---------------------|-----------------|---------------|
  
  d. The individual responsible for serving as the Chief Compliance Officer of the Applicant pursuant to § 39.10 of the Commission’s regulations

     | Name and Title | Office Phone Number | Mobile Phone Number | Mailing address | E-mail Address |
     |----------------|---------------------|---------------------|-----------------|---------------|
The individual responsible for serving as the chief legal officer of the Applicant

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<th>Name and Title</th>
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<td>Mailing address</td>
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- **Outside Service Providers:** Provide contact information specifying name, title, phone number, mailing address and e-mail address for any outside service provider retained by the Applicant as follows:
  
a. **Certified Public Accountant**

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b. **Legal Counsel**

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c. **Records Storage or Management**

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d. **Business Continuity/Disaster Recovery**

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Pt. 39, App.

17 CFR Ch. I (4–1–13 Edition)

e. Professional consultants providing services related to this application.

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<th>Name and Title</th>
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<th>Mobile Phone Number</th>
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- Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

<table>
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<tr>
<th>Print Name and Title</th>
<th>Number and Street</th>
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<tbody>
<tr>
<td>City</td>
<td>State</td>
<td>Zip Code</td>
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**SIGNATURE/REPRESENTATION**

- Applicant has duly caused this application to be signed on its behalf by its duly authorized representative as of the ______ day of ______, 20____. Applicant and the undersigned each represent hereby that, to the best of their knowledge, all information contained herein is true, current and complete in all material respects. It is understood that all required items and Exhibits are considered integral parts of this Form DCO. Applicant and the undersigned each further represent that, if this submission is an application for an amendment to an existing registration, Applicant has submitted those items and Exhibits that are relevant to the requested amendment and as necessary to demonstrate Applicant’s compliance with the core principles affected by the requested amendment and that such items and Exhibits are, to the best of their knowledge, true, current, and complete in all material respects.

| Name of Applicant | |
| By: | Manual Signature of Duly Authorized Person |
| Print Name and Title of Signatory |
EXHIBIT INSTRUCTIONS

1. The following Exhibits must be filed with the Commission by each Applicant seeking registration as a derivatives clearing organization or applying for an amendment to an existing derivatives clearing organization registration, pursuant to Section 5b of the Act and the Commission’s regulations thereunder.

2. The application must include a Table of Contents listing each Exhibit required by this Form DCO and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify “none,” “not applicable,” or “N/A,” as appropriate.

3. The Exhibits must be labeled as specified in this Form DCO. If any Exhibit requires information that is related to, or may be duplicative of, information required to be included in another Exhibit, Applicant may summarize such information and provide a cross-reference to the Exhibit that contains the required information.

4. If the information required in an Exhibit involves computerized programs or systems, Applicant must submit descriptions of system test procedures, tests conducted, or test results in sufficient detail to demonstrate the Applicant’s ability to comply with the core principles specified in Section 5b of the Act and the Commission’s regulations thereunder (the “Core Principles”). With respect to each system test, Applicant must identify the methodology used and provide the computer software, programs, and data necessary to enable the Commission to duplicate each system test as it relates to the applicable Core Principle.

5. If Applicant seeks confidential treatment of any Exhibit or a portion of any Exhibit, Applicant must mark such Exhibit with a prominent stamp, typed legend, or other suitable form of notice on each page or segregable portion of each page stating “Confidential Treatment Requested by [Applicant].” If such marking is impractical under the circumstances, a cover sheet prominently marked “Confidential Treatment Requested by [Applicant]” should be provided for each group of records submitted for which confidential treatment is requested. Each of the records transmitted in this matter shall be individually marked with an identifying number and code so that they are separately identifiable. Applicant must also file a confidentiality request with the Secretary of the Commission in accordance with 17 CFR 145.9.
DESCRIPTION OF EXHIBITS

EXHIBIT A – GENERAL INFORMATION/COMPLIANCE

- Attach as Exhibit A-1, a regulatory compliance chart setting forth each Core Principle and providing citations to the Applicant’s relevant rules, policies, and procedures that address each Core Principle, and a brief summary of the manner in which Applicant will comply with each Core Principle.

- Attach as Exhibit A-2, a current copy of Applicant’s rulebook. The rulebook must consist of all the rules necessary to carry out Applicant’s role as a derivatives clearing organization. Applicant must certify that its rules constitute a binding agreement between Applicant and its clearing members and, in addition to the separate clearing member agreements, establish rights and obligations between Applicant and its clearing members.

- Attach as Exhibit A-3, a narrative summary of Applicant’s proposed clearing activities including (i) the anticipated start date of clearing products (or, if Applicant is already clearing products, the anticipated start date of activities for which Applicant is seeking an amendment to its registration) and (ii) a description of the scope of Applicant’s proposed clearing activities (e.g., clearing for a designated contract market; clearing for a swap execution facility; clearing bilaterally executed products).

- Attach as Exhibit A-4, a detailed business plan setting forth, at a minimum, the nature of and rationale for Applicant’s activities as a derivatives clearing organization, the context in which it is beginning or expanding its activities, and the nature, terms, and conditions of the products it will clear.

- Attach as Exhibit A-5, a list of the names of any person (i) who owns 5% or more of Applicant’s stock or other ownership or equity interests; or (ii) who, either directly or indirectly, through agreement or otherwise, may control or direct the management or policies of Applicant. Provide as part of Exhibit A-5 the full name and address of each such person, indicate the person’s ownership percentage, and attach a copy of the agreement or, if there is no agreement, an explanation of the basis upon which such person exercises or may exercise such control or direction.

- Attach as Exhibit A-6, a list of Applicant’s current officers, directors, governors, general partners, LLC managers, and members of all standing committees (including any committee referenced in Section (a)(2) of Exhibit P herein), as applicable, or persons performing functions similar to any of the foregoing, indicating for each:
  a. Name and Title (with respect to a director, such title must include participation on any committee of Applicant);
  b. Phone number (both work and mobile) and e-mail contact information;
  c. Dates of commencement and, if appropriate, termination of present term of office or position;
  d. Length of time each such person has held the same office or position;
  e. Brief description of the business experience of each person over the last ten years;
  f. Any other current business affiliations in the financial services industry;
  g. If such person is not an employee of Applicant, list any compensation paid to the person as a result of his or her position at Applicant. For a director, describe any performance-based compensation;
  h. A certification for each such person that the individual would not be disqualified under Section 8a(2) of the Act or §1.63; and
  i. With respect to a director, whether such director is a public director or a clearing member customer, and the basis for such a determination as to the director’s status.
Commodity Futures Trading Commission
Pt. 39, App.

If another entity will operate or control the day-to-day business operations of the Applicant, attach for such entity all of the items indicated in Exhibit A-6.

- Attach as Exhibit A-7, a diagram of the entire corporate organizational structure of Applicant including the legal name of all entities within the organizational structure and the applicable percentage ownership among affiliated entities. Additionally, provide (i) a list of all jurisdictions in which Applicant or its affiliated entities are doing business; (ii) the registration status of Applicant and its affiliated entities, including pending applications or exemption requests and whether any applications or exemptions have been denied (e.g., country, regulator, registration category, date of registration or request for exemption, date of denial, if applicable); and (ii) the address for legal service of process for Applicant (which cannot be a post office box) for each applicable jurisdiction.

- Attach as Exhibit A-8, a copy of the constituent documents, articles of incorporation or association with all amendments thereto, partnership or limited liability agreements, and existing bylaws, operating agreement, and rules or instruments corresponding thereto, of Applicant. Provide a certificate of good standing or its equivalent for Applicant for each jurisdiction in which Applicant is doing business, including any foreign jurisdiction, dated within one month of the date of the Form DCO.

- Attach as Exhibit A-9, a brief description of any material pending legal proceeding(s) or governmental investigation(s) to which Applicant or any of its affiliates is a party or is subject, or to which any of its or their property is at issue. Include the name of the court or agency where the proceeding(s) is pending, the date(s) instituted, the principal parties involved, a description of the factual allegations in the complaint(s), the laws that were allegedly violated, and the relief sought. Include similar information as to any such proceeding(s) or any investigation known to be contemplated by any governmental agency.

- If Applicant intends to use the services of an outside service provider (including services of its clearing members or market participants), to enable Applicant to comply with any of the Core Principles, Applicant must submit as Exhibit A-10 all agreements entered into or to be entered into between Applicant and the outside service provider, and identify (1) the services that will be provided; (2) the staff who will provide the services; and (3) the Core Principles addressed by such arrangement. If a submitted agreement is not final and executed, the Applicant must submit evidence that constitutes reasonable assurance that such services will be provided as soon as operations require.

- Attach as Exhibit A-11, documentation that demonstrates compliance with the Chief Compliance Officer (“CCO”) requirements set forth in § 39.10(c), including but not limited to:
  a. Evidence of the designation of an individual to serve as Applicant’s CCO with full responsibility and authority to develop and enforce appropriate compliance policies and procedures;
  b. A description of the background and skills of the person designated as the CCO and a certification that the individual would not be disqualified under Section 8a(2) or 8a(3) of the Act or §1.63;
  c. Identification of to whom the CCO reports (i.e., the senior officer or the Board of Directors);
  d. Any plan of communication or regular or special meetings between the CCO and the Board of Directors or senior officer as appropriate;
  e. A job description setting forth the CCO’s duties;
  f. Procedures for the remediation of noncompliance issues; and
  g. A copy of Applicant’s written compliance policies and procedures (including a code of ethics and conflict of interest policy).

**EXHIBIT B — FINANCIAL RESOURCES**

- Attach as Exhibit B, documents that demonstrate compliance with the financial resources requirements set forth in § 39.11, including but not limited to:
a. General – Provide as Exhibit B-1:

(1) The most recent set of audited financial statements of Applicant or of its parent company, including the balance sheet, income statement, statement of cash flows, notes to the financial statements, and accountant’s opinion;

(2) If the audited financial statements are not dated within 1 month of the date of filing of the Form DCO, Applicant must provide a set of unaudited financial statements current within 1 month of the date of filing of the Form DCO;

(3) If Applicant does not have audited financial statements, Applicant must provide a balance sheet as of a date within 1 month of the date of filing of the Form DCO and an income statement and statement of cash flows reflecting the period since Applicant’s formation and a date that is within 1 month of the date of filing of the Form DCO. These statements must be accompanied by an independent certified public accountant’s review report.; and

(4) Evidence of ability to satisfy the requirements of Exhibits B-2 and B-3 below which may include (i) pro forma financial statements setting forth all projections and assumptions used therein, and (ii) a narrative description of how Applicant will fund its financial resources obligations on the first day of its operation as a derivatives clearing organization.

b. Default Resources – Provide as Exhibit B-2:

(1) A calculation of the financial resources needed to enable Applicant to meet its requirements under § 39.11(a)(1). Applicant must provide hypothetical default scenarios designed to reflect a variety of market conditions, and the assumptions and variables underlying the scenarios must be explained. All results of the analysis must be included. This calculation requires a start-up enterprise to estimate its largest anticipated financial exposure. A start-up must be able to explain the basis for its estimate;

(2) Evidence of unencumbered assets sufficient to satisfy § 39.11(a)(1). This may be demonstrated by a copy of a bank balance statement(s) in the name of Applicant. If relying on § 39.11(b)(1)(vi), such other resources must be thoroughly explained. If relying on § 39.11(b)(1)(i) and/or (vi), Applicant cannot also count these assets when demonstrating its compliance with its operating resources requirement under § 39.11(a)(2) and Applicant must detail the amounts or percentages of such assets that apply to each financial resource requirement;

(3) A demonstration that Applicant can perform the monthly calculations required by § 39.11(c)(1);

(4) A demonstration that Applicant’s financial resources are sufficiently liquid as required by § 39.11(e)(1);

(5) A demonstration of how Applicant will be able to maintain, at all times, the level of resources required by § 39.11(a)(1); and

(6) A demonstration of how default resources financial information will be updated and reported to clearing members and the public under § 39.21, and to the Commission as required by § 39.11(r)(1) and § 39.19.

c. Operating Resources – Provide as Exhibit B-3:

(1) A calculation of the financial resources needed to enable Applicant to meet its requirements under § 39.11(a)(2);

(2) Evidence of assets sufficient to satisfy the amount required under § 39.11(a)(2) This may be demonstrated by a copy of a bank balance statement(s) in the name of Applicant. If relying on § 39.11(b)(2)(i), such other resources must be thoroughly explained. If relying on § 39.11(b)(2)(i) or (ii), Applicant cannot also count these assets when demonstrating its compliance with meeting its default resources requirement under § 39.11(a)(1) and Applicant must detail the amounts or percentages of such assets that apply to each financial resource requirement;

(3) A narrative statement demonstrating the adequacy of Applicant’s physical infrastructure to carry out business operations, which includes a principal executive office (separate from any personal dwelling) with a U.S. street address (not merely a post office box number). For its principal executive office and other facilities Applicant
plans to occupy in carrying out its DCO functions, a description of the space (e.g., location and square footage), use of the space (e.g., executive office, data center), and the basis for Applicant's right to occupy the space (e.g., lease, agreement with parent company to share leased space);

(4) A narrative statement demonstrating the adequacy of the technological systems necessary to carry out Applicant's business operations, including a description of Applicant's information technology and telecommunications systems and a timetable for full operability;

(5) A calculation pursuant to § 39.11(c)(2), including the total projected operating costs for Applicant's first year of operation, calculated on a monthly basis with an explanation of the basis for calculating each cost and a discussion of the type, nature, and number of the various costs included;

(6) A demonstration that Applicant's financial resources are sufficiently liquid and unencumbered, as required by § 39.11(c)(2);

(7) A demonstration of how Applicant will maintain, at all times, the level of resources required by § 39.11(a)(2) with an explanation of asset valuation methodology and calculation of projected revenue, if applicable; and

(8) A demonstration of how operating resources financial information will be updated and reported to clearing members and the public under § 39.21, and to the Commission as required by § 39.11(f)(1) and § 39.19.

d. Human Resources - Provide as Exhibit B-4:

(1) An organizational chart showing Applicant's current and planned staff by position and title, including key personnel (as such term is defined in § 39.2) and, if applicable, managerial staff reporting to key personnel.

(2) A discussion and description of the staffing requirements needed to fulfill all operations and associated functions, tasks, services, and areas of supervision necessary to operate Applicant on a day-to-day basis; and

(3) The names and qualifications of individuals who are key personnel or other managerial staff who will carry out the operations and associated functions, tasks, services, and supervision needed to run the Applicant on day-to-day basis. In particular, Applicant must identify such individuals who are responsible for risk management, treasury, clearing operations and compliance (and specify whether each such person is an employee or consultant/agent).

EXHIBIT C—PARTICIPANT AND PRODUCT ELIGIBILITY

• Attach as Exhibit C, documents that demonstrate compliance with the participant and product eligibility requirements set forth in § 39.12 of the Commission’s regulations, including but not limited to:

  a. Participant Eligibility – Provide as Exhibit C-I, an explanation of the requirements for becoming a clearing member and how those requirements satisfy § 39.12 and, where applicable, support Applicant’s compliance with other Core Principles. Applicant must address how its participant eligibility requirements comply with the core principles and regulations thereunder for financial resources, risk management and operational capacity. The explanation also must include:

    (1) A final version of the membership agreement between Applicant and its clearing members that sets forth the full scope of respective rights and obligations;

    (2) A discussion of how Applicant will monitor for and enforce compliance with its eligibility criteria, especially minimum financial requirements;

    (3) An explanation of how the eligibility criteria are objective and allow for fair and open access to Applicant. Applicant must include an explanation of the differences between various classes of membership or participation that might be based on different levels of capital and/or creditworthiness. Applicant must also include information about whether any differences exist in how Applicant will monitor and enforce the obligations of its various clearing members including any differences in access, privilege, margin levels, position limits, or other controls;
(4) If Applicant allows intermediation, Applicant must describe the requirements applicable to those who may act as intermediaries on behalf of customers or other market participants;

(5) A description of the program for monitoring the financial status of the clearing members on an ongoing basis;

(6) The procedures that Applicant will follow in the event of the bankruptcy or insolvency of a clearing member, which did not result in a default to Applicant;

(7) A description of whether and how Applicant would adjust clearing member participation under continuing eligibility criteria based on the financial, risk, or operational status of a clearing member;

(8) A discussion of whether Applicant’s clearing members will be required to be registered with the Commission; and

(9) A list of current or prospective clearing members. If a current or prospective clearing member is a Commission registrant, Applicant must identify the member’s designated self-regulatory organization.

b. Product Eligibility – Provide as Exhibit C-2, an explanation of the criteria for instruments acceptable for clearing including:

(1) The regulatory status of each market on which a contract to be cleared by Applicant is traded (e.g., DCM, SEF, not a registered market), and whether the market for which Applicant clears intends to join the Joint Audit Committee. For bilaterally executed agreements, contracts, or transactions not traded on a registered market, Applicant must describe the nature of the related market and its interest in having the particular bilaterally executed agreement, contract, or transaction cleared;

(2) The criteria, and the factors considered in establishing the criteria, for determining the types of products that will be cleared;

(3) An explanation of how the criteria for deciding what products to clear take into account the different risks inherent in clearing different agreements, contracts, or transactions and how those criteria affect maintenance of assets to support the guarantee function in varying risk environments;

(4) A precise list of all the agreements, contracts, or transactions to be covered by Applicant’s registration order, including the terms and conditions of all agreements, contracts, or transactions;

(5) A forecast of expected volume and open interest at the outset of clearing operations, after six months, and after one year of operation; and

(6) The mechanics of clearing the contract, such as reliance on exchange for physical, exchange for swap, or other substitution activity; whether the contracts are matched prior to submission for clearing or after submission; and other aspects of clearing mechanics that are relevant to understanding the products that would be eligible for clearing.

EXHIBIT D — RISK MANAGEMENT

- Attach as Exhibit D, documents that demonstrate compliance with the risk management requirements set forth in § 39.13 of the Commission’s regulations, including but not limited to:

  a. Risk Management Framework - Provide as Exhibit D-1, a copy of Applicant’s written policies, procedures, and controls, as approved by Applicant’s Board of Directors, that establish Applicant’s risk management framework as required by § 39.13(b). Applicant must also provide a description of the composition and responsibilities of Applicant’s Risk Management Committee.

  b. Measuring Risk - Provide as Exhibit D-2, a narrative explanation of how Applicant has projected and will continue to measure its counterparty risk exposure, including:
(1) A description of the risk-based margin calculation methodology;

(2) The assumptions upon which the methodology was designed, including the risk analysis tools and procedures employed in the design process;

(3) An explanation as to whether other margining methodologies were considered and, if so, why they were not chosen;

(4) A demonstration of the margin methodology as applied to real or hypothetical clearing scenarios;

(5) A description of the data sources for inputs used in the methodology, e.g., historical price data reflecting market volatility over various periods of time;

(6) A description of the sources of price data for the measurement of current exposures and the valuation models for addressing circumstances where pricing data is not readily available or reliable;

(7) The frequency and circumstances under which the margin methodology will be reviewed and the criteria for deciding how often to review and whether to modify a margin methodology;

(8) An independent validation of Applicant’s systems for generating initial margin requirements, including its theoretical models;

(9) The frequency of measuring counterparty risk exposures (mark to market), whether counterparty risk exposures are routinely measured on an intraday basis, whether Applicant has the operational capacity to measure counterparty risk exposures on an intraday basis, and the circumstances under which Applicant would conduct a non-routine intraday measurement of counterparty risk exposures;

(10) Preliminary forecasts regarding future counterparty risk exposure and assumptions upon which such forecasts of exposure are based;

(11) A description of any systems or software that Applicant will require clearing members to use in order to margin their positions in their internal bookkeeping systems, and whether and under what terms and conditions Applicant will provide such systems or software to clearing members; and

(12) A description of the extent to which counterparty risk can be offset through the clearing process (i.e., the limitations, if any, on Applicant’s duty to fulfill its obligations as the buyer to every seller and the seller to every buyer).

c. Limiting Risk - Provide as Exhibit D-3, a narrative discussion addressing the specifics of Applicant’s clearing activities, including:

(1) How Applicant will collect financial information about its clearing members and other traders or market participants, monitor price movements, and mark to market, on a daily basis, the products and/or portfolios it clears;

(2) How Applicant will monitor accounts carried by clearing members, the accumulation of positions by clearing members and other market participants, and compliance with position limits; and how it will use large trader information;

(3) How Applicant will determine variation margin levels and outstanding initial margin due;

(4) How Applicant will identify unusually large pays on a proactive basis before they occur;

(5) Whether and how Applicant will compare price moves and position information to historical patterns and to the financial information collected from its clearing members; how it will identify unusually large pays on a daily basis;

(6) How Applicant will use various risk tools and procedures such as: (i) value-at-risk calculations; (ii) stress testing; (iii) back testing; and/or (iv) other risk management tools and procedures;
(7) How Applicant will communicate with clearing members, settlement banks, other derivatives clearing organizations, designated contract markets, swap execution facilities, major swap participants, swap data repositories, and other entities in emergency situations or circumstance that might require immediate action by the Applicant;

(8) How Applicant will monitor risk outside business hours;

(9) How Applicant will review its clearing members’ risk management practices;

(10) Whether Applicant will impose credit limits and/or employ other risk filters (such as automatic system denial of entry of trades under certain conditions);

(11) Plans for handling “extreme market volatility” and how Applicant defines that term;

(12) An explanation of how Applicant will be able to offset positions in order to manage risk including: (i) ensuring both Applicant and clearing members have the operational capacity to do so; and (ii) liquidity of the relevant market, especially with regard to bilaterally executed products;

(13) Plans for managing accounts that are “too big” to liquidate and for conducting “what if” analyses on these accounts;

(14) If options are involved, how Applicant will manage the different and more complex risk presented by these products;

(15) If Applicant intends to clear swaps, whether and how often Applicant will offer multilateral portfolio compression exercises for its clearing members; and

(16) If Applicant intends to clear credit default swaps, how Applicant will manage the unique risks associated with clearing these products, such as jump-to-default risk.

d. Existence of collateral (funds and assets) to apply to losses resulting from realized risk – Provide as Exhibit D-4:

(1) An explanation of the factors, process, and methodology used for calculating and setting required collateral levels, the required inputs, the appropriateness of those inputs, and an illustrative example;

(2) An analysis supporting the sufficiency of Applicant’s collateral levels for capturing all or most price moves that may take place in one settlement cycle;

(3) A description of how Applicant will value open positions and collateral assets;

(4) A description and explanation of the forms of assets allowed as collateral, why they are acceptable, and whether there are any haircuts or concentration limits on certain kinds of assets, including how often any such haircuts and concentration limits are reviewed;

(5) An explanation of how and when Applicant will collect collateral, whether and under what circumstances it will collect collateral on an intraday basis, and what will happen if collateral is not received in a timely manner. Include a proposed collateral collection schedule based on changes in market positions and collateral values; and

(6) If options are involved, a full explanation of how it will manage the associated risk through the use of collateral including, if applicable, a discussion of its option pricing model, how it establishes its implied volatility scan range, and other matters related to the complex matter of managing the risk associated with the clearing of option contracts.
Commodity Futures Trading Commission

EXHIBIT E — SETTLEMENT PROCEDURES

- Attach as Exhibit E, documents that demonstrate compliance with the settlement procedures requirements set forth in §39.14 of the Commission’s regulations, including but not limited to:

  a. **Settlement** — Provide as Exhibit E-1, a full description of the daily process of settling financial obligations on all open positions being cleared. This must include:

    (1) Procedures for completing settlements on a timely basis during normal market conditions (and no less frequently than once each business day);

    (2) Procedures for completing settlements on a timely basis in varying market circumstances including in the event of a default by the clearing member creating the largest financial exposure for Applicant in extreme but plausible market conditions;

    (3) A description of how contracts will be marked to market on at least a daily basis;

    (4) Identification of the settlement banks used by Applicant (including identification of the lead settlement bank, if applicable) and a copy of Applicant’s settlement bank agreement(s). Such settlement bank agreements must (i) outline daily cash settlement procedures, (ii) state clearly when settlement fund transfers will occur, (iii) provide procedures for settlements on bank holidays when the markets are open, and (iv) ensure that settlements are final when effected;

    (5) Identification of settlement banks that Applicant will allow its clearing members to use for margin calls and variation settlements;

    (6) A description of the criteria and review process used by Applicant when selecting settlement banks; procedures for monitoring the continued appropriateness of all settlement banks including a description of how Applicant monitors its concentration risk or exposure to each settlement bank;

    (7) The specific means by which settlement instructions are communicated from Applicant to the settlement bank(s);

    (8) A timetable showing the flow of funds associated with the settlement of products for a 24-hour period or such other settlement timeframe specified by a particular product; this may be presented in the form of a chart, as in the following example:
<table>
<thead>
<tr>
<th>Trade Date</th>
<th>Example of Settlement Activity for Which Times Should be Provided</th>
</tr>
</thead>
<tbody>
<tr>
<td>T: _____ pm</td>
<td>Last market closes (end of regular trading hours).</td>
</tr>
<tr>
<td>T: Approx. _____ pm</td>
<td>DCO/DCM/SEF establishes daily settlement price for each product based on information generated by its [INSERT NAME OF APPLICABLE CLEARING SYSTEM].</td>
</tr>
<tr>
<td>T: By _____ pm</td>
<td>Clearing members' position information for intraday settlement is obtained from DCO's clearing system.</td>
</tr>
<tr>
<td>T+1: Approx. _____ am</td>
<td>DCO provides daily initial margin (IM) and settlement variation/option premium (SVOP) amounts to clearing members and banks.</td>
</tr>
<tr>
<td>T+1: By _____ am</td>
<td>Banks commit to pay daily IM and SVOP amounts.</td>
</tr>
<tr>
<td>T+1: Approx. _____ am</td>
<td>Banks pay daily IM and SVOP amounts from clearing members to DCO.</td>
</tr>
<tr>
<td>T+1: Approx. _____ am</td>
<td>Banks pay daily IM and SVOP amounts from DCO to clearing members.</td>
</tr>
<tr>
<td>T: Approx. _____ pm</td>
<td>DCO/DCM/SEF determines prices for intraday settlement.</td>
</tr>
<tr>
<td>T: Approx. _____ pm</td>
<td>Clearing members' position information for intraday settlement is obtained from DCO's clearing system.</td>
</tr>
<tr>
<td>T: By approx. _____ pm</td>
<td>DCO provides intraday IM and SVOP amounts to banks and clearing members.</td>
</tr>
<tr>
<td>T: By _____ pm</td>
<td>Banks commit to pay intraday IM and SVOP amounts.</td>
</tr>
<tr>
<td>T: Approx. _____ pm</td>
<td>Banks pay intraday IM and SVOP amounts from clearing members to DCO.</td>
</tr>
<tr>
<td>T: Approx. _____ pm</td>
<td>Banks pay intraday IM and SVOP amounts from DCO to clearing members.</td>
</tr>
</tbody>
</table>

(9) A description of what happens in the event that there are insufficient funds in a clearing member's settlement account;

(10) An explanation of how and when Applicant will collect variation margin, whether and under what circumstances it will collect variation margin on an intraday basis, what will happen if variation margin is not received in a timely manner, and a proposed variation margin collection schedule based on changes in market prices;

(11) All the information above, to the extent relevant, for any products cleared that may be denominated in a foreign currency; and

(12) With respect to physical settlements, identify Applicant's rules that clearly state each obligation of Applicant with respect to physical deliveries, and explain how Applicant intends to identify and manage risks arising from physical settlement.
b. **Recordkeeping** – Provide as Exhibit E-2, a full description of the following:

(1) The nature and quality of the information collected concerning the flow of funds involved in clearing and settlement; and

(2) How such information will be recorded, maintained, and accessed.

c. **Interfaces with other clearing organizations** – Provide as Exhibit E-3, a description of Applicant’s relationships with other derivatives clearing organizations, clearing agencies, financial market utilities or foreign entities that perform similar functions including how compliance with the terms and conditions of agreements or arrangements with such other entities will be satisfied, e.g., any netting or offset arrangements, cross-margining, portfolio margining, linkage, common banking, common clearing programs or limited guaranty agreements or arrangements.

**EXHIBIT F — TREATMENT OF FUNDS**

- **Attach as Exhibit F,** documents that demonstrate compliance with the treatment of funds requirements set forth in § 39.15 of the Commission’s regulations, including but not limited to:

a. **Safe custody** – Provide as Exhibit F-1, documents that demonstrate:

(1) How Applicant will ensure the safekeeping of funds and collateral in depositories and how Applicant will minimize the risk of loss or of delay in accessing such funds and collateral;

(2) The depositories that will hold the funds and collateral and any written agreements between or among such depositories, Applicant or its clearing members regarding the legal status of the funds and collateral and the specific conditions or prerequisites for movement of the funds and collateral; and

(3) How Applicant will limit the concentration of risk in depositories where funds and collateral are deposited.

b. **Segregation of customer and proprietary funds** – Provide as Exhibit F-2, documents that demonstrate:

(1) The appropriate segregation of customer funds and associated acknowledgement documentation; and

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

c. **Investment standards** – Provide as Exhibit F-3, documents that demonstrate:

(1) How customer funds would be invested in instruments with minimal credit, market, and liquidity risks, and in compliance with the requirements of § 1.25; and

(2) How Applicant will obtain and keep associated records and data regarding the details of such investments.

**EXHIBIT G — DEFAULT RULES AND PROCEDURES**

- **Attach as Exhibit G,** documents that demonstrate compliance with the default rules and procedures requirements set forth in § 39.16 of the Commission’s regulations, including but not limited to:

a. **Default Management Plan** – Applicant must provide a copy of its written default management plan which must contain all of the information required by § 39.16(b), along with Applicant’s most recently documented results of a test of its default management plan.

b. **Definition of default** – Applicant must describe or otherwise document:
(1) The events (activities, lapses, or situations) that will constitute a clearing member default;

(2) What action Applicant can take upon a default and how Applicant will otherwise enforce the rules applicable in the event of default, including the steps and the sequence of the steps that will be followed. Identify whether a Default Management Committee exists and, if so, its role in the default process; and

(3) An example of a hypothetical default scenario and the results of the default management process used in the scenario.

c. Remedial action – Applicant must describe or otherwise document:

(1) The authority and methods by which Applicant may take appropriate action in the event of the default of a clearing member which may include, among other things, liquidating positions, hedging, auctioning, allocating (including any obligations of clearing members to participate in auctions or to accept allocations), and transferring of customer accounts to another clearing member (including an explanation of the movement of positions and collateral on deposit); and

(2) Actions taken by a clearing member or other events that would put a clearing member on Applicant’s “watch list” or similar device.

d. Process to address shortfalls – Applicant must describe or otherwise document:

(1) Procedures for the prompt application of Applicant and/or clearing member financial resources to address monetary shortfalls resulting from a default;

(2) How Applicant will make publicly available its default rules including a description of the priority of application of financial resources in the event of default (i.e., the “waterfall”); and

(3) How Applicant will take timely action to contain losses and liquidity pressures and to continue to meet each obligation of Applicant.

e. Use of cross-margin programs – Describe or otherwise document, as applicable, how cross-margining programs will provide for fair and efficient means of covering losses in the event of a default of any clearing member participating in the program.

f. Customer priority rule – Describe or otherwise document rules and procedures regarding priority of customer accounts over proprietary accounts of defaulting clearing members and, where applicable, specifically in the context of specialized margin reduction programs such as cross-margining or common banking arrangements with other derivatives clearing organizations, clearing agencies, financial market utilities or foreign entities that perform similar functions.

EXHIBIT H — RULE ENFORCEMENT

• Attach as Exhibit H, documents that demonstrate compliance with the rule enforcement requirements set forth in § 39.17 of the Commission’s regulations, including but not limited to:

  a. Surveillance – Describe or otherwise document arrangements and resources for the effective monitoring and enforcement of compliance with Applicant’s rules and the resolution of disputes.

  b. Enforcement – Applicant must describe or otherwise document:

(1) Arrangements and resources for the effective enforcement of rules and authority and ability to discipline and limit or suspend a member’s activities pursuant to clear and fair standards;

(2) Arrangements for enforcing compliance with its rules and addressing instances of non-compliance, including: disciplinary tools such as limiting, suspending, or terminating a clearing member’s access or member privileges;
(3) How Applicant will address situations related to, but which may not constitute an event of default, such as a clearing member’s failure to comply with certain rules or to maintain eligibility standards, or actions taken by other regulatory bodies;

(4) The standards and any procedural protections Applicant will follow in imposing any such enforcement measure; and

(5) Processes for reporting to the Commission Applicant’s rule enforcement activities and possible sanctions that could be imposed against clearing members.

c. Dispute resolution – Describe or otherwise document arrangements and resources for resolution of disputes between customers and clearing members, and between clearing members.

EXHIBIT I — SYSTEM SAFEGUARDS

- Attach as Exhibit I, documents that demonstrate compliance with the system safeguards requirements set forth in § 39.18 of the Commission’s regulations, including but not limited to:
  
a. A description of Applicant’s program of risk analysis and oversight with respect to its operations and automated systems. This program must be designed to ensure daily processing, clearing, and settlement of transactions and address each of the following categories of risk:

   (1) Information security;
   
   (2) Business continuity-disaster recovery planning and resources;
   
   (3) Capacity and performance planning;
   
   (4) Systems operations;
   
   (5) Systems development and quality assurance; and
   
   (6) Physical security and environmental controls.

b. An explanation of how Applicant will establish and maintain resources that allow for the fulfillment of its program of risk analysis and oversight with respect to its operations and automated systems, and a description of such resources, including:

   (1) A description of how Applicant will periodically verify that its resources are adequate to ensure daily processing, clearing, and settlement;
   
   (2) A demonstration that Applicant’s automated systems are reliable, secure, and have (and will continue to have) adequate scalable capacity;
   
   (3) A description of the physical, technological and personnel resources and procedures used by Applicant as part of its business continuity and disaster recovery plan, and support for the conclusion that these resources are sufficient to enable the Applicant to resume daily processing, clearing and settlement no later than the next business day following a disruption; and
   
   (4) A statement identifying which such resources are Applicant’s own resources and which are provided by a service provider (outsourced). For resources that are outsourced, provide (i) all contracts governing the outsourcing arrangements, including all schedules and other supplemental materials, and (ii) a demonstration that Applicant employs personnel with the expertise necessary to enable them to supervise the service provider’s delivery of the services.

c. An explanation of how Applicant will ensure the proper functioning of its systems, including its program for the periodic objective testing and review of its systems and back-up facilities (including all of its own and outsourced resources), and verification that all such resources will work effectively together;
d. Identification of the persons conducting the testing, including information as to their qualifications and independence;

e. A description of Applicant’s emergency procedures, including a copy of its written plan for business continuity and disaster recovery and a description of how Applicant will coordinate its business continuity and disaster recovery plan (including testing) with those of its clearing members and providers of essential services such as telecommunications, power and water; and

f. A description of how Applicant will report exceptional events and planned changes to the Commission as required by §§ 39.18(g) and 39.18(h).

EXHIBIT J — REPORTING

• Attach as Exhibit J, documents that demonstrate compliance with the reporting requirements set forth in § 39.19 of the Commission’s regulations including but not limited to:

a. How Applicant will make available to Commission staff all the information Commission staff need in order to carry out effective oversight. This must include a discussion of what will be made available on a routine basis, how often it will be made available, and the method of its transmission. The same items must be addressed for information it will make available on a non-routine basis and what events would precipitate the generation of such data or information. Applicant must also address the manner in which any information will be made available to clearing members, customers, market participants and/or the general public. If not part of an initial application, Applicant must provide a representation that it will provide the following when initially generated or when content changes occur:

(1) A list of current members/market participants;

(2) A list of all products currently eligible for clearing;

(3) The initial margin collection schedule;

(4) Information on any disciplinary actions (such as suspensions, etc.);

(5) Information concerning any physical or other emergencies;

(6) All information concerning any default by a member and the impact of the default on Applicant’s financial resources;

(7) A copy of any examination/evaluation/compliance report of any regulatory body other than the Commission that oversees Applicant;

(8) A copy of any internal examination/evaluation/compliance reports such as, but not limited to, those related to stress testing and systems testing;

(9) Key personnel that have particular knowledge of the market(s) for which Applicant clears and any changes in those personnel, especially those to be contacted in case of market volatility or to respond to inquiries and emergencies;

(10) Copies of audited financial statements of Applicant; and

(11) Information regarding counterparties and their positions, stress test results, internal governance, legal proceedings, and other clearing activities.

b. Forms or templates to be used to satisfy the daily, quarterly, annual, and event-specific reporting requirements specified in § 39.19(c) of the Commission’s regulations.

EXHIBIT K — RECORDKEEPING
• Attach as **Exhibit K**, documents that demonstrate compliance with the recordkeeping requirements set forth in § 39.20 of the Commission’s regulations including but not limited to:
  a. Applicant’s recordkeeping and record retention policies and procedures;
  b. The different activities related to the entity as a derivatives clearing organization for which it must maintain records;
  c. The manner in which records relating to swaps and swap data are gathered and maintained; and
  d. How Applicant will satisfy the performance standards of § 1.31 as applicable to derivatives clearing organizations, including:
     1. What “full” or “complete” will encompass with respect to each type of book or record that will be maintained;
     2. The form and manner in which books or records will be compiled and maintained with respect to each type of activity for which such books or records will be kept;
     3. Confirmation that books and records will be open to inspection by any representative of the Commission or of the U.S. Department of Justice;
     4. How long books and records will be readily available and how they will be made readily available during the first two years; and
     5. How long books and records will be maintained (and confirmation that, in any event, they will be maintained as required in § 1.31).

**EXHIBIT L — PUBLIC INFORMATION**

• Attach as **Exhibit L**, documents that demonstrate compliance with the public information requirements set forth in § 39.21 of the Commission’s regulations including but not limited to:
  a. Applicant’s procedures for making its rulebook, a list of all current clearing members, and the information listed in § 39.21(c) readily available to the general public, in a timely manner, by posting such information on Applicant’s website in accordance with § 39.21(d);
  b. Any other information routinely made available to the public by Applicant;
  c. How Applicant will make information available to clearing members and market participants in order to allow such persons to become familiar with Applicant’s procedures before participating in clearing operations; and
  d. How clearing members will be informed of their specific rights and obligations preceding a default and upon a default, and of the specific rights, options and obligations of Applicant preceding and upon a clearing member’s default.

**EXHIBIT M — INFORMATION SHARING**

• Attach as **Exhibit M**, documents that demonstrate compliance with the information sharing requirements set forth in § 39.22 of the Commission’s regulations, including but not limited to:
  a. The appropriate and applicable information sharing agreements to which Applicant is, or intends to be, a party including any domestic or international information-sharing agreements or arrangements, whether formal or informal, which involve or relate to Applicant’s operations, especially as it relates to measuring and addressing counterparty risk;
  b. A description of the types of information expected to be shared and how that information will be shared;
c. An explanation as to how information obtained pursuant to any information-sharing agreements or arrangements would be used to further the objectives of Applicant’s risk management program and any of its surveillance programs including financial surveillance and continuing eligibility of its clearing members; and

d. An explanation as to how Applicant expects to obtain accurate information pursuant to the information-sharing agreement or arrangement and the mechanisms or procedures which would allow for timely use and application of all information.

EXHIBIT N — ANTITRUST CONSIDERATIONS

- Attach as Exhibit N, documents that demonstrate compliance with the antitrust considerations requirements set forth in § 39.23 of the Commission’s regulations, including but not limited to policies or procedures to ensure compliance with the antitrust considerations requirements.

EXHIBIT O — GOVERNANCE FITNESS STANDARDS

- Attach as Exhibit O, documents that demonstrate compliance with the governance fitness standards requirements set forth in § 39.24 of the Commission’s regulations, including but not limited to:

a. The manner in which its governance arrangements permit consideration of the views of Applicant’s owners, whether voting or non-voting, and its participants (clearing members and customers) including (i) the general method by which Applicant will learn of the views of Applicant’s owners, other than through their exercise of voting power, or the views of participants, other than through representation on the Board of Directors or any committee of Applicant, and (ii) the manner in which Applicant will consider such views;

b. The fitness standards applicable to members of the Board of Directors, members of any disciplinary panels or disciplinary committees, clearing members, any individual or entity with direct access to settlement or clearing activities, and any party affiliated with any of the above individuals or entities, as well as natural persons who, directly or indirectly, own greater than 10 % of any one class of equity interest in Applicant; including a description or other documentation explaining how Applicant will collect and verify information that supports compliance with the fitness standards; and

c. The manner in which Applicant will condition clearing member access and other direct access to its settlement and clearing activities on agreement to be subject to the jurisdiction of Applicant.

EXHIBIT P — CONFLICTS OF INTEREST

- Attach as Exhibit P, documents that demonstrate compliance with the conflicts of interest requirements set forth in §§ 39.13(d), 39.25, and 40.9 of the Commission’s regulations, including but not limited to:

a. A copy of:

(1) The charter (or mission statement) of Applicant (if not attached as Exhibit A-8).

(2) The charter (or mission statement) of Applicant’s Board of Directors, each committee with a composition requirement (including any Executive Committee), as well as each other committee that has the authority to amend or constrain actions of Applicant’s Board of Directors (if not attached as Exhibit A-8).

(3) If another entity “operates” the Applicant, the charter (or mission statement) of such entity’s Board of Directors (if not attached as Exhibit A-8); and a description of the manner in which the Applicant will ensure that such entity’s officers, directors, employees and agents and such entity’s books and records shall be subject to the authority of the Commission pursuant to the Act and the Commission’s regulations thereunder.

(4) An internal organizational chart showing the lines of responsibility and accountability for each operational unit.

b. Describe or otherwise document:
Commodity Futures Trading Commission

(1) Applicant’s rules and procedures for ensuring compliance with the Commission’s regulations with respect to limitations on voting equity ownership and the exercise of voting power by owners of the Applicant (and the parent company of the Applicant, if applicable) including the manner in which Applicant would remedy any breach of such limits;

(2) Applicant’s nominations process for the Board of Directors and the process for assigning members of the Board of Directors or other persons to any committee referenced in item a.(2) above;

1. The manner in which the Board of Directors reviews its performance and the performance of its members on an annual basis; and
2. The procedures for removing a member of the Board of Directors, including where the conduct of such member is likely to be prejudicial to the sound and prudent management of Applicant;

(3) The composition of its nominating committee, including the number or percentage of public directors, and the identity of the Chairman of the Committee;

(4) The composition of any Executive Committee, including the number or percentage of public directors;

(5) The composition of the Risk Management Committee, including the number or percentage of public directors, the number or percentage of customer representatives, and the identity of the Chairman of the committee;

1. Whether the Risk Management Committee is an executive committee or an advisory committee; and
2. Whether the Risk Management Committee has delegated certain functions to any risk management subcommittee, including a description or other documentation of the functions so delegated;

(6) The form of report to be used in reporting to the Commission those instances in which the Board of Directors rejects a recommendation or supersedes an action of the Risk Management Committee, or the Risk Management Committee rejects a recommendation or supersedes an action of its subcommittee;

(7) The manner in which Applicant will (i) ensure decisions by the Risk Management Committee (or a subcommittee thereof) will not be restricted or limited by a body other than the Board of Directors (or the Risk Management Committee in the case of decisions by its subcommittee) with respect to decisions regarding clearing member eligibility or applications or product eligibility; (ii) prevent any undue influence on disciplinary panels or committees (including recusals by any member of a disciplinary panel or committee where such member has a financial interest in a matter before the panel); and (iii) provide that decisions by a disciplinary panel or committee may be appealed;

(8) Whether the Board of Directors has delegated the functions of the disciplinary panel to any other committee;

(9) The manner in which Applicant will record and summarize significant decisions, including decisions relating to open access, membership, and the finding of products acceptable or not acceptable for clearing;

(10) The manner in which Applicant will ensure that all information relating to transparency of governance arrangements at the Applicant is current, accurate, clear, and readily accessible to both the Commission and the public;

(11) Any written procedures that Applicant intends to adopt to identify, on an ongoing basis, existing and potential conflicts of interest;

(12) Applicant’s process for making fair and non-biased decisions in the event of a conflict of interest; and

(13) Applicant’s written policies or procedures on safeguarding non-public information.

EXHIBIT Q — COMPOSITION OF GOVERNING BOARDS
PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES

Sec.
40.1 Definitions.
40.2 Listing products for trading by certification.
40.3 Voluntary submission of new products for Commission review and approval.
40.4 Amendments to terms or conditions of enumerated agricultural products.
40.5 Voluntary submission of rules for Commission review and approval.
40.6 Self-certification of rules.
40.7 Delegations.
40.8 Availability of public information.
40.9 [Reserved]
40.10 Special certification procedures for submission of rules by systemically important derivatives clearing organizations.
40.11 Review of event contracts based upon certain excluded commodities.

APPENDIX A TO PART 40—SCHEDULE OF FEES
APPENDIXES B–C TO PART 40 [RESERVED]
APPENDIX D TO PART 40—SUBMISSION COVER SHEET AND INSTRUCTIONS


SOURCE: 76 FR 44790, July 27, 2011, unless otherwise noted.

§ 40.1 Definitions.

As used in this part:
(a) Business day means the intraday period of time starting at the business hour of 8:15 a.m. and ending at the business hour of 4:45 p.m.; business hour means any hour between 8:15 a.m. and 4:45 p.m. Business day and business
hour are Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect in Washington, DC, on all days except Saturdays, Sundays, and Federal holidays in Washington, DC.

(b) Dormant contract or dormant product means:

(1) Any agreement, contract, transaction, instrument, swap or any such commodity futures or option contract with respect to all future or option expiries, listed on a designated contract market, a swap execution facility or cleared by a registered derivatives clearing organization, that has no open interest and in which no trading has occurred for a period of twelve complete calendar months following a certification to, or approval by, the Commission; provided, however, that no contract or instrument under this paragraph (b)(1) initially and originally certified to, or approved by, the Commission within the preceding 36 complete calendar months shall be considered to be dormant; or

(2) Any commodity futures or option contract, swap or other agreement, contract, transaction or instrument of a dormant designated contract market, a dormant swap execution facility or a dormant derivatives clearing organization; or

(3) Any commodity futures or option contract or other agreement, contract, swap, transaction or instrument not otherwise dormant that a designated contract market, a swap execution facility or a derivatives clearing organization self-declares through certification to be dormant.

(c) Dormant designated contract market means any designated contract market on which no trading has occurred during the period of twelve consecutive calendar months, preceding the first day of the most recent calendar month; provided, however, no designated contract market shall be considered to be dormant if its initial and original Commission order of designation was issued within the preceding 36 consecutive calendar months.

(d) Dormant derivatives clearing organization means any derivatives clearing organization registered pursuant to Section 5b of the Act that has not accepted for clearing any agreement, contract or transaction that is required or permitted to be cleared by a derivatives clearing organization under Sections 5b(a) and 5b(b) of the Act, respectively, for a period of twelve complete calendar months; provided, however, no derivatives clearing organization shall be considered to be dormant if its initial and original Commission order of registration was issued within the preceding 36 complete calendar months.

(e) Dormant swap data repository means any registered swap data repository on which no data has resided for a period of twelve consecutive calendar months, preceding the most recent calendar month.

(f) Dormant swap execution facility means any swap execution facility on which no trading has occurred for a period of twelve consecutive calendar months, preceding the first day of the most recent calendar month; provided, however, no swap execution facility shall be considered to be dormant if its initial and original Commission order of registration was issued within the preceding 36 consecutive calendar months.

(g) Dormant rule means:

(1) Any registered entity rule which remains unimplemented for twelve consecutive calendar months following a certification with, or an approval by, the Commission; or

(2) Any rule or rule amendment of a dormant designated contract market, dormant swap execution facility, dormant derivatives clearing organization.

(h) Emergency means any occurrence or circumstance that, in the opinion of the governing board of a registered entity, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of a registered entity under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any agreements, contracts, swaps or transactions or the timely collection and payment of funds in connection with clearing and settlement by a derivatives clearing organization, including:
(1) Any manipulative or attempted manipulative activity;
(2) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions;
(3) Any circumstances which may materially affect the performance of agreements, contracts, swaps or transactions, including failure of the payment system or the bankruptcy or insolvency of any participant;
(4) Any action taken by any governmental body, or any other registered entity, board of trade, market or facility which may have a direct impact on trading or clearing and settlement; and
(5) Any other circumstance which may have a severe, adverse effect upon the functioning of a registered entity.

(i) Rule means any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted.

(j) Terms and conditions means any definition of the trading unit or the specific commodity underlying a contract for the future delivery of a commodity or commodity option contract, description of the payments to be exchanged under a swap, specification of cash settlement or delivery standards and procedures, and establishment of buyers' and sellers' rights and obligations under the swap or contract. Terms and conditions include provisions relating to the following:

(1) For a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap):
   (i) Quality and other standards that define the commodity or instrument underlying the contract;
   (ii) Quantity standards or other provisions related to contract size;
   (iii) Any applicable premiums or discounts for delivery of nonpar products;
   (iv) Trading hours, trading months and the listing of contracts;
   (v) The pricing basis, minimum price fluctuations, and maximum price fluctuations;
   (vi) Any price limits, no cancellation ranges, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;
   (vii) Position limits, position accountability standards, and position reporting requirements;
   (viii) Delivery points and locational price differentials;
   (ix) Delivery standards and procedures, including fees related to delivery or the delivery process; alternatives to delivery and applicable penalties or sanctions for failure to perform;
   (x) If cash settled; the definition, composition, calculation and revision of the cash settlement price or index;
   (xi) Payment or collection of commodity option premiums or margins;
   (xii) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;
   (xiii) Threshold prices for an option contract, the existence of which is contingent upon those prices; and
   (xiv) Any restrictions or requirements for exercising an option; and

(2) For a swap:
   (i) Identification of the major group, category, type or class in which the swap falls (such as an interest rate, commodity, credit or equity swap) and of any further sub-group, category, type or class that further describes the swap;
   (ii) Notional amounts, quantity standards, or other unit size characteristics;
   (iii) Any applicable premiums or discounts for delivery of nonpar products;
   (iv) Trading hours and the listing of swaps;
   (v) Pricing basis for establishing the payment obligations under, and mark-to-market value of, the swap including, as applicable, the accrual start dates, termination or maturity dates, and, for each leg of the swap, the initial cash flow components, spreads, and points, and the relevant indexes, prices, rates, coupons, or other price reference measures;
(vi) Any price limits, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;

(vii) Position limits, position accountability standards, and position reporting requirements;

(viii) Payment and reset frequency, day count conventions, business calendars, and accrual features;

(ix) If physical delivery applies, delivery standards and procedures, including fees related to delivery or the delivery process, alternatives to delivery and applicable penalties or sanctions for failure to perform;

(x) If cash settled, the definition, composition, calculation and revision of the cash settlement price, and the settlement currency;

(xi) Payment or collection of option premiums or margins;

(xii) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;

(xiii) Threshold prices for an option, the existence of which is contingent upon those prices;

(xiv) Any restrictions or requirements for exercising an option; and

(xv) Life cycle events.

§ 40.2 Listing products for trading by certification.

(a) A designated contract market or a swap execution facility must comply with the submission requirements of this section prior to listing a product for trading that has not been approved under §40.3 of this part or that remains dormant subsequent to being submitted under this section or approved under §40.3 of this part. A submission shall comply with the following conditions:

(1) The designated contract market or the swap execution facility has filed its submission electronically in a format and manner specified by the Secretary of the Commission with the Secretary of the Commission;

(2) The Commission has received the submission by the open of business on the business day preceding the product’s listing; and

(3) The submission includes:

(i) A copy of the submission cover sheet in accordance with the instructions in appendix D to this part;

(ii) A copy of the product’s rules, including all rules related to its terms and conditions;

(iii) The intended listing date;

(iv) A certification by the designated contract market or the swap execution facility that the product to be listed complies with the Act and Commission regulations thereunder;

(v) A concise explanation and analysis of the product and its compliance with applicable provisions of the Act, including core principles, and the Commission’s regulations thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

(vi) A certification that the registered entity posted a notice of pending product certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity’s Web site. Information that the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity’s Web site but must be republished consistent with any determination made pursuant to §40.8(c)(4);

(vii) A request for confidential treatment, if appropriate, as permitted under §40.8.

(b) Additional information. If requested by Commission staff, a registered entity shall provide any additional evidence, information or data that demonstrates that the contract meets, initially or on a continuing basis, the requirements of the Act or the Commission’s regulations or policies thereunder.

(c) Stay. The Commission may stay the listing of a contract pursuant to paragraph (a) of this section during the pendency of Commission proceedings for filing a false certification or during the pendency of a petition to alter or amend the contract terms and conditions pursuant to Section 8a(7) of the Act. The decision to stay the listing of a contract in such circumstances shall not be delegable to any employee of the Commission.
§ 40.3 Voluntary submission of new products for Commission review and approval.

(a) Request for approval. Pursuant to Section 5c(c) of the Act, a designated contract market, a swap execution facility, or a derivatives clearing organization may request that the Commission approve a new or dormant product prior to listing the product for trading or accepting the product for clearing, or if a product was initially submitted under § 40.2 of this part or § 39.5 of this chapter, subsequent to listing the product for trading or accepting the product for clearing. A submission requesting approval shall:

(1) Be filed electronically in a format and manner specified by the Secretary of the Commission with the Secretary of the Commission;

(2) Include a copy of the submission cover sheet in accordance with the instructions in appendix D to this part;

(3) Include a copy of the rules that set forth the contract’s terms and conditions;

(4) Include an explanation and analysis of the product and its compliance with applicable provisions of the Act, including core principles, and the Commission’s regulations thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with the applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

(5) Describe any agreements or contracts entered into with other parties that enable the registered entity to carry out its responsibilities;

(6) Include the certifications required in § 41.22 for product approval of a commodity that is a security future or a security futures product as defined in Sections 1a(44) or 1a(45) of the Act, respectively;

(7) Include, if appropriate, a request for confidential treatment as permitted under § 40.8;

(8) Include the filing fee required under appendix A to this part;

(9) Certify that the registered entity posted a notice of its request for Commission approval of the new product and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity’s Web site. Information that the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity’s Web site but must be republished.
consistent with any determination made pursuant to § 40.8(c)(4):

(10) Include, if requested by Commission staff, additional evidence, information or data demonstrating that the contract meets, initially or on a continuing basis, the requirements of the Act, or other requirement for designation or registration under the Act, or the Commission’s regulations or policies thereunder. The registered entity shall submit the requested information by the open of business on the date that is two business days from the date of request by Commission staff, or at the conclusion of such extended period agreed to by Commission staff after timely receipt of a written request from the registered entity.

(b) Standard for review and approval. The Commission shall approve a new product unless the terms and conditions of the product violate the Act or the Commission’s regulations.

(c) Forty-five day review. All products submitted for Commission approval under this paragraph shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of an extended period as provided under paragraph (d) of this section, unless notified otherwise within the applicable period, if:

(1) The submission complies with the requirements of paragraph (a) of this section; and

(2) The submitting entity does not amend the terms or conditions of the product or supplement the request for approval, except as requested by the Commission or for correction of typographical errors, renumbering or other non-substantive revisions, during that period. Any voluntary, substantive amendment by the submitting entity will be treated as a new submission under this section.

(d) Extension of time. The Commission may extend the 45 day review period in paragraph (c) of this section for:

(1) An additional 45 days, if the product raises novel or complex issues that require additional time to analyze, in which case the Commission shall notify the registered entity within the initial 45 day review period and shall briefly describe the nature of the specific issues for which additional time for review is required; or

(2) Any extended review period to which the registered entity agrees in writing.

(e) Notice of non-approval. The Commission at any time during its review under this section may notify the registered entity that it will not, or is unable to, approve the product. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission’s regulations, including the form or content requirements of paragraph (a) of this section, that the product violates, appears to violate or potentially violates but which cannot be ascertained from the submission.

(f) Effect of non-approval. (1) Notification to a registered entity under paragraph (e) of this section of the Commission’s determination not to approve a product does not prejudice the entity from subsequently submitting a revised version of the product for Commission approval or from submitting the product as initially proposed pursuant to a supplemented submission.

(2) Notification to a registered entity under paragraph (e) of this section of the Commission’s refusal to approve a product shall be presumptive evidence that the entity may not truthfully certify under § 40.2 that the same, or substantially the same, product does not violate the Act or the Commission’s regulations thereunder.

§ 40.4 Amendments to terms or conditions of enumerated agricultural products.

(a) Notwithstanding the provisions of this part, a designated contract market must submit for Commission approval under the procedures of § 40.5, prior to its implementation, any rule or dormant rule that, for a delivery month having open interest, would materially change a term or condition, as defined in § 40.1(j), of a contract for future delivery in an agricultural commodity enumerated in Section 1a(9) of the Act, or of an option on such a contract or commodity.

(b) The following rules or rule amendments are not material and should not be submitted under this section:
§ 40.5 Voluntary submission of rules for Commission review and approval.

(a) Request for approval of rules. Pursuant to Section 5c(c) of the Act, a registered entity may request that the Commission approve a new rule, rule amendment or dormant rule prior to implementation of the rule, or if the request was initially submitted under §§ 40.2 or 40.6 of this part, subsequent to implementation of the rule. A request for approval shall:

(1) Be filed electronically in a format and manner specified by the Secretary of the Commission with the Secretary of the Commission;

(2) Include a copy of the submission cover sheet in accordance with the instructions in appendix D to this part;

(3) Set forth the text of the rule or rule amendment (in the case of a rule amendment, deletions and additions must be indicated);

(4) Describe the proposed effective date of the rule or rule amendment and any action taken or anticipated to be taken to adopt the proposed rule by the registered entity or by its governing board or by any committee thereof, and cite the rules of the entity that authorize the adoption of the proposed rule;

(5) Provide an explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission’s regulations thereunder, including, as applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants or others, and how the rule fits into the registered entity’s framework of self-regulation;

(6) Certify that the registered entity posted a notice of pending rule with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity’s Web site. Information which the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity’s Web site but must be republished consistent with any determination made pursuant to § 40.8(c)(4);

(7) Provide additional information which may be beneficial to the Commission in analyzing the new rule or rule amendment. If a proposed rule affects, directly or indirectly, the application of any other rule of the registered entity, the pertinent text of any such rule must be set forth and the anticipated effect described;

(8) Provide a brief explanation of any substantive opposing views expressed to the registered entity by governing
(9) Identify any Commission regulation that the Commission may need to amend, or sections of the Act or the Commission’s regulations that the Commission may need to interpret, in order to approve the new rule or rule amendment. To the extent that such an amendment or interpretation is necessary to accommodate a new rule or rule amendment, the submission should include a reasoned analysis supporting the amendment to the Commission’s regulation or the interpretation;

(10) As appropriate, include a request for confidential treatment as permitted under the procedures of §40.8.

(b) Standard for review and approval.
The Commission shall approve a new rule or rule amendment unless the rule or rule amendment is inconsistent with the Act or the Commission’s regulations.

(c) Forty-five day review. (1) All rules submitted for Commission approval under paragraph (a) of this section shall be deemed approved by the Commission under section 5c(c) of the Act 45 days after receipt by the Commission, or at the conclusion of such extended period as provided under paragraph (d) of this section, unless the registered entity is notified otherwise within the applicable period, if:

(i) The submission complies with the requirements of paragraph (a) of this section;

(ii) The registered entity does not amend the proposed rule or supplement the submission, except as requested by the Commission, during the pendency of the review period other than for correction of typographical errors, renumbering or other non-substantive revisions. Any amendment or supplementation not requested by the Commission will be treated as the submission of a new filing under this section.

(2) The submission complies with the requirements of paragraph (a) of this section for a compliant submission under §40.4(b)(5) ten business days after its receipt.

(d) Commencement and extension of time for review. The Commission may further extend the review period in paragraph (c) of this section for any approval request for:

(1) An additional 45 days, if the proposed rule raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner, in which case the Commission shall notify the submitting registered entity within the initial forty-five day review period and shall briefly describe the nature of the specific issues for which additional time for review shall be required; or

(2) Any period, beyond the additional 45 days provided in §40.5(d)(1), to which the registered entity agrees in writing.

(e) Notice of non-approval. Any time during its review under this section, the Commission may notify the registered entity that it will not, or is unable to, approve the new rule or rule amendment. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission’s regulations, including the form or content requirements of this section, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the Act or the Commission’s regulations.

(f) Effect of non-approval. (1) Notification to a registered entity under paragraph (e) of this section does not prevent the registered entity from subsequently submitting a revised version of the proposed rule or rule amendment for Commission review and approval or from submitting the new rule or rule amendment as initially proposed in a supplemented submission; the revised submission will be reviewed without prejudice.

(2) Notification to a registered entity under paragraph (e) of this section of the Commission’s determination not to approve a proposed rule or rule amendment of a registered entity shall be presumptive evidence that the entity may not truthfully certify that the same, or substantially the same, proposed rule or rule amendment under §40.6(a) of this section.

(g) Expedited approval. Notwithstanding the provisions of paragraph
§ 40.6 Self-certification of rules.

(a) Required certification. A registered entity shall comply with the following conditions prior to implementing any rule, other than a rule delisting or withdrawing the certification of a product with no open interest and submitted in compliance with §§40.6(a)(1)-(2) and §40.6(a)(7), that has not obtained Commission approval under §40.5 of this part, that remains dormant subsequent to being submitted under this section or approved under §40.5 of this part, or that is submitted under §40.10 of this part, except as otherwise provided by §40.10(a):

1. The registered entity has filed its submission electronically in a format and manner specified by the Secretary of the Commission with the Secretary of the Commission.

2. The registered entity has provided a certification that the registered entity posted a notice of pending certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity’s Web site. Information that the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity’s Web site but it must be republished consistent with any determination made pursuant to §40.8(c)(4).

3. The Commission has received the submission not later than the open of business on the business day that is 10 business days prior to the registered entity’s implementation of the rule or rule amendment.

4. The Commission has not stayed the submission pursuant to §40.6(c).

5. The rule or rule amendment is not a rule or rule amendment of a designated contract market that materially changes a term or condition of a contract for future delivery of an agricultural commodity enumerated in section 1a(4) of the Act or an option on such a contract or commodity in a delivery month having open interest.

6. Emergency rule certifications. (i) New rules or rule amendments that establish standards for responding to an emergency must be submitted pursuant to §40.6(a);

(ii) Rules or rule amendments implemented under procedures of the governing board to respond to an emergency as defined in §40.1, shall, if practicable, be filed with the Commission prior to the implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than twenty-four hours after implementation. Such rules shall be subject to the certification and stay provisions of paragraphs (b) and (c) of this section.

7. The rule submission shall include:

(i) A copy of the submission cover sheet in accordance with the instructions in appendix D to this part (in the case of a rule or rule amendment that responds to an emergency, “Emergency Rule Certification” should be noted in the Description section of the submission coversheet);

(ii) The text of the rule (in the case of a rule amendment, deletions and additions must be indicated);

(iii) The date of intended implementation;

(iv) A certification by the registered entity that the rule complies with the Act and the Commission’s regulations thereunder;

(v) A concise explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission’s regulations thereunder;

(vi) A brief explanation of any substantive opposing views expressed to the registered entity by governing board or committee members, members of the entity or market participants,
that were not incorporated into the rule, or a statement that no such opposing views were expressed;

(vii) As appropriate, a request for confidential treatment pursuant to the procedures provided in §40.8, and

(8) The registered entity shall provide, if requested by Commission staff, additional evidence, information or data that may be beneficial to the Commission in conducting a due diligence assessment of the filing and the registered entity’s compliance with any of the requirements of the Act or the Commission’s regulations or policies thereunder.

(b) Review by the Commission. The Commission shall have 10 business days to review the new rule or rule amendment before the new rule or rule amendment is deemed certified and can be made effective, unless the Commission notifies the registered entity during the 10-business day review period that it intends to issue a stay of the certification under paragraph (c) of this section.

(c) Stay of certification of new rule or rule amendment. The Commission may stay the certification of a new rule or rule amendment submitted pursuant to paragraph (a) of this section by issuing a notification informing the registered entity that the Commission is staying the certification of the rule or rule amendment on the grounds that the rule or rule amendment presents novel or complex issues that require additional time to analyze, the rule or rule amendment is accompanied by an inadequate explanation or the rule or rule amendment is potentially inconsistent with the Act or the Commission’s regulations thereunder. The Commission will have an additional 90 days from the date of the notification to conduct the review. The decision to stay the certification of a rule in such circumstances shall be delegable pursuant to §40.7 of this part.

Public comment. The Commission shall provide a 30-day comment period within the 90-day period in which the stay is in effect as described in paragraph (c)(1) of this section. The Commission shall publish a notice of the 30-day comment period on the Commission’s Web site. Comments from the public shall be submitted as specified in that notice.

(3) Expiration of a stay of certification of new rule or rule amendment. A new rule or rule amendment subject to a stay pursuant to this paragraph shall become effective, pursuant to the certification, at the expiration of the 90-day review period described in paragraph (c)(1) of this section unless the Commission withdraws the stay prior to that time, or the Commission notifies the registered entity during the 90-day time period that it objects to the proposed certification on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission’s regulations.

(4) Stay of effectiveness of rules or rule amendments already implemented. The Commission may stay the effectiveness of an implemented rule during the pendency of Commission proceedings for filing a false certification or during the pendency of a petition to alter or amend the rule pursuant to section 8a(7) of the Act. The decision to stay the effectiveness of a rule in such circumstances shall not be delegable to any employee of the Commission.

(d) Notification of rule amendments. Notwithstanding the rule certification requirement of Section 5c(c)(1) of the Act and paragraph (a) of this section, a registered entity may place the following rules or rule amendments into effect without certification to the Commission if the following conditions are met:

(1) The registered entity provides to the Commission at least weekly a summary notice of all rule amendments made effective pursuant to this paragraph during the preceding week. Such notice must be labeled “Weekly Notification of Rule Amendments” and need not be filed for weeks during which no such actions have been taken. One copy of each such submission shall be furnished electronically in a format and manner specified by the Secretary of the Commission; and

(2) The rule governs:

(i) Non-substantive revisions. Corrections of typographical errors, renumbering, periodic routine updates to identifying information about registered entities and other such non-substantive revisions of a product’s
terms and conditions that have no effect on the economic characteristics of the product;

(ii) Delivery standards set by third parties. Changes to grades or standards of commodities deliverable on a product that are established by an independent third party and that are incorporated by reference as product terms, provided that the grade or standard is not established, selected or calculated solely for use in connection with futures or option trading and such changes do not affect deliverable supplies or the pricing basis for the product;

(iii) Index products. Routine changes in the composition, computation, or method of selection of component entities of an index (other than routine changes to securities indexes to the extent that such changes are not described in paragraph (d)(3)(ii)(F) of this section) referenced and defined in the product’s terms, that do not affect the pricing basis of the index, which are made by an independent third party whose business relates to the collection or dissemination of price information and which was not formed solely for the purpose of compiling an index for use in connection with a futures or option product;

(iv) Option contract terms. Changes to option contract rules, which may qualify for implementation without notice pursuant to paragraph (d)(3)(ii)(G) of this section, relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis;

(v) Fees. Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(A) Total $1.00 or more per contract, and

(B) Are established by an independent third party or are unrelated to delivery, trading, clearing or dispute resolution.

(vi) Survey lists. Changes to lists of banks, brokers, dealers, or other entities that provide price or cash market information to an independent third party and that are incorporated by reference as product terms;

(vii) Approved brands. Changes in lists of approved brands or markings pursuant to previously certified or Commission approved standards or criteria;

(viii) Delivery facilities and delivery service providers. Changes in lists of approved delivery facilities and delivery service providers (including weigh masters, assayers, and inspectors) at a delivery location, pursuant to previously certified or Commission approved standards or criteria;

(ix) Trading months. The initial listing of trading months, which may qualify for implementation without notice pursuant to (d)(3)(ii)(H) of this section, within the currently established cycle of trading months;

(x) Minimum tick. Reductions in the minimum price fluctuation (or “tick”).

(3) Notification of rule amendments not required. Notwithstanding the rule certification requirements of section 5c(c)(1) of the Act and paragraph (a) of this section, a registered entity may place the following rules or rule amendments into effect without certification or notice to the Commission if the following conditions are met:

(i) The registered entity maintains documentation regarding all changes to rules; and

(ii) The rule governs:

(A) Transfer of membership or ownership. Procedures and forms for the purchase, sale or transfer of membership or ownership, but not including qualifications for membership or ownership, any right or obligation of membership or ownership or dues or assessments;

(B) Administrative procedures. The organization and administrative procedures of a registered entity governing bodies such as a Board of Directors, Officers and Committees, but not voting requirements, Board of Directors or Committee composition requirements or procedures, decision making procedures, use or disclosure of material non-public information gained through the performance of official duties, or requirements relating to conflicts of interest;

(C) Administration. The routine, daily administration, direction and control of employees, requirements relating to gratuity and similar funds, but not guaranty, reserves, or similar funds; declaration of holidays, and changes to facilities housing the market, trading floor or trading area;
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(D) Standards of decorum. Standards of decorum or attire or similar provisions relating to admission to the floor, badges, or visitors, but not the establishment of penalties for violations of such rules; and

(E) Fees. Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(1) Are less than $1.00; or

(2) Relate to matters such as dues, badges, telecommunication services, booth space, real time quotations, historical information, publications, software licenses, or other matters that are administrative in nature.

(F) Securities indexes. Routine changes to the composition, computation or method of security selection of an index that is referenced and defined in the product’s rules, and which is made by an independent third party.

(G) Option contract terms. For registered entities that are in compliance with the daily reporting requirements of §16.01 of this chapter, changes to option contract rules relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis.

(H) Trading months. For registered entities that are in compliance with the daily reporting requirements of §16.01 of this chapter, the initial listing of trading months which are within the currently established cycle of trading months.


§ 40.7 Delegations.

(a) Procedural matters. (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, the following authorities, with the concurrence of the General Counsel or the General Counsel’s delegate:

(i) To request, pursuant to §40.3(c)(2) or §40.5(c)(1)(ii) of this part, that the registered entity request amendment, or supplement the submission to the Commission:

(ii) To notify the registered entity, pursuant to §40.3(e) or §40.5(e) of this part, that the Commission is not approving, or is unable to approve, the proposed product, rule or rule amendment;

(iii) To make all determinations reserved to the Commission in §40.10.

(2) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, the following authorities, after consultation with the Office of General Counsel or the General Counsel’s delegate to notify a registered entity:

(i) Pursuant to §40.3(d) of this part, that the time for review of the submission has been extended because the product raises novel or complex issues that require additional time for review;

(ii) Pursuant to §40.5(d) of this part, that the time for review of the submission has been extended because the proposed rule or rule amendment raises novel or complex issues that require additional time for review or is of major economic significance;

(iii) Pursuant to §40.6(c) of this part, that the proposed rule or rule amendment has been stayed because there exist novel or complex issues that require additional time to analyze, or there is potential inconsistency with the Act or the Commission’s regulations.

(3) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, the following authorities, with the concurrence of the General Counsel or the General Counsel’s delegate:

(i) To request, pursuant to §40.3(d) or §40.5(d) of this part, that the time for review of the submission has been extended, or that a rule certified pursuant to §40.6(c) has been stayed, because
§ 40.8 Availability of public information.

(a) The following sections of all applications to become a designated contract market, swap execution facility, derivatives clearing organization, or swap data repository shall be made publicly available: Transmittal letter and first page of the application cover sheet, proposed rules, narrative summary of the applicant’s proposed activities and regulatory compliance chart, documents establishing the applicant’s legal status, documents setting forth the applicant’s corporate and governance structure and any other part of the application not covered by a request for confidential treatment.

(b) The following submissions provided by an electronic trading facility on which significant price discovery

the submission is incomplete or provides an inadequate explanation.

(4) Emergency rules. The Commission hereby delegates to the Director of the Division of Market Oversight and, separately, to the Director of the Division of Clearing and Intermediary Oversight, to be exercised by either Director, as appropriate, or by such other employee or employees of the Commission that either Director may designate from time to time, authority to receive notification of emergency rules under § 40.6(a)(6)(ii) of this part.

(5) The Commission hereby delegates to the Director of the Division of Market Oversight, to be exercised by the Director or by such employees of the Commission that the Director may designate from time to time, with the concurrence of the General Counsel or the General Counsel’s delegate, the authority to determine whether a rule change submitted by a designated contract market for a materiality determination under § 40.4(b)(5) of this part is not material (in which case it may be reported pursuant to the provisions of § 40.6(d) of this part), or is material, in which case he or she shall notify the registered entity that the rule change must be submitted for the Commission’s prior approval.

(b) Approval authority. The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, with the concurrence of the General Counsel or the General Counsel’s delegate, the authority to approve, pursuant to section 5c(c)(3) of the Act and § 40.5 of this part, rules or rule amendments of a registered entity that:

(1) Relate to, but do not substantially change, the quantity, quality, or other delivery specifications, procedures, or obligations for delivery, cash settlement, or exercise under an agreement, contract or transaction approved for trading by the Commission; daily settlement prices; clearing position limits; requirements or procedures for governance of a registered entity; procedures for transfer trades; trading hours; minimum price fluctuations; and maximum price limit and trading suspension provisions;

(2) Reflect routine modifications that are required or anticipated by the terms of the rule of a registered entity;

(3) Establish or amend speculative limits or position accountability provisions that are in compliance with the requirements of the Act and the Commission’s regulations;

(4) Are in substance the same as a rule of the same or another registered entity which has been approved previously by the Commission pursuant to section 5c(c)(3) of the Act;

(5) Are consistent with a specific, stated policy or interpretation of the Commission; or

(6) Relate to the listing of additional trading months of approved contracts.

(c) Notwithstanding the provisions of this section, the Director of the Division of Clearing and Intermediary Oversight and, separately, the Director of the Division of Market Oversight may submit to the Commission for its consideration any matter that has been delegated pursuant to this section.

(d) Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising any of the authority delegated pursuant to this section.
contracts are traded or executed will be public: rulebook, the facility’s regulatory compliance chart, documents establishing the facility’s legal status, documents setting forth the facility’s governance structure, and any other parts of the submissions not covered by a request for confidential treatment (§40.8(b) will be removed on July 20, 2012).

(c) A registered entity’s filing of new products pursuant to the self-certification procedures of §40.2 of this part, new products for Commission review and approval pursuant to §40.3 of this part, new rules and rule amendments pursuant to the self-certification procedures of §40.6 and §40.10 of this part shall be treated as public information unless accompanied by a request for confidential treatment. If a registered entity files a request for confidential treatment, the following procedures shall apply:

(1) A detailed written justification of the confidential treatment request must be filed simultaneously with the request for confidential treatment. The form and content of the detailed written justification shall be governed by §145.9 of this chapter;

(2) All material for which confidential treatment is requested must be segregated in an appendix to the submission;

(3) The submission itself must indicate that material has been segregated and, as appropriate, an additional redacted version provided;

(4) Commission staff may make an initial determination with respect to the request for confidential treatment without regard to whether a request for the information has been sought under the Freedom of Information Act;

(5) All requests for confidential treatment shall be subject to the process provided by §145.9 of this chapter;

(6) A submitter of information under this part may appeal an adverse decision by the Commission’s Office of General Counsel. The form and content of such appeal shall be governed by §145.9(g) of this chapter;

(7) The grant of any part of a request for confidential treatment under this section may be reconsidered if a subsequent request under the Freedom of Information Act is made for the information.

(d) Commission staff will not consider confidential treatment requests for information that is required to be made public under the Act. The terms and conditions of a product submitted to the Commission pursuant to §40.2, §40.3, §40.5 and §40.6 of this part shall be made publicly available at the time of submission.

§ 40.9 [Reserved]

§ 40.10 Special certification procedures for submission of rules by systemically important derivatives clearing organizations.

(a) Advance notice. A registered derivatives clearing organization that has been designated by the Financial Stability Oversight Council as a systemically important derivatives clearing organization shall provide notice to the Commission not less than 60 days in advance of any proposed change to its rules, procedures, or operations that could materially affect the nature or level of risks presented by the systemically important derivatives clearing organization. A notice submitted under this section shall be subject to the filing requirements of §40.6(a)(1) and the Web site publication requirements of §40.6(a)(2).

(1) The notice of a proposed change shall provide the information required to be submitted under §40.6(a)(7) and shall specifically describe:

(i) The nature of the change and expected effects on risks to the systemically important derivatives clearing organization, its clearing members, or the market; and

(ii) How the systemically important derivatives clearing organization plans to manage any identified risks.

(2) Concurrent with providing the Commission with the advance notice or any request or other information related to the advance notice, the systemically important derivatives clearing organization shall provide the Board of Governors of the Federal Reserve System with a copy of such notice, request or other information in the same format and manner as required by the Board of Governors for
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those designated financial market utilities for which it is the Supervisory Agency pursuant to section 803(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(3) The systemically important derivatives clearing organization may request that the Commission expedite the review on the grounds that the change would materially decrease risk. The Commission, in its discretion, may expedite the review and, pursuant to paragraph (g) of this section, notify the systemically important derivatives clearing organization in less than 60 days from the date the Commission receives the notice of proposed change in writing that it does not object to the proposed change and authorizes implementation of the change on an earlier date.

(b) Materiality. The term “materially affect the nature or level of risks presented,” when used to qualify determinations on a change to rules, procedures, or operations of a systemically important derivatives clearing organization, means matters as to which there is a reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the systemically important derivatives clearing organization. Such changes may include, but are not limited to, changes that materially affect financial resources, participant and product eligibility, risk management (including matters relating to margin and stress testing), daily or intraday settlement procedures, default procedures, system safeguards (business continuity and disaster recovery), and governance. If a systemically important derivatives clearing organization determines that a proposed change is not material and therefore does not file an advance notice under this §40.10, but the Commission determines that the change is material, the Commission may require the systemically important derivatives clearing organization to withdraw the proposed change and provide notice pursuant to this section.

(c) Further information. The Commission may require the systemically important derivatives clearing organization to provide any further information necessary to assess the effect the proposed change would have on the nature or level of risks associated with the systemically important derivatives clearing organization’s payment, clearing, or settlement activities and the sufficiency of any proposed risk management techniques.

(d) Notice of objection. A systemically important derivatives clearing organization shall not implement a change to which the Commission has an objection on the grounds that the proposed change is not consistent with the Act or the Commission’s regulations, or the purposes of the Dodd-Frank Act or any applicable rules, orders, or standards prescribed under Section 805(a) of the Dodd-Frank Act. The Commission will notify the systemically important derivatives clearing organization in writing of any objection regarding the proposed change within 60 days from the later of:

(1) The date that the notice of the proposed change was received; or

(2) The date the Commission received any further information it had requested for consideration of the notice.

(e) Implementation of change absent Commission objection. A systemically important derivatives clearing organization may implement a change if it has not received an objection to the proposed change within 60 days from the later of:

(1) The date that the Commission received the notice of proposed change; or

(2) The date the Commission received any further information it had requested for consideration of the notice.

(f) Extended review. The Commission may, during the 60-day review period, extend the review period if the proposed change raises novel or complex issues. A notification by the Commission pursuant to this paragraph will extend the review for an additional 60 days. Any extension under this paragraph will extend the time periods under paragraphs (d) and (e) of this section for an additional 60 days.

(g) Change allowed earlier if notified of no objection. A systemically important derivatives clearing organization may implement a change in less than 60 days from the date the Commission receives the notice of proposed change or
the date the Commission receives any further information it has requested, if the Commission notifies the systemically important derivatives clearing organization in writing that it does not object to the proposed change and authorizes implementation of the change on an earlier date, subject to any conditions imposed by the Commission.

(h) Emergency changes. A systemically important derivatives clearing organization may implement a change that would otherwise require advance notice under this section if it determines that an emergency exists and immediate implementation of the change is necessary for the systemically important derivatives clearing organization to continue to provide its services in a safe and sound manner.

(1) The systemically important derivatives clearing organization shall provide notice of any such emergency change to the Commission as soon as practicable, which shall be no later than 24 hours after implementation of the change.

(2) The notice of an emergency change shall:

(i) Provide the information required for advance notice as set forth in paragraph (a) of this section;

(ii) Describe the nature of the emergency; and

(iii) Describe the reason the change was necessary for the systemically important derivatives clearing organization to continue to provide its services in a safe and sound manner.

(3) The Commission may require modification or rescission of the emergency change if it finds that the change is not consistent with the Act or the Commission's regulations, or the purposes of the Dodd-Frank Act or any applicable rules, orders, or standards prescribed under Section 805(a) of the Dodd-Frank Act.

§ 40.11 Review of event contracts based upon certain excluded commodities.

(a) Prohibition. A registered entity shall not list for trading or accept for clearing on or through the registered entity any of the following:

(1) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act, that involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law; or

(2) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which involves, relates to, or references an activity that is similar to an activity enumerated in §40.11(a)(1) of this part, and that the Commission determines, by rule or regulation, to be contrary to the public interest.

(b) [Reserved]

(c) 90-day review and approval of certain event contracts. The Commission may determine, based upon a review of the terms or conditions of a submission under §40.2 or §40.3, that an agreement, contract, transaction, or swap based on an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which may involve, relate to, or reference an activity enumerated in §40.11(a)(1) or §40.11(a)(2), be subject to a 90-day review. The 90-day review shall commence from the date the Commission notifies the registered entity of a potential violation of §40.11(a).

(1) The Commission shall request that a registered entity suspend the listing or trading of any agreement, contract, transaction, or swap based on an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which may involve, relate to, or reference an activity enumerated in §40.11(a)(1) or §40.11(a)(2), during the Commission's 90-day review period. The Commission shall post on the Web site a notification of the intent to carry out a 90-day review.

(2) Final determination. The Commission shall issue an order approving or disapproving an agreement, contract, transaction, or swap that is subject to a 90-day review under §40.11(c) not later than 90 days subsequent to the date that the Commission commences review, or if applicable, at the conclusion of such extended period agreed to or requested by the registered entity.
§ 40.12 Staying of certification and tolling of review period pending jurisdictional determination.

(a) Notice of novel derivative products. (1) A registered entity certifying, submitting for approval, or otherwise filing a proposal to list, trade, or clear a novel derivative product (other than a product subject to the provisions of § 1.8 of this chapter) having elements of both a security and a contract for the sale of a commodity for future delivery (or an option on such contract or an option on a commodity) may provide notice of its proposal to the Commission and the Securities and Exchange Commission with a statement that written notice has been provided to both agencies through an appropriate means provided in each Commission's regulations.

(2) If concurrent notice is not provided pursuant to §40.12(a)(1), the Commission shall notify the Securities and Exchange Commission of the registered entity's submission of a novel derivative product described in §40.12(a)(1) and accompany such notice with a copy of the submission. The Commission shall determine whether a particular submission is a novel derivative product requiring notice to the Securities and Exchange Commission not later than five business days subsequent to the date that the registered entity submits the product for Commission review.

(b) Tolling of review period. Upon receipt of a request for a jurisdictional determination, pursuant to Section 718(a)(2) of the Dodd-Frank Act, by the Commission or the Securities and Exchange Commission, the product certification shall be stayed or the approval review period shall be tolled until a final determination order is issued.

(1) The Commission will provide the registered entity with a written notice of stay pending issuance of a final determination order by the Commission or the Securities and Exchange Commission.

(2) The stay shall be withdrawn or the approval review period shall resume upon the Commission's or the Securities and Exchange Commission's issuance of a final determination order finding that the Commission has jurisdiction over the submission.

(3) Determination order. A final determination, for purposes of §40.12(b) of this part, shall be a determination order issued by the Commission or the Securities and Exchange Commission pursuant to Section 718(a)(3) of the Dodd-Frank Act.

(c) Judicial review of determination order. The filing of a petition by a complaining Commission, pursuant to Section 718(b) of the Dodd-Frank Act, shall operate as a stay of the agency order.

(1) The stay shall remain in effect until the date on which the United States Court of Appeals for the District of Columbia Circuit issues a final determination pursuant to Section 718(b)(4) of the Dodd-Frank Act, or until such date that there is a final disposition of an appeal of that determination.

(2) The submission review period shall resume upon issuance of a final determination, as described in §40.12(c)(1), that the Commission has jurisdiction over the submission.

APPENDIX A TO PART 40—SCHEDULE OF FEES

(a) Applications for product approval. Each application for product approval under §40.3 must be accompanied by a check or money order made payable to the Commodity Futures Trading Commission in an amount to be determined annually by the Commission and published in the FEDERAL REGISTER.

(b) Checks and applications should be sent to the attention of the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581. No checks or money orders may be accepted by personnel other than those in the Office of the Secretariat.

(c) Failure to submit the fee with an application for product approval will result in return of the application. Fees will not be returned after receipt.

APPENDIXES B–C TO PART 40 [RESERVED]

APPENDIX D TO PART 40—SUBMISSION COVER SHEET AND INSTRUCTIONS

(a) A properly completed submission cover sheet shall accompany all rule and product submissions submitted electronically by a registered entity in a format and manner specified by the Secretary of the Commission.
to the Secretary of the Commission. A properly completed submission cover sheet shall include all of the following:

1. **Identifier Code (optional)**—A registered entity Identifier Code at the top of the cover sheet, if applicable. Such codes are commonly generated by registered entities to provide an identifier that is unique to each filing (e.g., NYMEX Submission 03-116).

2. **Date**—The date of the filing.

3. **Organization**—The name of the organization filing the submission (e.g., CBOT).

4. **Filing as a**—Check in the appropriate box indicating that the rule or product is being submitted by a designated contract market (DCM), derivatives clearing organization (DCO), swap execution facility (SEF), or swap data repository (SDR), electronic trading facility with a significant price discovery contract (the term will be removed on July 20, 2012).

5. **Type of Filing**—An indication as to whether the filing is a new rule, rule amendment or new product. The registered entity should check the appropriate box to indicate the applicable category under that heading.

6. **Rule Numbers**—For rule filings, the rule number(s) being adopted or modified in the case of rule amendment filings.

7. **Description**—For rule or rule amendment filings, a description of the new rule or rule amendment, including a discussion of its expected impact on the registered entity, market participants, and the overall market. The narrative should describe the substance of the submission with enough specificity to characterize all material aspects of the filing.

(b) **Other Requirements**—A submission shall comply with all applicable filing requirements for proposed rules, rule amendments, or products. The filing of the submission cover sheet does not obviate the registered entity’s responsibility to comply with applicable filing requirements (e.g., rules submitted for Commission approval under §40.5 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views).

(c) Checking the box marked “confidential treatment requested” on the Submission Cover Sheet does not obviate the submitter’s responsibility to comply with all applicable requirements for requesting confidential treatment in §40.8 and, where appropriate, §145.9 of this chapter, and will not substitute for notice or full compliance with such requirements.

### PART 41—SECURITY FUTURES PRODUCTS

**Subpart A—General Provisions**

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- **41.11 Method for determining market capitalization and dollar value of average daily trading volume; application of the definition of narrow-based security index.**
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- **41.45 Required margin.**
§ 41.1 Definitions.

For purposes of this part:

(a) Alternative trading system shall have the meaning set forth in section 1a(1) of the Act.

(b) Board of trade shall have the meaning set forth in section 1a(2) of the Act.

(c) Broad-based security index means a group or index of securities that does not constitute a narrow-based security index.

(d) Foreign board of trade means a board of trade located outside of the United States, its territories or possessions, whether incorporated or unincorporated, where foreign futures or foreign options are entered into.

(e) Narrow-based security index has the same meaning as in section 1a(35) of the Commodity Exchange Act.

(f) National securities association means a board of trade registered with the Securities and Exchange Commission pursuant to section 15A(a) of the Securities Exchange Act of 1934.

(g) National securities exchange means a board of trade registered with the Securities and Exchange Commission pursuant to section 6(a) of the Securities Exchange Act of 1934.

(h) Rule shall have the meaning set forth in Commission regulation 40.1.

(i) Security futures product shall have the meaning set forth in section 1a(32) of the Act.

(j) Opening price means the price at which a security opened for trading, or a price that fairly reflects the price at which a security opened for trading, during the regular trading session of the national securities exchange or national securities association that lists the security. If the security is not listed on a national securities exchange or a national securities association, then opening price shall mean the price at which a security opened for trading, or a price that fairly reflects the price at which a security opened for trading, on the primary market for the security.

(k) Regular trading session of a security means the normal hours for business of a national securities exchange or national securities association that lists the security.

(l) Regulatory halt means a delay, halt, or suspension in the trading of a security, that is instituted by the national securities exchange or national securities association that lists the security, as a result of:

(1) A determination that there are matters relating to the security or issuer that have not been adequately disclosed to the public, or that there are regulatory problems relating to the security which should be clarified before trading is permitted to continue; or

(2) The operation of circuit breaker procedures to halt or suspend trading in all equity securities trading on that national securities exchange or national securities association.


§ 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.

[77 FR 66344, Nov. 2, 2012]

§ 41.3 Application for an exemptive order pursuant to section 4f(a)(4)(B) of the Act.

(a) Any futures commission merchant or introducing broker registered in accordance with the notice registration provisions of §3.10 of this chapter, or any broker or dealer exempt from floor broker or floor trader registration pursuant to section 4a(3) of the Act, may apply to the Commission for an
order pursuant to section 4f(a)(4)(B) of the Act granting exemption to such person from any provision of the Act or the Commission’s regulations other than sections 4c(b), 4c(d), 4c(e), 4c(g), 4d, 4e, 4h, 4f(b), 4f(c), 4j, 4k(1), 4p, 6d, 8(d), 8(g), and 16 of the Act and the rules thereunder.

(b) An application pursuant to this section must set forth in writing or in an electronic mail message the following information:

(1) The name, main business address and main business telephone number of the person applying for an order;

(2) The capacity in which the person is registered with the Securities and Exchange Commission and the person’s CRD number (if a member of the National Association of Securities Dealers, Inc.) or equivalent self-regulatory organization identification, together with a certification, if true, that the person’s registration is not suspended pursuant to an order of the Securities and Exchange Commission;

(3) The particular section(s) of the Act and/or provision(s) of the Commission’s regulations with respect to which the person seeks exemption;

(4) Any provision(s) of the securities laws or rules, or of the rules of a securities self-regulatory organization analogous to the provision(s);

(5) A clear explanation of the facts and circumstances under which the person believes that the requested exemptive relief is necessary or appropriate in the public interest; and

(6) A clear explanation of the extent to which the requested exemptive relief is consistent with the protection of investors.

(c) A national securities exchange or other securities industry self-regulatory organization may submit an application for an order pursuant to this section on behalf of its members.

(d) An application for an order must be submitted to the Director of the Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, if in paper form, or to tm@cftc.gov if submitted via electronic mail.

(e) The Commission may, in its sole discretion, grant the application, deny the application, decline to entertain the application, or grant the application subject to one or more conditions.

§§ 41.4–41.9 [Reserved]

Subpart B—Narrow-Based Security Indexes

§ 41.11 Method for determining market capitalization and dollar value of average daily trading volume; application of the definition of narrow-based security index.

(a) Market capitalization. For purposes of section 1a(35)(B) of the Act (7 U.S.C. 1a(35)(B)):

(1) On a particular day, a security shall be 1 of 750 securities with the largest market capitalization as of the preceding 6 full calendar months when it is included on a list of such securities designated by the Commission and the SEC as applicable for that day.

(2) In the event that the Commission and the SEC have not designated a list under paragraph (a)(1) of this section:

(i) The method to be used to determine market capitalization of a security as of the preceding 6 full calendar months is to sum the values of the market capitalization of such security for each U.S. trading day of the preceding 6 full calendar months, and to divide this sum by the total number of such trading days.

(ii) The 750 securities with the largest market capitalization shall be identified from the universe of all NMS securities as defined in § 242.600 that are common stock or depositary shares.

(b) Dollar value of ADTV. (1) For purposes of section 1a(35)(A) and (B) of the Act (7 U.S.C. 1a(35)(A) and (B)):

(i)(A) The method to be used to determine the dollar value of ADTV of a security is to sum the dollar value of ADTV of all reported transactions in such security in each jurisdiction as calculated pursuant to paragraphs (b)(1)(ii) and (iii) of this section.

(B) The dollar value of ADTV of a security shall include the value of all reported transactions for such security and for any depositary share that represents such security.
(C) The dollar value of ADTV of a depositary share shall include the value of all reported transactions for such depositary share and for the security that is represented by such depositary share.

(ii) For trading in a security in the United States, the method to be used to determine the dollar value of ADTV as of the preceding 6 full calendar months is to sum the value of all reported transactions in such security for each U.S. trading day during the preceding 6 full calendar months, and to divide this sum by the total number of such trading days.

(iii)(A) For trading in a security in a jurisdiction other than the United States, the method to be used to determine the dollar value of ADTV as of the preceding 6 full calendar months is to sum the value in U.S. dollars of all reported transactions in such security in such jurisdiction for each trading day during the preceding 6 full calendar months, and to divide this sum by the total number of trading days in such jurisdiction during the preceding 6 full calendar months.

(B) If the value of reported transactions used in calculating the ADTV of securities under paragraph (b)(1)(iii)(A) is reported in a currency other than U.S. dollars, the total value of each day's transactions in such currency shall be converted into U.S. dollars on the basis of a spot rate of exchange for that day obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

(iv) The dollar value of ADTV of the lowest weighted 25% of an index is the sum of the dollar value of ADTV of each of the component securities comprising the lowest weighted 25% of such index.

(ii) In the event that the Commission and the SEC have not designated a list under paragraph (b)(2)(i) of this section:

(A) The method to be used to determine the dollar value of ADTV of a security as of the preceding 6 full calendar months is to sum the value of all reported transactions in such security in the United States for each U.S. trading day during the preceding 6 full calendar months, and to divide this sum by the total number of such trading days.

(B) The 675 securities with the largest dollar value of ADTV shall be identified from the universe of all NMS securities as defined in §242.600 that are common stock or depositary shares.

(c) Depositary Shares and Section 12 Registration. For purposes of section 1a(35)(B)(III)(aa) of the Act (7 U.S.C. 1a(35)(B)(III)(aa)), the requirement that each component security of an index be registered pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) shall be satisfied with respect to any security that is a depositary share if the deposited securities underlying the depositary share are registered under the Securities Exchange Act of 1934 and the depositary share is registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.) on Form F–6 (17 CFR 239.36).

(d) Definitions. For purposes of this section:

(1) SEC means the Securities and Exchange Commission.

(2) Closing price of a security means:

(i) If reported transactions in the security have taken place in the United States, the price at which the last transaction in such security took place in the regular trading session of the principal market for the security in the United States.

(ii) If no reported transactions in a security have taken place in the United States, the closing price of such security shall be the closing price of any depositary share representing such security divided by the number of shares represented by such depositary share.

(iii) If no reported transactions in a security or in a depositary share representing such security have taken place in the United States, the closing price of such security shall be the price...
at which the last transaction in such security took place in the regular trading session of the principal market for the security. If such price is reported in a currency other than U.S. dollars, such price shall be converted into U.S. dollars on the basis of a spot rate of exchange relevant for the time of the transaction obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

(3) **Depositary share** has the same meaning as in §240.12b-2.

(4) **Foreign financial regulatory authority** has the same meaning as in Section 3(a)(52) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(52)).

(5) **Lowest weighted 25% of an index.** With respect to any particular day, the lowest weighted component securities comprising, in the aggregate, 25% of an index’s weighting for purposes of section 1a(35)(A)(iv) of the Act (15 U.S.C. 1a(35)(A)(iv)) (“lowest weighted 25% of an index”) means those securities:

(i) That are the lowest weighted securities when all the securities in such index are ranked from lowest to highest based on the index’s weighting methodology; and

(ii) For which the sum of the weight of such securities is equal to, or less than, 25% of the index’s total weighting.

(6) **Market capitalization** of a security on a particular day:

(i) If the security is not a depositary share, is the product of:

(A) The closing price of such security on that same day; and

(B) The number of outstanding shares of such security on that same day.

(ii) If the security is a depositary share, is the product of:

(A) The closing price of the depositary share on that same day divided by the number of deposited securities represented by such depositary share; and

(B) The number of outstanding shares of the security represented by the depositary share on that same day.

(7) **Outstanding shares** of a security means the number of outstanding shares of such security as reported on the most recent Form 10-K, Form 10-Q, Form 10-KSB, Form 10-QSB, or Form 20-F (17 CFR 249.310, 249.308a, 249.308b, or 249.220f) filed with the Securities and Exchange Commission by the issuer of such security, including any change to such number of outstanding shares subsequently reported by the issuer on a Form 8-K (17 CFR 249.308).

(8) **Preceding 6 full calendar months** means, with respect to a particular day, the period of time beginning on the same day of the month 6 months before and ending on the day prior to such day.

(9) **Principal market** for a security means the single securities market with the largest reported trading volume for the security during the preceding 6 full calendar months.

(10) **Reported transaction** means:

(i) With respect to securities transactions in the United States, any transaction for which a transaction report is collected, processed, and made available pursuant to an effective transaction reporting plan, or for which a transaction report, last sale data, or quotation information is disseminated through an automated quotation system as described in Section 3(a)(51)(A)(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(51)(A)(i)); and

(ii) With respect to securities transactions outside the United States, any transaction that has been reported to a foreign financial regulatory authority in the jurisdiction where such transaction has taken place.

(11) **U.S. trading day** means any day on which a national securities exchange is open for trading.

(12) **Weighting** of a component security of an index means the percentage of such index’s value represented, or accounted for, by such component security.
§ 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.

(77 FR 66344, Nov. 2, 2012)

§ 41.14 Transition period for indexes that cease being narrow-based security indexes.

(a) Forty-five day tolerance provision. An index that is a narrow-based security index that becomes a broad-based security index for more than 45 business days has the same meaning as in §41.11(d)(6) of this chapter.

(2) Dollar value of trading volume of a security on a particular day is the value in U.S. dollars of all reported transactions in such security on that day. If the value of reported transactions used in calculating dollar value of trading volume is reported in a currency other than U.S. dollars, the total value of each day’s transactions shall be converted into U.S. dollars on the basis of a spot rate of exchange for that day obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

3 Lowest weighted 25% of an index has the same meaning as in §41.11(d)(5) of this chapter.

4 Preceding 6 full calendar months has the same meaning as in §41.11(d)(8) of this chapter.

5 Reported transaction has the same meaning as in §41.11(d)(10) of this chapter.
45 business days over 3 consecutive calendar months shall be a narrow-based security index.

(b) Transition period for indexes that cease being narrow-based security indexes for more than forty-five days. An index that is a narrow-based security index that becomes a broad-based security index for more than 45 business days over 3 consecutive calendar months shall continue to be a narrow-based security index for the following 3 calendar months.

(c) Trading in months with open interest following transition period. After the transition period provided for in paragraph (b) of this section ends, a national securities exchange may continue to trade only in those months in the security futures product that had open interest on the date the transition period ended.

(d) Definition of calendar month. Calendar month means, with respect to a particular day, the period of time beginning on a calendar date and ending during another month on a day prior to such date.

§ 41.15 Exclusion from definition of narrow-based security index for indexes composed of debt securities.

(a) An index is not a narrow-based security index if:

(i) Each of the securities of an issuer included in the index is a security, as defined in section 2(a)(1) of the Securities Act of 1933 and section 3(a)(10) of the Securities Exchange Act of 1934 and the respective rules promulgated thereunder, that is a note, bond, debenture, or evidence of indebtedness;

(ii) None of the securities of an issuer included in the index is an equity security, as defined in section 3(a)(11) of the Securities Exchange Act of 1934 and the rules promulgated thereunder;

(iii) The index is comprised of more than nine securities that are issued by more than nine non-affiliated issuers;

(iv) The securities of any issuer included in the index do not comprise more than 30 percent of the index’s weighting;

(v) The securities of any five non-affiliated issuers included in the index do not comprise more than 60 percent of the index’s weighting;

(vi) Except as provided in paragraph (a)(1)(vii) of this section, for each security of an issuer included in the index one of the following criteria is satisfied:

(A) The issuer of the security is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934;

(B) The issuer of the security has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(C) The issuer of the security has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion;

(D) The security is an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 and the rules promulgated thereunder; or

(E) The issuer of the security is a government of a foreign country or a political subdivision of a foreign country; and

(vii) Except as provided in paragraph (a)(1)(vii) of this section, for each security of an issuer included in the index one of the following criteria is satisfied:

(A) The security has a total remaining principal amount of at least $250,000,000; or

(B) The security is a municipal security (as defined in section 3(a)(29) of the Securities Exchange Act of 1934 and the rules promulgated thereunder) that has a total remaining principal amount of at least $200,000,000 and the issuer of such municipal security has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion; and

(viii) Paragraphs (a)(1)(vi) and (a)(1)(vii) of this section will not apply to securities of an issuer included in the index if:

(A) All securities of such issuer included in the index represent less than five percent of the index’s weighting; and

(B) Securities comprising at least 80 percent of the index’s weighting satisfy the provisions of paragraphs (a)(1)(vi) and (a)(1)(vii) of this section.
(2)(i) The index includes exempted securities, other than municipal securities as defined in section 3(a)(29) of the Securities Exchange Act of 1934 and the rules promulgated thereunder, that are:
   (A) Notes, bonds, debentures, or evidences of indebtedness; and
   (B) Not equity securities, as defined in section 3(a)(11) of the Securities Exchange Act of 1934 and the rules promulgated thereunder; and
   (ii) Without taking into account any portion of the index composed of such exempted securities, other than municipal securities, the remaining portion of the index would not be a narrow-based security index meeting all the conditions under paragraph (a)(1) of this section.

(b) For purposes of this section:
   (1) An issuer is affiliated with another issuer if it controls, is controlled by, or is under common control with, that issuer.
   (2) For purposes of this section, "control" means ownership of 20 percent or more of an issuer's equity, or the ability to direct the voting of 20 percent or more of the issuer's voting equity.
   (3) The term "issuer" includes a single issuer or group of affiliated issuers.

Subpart C—Requirements and Standards for Listing Security Futures Products

Source: 66 FR 55083, Nov. 1, 2001, unless otherwise noted.

§ 41.21 Requirements for underlying securities.

(a) Security futures products based on a single security. A futures contract on a single security is eligible to be traded as a security futures product only if:
   (1) The underlying security is registered pursuant to section 12 of the Securities Exchange Act of 1934;
   (2) The underlying security is:
      (i) Common stock,
      (ii) Such other equity security as the Commission and the SEC jointly deem appropriate, or
      (iii) A note, bond, debenture, or evidence of indebtedness; and
   (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) Security futures product based on two or more securities. A futures contract on an index of two or more securities is eligible to be traded as a security futures product only if:
   (1) The index is a narrow-based security index as defined in section 1a(35) of the Act;
   (2) The securities in the index are registered pursuant to section 12 of the Securities Exchange Act of 1934;
   (3) The securities in the index are:
      (i) Common stock,
      (ii) Such other equity securities as the Commission and the SEC jointly deem appropriate, or
      (iii) A note, bond, debenture, or evidence of indebtedness; and
   (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.

§ 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:
   (a) The underlying security or securities satisfy the requirements of § 41.21;
   (b) If the security futures product is not cash settled, arrangements are in place with a clearing agency registered pursuant to section 17A of the Securities Exchange Act of 1934 for the payment and delivery of the securities underlying the security futures product;
   (c) Common clearing. [Reserved]
   (d) Only futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators or associated persons subject to suitability rules comparable
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§ 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:

(1) Is labeled “Listing of Security Futures Product;

(2) Includes a copy of the product’s rules, including its terms and conditions;

(1) The alternative trading system is a member of a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 or national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934; and

(2) The national securities association or national securities exchange of which the alternative trading system is a member has in place such procedures;

(1) Procedures are in place to coordinate regulatory trading halts between the board of trade and markets on which any related security is traded. A board of trade that is an alternative trading system does not need to make this certification, provided that:

(1) The alternative trading system is a member of a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 or national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934; and

(2) The national securities association or national securities exchange of which the alternative trading system is a member has in place such procedures;

(1) The alternative trading system is a member of a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 and the rules and regulations thereunder, except to the extent otherwise permitted under the Securities Exchange Act of 1934 and the rules and regulations thereunder, may solicit, accept any order for, or otherwise deal in any transaction in or in connection with security futures products;

(e) If the board of trade is a designated contract market pursuant to section 5 of the Act, dual trading in security futures products is restricted in accordance with § 41.27;

(f) Trading in the security futures products is not readily susceptible to manipulation of the price of such security futures product, nor to causing or being used in the manipulation of the price of any underlying security, option on such security, or option on a group or index including such securities, consistent with the conditions for trading of § 41.25;

(g) Procedures are in place for coordinated surveillance among the board of trade, any market on which any security underlying a security futures product is traded, and other markets on which any related security is traded to detect manipulation and insider trading. A board of trade that is an alternative trading system does not need to make this certification, provided that:

(1) The alternative trading system is a member of a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 or national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934; and

(2) The national securities association or national securities exchange of which the alternative trading system is a member has in place such procedures;

(h) An audit trail is in place to facilitate coordinated surveillance among the board of trade, any market on which any security underlying a security futures product is traded, and any market on which any related security is traded. A board of trade that is an alternative trading system does not need to make this certification, provided that:

(1) The alternative trading system is a member of a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 or national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934; and

(2) The national securities association or national securities exchange of which the alternative trading system is a member has in place such procedures;

(1) 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:

(1) 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:

(1) 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:
§ 41.24 Rule amendments to security futures products.

(a) Self-certification of rules and rule amendments by designated contract markets and registered derivatives clearing organizations. A designated contract market or registered derivatives clearing organization may implement any new rule or rule amendment relating to a security futures product by submitting 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 implementation of the rule or rule amendment, a filing that:

(1) Is labeled “Security Futures Product Rule Submission;”

(2) Includes a copy of the new rule or rule amendment;

(3) Includes a certification that the designated contract market or registered derivatives clearing organization has filed the rule or rule amendment with the Securities and Exchange Commission, if such a filing is required;

(4) 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

(5) Includes a copy of the submission cover sheet in accordance with the instructions in appendix D of part 40.

(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.

§ 41.25 Additional conditions for trading for security futures products.

(a) Common provisions—

(1) Reporting of data. The designated contract market shall comply with part 16 of this chapter requiring the daily reporting of market data.

(2) Regulatory trading halts. The rules of a designated contract market that lists or trades one or more security futures products must include the following provisions:

(i) Trading of a security futures product based on a single security shall be halted at all times that a regulatory halt has been instituted for the underlying security; and

(3) Includes the certifications required by §41.22;

(4) Includes a certification that the terms and conditions of the contract comply with the additional conditions for trading of §41.25;

(5) If the board of trade is a designated contract market pursuant to section 5 of the Act, it includes the documents and certifications required to be filed with the Commission pursuant to §40.6 of this chapter, including a certification that the security futures product complies with the Act and rules thereunder; and

(6) Includes a request for confidential treatment as permitted under the procedures of §40.8.

§ 41.24 Rule amendments to security futures products.

(a) Self-certification of rules and rule amendments by designated contract markets and registered derivatives clearing organizations. A designated contract market or registered derivatives clearing organization may implement any new rule or rule amendment relating to a security futures product by submitting 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 implementation of the rule or rule amendment, a filing that:

(1) Is labeled “Security Futures Product Rule Submission;”

(2) Includes a copy of the new rule or rule amendment;

(3) Includes a certification that the designated contract market or registered derivatives clearing organization has filed the rule or rule amend-
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(ii) Trading of a security futures product based on a narrow-based security index shall be halted at all times that a regulatory halt has been instituted for one or more underlying securities that constitute 50 percent or more of the market capitalization of the narrow-based security index.

(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) Adopt a net position limit no greater than 13,500 (100-share) contracts applicable to positions held during the last five trading days of an expiring contract month; except where,

(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 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.

(ii) For a security futures product comprised of more than one security, the criteria in paragraphs (a)(3)(i)(A) and (a)(3)(i)(B) of this section must apply to the security in the index with the lowest average daily trading volume.

(iii) Exchanges may approve exemptions from these position limits pursuant to rules that are consistent with §150.3 of this chapter.

(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.

(b) Final settlement prices for security futures products. (1) The final settlement price of a cash-settled security futures product must fairly reflect the opening price of the underlying security or securities;

(2) Notwithstanding paragraph (b)(1) of this section, if an opening price for one or more securities underlying a security futures product is not readily available, the final settlement price of the security futures product shall fairly reflect:

(i) The price of the underlying security or securities during the most recent regular trading session for such security or securities; or

(ii) The next available opening price of the underlying security or securities.

(3) Notwithstanding paragraphs (b)(1) or (b)(2) of this section, if a derivatives clearing organization registered under Section 5b of the Act or a clearing agency exempt from registration pursuant to Section 5b(a)(2) of the Act, to which the final settlement price of a security futures product is or would be reported determines, pursuant to its rules, that such final settlement price is not consistent with the protection of customers and the public interest, taking into account such factors as fairness to buyers and sellers of the affected security futures product, the
maintenance of a fair and orderly market in such security futures product, and consistency of interpretation and practice, the clearing organization shall have the authority to determine, under its rules, a final settlement price for such security futures product.

(c) Special requirements for physical delivery contracts. For security futures products settled by actual delivery of the underlying security or securities, payment and delivery of the underlying security or securities must be effected through a clearing agency that is registered pursuant to section 17A of the Securities Exchange Act of 1934.

(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.

§ 41.27 Prohibition of dual trading in security futures products by floor brokers.

(a) Definitions. For purposes of this section:

(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.

(2) Member shall have the meaning set forth in section 1a(24) of the Act.

(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:

(i) Engage in floor brokerage activity on behalf of the same employer;

(ii) Have an employer and employee relationship which relates to floor brokerage activity;

(iii) Share profits and losses associated with their brokerage or trading activity; or

(iv) Regularly share a deck of orders.

(4) Customer means an account owner for which a trade is executed other than:

(i) An account in which such floor broker has any interest;

(ii) An account for which a floor broker has discretion;

(iii) An account controlled by a person with whom a floor broker has a relationship through membership in a broker association;

(iv) A house account of the floor broker’s clearing member; or

(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 over ride 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 over ride a predetermined algorithm from trading a security futures product for
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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) Rules Prohibiting Dual Trading—(1) Designated contract markets. Prior to listing a security futures product for trading on a trading floor where bids and offers are executed through open outcry, a designated contract market:
   (i) Must submit to the Commission in accordance with § 40.6, a rule prohibiting dual trading, together with a written certification that the rule complies with the Act and the regulations thereunder, including this section; or
   (ii) Must obtain Commission approval of such rule pursuant to § 40.5.

(2) Customer consent. To permit a customer to designate in writing not less than once annually a specifically identified floor broker to dual trade while executing orders for such customer's account. An account controller acting pursuant to a power of attorney may designate a dual trading broker on behalf of its customer, provided, that the customer explicitly grants in writing to the individual account controller the authority to select a dual trading broker.

(3) Spread transactions. To permit a broker who unsuccessfully attempts to leg into a spread transaction for a customer to take the executed leg into his or her personal account and to offset such position, provided, that a record is prepared and maintained to demonstrate that the customer order was for a spread.

(4) Market emergencies. To address emergency market conditions resulting in a temporary emergency action as determined by a designated contract market.

(e) Rules Permitting Specific Exceptions—(1) Designated contract markets. Prior to permitting dual trading under any of the exceptions provided in paragraphs (d)(1)–(4) of this section, a designated contract market:
   (i) Must submit to the Commission in accordance with § 40.6, a rule permitting the exception(s), together with a written certification that the rule complies with the Act and the regulations thereunder, including this section; or
   (ii) Must obtain Commission approval of such rule pursuant to § 40.5.

(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 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. 
   (2) [Reserved]
characteristic of agreements, contracts, or transactions, or of the designated contract market must be submitted to the Commission for prior approval under the procedures set forth in §40.5. The rule submission must include a detailed demonstration of why an exception is warranted.


Subpart D—Notice-Designated Contract Markets in Security Futures Products

Source: 66 FR 44965, Aug. 27, 2001, unless otherwise noted.

§41.31 Notice-designation requirements.

(a) Any board of trade that is a national securities exchange, a national securities association, or an alternative trading system, and that seeks to operate as a designated contract market in security futures products under section 5f of the Act, shall so notify the Commission. Such notification shall be filed with the Secretary of the Commission at its Washington, D.C. headquarters, in either electronic or hard copy form, shall be labeled as “Notice of Designation as a Contract Market in Security Futures Products,” and shall include:

(1) The name and address of the board of trade;

(2) The name and telephone number of a contact person designated to receive communications from the Commission on behalf of the board of trade;

(3) A description of the security futures products that the board of trade intends to make available for trading, including an identification of all facilities that would clear transactions in security futures products on behalf of the board of trade;

(4) A copy of the current rules of the board of trade; and

(5) A certification that the board of trade—

(i) Will not list or trade any contracts of sale for future delivery, except for security futures products;

(ii) Is registered with the Securities and Exchange Commission as a national securities association, or alternative trading system, and such registration is not suspended pursuant to an order by the Securities and Exchange Commission;

(iii) Will meet the criteria specified in subclauses (I) through (XI) of section 2(a)(1)(D)(i) of the Act, except as otherwise provided in section 2(a)(1)(D)(vi) of the Act, for each specific security futures product that the board of trade intends to make available for trading;

(iv) Will comply with the conditions for designation under this section and section 5f of the Act, including a specific representation by any alternative trading system that it is a member of a futures association registered under section 17 of the Act; and

(v) Will comply with the continuing obligations of regulation 41.32.

(b) A board of trade which files notice with the Commission under this section shall be deemed a designated contract market in security futures products upon the Commission’s receipt of such notice. Accordingly, the Commission shall send prompt acknowledgment of receipt to the filer.

(c) Designation as a contract market in security futures products pursuant to this section shall be deemed suspended if the board of trade:

(1) Lists or trades any contracts of sale for future delivery, except for security futures products; or

(2) Has its registration as a national securities exchange, national securities association, or alternative trading system suspended pursuant to an order by the Securities and Exchange Commission.

§41.32 Continuing obligations.

(a)(1) A board of trade designated as a contract market in security futures products pursuant to §41.31 of this chapter shall:

(i) Notify the Commission of any change in its regulatory status with the Securities and Exchange Commission or with a futures association registered under section 17 of the Act;

(ii) Comply with the filing requirements of section 2(a)(1)(D)(vii) of the Act each time the board of trade lists a security futures product for trading;

(iii) Provide the Commission with any new rules or rule amendments that
relate to the trading of security futures products, including both operational rules and the terms and conditions of products listed for trading on the facility, promptly after final implementation of such rules or rule amendments; and

(iv) Upon request, file promptly with the Commission—

(A) Such information related to its business as a designated contract market in security futures products as the Commission may request; and

(B) A written demonstration, containing such supporting data and other information and documents as the Commission may specify, that the board of trade is in compliance with one or more applicable provisions of the Act or regulations thereunder as specified in the request.

(2) Any information filed pursuant to paragraph (a) of this section shall be addressed to the Secretary of the Commission at its Washington, D.C. headquarters, shall be labeled "SFPCM Continuing Obligations," and may be transmitted in either electronic or hard copy form.

(b) Except as exempted under section 5f(b) of the Act or under §§ 41.33 and 41.34 of this chapter, any board of trade designated as a contract market in security futures products pursuant to § 41.31 of this chapter shall be subject to all applicable requirements of the Act and regulations thereunder. Failure to comply shall subject the board of trade to Commission action under, among other provisions, sections 5e and 6(b) of the Act.

§ 41.33 Applications for exemptive orders.

(a) Any board of trade designated as a contract market in security futures products pursuant to § 41.31 of this chapter may apply to the Commission for an exemption from any provision of the Act or regulations thereunder. Except as provided in sections 5f(b)(1) and 5f(b)(2) of the Act, the Commission shall have sole discretion to exempt a board of trade, conditionally or unconditionally, from any provision of the Act or regulations thereunder pursuant to this section. The Commission may issue such an exemptive order in response to an application only to the extent it finds, after review, that the issuance of an exemptive order is necessary or appropriate in the public interest and is consistent with the protection of investors.

(b) Each application for exemptive relief must comply with the requirements of this section. The Commission may, in its sole discretion, decline to entertain any application for an exemptive order under this section without explanation; provided, however, that the Commission shall notify the board of trade of such a decision in writing.

(c) Application requirements. (1) Each application for an exemptive order made pursuant to this section must include:

(i) The name and address of the board of trade requesting relief, and the name and telephone number of a person whom Commission staff may contact to obtain additional information regarding the request;

(ii) A certification that the registration of the board of trade is not suspended pursuant to an order of the Securities and Exchange Commission;

(iii) The provision(s) of the Act or regulations thereunder from which the board of trade seeks relief and, if applicable, whether the board of trade is otherwise subject to similar provisions as a result of Securities and Exchange Commission jurisdiction; and

(iv) The type of relief requested and the order sought; an explanation of the need for relief, including all material facts and circumstances giving rise to the request; and the extent to which such relief is necessary or appropriate in the public interest and consistent with the protection of investors.

(2) Each application must be filed with the Secretary of the Commission at its Washington, D.C. headquarters, in either electronic or hard copy form, signed by an authorized representative of the board of trade, and labeled "Application for an Exemptive Order pursuant to Commission regulation 41.33."

(d) Review Period. (1) The Commission shall have 90 days upon receipt of an application for an exemptive order in which to make a determination as to whether such relief should be granted or denied.
§ 41.34 Exempt Provisions.

Any board of trade notice-designated as a contract market in security futures products pursuant to §41.31 also shall be exempt from:

(a) The following provisions of the Act, pursuant to section 5(f)(1) of the Act:
   (1) Section 4(c)(c);
   (2) Section 4(c)(e);
   (3) Section 4(c)(g);
   (4) Section 4j;
   (5) Section 5;
   (6) Section 5c;
   (7) Section 6a;
   (8) Section 8(d);
   (9) Section 9(f);
   (10) Section 16 and;
(b) The following provisions, pursuant to section 5(f)(4) of the Act:
   (1) Section 6(a);
   (2) Part 38 of this chapter;
   (3) Part 40 of this chapter; and
   (4) Section 41.27.

§ 41.41 Security futures products accounts.

(a) Where security futures products may be held. (1) A person registered with the Commission as a futures commission merchant pursuant to section 4(a)(1) of the Commodity Exchange Act (“CEA”) and registered with the Securities and Exchange Commission (“SEC”) as a broker or dealer pursuant to section 15(b)(1) of the Securities Exchange Act of 1934 (“Securities Exchange Act”) (”Full FCM/Full BD”) may hold all of a customer’s security futures products in a futures account, all of a customer’s security futures products in a securities account, or some of a customer’s security futures products in a futures account and other security futures products of the same customer in a securities account. A person registered with the Commission as a futures commission merchant pursuant to section 4(a)(2) of the CEA (a notice-registered broker-dealer) may hold a customer’s security futures products only in a securities account. A person registered with the SEC as a broker or dealer pursuant to section 15(b)(11) of the Securities Exchange Act (a notice-registered broker-dealer) may hold a customer’s security futures products.
futures products only in a futures account.

(2) A Full FCM/Full BD shall establish written policies or procedures for determining whether customer security futures products will be placed in a futures account and/or a securities account and, if applicable, the process by which a customer may elect the type or types of account in which security futures products will be held (including the procedure to be followed if a customer fails to make an election of account type).

(b) Disclosure requirements. (1) Except as provided in paragraph (b)(2), before a futures commission merchant accepts the first order for a security futures product from or on behalf of a customer, the firm shall furnish the customer with a disclosure document containing the following information:

(i) A description of the protections provided by the requirements set forth under section 4d of the CEA applicable to a futures account;

(ii) A description of the protections provided by the requirements set forth under Securities Exchange Act Rule 15c3-3 and the Securities Investor Protection Act of 1970 applicable to a securities account;

(iii) A statement indicating whether the customer’s security futures products will be held in a futures account and/or a securities account, or whether the firm permits customers to make or change an election of account type; and

(iv) A statement that, with respect to holding the customer’s security futures products in a securities account or a futures account, the alternative regulatory scheme is not available to the customer in connection with that account.

(2) Where a customer account containing an open security futures product position is transferred to a futures commission merchant, that futures commission merchant may instead provide the statements described in paragraphs (b)(1)(i)(ii) and (b)(1)(iv) above no later than ten business days after the date the account is transferred.

(c) Changes in account type. A Full FCM/Full BD may change the type of account in which a customer’s security futures products will be held; provided, that:

(1) The firm creates a record of each change in account type, including the name of the customer, the account number, the date the firm received the customer’s request to change the account type, if applicable, and the date the change in account type became effective; and

(2) The firm, at least ten business days before the customer’s account type is changed:

(i) Notifies the customer in writing of the date that the change will become effective; and

(ii) Provides the customer with the disclosures described in paragraph (b)(1) above.

(d) Recordkeeping requirements. The Commission’s recordkeeping rules set forth in §§1.31, 1.32, 1.35, 1.36, 1.37, 4.23, 4.33, 18.05 and 190.06 of this chapter shall apply to security futures product transactions and positions in a futures account (as that term is defined in §1.3(vv) of this chapter). These rules shall not apply to security futures product transactions and positions in a securities account (as that term is defined in §1.3(ww) of this chapter); provided, that the SEC’s recordkeeping rules apply to those transactions and positions.

(e) Reports to customers. The Commission’s reporting requirements set forth in §§1.33 and 1.46 of this chapter shall apply to security futures product transactions and positions in a futures account (as that term is defined in §1.3(vv) of this chapter). These rules shall not apply to security futures product transactions and positions in a securities account (as that term is defined in §1.3(ww) of this chapter); provided, that the SEC’s rules set forth in §§240.10b–10 and 240.15c3–2 of this chapter regarding delivery of confirmations and account statements apply to those transactions and positions.

(f) Segregation of customer funds. All money, securities, or property held to margin, guarantee or secure security futures products held in a futures account, or accruing to customers as a result of such products, are subject to the segregation requirements of section 4d of the CEA and the rules thereunder.

[67 FR 58297, Sept. 13, 2002]
§ 41.42 Customer margin requirements for security futures—authority, purpose, interpretation, and scope.

(a) Authority and purpose. Subpart E, §§ 41.42 through 41.49, and 17 CFR 242.400 through 242.406 ("this Regulation") are issued by the Commodity Futures Trading Commission ("Commission") jointly with the Securities and Exchange Commission ("SEC"), pursuant to authority delegated by the Board of Governors of the Federal Reserve System under section 7(c)(2)(A) of the Securities Exchange Act of 1934 ("Exchange Act"). The principal purpose of this Regulation (Subpart E, §§ 41.42 through 41.49) is to regulate customer margin collected by brokers, dealers, and members of national securities exchanges, including futures commission merchants required to register as brokers or dealers under section 15(b)(11) of the Exchange Act, relating to security futures.

(b) Interpretation. This Regulation (Subpart E, §§ 41.42 through 41.49) shall be jointly interpreted by the SEC and the Commission, consistent with the criteria set forth in clauses (i) through (iv) of section 7(c)(2)(B) of the Exchange Act and the provisions of Regulation T (12 CFR part 220).

(c) Scope. (1) This Regulation (Subpart E, §§ 41.42 through 41.49) does not preclude a self-regulatory authority, under rules that are effective in accordance with section 19(b)(2) of the Exchange Act and the provisions of Regulation T (12 CFR part 220).

(2) This Regulation (Subpart E, §§ 41.42 through 41.49) does not apply to:

(i) Financial relations between a customer and a security futures intermediary to the extent that they comply with a portfolio margining system under rules that meet the criteria set forth in section 7(c)(2)(B) of the Exchange Act and that are effective in accordance with section 19(b)(2) of the Exchange Act and, as applicable, section 5c(c) of the Act;

(ii) Financial relations between a security futures intermediary and a foreign person involving security futures traded on or subject to the rules of a foreign board of trade;

(iii) Margin requirements that clearing agencies registered under section 17A of the Exchange Act or derivatives clearing organizations registered under section 5b of the Act impose on their members;

(iv) Financial relations between a security futures intermediary and a person based on a good faith determination by the security futures intermediary that such person is an exempted person; and

(v) Financial relations between a security futures intermediary and, or arranged by a security futures intermediary for, a person relating to trading in security futures by such person for its own account, if such person:

(A) Is a member of a national securities exchange or national securities association registered pursuant to section 15A(a) of the Exchange Act; and

(B) Is registered with such exchange or such association as a security futures dealer pursuant to rules that are effective in accordance with section 19(b)(2) of the Exchange Act and, as applicable, section 5c(c) of the Act, that:

(1) Require such member to be registered as a floor trader or a floor broker with the Commission under section 4(f)(1) of the Act, or as a dealer with the SEC under section 15(b) of the Exchange Act;

(2) Require such member to maintain records sufficient to prove compliance with this paragraph (c)(2)(v) and the rules of the exchange or association of which it is a member;

(3) Require such member to hold itself out as being willing to buy and sell security futures for its own account on a regular or continuous basis; and

(4) Provide for disciplinary action, including revocation of such member’s registration as a security futures dealer, for such member’s failure to comply with this Regulation (Subpart E, §§ 41.42 through 41.49) or the rules of the exchange or association.
(d) **Exemption.** The Commission may exempt, either unconditionally or on specified terms and conditions, financial relations involving any security futures intermediary, customer, position, or transaction, or any class of security futures intermediaries, customers, positions, or transactions, from one or more requirements of this Regulation (Subpart E, §§ 41.42 through 41.49), if the Commission determines that such exemption is necessary or appropriate in the public interest and consistent with the protection of customers. An exemption granted pursuant to this paragraph shall not operate as an exemption from any SEC rules. Any exemption that may be required from such rules must be obtained separately from the SEC.

§ 41.43 **Definitions.**

(a) For purposes of this Regulation (Subpart E, §§ 41.42 through 41.49) only, the following terms shall have the meanings set forth in this section.

1. **Applicable margin rules and margin rules applicable to an account** mean the rules and regulations applicable to financial relations between a security futures intermediary and a customer with respect to security futures and related positions carried in a securities account or futures account as provided in § 41.44(a) of this subpart.

2. **Broker** shall have the meaning provided in section 3(a)(4) of the Exchange Act.

3. **Contract multiplier** means the number of units of a narrow-based security index expressed as a dollar amount, in accordance with the terms of the security future contract.

4. **Current market value** means, on any day:
   (i) With respect to a security future:
      (A) If the instrument underlying such security future is a stock, the product of the daily settlement price of such security future as shown by any regularly published reporting or quotation service, and the applicable number of shares per contract; or
      (B) If the instrument underlying such security future is a narrow-based security index, as defined in section 1a(35)(A) of the Act, the product of the daily settlement price of such security future as shown by any regularly published reporting or quotation service, and the applicable contract multiplier.
   (ii) With respect to a security other than a security future, the most recent closing sale price of the security, as shown by any regularly published reporting or quotation service. If there is no recent closing sale price, the security futures intermediary may use any reasonable estimate of the market value of the security as of the most recent close of business.

5. **Customer** excludes an exempted person and includes:
   (i) Any person or persons acting jointly:
      (A) On whose behalf a security futures intermediary effects a security futures transaction or carries a security futures position; or
      (B) Who would be considered a customer of the security futures intermediary according to the ordinary usage of the trade;
   (ii) Any partner in a security futures intermediary that is organized as a partnership who would be considered a customer of the security futures intermediary absent the partnership relationship; and
   (iii) Any joint venture in which a security futures intermediary participates and which would be considered a customer of the security futures intermediary if the security futures intermediary were not a participant.

6. **Daily settlement price** means, with respect to a security future, the settlement price of such security future determined at the close of trading each day, under the rules of the applicable exchange, clearing agency, or derivatives clearing organization.

7. **Dealer** shall have the meaning provided in section 3(a)(5) of the Exchange Act.

8. **Equity** means the equity or margin equity in a securities or futures account, as computed in accordance with the margin rules applicable to the account and subject to adjustment under § 41.46(c), (d) and (e) of this subpart.

9. **Exempted person** means:
   (i) A member of a national securities exchange, a registered broker or dealer, or a registered futures commission merchant, a substantial portion of whose business consists of transactions in securities, commodity futures, or...
commodity options with persons other than brokers, dealers, futures commission merchants, floor brokers, or floor traders, and includes a person who:

(A) Maintains at least 1000 active accounts on an annual basis for persons other than brokers, dealers, persons associated with a broker or dealer, futures commission merchants, floor brokers, floor traders, and persons affiliated with a futures commission merchant, floor broker, or floor trader that are effecting transactions in securities, commodity futures, or commodity options;

(B) Earns at least $10 million in gross revenues on an annual basis from transactions in securities, commodity futures, or commodity options with persons other than brokers, dealers, persons associated with a broker or dealer, futures commission merchants, floor brokers, floor traders, and persons affiliated with a futures commission merchant, floor broker, or floor trader; or

(C) Earns at least 10 percent of its gross revenues on an annual basis from transactions in securities, commodity futures, or commodity options with persons other than brokers, dealers, persons associated with a broker or dealer, futures commission merchants, floor brokers, floor traders, and persons affiliated with a futures commission merchant, floor broker, or floor trader.

(ii) For purposes of paragraph (a)(9)(i) of this section only, persons affiliated with a futures commission merchant, floor broker, or floor trader means any partner, officer, director, or branch manager of such futures commission merchant, floor broker, or floor trader (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such futures commission merchant, floor broker, or floor trader, or any employee of such a futures commission merchant, floor broker, or floor trader.

(iii) A member of a national securities exchange, a registered broker or dealer, or a registered futures commission merchant that has been in existence for less than one year may meet the definition of exempted person based on a six-month period.

(10) Exempted security shall have the meaning provided in section 3(a)(12) of the Exchange Act.

(11) Floor broker shall have the meaning provided in section 1a(16) of the Act.

(12) Floor trader shall have the meaning provided in section 1a(17) of the Act.

(13) Futures account shall have the meaning provided in §1.3(vv) of this chapter.

(14) Futures commission merchant shall have the meaning provided in section 1a(20) of the Act.

(15) Good faith, with respect to making a determination or accepting a statement concerning financial relations with a person, means that the security futures intermediary is alert to the circumstances surrounding such financial relations, and if in possession of information that would cause a prudent person not to make the determination or accept the notice or certification without inquiry, investigates and is satisfied that it is correct.

(16) Listed option means a put or call option that is:

(i) Issued by a clearing agency that is registered under section 17A of the Exchange Act or cleared and guaranteed by a derivatives clearing organization that is registered under section 5b of the Act; and

(ii) Traded on or subject to the rules of a self-regulatory authority.

(17) Margin call means a demand by a security futures intermediary to a customer for a deposit of cash, securities or other assets to satisfy the required margin for security futures or related positions or a special margin requirement.

(18) Margin deficiency means the amount by which the required margin in an account is not satisfied by the equity in the account, as computed in accordance with §41.46 of this subpart.

(19) Margin equity security shall have the meaning provided in Regulation T.

(20) Margin security shall have the meaning provided in Regulation T.

(21) Member shall have the meaning provided in section 3(a)(3) of the Exchange Act, and shall include persons registered under section 15(b)(11) of the
Exchange Act that are permitted to effect transactions on a national securities exchange without the services of another person acting as executing broker.

(22) **Money market mutual fund** means any security issued by an investment company registered under section 8 of the Investment Company Act of 1940 that is considered a money market fund under §270.2a-7 of this title.

(23) **Persons associated with a broker or dealer** shall have the meaning provided in section 3(a)(18) of the Exchange Act.

(24) **Regulation T** means Regulation T promulgated by the Board of Governors of the Federal Reserve System, 12 CFR part 220, as amended from time to time.

(25) **Regulation T collateral value**, with respect to a security, means the current market value of the security reduced by the percentage of required margin for a position in the security held in a margin account under Regulation T.

(26) **Related position**, with respect to a security future, means any position in an account that is combined with the security future to create an offsetting position as provided in §41.45(b)(2) of this subpart.

(27) **Related transaction**, with respect to a position or transaction in a security future, means:

(i) Any transaction that creates, eliminates, increases or reduces an offsetting position involving a security future and a related position, as provided in §41.45(b)(2) of this subpart; or

(ii) Any deposit or withdrawal of margin for the security future or a related position, except as provided in §41.47(b) of this subpart.

(28) **Securities account** shall have the meaning provided in §1.3(ww) of this chapter.

(29) **Security futures intermediary** means any creditor as defined in Regulation T with respect to its financial relations with any person involving security futures, including:

(i) Any futures commission merchant;

(ii) Any partner, officer, director, or branch manager (or person occupying a similar status or performing similar functions) of a futures commission merchant;

(iii) Any person directly or indirectly controlling, controlled by, or under common control with (except for business entities controlling or under common control with) a futures commission merchant; and

(iv) Any employee of a futures commission merchant (except an employee whose functions are solely clerical or ministerial).

(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.

(31) **Special margin requirement** shall have the meaning provided in §41.46(e)(1)(ii) of this subpart.

(32) **Variation settlement** means any credit or debit to a customer account, made on a daily or intraday basis, for the purpose of marking to market a security future or any other contract that is:

(i) Issued by a clearing agency that is registered under section 17A of the Exchange Act or cleared and guaranteed by a derivatives clearing organization that is registered under section 5b of the Act; and

(ii) Traded on or subject to the rules of a self-regulatory authority.

(b) Terms used in this Regulation (Subpart E, §§41.42 through 41.49) and not otherwise defined in this section shall have the meaning set forth in the margin rules applicable to the account.

(c) Terms used in this Regulation (Subpart E, §§41.42 through 41.49) and not otherwise defined in this section or in the margin rules applicable to the account shall have the meaning set forth in the Exchange Act and the Act; if the definitions of a term in the Exchange Act and the Act are inconsistent as applied in particular circumstances, such term shall have the meaning set forth in rules, regulations, or interpretations jointly promulgated by the SEC and the Commission.

§ 41.44 General provisions.

(a) Applicable margin rules. Except to the extent inconsistent with this Regulation (Subpart E, §§ 41.42 through 41.49):

(1) A security futures intermediary that carries a security future on behalf of a customer in a securities account shall record and conduct all financial relations with respect to such security future and related positions in accordance with Regulation T and the margin rules of the self-regulatory authorities of which the security futures intermediary is a member.

(2) A security futures intermediary that carries a security future on behalf of a customer in a futures account shall record and conduct all financial relations with respect to such security future and related positions in accordance with the margin rules of the self-regulatory authorities of which the security futures intermediary is a member.

(b) Separation and consolidation of accounts. (1) The requirements for security futures and related positions in one account may not be met by considering items in any other account, except as permitted or required under paragraph (b)(2) of this section or applicable margin rules. If withdrawals of cash, securities or other assets deposited as margin are permitted under this Regulation (Subpart E, §§ 41.42 through 41.49), bookkeeping entries shall be made when such cash, securities, or assets are used for purposes of meeting requirements in another account.

(2) Notwithstanding paragraph (b)(1) of this section, the security futures intermediary shall consider all futures accounts in which security futures and related positions are held that are within the same regulatory classification or account type and are owned by the same customer to be a single account for purposes of this Regulation (Subpart E, §§ 41.42 through 41.49). The security futures intermediary may combine such accounts with other futures accounts that are within the same regulatory classification or account type and are owned by the same customer for purposes of computing a customer’s overall margin requirement, as permitted or required by applicable margin rules.

(c) Accounts of partners. If a partner of the security futures intermediary has an account with the security futures intermediary in which security futures or related positions are held, the security futures intermediary shall disregard the partner’s financial relations with the firm (as shown in the partner’s capital and ordinary drawing accounts) in calculating the margin or equity of any such account.

(d) Contribution to joint venture. If an account in which security futures or related positions are held is the account of a joint venture in which the security futures intermediary participates, any interest of the security futures intermediary in the joint account in excess of the interest which the security futures intermediary would have on the basis of its right to share in the profits shall be margined in accordance with this Regulation (Subpart E, §§ 41.42 through 41.49).

(e) Extensions of credit. (1) No security futures intermediary may extend or maintain credit to or for any customer for the purpose of evading or circumventing any requirement under this Regulation (Subpart E, §§ 41.42 through 41.49).

(2) A security futures intermediary may arrange for the extension or maintenance of credit to or for any customer by any person, provided that the security futures intermediary does not willfully arrange credit that would constitute a violation of Regulation T, U or X of the Board of Governors of the Federal Reserve System (12 CFR parts 220, 221, and 224) by such person.

(f) Change in exempted person status. Once a person ceases to qualify as an exempted person, it shall notify the security futures intermediary of this fact before entering into any new security futures transaction or related transaction that would require additional margin to be deposited under this Regulation (Subpart E, §§ 41.42 through 41.49). Financial relations with respect to any such transactions shall be subject to the provisions of this Regulation (Subpart E, §§ 41.42 through 41.49).

§ 41.45 Required margin.

(a) Applicability. Each security futures intermediary shall determine the
required margin for the security futures and related positions held on behalf of a customer in a securities account or futures account as set forth in this section.

(b) Required margin—(1) General rule. The required margin for each long or short position in a security future shall be twenty (20) percent of the current market value of such security future. (2) Offsetting positions. Notwithstanding the margin levels specified in paragraph (b)(1) of this section, a self-regulatory authority may set the required initial or maintenance margin level for an offsetting position involving security futures and related positions at a level lower than the level that would be required under paragraph (b)(1) of this section if such positions were margined separately, pursuant to rules that meet the criteria set forth in section 7(c)(2)(B) of the Exchange Act and are effective in accordance with section 19(b)(2) of the Exchange Act and, as applicable, section 5c(c) of the Act.

(c) Procedures for certain margin level adjustments. An exchange registered under section 6(g) of the Exchange Act, or a national securities association registered under section 15A(k) of the Exchange Act, may raise or lower the required margin level for a security future to a level not lower than that specified in this section, in accordance with section 19(b)(7) of the Exchange Act.

§ 41.46 Type, form and use of margin.

(a) When margin is required. Margin is required to be deposited whenever the required margin for security futures and related positions in an account is not satisfied by the equity in the account, subject to adjustment under paragraph (c) of this section.

(b) Acceptable margin deposits. (1) The required margin may be satisfied by a deposit of cash, margin securities (subject to paragraph (b)(2) of this section), exempted securities, any other asset permitted under Regulation T to satisfy a margin deficiency in a securities margin account, or any combination thereof, each as valued in accordance with paragraph (c) of this section.

(2) Shares of a money market mutual fund may be accepted as a margin deposit for purposes of this Regulation (Subpart E, §§ 41.42 through 41.49), Provided that:

(i) The customer waives any right to redeem the shares without the consent of the security futures intermediary and instructs the fund or its transfer agent accordingly;

(ii) The security futures intermediary (or clearing agency or derivatives clearing organization with which the shares are deposited as margin) obtains the right to redeem the shares in cash, promptly upon request; and

(iii) The fund agrees to satisfy any conditions necessary or appropriate to ensure that the shares may be redeemed in cash, promptly upon request.

(c) Adjustments—(1) Futures accounts. For purposes of this section, the equity in a futures account shall be computed in accordance with the margin rules applicable to the account, subject to the following:

(i) A security future shall have no value;

(ii) Each net long or short position in a listed option on a contract for future delivery shall be valued in accordance with the margin rules applicable to the account;

(iii) Except as permitted in paragraph (e) of this section, each margin equity security shall be valued at an amount no greater than its Regulation T collateral value;

(iv) Each other security shall be valued at an amount no greater than its current market value reduced by the percentage specified for such security in §240.15c3-1(c)(2)(vi) of this title;

(v) Freely convertible foreign currency may be valued at an amount no greater than its daily marked-to-market U.S. dollar equivalent;

(vi) Variation settlement receivable (or payable) by an account at the close of trading on any day shall be treated as a credit (or debit) to the account on that day; and

(vii) Each other acceptable margin deposit or component of equity shall be valued at an amount no greater than its value under Regulation T.

(2) Securities accounts. For purposes of this section, the equity in a securities account shall be computed in accordance with the margin rules applicable
to the account, subject to the following:

(i) A security future shall have no value;

(ii) Freely convertible foreign currency may be valued at an amount no greater than its daily mark-to-market U.S. dollar equivalent; and

(iii) Variation settlement receivable (or payable) by an account at the close of trading on any day shall be treated as a credit (or debit) to the account on that day.

(d) Satisfaction restriction. Any transaction, position or deposit that is used to satisfy the required margin for security futures or related positions under this Regulation (Subpart E, §§41.42 through 41.49), including a related position, shall be unavailable to satisfy the required margin for any other position or transaction or any other requirement.

(e) Alternative collateral valuation for margin equity securities in a futures account. (1) Notwithstanding paragraph (c)(1)(iii) of this section, a security futures intermediary need not value a margin equity security at its Regulation T collateral value when determining whether the required margin for the security futures and related positions in a futures account is satisfied, provided that:

(i) The margin equity security is valued at an amount no greater than the current market value of the security reduced by the lowest percentage level of margin required for a long position in the security held in a margin account under the rules of a national securities exchange registered pursuant to section 6(a) of the Exchange Act;

(ii) Additional margin is required to be deposited on any day when the day's security futures transactions and related transactions would create or increase a margin deficiency in the account if the margin equity securities were valued at their Regulation T collateral value,

(iii) Cash, securities, or other assets deposited as margin for the positions in an account are not permitted to be withdrawn from the account at any time that: (A) Additional cash, securities, or other assets are required to be deposited as margin under this section for a transaction in the account on the same or a previous day; or

(B) The withdrawal, together with other transactions, deposits, and withdrawals on the same day, would create or increase a margin deficiency if the margin equity securities were valued at their Regulation T collateral value.

(2) All security futures transactions and related transactions on any day shall be combined to determine the amount of a special margin requirement. Additional margin deposited to satisfy a special margin requirement shall be valued at an amount no greater than its Regulation T collateral value.

(3) If the alternative collateral valuation method set forth in paragraph (e) of this section is used with respect to an account in which security futures or related positions are carried:

(i) An account that is transferred from one security futures intermediary to another may be treated as if it had been maintained by the transferee from the date of its origin, if the transferee accepts, in good faith, a signed statement of the transferor (or, if that is not practicable, of the customer), that any margin call issued under this Regulation (Subpart E, §§41.42 through 41.49) has been satisfied; and

(ii) An account that is transferred from one customer to another as part of a transaction, not undertaken to avoid the requirements of this Regulation (Subpart E, §§41.42 through 41.49), may be treated as if it had been maintained for the transferee from the date of its origin, if the security futures intermediary accepts in good faith and keeps with the transferee account a signed statement of the transferor describing the circumstances for the transfer.

(f) Guarantee of accounts. No guarantee of a customer's account shall be given any effect for purposes of determining whether the required margin in an account is satisfied, except as permitted under applicable margin rules.

§ 41.47 Withdrawal of margin.

(a) By the customer. Except as otherwise provided in §41.46(e)(1)(ii) of this
Commodity Futures Trading Commission

§ 41.49 Filing proposed margin rule changes with the Commission.

(a) Notification requirement for notice-designated contract markets. Any self-regulatory authority that is registered with the Commission as a designated contract market under section 5f of the Act shall, when filing a proposed rule change regarding customer margin for security futures with the SEC for approval in accordance with section 19(b)(2) of the Exchange Act, concurrently provide to the Commission a copy of such proposed rule change and any accompanying documentation filed with the SEC.

(b) Filing requirements under the Act. Any self-regulatory authority that is registered with the Commission as a designated contract market under section 5 of the Act shall, when filing a proposed rule change regarding customer margin for security futures with the SEC for approval in accordance with section 19(b)(2) of the Exchange Act, submit such proposed rule change to the Commission as follows:

(1) If the self-regulatory authority elects to request the Commission’s prior approval for the proposed rule change pursuant to section 5c(c)(2) of the Act, it shall concurrently file the proposed rule change with the Commission in accordance with §40.5 of this chapter.

(2) If the self-regulatory authority elects to implement a proposed rule change by written certification pursuant to section 5c(c)(1) of the Act, it shall concurrently provide to the Commission a copy of the proposed rule change and any accompanying documentation filed with the SEC. Promptly after obtaining SEC approval for the proposed rule change, such self-regulatory authority shall file its written...
certification with the Commission in accordance with §40.6 of this chapter.


PART 42—ANTI-MONEY LAUNDERING, TERRORIST FINANCING

Subpart A—General Provisions

Sec.
42.1 [Reserved]
42.2 Compliance with Bank Secrecy Act


SOURCE: 68 FR 25159, May 9, 2003, unless otherwise noted.

Subpart A—General Provisions

§42.1 [Reserved]

§42.2 Compliance with Bank Secrecy Act.

Every futures commission merchant and introducing broker shall comply with the applicable provisions of the Bank Secrecy Act and the regulations promulgated by the Department of the Treasury under that Act at 31 CFR part 103, and with the requirements of 31 U.S.C. 5318(l) and the implementing regulation jointly promulgated by the Commission and the Department of the Treasury at 31 CFR 103.123, which require that a customer identification program be adopted as part of the firm’s Bank Secrecy Act compliance program.

PART 43—REAL-TIME PUBLIC REPORTING

Sec.
43.1 Purpose, scope, and rules of construction.
43.2 Definitions.
43.3 Method and timing for real-time public reporting.
43.4 Swap transaction and pricing data to be publicly disseminated in real-time.
43.5 Time delays for public dissemination of swap transaction and pricing data.
43.6 [Reserved]

APPENDIX A TO PART 43—DATA FIELDS FOR PUBLIC DISSEMINATION

APPENDIX B TO PART 43—ENUMERATED PHYSICAL COMMODITY CONTRACTS AND OTHER CONTRACTS

APPENDIX C TO PART 43—TIME DELAYS FOR PUBLIC DISSEMINATION


SOURCE: 76 FR 12433, Jan. 9, 2012, unless otherwise noted.

§43.1 Purpose, scope, and rules of construction.

(a) Purpose. This part implements rules relating to the reporting and public dissemination of certain swap transaction and pricing data to enhance transparency and price discovery pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376 (2010).

(b)(1) Scope. The provisions of this part shall apply to all swaps as defined in Section 1a(47) of the Act and any implementing regulations thereunder, including:

(i) Swaps subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act, including those swaps that are excepted from the requirement pursuant to Section 2(h)(7) of the Act;

(ii) Swaps that are not subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act, but are cleared at a registered derivatives clearing organization;

(iii) Swaps that are not cleared at a registered derivatives clearing organization and are reported to a registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time; and

(iv) Swaps that are required to be cleared under Section 2(h)(2) of the Act, but are not cleared.

(2) This part also shall apply to registered entities as defined in the Act, as well as to parties to a swap including swap dealers, major swap participants and U.S.-based market participants in a manner as the Commission may determine.

(c) Rules of construction. The examples in this part and in appendix A to this part are not exclusive. Compliance with a particular example or application of a sample clause, to the extent
applicable, shall constitute compliance with the particular portion of the rule to which the example relates.

(d) **Severability.** If any provision of this part, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or application of such provision to other persons or circumstances which can be given effect without the invalid provision or application.

§ 43.2 Definitions.

As used in this part:

**Act** means the Commodity Exchange Act, as amended, 7 U.S.C. 1 et seq.

**Affirmation** means the process by which parties to a swap verify (orally, in writing, electronically or otherwise) that they agree on the primary economic terms of a swap (but not necessarily all terms of the swap). Affirmation may constitute “execution” of the swap or may provide evidence of execution of the swap, but does not constitute confirmation (or confirmation by affirmation) of the swap.

**Appropriate minimum block size** means the minimum notional or principal amount for a category of swaps that qualifies a swap within such category as a block trade or large notional off-facility swap.

**As soon as technologically practicable means** as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants.

**Asset class** means a broad category of commodities including, without limitation, any “excluded commodity” as defined in Section 1a(19) of the Act, with common characteristics underlying a swap. The asset classes include interest rate, foreign exchange, credit, equity, other commodity and such other asset classes as may be determined by the Commission.

**Block trade** means a publicly reportable swap transaction that:

1. Involves a swap that is listed on a registered swap execution facility or designated contract market;

2. Occurs away from the registered swap execution facility’s or designated contract market’s trading system or platform and is executed pursuant to the registered swap execution facility’s or designated contract market’s rules and procedures;

3. Has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and

4. Is reported subject to the rules and procedures of the registered swap execution facility or designated contract market and the rules described in this part, including the appropriate time delay requirements set forth in § 43.5 of this part.

**Business day** means the twenty-four hour day, on all days except Saturdays, Sundays and legal holidays, in the location of the reporting party or registered entity reporting data for the swap.

**Business hours** means the consecutive hours of one or more consecutive business days.

**Confirmation** means the consummation (electronic or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation shall be in writing (electronic or otherwise) and shall legally supersede any previous agreement (electronic or otherwise) relating to the swap.

**Confirmation by affirmation** means the process by which one party to a swap acknowledges its assent to the complete swap terms submitted by the other party to the swap. If the parties to a swap are using a confirmation service vendor, complete swap terms may be submitted electronically by a party to such vendor’s platform and the other party may affirm such terms on such platform.

**Embedded option** means any right, but not an obligation, provided to one party of a swap by the other party to the swap that provides the party holding the option with the ability to change any one or more of the economic terms of the swap as those terms previously were established at confirmation (or were in effect on the start date).

**Executed** means the completion of the execution process.

**Execution** means an agreement by the parties (whether orally, in writing, electronically, or otherwise) to the terms of a swap that legally binds the
§ 43.3 Method and timing for real-time public reporting.

(a) Responsibilities of parties to a swap to report swap transaction and pricing

However, if the swap is not a block trade, it is a large notional off-facility swap. A large notional off-facility swap means an off-facility swap that has a notional or principal amount at or above the appropriate minimum block size applicable to such publicly reportable swap transaction and is not a block trade as defined in §43.2 of the Commission’s regulations.

Novation means the process by which a party to a swap transfers all of its rights, liabilities, duties and obligations under the swap to a new legal party other than the counterparty to the swap. The transferee accepts all of the transferor’s rights, liabilities, duties and obligations under the swap. A novation is valid as long as the transferor and the remaining party to the swap are given notice, and the transferor, transferee and remaining party to the swap consent to the transfer.

Off-facility swap means any publicly reportable swap transaction that is not executed on or pursuant to the rules of a registered swap execution facility or designated contract market.

Other commodity means any commodity that is not categorized in the other asset classes as may be determined by the Commission.

Public dissemination and publicly disseminate means to publish and make available swap transaction and pricing data in a non-discriminatory manner, through the Internet or other electronic data feed that is widely published and in machine-readable electronic format.

Publicly reportable swap transaction means:

(i) Any executed swap that is an arm’s-length transaction between two parties that results in a corresponding change in the market risk position between the two parties; or

(ii) Any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of the swap.

(2) Examples of executed swaps that do not fall within the definition of publicly reportable swap may include:

(i) Internal swaps between one-hundred percent owned subsidiaries of the same parent entity; and

(ii) Portfolio compression exercises.

(3) These examples represent swaps that are not at arm’s length and thus are not publicly reportable swap transactions, notwithstanding that they do result in a corresponding change in the market risk position between two parties.

Real-time public reporting means the reporting of data relating to a swap transaction, including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed.

Remaining party means a party to a swap that consents to a transferor’s transfer by novation of all of the transferor’s rights, liabilities, duties and obligations under such swap to a transferee.

Reporting party means the party to a swap with the duty to report a publicly reportable swap transaction in accordance with this part and section 2(a)(13)(F) of the Act.

Transferee means a party to a swap that accepts, by way of novation, all of a transferor’s rights, liabilities, duties and obligations under such swap with respect to a remaining party.

Transferor means a party to a swap that transfers, by way of novation, all of its rights, liabilities, duties and obligations under such swap, with respect to a remaining party, to a transferee.

Unique product identifier means a unique identification of a particular level of the taxonomy of the product in an asset class or sub-asset class in question, as further described in §43.4(f) and appendix A to this part. Such unique product identifier may combine the information from one or more of the data fields described in appendix A.

Widely published means to publish and make available through electronic means in a manner that is freely available and readily accessible to the public.

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data in real-time.—(1) In general. A reporting party shall report any publicly reportable swap transaction to a registered swap data repository as soon as technologically practicable after such publicly reportable swap transaction is executed. For purposes of this part, a registered swap data repository includes any swap data repository provisionally registered with the Commission pursuant to part 49 of this chapter.

(2) Swaps executed on or pursuant to the rules of a registered swap execution facility or designated contract market. A party to a publicly reportable swap transaction shall satisfy its reporting requirement under this section by executing a publicly reportable swap transaction on or pursuant to the rules of a registered swap execution facility or designated contract market.

(3) Off-facility swaps. All off-facility swaps shall be reported by the reporting party as soon as technologically practicable following execution, to a registered swap data repository for the appropriate asset class in accordance with the rules set forth in this part. Unless otherwise agreed to by the parties prior to the execution of the publicly reportable swap transaction, the following persons shall be reporting parties for off-facility swaps:

(i) If only one party is a swap dealer or major swap participant, then the swap dealer or major swap participant shall be the reporting party;

(ii) If one party is a swap dealer and the other party is a major swap participant, then the swap dealer shall be the reporting party;

(iii) If both parties are swap dealers, then the swap dealers shall designate which party shall be the reporting party;

(iv) If both parties are major swap participants, then the major swap participants shall designate which party shall be the reporting party;

(v) If neither party is a swap dealer or a major swap participant, then the parties shall designate which party (or its agent) shall be the reporting party.

(b) Public dissemination of swap transaction and pricing data—(1) Publicly reportable swap transactions executed on or pursuant to the rules of a registered swap execution facility or designated contract market. A registered swap execution facility or designated contract market shall satisfy the requirements of this subparagraph by transmitting swap transaction and pricing data to a registered swap data repository, as soon as technologically practicable after the publicly reportable swap transaction has been executed on or pursuant to the rules of such trading platform or facility.

(2) Public dissemination of swap transaction and pricing data by registered swap data repositories. A registered swap data repository shall ensure that swap transaction and pricing data is publicly disseminated, as soon as technologically practicable after such data is received from a registered swap execution facility, designated contract market or reporting party, unless such publicly reportable swap transaction is subject to a time delay described in §43.5 of this part, in which case the publicly reportable swap transaction shall be publicly disseminated in the manner described in §43.5.

(3) Prohibitions on disclosure of data.

(i) If there is a registered swap data repository for an asset class, a registered swap execution facility or designated contract market shall not disclose swap transaction and pricing data relating to publicly reportable swap transactions in such asset class, prior to the public dissemination of such data by a registered swap data repository unless:

(A) Such disclosure is made no earlier than the transmittal of such data to a registered swap data repository for public dissemination;

(B) Such disclosure is only made to market participants on such registered swap execution facility or designated contract market;

(C) Market participants are provided advance notice of such disclosure; and

(D) Any such disclosure by the registered swap execution facility or designated contract market is non-discriminatory.

(ii) If there is a registered swap data repository for an asset class, a swap dealer or major swap participant shall not disclose swap transaction and pricing data relating to publicly reportable swap transactions in such asset class, prior to the public dissemination of
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such data by a registered swap data repository unless:

(A) Such disclosure is made no earlier than the transmittal of such data to a registered swap data repository for public dissemination;

(B) Such disclosure is only made to the customer base of such swap dealer or major swap participant, including parties who maintain accounts with or have been swap counterparties with such swap dealer or major swap participant;

(C) Swap counterparties are provided advance notice of such disclosure; and

(D) Any such disclosure by the swap dealer or major swap participant is non-discriminatory.

(c) Requirements for registered swap data repositories in providing the public dissemination of swap transaction and pricing data in real-time—

(1) Compliance with 17 CFR part 49. Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall comply with part 49 of this chapter and shall publicly disseminate swap transaction and pricing data in accordance with this part as soon as technologically practicable upon receipt of such data, except as otherwise provided in this part.

(2) Acceptance and public dissemination of all swaps in an asset class. Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time for swaps in its selected asset class shall accept and publicly disseminate swap transaction and pricing data in real-time for all publicly reportable swap transactions within such asset class, unless otherwise prescribed by the Commission.

(3) Annual independent review. Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall perform, on an annual basis, an independent review in accordance with established audit procedures and standards of the registered swap data repository’s security and other system controls for the purposes of ensuring compliance with the requirements in this part.

(d) Availability of swap transaction and pricing data to the public. (1) Registered swap data repositories shall publicly disseminate swap transaction and pricing data in a consistent, usable and machine-readable electronic format that allows the data to be downloaded, saved and analyzed.

(2) Data that is publicly disseminated pursuant to this part shall be available from an Internet Web site in a format that is freely available and readily accessible to the public.

(3) Registered swap data repositories shall provide to the Commission a hyperlink to the Internet Web site where publicly disseminated swap transaction and pricing data can be accessed by the public.

(e) Errors or omissions—

(1) In general. Any errors or omissions in swap transaction and pricing data that were publicly disseminated in real-time shall be corrected or cancelled in the following manner:

(i) If a party to the swap becomes aware of an error or omission in the swap transaction and pricing data reported with respect to such swap, such party shall promptly notify the other party of the error and/or correction.

(ii) If a reporting party to a swap becomes aware of an error or omission in the swap transaction or pricing data which it reported to a registered swap data repository or which was reported by a registered swap execution facility or designated contract market with respect to such swap, either through its own initiative or through notice by the other party to the swap, the reporting party shall promptly submit corrected data to the same registered swap execution facility, designated contract market or registered swap data repository.

(iii) If the registered swap execution facility or designated contract market becomes aware of an error or omission in the swap transaction or pricing data reported with respect to such swap, or receives notification from the reporting party, the registered swap execution facility or designated contract market shall promptly submit corrected data to the same registered swap data repository.

(iv) Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall comply with the requirements in part 49 of this chapter.

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data in real-time shall publicly disseminate any cancellations or corrections to such data, as soon as technologically practicable after receipt or discovery of any such cancellation or correction.

(2) Improper cancellation or correction. Reporting parties, registered swap execution facilities, designated contract markets and registered swap data repositories shall not submit or agree to submit a cancellation or correction for the purpose of re-reporting swap transaction and pricing data in order to gain or extend a delay in public dissemination of accurate swap transaction or pricing data or to otherwise evade the reporting requirements in this part.

(3) Cancellation. A registered swap data repository shall cancel any incorrect data that had been publicly disseminated by publicly disseminating a cancellation of such data, as soon as technologically practicable, in the manner described in appendix A to this part.

(4) Correction. A registered swap data repository shall correct any incorrect data that had been publicly disseminated by publicly disseminating the correct data, as soon as technologically practicable, in the manner described in appendix A to this part.

(5) Hours of operation of registered swap data repositories. Unless otherwise provided in this subsection, a registered swap data repository shall have systems in place to continuously receive and publicly disseminate swap transaction and pricing data in real-time pursuant to this part.

(1) A registered swap data repository may declare closing hours to perform system maintenance.

(2) A registered swap data repository shall, to the extent reasonably possible, avoid scheduling closing hours when, in its estimation, the U.S. market and major foreign markets are most active.

(3) A registered swap data repository shall comply with the requirements under part 40 of this chapter in setting closing hours and shall provide advance notice of its closing hours to market participants and the public.

(g) Acceptance of data during closing hours. During closing hours, a registered swap data repository shall have the capability to receive and hold in queue any data regarding publicly reportable swap transactions pursuant to this part.

(1) Upon any reopening after closing hours, a registered swap data repository shall promptly and publicly disseminate the swap transaction and pricing data of swaps held in queue, in accordance with the requirements of this part.

(2) If at any time during closing hours a registered swap data repository is unable to receive and hold in queue swap transaction and pricing data pursuant to this part, then the registered swap data repository shall immediately upon reopening issue notice that it has resumed normal operations. Any registered swap execution facility, designated contract market or reporting party that is obligated under this section to report data to the registered swap data repository shall report the data to the registered swap data repository immediately after receiving such notice.

(h) Timestamp requirements. In addition to the execution timestamp described in appendix A to this part, registered entities, swap dealers and major swap participants shall have the following timestamp requirements with respect to real-time public reporting of swap transaction and pricing data for all publicly reportable swap transactions:

(1) A registered swap execution facility or designated contract market shall timestamp swap transaction and pricing data relating to a publicly reportable swap transaction with the date and time, to the nearest second of when such registered swap execution facility or designated contract market:

(i) Receives data from a swap counterparty (if applicable); and

(ii) Transmits such data to a registered swap data repository for public dissemination.

(2) A registered swap data repository shall timestamp swap transaction with the date and time, to the nearest second
§ 43.4 Swap transaction and pricing data to be publicly disseminated in real-time.

(a) In general. Swap transaction and pricing information shall be reported to a registered swap data repository so that the registered swap data repository can publicly disseminate swap transaction and pricing data in real-time in accordance with this part, including the manner described in this section and appendix A to this part.

(b) Public dissemination of data fields. Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall publicly disseminate the information described in appendix A to this part, as applicable, for any publicly reportable swap transaction.

(c) Additional swap information. A registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time may require reporting parties, registered swap execution facilities and designated contract markets to report to such registered swap data repository, such information that is necessary to compare the swap transaction and pricing data that was publicly disseminated in real-time to the data reported to a registered swap data repository pursuant to Section 2(a)(13)(G) of the Act or to confirm that parties to a swap have reported in a timely manner pursuant to §43.3 of this part. Such additional information shall not be publicly disseminated by the registered swap data repository.

(d) Anonymity of the parties to a publicly reportable swap transaction—(1) In general. Swap transaction and pricing data that is publicly disseminated in real-time shall not disclose the identities of the parties to the swap or otherwise facilitate the identification of a party to a swap. A registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall not publicly disseminate such data in a manner that discloses or otherwise facilitates the identification of a party to a swap.

(2) Actual product description reported to registered swap data repository. Reporting parties, registered swap execution facilities and designated contract markets shall provide a registered swap data repository with swap transaction and pricing data that includes an actual description of the underlying asset(s). This requirement is separate from the requirement that a reporting party, registered swap execution facility or designated contract market shall report swap data to a registered swap data repository pursuant to Section 2(a)(13)(G) of the Act and the Commission’s regulations.

(3) Public dissemination of the actual description of underlying asset(s). Notwithstanding the anonymity protection for certain swaps in the other commodity asset class in §43.4(d)(4)(ii), a registered swap data repository shall publicly disseminate the actual underlying asset(s) of all publicly reportable

when such registered swap data repository:

(i) Receives data from a registered swap execution facility, designated contract market or reporting party; and

(ii) Publicly disseminates such data.

(3) A swap dealer or major swap participant shall timestamp swap transaction and pricing data relating to an off-facility swap with the date and time, to the nearest second when such swap dealer or major swap participant transmits such data to a registered swap data repository for public dissemination.

(4) Records of all timestamps required by this subsection shall be maintained for a period of at least five years from the execution of the publicly reportable swap transaction.

(i) Fees. Any fees or charges assessed on a reporting party, registered swap execution facility or designated contract market by a registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time for the collection of such data shall be equitable and non-discriminatory. If such registered swap data repository allows a fee discount based on the volume of data reported to it for public dissemination, then such discount shall be made available to all reporting parties, registered swap execution facilities and designated contract markets in an equitable and non-discriminatory manner.
swap transactions in the interest rate, credit, equity and foreign exchange asset classes.

(4) Public dissemination of the underlying asset(s) for certain swaps in the other commodity asset class. A registered swap data repository shall publicly disseminate swap transaction and pricing data in the other commodity asset class as described in this subsection.

(i) A registered swap data repository shall publicly disseminate swap transaction and pricing data for publicly reportable swap transactions in the other commodity asset class in the manner described in §43.4(d)(4)(ii).

(ii) The actual underlying asset(s) shall be publicly disseminated for the following publicly reportable swap transactions in the other commodity asset class:

(A) Any publicly reportable swap transaction that references one of the contracts described in appendix B to this part;

(B) Any publicly reportable swap transaction that is economically related to one of the contracts described in appendix B to this part; and

(C) Any publicly reportable swap transaction executed on or pursuant to the rules of a registered swap execution facility or designated contract market.

(e) Unique product identifier. If a unique product identifier is developed that sufficiently describes one or more of the swap transaction and pricing data fields for real-time reporting described in appendix A to this part, then such unique product identifier may be publicly disseminated in lieu of the data fields that it describes.

(f) Reporting of notional or principal amounts to a registered swap data repository—(1) Off-facility swaps. The reporting party shall report the actual notional or principal amount of any off-facility swap to a registered swap data repository that accepts and publicly disseminates such data pursuant to part 43.

(2) Swaps executed on or pursuant to the rules of a registered swap execution facility or designated contract market. (1) A registered swap execution facility or designated contract market shall transmit the actual notional or principal amount for all swaps executed on or pursuant to the rules of such registered swap execution facility or designated contract market, to a registered swap data repository that accepts swaps in the asset class.

(ii) The actual notional or principal amount for any block trade executed pursuant to the rules of a registered swap execution facility or designated contract market shall be reported to the registered swap execution facility or designated contract market pursuant to the rules of the registered swap execution facility or designated contract market.

(g) Public dissemination of rounded notional or principal amounts. The notional or principal amount of a publicly reportable swap transaction, as described in appendix A to this part, shall be rounded and publicly disseminated by a registered swap data repository as follows:

(1) If the notional or principal amount is less than one thousand, round to nearest five, but in no case shall a publicly disseminated notional or principal amount be less than five;

(2) If the notional or principal amount is less than ten thousand but equal to or greater than one thousand, round to nearest one hundred;

(3) If the notional or principal amount is less than 100 thousand but equal to or greater than ten thousand, round to nearest one thousand;

(4) If the notional or principal amount is less than one million but equal to or greater than 100 thousand, round to nearest ten thousand;

(5) If the notional or principal amount is less than 100 million but equal to or greater than one million, round to the nearest one million;

(6) If the notional or principal amount is less than 500 million but equal to or greater than 100 million, round to the nearest ten million;

(7) If the notional or principal amount is less than one billion but equal to or greater than one million, round to the nearest ten million;

(8) If the notional or principal amount is less than 100 billion but equal to or greater than one billion, round to the nearest one billion;

(9) If the notional or principal amount is greater than 100 billion, round to the nearest 50 billion.
§ 43.5 Time delays for public dissemination of swap transaction and pricing data.

(a) In general. The time delay for the real-time public reporting of a block trade or large notional off-facility swap begins upon execution, as defined in §43.2 of this part. It is the responsibility of the registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time to ensure that the block trade or large notional off-facility swap transaction and pricing data is publicly disseminated pursuant to this part upon the expiration of the appropriate time delay described in §43.5(d) through (h).

(b) Public dissemination of publicly reportable swap transactions subject to a time delay. A registered swap data repository shall publicly disseminate swap transaction and pricing data subject to a time delay pursuant to this paragraph, as follows:

(1) No later than the prescribed time delay period described in this paragraph;

(2) No sooner than the prescribed time delay period described in this paragraph; and

(3) Precisely upon the expiration of the time delay period described in this paragraph.

(c) Interim time delay—(1) In general. The public dissemination of swap transaction and pricing data relating to any publicly reportable swap transaction shall receive the same time delays for block trades and large notional off-facility swaps, as described in this subsection, until such time as an appropriate minimum block size is established with respect to such publicly reportable swap transaction.

(2) Swaps executed on or pursuant to the rules of a registered swap execution facility or designated contract market. Any publicly reportable swap transaction that does not have an appropriate minimum block size and that is executed on or pursuant to the rules of a registered swap execution facility or designated contract market shall follow the time delays set forth in §43.5(d) until such time that an appropriate minimum block size is established for such publicly reportable swap transaction.

§ 43.5 (h) Public dissemination caps on notional or principal amounts. The rounded notional or principal amount that is publicly disseminated for a publicly reportable swap transaction shall be capped in a manner that adjusts in accordance with the appropriate minimum block size that corresponds to such publicly reportable swap transaction. If there is no appropriate minimum block size applicable to a publicly reportable swap transaction, then the cap on the notional or principal amount that is publicly disseminated shall be applied in the following manner:

(1) Interest rate swaps. (i) The publicly disseminated notional or principal amount for an interest rate swap subject to the rules in this part with a tenor greater than zero up to and including two years shall be capped at USD 250 million.

(ii) The publicly disseminated notional or principal amount for an interest rate swap subject to the rules in this part with a tenor greater than two years up to and including ten years shall be capped at USD 100 million.

(iii) The publicly disseminated notional or principal amount for an interest rate swap subject to the rules in this part with a tenor greater than ten years shall be capped at USD 75 million.

(2) Credit swaps. The publicly disseminated notional or principal amount for a credit swap subject to the rules in this part shall be capped at USD 100 million.

(3) Equity swaps. The publicly disseminated notional or principal amount for an equity swap subject to the rules in this part shall be capped at USD 250 million.

(4) Foreign exchange swaps. The publicly disseminated notional or principal amount for a foreign exchange swap subject to the rules in this part shall be capped at USD 250 million.

(5) Other commodity swaps. The publicly disseminated notional or principal amount for any other commodity swap subject to the rules in this part shall be capped at USD 25 million.
(3) Off-facility swaps subject to the mandatory clearing requirement. Any off-facility swap that does not have an appropriate minimum block size and that is subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act and Commission regulations, with the exception of those off-facility swaps that are either excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations or that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared, shall follow the time delays set forth in §43.5(e) until such time that an appropriate minimum block size is established for such off-facility swap.

(4) Off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes not subject to the mandatory clearing requirement with at least one swap dealer or major swap participant counterparty. Any off-facility swap in the interest rate, credit, foreign exchange or equity asset classes, where at least one party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is excepted from such mandatory clearing requirement and that does not have an appropriate minimum block size shall follow the time delays set forth in §43.5(f) until such time that an appropriate minimum block size is established for such off-facility swap.

(5) Off-facility swaps in the other commodity asset class not subject to the mandatory clearing requirement with at least one swap dealer or major swap participant counterparty. Any off-facility swap in the other commodity asset class, where at least one party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is excepted from such mandatory clearing requirement and that does not have an appropriate minimum block size shall follow the time delays set forth in §43.5(g) until such time that an appropriate minimum block size is established for such off-facility swap.

(6) Off-facility swaps in all asset classes not subject to the mandatory clearing requirement—in which neither counterparty is a swap dealer or major swap participant. Any off-facility swap, in all asset classes, where neither party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is excepted from such mandatory clearing requirement and that does not have an appropriate minimum block size shall follow the time delays set forth in §43.5(h) until such time that an appropriate minimum block size is established for such off-facility swap.

(7) Time delays for public dissemination upon establishment of an appropriate minimum block size. After an appropriate minimum block size is established for a particular swap or category of swaps, all publicly reportable swap transactions that are below the appropriate minimum block size shall be publicly disseminated as soon as technologically practicable after execution pursuant to §43.3 of this part.

(d) Time delay for block trades executed pursuant to the rules of a registered swap execution facility or designated contract market. Any block trade that is executed pursuant to the rules of a registered swap execution facility or designated contract market shall receive a time delay in the public dissemination of swap transaction and pricing data as follows:

(1) Time delay during Year 1. For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all publicly reportable swap transactions described in §43.5(d) shall be 30 minutes immediately after execution of such publicly reportable swap transaction.

(2) Time delay after Year 1. Beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all publicly reportable swap transactions described in §43.5(d) shall be 15 minutes immediately after execution of such publicly reportable swap transaction.

(e) Time delay for large notional off-facility swaps subject to the mandatory clearing requirement—(1) In general. This subsection shall not apply to off-facility swaps that are excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and
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Commission regulations, and this subsection shall not apply to those swaps that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared.

(2) Swaps subject to the mandatory clearing requirement where at least one party is a swap dealer or major swap participant. Any large notional off-facility swap that is subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act and Commission regulations, in which at least one party is a swap dealer or major swap participant, shall receive a time delay as follows:

(i) Time delay during Year 1. For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(2) shall be 30 minutes immediately after execution of such swap.

(ii) Time delay after Year 1. Beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(2) shall be 15 minutes immediately after execution of such swap.

(3) Swaps subject to the mandatory clearing requirement where neither party is a swap dealer or major swap participant. Any large notional off-facility swap that is subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act and Commission regulations, in which neither party is a swap dealer or major swap participant, shall receive a time delay as follows:

(i) Time delay during Year 1. For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(3) shall be four hours immediately after execution of such swap.

(ii) Time delay during Year 2. For one year beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(3) shall be two hours immediately after execution of such swap.

(iii) Time delay after Year 2. Beginning on the second anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(3) shall be one hour immediately after execution of such swap.

(f) Time delay for large notional off-facility swaps in the interest rate, credit, foreign exchange or equity asset classes not subject to the mandatory clearing requirement with at least one swap dealer or major swap participant counterparty. Any large notional off-facility swap in the interest rate, credit, foreign exchange or equity asset classes where at least one party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is excepted from such mandatory clearing requirement, shall receive a time delay in the public dissemination of swap transaction and pricing data as follows:

(1) Time delay during Year 1. For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(f) shall be one hour immediately after execution of such swap; however, any large notional off-facility swap in the interest rate, credit, foreign exchange or equity asset classes in which one party is not a swap dealer or major swap participant and such party is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of one hour immediately after execution of such swap; or if such swap transaction or pricing data is received by the registered swap data repository later than one hour immediately after execution, the registered swap data repository shall publicly disseminate such data as soon as technologically practicable after the data is received.

(2) Time delay during Year 2. For one year beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(f) shall be 30 minutes immediately after execution of such swap; however, any large notional off-facility swap in the interest rate, credit, foreign exchange or equity asset classes in which one party is not a swap dealer or major swap participant and such party is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of 30 minutes immediately after execution of such swap.
Commodity Futures Trading Commission § 43.5

(1) Commodity Futures Trading Commission § 43.5 entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of 30 minutes immediately after execution of such swap; or if such swap transaction or pricing data is received by the registered swap data repository later than 30 minutes immediately after execution, the registered swap data repository shall publicly disseminate such data as soon as technologically practicable after the data is received.

(2) Time delay during Year 1. For one year beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in §43.5(f) shall be two hours immediately after execution of such swap; however, any large notional off-facility swap in the other commodity asset class in which only one party is not a swap dealer or major swap participant and such party is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of two hours immediately after execution of such swap, or if such swap transaction or pricing data is received by the registered swap data repository later than two hours immediately after execution, the registered swap data repository shall publicly disseminate such data as soon as technologically practicable after the data is received.

(3) Time delay after Year 2. Beginning on the second anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in §43.5(f) shall be two hours after the execution of such swap.

(3) Time delay after Year 2. Beginning on the second anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in §43.5(g) shall be four hours immediately after execution of such swap; however, any large notional off-facility swap in the other commodity asset class in which only one party is not a swap dealer or major swap participant and such party is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of four hours immediately after execution of such swap, or if such swap transaction or pricing data is received by the registered swap data repository later than four hours immediately after execution, the registered swap data repository shall publicly disseminate such data as soon as technologically practicable after the data is received.

(2) Time delay during Year 2. For one year beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in §43.5(h) shall be 48 business hours immediately after execution of such swap.
§ 43.6

36 business hours immediately after the execution of such swap.

(3) Time delay after Year 2. Beginning on the second anniversary of the compliance date of this part, the time delay for public dissemination transaction and pricing data for all swaps described in §43.5(h) shall be 24 business hours immediately after the execution of such swap.

§ 43.6 [Reserved]

APPENDIX A TO PART 43—DATA FIELDS FOR PUBLIC DISSEMINATION

The data fields described in Table A1 and Table A2, to the extent applicable for a particular publicly reportable swap transaction, shall be publicly disseminated pursuant to part 43. Table A1 and Table A2 provide guidance for compliance with the reporting and public dissemination of each data field. Reporting parties, registered swap execution facilities and designated contract markets shall report swap transaction and pricing data necessary to publicly disseminate such data, pursuant to part 43 and this appendix A to part 43, to a registered swap data repository as soon as technologically practicable after execution of the publicly reportable swap transaction. A registered swap data repository shall publicly disseminate the information in Table A1 and A2 in a consistent form and manner for swaps within the same asset class.
### TABLE A1 — Data Fields and Suggested Form and Order for Real-time Public Reporting of Swap Transaction and Pricing Data.

<table>
<thead>
<tr>
<th>Field</th>
<th>Description</th>
<th>Example</th>
<th>Data application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cancellation</td>
<td>An indication that a publicly reportable swap transaction has been incorrectly or erroneously publicly disseminated and is canceled. There shall be a clear indication to the public that the publicly reportable swap transaction is being canceled (e.g., “CANCEL”) followed by the swap transaction and pricing data that is being canceled in the same form and manner that it was erroneously reported. Any cancellations should be made in accordance with § 43.3(c). If a publicly reportable swap transaction is canceled, it may be corrected by reporting the “Correction” data field and the correct information.</td>
<td>CANCEL…………… (e.g., the information is being cancelled in accordance with § 43.3(c))</td>
<td>Information is needed to inform market participants and the public that swap transaction and pricing data was erroneously disseminated to the public.</td>
</tr>
<tr>
<td>Correction</td>
<td>An indication that the swap transaction and pricing data that is being publicly disseminated is a correction to previously publicly disseminated swap transaction and pricing data that contained an error or omission. In order for a correction to occur, the registered swap data repository that accepts and publicly</td>
<td>CORRECT ………… (e.g., the information is a correction to a previously reported swap)</td>
<td>Information needed to inform market participants and the public that a particular publicly reportable swap transaction that is being reported is a correction to swap transaction and pricing data that has previously been publicly disseminated by a registered swap data</td>
</tr>
<tr>
<td>Execution timestamp</td>
<td>The time and date of execution of the publicly reportable swap transaction in Coordinated Universal Time (UTC). The timestamp shall be displayed with two digits for each of the hour, minute and second, or in such other manner that clearly publicly disseminates the information.</td>
<td>13-10-2007; 15:25:47 (e.g., the date (October 13, 2007) and time in UTC (15:25:47))</td>
<td>Information needed to indicate the time and date of execution of the publicly reportable swap transaction.</td>
</tr>
<tr>
<td>---------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Cleared or uncleared</td>
<td>An indication of whether or not a publicly reportable swap transaction is going to be cleared by a derivatives clearing organization. If the publicly reportable swap transaction is cleared by a derivatives clearing organization, a “C” may be used and if uncleared a “U” may be used.</td>
<td>C………………………… (e.g., cleared)</td>
<td>Information needed to indicate whether or not a publicly reportable swap transaction is cleared through a derivatives clearing organization.</td>
</tr>
<tr>
<td>Indication of Collateralization</td>
<td>If a swap is not cleared, an indication of whether a swap is (A) Uncollateralized –</td>
<td>PC ………………. (e.g., partially collateralized)</td>
<td>Information needed to provide information regarding differences</td>
</tr>
</tbody>
</table>
there is no credit arrangement between the parties or the agreement between the parties of an uncleared swap states that no collateral (neither initial margin nor variation margin) has to be posted at any time; 
(B) Partially Collateralized – the agreement between the parties states that both parties will regularly post variation margin;  
(C) One-Way Collateralized – the agreement between the parties of an uncleared swap states that only one party to such swap agrees to post initial margin, regularly post variation margin or both; or 
(D) Fully Collateralized – the agreement between the parties of an uncleared swap states that initial margin must be posted and variation margin must be regularly posted by both parties.

<table>
<thead>
<tr>
<th>Indication of end-user exception</th>
<th>Information needed to indicate the reason why a swap that would otherwise be subject to mandatory clearing is not being cleared and to help market participants and the public evaluate the price of the publicly reportable swap transaction.</th>
</tr>
</thead>
<tbody>
<tr>
<td>An indication of whether a party to a swap is using the end-user exception pursuant to CEA Section 2(h)(7) and Commission regulations.</td>
<td>EU ...................... (e.g., swap is not required to be cleared under CEA Section 2(h)(7) and Commission regulations)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Indication of other price affecting term (indication for publicly reportable swap transaction has)</th>
<th>Information needed to indicate whether a publicly reportable</th>
</tr>
</thead>
<tbody>
<tr>
<td>An indication that the</td>
<td>B* ...................... (e.g., bespoke swap that has a material</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Information</th>
<th>Information needed to indicate the reason why a swap that would otherwise be subject to mandatory clearing is not being cleared and to help market participants and the public evaluate the price of the publicly reportable swap transaction.</th>
</tr>
</thead>
<tbody>
<tr>
<td>An indication of whether a party to a swap is using the end-user exception pursuant to CEA Section 2(h)(7) and Commission regulations.</td>
<td>EU ...................... (e.g., swap is not required to be cleared under CEA Section 2(h)(7) and Commission regulations)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Indication of other price affecting term (indication for publicly reportable swap transaction has)</th>
<th>Information needed to indicate whether a publicly reportable</th>
</tr>
</thead>
<tbody>
<tr>
<td>An indication that the</td>
<td>B* ...................... (e.g., bespoke swap that has a material</td>
</tr>
<tr>
<td>non-standardized swap (bespoke) swaps</td>
<td>one or more additional term(s) or provision(s), other than those listed in the required real-time data fields, that materially affect(s) the price of the publicly reportable swap transaction. Publicly reportable swap transactions that are reported with this designation would be non-standardized (bespoke) swaps.</td>
</tr>
<tr>
<td>Block trades and large notional off-facility swaps</td>
<td>An indication of whether a publicly reportable swap transaction is a block trade or large notional off-facility swap. If a publicly reportable swap transaction is a block trade or large notional off-facility swap and subject to a time delay in real-time public reporting pursuant to § 43.5, such block trade or large notional off-facility swap may be indicated as follows: Block trade or large notional off-facility swap (“BLK”). If a trade is not a block trade or large notional off-facility swap, then no indication would be publicly disseminated.</td>
</tr>
<tr>
<td>Execution venue</td>
<td>An indication of the venue of execution of a publicly reportable swap transaction. The specific name of a registered swap execution facility or designated contract market need not be reported; however, an</td>
</tr>
<tr>
<td>Commodity Futures Trading Commission</td>
<td>Pt. 43, App. A</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td><strong>Effective or Start date</strong></td>
<td>The date that the publicly reportable swap transaction becomes effective or starts.</td>
</tr>
<tr>
<td><strong>End Date</strong></td>
<td>The maturity, termination, or end date of the publicly reportable swap transaction. The time between the Effective or Start Date and End Date field will indicate the tenor of the swap.</td>
</tr>
<tr>
<td><strong>Day count convention</strong></td>
<td>The determination of how interest accrues over time for the swap.</td>
</tr>
<tr>
<td><strong>Settlement currency (i.e., value date)</strong></td>
<td>The settlement currency type for publicly reportable swap transactions in the foreign exchange asset class.</td>
</tr>
<tr>
<td><strong>Asset class</strong></td>
<td>An indication of one of the broad categories as described in § 43.2(e).</td>
</tr>
<tr>
<td><strong>Sub-asset class for other commodity</strong></td>
<td>An indication of a more specific description of</td>
</tr>
<tr>
<td>the asset class for other commodity. Such sub-asset classes for other commodity publicly reportable swap transactions may include, but are not limited to, energy, precious metals, metals-other, agriculture, weather, emissions and volatility.</td>
<td>specificity, the type of other commodity that is being publicly disseminated and to facilitate comparison with other similar publicly reportable swap transactions.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>An indication of one of four specific contract types of publicly reportable swap transactions. Such contract types may include but are not limited to: Swap, swaption and standalone options.</td>
<td>S………………….. (e.g., swap) Information needed to describe the publicly reportable swap transaction and to be able to compare such publicly reportable swap transaction to other similar publicly reportable swap transactions.</td>
</tr>
<tr>
<td>An indication of more specificity into the type of contract described in the contract type field. Such contract sub-types may include, but are not limited to, basis swaps, index swaps, broad-based security swaps, and basket swaps.</td>
<td>SS………………….. (e.g., basis swap) Information needed to define with greater specificity, the type of contract that is being publicly disseminated and to facilitate comparison with other similar publicly reportable swap transactions.</td>
</tr>
<tr>
<td>An indication of whether such publicly reportable swap transaction is a post-execution event that affects the price of the publicly reportable swap transaction. Such price-forming continuation data may include: Terminations, assignments, novations, exchanges, transfers, amendments, conveyances or</td>
<td>NOV………………….. (e.g., novation) Information needed to describe whether the reportable swap transaction is a post-execution event for a pre-existing swap (i.e., not a newly executed swap) that materially affects the price of the publicly reportable swap transaction.</td>
</tr>
<tr>
<td>Underlying asset 1</td>
<td>The asset, reference asset or reference obligation for payments of a party’s obligations under the publicly reportable swap transaction reference. The underlying asset may be a reference price, index, obligation, physical commodity with delivery point, futures contract or any other rate or instrument agreed to by the parties to a publicly reportable swap transaction.</td>
</tr>
<tr>
<td>Underlying asset 2</td>
<td>The asset, reference asset or reference obligation for payments of a party’s obligations under the publicly reportable swap transaction reference. The underlying asset may be a reference price, index, obligation, physical commodity with delivery point, futures contract or any other rate or instrument agreed to by the parties to a publicly reportable swap transaction. If there are more than two underlying assets, such underlying assets shall be reported in the same manner as above.</td>
</tr>
<tr>
<td>Price notation</td>
<td>The price, yield, spread, coupon, etc., depending on the type of swap, which is calculated at affirmation. The pricing characteristic shall not include any</td>
</tr>
<tr>
<td>Premiums associated with margin, collateral, independent amounts, reconcilable post-execution events, options on a swap, or other non-economic characteristics. The format in which the pricing characteristic is real-time reported to the public shall be the format commonly sought by market participants for each particular market or contract.</td>
<td>Reportable swap transaction.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>Additional price notation</strong></td>
<td>The additional price notation shall include any premiums associated with reconcilable post-execution events, the presence of collateral, front-end payments, back-end payments, or other non-economic characteristics (e.g., counterparty credit risk) not illustrated in the reporting field for pricing characteristic. The additional price notation shall not include options as they are reported elsewhere. The additional price notation shall be publicly disseminated as an addition or subtraction of the pricing characteristic and in a way commonly sought by market participants for each particular market or contract.</td>
</tr>
</tbody>
</table>
| **Unique product identifier** | Certain fields may be replaced with a unique identifier. (e.g., 12345 ……………..) | Information needed to describe the
<table>
<thead>
<tr>
<th>Commodity Futures Trading Commission</th>
<th>Pt. 43, App. A</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Notional currency 1 (i.e., base currency)</strong></td>
<td>An indication of the type of currency of the notional or principal amount. The notional currency may be reported in a commonly accepted code (e.g., the three character alphabetic ISO 4217 currency code).</td>
</tr>
<tr>
<td><strong>Rounded notional or principal amount 1</strong></td>
<td>The total rounded currency amount or quantity of units of the underlying asset. The notional or principal amounts for publicly reportable swap transactions, including block trades and large notional off-facility swaps, shall be reported and rounded amounts shall be publicly disseminated pursuant § 43.4.</td>
</tr>
<tr>
<td><strong>Notional currency 2 (i.e., counter currency)</strong></td>
<td>An indication of the type of currency of the notional or principal amount. The notional currency may be reported in a commonly accepted code (e.g., the</td>
</tr>
<tr>
<td><strong>Rounded notional or principal amount 2</strong></td>
<td>The total rounded currency amount or quantity of units of the underlying asset. The notional or principal amounts for the publicly reportable swap transactions, including block trades and large notional off-facility swaps, shall be reported and rounded amounts shall be publicly disseminated pursuant to § 43.4. Each notional or principal amount (if there is more than one) should be labeled (e.g., 1, 2, 3, etc.) such that the number corresponds to the underlying asset for which the notional or principal amount is applicable. If there are more than two notional or principal amounts, then each additional notional or principal amount shall be reported in the same manner.</td>
</tr>
</tbody>
</table>

| **Payment frequency 1** | An integer multiplier of a time period describing how often the parties to the publicly reportable swap transaction exchange payments associated with each party’s obligation under the publicly reportable swap | 2M......................... (e.g., payment would occur every two months) | Information needed to identify the pricing characteristic of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap |
| **Payment frequency 2** | An integer multiplier of a time period describing how often the parties to the publicly reportable swap transaction exchange payments associated with each party’s obligation under the publicly reportable swap transaction. Such payment frequency may be described as one letter preceded by an integer. Each payment frequency (if there is more than one) should be labeled (e.g., 1, 2, 3, etc.) such that the number corresponds to the underlying asset for which the payment frequency is applicable. If there are more than two payment frequencies, then each additional payment frequency shall be reported in the same manner. | 6W………………. (e.g., payment would occur every six weeks) | Information needed to identify the pricing characteristic of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction. |
| **Reset frequency 1** | An integer multiplier of a period describing how often the parties to the publicly reportable swap transaction shall evaluate and, when applicable, change the price used for the underlying assets of the publicly reportable swap transaction. Such reset frequency may be | 1Y………………. (e.g., reset occurs every year) | Information needed to identify the pricing characteristic of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction. |
| Reset frequency 2 | An integer multiplier of a period describing how often the parties to the publicly reportable swap transaction shall evaluate and, when applicable, change the price used for the underlying assets of the publicly reportable swap transaction. Such reset frequency may be described as one letter preceded by an integer. Each reset frequency (if there is more than one) should be labeled with a number (e.g., 1, 2, 3, etc.) such that the number corresponds to the underlying asset for which the reset frequency is applicable. If there are more than two reset frequencies, then each additional reset frequency shall be reported in the same manner. | 6M…………………… (e.g., reset occurs every six months) | Information needed to identify the pricing characteristic of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction. |
TABLE A2.—Additional real-time public reporting data fields for options, swaptions and swaps with embedded options.

The data fields described in Table A2 of appendix A to this part apply to all options, swaptions and embedded options. If a swap has more than one embedded option, or multiple swaptions provisions, all such option provisions shall be reported in the same manner pursuant to the fields in Table A2 of appendix A to this part. When publicly disseminated, multiple embedded options associated with the same swap shall be clearly described and clearly linked to the swap with which the embedded option is associated.

<table>
<thead>
<tr>
<th>Field</th>
<th>Description</th>
<th>Example</th>
<th>Data application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Embedded Option on Swap</td>
<td>An indication of whether or not the option fields are for an embedded option. This indication may be displayed as “EMBED1,” “EMBED2,” etc.</td>
<td>EMBED1………………. (e.g., the option is embedded in the terms of the swap)</td>
<td>Information needed to describe whether an option is embedded in a swap to prevent confusion and allow the market participants and the public to understand the information that is being reported.</td>
</tr>
<tr>
<td>Option Strike Price</td>
<td>The level or price at which an option may be exercised.</td>
<td>O25…………………. (e.g., the option strike price may be displayed with an “O” followed by the level or price, in this case 25 of the given underlying)</td>
<td>Information needed to indicate the level or price at which the option may be exercised to market participants and the public.</td>
</tr>
<tr>
<td>Option Type</td>
<td>An indication of the type of option. The option types may include, but are not limited to: Puts, calls, caps, floors, collars, straddles, strangles, amortizing, cancelable and other exotic option types.</td>
<td>P…………………. (e.g., put)</td>
<td>Information needed to adequately describe the option to market participants and the public.</td>
</tr>
<tr>
<td>Option Family</td>
<td>An indication of the style of the option transaction. The option style/family may include, but are not limited to: European, American, Bermudan and Asian.</td>
<td>EU…………………. (e.g., European option)</td>
<td>Information needed to adequately describe the option to market participants and the public.</td>
</tr>
</tbody>
</table>
### APPENDIX B TO PART 43—ENUMERATED PHYSICAL COMMODITY CONTRACTS AND OTHER CONTRACTS

#### Enumerated Physical Commodity Contracts

**Agriculture**
- ICE Futures U.S. Cocoa
- ICE Futures U.S. Coffee C
- Chicago Board of Trade Corn
- ICE Futures U.S. Cotton No. 2
- ICE Futures U.S. FCOJ-A
- Chicago Mercantile Exchange Live Cattle
- Chicago Board of Trade Oats
- Chicago Board of Trade Rough Rice
- Chicago Board of Trade Soybeans
- Chicago Board of Trade Soybean Meal
- Chicago Board of Trade Soybean Oil
- ICE Futures U.S. Sugar No. 11
- ICE Futures U.S. Sugar No. 16
- Chicago Board of Trade Wheat
- Minneapolis Grain Exchange Hard Red Spring Wheat
- Kansas City Board of Trade Hard Winter Wheat
- Chicago Mercantile Exchange Class III Milk
- Chicago Mercantile Exchange Feeder Cattle
- Chicago Mercantile Exchange Lean Hogs

---

<table>
<thead>
<tr>
<th>Option currency</th>
<th>An indication of the type of currency of the option premium. The option currency may be reported in a commonly accepted code (e.g., the three character alphabetic ISO 4217 currency code).</th>
<th>USD....................... (e.g., U.S. Dollar)</th>
<th>Information needed to identify the type of currency of the option premium to market participants and the public.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option premium</td>
<td>An indication of the additional cost of the option to the publicly reportable swap transaction as a numerical value, not as the difference of the premiums of the parties’ obligations to the reportable swap transaction. This field is associated with the option currency field.</td>
<td>50000....................... (e.g., the cost would be 50,000 to purchase the option)</td>
<td>Information needed to explain the market value of the option to market participants and the public at the time of execution. This field will allow the public to understand the price of the publicly reportable swap transaction.</td>
</tr>
<tr>
<td>Option lockout period</td>
<td>An indication of the first allowable exercise date of the option.</td>
<td>20-08-2010....................... (e.g., August 20, 2010)</td>
<td>Information is needed to identify when the option can first be exercised and to help market participants and the public evaluate the price of the option.</td>
</tr>
<tr>
<td>Option expiration date</td>
<td>An indication of the date that the option is no longer available for exercise.</td>
<td>20-08-2012....................... (e.g., August 20, 2012)</td>
<td>Information is needed to identify when the option can no longer be exercised and to help market participants and the public evaluate the price of the option.</td>
</tr>
</tbody>
</table>
## APPENDIX C TO PART 43—TIME DELAYS FOR PUBLIC DISSEMINATION

The tables below provide clarification of the time delays for public dissemination set forth in §43.5. The first row of each table describes the asset classes to which each chart applies. The column entitled “Yearly Phase-In” indicates the periods beginning on the compliance date of this part and beginning on the anniversary of the compliance date thereafter. The column entitled “Time Delay for Public Dissemination” indicates the precise length of time delay, starting upon execution, for the public dissemination of such swap transaction and pricing data by a registered swap data repository.

### Table C1. Block Trades Executed on or Pursuant to the Rules of a Registered Swap Execution Facility or Designated Contract Market (Illustrating §§ 43.5(d)(1) and (d)(2))

<table>
<thead>
<tr>
<th>Asset Class</th>
<th>Yearly phase-in</th>
<th>Time delay for public dissemination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Metals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commodity Exchange, Inc. Copper</td>
<td>Year 1</td>
<td>30 minutes.</td>
</tr>
<tr>
<td>New York Mercantile Exchange Palladium</td>
<td>After Year 1</td>
<td>15 minutes.</td>
</tr>
<tr>
<td>New York Mercantile Exchange Platinum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commodity Exchange, Inc. Gold</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commodity Exchange, Inc. Silver</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Energy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York Mercantile Exchange Light Sweet Crude Oil</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York Mercantile Exchange New York Harbor Gasoline Blendstock</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York Mercantile Exchange Henry Hub Natural Gas</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York Mercantile Exchange New York Harbor Heating Oil</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Contracts</td>
<td>Brent Crude Oil (ICE)</td>
<td></td>
</tr>
</tbody>
</table>

### Table C2. Large Notional Off-Facility Swaps Subject to the Mandatory Clearing Requirement With at Least One Swap Dealer or Major Swap Participant Counterparty (Illustrating §§ 43.5(e)(2)(A) and (e)(2)(B))

Table C2 excludes off-facility swaps that are excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations and those off-facility swaps that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared.

<table>
<thead>
<tr>
<th>Asset Class</th>
<th>Yearly phase-in</th>
<th>Time delay for public dissemination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Metals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Energy</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Table C3. Large Notional Off-Facility Swaps Subject to the Mandatory Clearing Requirement in Which Neither Counterparty Is a Swap Dealer or Major Swap Participant (Illustrating §§ 43.5(e)(3)(A), (e)(3)(B), and (e)(3)(C))

Table C3 excludes off-facility swaps that are excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations and those swaps that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared.

<table>
<thead>
<tr>
<th>Asset Class</th>
<th>Yearly phase-in</th>
<th>Time delay for public dissemination</th>
</tr>
</thead>
</table>

### Table C4. Large Notional Off-Facility Swaps Subject to the Mandatory Clearing Requirement in Which One Counterparty Is a Swap Dealer or Major Swap Participant (Illustrating §§ 43.5(e)(4)(A) and (e)(4)(B))

Table C4 excludes off-facility swaps that are excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations and those swaps that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared.

<table>
<thead>
<tr>
<th>Asset Class</th>
<th>Yearly phase-in</th>
<th>Time delay for public dissemination</th>
</tr>
</thead>
</table>
Table C4. Large Notional Off-Facility Swaps Not Subject to the Mandatory Clearing Requirement With at Least One Swap Dealer or Major Swap Participant Counterparty (Illustrating §§ 43.5(f)(1), (f)(2) and (f)(3))

Table C4 includes large notional off-facility swaps that are not subject to the mandatory clearing requirement or are exempt from such mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations. Table C4 also designates the interim time delays for swaps described in §43.5(c)(4).

**INTEREST RATES, CREDIT, FOREIGN EXCHANGE, EQUITY ASSET CLASSES**

<table>
<thead>
<tr>
<th>Yearly phase-in</th>
<th>Time delay for public dissemination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 1</td>
<td>1 hour.</td>
</tr>
<tr>
<td></td>
<td>However, if such swap includes a non-swap dealer/non-major swap participant counterparty that is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, then one hour immediately after execution; or if received later than one hour by the registered swap data repository, then public dissemination shall occur as soon as technologically practicable after the data is received.</td>
</tr>
<tr>
<td>Year 2</td>
<td>30 minutes.</td>
</tr>
<tr>
<td></td>
<td>However, if such swap includes a non-swap dealer/non-major swap participant counterparty that is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, then 30 minutes immediately after execution; or if received later than 30 minutes by the registered swap data repository, then public dissemination shall occur as soon as technologically practicable after the data is received.</td>
</tr>
<tr>
<td>After Year 2</td>
<td>30 minutes.</td>
</tr>
</tbody>
</table>

Table C5. Large Notional Off-Facility Swaps Not Subject to the Mandatory Clearing Requirement With at Least One Swap Dealer or Major Swap Participant Counterparty (Illustrating §§ 43.5(g)(1), (g)(2), and (g)(3))

Table C5 includes large notional off-facility swaps that are not subject to the mandatory clearing requirement or are excepted from such mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations. Table C5 also designates the interim time delays for swaps described in §43.5(c)(5).

**OTHER COMMODITY ASSET CLASS**

<table>
<thead>
<tr>
<th>Yearly phase-in</th>
<th>Time delay for public dissemination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 1</td>
<td>4 hours.</td>
</tr>
<tr>
<td></td>
<td>However, if such swap includes a non-swap dealer/non-major swap participant counterparty that is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, then four hours immediately after execution; or if received later than four hours by the registered swap data repository, then public dissemination shall occur as soon as technologically practicable after the data is received.</td>
</tr>
<tr>
<td>Year 2</td>
<td>2 hours.</td>
</tr>
<tr>
<td></td>
<td>However, if such swap includes a non-swap dealer/non-major swap participant counterparty that is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, then two hours immediately after execution; or if received later than two hours by the registered swap data repository, then public dissemination shall occur as soon as technologically practicable after the data is received.</td>
</tr>
<tr>
<td>After Year 2</td>
<td>2 hours.</td>
</tr>
</tbody>
</table>

Table C6. Large Notional Off-Facility Swaps Not Subject to the Mandatory Clearing Requirement in Which Neither Counterparty Is a Swap Dealer or Major Swap Participant (Illustrating §§ 43.5(h)(1), (h)(2) and (h)(3))

Table C6 includes large notional off-facility swaps that are not subject to the mandatory clearing requirement or are exempt from such mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations. Table C6 also designates the interim time delays for swaps described in §43.5(c)(6).
PART 44—INTERIM FINAL RULE FOR PRE-ENACTMENT SWAP TRANSACTIONS

Sec. 44.00 Definition of terms used in part 44 of this chapter.

44.01 Effective date.
44.02 Reporting pre-enactment swaps to a swap data repository or the Commission.
44.03 Reporting transition swaps to a swap data repository or to the Commission.


SOURCE: 75 FR 63084, Oct. 14, 2010, unless otherwise noted.

§ 44.00 Definition of terms used in part 44 of this chapter.

(a) Major swap participant shall have the meaning provided in Section 1a(33) of the Commodity Exchange Act, as amended, and any rules or regulations thereunder.

(b) Pre-enactment unexpired swap means any swap entered into after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) the terms of which had not expired as of the date of enactment of that Act;

(c) Transition swap means any swap entered into after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the effective date of the swap data reporting and recordkeeping rule implemented under Section 2(h)(5)(B) of the CEA.

(d) Reporting entity, when used in this part, means any counterparty referenced or identified in Section 4r(a)(3)(A)–(C) of the Commodity Exchange Act, as amended;

(e) Swap Data Repository shall have the meaning provided in Section 1a(48) of the Commodity Exchange Act, as amended, and any rules or regulations thereunder;

(f) Swap Dealer shall have the meaning provided in Section 1(a)(49) of the Commodity Exchange Act, as amended, and any rules or regulations thereunder;


§ 44.01 Effective date.

The provisions of this part are effective immediately on publication in the Federal Register.

§ 44.02 Reporting pre-enactment swaps to a swap data repository or the Commission.

(a) A counterparty to a pre-enactment unexpired swap transaction shall:

(1) Report to a registered swap data repository or the Commission by the compliance date established in the reporting rules required under Section 2(h)(5) of the Commodity Exchange Act, or within 60 days after a swap data repository becomes registered with the Commission and commences operations to receive and maintain data related to such swap, whichever occurs first, the following information with respect to the swap transaction:

(i) A copy of the transaction confirmation, in electronic form if available, or in written form if there is no electronic copy; and

(ii) The time, if available, that the transaction was executed; and

(2) Report to the Commission on request, in a form and manner prescribed by the Commission, any information relating to the swap transaction.

NOTE TO PARAGRAPHS (a)(1) AND (a)(2). In order to comply with the reporting requirements contained in paragraph (a)(1) and (a)(2) of this section, each counterparty to a pre-enactment unexpired swap transaction that may be required to report such transaction should retain, in its existing format, all information and documents, to the extent and in such form as they presently exist, relating to the terms of a swap transaction, including but not limited to any information

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**Commodity Futures Trading Commission**

**ALL ASSET CLASSES**

<table>
<thead>
<tr>
<th>Yearly phase-in</th>
<th>Time delay for public dissemination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 1</td>
<td>48 business hours.</td>
</tr>
<tr>
<td>Year 2</td>
<td>36 business hours.</td>
</tr>
<tr>
<td>After Year 2</td>
<td>24 business hours.</td>
</tr>
</tbody>
</table>

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necessary to identify and value the transaction; the date and time of execution of the transaction; information relevant to the price of the transaction; whether the transaction was accepted for clearing and, if so, the identity of such clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.

(b) Reporting party. The counterparties to a swap transaction shall report the information required under paragraph (a) of this section as follows:

(1) Where only one counterparty to a swap transaction is a swap dealer or a major swap participant, the swap dealer or major swap participant shall report the transaction;

(2) Where one counterparty to a swap transaction is a swap dealer and the other counterparty is a major swap participant, the swap dealer shall report the transaction; and

(3) Where neither counterparty to a swap transaction is a swap dealer or a major swap participant, the counterparties to the transaction shall select the counterparty who will report the transaction.

§ 44.03 Reporting transition swaps to a swap data repository or to the Commission.

(a) A counterparty to a post-enactment pre-effective swap transaction shall:

(1) As required by the reporting rules required to be adopted pursuant to Section 2(h)(5)(B) of the Commodity Exchange Act, report data related to a transition swap to a registered swap data repository or the Commission by the compliance date established in such reporting rules or within 60 days after an appropriate swap data repository becomes registered with the Commission and commences operations to receive and maintain data related to such swap, whichever occurs first, the following information with respect to the swap transaction:

(i) A copy of the transaction confirmation, in electronic form if available, or in written form if there is no electronic copy;

(ii) The time, if available, that the transaction was executed; and

(2) Report to the Commission on request, in the form and manner prescribed by the Commission, any information relating to the swap transaction.

Note to Paragraphs (a). In order to comply with the reporting requirements contained in paragraphs (a)(1) and (a)(2) of this section, each counterparty to a post-enactment pre-effective swap transaction that may be required to report such transaction should retain, in its existing format, all information and documents, to the extent and in such form as they exist on the effective date of this section, relating to: the terms of a swap transaction, including but not limited to any information necessary to identify and value the transaction (e.g., underlying asset and tenor); the date and time of execution of the transaction; volume (e.g., notional or principal amount); information relevant to the price and payment for the transaction until the swap is terminated, reaches maturity or is novated; whether the transaction was accepted for clearing and, if so, the identity of such clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.

(b) Reporting party. The counterparties to a swap transaction shall report the information required under paragraph (a) of this section as follows:

(1) Where only one counterparty to a swap transaction is a swap dealer or a major swap participant, the swap dealer or major swap participant shall report the transaction;

(2) Where one counterparty to a swap transaction is a swap dealer and the other counterparty is a major swap participant, the swap dealer shall report the transaction; and

(3) Where neither counterparty to a swap transaction is a swap dealer or a major swap participant, the counterparties to the transaction shall select the counterparty who will report the transaction.

[75 FR 78896, Dec. 17, 2010]
§ 45.1 Definitions.

As used in this part:

Asset class means the broad category of goods, services or commodities, including any “excluded commodity” as defined in CEA section 1a(19), with common characteristics underlying a swap. The asset classes include credit, equity, foreign exchange (excluding cross-currency), interest rate (including cross-currency), other commodity, and such other asset classes as may be determined by the Commission.

Business day means the twenty-four hour day, on all days except Saturdays, Sundays, and legal holidays, in the location of the reporting counterparty or registered entity reporting data for the swap.

Business hours means consecutive hours during one or more consecutive business days.

Compliance date means the applicable date on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part, as set forth in the preamble to this part.

Confirmation (“confirming”) means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise).

Confirmation data means all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap. For cleared swaps, confirmation data also includes the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house.

Credit swap means any swap that is primarily based on instruments of indebtedness, including, without limitation: Any swap primarily based on one or more broad-based indices related to instruments of indebtedness; and any swap that is an index credit swap or total return swap on one or more indices of debt instruments.

Derivatives clearing organization has the meaning set forth in CEA section 1a(9), and any Commission regulation implementing that Section, including, without limitation, § 39.5 of this chapter.

Designated contract market has the meaning set forth in CEA section 5, and any Commission regulation implementing that Section.

Electronic confirmation (confirmation “occurs electronically”) means confirmation that is done by means of automated electronic systems.

Electronic reporting (“report electronically”) means the reporting of data normalized in data fields as required by the data standard or standards used by the swap data repository to which the data is reported. Except where specifically otherwise provided in this chapter, electronic reporting does not include submission of an image of a document or text file.

Electronic verification (verification “occurs electronically”) means verification that is done by means of automated electronic systems.

Financial entity has the meaning set forth in CEA section 2(h)(7)(C).

Foreign exchange forward has the meaning set forth in CEA section 1a(24).

Foreign exchange instrument means an instrument that is both defined as a swap in part 1 of this chapter and included in the foreign exchange asset...
class. Instruments in the foreign exchange asset class include: Any currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; any foreign exchange forward as defined in CEA section 1a(24); any foreign exchange swap as defined in CEA section 1a(25); and any non-deliverable forward involving foreign exchange.

Foreign exchange swap has the meaning set forth in CEA section 1a(25). It does not include swaps primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as “cross-currency swaps”).

Interest rate swap means any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates; or any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as “cross-currency swaps”).

International swap means a swap required by U.S. law and the law of another jurisdiction to be reported both to a swap data repository and to a different trade repository registered with the other jurisdiction.

Life cycle event means any event that would result in either a change to a primary economic term of a swap or to any primary economic terms data previously reported to a swap data repository in connection with a swap. Examples of such events include, without limitation, a counterparty change resulting from an assignment or novation; a partial or full termination of the swap; a change in the end date for the swap; a change in the cash flows or rates originally reported; availability of a legal entity identifier for a swap counterparty previously identified by name or by some other identifier; or a corporate action affecting a security or securities on which the swap is based (e.g., a merger, dividend, stock split, or bankruptcy).

Life cycle event data means all of the data elements necessary to fully report any life cycle event.

Major swap participant has the meaning set forth in CEA section 1a(33) and in part 1 of this chapter.

Mixed swap has the meaning set forth in CEA section 1a(47)(D), and refers to an instrument that is in part a swap subject to the jurisdiction of the Commission, and in part a security-based swap subject to the jurisdiction of the SEC.

Multi-asset swap means a swap that does not have one easily identifiable primary underlying notional item, but instead involves multiple underlying notional items within the Commission’s jurisdiction that belong to different asset classes.

Non-electronic confirmation (confirmation “does not occur electronically”) means confirmation that is done manually rather than by means of automated electronic systems.

Non-electronic verification (verification “does not occur electronically”) means verification that is done manually rather than by means of automated electronic systems.

Non-SD/MSP counterparty means a swap counterparty that is neither a swap dealer nor a major swap participant.

Off-facility swap means a swap not executed on or pursuant to the rules of a swap execution facility or designated contract market.

Other commodity swap means any swap not included in the credit, equity, foreign exchange, or interest rate asset classes, including, without limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity.

Primary economic terms means all of the terms of a swap matched or affirmed by the counterparties in verifying the swap, including at a minimum each of the terms included in the most recent FEDERAL REGISTER release by the Commission listing minimum primary economic terms for swaps in the swap asset class in question. The Commission’s current lists of minimum primary economic terms for swaps in each swap asset class are found in appendix 1 to part 45.

Primary economic terms data means all of the data elements necessary to fully report all of the primary economic terms of a swap in the swap asset class of the swap in question.
Quarterly reporting ("reported quarterly") means reporting four times each fiscal year, following the end of each fiscal year quarter, making each quarterly report within 30 calendar days of the end of the fiscal year quarter. Reporting counterparty means the counterparty required to report swap data pursuant to this part, selected as provided in §45.8.

Required swap continuation data means all of the data elements that must be reported during the existence of a swap to ensure that all data concerning the swap in the swap data repository remains current and accurate, and includes all changes to the primary economic terms of the swap occurring during the existence of the swap. For this purpose, required swap continuation data includes:

1. All life cycle event data for the swap if the swap is reported using the life cycle reporting method, or all state data for the swap if the swap is reported using the snapshot reporting method; and
2. All valuation data for the swap.

Required swap creation data means all primary economic terms data for a swap in the swap asset class in question, and all confirmation data for the swap.

State data means all of the data elements necessary to provide a snapshot view, on a daily basis, of all of the primary economic terms of a swap in the swap asset class of the swap in question, including any change to any primary economic term or to any previously-reported primary economic terms data since the last snapshot. At a minimum, state data must include each of the terms included in the most recent FEDERAL REGISTER release by the Commission listing minimum primary economic terms for swaps in the swap asset class in question. The Commission's current lists of minimum primary economic terms for swaps in each swap asset class are found in appendix 1 to part 45.

Swap data repository has the meaning set forth in CEA section 1a(48), and in part 49 of this chapter.

Swap dealer has the meaning set forth in CEA section 1a(48), and in part 1 of this chapter.

Swap execution facility has the meaning set forth in CEA section 1a(50) and in part 37 of this chapter.

Valuation data means all of the data elements necessary to fully describe the daily mark of the transaction, pursuant to CEA section 4s(h)(3)(B)(ii), and to §23.431 of this chapter if applicable.

Verification ("verify," "verified," or "verifying") means the matching by the counterparties to a swap of each of the primary economic terms of a swap, at or shortly after the time the swap is executed.

§ 45.2 Swap recordkeeping.

(a) Recordkeeping by swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants. Each swap execution facility, designated contract market, derivatives clearing organization, swap dealer, and major swap participant subject to the jurisdiction of the Commission shall keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of such entity or person with respect to swaps, as prescribed by the Commission. Such records shall include, without limitation, the following:

1. For swap execution facilities, all records required by part 37 of this chapter.
2. For designated contract markets, all records required by part 38 of this chapter.
3. For derivatives clearing organizations, all records required by part 39 of this chapter.
4. For swap dealers and major swap participants, all records required by part 23 of this chapter, and all records demonstrating that they are entitled, with respect to any swap, to elect the clearing requirement exception pursuant to CEA section 2(h)(7).

(b) Recordkeeping by non-SD/MSP counterparties. All non-SD/MSP counterparties subject to the jurisdiction of the Commission shall keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty, including, without limitation, all records.
demonstrating that they are entitled, with respect to any swap, to elect the clearing requirement exception in CEA section 2(h)(7).

(c) Record retention. All records required to be kept pursuant to this section shall be retained with respect to each swap throughout the life of the swap and for a period of at least five years following the final termination of the swap.

(d) Retention form. Records required to be kept pursuant to this section must be kept as required by paragraph (d)(1) or (2) of this section, as applicable.

(1) Records required to be kept by swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, or major swap participants may be kept in electronic form, or kept in paper form if originally created and exclusively maintained in paper form, so long as they are retrievable, and information in them is reportable, as required by this section.

(2) Records required to be kept by non-SD/MSP counterparties may be kept in either electronic or paper form, so long as they are retrievable, and information in them is reportable, as required by this section.

(e) Record retrievability. Records required to be kept by swap execution facilities, designated contract markets, derivatives clearing organizations, or swap counterparties pursuant to this section shall be retrievable as provided in paragraphs (e)(1) and (2) of this section, as applicable.

(1) Each record required by this section or any other section of the CEA to be kept by a swap execution facility, designated contract market, derivatives clearing organization, swap dealer, or major swap participant shall be readily accessible via real time electronic access by the registrant throughout the life of the swap and for two years following the final termination of the swap, and shall be retrievable by the registrant within three business days through the remainder of the period following final termination of the swap during which it is required to be kept.

(2) Each record required by this section or any other section of the CEA to be kept by a non-SD/MSP counterparty shall be retrievable by that counterparty within five business days throughout the period during which it is required to be kept.

(f) Recordkeeping by swap data repositories. Each swap data repository registered with the Commission shall keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of the swap data repository and all swap data reported to the swap data repository, as prescribed by the Commission. Such records shall include, without limitation, all records required by part 49 of this chapter.

(g) Record retention and retrievability by swap data repositories. All records required to be kept by a swap data repository pursuant to this section must be kept by the swap data repository both:

(1) Throughout the existence of the swap and for five years following final termination of the swap, during which time the records must be readily accessible by the swap data repository and available to the Commission via real time electronic access; and

(2) Thereafter, for a period of at least ten additional years in archival storage from which they are retrievable by the swap data repository within three business days.

(h) Record inspection. All records required to be kept pursuant to this section by any registrant or its affiliates or by any non-SD/MSP counterparty subject to the jurisdiction of the Commission shall be open to inspection upon request by any representative of the Commission, the United States Department of Justice, or the Securities and Exchange Commission, or by any representative of a prudential regulator as authorized by the Commission. Copies of all such records shall be provided, at the expense of the entity or person required to keep the record, to any representative of the Commission upon request. Copies of records required to be kept by any registrant shall be provided either by electronic means, in hard copy, or both, as requested by the Commission, with the sole exception that copies of records originally created and exclusively maintained in paper form may be provided in hard copy only. Copies of
Commodity Futures Trading Commission

§ 45.3 Swap data reporting: creation data.

Registered entities and swap counterparties must report required swap creation data electronically to a swap data repository as set forth in this section. This obligation commences on the applicable compliance date set forth in the preamble to this part. The reporting obligations of swap counterparties with respect to swaps executed prior to the applicable compliance date and in existence on or after July 21, 2010, the date of enactment of the Dodd-Frank Act, are set forth in part 46 of this chapter. This section and § 45.4 establish the general swap data reporting obligations of swap dealers, major swap participants, non-SD/MSP counterparties, swap execution facilities, designated contract markets, and derivatives clearing organizations to report swap data to a swap data repository. In addition to the reporting obligations set forth in this section and § 45.4, registered entities and swap counterparties are subject to other reporting obligations set forth in this chapter, including, without limitation, the following: Swap dealers, major swap participants, and non-SD/MSP counterparties are also subject to the reporting obligations with respect to corporate affiliations reporting set forth in § 45.6; swap execution facilities, designated contract markets, swap dealers, major swap participants, and non-SD/MSP counterparties are subject to the reporting obligations with respect to real time reporting of swap data set forth in part 43 of this chapter; counterparties to a swap for which the clearing requirement exception in CEA section 2(h)(7) has been elected are subject to the reporting obligations set forth in part 39 of this chapter; and, where applicable, swap dealers, major swap participants, and non-SD/MSP counterparties are subject to the reporting obligations with respect to large traders set forth in parts 17 and 18 of this chapter.

(a) Swaps executed on or pursuant to the rules of a swap execution facility or designated contract market. (1) For each swap executed on or pursuant to the rules of a swap execution facility or designated contract market, the swap execution facility or designated contract market must report all required swap creation data, as soon as technologically practicable after execution of the swap. This report must include all confirmation data for the swap, as defined in part 23 and in § 45.1, and all primary economic terms data for the swap, as defined in § 45.1.

(2) If such a swap is accepted for clearing by a derivatives clearing organization, the derivatives clearing organization must report all confirmation data for the swap, as defined in part 39 and in § 45.1, as soon as technologically practicable after clearing. The derivatives clearing organization shall fulfill this requirement by reporting all confirmation data for the swap, as defined in part 39 and in this § 45.1, which must include all primary economic terms data for the swap as defined in § 45.1, and must include the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house.

(b) Off-facility swaps subject to mandatory clearing. For all off-facility swaps subject to the mandatory clearing requirement, except for those off-facility swaps excepted from that requirement pursuant to CEA section 2(h)(7) and those off-facility swaps covered by CEA section 2(a)(13)(C)(iv), required swap creation data must be reported as provided in paragraph (b) of this section.

(1) The reporting counterparty, as determined pursuant to § 45.8, must report all primary economic terms data for the swap, within the applicable reporting deadline set forth in paragraph (b)(1)(i) or (ii) of this section. However, if the swap is voluntarily submitted for clearing and accepted for clearing by a derivatives clearing organization before the applicable reporting deadline set forth in paragraphs (b)(1)(i) or (ii) of this section, and if the swap is accepted for clearing before the reporting
counterparty reports any primary economic terms data to a swap data repository, then the reporting counterparty is excused from reporting required swap creation data for the swap.

(i) If the reporting counterparty is a swap dealer or a major swap participant, the reporting counterparty must report all primary economic terms data for the swap as soon as technologically practicable after execution, but no later than: 30 minutes after execution during the first year following the compliance date; and 15 minutes after execution thereafter.

(ii) If the reporting counterparty is a non-SD/MSP counterparty, the reporting counterparty must report all primary economic terms data for the swap as soon as technologically practicable after execution, but no later than: four business hours after execution during the first year following the compliance date; two business hours after execution during the second year following the compliance date; and one business hour after execution thereafter.

(2) If the swap is accepted for clearing by a derivatives clearing organization, the derivatives clearing organization must report all confirmation data for the swap, as defined in part 39 and in §45.1, as soon as technologically practicable after clearing. The derivatives clearing organization shall fulfill this requirement by reporting all confirmation data for the swap, as defined in §45.1, and must include the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house.

(3) If the swap is not accepted for clearing, the reporting counterparty must report all confirmation data for the swap, as defined in §45.1, within the applicable reporting deadline set forth in paragraph (b)(3)(i) or (ii) of this section. During the first 180 calendar days following the compliance date, if reporting confirmation data normalized in data fields is not yet technologically practicable for the reporting counterparty, the reporting counterparty may report confirmation data to the swap data repository by transmitting to the swap data repository an image of the document or documents constituting the confirmation, until such time as electronic reporting of confirmation data is technologically practicable for the reporting counterparty. Beginning 180 days after the compliance date, the reporting counterparty must report all confirmation data to the swap data repository electronically.

(i) If the reporting counterparty is a swap dealer or major swap participant, the reporting counterparty must report all confirmation data as soon as technologically practicable following confirmation, but no later than: 30 minutes after confirmation if confirmation occurs electronically; or 24 business hours after confirmation if confirmation does not occur electronically.

(ii) If the reporting counterparty is a non-SD/MSP counterparty, the reporting counterparty must report all confirmation data as soon as technologically practicable following confirmation, but no later than: the end of the second business day after the date of confirmation during the first year following the compliance date; and the end of the first business day after the date of confirmation thereafter.

(c) Off-facility swaps not subject to mandatory clearing, with a swap dealer or major swap participant reporting counterparty.

For all off-facility swaps not subject to the mandatory clearing requirement set forth in CEA section 2(h), all off-facility swaps for which the clearing requirement exception in CEA section 2(h)(7) has been elected, and all off-facility swaps covered by CEA section 2(a)(13)(C)(iv), for which a swap dealer or major swap participant is the reporting counterparty, required swap creation data must be reported as provided in paragraph (c) of this section.

(1) Credit, equity, foreign exchange, and interest rate swaps. For each such credit swap, equity swap, foreign exchange instrument, or interest rate swap:

(i) The reporting counterparty, as determined pursuant to §45.8, must report all primary economic terms data for the swap, within the applicable reporting deadline set forth in paragraph...
(c)(1)(i)(A) or (B) of this section. However, if the swap is voluntarily submitted for clearing and accepted for clearing by a derivatives clearing organization before the applicable reporting deadline set forth in paragraphs (c)(1)(i)(A) or (B) of this section, and if the swap is accepted for clearing before the reporting counterparty reports any primary economic terms data to a swap data repository, then the reporting counterparty is excused from reporting required swap creation data for the swap.

(A) If the non-reporting counterparty is a swap dealer, a major swap participant, or a non-SD/MSP counterparty that is a financial entity as defined in CEA section 2(h)(7)(C), or if the non-reporting counterparty is a non-SD/MSP counterparty that is not a financial entity as defined in CEA section 2(h)(7)(C) and verification of primary economic terms occurs electronically, then the reporting counterparty must report all primary economic terms data for the swap as soon as technologically practicable after execution, but no later than: one hour after execution during the first year following the compliance date; and 30 minutes after execution thereafter.

(B) If the non-reporting counterparty is a non-SD/MSP counterparty that is not a financial entity as defined in CEA section 2(h)(7)(C), and if verification of primary economic terms does not occur electronically, then the reporting counterparty must report all primary economic terms data for the swap as soon as technologically practicable after execution, but no later than: 24 business hours after execution during the first year following the compliance date; 12 business hours after execution during the second year following the compliance date; and 30 minutes after execution thereafter.

(ii) If the swap is accepted for clearing by a derivatives clearing organization, the derivatives clearing organization must report all confirmation data for the swap, as defined in part 39 and in §45.1, which must include all primary economic terms data for the swap as defined in §45.1, and must include the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house.

(iii) If the swap is not voluntarily submitted for clearing, the reporting counterparty must report all confirmation data for the swap, as defined in §45.1, as soon as technologically practicable after confirmation, but no later than: 30 minutes after confirmation if confirmation occurs electronically; or 24 business hours after confirmation if confirmation does not occur electronically. During the first 180 calendar days following the compliance date, if reporting confirmation data normalized in data fields is not yet technologically practicable for the reporting counterparty, the reporting counterparty may report confirmation data to the swap data repository by transmitting to the swap data repository an image of the document or documents constituting the confirmation, until such time as electronic reporting of confirmation data is technologically practicable for the reporting counterparty. Beginning 180 days after the compliance date, the reporting counterparty must report all confirmation data to the swap data repository electronically.

(2) Other commodity swaps. For each such other commodity swap:

(i) The reporting counterparty, as determined pursuant to §45.8, must report all primary economic terms data for the swap, within the applicable reporting deadline set forth in paragraph (c)(2)(i)(A) or (B) of this section. However, if the swap is voluntarily submitted for clearing and accepted for clearing by a derivatives clearing organization before the applicable reporting deadline set forth in paragraphs (c)(2)(i)(A) or (B) of this section, and if the swap is accepted for clearing before the reporting counterparty reports any primary economic terms data to a swap data repository, then the reporting counterparty is excused from reporting required swap creation data for the swap.
(A) If the non-reporting counterparty is a swap dealer, a major swap participant, or a non-SD/MSP counterparty that is a financial entity as defined in CEA section 2(h)(7)(C), or if the non-reporting counterparty is a non-SD/MSP counterparty that is not a financial entity as defined in CEA section 2(h)(7)(C) and verification of primary economic terms occurs electronically, then the reporting counterparty must report all primary economic terms data for the swap as soon as technologically practicable after execution, but no later than: four hours after execution during the first year following the compliance date; and two hours after execution thereafter.

(B) If the non-reporting counterparty is a non-SD/MSP counterparty that is not a financial entity as defined in CEA section 2(h)(7)(C), and if verification of primary economic terms does not occur electronically, then the reporting counterparty must report all primary economic terms data for the swap as soon as technologically practicable after execution, but no later than: 48 business hours after execution during the first year following the compliance date; 24 business hours after execution during the second year following the compliance date; and two hours after execution thereafter.

(ii) If the swap is accepted for clearing by a derivatives clearing organization, the derivatives clearing organization must report all confirmation data for the swap, as defined in part 39 and in this §45.1, which must include all primary economic terms data for the swap as defined in §45.1, and must include the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house.

(iii) If the swap is not voluntarily submitted for clearing, the reporting counterparty must report all confirmation data for the swap, as defined in §45.1, as soon as technologically practicable after confirmation, but no later than: 30 minutes after confirmation if confirmation occurs electronically; or 24 business hours after confirmation if confirmation does not occur electronically. During the first 180 calendar days following the compliance date, if reporting confirmation data normalized in data fields is not yet technologically practicable for the reporting counterparty, the reporting counterparty may report confirmation data to the swap data repository by transmitting to the swap data repository an image of the document or documents constituting the confirmation, until such time as electronic reporting of confirmation data is technologically practicable for the reporting counterparty. Beginning 180 days after the compliance date, the reporting counterparty must report all confirmation data to the swap data repository electronically.

(d) Off-facility swaps not subject to mandatory clearing, with a non-SD/MSP reporting counterparty. For all off-facility swaps not subject to the mandatory clearing requirement set forth in CEA section 2(h), all off-facility swaps for which the clearing requirement exception in CEA section 2(h)(7) has been elected, and all off-facility swaps covered by CEA section 2(a)(13)(C)(iv), in all asset classes, for which a non-SD/MSP counterparty is the reporting counterparty, required swap creation data must be reported as provided in this paragraph (d).

(1) The reporting counterparty, as determined pursuant to §45.8, must report all primary economic terms data for the swap, as soon as technologically practicable after execution, but no later than: 48 business hours after execution during the first year following the compliance date; 36 business hours after execution during the first year following the compliance date; 24 business hours after execution thereafter. However, if the swap is voluntarily submitted for clearing and accepted for clearing by a derivatives clearing organization before the applicable reporting deadline set forth in this paragraph (d)(1), and if the swap is accepted for clearing before the reporting counterparty reports any primary economic terms data to a swap data repository, then the reporting...
counterparty is excused from reporting required swap creation data for the swap.

(2) If the swap is accepted for clearing by a derivatives clearing organization, the derivatives clearing organization must report all confirmation data for the swap, as defined in part 39 and in §45.1, as soon as technologically practicable after clearing. The derivatives clearing organization shall fulfill this requirement by reporting all confirmation data for the swap, as defined in part 39 and in this §45.1, which must include all primary economic terms data for the swap as defined in §45.1, and must include the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house.

(3) If the swap is not voluntarily submitted for clearing, the reporting counterparty must report all confirmation data for the swap, as defined in §45.1, as soon as technologically practicable after confirmation, but no later than: 48 business hours after confirmation during the first year following the compliance date; 36 business hours after confirmation during the second year following the compliance date; and 24 business hours after confirmation thereafter. During the first 180 calendar days following the compliance date, if reporting confirmation data normalized in data fields is not yet technologically practicable for the reporting counterparty, the reporting counterparty may report confirmation data to the swap data repository by transmitting to the swap data repository an image of the document or documents constituting the confirmation, until such time as electronic reporting of confirmation data is technologically practicable for the reporting counterparty. Beginning 180 days after the compliance date, the reporting counterparty must report all confirmation data to the swap data repository electronically.

(e) Allocations. For swaps involving allocation, required swap creation data shall be reported to a single swap data repository as follows.

(i) Initial swap between reporting counterparty and agent. The initial swap transaction between the reporting counterparty and the agent shall be reported as required by §45.3(a) through (d) of this part. A unique swap identifier for the initial swap transaction must be created as provided in §45.5 of this part.

(ii) Post-allocation swaps. (A) Duties of the agent. In accordance with this section, the agent shall inform the reporting counterparty of the identities of the reporting counterparty’s actual counterparties resulting from allocation, as soon as technologically practicable after execution, but not later than eight business hours after execution.

(B) Duties of the reporting counterparty. The reporting counterparty must report all required swap creation data for each swap resulting from allocation, to the same swap data repository to which the initial swap transaction is reported, as soon as technologically practicable after it is informed by the agent of the identities of its actual counterparties. The reporting counterparty must create a unique swap identifier for each such swap as required in §45.5 of this part.

(C) Duties of the swap data repository. The swap data repository to which the initial swap transaction and the post-allocation swaps are reported must map together the unique swap identifiers of the original swap transaction and of each of the post-allocation swaps.

(f) Multi-asset swaps. For each multi-asset swap, required swap creation data and required swap continuation data shall be reported to a single swap data repository that accepts swaps in the asset class treated as the primary asset class involved in the swap by the swap execution facility, designated contract market, or reporting counterparty making the first report of required swap creation data pursuant to this section. The registered entity or reporting counterparty making the first report of required swap creation data pursuant to this section shall report all primary economic terms for each asset class involved in the swap.

(g) Mixed swaps. (1) For each mixed swap, required swap creation data and required swap continuation data shall
§ 45.4 Swap data reporting: continuation data.

Registered entities and swap counterparties must report required swap continuation data electronically to a swap data repository as set forth in this section. This obligation commences on the applicable compliance date set forth in the preamble to this part. The reporting obligations of registered entities and swap counterparties with respect to swaps executed prior to the applicable compliance date and in existence on or after July 21, 2010, the date of enactment of the Dodd-Frank Act, are set forth in part 46 of this chapter. This section and §45.3 establish the general swap data reporting obligations of swap dealers, major swap participants, non-SD/MSP counterparties, swap execution facilities, designated contract markets, and derivatives clearing organizations to report swap data to a swap data repository. In addition to the reporting obligations set forth in this section and §45.3, registered entities and swap counterparties are subject to other reporting obligations set forth in this chapter, including, without limitation, the following: Swap dealers, major swap participants, and non-SD/MSP counterparties are also subject to the reporting obligations with respect to corporate affiliations reporting set forth in §45.6; swap execution facilities, designated contract markets, swap dealers, major swap participants, and non-SD/MSP counterparties are subject to the reporting obligations with respect to real-time reporting of swap data set forth in part 43 of this chapter; and, where applicable, swap dealers, major swap participants, and non-SD/MSP counterparties are subject to the reporting obligations with respect to large traders set forth in parts 17 and 18 of this chapter.

(a) Continuation data reporting method.

For each swap, regardless of asset class, reporting counterparties and derivatives clearing organizations required to report swap continuation data must do so in a manner sufficient to ensure that all data in the swap data repository concerning the swap remains current and accurate, and includes all changes to the primary economic terms of the swap occurring during the existence of the swap. Reporting entities and counterparties fulfill this obligation by reporting either life cycle event data or state data for the swap within the applicable deadlines set forth in this section. Reporting counterparties and derivatives clearing organizations required to report swap continuation data for a swap may fulfill their obligation to report either life cycle event data or state data by reporting:

(1) Life cycle event data to a swap data repository that accepts only life cycle event data reporting;

(2) State data to a swap data repository that accepts only state data reporting; or

(3) Either life cycle event data or state data to a swap data repository that accepts both life cycle event data and state data reporting.

(b) Continuation data reporting for cleared swaps. For all swaps cleared by a derivatives clearing organization, required continuation data must be reported as provided in this section.
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(1) Life cycle event data or state data reporting. The derivatives clearing organization must report to the swap data repository either:

(i) All life cycle event data for the swap, reported on the same day that any life cycle event occurs with respect to the swap; or

(ii) All state data for the swap, reported daily.

(2) Valuation data reporting. Valuation data for the swap must be reported as follows:

(i) By the derivatives clearing organization, daily; and

(ii) If the reporting counterparty is a swap dealer or major swap participant, by the reporting counterparty, daily.

Non-SD/MSP reporting counterparties are not required to report valuation data for cleared swaps.

(c) Continuation data reporting for uncleared swaps. For all swaps that are not cleared by a derivatives clearing organization, the reporting counterparty must report all required swap continuation data as provided in this section.

(1) Life cycle event data or state data reporting. The reporting counterparty for the swap must report to the swap data repository either all life cycle event data for the swap, or all state data for the swap, within the applicable deadline set forth in paragraphs (c)(1)(i) or (ii) of this section.

(i) If the reporting counterparty is a swap dealer or major swap participant:

(A) Life cycle event data must be reported on the same day that any life cycle event occurs, with the sole exception that life cycle event data relating to a corporate event of the non-reporting counterparty must be reported no later than the end of the second business day after the day on which such event occurs.

(B) State data must be reported daily.

(ii) If the reporting counterparty is a non-SD/MSP counterparty:

(A) Life cycle event data must be reported no later than: the end of the second business day following the date of any life cycle event during the first year after the applicable compliance date; and the end of the first business day following the date of any life cycle event thereafter; with the sole exception that life cycle event data relating to a corporate event of the non-reporting counterparty must be reported no later than the end of the third business day following the date of such event during the first year after the compliance date, and no later than the end of the second business day following such event thereafter.

(B) State data must be reported daily.

(2) Valuation data reporting. Valuation data for the swap must be reported by the reporting counterparty for the swap as follows:

(i) If the reporting counterparty is a swap dealer or major swap participant, the reporting counterparty must report all valuation data for the swap, daily.

(ii) If the reporting counterparty is a non-SD/MSP counterparty, the reporting counterparty must report the current daily mark of the transaction as of the last day of each fiscal quarter. This report must be transmitted to the swap data repository within 30 calendar days of the end of each fiscal quarter. If a daily mark of the transaction is not available for the swap, the reporting counterparty satisfies this requirement by reporting the current valuation of the swap recorded on its books in accordance with applicable accounting standards.

§ 45.5 Unique swap identifiers.

Each swap subject to the jurisdiction of the Commission shall be identified in all recordkeeping and all swap data reporting pursuant to this part by the use of a unique swap identifier, which shall be created, transmitted, and used for each swap as provided in paragraphs (a) through (c) of this section.

(a) Swaps executed on a swap execution facility or designated contract market. For each swap executed on a swap execution facility or designated contract market, the swap execution facility or designated contract market shall create and transmit a unique swap identifier as provided in paragraphs (a)(1) and (2) of this section.

(1) Creation. The swap execution facility or designated contract market shall generate and assign a unique swap identifier at, or as soon as technologically practicable following, the time of execution of the swap, and
prior to the reporting of required swap creation data. The unique swap identifier shall consist of a single data field that contains two components:

(i) The unique alphanumeric code assigned to the swap execution facility or designated contract market by the Commission for the purpose of identifying the swap execution facility or designated contract market with respect to unique swap identifier creation; and

(ii) An alphanumeric code generated and assigned to that swap by the automated systems of the swap execution facility or major swap participant, which shall be unique with respect to all such codes generated and assigned by that swap execution facility or designated contract market.

(2) **Transmission.** The swap execution facility or designated contract market shall transmit the unique swap identifier electronically as follows:

(i) To the swap data repository to which the swap execution facility or designated contract market reports required swap creation data for the swap, as part of that report;

(ii) To each counterparty to the swap, as soon as technologically practicable after execution of the swap;

(iii) To the derivatives clearing organization, if any, to which the swap is submitted for clearing, as part of the required swap creation data transmitted to the derivatives clearing organization for clearing purposes.

(b) **Off-facility swaps with a swap dealer or major swap participant reporting counterparty.** For each off-facility swap where the reporting counterparty is a swap dealer or major swap participant, the reporting counterparty shall create and transmit a unique swap identifier as provided in paragraphs (b)(1) and (2) of this section.

(1) **Creation.** The reporting counterparty shall generate and assign a unique swap identifier as soon as technologically practicable after execution of the swap and prior to both the reporting of required swap creation data and the transmission of data to a derivatives clearing organization if the swap is to be cleared. The unique swap identifier shall consist of a single data field that contains two components:

(i) The unique alphanumeric code assigned to the swap dealer or major swap participant by the Commission at the time of its registration as such, for the purpose of identifying the swap dealer or major swap participant with respect to unique swap identifier creation; and

(ii) An alphanumeric code generated and assigned to that swap by the automated systems of the swap dealer or major swap participant, which shall be unique with respect to all such codes generated and assigned by that swap dealer or major swap participant.

(2) **Transmission.** The reporting counterparty shall transmit the unique swap identifier electronically as follows:

(i) To the swap data repository to which the reporting counterparty reports required swap creation data for the swap, as part of that report;

(ii) To the non-reporting counterparty to the swap, as soon as technologically practicable after execution of the swap; and

(iii) To the derivatives clearing organization, if any, to which the swap is submitted for clearing, as part of the required swap creation data transmitted to the derivatives clearing organization for clearing purposes.

(c) **Off-facility swaps with a non-SD/MSP reporting counterparty.** For each off-facility swap for which the reporting counterparty is a non-SD/MSP counterparty, the swap data repository to which primary economic terms data is reported shall create and transmit a unique swap identifier as provided in paragraphs (c)(1) and (2) of this section.

(1) **Creation.** The swap data repository shall generate and assign a unique swap identifier as soon as technologically practicable following receipt of the first report of required swap creation data concerning the swap. The unique swap identifier shall consist of a single data field that contains two components:

(i) The unique alphanumeric code assigned to the swap data repository by the Commission at the time of its registration as such, for the purpose of identifying the swap data repository with respect to unique swap identifier creation; and
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(i) An alphanumeric code generated and assigned to that swap by the automated systems of the swap data repository, which shall be unique with respect to all such codes generated and assigned by that swap data repository.

(2) Transmission. The swap data repository shall transmit the unique swap identifier electronically as follows:

(i) To the counterparties to the swap, as soon as technologically practicable following creation of the unique swap identifier; and

(ii) To the derivatives clearing organization, if any, to which the swap is submitted for clearing, as soon as technologically practicable following creation of the unique swap identifier.

(d) Allocations. For swaps involving allocation, unique swap identifiers shall be created and transmitted as follows.

(1) Initial swap between reporting counterparty and agent. The unique swap identifier for the initial swap transaction between the reporting counterparty and the agent shall be created as required by paragraph (a) through (c) of this section, and shall be transmitted as follows:

(i) If the unique swap identifier is created by a swap execution facility or designated contract market, the swap execution facility or designated contract market must include the unique swap identifier in its swap creation data report to the swap data repository, and must transmit the unique identifier to the reporting counterparty and to the agent.

(ii) If the unique swap identifier is created by the reporting counterparty, the reporting counterparty must include the unique swap identifier in its swap creation data report to the swap data repository, and must transmit the unique identifier to the reporting counterparty and to the agent.

(iii) The derivatives clearing organization, if any, to which the swap is submitted for clearing, as part of the required swap creation data transmitted to the derivatives clearing organization for clearing purposes.

(iv) The same swap data repository to which the initial swap transaction is reported, as part of the report of required swap creation data to the swap data repository.

(e) Use. Each registered entity or swap counterparty subject to the jurisdiction of the Commission shall include the unique swap identifier for a swap in all of its records and all of its swap data reporting concerning that swap, from the time it creates or receives the unique swap identifier as provided in this section, throughout the existence of the swap and for as long as any records are required by the CEA or Commission regulations to be kept by that registered entity or counterparty concerning the swap, regardless of any life cycle events or any changes to state data concerning the swap, including, without limitation, any changes with respect to the counterparties to or the ownership of the swap. This requirement shall not prohibit the use by a registered entity or swap counterparty in its own records of any additional identifier or identifiers internally generated by the automated systems of the registered entity or swap counterparty, or the reporting to a swap data repository, the Commission, or another regulator of such internally generated identifiers in addition to the reporting of the unique swap identifier.

§ 45.6 Legal entity identifiers

Each counterparty to any swap subject to the jurisdiction of the Commission shall be identified in all record-keeping and all swap data reporting pursuant to this part by means of a single legal entity identifier as specified in this section.

(a) Definitions. As used in this section:

Control ("controlling," "controlled by," "under common control with") means, for the purposes of §45.6, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a
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person, whether through the ownership of voting interest, by contract, or otherwise. A person is presumed to control another person if the person: is a director, general partner or officer exercising executive responsibility (or having similar status or functions); directly or indirectly has the right to vote 25 percent or more of a class of voting interest or has the power to sell or direct the sale of 25 percent or more of a class of voting interest; or, in the case of a partnership, has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital.

Legal identifier system means an LEI utility conforming with the requirements of this section that issues or is capable of issuing an LEI conforming with the requirements of this section, and is capable of maintaining LEI reference data as required by this section.

Level one reference data means the minimum information needed to identify, on a verifiable basis, the legal entity to which a legal entity identifier is assigned. Level one reference data shall include, without limitation, all of the data elements included in ISO Standard 17442. Examples of level one reference data include, without limitation, a legal entity’s official legal name, its place of incorporation, and the address and contact information of its corporate headquarters.

Level two reference data means information concerning the corporate affiliations or company hierarchy relationships of the legal entity to which a legal entity identifier is assigned. Examples of level two reference data include, without limitation, the identity of the legal entity’s ultimate parent.

Parent means, for the purposes of §45.6, a legal person that controls a counterparty to a swap required to be reported pursuant to this section, or that controls a legal entity identified or to be identified by a legal entity identifier provided by the legal identifier system designated by the Commission pursuant to this section, and that itself has no parent.

(b) International standard for the legal entity identifier. The legal entity identifier used in all recordkeeping and all swap data reporting required by this part, following designation of the legal entity identifier system as provided in paragraph (c)(2) of this section, shall be issued under, and shall conform to, ISO Standard 17442, Legal Entity Identifier (LEI), issued by the International Organisation for Standardisation.

(b) Technical principles for the legal entity identifier. The legal entity identifier used in all recordkeeping and all swap data reporting required by this part shall conform to the technical principles set forth in paragraphs (b)(1) through (6) of this section.

(1) Uniqueness. Only one legal entity identifier shall be assigned to any legal entity, and no legal entity identifier shall ever be reused. Each entity within a corporate organization or group structure that acts as a counterparty in any swap shall have its own legal entity identifier.

(2) Neutrality. To ensure the persistence of the legal entity identifier, it shall have a format consisting of a single data field, and shall contain either no embedded intelligence or as little embedded intelligence as practicable.
Entity characteristics of swap counterparties identified by legal entity identifiers shall constitute separate elements within a reference data system as set forth in paragraphs (a), (c)(2), (d), and (e) of this section.

(3) **Reliability.** The legal entity identifier shall be supported by a trusted and auditable method of verifying the identity of the legal entity to which it is assigned, both initially and at appropriate intervals thereafter. The issuer of legal entity identifiers shall maintain minimum reference or identification data sufficient to verify that a user has been correctly identified. Issuance and maintenance of the legal entity identifier, and storage and maintenance of all associated data, shall involve robust quality assurance practices and system safeguards. At a minimum, such system safeguards shall include the system safeguards applied to swap data repositories by part 49 of this chapter.

(4) **Open Source.** The schema for the legal entity identifier shall have an open standard that ensures to the greatest extent practicable that the legal entity identifier is compatible with existing automated systems of financial market infrastructures, market participants, and regulators.

(5) **Extensibility.** The legal entity identifier shall be capable of becoming the single international standard for unique identification of legal entities across the financial sector on a global basis. Therefore, it shall be sufficiently extensible to cover all existing and potential future legal entities of all types that may be counterparties to swap, OTC derivative, or other financial transactions; that may be involved in any aspect of the financial issuance and transactions process; or that may be subject to required due diligence by financial sector entities.

(6) **Persistence.** The legal entity identifier assigned to an entity shall persist despite all corporate events. When a corporate event results in a new entity, the new entity shall receive a new legal entity identifier, while the previous legal entity identifier or identifiers continue to identify the predecessor entity or entities in the record.

(c) **Governance principles for the legal entity identifier.** The legal entity identifier used in all recordkeeping and all swap data reporting required by this part shall conform to the governance principles set forth in paragraphs (c)(1) through (4) of this section.

(1) **International governance.** The issuance of the legal entity identifier used pursuant to this section, and any legal entity identifier utility formed for the purpose of issuing legal entity identifiers that are used pursuant to this section, shall be subject to international supervision as follows:

   (i) With respect to operations, by a governance structure that includes the Commission and other financial regulators in any jurisdiction requiring use of the legal entity identifier pursuant to applicable law. The governance structure shall have authority sufficient to ensure, and shall ensure, that issuance and maintenance of the legal entity identifier system adheres on an ongoing basis to the principles set forth in this section.

(2) **Reference data access.** Access to reference data associated with the legal entity identifier shall enable use of the legal entity identifier as a public good, while respecting applicable law regarding data confidentiality. Accordingly:

   (i) Reference data associated with the legal entity identifier that is public under applicable law shall be available publicly and free of charge. Such data shall include, without limitation, level one reference data (i.e., the minimum reference data needed to verify the identity of the legal entity receiving each legal entity identifier), and a current directory of all issued legal entity identifiers.

   (ii) Collection and maintenance of, and access to, reference data associated with the legal entity identifier shall comply with applicable laws on data protection and confidentiality.

(3) **Non-profit operation and funding.** Funding of both start-up and ongoing operation of the legal entity identifier system, including, without limitation, any legal entity identifier utility formed for the purpose of issuing legal entity identifiers that are used pursuant to this section, shall be conducted
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on a non-profit, reasonable cost-recovery basis, and shall be subject to international governance as provided in paragraph (c)(1) of this section.

(4) Unbundling and non-restricted use. Issuance of the legal entity identifier shall not be tied to other services, if any, offered by the issuer, and information concerning the issuance process for new legal entity identifiers must be available publicly and free of charge. Restrictions shall not be imposed on use of the legal entity identifier by any person in its own products and services, or on use of the legal entity identifier and associated reference data by any financial regulator. Any intellectual property created as part of the legal entity identifier system shall be treated in a manner consistent with open source principles.

(5) Commercial advantage prohibition. The legal entity identifier utility providing legal entity identifiers for use in compliance with this part shall not make any commercial or business use (other than the operation of the utility) of any reference data associated with the legal entity identifier that is not available to the public free of charge. This restriction shall also apply to any entity or person that participates in the utility, that is legally or otherwise affiliated or associated with the utility, or that provides third-party services to the utility or to any component, partner, affiliate, or associate thereof.

(e) Designation of the legal entity identifier system. (1) The Commission shall determine, as provided in paragraphs (e)(1)(i) through (iii) of this section, whether a legal entity identifier system that satisfies the requirements set forth in this section is available to provide legal entity identifiers for registered entities and swap counterparties required to comply with this part.

(i) In making this determination, the Commission shall consider, without limitation, the following factors:

(A) Whether the LEI provided by the LEI utility is issued under, and conforms to, ISO Standard 17442, Legal Entity Identifier (LEI).

(B) Whether the LEI provided by the LEI utility complies with all of the technical principles set forth in this rule.

(C) Whether the LEI utility complies with all of the governance principles set forth in this rule.

(D) Whether the LEI utility has demonstrated that it in fact can provide LEIs complying with this section for identification of swap counterparties in swap data reporting commencing as of the compliance dates set forth in §45.5.

(E) The acceptability of the LEI utility to industry participants required to use the LEI in complying with this part.

(ii) In making this determination, the Commission shall consider all candidates meeting the criteria set forth in paragraph (e)(1)(i) of this section, but shall not consider any candidate that does not demonstrate that it in fact can provide LEIs for identification of swap counterparties in swap data reporting commencing as of the compliance dates set forth in this part.

(iii) The Commission shall make this determination at a time it believes is sufficiently prior to the compliance dates set forth this part to enable issuance of LEIs far enough in advance of those compliance dates to enable compliance with this part.

(2) If the Commission determines pursuant to paragraph (e)(1) of this section that such a legal entity identifier system is available, the Commission shall designate the legal entity identifier system as the provider of legal entity identifiers to be used in record-keeping and swap data reporting pursuant to this part, by means of a Commission order that is published in the Federal Register and on the Web site of the Commission, as soon as practicable after such determination is made. The order shall include notice of this designation, the contact information of the LEI utility, and information concerning the procedure and requirements for obtaining legal entity identifiers.

(3) If the Commission determines pursuant to paragraph (e)(1) of this section that such a legal entity identifier system is not yet available, the Commission shall publish notice of the determination in the Federal Register and on the Web site of the Commission, as soon as practicable after the determination is made. If the Commission
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later determines, pursuant to paragraphs (e)(1)(i) and (ii) of this section, that such a legal entity identifier system has become available, the Commission shall designate the legal entity identifier system as the provider of legal entity identifiers to be used in recordkeeping and swap data reporting pursuant to this part, by means of a Commission order that is published in the FEDERAL REGISTER and on the Web site of the Commission, as soon as practicable after such determination is made. The order shall include notice of this designation, the contact information of the LEI utility, and information concerning the procedure and requirements for obtaining legal entity identifiers.

(e) Reference data reporting—(1) Reporting of level one reference data. Level one reference data for each counterparty to any swap subject to the jurisdiction of the Commission shall be reported, by means of self-registration, third-party registration, or both, into a public level one reference database maintained by the issuer of the legal entity identifier designated by the Commission pursuant to paragraph (d) of this section. Such level one reference data shall be reported at a time sufficient to ensure that the counterparty’s legal entity identifier is available for inclusion in recordkeeping and swap data reporting as required by this section. All subsequent changes and corrections to level one reference data previously reported shall be reported to the issuer, by means of self-registration, third-party registration, or both, as soon as technologically practicable following occurrence of any such change or discovery of the need for a correction.

(2) Reporting of level two reference data. (i) Level two reference data for each counterparty to any swap subject to the jurisdiction of the Commission, consisting of the identity of the counterparty’s ultimate parent, shall be reported, by means of self-registration, third-party registration, or both, into a level two reference database. Where applicable law forbids such reporting, that fact and the citation of the law in question shall be reported in place of the data to which such law applies.

(ii) All non-public level two reference data reported to the level two reference database shall be confidential, non-public, and available only to financial regulators in any jurisdiction requiring use of the legal entity identifier pursuant to applicable law.

(iii) The Commission shall determine the location of the level two reference database by means of a Commission order that is published in the FEDERAL REGISTER and on the Web site of the Commission, as soon as practicable after such determination is made. The order shall include notice of the location of the level two reference database, and information concerning the procedure and requirements for reporting level two reference data to the database.

(iv) The obligation to report level two reference data does not apply until the Commission has determined the location of the level two reference database as provided in paragraph (e)(2)(iii) of this section.

(v) After the Commission determines the location of the level two reference database pursuant to paragraph (e)(2)(iii) of this section, required level two reference data shall be reported at a time sufficient to ensure that it is included in the database when the counterparty’s legal entity identifier is included in recordkeeping and swap data reporting as required by this section.

(vi) All subsequent changes and corrections to required level two reference data previously reported shall be reported into the level two reference database, by means of self-registration, third-party registration, or both, as soon as technologically practicable following occurrence of any such change or discovery of the need for a correction.

(f) Use of the legal entity identifier system by registered entities and swap counterparties. (1) When a legal entity identifier system has been designated by the Commission pursuant to paragraph (e) of this section, each registered entity and swap counterparty shall use the legal entity identifier provided by that system in all recordkeeping and swap data reporting pursuant to this part.
§ 45.7 Unique product identifiers.

Each swap subject to the jurisdiction of the Commission shall be identified in all recordkeeping and all swap data reporting pursuant to this part by means of a unique product identifier and product classification system as specified in this section. Each swap sufficiently standardized to receive a unique product identifier shall be identified by a unique product identifier. Each swap not sufficiently standardized for this purpose shall be identified by its description using the product classification system.
§ 45.8 Determination of which counterparty must report.

The determination of which counterparty is the reporting counterparty for a swap shall be made as provided in this section.

(a) If only one counterparty is a swap dealer, the swap dealer shall be the reporting counterparty.

(b) If neither counterparty is a swap dealer, and only one counterparty is a major swap participant, the major swap participant shall be the reporting counterparty.

(c) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a financial entity as defined in CEA section 2(h)(7)(C), the counterparty that is a financial entity shall be the reporting counterparty.

(d) If both counterparties are swap dealers, or both counterparties are major swap participants, or both counterparties are non-SD/MSP counterparties and neither counterparty is a financial entity as defined in CEA section 2(h)(7)(C):

(1) For a swap executed on or pursuant to the rules of a swap execution facility or designated contract market, the counterparties shall agree which counterparty shall be the reporting counterparty. The counterparties shall make this agreement after the swap execution facility or designated contract market notifies the counterparties, as provided in paragraph (h)(2) of this section, that paragraph (d) of this section applies to them, and not later than the end of the first business day following the date of execution of the swap. After this agreement is reached, the reporting counterparty shall report
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to the swap data repository that it is the reporting counterparty.

(2) For an off-facility swap, the counterparties shall agree as one term of their swap which counterparty shall be the reporting counterparty.

(e) Notwithstanding the provisions of paragraphs (a) through (d) of this section, if both counterparties to a swap are non-SD/MSP counterparties and only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty.

(f) Notwithstanding the provisions of paragraphs (a) through (e) of this section, if neither counterparty to a swap is a U.S. person, but the swap is executed on a swap execution facility or designated contract market or otherwise executed in the United States, or is cleared by a derivatives clearing organization:

(1) For such a swap executed on or pursuant to the rules of a swap execution facility or designated contract market, the counterparties shall agree which counterparty shall be the reporting counterparty. The counterparties shall make this agreement after the swap execution facility or designated contract market notifies the counterparties, as provided in paragraph (h)(2) of this section, that neither counterparty is a U.S. person, and not later than the end of the first business day following the date of execution of the swap. After this agreement is reached, the reporting counterparty shall report to the swap data repository that it is the reporting counterparty.

(2) For an off-facility swap, the counterparties shall agree as one term of their swap which counterparty shall be the reporting counterparty.

(g) If a reporting counterparty selected pursuant to paragraphs (a) through (f) of this section ceases to be a counterparty to a swap due to an assignment or novation, the reporting counterparty for reporting of required swap continuation data following the assignment or novation shall be selected from the two current counterparties as provided in paragraphs (g)(1) through (4) of this section.

(1) If only one counterparty is a swap dealer, the swap dealer shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(2) If neither counterparty is a swap dealer, and only one counterparty is a major swap participant, the major swap participant shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(3) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(4) In all other cases, the counterparty that replaced the previous reporting counterparty by reason of the assignment or novation shall be the reporting counterparty, unless otherwise agreed by the counterparties.

(h) For all swaps executed on or pursuant to the rules of a swap execution facility or designated contract market, the rules of the swap execution facility or designated contract market must require each swap counterparty to provide sufficient information to the swap execution facility or designated contract market to enable the swap execution facility or designated contract market to report all swap creation data as provided in this part.

(1) To achieve this, the rules of the swap execution facility or designated contract market must require each market participant placing an order with respect to any swap traded on the swap execution facility or designated contract market to include in the order, without limitation:

(i) The legal entity identifier of the market participant placing the order, if available.

(ii) A yes/no indication of whether the market participant is a swap dealer with respect to the product with respect to which the order is placed.

(iii) A yes/no indication of whether the market participant is a major swap participant with respect to the product with respect to which the order is placed.

(iv) A yes/no indication of whether the market participant is a financial entity as defined in CEA section (2)(h)(7)(C).

(v) A yes/no indication of whether the market participant is a U.S. person.
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§ 45.10 Reporting to a single swap data repository.

All swap data for a given swap must be reported to a single swap data repository, which shall be the swap data repository to which the first report of required swap creation data is made pursuant to this part.

(a) Swaps executed on a swap execution facility or designated contract market. To ensure that all swap data for a swap executed on or pursuant to the rules of a swap execution facility or designated contract market is reported to a single swap data repository:

(1) The swap execution facility or designated contract market that reports required swap creation data as required by §45.3 shall report all such data to a single swap data repository. As soon as technologically practicable after execution, the swap execution facility or designated contract market shall transmit to both counterparties to the swap, and to the derivatives clearing organization, if any, that will clear the swap, both:

(i) The identity of the swap data repository to which required swap creation data is reported by the swap execution facility or designated contract market; and

(ii) The unique swap identifier for the swap, created pursuant to §45.5.

(2) Thereafter, all required swap creation data and all required swap continuation data reported for the swap reported by any registered entity or counterparty shall be reported to that same swap data repository (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

(b) Off-facility swaps with a swap dealer or major swap participant reporting counterparty. To ensure that all swap data for such swaps is reported to a single swap data repository:

(1) If the reporting counterparty reports primary economic terms data to a swap data repository as required by §45.3:

(i) The reporting counterparty shall report primary economic terms data to a single swap data repository.

(ii) As soon as technologically practicable after execution, but no later than as required pursuant to §45.3, the reporting counterparty shall transmit to the other counterparty to the swap both the identity of the swap data repository to which primary economic terms data is reported by the reporting counterparty, and the unique swap identifier from the information available to it as specified in paragraph (h) of this section, the swap execution facility or designated contract market shall:

(i) Notify each counterparty, as soon as technologically practicable after execution of the swap, that it cannot identify whether that counterparty is the reporting counterparty pursuant to the CEA and this section, wherever possible. If the swap execution facility or designated contract market cannot identify the reporting counterparty from the information available to it as specified in paragraph (h) of this section, the swap execution facility or designated contract market shall:

(ii) Transmit to each counterparty the LEI (or substitute identifier as provided in this section) of the other counterparty.

§ 45.9 Third-party facilitation of data reporting.

Registered entities and swap counterparties required by this part to report required swap creation data or required swap continuation data, while remaining fully responsible for reporting as required by this part, may contract with third-party service providers to facilitate reporting.

§ 45.10 Reporting to a single swap data repository.

All swap data for a given swap must be reported to a single swap data repository, which shall be the swap data repository to which the first report of required swap creation data is made pursuant to this part.

(a) Swaps executed on a swap execution facility or designated contract market. To ensure that all swap data for a swap executed on or pursuant to the rules of a swap execution facility or designated contract market is reported to a single swap data repository:

(1) The swap execution facility or designated contract market that reports required swap creation data as required by §45.3 shall report all such data to a single swap data repository. As soon as technologically practicable after execution, the swap execution facility or designated contract market shall transmit to both counterparties to the swap, and to the derivatives clearing organization, if any, that will clear the swap, both:

(i) The identity of the swap data repository to which required swap creation data is reported by the swap execution facility or designated contract market; and

(ii) The unique swap identifier for the swap, created pursuant to §45.5.

(2) Thereafter, all required swap creation data and all required swap continuation data reported for the swap reported by any registered entity or counterparty shall be reported to that same swap data repository (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

(b) Off-facility swaps with a swap dealer or major swap participant reporting counterparty. To ensure that all swap data for such swaps is reported to a single swap data repository:

(1) If the reporting counterparty reports primary economic terms data to a swap data repository as required by §45.3:

(i) The reporting counterparty shall report primary economic terms data to a single swap data repository.

(ii) As soon as technologically practicable after execution, but no later than as required pursuant to §45.3, the reporting counterparty shall transmit to the other counterparty to the swap both the identity of the swap data repository to which primary economic terms data is reported by the reporting counterparty, and the unique swap identifier from the information available to it as specified in paragraph (h) of this section, the swap execution facility or designated contract market shall:

(i) Notify each counterparty, as soon as technologically practicable after execution of the swap, that it cannot identify whether that counterparty is the reporting counterparty pursuant to the CEA and this section, wherever possible. If the swap execution facility or designated contract market cannot identify the reporting counterparty from the information available to it as specified in paragraph (h) of this section, the swap execution facility or designated contract market shall:

(ii) Transmit to each counterparty the LEI (or substitute identifier as provided in this section) of the other counterparty.

§ 45.9 Third-party facilitation of data reporting.

Registered entities and swap counterparties required by this part to report required swap creation data or required swap continuation data, while remaining fully responsible for reporting as required by this part, may contract with third-party service providers to facilitate reporting.
identifier for the swap created pursuant to §45.5.

(iii) If the swap will be cleared, the reporting counterparty shall transmit to the derivatives clearing organization at the time the swap is submitted for clearing both the identity of the swap data repository to which primary economic terms data is reported by the reporting counterparty, and the unique swap identifier for the swap created pursuant to §45.5.

(2) If the reporting counterparty is excused from reporting primary economic terms data as provided in §45.3(b) or (c):

(i) Paragraph (b)(1) of this section shall not apply.

(ii) At the time the swap is submitted for clearing, the reporting counterparty shall transmit to the derivatives clearing organization the unique swap identifier for the swap created pursuant to §45.5, and notify the derivatives clearing organization that the reporting counterparty has not reported any required swap creation data for the swap to a swap data repository.

(iii) The derivatives clearing organization shall report all required swap creation data for the swap to a single swap data repository. As soon as technologically practicable after execution, but no later than as required pursuant to §45.3, the reporting counterparty shall transmit to the other counterparty to the swap the identity of the swap data repository to which primary economic terms data was reported by the reporting counterparty.

(2) If the reporting counterparty will be excused from reporting primary economic terms data as provided in §45.3(b) or (c):

(i) Paragraph (c)(1) of this section shall not apply.

(ii) At the time the swap is submitted for clearing, the reporting counterparty shall notify the derivatives clearing organization that the reporting counterparty has not reported any required swap creation data for the swap to a swap data repository.

(iii) The derivatives clearing organization shall report all required swap creation data for the swap to a single swap data repository. As soon as technologically practicable after clearing, the derivatives clearing organization shall transmit to both counterparties to the swap the identity of the swap data repository to which required swap creation data is reported by the derivatives clearing organization.

(3) Thereafter, all required swap creation data and all required swap continuation data reported for the swap, by any registered entity or counterparty, shall be reported to the swap data repository to which swap data has been reported pursuant to paragraph (b)(1) or (b)(2) of this section (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

(c) Off-facility swaps with a non-SD/MSP reporting counterparty. To ensure that all swap data for such swaps is reported to a single swap data repository:

(1) If the reporting counterparty reports primary economic terms data to a swap data repository as required by §45.3:

(i) The reporting counterparty shall report primary economic terms data to a single swap data repository.

(ii) As soon as technologically practicable after execution, but no later than as required pursuant to §45.3, the reporting counterparty shall transmit to the other counterparty to the swap the identity of the swap data repository to which primary economic terms data was reported by the reporting counterparty.

(iii) If the swap will be cleared, the reporting counterparty shall transmit to the derivatives clearing organization at the time the swap is submitted for clearing the identity of the swap data repository to which primary economic terms data was reported by the reporting counterparty.

(2) If the reporting counterparty will be excused from reporting primary economic terms data as provided in §45.3(b) or (c):

(i) Paragraph (c)(1) of this section shall not apply.

(ii) At the time the swap is submitted for clearing, the reporting counterparty shall notify the derivatives clearing organization that the reporting counterparty has not reported any required swap creation data for the swap to a swap data repository.

(iii) The derivatives clearing organization shall report all required swap creation data for the swap to a single swap data repository. As soon as technologically practicable after clearing, the derivatives clearing organization shall transmit to both counterparties to the swap the identity of the swap data repository to which required swap creation data is reported by the derivatives clearing organization.

(3) The swap data repository to which the swap is reported as provided in paragraph (c) of this section shall transmit the unique swap identifier created pursuant to §45.5 to both counterparties and to the derivatives clearing organization, if any, as soon as technologically practicable after creation of the unique swap identifier.

(4) Thereafter, all required swap creation data and all required swap continuation data reported for the swap, by any registered entity or
counterparty, shall be reported to the swap data repository to which swap data has been reported pursuant to paragraph (c)(1) or (2) of this section (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

§ 45.11 Data reporting for swaps in a swap asset class not accepted by any swap data repository.

(a) Should there be a swap asset class for which no swap data repository registered with the Commission currently accepts swap data, each registered entity or counterparty required by this part to report any required swap creation data or required swap continuation data with respect to a swap in that asset class must report that same data to the Commission.

(b) Data reported to the Commission pursuant to this section shall be reported at times announced by the Commission and in an electronic file in a format acceptable to the Commission.

(c) Delegation of authority to the Chief Information Officer: The Commission hereby delegates to its Chief Information Officer, until the Commission orders otherwise, the authority set forth in paragraph (c) of this section, to be exercised by the Chief Information Officer or by such other employee or employees of the Commission as may be designated from time to time by the Chief Information Officer. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph. The authority delegated to the Chief Information Officer by paragraph (c) of this section shall include:

(1) The authority to determine the manner, format, coding structure, and electronic data transmission standards and procedures acceptable to the Commission for the purposes of paragraphs (a) and (b) of this section.

(2) The authority to determine whether the Commission may permit or require use by reporting entities or counterparties in reporting pursuant to this section of one or more particular data standards (such as FIX, FpML, ISO 20022, or some other standard), in order to accommodate the needs of different communities of users.

(3) The dates and times at which required swap creation data or required swap continuation data shall be reported pursuant to this section.

(d) The Chief Information Officer shall publish from time to time in the FEDERAL REGISTER and on the Web site of the Commission the format, data schema, electronic data transmission methods and procedures, and dates and times for reporting acceptable to the Commission with respect to swap data reporting pursuant to this section.

§ 45.12 Voluntary supplemental reporting

(a) For purposes of this section, the term voluntary, supplemental report means any report of swap data to a swap data repository that is not required to be made pursuant to this part or any other part in this chapter.

(b) A voluntary, supplemental report may be made only by a counterparty to the swap in connection with which the voluntary, supplemental report is made, or by a third-party service provider acting on behalf of a counterparty to the swap.

(c) A voluntary, supplemental report may be made either to the swap data repository to which all required swap creation data and all required swap continuation data is reported for the swap pursuant to §§45.3 and 45.10, or to a different swap data repository.

(d) A voluntary, supplemental report must contain:

(1) An indication that the report is a voluntary, supplemental report.

(2) The unique swap identifier created pursuant to §§45.5 and 45.9. Therefore, no voluntary, supplemental report may be made until after the unique swap identifier has been created pursuant to §§45.5 and 45.9 and has been transmitted to the counterparty making the voluntary, supplemental report.

(3) The identity of the swap data repository to which all required swap creation data and all required swap continuation data is reported for the swap pursuant to §§45.3 and 45.10, if the voluntary supplemental report is made to a different swap data repository.
§ 45.13 Required data standards.

(a) Data maintained and furnished to the commission by swap data repositories. A swap data repository shall maintain all swap data reported to it in a format acceptable to the Commission, and shall transmit all swap data requested by the Commission to the Commission in an electronic file in a format acceptable to the Commission.

(b) Data reported to swap data repositories. In reporting swap data to a swap data repository as required by this part, each reporting entity or counterparty shall use the facilities, methods, or data standards provided or required by the swap data repository to which the entity or counterparty reports the data. A swap data repository may permit reporting entities and counterparties to use various facilities, methods, or data standards, provided that its requirements in this regard enable it to meet the requirements of paragraph (a) of this section with respect to maintenance and transmission of swap data.

(c) Delegation of authority to the Chief Information Officer. The Commission hereby delegates to its Chief Information Officer, until the Commission orders otherwise, the authority set forth in this paragraph (c), to be exercised by the Chief Information Officer or by such other employee or employees of the Commission as may be designated from time to time by the Chief Information Officer. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph (c). Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph. The authority delegated to the Chief Information Officer by this paragraph (c) shall include:

(1) The authority to determine the manner, format, coding structure, and electronic data transmission standards and procedures acceptable to the Commission for the purposes of paragraph (a) of this section.

(2) The authority to determine whether the Commission may permit or require use by reporting entities or counterparties, or by swap data repositories, of one or more particular data standards (such as FIX, FpML, ISO 20022, or some other standard), in order to accommodate the needs of different communities of users, or to enable swap data repositories to comply with paragraph (a) of this section.

(d) The Chief Information Officer shall publish from time to time in the FEDERAL REGISTER and on the Web site of the Commission the format, data schema, and electronic data transmission methods and procedures acceptable to the Commission.

§ 45.14 Reporting of errors and omissions in previously reported data.

(a) Each registered entity and swap counterparty required by this part to report swap data to a swap data repository, to any other registered entity or swap counterparty, or to the Commission shall report any errors and omissions in the data so reported. Corrections of errors or omissions shall be reported as soon as technologically practicable after discovery of any such error or omission. With respect to swaps for which required swap continuation data is reported using the snapshot reporting method, reporting counterparties fulfill the requirement to report errors or omissions in state data previously reported by making appropriate corrections in their next daily report of state data as required by this part.

(b) Each counterparty to a swap that is not the reporting counterparty as determined pursuant to §45.8, and that discovers any error or omission with
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respect to any swap data reported to a swap data repository for that swap, shall promptly notify the reporting counterparty of each such error or omission. Upon receiving such notice, the reporting counterparty shall report a correction of each such error or omission to the swap data repository as provided in paragraph (a) of this section.

(c) Unless otherwise approved by the Commission, or by the Chief Information Officer pursuant to §45.13, each registered entity or swap counterparty reporting corrections to errors or omissions in data previously reported as required by this section shall report such corrections in the same format as it reported the erroneous or omitted data. Unless otherwise approved by the Commission, or by the Chief Information Officer pursuant to §45.13, a swap data repository shall transmit corrections to errors or omission in data previously transmitted to the Commission in the same format as it transmitted the erroneous or omitted data.
### EXHIBIT A
**Minimum Primary Economic Terms Data**
**CREDIT SWAPS AND EQUITY SWAPS**
(Enter N/A for fields that are not applicable)

<table>
<thead>
<tr>
<th>Data categories and fields</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Unique Swap Identifier for the swap</td>
<td>As provided in § 45.5. For cleared swaps between two non-SD/MSP counterparties (for which the SDR will create the USI), if the DCO has not received the USI, the DCO reports the internal identifier assigned to the swap by the automated systems of the DCO upon acceptance of the swap for clearing, in addition to the internal identifiers reported pursuant to § 45.3(d)(2)</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the reporting counterparty*</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty* is yet available, enter the internal identifier for the reporting counterparty* used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the reporting counterparty* is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty* is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication that the swap will be allocated</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the agent is yet available, enter the internal identifier for the agent used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication that the swap is a post-allocation swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent</td>
<td>As provided in § 45.5</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the non-reporting counterparty**</td>
<td>As provided in § 45.6</td>
</tr>
<tr>
<td>If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty** is yet available, the internal identifier for the non-reporting counterparty** used by the swap data repository</td>
<td>If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>Description</td>
<td>Value</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the non-reporting counterparty** is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty** is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The Unique Product Identifier assigned to the swap</td>
<td>As provided in § 45.7</td>
</tr>
<tr>
<td>If no Unique Product Identifier is available for the swap because the swap is not sufficiently standardized, the taxonomic description of the swap pursuant to the CFTC-approved product classification system</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>If no CFTC-approved UPI and product classification system is yet available, the internal product identifier or product description used by the swap data repository</td>
<td></td>
</tr>
<tr>
<td>An indication that the swap is a multi-asset swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the primary asset class</td>
<td>Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the secondary asset class(es)</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>An indication that the swap is a mixed swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>An indication of the counterparty purchasing protection</td>
<td>Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>An indication of the counterparty selling protection</td>
<td>Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>Information identifying the reference entity</td>
<td>The entity that is the subject of the protection being purchased and sold in the swap. Field values: LEI if available, or substitute identifier as above if LEI is not yet available, or name</td>
</tr>
<tr>
<td>Contract type</td>
<td>E.g., swap, swaption, forward, option, basis swap, index swap, basket swap</td>
</tr>
<tr>
<td>Block trade indicator</td>
<td>Indication (Yes/No) of whether the swap qualifies as a block trade or large notional swap. Until the CFTC determines an appropriate minimum block size for the swap asset class involved, pursuant to part 43, enter N/A</td>
</tr>
<tr>
<td>Execution timestamp</td>
<td>The date and time of the trade, expressed using Coordinated Universal Time (“UCT”)</td>
</tr>
<tr>
<td><strong>Execution venue</strong></td>
<td>The swap execution facility or designated contract market on or pursuant to the rules of which the swap was executed. Field values: Identifier (if available) or name of the swap execution facility or designated contract market, or “off-facility” if not so executed</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Start date</strong></td>
<td>The date on which the swap starts or goes into effect</td>
</tr>
<tr>
<td><strong>Maturity, termination or end date</strong></td>
<td>The date on which the swap expires</td>
</tr>
<tr>
<td><strong>The price</strong></td>
<td>E.g., strike price, initial price, spread</td>
</tr>
<tr>
<td><strong>The notional amount, and the currency in which the notional amount is expressed</strong></td>
<td></td>
</tr>
<tr>
<td><strong>The amount and currency (or currencies) of any up-front payment</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Payment frequency of the reporting counterparty</strong></td>
<td>A description of the payment stream of the reporting counterparty, e.g., coupon</td>
</tr>
<tr>
<td><strong>Payment frequency of the non-reporting counterparty</strong></td>
<td>A description of the payment stream of the non-reporting counterparty, e.g., coupon</td>
</tr>
<tr>
<td><strong>Timestamp for submission to swap data repository</strong></td>
<td>Time and date of submission to the swap data repository, expressed using Coordinated Universal Time (&quot;UCT&quot;), as recorded by an automated system where available, or as recorded manually where an automated system is not available</td>
</tr>
<tr>
<td><strong>Clearing indicator</strong></td>
<td>Yes/No indication of whether the swap will be cleared by a derivatives clearing organization</td>
</tr>
<tr>
<td><strong>Clearing venue</strong></td>
<td>Identifier (if available) or name of the derivatives clearing organization</td>
</tr>
<tr>
<td><strong>If the swap will not be cleared, an indication of whether the clearing requirement exception in CEA section (2)(b)(7) was elected</strong></td>
<td>Yes/No</td>
</tr>
<tr>
<td><strong>The identity of the counterparty electing the clearing requirement exception in CEA section (2)(b)(7)</strong></td>
<td>Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td><strong>Indication of collateralization</strong></td>
<td>Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized</td>
</tr>
<tr>
<td><strong>Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap</strong></td>
<td>Use as many fields as required to report each such term</td>
</tr>
</tbody>
</table>

* Applies to counterparty 1 if a swap execution facility or designated contract market reports and does not know which counterparty is the reporting counterparty

** Applies to counterparty 2 if a swap execution facility or designated contract market reports and does not know which counterparty is the non-reporting counterparty
## EXHIBIT B
Minimum Primary Economic Terms Data
FOREIGN EXCHANGE TRANSACTIONS
(OFFER THAN CROSS-CURRENCY SWAPS)
(Enter N/A for fields that are not applicable)

<table>
<thead>
<tr>
<th>Data fields</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Unique Swap Identifier for the swap</td>
<td>As provided in § 45.5. For cleared swaps between two non-SD/MSP counterparties (for which the SDR will create the USI), if the DCO has not received the USI, the DCO reports the internal identifier assigned to the swap by the automated systems of the DCO upon acceptance of the swap for clearing, in addition to the internal identifiers reported pursuant to § 45.3(d)(2).</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the reporting counterparty*</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty* is yet available, enter the internal identifier for the reporting counterparty* used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the reporting counterparty* is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty* is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a U.S. person</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication that the swap will be allocated</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the agent is yet available, enter the internal identifier for the agent used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication that the swap is a post-allocation swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent</td>
<td>As provided in § 45.5</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the non-reporting party**</td>
<td>As provided in § 45.6</td>
</tr>
<tr>
<td>If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty** is yet available, the internal identifier for the non-reporting counterparty** used by the swap data repository</td>
<td>If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the non-reporting counterparty** is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty** is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The Unique Product Identifier assigned to the swap</td>
<td>As provided in § 45.7</td>
</tr>
<tr>
<td>If no Unique Product Identifier is available for the swap because the swap is not sufficiently standardized, the taxonomic description of the swap pursuant to the CFTC-approved product classification system</td>
<td></td>
</tr>
<tr>
<td>If no CFTC-approved UPI and product classification system is yet available, the internal product identifier or product description used by the swap data repository</td>
<td></td>
</tr>
<tr>
<td>An indication that the swap is a multi-asset swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the primary asset class</td>
<td>Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the secondary asset class(es)</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>An indication that the swap is a mixed swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported</td>
<td></td>
</tr>
<tr>
<td>Contract type</td>
<td>E.g., forward, non-deliverable forward (NDF), non-deliverable option (NDO), vanilla option, simple exotic option, complex exotic option</td>
</tr>
<tr>
<td>Block trade indicator</td>
<td>Indication (Yes/No) of whether the swap qualifies as a block trade or large notional swap. Until the CFTC determines an appropriate minimum block size for the swap asset class involved, pursuant to part 43, enter N/A</td>
</tr>
<tr>
<td>Execution timestamp</td>
<td>The date and time of the trade, expressed using Coordinated Universal Time (“UCT”)</td>
</tr>
<tr>
<td><strong>Commodity Futures Trading Commission</strong></td>
<td><strong>Pt. 45, App. 1</strong></td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td><strong>Execution venue</strong></td>
<td>The swap execution facility or designated contract market on or pursuant to the rules of which the swap was executed. Field values: Identifier (if available) or name of the swap execution facility or designated contract market, or “off-facility” if not so executed</td>
</tr>
<tr>
<td><strong>Currency 1</strong></td>
<td>ISO code</td>
</tr>
<tr>
<td><strong>Currency 2</strong></td>
<td>ISO code</td>
</tr>
<tr>
<td><strong>Notional amount 1</strong></td>
<td>For currency 1</td>
</tr>
<tr>
<td><strong>Notional amount 2</strong></td>
<td>For currency 2</td>
</tr>
<tr>
<td><strong>Exchange rate</strong></td>
<td>Contractual rate of exchange of the currencies</td>
</tr>
<tr>
<td><strong>Delivery type</strong></td>
<td>Physical (deliverable) or cash (non-deliverable)</td>
</tr>
<tr>
<td><strong>Settlement or expiration date</strong></td>
<td>Settlement date, or for an option the contract expiration date</td>
</tr>
<tr>
<td><strong>Timestamp for submission to swap data repository</strong></td>
<td>Time and date of submission to the swap data repository, expressed using Coordinated Universal Time (“UCT”), as recorded by an automated system where available, or as recorded manually where an automated system is not available</td>
</tr>
<tr>
<td><strong>Clearing indicator</strong></td>
<td>Yes/No indication of whether the swap will be cleared by a derivatives clearing organization</td>
</tr>
<tr>
<td><strong>Clearing venue</strong></td>
<td>Identifier (if available) or name of the derivatives clearing organization</td>
</tr>
<tr>
<td><strong>If the swap will not be cleared, an indication of whether the clearing requirement exception in CEA section (2)(b)(7) was elected</strong></td>
<td>Yes/No</td>
</tr>
<tr>
<td><strong>The identity of the counterparty electing the clearing requirement exception in CEA section (2)(b)(7)</strong></td>
<td>Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td><strong>Indication of collateralization</strong></td>
<td>Is the trade collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized</td>
</tr>
<tr>
<td><strong>Any other term(s) of the trade matched or affirmed by the counterparties in verifying the trade</strong></td>
<td>E.g., for options, premium, premium currency, premium payment date; for non-deliverable trades, settlement currency, valuation (fixing) date; indication of the economic obligations of the counterparties. Use as many fields as required to report each such term</td>
</tr>
</tbody>
</table>

* Applies to counterparty 1 if a swap execution facility or designated contract market reports and does not know which counterparty is the reporting counterparty

** Applies to counterparty 2 if a swap execution facility or designated contract market reports and does not know which counterparty is the non-reporting counterparty
### EXHIBIT C

Minimum Primary Economic Terms Data

**INTEREST RATE SWAPS (INCLUDING CROSS-CURRENCY SWAPS)**

(Enter N/A for fields that are not applicable)

<table>
<thead>
<tr>
<th>Data field</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Unique Swap Identifier for the swap</td>
<td>As provided in § 45.5. For cleared swaps between two non-SD/MSP counterparties (for which the SDR will create the USI), if the DCO has not received the USI, the DCO reports the internal identifier assigned to the swap by the automated systems of the DCO upon acceptance of the swap for clearing, in addition to the internal identifiers reported pursuant to § 45.3(d)(2)</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the reporting counterparty*</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty* is yet available, enter the internal identifier for the reporting counterparty* used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the reporting counterparty* is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty* is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication that the swap will be allocated</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the agent is yet available, enter the internal identifier for the agent used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication that the swap is a post-allocation swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent</td>
<td>As provided in § 45.5</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the non-reporting counterparty**</td>
<td>As provided in § 45.6</td>
</tr>
<tr>
<td><strong>Commodity Futures Trading Commission</strong></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>Pt. 45, App. 1</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Table</strong>: List of swap data repository fields</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Description</strong></td>
</tr>
<tr>
<td>If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty** is yet available, the internal identifier for the non-reporting counterparty** used by the swap data repository</td>
<td>If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the non-reporting counterparty** is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty** is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The Unique Product Identifier assigned to the swap</td>
<td>As provided in § 45.7</td>
</tr>
<tr>
<td>If no Unique Product Identifier is available for the swap because the swap is not sufficiently standardized, the taxonomic description of the swap pursuant to the CFTC-approved product classification system</td>
<td></td>
</tr>
<tr>
<td>If no CFTC-approved UPI and product classification system is yet available, the internal product identifier or product description used by the swap data repository</td>
<td></td>
</tr>
<tr>
<td>An indication that the swap is a multi-asset swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the primary asset class</td>
<td>Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the secondary asset class(es)</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>An indication that the swap is a mixed swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported</td>
<td></td>
</tr>
<tr>
<td>Contract type</td>
<td>E.g., swap, swaption, option, basis swap, index swap</td>
</tr>
<tr>
<td>Block trade indicator</td>
<td>Indication (Yes/No) of whether the swap qualifies as a block trade or large notional swap. Until the CFTC determines an appropriate minimum block size for the swap asset class involved, pursuant to part 43, enter N/A</td>
</tr>
<tr>
<td>Execution timestamp</td>
<td>The date and time of the trade, expressed using Coordinated Universal Time (“UCT”)</td>
</tr>
<tr>
<td>Execution venue</td>
<td>The swap execution facility or designated contract market on or pursuant to the rules of which the swap was executed. Field values: Identifier (if available) or name of the swap execution facility or designated contract market, or &quot;off-facility&quot; if not so executed</td>
</tr>
<tr>
<td>-----------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Start date</td>
<td>The date on which the swap starts or goes into effect</td>
</tr>
<tr>
<td>Maturity, termination or end date</td>
<td>The date on which the swap expires or ends</td>
</tr>
<tr>
<td>Day count convention</td>
<td></td>
</tr>
<tr>
<td>Notional amount (leg 1)</td>
<td>The current active notional amount</td>
</tr>
<tr>
<td>Notional currency (leg 1)</td>
<td>ISO code</td>
</tr>
<tr>
<td>Notional amount (leg 2)</td>
<td>The current active notional amount</td>
</tr>
<tr>
<td>Notional currency (leg 2)</td>
<td>ISO code</td>
</tr>
<tr>
<td>Payer (fixed rate)</td>
<td>Is the reporting party a fixed rate payer? Yes/No/Not applicable</td>
</tr>
<tr>
<td>Payer (floating rate leg 1)</td>
<td>If two floating legs, the payer for leg 1</td>
</tr>
<tr>
<td>Payer (floating rate leg 2)</td>
<td>If two floating legs, the payer for leg 2</td>
</tr>
<tr>
<td>Direction</td>
<td>For swaps: whether the principal is paying or receiving the fixed rate. For float-to-float and fixed-to-fixed swaps: indicate N/A. For non-swap instruments and swaptions: indicate the instrument that was bought or sold.</td>
</tr>
<tr>
<td>Option type</td>
<td>E.g., put, call, straddle</td>
</tr>
<tr>
<td>Fixed rate</td>
<td></td>
</tr>
<tr>
<td>Fixed rate day count fraction</td>
<td>E.g., actual 360</td>
</tr>
<tr>
<td>Floating rate payment frequency</td>
<td></td>
</tr>
<tr>
<td>Floating rate reset frequency</td>
<td></td>
</tr>
<tr>
<td>Floating rate index name/rate period</td>
<td>E.g., USD-Libor-BBA</td>
</tr>
<tr>
<td>Timestamp for submission to swap data repository</td>
<td>Time and date of submission to the swap data repository, expressed using Coordinated Universal Time (&quot;UCT&quot;), as recorded by an automated system where available, or as recorded manually where an automated system is not available</td>
</tr>
<tr>
<td>Clearing indicator</td>
<td>Yes/No indication of whether the swap will be cleared by a derivatives clearing organization</td>
</tr>
<tr>
<td>Clearing venue</td>
<td>Identifier (if available) or name of the derivatives clearing organization</td>
</tr>
<tr>
<td>If the swap will not be cleared, an indication of whether the clearing requirement exception in CEA section (2)(b)(7) was elected</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The identity of the counterparty electing the clearing requirement exception in CEA section (2)(b)(7)</td>
<td>Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>Indication of collateralization</td>
<td>Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized</td>
</tr>
<tr>
<td>Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap</td>
<td>E.g., early termination option clause. Use as many fields as required to report each such term</td>
</tr>
</tbody>
</table>

* Applies to counterparty 1 if a swap execution facility or designated contract market reports and does not know which counterparty is the reporting counterparty

** Applies to counterparty 2 if a swap execution facility or designated contract market reports and does not know which counterparty is the non-reporting counterparty
<table>
<thead>
<tr>
<th>Data field</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Unique Swap Identifier for the swap</td>
<td>As provided in § 45.5. For cleared swaps between two non-SD/MSP counterparties (for which the SDR will create the USI), if the DCO has not received the USI, the DCO reports the internal identifier assigned to the swap by the automated systems of the DCO upon acceptance of the swap for clearing, in addition to the internal identifiers reported pursuant to § 45.3(d)(2)</td>
</tr>
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</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the reporting counterparty* is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty* is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty* is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication that the swap will be allocated</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the agent is yet available, enter the internal identifier for the agent used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication that the swap is a post-allocation swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent</td>
<td>As provided in § 45.5</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the non-reporting party**</td>
<td>As provided in § 45.6</td>
</tr>
</tbody>
</table>

**EXHIBIT D**
Minimum Primary Economic Terms Data
OTHER COMMODITY SWAPS
(Enter N/A for fields that are not applicable)
<table>
<thead>
<tr>
<th>If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty** is yet available, the internal identifier for the non-reporting counterparty** used by the swap data repository</th>
<th>If no repository identifier yet exists, the repository fills in this field after creating its identifier</th>
</tr>
</thead>
<tbody>
<tr>
<td>An indication of whether the non-reporting counterparty** is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the non-reporting counterparty** is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty** is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty** is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The Unique Product Identifier assigned to the swap</td>
<td>As provided in § 45.7</td>
</tr>
<tr>
<td>If no Unique Product Identifier is available for the swap because the swap is not sufficiently standardized, the taxonomic description of the swap pursuant to the CFTC-approved product classification system</td>
<td></td>
</tr>
<tr>
<td>If no CFTC-approved UPI and product classification system is yet available, the internal product identifier or product description used by the swap data repository</td>
<td></td>
</tr>
<tr>
<td>An indication that the swap is a multi-asset swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the primary asset class</td>
<td>Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the secondary asset class(es)</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>An indication that the swap is a mixed swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported</td>
<td></td>
</tr>
<tr>
<td>Contract type</td>
<td>E.g., swap, swaption, option, basis swap, index swap</td>
</tr>
<tr>
<td>Block trade indicator</td>
<td>Indication (Yes/No) of whether the swap qualifies as a “block trade” or “large notional off-facility swap” as defined in part 43 of the CFTC’s regulations. Until the CFTC determines an appropriate minimum block size for the swap asset class involved, pursuant to part 43, enter N/A</td>
</tr>
<tr>
<td>Description</td>
<td>Description</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Execution timestamp</td>
<td>The date and time of the trade, expressed using Coordinated Universal Time (&quot;UCT&quot;), as recorded by an automated system where available, or as recorded manually where an automated system is not available</td>
</tr>
<tr>
<td>Execution venue</td>
<td>The swap execution facility or designated contract market on or pursuant to the rules of which the swap was executed. Field values: Identifier (if available) or name of the swap execution facility or designated contract market, or &quot;off-facility&quot; if not so executed</td>
</tr>
<tr>
<td>Timestamp for submission to swap data repository</td>
<td>Time and date of submission to the swap data repository, expressed using Coordinated Universal Time (&quot;UCT&quot;), as recorded by an automated system where available, or as recorded manually where an automated system is not available</td>
</tr>
<tr>
<td>Start date</td>
<td>The date on which the swap commences or goes into effect (e.g., in physical oil, the pricing start date)</td>
</tr>
<tr>
<td>Maturity, termination, or end date</td>
<td>The date on which the swap expires or ends (e.g., in physical oil, the pricing end date)</td>
</tr>
<tr>
<td>Buyer</td>
<td>The counterparty purchasing the product: e.g., the payer of the fixed price (for a swap), or the payer of the floating price on the underlying swap (for a put swaption), or the payer of the fixed price on the underlying swap (for a call swaption). Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>Seller</td>
<td>The counterparty offering the product: e.g., the payer of the floating price (for a swap), the payer of the fixed price on the underlying swap (for a put swaption), or the payer of the floating price on the underlying swap (for a call swaption). Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>Quantity unit</td>
<td>The unit of measure applicable for the quantity on the swap. E.g., barrels, bushels, gallons, pounds, tons</td>
</tr>
<tr>
<td>Quantity</td>
<td>The amount of the commodity (the number of quantity units) quoted on the swap.</td>
</tr>
<tr>
<td>Quantity frequency</td>
<td>The rate at which the quantity is quoted on the swap. E.g., hourly, daily, weekly, monthly</td>
</tr>
<tr>
<td>Total quantity</td>
<td>The quantity of the commodity for the entire term of the swap</td>
</tr>
<tr>
<td>Settlement method</td>
<td>Physical delivery or cash</td>
</tr>
<tr>
<td>Price</td>
<td>The price of the swap. For options, the strike price</td>
</tr>
<tr>
<td>Price unit</td>
<td>The unit of measure applicable for the price of the swap</td>
</tr>
<tr>
<td>Price currency</td>
<td>ISO code</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Buyer pay index</td>
<td>The published price as paid by the buyer (if applicable). For swaptions, applies to the underlying swap</td>
</tr>
<tr>
<td>Buyer pay averaging method</td>
<td>The averaging method used to calculate the index of the buyer pay index. For swaptions, applies to the underlying swap</td>
</tr>
<tr>
<td>Seller pay index</td>
<td>The published price as paid by the seller (if applicable). For swaptions, applies to the underlying swap</td>
</tr>
<tr>
<td>Seller pay averaging method</td>
<td>The averaging method used to calculate the index of the seller pay index. For swaptions, applies to the underlying swap</td>
</tr>
<tr>
<td>Grade</td>
<td>If applicable, the grade of the commodity to be delivered, e.g., the grade of oil or refined product</td>
</tr>
<tr>
<td>Option type</td>
<td>Descriptor for the type of option transaction. E.g., put, call, straddle</td>
</tr>
<tr>
<td>Option style</td>
<td>E.g., American, European, European Daily, European Monthly, Asian</td>
</tr>
<tr>
<td>Option premium</td>
<td>The total amount paid by the option buyer</td>
</tr>
<tr>
<td>Hours from through</td>
<td>For electric power, the hours of the day for which the swap is effective</td>
</tr>
<tr>
<td>Hours from through time zone</td>
<td>For electric power, the time zone prevailing for the hours during which electricity is transmitted</td>
</tr>
<tr>
<td>Days of week</td>
<td>For electric power, the profile applicable for the delivery of power</td>
</tr>
<tr>
<td>Load type</td>
<td>For electric power, the load profile for the delivery of power</td>
</tr>
<tr>
<td>Clearing indicator</td>
<td>Yes/No indication of whether the swap will be cleared by a derivatives clearing organization</td>
</tr>
<tr>
<td>Clearing venue</td>
<td>Identifier (if available) or name of the derivatives clearing organization</td>
</tr>
<tr>
<td>If the swap will not be cleared, an indication of whether the clearing requirement exception in CEA section (2)(b)(7) was elected</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The identity of the counterparty electing the clearing requirement exception in CEA section (2)(b)(7)</td>
<td>Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>Indication of collateralization</td>
<td>Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized</td>
</tr>
<tr>
<td>Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap</td>
<td>Use as many fields as required to report each such term</td>
</tr>
</tbody>
</table>

* Applies to counterparty 1 if a swap execution facility or designated contract market reports and does not know which counterparty is the reporting counterparty

** Applies to counterparty 2 if a swap execution facility or designated contract market reports and does not know which counterparty is the non-reporting counterparty
§ 46.1 Definitions.

Terms used in this part are defined as follows:

**Asset class** means the broad category of goods, services or commodities, including any “excluded commodity” as defined in CEA section 1a(19), with common characteristics underlying a swap. The asset classes include credit, equity, foreign exchange (excluding cross-currency), interest rate (including cross-currency), other commodity, and such other asset classes as may be determined by the Commission.

**Compliance date** means the applicable date, as specified in part 45 of this chapter, on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part and with all applicable provisions of part 45 of this chapter, as set forth in the preamble to this part.

**Confirmation (confirming)** means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise).

**Confirmation data** means all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap.

**Credit swap** means any swap that is primarily based on instruments of indebtedness, including, without limitation: any swap primarily based on one or more broad-based indices related to instruments of indebtedness; and any swap that is an index credit swap or total return swap on one or more indices of debt instruments.

**Electronic reporting** (“report electronically”) means the reporting of data normalized in data fields as required by the data standard or standards used by the swap data repository to which the data is reported. Except where specifically otherwise provided in this chapter, electronic reporting does not include submission of an image of a document or text file.

**Equity swap** means any swap that is primarily based on equity securities, including, without limitation: any swap primarily based on one or more broad-based indices of equity securities; and any total return swap on one or more equity indices.

**Financial entity** has the meaning set forth in CEA section 2(h)(7)(C).

**Foreign exchange forward** has the meaning set forth in CEA section 1a(24).

**Foreign exchange instrument** means an instrument that is both defined as a swap in part 1 of this chapter and included in the foreign exchange asset class. Instruments in the foreign exchange asset class include: any currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; any foreign exchange forward as defined in CEA section 1a(24); any foreign exchange swap as defined in CEA section 1a(25); and any non-deliverable forward involving foreign exchange.

**Foreign exchange swap** has the meaning set forth in CEA section 1a(25). It does not include swaps primarily based on rates of exchange between different
currencies, changes in such rates, or other aspects of such rates (sometimes known as “cross-currency swaps”).

Interest rate swap means any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates; or any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as “cross-currency swaps”).

International swap means a swap required by U.S. law and the law of another jurisdiction to be reported both to a swap data repository and to a different trade repository registered with the other jurisdiction.

Major swap participant has the meaning set forth in CEA section 1a(33) and in part 1 of this chapter.

Minimum primary economic terms means, with respect to a historical swap, the terms included in the list of minimum primary economic terms for swaps in each swap asset class found in appendix 1 to this part.

Minimum primary economic terms data means all of the data elements necessary to fully report all of the minimum primary economic terms required by this part to be reported for a swap in the swap asset class of the swap in question.

Mixed swap has the meaning set forth in CEA section 1a(47)(D), and refers to an instrument that is in part a swap subject to the jurisdiction of the Commission, and in part a security-based swap subject to the jurisdiction of the SEC.

Multi-asset swap means a swap that does not have one easily identifiable primary underlying notional item, but instead involves multiple underlying notional items within the Commission’s jurisdiction that belong to different asset classes.

Non-SD/MSP counterparty means a swap counterparty that is neither a swap dealer nor a major swap participant.

Other commodity swap means any swap not included in the credit, equity, foreign exchange, or interest rate asset classes, including, without limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity.

Pre-enactment swap means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

Reporting counterparty means the counterparty required to report swap data pursuant to this part, selected as provided in §46.5.

Required swap continuation data means all of the data elements that must be reported during the existence of a swap as required by part 45 of this chapter.

Swap data repository has the meaning set forth in CEA section 1a(48), and in part 49 of this chapter.

Swap dealer has the meaning set forth in CEA section 1a(49), and in part 1 of this chapter.

Transition swap means any swap entered into on or after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the applicable compliance date on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part, as set forth in the preamble to this part.

§ 46.2 Recordkeeping for pre-enactment swaps and transition swaps.

(a) Recordkeeping for pre-enactment and transition swaps in existence on or after April 25, 2011. Each counterparty subject to the jurisdiction of the Commission that is a counterparty to any pre-enactment swap or transition swap that is in existence on or after April 25, 2011 shall keep the following records concerning each such swap:

(1) Minimum records required. Each counterparty shall keep records of all of the minimum primary economic terms data specified in appendix 1 to this part.

(2) Additional records required to be kept if possessed by a counterparty. In addition to the minimum records required pursuant to paragraph (a)(1) of this part, a counterparty that is in possession at any time on or after April 25, 2011 of any of the following documentation shall keep copies thereof:

(i) Any confirmation of the swap executed by the counterparties.
Commodity Futures Trading Commission § 46.2

(ii) Any master agreement governing the swap, and any modification or amendment thereof.

(iii) Any credit support agreement, or other agreement between the counterparties having the same function as a credit support agreement, relating to the swap, and any modification or amendment thereof.

(3) Records created or available after the compliance date. In addition to the records required to be kept pursuant to paragraphs (a)(1) and (2) of this section, each counterparty to any pre-enactment swap or transition swap that remains in existence on the compliance date shall keep for each such swap, from the compliance date forward, all of the records required to be kept by section 45.2 of this chapter, to the extent that any such records are created by or become available to the counterparty on or after the compliance date.

(4) Retention form. Records required to be kept pursuant to this section with respect to historical swaps in existence on or after April 25, 2011, must be kept as required by paragraph (a)(4)(i) or (ii) of this section, as applicable.

(i) Records required to be kept by swap dealers or major swap participants may be kept in electronic form, or kept in paper form if originally created and exclusively maintained in paper form, so long as they are retrievable, and information in them is reportable as required by this part.

(ii) Records required to be kept by non-SD/MSP counterparties may be kept in either electronic or paper form, so long as they are retrievable, and information in them is reportable, as required by this part.

(b) Recordkeeping for pre-enactment and transition swaps expired or terminated prior to April 25, 2011. Each counterparty subject to the jurisdiction of the Commission that is a counterparty to any pre-enactment swap or transition swap that is expired or terminated prior to April 25, 2011 shall keep the following records concerning each such swap:

(1) Pre-enactment swaps expired prior to April 25, 2011. Each counterparty to any pre-enactment swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after October 14, 2010 (17 CFR 44.00 through 44.02). Such information may be retained in the format in which it existed on or after October 14, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(1) does not require the counterparty to create or retain records of information not in its possession on or after October 14, 2010, or to alter the format, i.e., the method by which the information is organized and stored.

(2) Transition swaps expired prior to April 25, 2011. Each counterparty to any transition swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after December 17, 2010 (17 CFR 44.03). Such information may be retained in the format in which it existed on or after December 17, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(2) does not require the counterparty to create or retain records of information not in its possession on or after December 17, 2010, or to alter the format, i.e., the method by which the information is organized and stored.

(c) Retention period. All records required to be kept by this section shall be kept from the applicable dates specified in paragraphs (a) or (b) of this section through the life of the swap, and for a period of at least five years from the final termination of the swap.

(d) Retrieval. Records required to be kept pursuant to this section shall be retrievable as follows:

(1) Retrieval for pre-enactment and transition swaps in existence on or after April 25, 2011. Records concerning pre-enactment and transition swaps in existence on or after April 25, 2011 shall be retrievable as follows:

(i) Each record required to be kept by a counterparty that is a swap dealer or major swap participant shall be readily accessible via real time electronic access by the counterparty throughout the life of the swap and for two years following the final termination of the
swap, and shall be retrievable by the registrant or its affiliates within three business days through the remainder of the period following final termination of the swap during which it is required to be kept.

(ii) Each record required to be kept by a non-SD/MSP counterparty shall be retrievable by the counterparty within five business days throughout the period during which it is required to be kept.

(2) Retrieval for pre-enactment and transition swaps expired or terminated prior to April 25, 2011. Records concerning pre-enactment and transition swaps expired or terminated prior to April 25, 2011, shall be retrievable by the counterparty within five business days throughout the period during which they are required to be kept.

(e) Inspection. All records required to be kept pursuant to this section by any registrant or its affiliates or by any counterparty subject to the jurisdiction of the Commission shall be open to inspection upon request by any representative of the Commission, the United States Department of Justice, or the Securities and Exchange Commission, or by any representative of a prudential regulator as authorized by the Commission. Copies of all such records shall be provided, at the expense of the entity or person required to keep the record, to any representative of the Commission upon request. With respect to historical swaps in existence on or after April 25, 2011, copies of records required to be kept by any swap dealer or major swap participant shall be provided either by electronic means, in hard copy, or both, as requested by the Commission, with the sole exception that copies of records originally created and exclusively maintained in paper form may be provided in hard copy only; and copies of records required to be kept by any non-SD/MSP counterparty shall be provided in the form, whether electronic or paper, in which the records are kept. With respect to historical swaps expired or terminated prior to April 25, 2011, records shall be provided in the form, whether electronic or paper, in which the records are kept.

§ 46.3 Swap data reporting for pre-enactment swaps and transition swaps.

(a) Reporting for pre-enactment and transition swaps in existence on or after April 25, 2011—

(1) Initial data report. For each pre-enactment swap or transition swap in existence on or after April 25, 2011, the reporting counterparty shall report electronically to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, the following:

(i) All of the minimum primary economic terms data specified in appendix 1 to this part that were in the possession of the reporting counterparty on or after April 25, 2011;

(ii) The legal entity identifier of the reporting counterparty required pursuant to § 46.4; and

(iii) The following additional identifiers:

(A) The internal counterparty identifier or legal entity identifier used by the reporting counterparty to identify the non-reporting counterparty; and

(B) The internal transaction identifier used by the reporting counterparty to identify the swap.

(2) Reporting of required swap continuation data. (i) For each uncleared pre-enactment or transition swap in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty must report all required swap continuation data required to be reported pursuant to part 45 of this chapter, with the exception that when a reporting counterparty reports changes to minimum primary economic terms for a pre-enactment or transition swap, the reporting counterparty is required to report only changes to the minimum primary economic terms listed in appendix 1 to this part and reported in the initial data report made pursuant to paragraph (a)(1) of this section, rather than changes to all minimum primary economic terms listed in appendix 1 to part 45.

(ii) Swap continuation data reporting is not required for a pre-enactment or transition swap in existence on or after April 25, 2011, that has been cleared by a designated clearing organization.
Data reporting for multi-asset swaps and mixed swaps. (1) For each pre-enactment or transition swap in existence on or after April 25, 2011, that is a multi-asset swap, all data required to be reported by this part shall be reported to a single swap data repository that accepts swaps in the asset class treated as the primary asset class involved in the swap by the reporting counterparty making the first report of required swap creation data pursuant to this section.

(ii) For each pre-enactment or transition swap in existence on or after April 25, 2011, that is a mixed swap, all data required to be reported pursuant to this part shall be reported to a swap data repository registered with the Commission and to a security-based swap data repository registered with the Securities and Exchange Commission. This requirement may be satisfied by reporting the mixed swap to a swap data repository or security-based swap data repository registered with both Commissions.

(b) Reporting for pre-enactment and transition swaps expired or terminated prior to April 25, 2011—(1) Pre-enactment swaps expired or terminated prior to April 25, 2011. For each pre-enactment swap which expired or was terminated prior to April 25, 2011, the reporting counterparty shall report to a swap data repository registered with the Commission and to a security-based swap data repository registered with the Securities and Exchange Commission. This requirement may be satisfied by reporting the mixed swap to a swap data repository or security-based swap data repository registered with both Commissions.

(i) For each pre-enactment or transition swap in existence on or after April 25, 2011, that is a mixed swap, all data required to be reported pursuant to this part shall be reported to a single swap data repository that accepts swaps in the asset class treated as the primary asset class involved in the swap by the reporting counterparty making the first report of required swap creation data pursuant to this section.

(ii) For each pre-enactment or transition swap in existence on or after April 25, 2011, that is a mixed swap, all data required to be reported pursuant to this part shall be reported to a swap data repository registered with the Commission and to a security-based swap data repository registered with the Securities and Exchange Commission. This requirement may be satisfied by reporting the mixed swap to a swap data repository or security-based swap data repository registered with both Commissions.

(c) Voluntary early submission of initial data report. For all pre-enactment and transition swaps required to be reported pursuant to this part, the reporting counterparty may make the initial data report required by paragraph (a)(1) of this section, or the data report required by paragraph (b) of this section, prior to the applicable compliance date, if a swap data repository accepting swaps in the asset class in question is prepared to accept the report. The obligation to report continuation data as required by paragraph (a)(2) of this section with respect to a swap for which a voluntary early submission is made commences on the applicable compliance date. However, the reporting counterparty may submit continuation data at any time after a voluntary early submission made pursuant to this paragraph, if the swap data repository is prepared to accept such continuation data, and if that repository has registered with the Commission as a swap data repository as of the applicable compliance date.

(d) Non-duplication of previous reporting. If the reporting counterparty for a pre-enactment or transition swap has reported any of the information required as paragraphs (a) or (b) of this section to a trade repository prior to the compliance date, and if as of the compliance date that repository has registered with the Commission as a swap data repository, then:

(1) The counterparty shall not be required to report such previously reported information to the swap data repository again;

(2) The counterparty shall be required to report to the swap data repository on the compliance date any information required as part of the initial data report by paragraph (a) of this section that has not been reported prior to the compliance date; and

(3) In the case of pre-enactment and transition swaps in existence on or after April 25, 2011, the initial data report required by paragraph (a) of this section and all subsequent data reporting concerning the swap shall be made to the same swap data repository to which data concerning the swap was
first reported prior to the compliance date (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

§ 46.4 Unique identifiers.

The unique identifier requirements for swap data reporting with respect to pre-enactment or transition swaps shall be as follows:

(a) By the compliance date, the reporting counterparty (as defined by part 45 of this chapter) for each pre-enactment or transition swap in existence on or after April 25, 2011, for which an initial data report is required by this part 46, shall obtain for itself a legal entity identifier as provided in § 45.6 of this chapter (or if the Commission has not yet designated a legal entity identifier system, a substitute counterparty identifier as provided in § 45.6(f) of this chapter), and shall include its own legal entity identifier (or substitute counterparty identifier) in the initial data report concerning the swap. With respect to the legal entity identifier (or substitute counterparty identifier) of the reporting counterparty, the reporting counterparty and the swap data repository to which the swap is reported shall comply thereafter with all unique identifier requirements of § 45.6 of this chapter.

(b) Within 180 days after the compliance date, the non-reporting counterparty for each pre-enactment or transition swap in existence on or after April 25, 2011, for which an initial data report is required by this part 46, shall obtain a legal entity identifier as provided in § 45.6 of this chapter (or if the Commission has not yet designated a legal entity identifier system, a substitute counterparty identifier as provided in § 45.6(f) of this chapter), and shall provide its legal entity identifier (or substitute counterparty identifier) to the reporting counterparty. Upon receipt of the non-reporting counterparty’s legal entity identifier (or substitute counterparty identifier), the reporting counterparty shall provide it to the swap data repository to which swap data for the swap was reported. Thereafter, with respect to the legal entity identifier (or substitute counterparty identifier) of the non-reporting counterparty, the counterparties to the swap and the swap data repository to which it is reported shall comply with all requirements of § 45.6 of this chapter.

(c) The legal entity identifier requirements of parts 46 and 45 of this chapter shall not apply to pre-enactment or transition swaps expired or terminated prior to April 25, 2011.

(d) The unique swap identifier and unique product identifier requirements of part 45 of this chapter shall not apply to pre-enactment or transition swaps.

§ 46.5 Determination of which counterparty must report.

(a) Determination of which counterparty must report swap data concerning each pre-enactment or transition swap shall be made as follows:

(1) If only one counterparty is a swap dealer, the swap dealer shall fulfill all counterparty reporting obligations.

(2) If neither party is an swap dealer, and only one counterparty is a major swap participant, the major swap participant shall fulfill all counterparty reporting obligations.

(3) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a financial entity as defined in CEA section 2(h)(7)(C), the counterparty that is a financial entity shall be the reporting counterparty.

(4) For each pre-enactment swap or transition swap for which both counterparties are swap dealers, or both counterparties are major swap participants, or both counterparties are non-SD/MSP counterparties that are financial entities as defined in CEA section 2(h)(7)(C), or both counterparties are non-SD/MSP counterparties and neither counterparty is a financial entity as defined in CEA section 2(h)(7)(C), the counterparties shall agree which counterparty shall fulfill reporting obligations with respect to that swap; and the counterparty so selected shall fulfill all counterparty reporting obligations.

(5) Notwithstanding the provisions of paragraphs (a)(1) through (3) of this section, for pre-enactment or transition swaps for which both counterparties are non-SD/MSP counterparties, if
§ 46.8

only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(b) For pre-enactment and transition swaps in existence as of the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section with respect to the current counterparties to the swap as of the compliance date, regardless of whether either or both were original counterparties to the swap when it was first executed.

(c) For pre-enactment and transition swaps for which reporting is required, but which have expired or been terminated prior to the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section to the counterparties to the swap as of the date of its expiration or termination (except for determination of a counterparty’s status as an SD or MSP, which shall be made as of the compliance date), regardless of whether either or both were original counterparties to the swap when it was first executed.

(d) After the initial report required by §46.3 is made, if a reporting counterparty selected pursuant to this section ceases to be a counterparty to a swap due to an assignment or novation, the reporting counterparty for reporting of required swap continuation data following the assignment or novation shall be selected from the two current counterparties as provided in paragraphs (d)(1) through (4) of this section.

1) If only one counterparty is a swap dealer, the swap dealer shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

2) If neither counterparty is a swap dealer, and only one counterparty is a major swap participant, the major swap participant shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

3) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

4) In all other cases, the counterparty that replaced the previous reporting counterparty by reason of the assignment or novation shall be the reporting counterparty, unless otherwise agreed by the counterparties.

§ 46.6 Third-party facilitation of data reporting.

Counterparties required by this part 46 to report swap data for any pre-enactment or transition swap, while remaining fully responsible for reporting as required by this part 46, may contract with third-party service providers to facilitate reporting.

§ 46.7 Reporting to a single swap data repository.

All data reported for each pre-enactment or transition swap pursuant to this part 46, and all corrections of errors and omissions in previously reported data for the swap, shall be reported to the same swap data repository to which the initial data report concerning the swap is made (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

§ 46.8 Data reporting for swaps in a swap asset class not accepted by any swap data repository.

(a) Should there be a swap asset class for which no swap data repository registered with the Commission currently accepts swap data, each registered entity or counterparty required by this part to report any required swap creation data or required swap continuation data with respect to a swap in that asset class must report that same data to the Commission.

(b) Data reported to the Commission pursuant to this section shall be reported at times announced by the Commission. Data reported to the Commission pursuant to this section with respect to pre-enactment and transition swaps in existence on or after April 25, 2011 shall be reported in an electronic format acceptable to the Commission.

(c) Delegation of authority to the Chief Information Officer: The Commission hereby delegates to its Chief Information Officer, until the Commission orders otherwise, the authority
set forth in paragraph (c) of this section, to be exercised by the Chief Information Officer or by such other employee or employees of the Commission as may be designated from time to time by the Chief Information Officer. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph.

§ 46.9 Voluntary supplemental reporting.

(a) For purposes of this section, the term voluntary, supplemental report means any report of swap data for a pre-enactment or transition swap to a swap data repository that is not required to be made pursuant to this part or any other part in this chapter.

(b) A voluntary, supplemental report for a pre-enactment or transition swap may be made only by a counterparty to the swap in connection with which the voluntary, supplemental report is made, or by a third-party service provider acting on behalf of a counterparty to the swap.

(c) A voluntary, supplemental report for a pre-enactment or transition swap may be made only after the initial data report for the swap required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made.

(d) A voluntary, supplemental report for a pre-enactment or transition swap may be made either to the swap data repository to which the initial data report for the swap required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made, or to a different swap data repository.

(e) A voluntary, supplemental report for a pre-enactment or transition swap must contain:

(1) An indication that the report is a voluntary, supplemental report.

(2) The swap data repository identifier created for the swap by the automated systems of the swap data repository to which the initial data report required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made.

(3) An indication of the identity of the swap data repository to which the initial data report required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made, if the voluntary supplemental report is made to a different swap data repository.

(4) If the pre-enactment or transition swap was in existence on or after April 25, 2011, the legal entity identifier (or substitute identifier) of the counterparty making the voluntary, supplemental report.

(5) If applicable, an indication that the voluntary, supplemental report is made pursuant to the laws or regulations of any jurisdiction outside the United States.

(f) If a counterparty that has made a voluntary, supplemental report discovers any errors in the swap data included in the voluntary, supplemental
§ 46.11 Reporting of errors and omissions in previously reported data.

(a) Each swap counterparty required by this part 46 to report swap data shall report any errors and omissions in the data so reported. Corrections of errors or omissions shall be reported as soon as technologically practicable after discovery of any such error or omission.

(b) For pre-enactment or transition swaps for which this part requires reporting of continuation data, reporting counterparties reporting state data as provided in part 45 of this chapter may fulfill the requirement to report errors or omissions by making appropriate corrections in their next daily report of state data pursuant to part 45 of this chapter.

(c) Each counterparty to a pre-enactment or transition swap that is not the reporting counterparty as determined pursuant to §46.5, and that discovers any error or omission with respect to any swap data reported to a swap data repository for that swap, shall promptly notify the reporting counterparty of each such error or omission. As soon as technologically practicable after receiving such notice, the reporting counterparty shall report a correction of each such error or omission to the swap data repository.

(d) Each swap counterparty reporting corrections to errors or omissions in data previously reported as required by this part shall report such corrections in the same format as it reported the erroneous or omitted data.
### EXHIBIT A

**Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps**

**CREDIT SWAPS AND EQUITY SWAPS**

(Enter N/A for fields that are not applicable)

<table>
<thead>
<tr>
<th>Data categories and fields</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Legal Entity Identifier of the reporting counterparty</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier.</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the non-reporting party</td>
<td>As provided in § 46.4. This information is only required 180 days after the applicable compliance date.</td>
</tr>
<tr>
<td>If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository</td>
<td>If no repository identifier yet exists, the repository fills in this field after creating its identifier.</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>Field</td>
<td>Description</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication that the swap is a multi-asset swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the primary asset class</td>
<td>Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the secondary asset class(es)</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>An indication that the swap is a mixed swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported</td>
<td></td>
</tr>
<tr>
<td>An indication of the counterparty purchasing protection</td>
<td>Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>An indication of the counterparty selling protection</td>
<td>Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>Information identifying the reference entity</td>
<td>The entity that is the subject of the protection being purchased and sold in the swap. Field values: LEI if available, or substitute identifier as above if LEI is not yet available, or name</td>
</tr>
<tr>
<td>Contract type</td>
<td>E.g., swap, swaption, forward, option, basis swap, index swap, basket swap</td>
</tr>
<tr>
<td>Execution timestamp</td>
<td>The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade</td>
</tr>
<tr>
<td>Execution venue</td>
<td>The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or “off-facility” if not so executed</td>
</tr>
<tr>
<td>Start date</td>
<td>The date on which the swap starts or goes into effect</td>
</tr>
<tr>
<td>Maturity, termination or end date</td>
<td>The date on which the swap expires</td>
</tr>
<tr>
<td>The price</td>
<td>E.g., strike price, initial price, spread</td>
</tr>
<tr>
<td>The notional amount, and the currency in which the notional amount is expressed</td>
<td></td>
</tr>
<tr>
<td>The amount and currency (or currencies) of any up-front payment</td>
<td></td>
</tr>
<tr>
<td>Payment frequency of the reporting counterparty</td>
<td>A description of the payment stream of the reporting counterparty, e.g., coupon</td>
</tr>
<tr>
<td>Payment frequency of the non-reporting counterparty</td>
<td>A description of the payment stream of the non-reporting counterparty, e.g., coupon</td>
</tr>
<tr>
<td>Clearing indicator</td>
<td>Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization</td>
</tr>
<tr>
<td>Clearing venue</td>
<td>If the swap was or will be cleared, the identifier (if available) or name of the derivatives clearing organization</td>
</tr>
</tbody>
</table>
## EXHIBIT B
Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps
FOREIGN EXCHANGE TRANSACTIONS
(OTHER THAN CROSS-CURRENCY SWAPS)
(Enter N/A for fields that are not applicable)

<table>
<thead>
<tr>
<th>Data fields</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Legal Entity Identifier of the reporting counterparty</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(b)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a U.S. person</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the non-reporting party</td>
<td>As provided in § 46.4. This information is only required 180 days after the applicable compliance date</td>
</tr>
<tr>
<td>If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository</td>
<td>If no repository identifier yet exists, the repository fills in this field after creating its identifier</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(b)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a U.S. person</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication that the swap is a multi-asset swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the primary asset class</td>
<td>Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>Category</td>
<td>Description</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the secondary asset class(es)</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>An indication that the swap is a mixed swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported</td>
<td>E.g., forward, non-deliverable forward (NDF), non-deliverable option (NDO), vanilla option, simple exotic option, complex exotic option</td>
</tr>
<tr>
<td>Contract type</td>
<td>The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade</td>
</tr>
<tr>
<td>Execution venue</td>
<td>The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or “off-facility” if not so executed</td>
</tr>
<tr>
<td>Currency 1</td>
<td>ISO code</td>
</tr>
<tr>
<td>Currency 2</td>
<td>ISO code</td>
</tr>
<tr>
<td>Notional amount 1</td>
<td>For currency 1</td>
</tr>
<tr>
<td>Notional amount 2</td>
<td>For currency 2</td>
</tr>
<tr>
<td>Exchange rate</td>
<td>Contractual rate of exchange of the currencies</td>
</tr>
<tr>
<td>Delivery type</td>
<td>Physical (deliverable) or cash (non-deliverable)</td>
</tr>
<tr>
<td>Settlement or expiration date</td>
<td>Settlement date, or for an option the contract expiration date</td>
</tr>
<tr>
<td>Clearing indicator</td>
<td>Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization</td>
</tr>
<tr>
<td>Clearing venue</td>
<td>If the swap was or will be cleared, the identifier (if available) or name of the derivatives clearing organization</td>
</tr>
</tbody>
</table>
## EXHIBIT C
Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

**INTEREST RATE SWAPS (INCLUDING CROSS-CURRENCY SWAPS)**

(Enter N/A for fields that are not applicable)

<table>
<thead>
<tr>
<th>Data field</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Legal Entity Identifier of the reporting counterparty</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier.</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the non-reporting counterparty</td>
<td>As provided in § 46.4. This information is only required 180 days after the applicable compliance date.</td>
</tr>
<tr>
<td>If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository</td>
<td>If no repository identifier yet exists, the repository fills in this field after creating its identifier.</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication that the swap is a multi-asset swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the primary asset class</td>
<td>Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the secondary asset class(es)</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>Field Name</td>
<td>Description</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>An indication that the swap is a mixed swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported</td>
<td>E.g., swap, swaption, option, basis swap, index swap</td>
</tr>
<tr>
<td>Contract type</td>
<td>The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade</td>
</tr>
<tr>
<td>Execution timestamp</td>
<td>The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or “off-facility” if not so executed</td>
</tr>
<tr>
<td>Execution venue</td>
<td>The date on which the swap starts or goes into effect</td>
</tr>
<tr>
<td>Start date</td>
<td>The date on which the swap expires or ends</td>
</tr>
<tr>
<td>Day count convention</td>
<td>The current active notional amount</td>
</tr>
<tr>
<td>Notional amount (leg 1)</td>
<td>ISO code</td>
</tr>
<tr>
<td>Notional currency (leg 1)</td>
<td>The current active notional amount</td>
</tr>
<tr>
<td>Notional amount (leg 2)</td>
<td>ISO code</td>
</tr>
<tr>
<td>Notional currency (leg 2)</td>
<td>Is the reporting party a fixed rate payer? Yes/No/Not applicable</td>
</tr>
<tr>
<td>Payer (fixed rate)</td>
<td>If two floating legs, the payer for leg 1</td>
</tr>
<tr>
<td>Payer (floating rate leg 1)</td>
<td>If two floating legs, the payer for leg 2</td>
</tr>
<tr>
<td>Payer (floating rate leg 2)</td>
<td>For swaps: whether the principal is paying or receiving the fixed rate. For float-to-float and fixed-to-fixed swaps: indicate N/A. For non-swap instruments and swaptions: indicate the instrument that was bought or sold.</td>
</tr>
<tr>
<td>Direction</td>
<td>E.g., put, call, straddle</td>
</tr>
<tr>
<td>Option type</td>
<td>Fixed rate</td>
</tr>
<tr>
<td>Fixed rate</td>
<td>E.g., actual 360</td>
</tr>
<tr>
<td>Fixed rate day count fraction</td>
<td>Floating rate payment frequency</td>
</tr>
<tr>
<td>Floating rate reset frequency</td>
<td>E.g., USD-Libor-BBA</td>
</tr>
<tr>
<td>Floating rate index/name/rate period</td>
<td>Clearing indicator: Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization</td>
</tr>
<tr>
<td>Clearing venue</td>
<td>Identifier (if available) or name of the derivatives clearing organization</td>
</tr>
</tbody>
</table>

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# EXHIBIT D
Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

**OTHER COMMODITY SWAPS**
(Enter N/A for fields that are not applicable)

<table>
<thead>
<tr>
<th>Data field</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Legal Entity Identifier of the reporting counterparty</td>
<td>As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier.</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the reporting counterparty is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>The Legal Entity Identifier of the non-reporting party</td>
<td>As provided in § 46.4. This information is only required 180 days after the applicable compliance date.</td>
</tr>
<tr>
<td>If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty is used by the swap data repository</td>
<td>If no repository identifier yet exists, the repository fills in this field after creating its identifier.</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap</td>
<td>Yes/No</td>
</tr>
<tr>
<td>If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication of whether the non-reporting counterparty is a U.S. person.</td>
<td>Yes/No</td>
</tr>
<tr>
<td>An indication that the swap is a multi-asset swap</td>
<td>Field values: Yes, Not applicable</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the primary asset class</td>
<td>Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>For a multi-asset class swap, an indication of the secondary asset class(es)</td>
<td>Field values: credit, equity, FX, rates, other commodity</td>
</tr>
<tr>
<td>Field</td>
<td>Description</td>
</tr>
<tr>
<td>--------------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Contract type</td>
<td>E.g., swap, swaption, option, basis swap, index swap</td>
</tr>
<tr>
<td>Execution timestamp</td>
<td>The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade</td>
</tr>
<tr>
<td>Execution venue</td>
<td>The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or “off-facility” if not so executed</td>
</tr>
<tr>
<td>Start date</td>
<td>The date on which the swap commences or goes into effect (e.g., in physical oil, the pricing start date)</td>
</tr>
<tr>
<td>Maturity, termination, or end date</td>
<td>The date on which the swap expires or ends (e.g., in physical oil, the pricing end date)</td>
</tr>
<tr>
<td>Buyer</td>
<td>The counterparty purchasing the product: e.g., the payer of the fixed price (for a swap), or the payer of the floating price on the underlying swap (for a put swaption), or the payer of the fixed price on the underlying swap (for a call swaption). Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>Seller</td>
<td>The counterparty offering the product: e.g., the payer of the floating price (for a swap), the payer of the fixed price on the underlying swap (for a put swaption), or the payer of the floating price on the underlying swap (for a call swaption). Field values: LEI if available, or substitute identifier as above if LEI is not yet available</td>
</tr>
<tr>
<td>Quantity unit</td>
<td>The unit of measure applicable for the quantity on the swap. E.g., barrels, bushels, gallons, pounds, tons</td>
</tr>
<tr>
<td>Quantity</td>
<td>The amount of the commodity (the number of quantity units) quoted on the swap</td>
</tr>
<tr>
<td>Quantity frequency</td>
<td>The rate at which the quantity is quoted on the swap. E.g., hourly, daily, weekly, monthly</td>
</tr>
<tr>
<td>Total quantity</td>
<td>The quantity of the commodity for the entire term of the swap</td>
</tr>
<tr>
<td>Settlement method</td>
<td>Physical delivery or cash</td>
</tr>
<tr>
<td>Price</td>
<td>The price of the swap. For options, the strike price</td>
</tr>
<tr>
<td>Price unit</td>
<td>The unit of measure applicable for the price of the swap</td>
</tr>
<tr>
<td>Price currency</td>
<td>ISO code</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Buyer pay index</td>
<td>The published price as paid by the buyer (if applicable). For swaptions, applies to the underlying swap</td>
</tr>
<tr>
<td>Buyer pay averaging method</td>
<td>The averaging method used to calculate the index of the buyer pay index. For swaptions, applies to the underlying swap</td>
</tr>
<tr>
<td>Seller pay index</td>
<td>The published price as paid by the seller (if applicable). For swaptions, applies to the underlying swap</td>
</tr>
<tr>
<td>Seller pay averaging method</td>
<td>The averaging method used to calculate the index of the seller pay index. For swaptions, applies to the underlying swap</td>
</tr>
<tr>
<td>Grade</td>
<td>If applicable, the grade of the commodity to be delivered, e.g., the grade of oil or refined product</td>
</tr>
<tr>
<td>Option type</td>
<td>Descriptor for the type of option transaction. E.g., put, call, straddle</td>
</tr>
<tr>
<td>Option style</td>
<td>E.g., American, European, European Daily, European Monthly, Asian</td>
</tr>
<tr>
<td>Option premium</td>
<td>The total amount paid by the option buyer</td>
</tr>
<tr>
<td>Hours from through</td>
<td>For electric power, the hours of the day for which the swap is effective</td>
</tr>
<tr>
<td>Hours from through time zone</td>
<td>For electric power, the time zone prevailing for the hours during which electricity is transmitted</td>
</tr>
<tr>
<td>Days of week</td>
<td>For electric power, the profile applicable for the delivery of power</td>
</tr>
<tr>
<td>Load type</td>
<td>For electric power, the load profile for the delivery of power</td>
</tr>
<tr>
<td>Clearing indicator</td>
<td>Yes/No indication of whether the swap will be cleared by a derivatives clearing organization</td>
</tr>
<tr>
<td>Clearing venue</td>
<td>Identifier (if available) or name of the derivatives clearing organization</td>
</tr>
</tbody>
</table>

**PART 48—REGISTRATION OF FOREIGN BOARDS OF TRADE**

Sec. 48.1 Scope.
48.2 Definitions.
48.3 Registration required.
48.4 Registration eligibility and scope.
48.5 Registration procedures.
48.6 Foreign boards of trade providing direct access pursuant to existing no-action relief.
48.7 Requirements for registration.
48.8 Conditions of registration.
48.9 Revocation of registration.
48.10 Additional contracts.

**Appendix to Part 48—Form FBOT**

**Authority:** 7 U.S.C. 5, 6 and 12a, unless otherwise noted.

**Source:** 76 FR 80696, Dec. 23, 2011, unless otherwise noted.

**§ 48.1 Scope.**

The provisions of this part apply to any foreign board of trade that is registered, required to be registered, or applying to become registered with the Commission in order to provide its identified members or other participants located in the United States with direct access to its electronic trading and order matching system.

**§ 48.2 Definitions.**

For purposes of this part:
(a) **Foreign board of trade.** Foreign board of trade means any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated.

(b) **Foreign board of trade eligible to be registered.** A foreign board of trade eligible to be registered means a foreign board of trade that satisfies the requirements for registration specified in §48.7 and:

1. Possesses the attributes of an established, organized exchange,
§ 48.2

(2) Adheres to appropriate rules prohibiting abusive trading practices,

(3) Enforces appropriate rules to maintain market and financial integrity,

(4) Has been authorized by a regulatory process that examines customer and market protections, and

(5) Is subject to continued oversight by a regulator that has power to intervene in the market and the authority to share information with the Commission.

c) Direct access. Direct access means an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the foreign board of trade.

d) Linked contract. Linked contract means a futures, option or swap contract that is made available for trading by direct access by a registered foreign board of trade that settles against any price (including the daily or final settlement price) of one or more contracts listed for trading on a registered entity as defined in section 1a(40) of the Act.

e) Communications. Communications means any written or electronic documentation or correspondence issued by or on behalf of the Commission, the United States Department of Justice, or the National Futures Association.

f) Material change. Material change means a material change in the information provided to the Commission in support of an application for registration under this part. Subsequent to registration, material change also includes a material change in the operations of the foreign board of trade or its clearing organization and, without limitation, a change in any of the following: The membership or participant criteria of the foreign board of trade or its clearing organization; the location of the management, personnel or operations of the foreign board of trade or its clearing organization; the structure, nature, or operation of the trading or clearing systems; the regulatory or self-regulatory regime applicable to the foreign board of trade, its clearing organization, or their respective members and other participants; the authorization, licensure, registration or recognition of the foreign board of trade or clearing organization; and the ability of the clearing organization to observe the Recommendations for Central Counterparties.

g) Clearing organization. Clearing organization means the foreign board of trade, affiliate of the foreign board of trade or any third party clearing house, clearing association, clearing corporation or similar entity, facility or organization that, with respect to any agreement, contract or transaction executed on or through the foreign board of trade, would be:

1. Defined as a derivatives clearing organization under section 1a(15) of the Act; or

2. Defined as a central counterparty by the Recommendations for Central Counterparties.

(h) Existing no-action relief. Existing no-action relief means a no-action letter issued by a division of the Commission to the foreign board of trade in which the division informs the foreign board of trade that it will not recommend that the Commission institute enforcement action against the foreign board of trade if the foreign board of trade does not seek designation as either a designated contract market pursuant to section 5 of the Act or a derivatives transaction execution facility pursuant to section 5a of the Act in connection with the granting of direct access.

(i) Swap. Swap means a swap as defined in section 1a(47) of the Act and any Commission regulation further defining the term adopted thereunder.

(j) Recommendations for Central Counterparties. Recommendations for Central Counterparties means:

1. The current Recommendations for Central Counterparties issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions as updated, revised or otherwise amended; or

2. Successor standards, principles and guidance for central counterparties or financial market infrastructures adopted jointly by the Technical Committee of the International Organization of Securities Commissions and the Committee on Payment and Settlement Systems.
§ 48.3 Registration required.

(a) Except as specified in this part, it shall be unlawful for a foreign board of trade to permit direct access to its electronic trading and order matching system unless and until the Commission has issued a valid and current Order of Registration to the foreign board of trade pursuant to the provisions of this part.

(b) It shall be unlawful for a foreign board of trade or the clearing organization to make false or misleading statements in or in connection with any application for registration under this part.

§ 48.4 Registration eligibility and scope.

(a) Only foreign boards of trade eligible to be registered, as defined in §48.2(b) of this part, are eligible for registration with the Commission pursuant to this part.

(b) A foreign board of trade may apply for registration under this part in order to permit the members and other participants of the foreign board of trade that are located in the United States to enter trades directly into the trading and order matching system of the foreign board of trade, to the extent that such members or other participants are:

(1) Entering orders for the member's or other participant's proprietary accounts;

(2) Registered with the Commission as futures commission merchants and are submitting customer orders to the trading system for execution; or

(3) Registered with the Commission as a commodity pool operator or commodity trading advisor, or are exempt from such registration pursuant to §4.13 or §4.14 of this chapter, and are submitting orders for execution on behalf of a United States pool that the member or other participant operates or an account of a United States customer for which the member or other participant has discretionary authority, respectively, provided that a futures commission merchant or a firm exempt from such registration pursuant to §30.10 of this chapter acts as clearing firm and guarantees, without limitation, all such trades of the commodity pool operator or commodity trading advisor effected through submission of orders to the trading system.

§ 48.5 Registration procedures.

(a) A foreign board of trade seeking registration with the Commission pursuant to this part must electronically file an application for registration with the Secretary of the Commission at its Washington DC headquarters at FBOTapplications@cftc.gov.

(b) A complete application for registration must include:

(1) A completed Form FBOT and Form Supplement S–1, as set forth in the appendix to this part, or any successor forms, and all information and documentation described in such forms; and

(2) Any additional information and documentation necessary, in the discretion of the Commission, to supplement the application including, but not limited to, documentation and information provided during the course of an on-site visit, as applicable, to the foreign board of trade, the clearing organization and the regulatory authority or authorities, to effectively demonstrate that the foreign board of trade and its clearing organization satisfy the registration requirements set forth in §48.7.

(c) An applicant for registration must identify with particularity any information in the application that will be subject to a request for confidential treatment and must provide...
§ 48.6

(a) A foreign board of trade operating pursuant to existing no-action relief as of the effective date of this part 48 must register with the Commission pursuant to this part in order to continue to provide direct access to its electronic trading and order matching system from the United States.

(b)(1) The application of a foreign board of trade operating pursuant to existing no-action relief must include a complete Form FBOT and Supplement S–1, as set forth in the appendix to this part. If the foreign board of trade, as part of its application for registration, wishes to rely on information and documentation previously submitted electronically in connection with its request for no-action relief in order to look to determine if the government authorities support and enforce regulatory objectives in the oversight of the foreign board of trade and the clearing organization that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight of designated contract markets and derivatives clearing organizations.

§ 48.8

(a) A foreign board of trade operating pursuant to existing no-action relief as of the effective date of this part 48 must register with the Commission pursuant to this part in order to continue to provide direct access to its electronic trading and order matching system from the United States.

(b)(1) The application of a foreign board of trade operating pursuant to existing no-action relief must include a complete Form FBOT and Supplement S–1, as set forth in the appendix to this part. If the foreign board of trade, as part of its application for registration, wishes to rely on information and documentation previously submitted electronically in connection with its request for no-action relief in order to look to determine if the government authorities support and enforce regulatory objectives in the oversight of the foreign board of trade and the clearing organization that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight of designated contract markets and derivatives clearing organizations.

§ 48.6

(a) A foreign board of trade operating pursuant to existing no-action relief as of the effective date of this part 48 must register with the Commission pursuant to this part in order to continue to provide direct access to its electronic trading and order matching system from the United States.

(b)(1) The application of a foreign board of trade operating pursuant to existing no-action relief must include a complete Form FBOT and Supplement S–1, as set forth in the appendix to this part. If the foreign board of trade, as part of its application for registration, wishes to rely on information and documentation previously submitted electronically in connection with its request for no-action relief in order to look to determine if the government authorities support and enforce regulatory objectives in the oversight of the foreign board of trade and the clearing organization that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight of designated contract markets and derivatives clearing organizations.

§ 48.6

(a) A foreign board of trade operating pursuant to existing no-action relief as of the effective date of this part 48 must register with the Commission pursuant to this part in order to continue to provide direct access to its electronic trading and order matching system from the United States.

(b)(1) The application of a foreign board of trade operating pursuant to existing no-action relief must include a complete Form FBOT and Supplement S–1, as set forth in the appendix to this part. If the foreign board of trade, as part of its application for registration, wishes to rely on information and documentation previously submitted electronically in connection with its request for no-action relief in order to look to determine if the government authorities support and enforce regulatory objectives in the oversight of the foreign board of trade and the clearing organization that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight of designated contract markets and derivatives clearing organizations.
§ 48.7 Requirements for registration.

An applicant for registration must demonstrate that it and, where applicable, its clearing organization meet the following requirements. The registration requirements applicable to clearing organizations may alternatively be met by demonstrating that the clearing organization is registered and in good standing with the Commission as a derivatives clearing organization. The Commission, in its discretion, may request additional information and documentation in connection with an application for registration and an applicant for registration must provide promptly any such additional information or documentation. The Commission, in its discretion, also may impose additional registration requirements that the Commission deems necessary after appropriate notice and opportunity to respond.

(a) Foreign Board of Trade and Clearing Membership:

(1) The members and other participants of the foreign board of trade and its clearing organization are fit and proper and meet appropriate financial and professional standards;

(2) The foreign board of trade and its clearing organization have and enforce provisions to minimize and resolve conflicts of interest; and

(3) The foreign board of trade and its clearing organization have and enforce rules prohibiting the disclosure, both during and subsequent to service on a board or committee, of material nonpublic information obtained as a result of a member's or other participant's performance of duties as a member of their respective governing boards and significant committees.

(b) The Automated Trading System:

(1) The trading system complies with Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions,

(2) The trade matching algorithm matches trades fairly and timely,

(3) The audit trail captures all relevant data, including changes to orders, and audit trail data is securely maintained and available for an adequate time period.
(4) Adequate and appropriate trade data is made available to users and the public,
(5) The trading system has demonstrated reliability,
(6) Access to the trading system is secure and protected,
(7) There are adequate provisions for emergency operations and disaster recovery,
(8) Trading data is backed up to prevent loss of data, and
(9) Only those futures, option or swap contracts that have been identified to the Commission in the foreign board of trade’s application for registration or permitted to be made available for trading by direct access pursuant to the procedures set forth in §48.10 of this part are made available for trading by direct access.

(c) Terms and Conditions of Contracts to Be Made Available in the United States.
(1) Contracts must meet the following standards:
   (i) Contracts must be futures, option or swap contracts that would be eligible to be traded on a designated contract market;
   (ii) Contracts must be cleared;
   (iii) Contracts must not be prohibited from being traded by United States persons; and
   (iv) Contracts must not be readily susceptible to manipulation.
(2) Foreign futures and option contracts on non-narrow-based security indexes must have been certified by the Commission pursuant to the procedures set forth in §30.13 of this chapter.
(3) Contracts that have the following characteristics must be specifically identified as having such characteristics:
   (i) Contracts that are linked to a contract listed for trading on a registered entity as defined in section 1a(40) of the Act, and
   (ii) Contracts that have any other relationship with a contract listed for trading on a registered entity (for example, if both the foreign board of trade’s and the registered entity’s contract settle to the price of the same third party-constructed index).

(d) Settlement and Clearing:
(1) The clearing organization observes the Recommendations for Central Counterparties or is registered with the Commission as a derivatives clearing organization, and
(2) The clearing organization is in good regulatory standing in its home country jurisdiction.

(e) The Regulatory Regimes Governing the Foreign Board of Trade and the Clearing Organization:
(1) The regulatory authorities provide comprehensive supervision and regulation of the foreign board of trade, the clearing organization, and the type of contracts to be made available through direct access that is comparable to the comprehensive supervision and regulation provided by the Commission to designated contract markets, derivatives clearing organizations, and such contracts. That is, the regulatory authorities support and enforce regulatory objectives in the oversight of the foreign board of trade, clearing organization and the type of contracts that the foreign board of trade wishes to make available through direct access that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight of designated contract markets, derivatives clearing organizations, and such products.
(2) The regulatory authorities engage in ongoing regulatory supervision and oversight of the foreign board of trade and its trading system, the clearing organization and its clearing system, and the members, intermediaries and other participants of the foreign board of trade and clearing organization, with respect to, among other things, market integrity, customer protection, clearing and settlement and the enforcement of the rules of the foreign board of trade and the clearing organization.
(3) The regulatory authorities have the power to share information directly with the Commission, upon request, including information necessary to evaluate the continued eligibility of the foreign board of trade for registration and to audit for compliance with the terms and conditions of the registration.
(4) The regulatory authorities have the power to intervene in the market.

(f) The Rules of the Foreign Board of Trade and the Clearing Organization and Enforcement Thereof:
(1) The foreign board of trade and its clearing organization have implemented and enforce rules to ensure compliance with the requirements of registration contained in this part;

(2) The foreign board of trade and its clearing organization have the capacity to detect, investigate, and sanction persons who violate their respective rules;

(3) The foreign board of trade and the clearing organization (or their respective regulatory authorities) have implemented and enforce disciplinary procedures that empower them to recommend and prosecute disciplinary actions for suspected rule violations, impose adequate sanctions for such violations, and provide adequate protections to charged parties pursuant to fair and clear standards;

(4) The foreign board of trade and its clearing organization are authorized by rule or by contractual agreement to obtain, from members and other participants, any information and cooperation necessary to conduct investigations, to effectively enforce their respective rules, and to ensure compliance with the conditions of registration;

(5) The foreign board of trade and its clearing organization have sufficient compliance staff and resources, including by delegation and/or outsourcing to a third party, to fulfill their respective regulatory responsibilities, including appropriate trade practice surveillance, real time market monitoring, market surveillance, financial surveillance, protection of customer funds, enforcement of clearing and settlement provisions and other compliance and regulatory responsibilities;

(6) The foreign board of trade has implemented and enforces rules with respect to access to the trading system and the means by which the connection thereto is accomplished;

(7) The foreign board of trade’s audit trail captures and retains sufficient order and trade-related data to allow its compliance staff to detect trading and market abuses and to reconstruct all transactions within a reasonable period of time;

(8) The foreign board of trade has implemented and enforces rules prohibiting fraud and abusive trading practices including, but not limited to, wash sales and trading ahead;

(9) The foreign board of trade has the capacity to detect and deter, and has implemented and enforces rules relating to, market manipulation, attempted manipulation, price distortion, and other disruptions of the market;

(10) The foreign board of trade has and enforces rules and procedures that ensure a competitive, open and efficient market and mechanism for executing transactions.

(g) Information Sharing:

(1) The regulatory authorities governing the activities of the foreign board of trade and the clearing organization are signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding, or otherwise ensure that substitute information sharing arrangements that are satisfactory to the Commission are in place;

(2) The regulatory authorities governing the activities of the foreign board of trade and the clearing organization are signatories to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations or otherwise commit, in writing, to share the types of information contemplated by the International Information Sharing Memorandum of Understanding and Agreement with the Commission;

(3) The foreign board of trade has executed the International Information Sharing Memorandum of Understanding and Agreement; and

(4) Pursuant to the conditions described in §48.8(a)(6), the foreign board of trade and clearing organization agree to provide directly to the Commission, upon request, any information necessary, in the discretion of the Commission, to evaluate the continued eligibility and appropriateness of the foreign board of trade and the clearing organization, or their respective members or other participants for registration, to audit for and enforce compliance with the requirements and conditions of the registration, or to enable the Commission to carry out its duties under the Act and Commission regulations.
§ 48.8 Conditions of registration.

Upon registration under this part, and on an ongoing basis thereafter, the foreign board of trade and the clearing organization shall comply with the applicable conditions of registration set forth in this section and any additional conditions that the Commission deems necessary and may impose, in its discretion, and after appropriate notice and opportunity to respond. Such conditions could include, but are not limited to, additional conditions applicable to the listing of swap contracts. Continued registration is expressly conditioned upon satisfaction of these conditions.

(a) Specified Conditions for Maintaining Registration

(1) Registration Requirements: The foreign board of trade and its clearing organization shall continue to satisfy all of the requirements for registration set forth in § 48.7.

(2) Regulatory Regime:

(i) The foreign board of trade will continue to satisfy the criteria for a regulated market or licensed exchange pursuant to the regulatory regime described in its application and will continue to be subject to oversight by the regulatory authorities described in its application.

(ii) The clearing organization will continue to satisfy the criteria for a regulated clearing organization pursuant to the regulatory regime described in the application for registration and will continue to be in good standing with the relevant regulatory authority.

(iii) The laws, systems, rules, and compliance mechanisms of the regulatory regime applicable to the foreign board of trade will continue to require the foreign board of trade to maintain fair and orderly markets; prohibit fraud, abuse, and market manipulation and other disruptions of the market; and provide that such requirements are subject to the oversight of appropriate regulatory authorities.

(3) Satisfaction of International Standards:

(i) The foreign board of trade will continue to comply with the Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions, as updated, revised, or otherwise amended, to the extent such principles do not contravene United States law.

(ii) The clearing organization will continue to:

(A) Be registered with the Commission as a derivatives clearing organization and be in compliance with the law and regulations related thereto; or

(B) Observe the Recommendations for Central Counterparties.

(4) Restrictions on Direct Access:

(i) Only the foreign board of trade's identified members or other participants will have direct access to the foreign board of trade's trading system from the United States and the foreign board of trade will not provide, and will take reasonable steps to prevent, third parties from providing direct access to persons other than the identified members or other participants.

(ii) All orders that are transmitted to the foreign board of trade's trading system by a foreign board of trade's identified member or other participant that is operating pursuant to the foreign board of trade's registration will be solely for the member's or trading participant's own account unless such member or other participant is registered with the Commission as a futures commission merchant or such member or other participant is registered with the Commission as a commodity pool operator or commodity trading advisor, or is exempt from such registration pursuant to § 4.13 or § 4.14 of this chapter, provided that a futures commission merchant or a firm exempt from such registration pursuant to § 30.10 of this chapter acts as clearing firm and guarantees, without limitation, all such trades of the commodity pool operator or commodity trading advisor effected through submission of orders on the trading system.

(5) Submission to Commission Jurisdiction:

(i) Prior to operating pursuant to registration under this part and on a continuing basis thereafter, a registered foreign board of trade will require that each current and prospective member or other participant that is granted direct access to the foreign board of trade's trading system and
that is not registered with the Commission as a futures commission merchant, a commodity trading advisor or a commodity pool operator, file with the foreign board of trade a written representation, executed by a person with the authority to bind the member or other participant, stating that as long as the member or other participant is authorized to enter orders directly into the trade matching system of the foreign board of trade, the member or other participant agrees to and submits to the jurisdiction of the Commission with respect to activities conducted pursuant to the registration.

(ii) The foreign board of trade and its clearing organization will file with the Commission a valid and binding appointment of an agent for service of process in the United States pursuant to which the agent is authorized to accept delivery and service of communications, as defined in §48.2(e) issued by or on behalf of the Commission, the United States Department of Justice, or the National Futures Association.

(iii) The foreign board of trade, clearing organization, and each current and prospective member or other participant that is granted direct access to the foreign board of trade’s trading system and that is not registered with the Commission as a futures commission merchant, a commodity trading advisor, or a commodity pool operator will maintain with the foreign board of trade written representations, executed by persons with the authority to bind the entity making them, stating that as long as the foreign board of trade is registered under this regulation, the foreign board of trade, the clearing organization or member of either or other participant granted direct access pursuant to this regulation will provide, upon the request of the Commission, the United States Department of Justice and, if appropriate, the National Futures Association, prompt access to the entity’s, member’s, or other participant’s original books and records or, at the election of the requesting agency, a copy of specified information containing such books and records, as well as access to the premises where the trading system is available in the United States.

(iv) The foreign board of trade will maintain all representations required pursuant to §48.8(a)(5) as part of its books and records and make them available to the Commission upon request.

(6) Information Sharing:

(i) Information-sharing arrangements satisfactory to the Commission, including but not limited to those set forth in §48.7(g), are in effect between the Commission and the regulatory authorities that govern the activities of both the foreign board of trade and the clearing organization.

(ii) The Commission is, in fact, able to obtain sufficient information regarding the foreign board of trade, the clearing organization, their respective members and participants and the activities related to the foreign board of trade’s registration.

(iii) The foreign board of trade and its clearing organization, as applicable, will provide directly to the Commission any information necessary to evaluate the continued eligibility and appropriateness of the foreign board of trade for registration, the capability and determination to enforce compliance with the requirements and conditions of the registration, or to enable the Commission to carry out its duties under the Act and Commission regulations and to provide adequate protection to the public or United States registered entities.

(iv) In the event that the foreign board of trade and the clearing organization are separate entities, the foreign board of trade will require the clearing organization to enter into a written agreement in which the clearing organization is contractually obligated to promptly provide any and all information and documentation that may be required of the clearing organization under this regulation and such agreement shall be made available to the Commission, upon request.

(7) Monitoring for Compliance: The foreign board of trade and the clearing organization will employ reasonable procedures for monitoring and enforcing compliance with the specified conditions of its registration.

(8) On-Site Visits: The foreign board of trade and the clearing organization will permit and will cooperate with
Commission staff with respect to on-site visits for the purpose of overseeing ongoing compliance of the foreign board of trade and the clearing organization with registration requirements and conditions of registration.

(9) Conditions Applicable to Swap Trading:

(i) The foreign board of trade will ensure that all transaction data relating to each swap transaction, including price and volume, are reported as soon as technologically practicable after execution of the swap transaction to a swap data repository that is either registered with the Commission or has an information sharing arrangement with the Commission.

(ii) The foreign board of trade will agree to coordinate with the Commission with respect to arrangements established to address cross market oversight issues involving swap trading, including surveillance, emergency actions and the monitoring of trading.

(b) Other Continuing Obligations.

(1) Registered foreign boards of trade and their clearing organizations will continue to comply with the following obligations on an ongoing basis:

(i) The foreign board of trade will maintain the following updated information and submit such information to the Commission on at least a quarterly basis, not later than 30 days following the end of the quarter, and at any time promptly upon the request of a Commission representative, computed based upon separating buy sides and sell sides, in a format as determined by the Commission:

(A) For each contract available to be traded through the foreign board of trade’s trading system;

(B) For each contract available to be traded through the foreign board of trade generally; and

(B) A listing of the names, National Futures Association identification numbers (if applicable), and main business addresses in the United States of all members and other participants that have direct access.

(ii) The foreign board of trade will promptly provide to the Commission written notice of the following:

(A) Any material change to the information provided in the foreign board of trade’s registration application.

(B) Any material change in the rules of the foreign board of trade or clearing organization or the laws, rules, or regulations in the home country jurisdictions of the foreign board of trade or clearing organization relevant to futures, option or swap contracts made available by direct access.

(C) Any matter known to the foreign board of trade, the clearing organization or its representatives that, in the judgment of the foreign board of trade or clearing organization, may affect the financial or operational viability of the foreign board of trade or its clearing organization with respect to contracts traded by direct access, including, but not limited to, any significant system failure or interruption.

(D) Any default, insolvency, or bankruptcy of any foreign board of trade member or other participant that is or should be known to the foreign board of trade or its representatives or the clearing organization or its representatives that may have a material, adverse impact upon the condition of the foreign board of trade as it relates to trading by direct access, its clearing organization or upon any United States customer or firm or any default, insolvency or bankruptcy of any member of the foreign board of trade’s clearing organization.

(E) Any violation of any specified conditions of the foreign board of trade’s registration or failure to satisfy the requirements for registration under this part that is known or should be known by the foreign board of trade, the clearing organization or any of their respective members or participants.

(F) Any disciplinary action by the foreign board of trade or its clearing organization, or any regulatory authority that governs their respective activities, taken against any of their respective members or participants with respect to any contract available to be traded by direct access that involves any market manipulation,
§ 48.8 17 CFR Ch. I (4–1–13 Edition)

abuse, fraud, deceit, or conversion or that results in suspension or expulsion.

(iii) The foreign board of trade and the clearing organization, or their respective regulatory authorities, as applicable, will provide the following to the Commission annually as of June 30 and not later than July 31.

(A) A certification from the foreign board of trade’s regulatory authority confirming that the foreign board of trade retains its authorization, licensure or registration, as applicable, as a regulated market and/or exchange under the authorization, licensing, recognition or other registration methodology used by the foreign board of trade’s regulatory authority and that the foreign board of trade is in continued good standing.

(B) If the clearing organization is not a derivatives clearing organization registered with the Commission, a certification from the clearing organization’s regulatory authority confirming that the clearing organization retains its authorization, licensure or registration, as applicable, as a clearing organization under the authorization, licensing or other registration methodology used by the clearing organization’s regulatory authority and is in continued good standing.

(C) If the clearing organization is not a derivatives clearing organization registered with the Commission, a recertification of the clearing organization’s observance of the Recommendations for Central Counterparties.

(D) A certification that affiliates, as defined in §48.2(k), continue to be required to comply with the rules of the foreign board of trade and clearing organization and that the members or other participants to which they are affiliated remain responsible to the foreign board of trade for ensuring their affiliates’ compliance.

(E) A description of any material changes regarding the foreign board of trade or clearing organization that have not been previously disclosed, in writing, to the Commission, or a certification that no such material changes have occurred.

(F) A description of any significant disciplinary or enforcement actions that have been instituted by or against the foreign board of trade or the clearing organization or the senior officers of either during the prior year.

(G) A written description of any material changes to the regulatory regime to which the foreign board of trade or the clearing organization are subject that have not been previously disclosed, in writing, to the Commission, or a certification that no material changes have occurred.

(2) The above-referenced annual reports must be signed by an officer of the foreign board of trade or the clearing organization who maintains the authority to bind the foreign board of trade or clearing organization, as applicable, and must be based on the officer’s personal knowledge.

(c) Additional Specified Conditions for Foreign Boards of Trade with Linked Contacts. If a registered foreign board of trade grants members or other participants direct access and makes available for trading a linked contract, the following additional conditions apply:

(1) Statutory Conditions.

(i) The foreign board of trade will make public daily trading information regarding the linked contract that is comparable to the daily trading information published by the registered entity for the contract to which it is linked; and

(ii) The foreign board of trade (or its regulatory authority) will:

(A) Adopt position limits (including related hedge exemption provisions) applicable to all market participants for the linked contract that are comparable to the position limits (including related hedge exemption provisions) adopted by the registered entity for the contract to which it is linked;

(B) Have the authority to require or direct any market participant to limit, reduce, or liquidate any position the foreign board of trade (or its regulatory authority) determines to be necessary to prevent or reduce the threat of price manipulation, excessive speculation as described in section 4a of the Act, price distortion, or disruption of delivery on the cash settlement process;

(C) Agree to promptly notify the Commission, with regard to the linked contract, of any change regarding—
§ 48.9 Revocation of registration.

(a) Failure to Satisfy Registration Requirements or Conditions:

(1) If the Commission determines that a registered foreign board of trade or the clearing organization has failed to satisfy any registration requirements or conditions for registration, the Commission shall notify the foreign board of trade or clearing organization of such determination, including the particular requirements or conditions that are not being satisfied, and shall afford the foreign board of trade or clearing organization an opportunity to make appropriate changes to bring it into compliance.

(2) If, not later than 30 days after receiving a notification under paragraph (a)(1) of this section, the foreign board of trade or clearing organization fails to make changes that, in the opinion of the Commission, are necessary to comply with the registration requirements or conditions of registration, the Commission may revoke the foreign board of trade’s registration, after providing the foreign board of trade with respect to the linked contracts.

(iv) The foreign board of trade will provide to the Commission copies of all reports of disciplinary action involving the foreign board of trade’s linked contracts upon closure of the action. Such reports should include the reason the action was undertaken, the results of the investigation that led to the disciplinary action, and any sanctions imposed.

(v) In the event that the Commission, pursuant to its emergency powers authority, directs that the registered entity which lists the contract to which the foreign board of trade’s contract is linked to take emergency action with respect to a linked contract (for example, to cease trading in the contract), the foreign board of trade, subject to information-sharing arrangements between the Commission and its regulatory authority, will promptly take similar action with respect to the linked contract.

§ 48.9 Revocation of registration.

(a) Failure to Satisfy Registration Requirements or Conditions:

(1) If the Commission determines that a registered foreign board of trade or the clearing organization has failed to satisfy any registration requirements or conditions for registration, the Commission shall notify the foreign board of trade or clearing organization of such determination, including the particular requirements or conditions that are not being satisfied, and shall afford the foreign board of trade or clearing organization an opportunity to make appropriate changes to bring it into compliance.

(2) If, not later than 30 days after receiving a notification under paragraph (a)(1) of this section, the foreign board of trade or clearing organization fails to make changes that, in the opinion of the Commission, are necessary to comply with the registration requirements or conditions of registration, the Commission may revoke the foreign board of trade’s registration, after providing the foreign board of trade with respect to the linked contracts.

(iv) The foreign board of trade will provide to the Commission copies of all reports of disciplinary action involving the foreign board of trade’s linked contracts upon closure of the action. Such reports should include the reason the action was undertaken, the results of the investigation that led to the disciplinary action, and any sanctions imposed.

(v) In the event that the Commission, pursuant to its emergency powers authority, directs that the registered entity which lists the contract to which the foreign board of trade’s contract is linked to take emergency action with respect to a linked contract (for example, to cease trading in the contract), the foreign board of trade, subject to information-sharing arrangements between the Commission and its regulatory authority, will promptly take similar action with respect to the linked contract.
apply for re-registration 360 days after
the issuance of the Order Revoking
Registration if the deficiency causing
the revocation has been cured or rel-
levant facts and circumstances have
changed.
(b) Other Events that Could Result in
Revocation. Notwithstanding §48.9(a),
revocation under these circumstances
will be handled by the Commission as
relevant facts or circumstances war-
rant.
(1) The Commission may revoke a
foreign board of trade’s registration,
after appropriate notice and an oppor-
tunity to respond, if the Commission
determines that a representation made
in the foreign board of trade’s applica-
tion for registration is found to be un-
true or materially misleading or if the
foreign board of trade failed to include
information in the application that
would have been material to the Com-
misson’s determination as to whether
to issue an Order of Registration.
(2) The Commission may revoke a
foreign board of trade’s registration,
after appropriate notice and an oppor-
tunity to respond, if there is a material
change in the regulatory regime appli-
cable to the foreign board of trade or
clearing organization such that the
regulatory regime no longer satisfies
any registration requirement or condi-
tion for registration applicable to the
regulatory regime.
(3) The Commission may revoke a
foreign board of trade’s registration in
the event of an emergency or in a cir-
cumstance where the Commission de-
termines that revocation would be ne-
necessary or appropriate in the public in-
terest. Following revocation, the Com-
misson will provide notice and an op-
tportunity to respond.
(4) The Commission may revoke a
foreign board of trade’s registration in
the event the foreign board of trade or
the clearing organization is no longer
authorized, licensed or registered, as
applicable, as a regulated market and/
or exchange or clearing organization or
ceases to operate as a foreign board of
trade or clearing organization, subject
to notice and an opportunity to re-
pond.
(c) Upon request by the Commission,
a registered foreign board of trade
must file with the Commission a writ-
ten demonstration, containing such
supporting data, information, and doc-
uments, in such form and manner and
within such timeframe as the Commis-
mion may specify, that the foreign
board of trade or clearing organization
is in compliance with the registration
requirements and/or conditions for reg-
istration.
§ 48.10 Additional contracts.
(a) Generally. A registered foreign
board of trade that wishes to make an
additional futures, option or swap con-
tact available for trading by identified
members or other participants located
in the United States with direct access
to its electronic trading and order
matching system must submit a writ-
ten request prior to offering the con-
tacts from within the United States.
Such a written request must include
the terms and conditions of the addi-
tional futures, option or swap con-
tacts and a certification that the addi-
tional contracts meet the requirements
of §48.8(c), if applicable, and that the
foreign board of trade and the clearing
organization continue to satisfy the re-
quirements and conditions of registra-
tion. The foreign board of trade can
make available for trading by direct
access the additional contracts ten
business days after the date of receipt
by the Commission of the written re-
quest, unless the Commission notifies
the foreign board of trade that addi-
tional time is needed to complete its
review of policy or other issues perti-
nent to the additional contracts. A reg-
istered foreign board of trade may list
for trading by direct access an addi-
tional futures or option contract on a
non-narrow-based security index pursu-
ant to the Commission certification
procedures set forth in §30.13(d) and ap-
pendix D to part 30 of this chapter.
(b) Option contracts on previously ap-
proved futures contracts. (1) If the option
is on a futures contract that is not a
linked contract, the option contract
may be made available for trading by
direct access by filing with the Com-
misson no later than the business day
preceding the initial listing of the con-
tact:
(1) A copy of the terms and condi-
tions of the additional contract and
(i) A certification that the foreign board of trade and the clearing organization continue to satisfy the conditions of its registration.

(2) If the option is on a futures contract that is a linked contract, the option contract may be made available for trading by direct access by filing with the Commission no later than the business day preceding the initial listing of the contract:

(i) A copy of the terms and conditions of the additional contract; and

(ii) A certification that the foreign board of trade and the clearing organization continue to satisfy the conditions of its registration.

(2) If the option is on a futures contract that is a linked contract, the option contract may be made available for trading by direct access by filing with the Commission no later than the business day preceding the initial listing of the contract:

(i) A copy of the terms and conditions of the additional contract; and

(ii) A certification that the foreign board of trade and the clearing organization continue to satisfy the conditions of its registration.

(3) If the option is on a non-narrow-based security index futures contract which may be offered or sold in the United States pursuant to a Commission certification issued pursuant to §30.13 of this chapter, the option contract may be listed for trading by direct access without further action by either the registered foreign board of trade or the Commission.

APPENDIX TO PART 48—FORM FBOT

COMMODITY FUTURES TRADING COMMISSION

FORM FBOT

FOREIGN BOARD OF TRADE APPLICATION FOR REGISTRATION (IN ORDER TO PERMIT DIRECT ACCESS TO MEMBERS AND OTHER PARTICIPANTS)

APPLICATION INSTRUCTIONS

DEFINITIONS

1. Unless the context requires otherwise, all terms used in this application have the same meaning as in the Commodity Exchange Act, as amended (CEA or Act),1 and in the regulations of the Commodity Futures Trading Commission (Commission or CFTC).2

2. For the purposes of this Form FBOT, the term “applicant” refers to the foreign board of trade applying for registration pursuant to CEA section 4(b) and part 48 of the Commission’s regulations. The term “clearing organization” refers to the clearing organization that will be clearing trades executed on the trading system of such foreign board of trade.

GENERAL INSTRUCTIONS

1. A Form FBOT (including exhibits) shall be completed by any foreign board of trade applying for registration with the Commission pursuant to CEA section 4(b) and part 48 of the Commission’s regulations.

2. Form FBOT (including exhibits and any supplement thereto) (collectively, the “application” or “application for registration”) must be filed electronically with the Secretary of the Commission at FBOTapplications@cftc.gov. Applicants may prepare their own Form FBOT, but must follow the format prescribed herein.

3. The name of any individual listed in Form FBOT shall be provided in full (Last Name, First Name and Middle Name or Initial).

4. Form FBOT must be signed by the Chief Executive Officer (or the functional equivalent) of the foreign board of trade who must possess the authority to bind the foreign board of trade.

5. If this Form FBOT is being filed as a new application for registration, all applicable items on the Form FBOT must be answered in full. Non-applicable items should be indicated by marking “none” or “N/A.”

6. Submission of a complete Form FBOT (including all information, documentation and exhibits requested therein, and any required supplement) is mandatory and must be received by the Commission before it will begin to process a foreign board of trade’s application for registration. The information provided with a Form FBOT (including exhibits and any supplement thereto) will be used to determine whether the Commission should approve or deny registration to an applicant. Pursuant to its regulations, the Commission may determine that information and/or documentation in addition to that requested in the Form FBOT is required from the applicant in order to process the application for registration or to determine whether registration is appropriate.

7. Pursuant to Commission regulations, an applicant or its clearing organization must identify with particularity any information in the application (including, but not limited to, any information contained in this Form FBOT) that will be the subject of a request for confidential treatment and must provide support for any request for confidential treatment pursuant to the procedures set forth in Commission regulation 145.9.3 Except in cases where confidential treatment is granted by the Commission pursuant to the Freedom of Information Act and Commission regulations, information supplied in the Form FBOT (including exhibits and any supplement thereto) will be included routinely in the public files of the Commission.

17 CFR 145.9.
Applicants and their clearing organizations are encouraged to correspond with the Commission’s Division of Market Oversight regarding any content, procedural, or formatting questions encountered in connection with the preparation of a Form FBOT, or any exhibits or supplements thereto, prior to formally submitting those documents to the Commission. When appropriate, potential applicants and clearing organizations, as applicable, may provide a complete draft Form FBOT (including exhibits and any required supplement) to the Division of Market Oversight for early review to minimize the risk of having a submission returned or otherwise denied as not acceptable for filing. Review of draft submissions by any division of the Commission and any comments provided by a division of the Commission are for consultation purposes only and do not bind the Commission. To obtain instructions for submitting drafts, please contact the Division of Market Oversight.

4Applicants and their clearing organizations are encouraged to correspond with the Commission’s Division of Market Oversight regarding any content, procedural, or formatting questions encountered in connection with the preparation of a Form FBOT, or any exhibits or supplements thereto, prior to formally submitting those documents to the Commission. When appropriate, potential applicants and clearing organizations, as applicable, may provide a complete draft Form FBOT (including exhibits and any required supplement) to the Division of Market Oversight for early review to minimize the risk of having a submission returned or otherwise denied as not acceptable for filing. Review of draft submissions by any division of the Commission and any comments provided by a division of the Commission are for consultation purposes only and do not bind the Commission. To obtain instructions for submitting drafts, please contact the Division of Market Oversight.

determines that a representation made in this Form FBOT is found to be untrue or materially misleading or if the foreign board of trade failed to include information in this Form FBOT that would have been material to the Commission’s determination as to whether to issue an Order of Registration.

9. In addition to this Form FBOT, the clearing organization associated with the foreign board of trade must complete and submit Supplement S-1 to this Form FBOT in accordance with the instructions thereto. To the extent a single document or description is responsive to more than one request for the same information in either the Form FBOT or the Supplement S-1, the document or description need only be provided once and may be cross-referenced elsewhere.

10. All documents submitted as part of this Form FBOT (or exhibits thereto) must be written in English or accompanied by a certified English translation.

UPDATING INFORMATION ON THE FORM FBOT

Pursuant to the Commission’s regulations, if any information or documentation contained in this Form FBOT (including exhibits or any supplement or amendment thereto) is or becomes inaccurate for any reason prior to the issuance of an Order of Registration, an amendment correcting such information must be filed promptly with the Commission. A registered foreign board of trade also may submit an amendment to this Form FBOT to correct information that has become inaccurate subsequent to the receipt of an Order of Registration.
COMMODITY FUTURES TRADING COMMISSION

FORM FBOT

FOREIGN BOARD OF TRADE APPLICATION FOR REGISTRATION (IN ORDER TO PERMIT DIRECT ACCESS TO MEMBERS AND OTHER PARTICIPANTS)

Name of applicant as specified in organizational documents

Address of principal executive office

☐ If this Form FBOT is a new application for registration, complete in full and check here.

☐ If this Form FBOT is an amendment to a pending application or to a final application that resulted in the issuance of an Order of Registration, list and/or describe all items that are amended or otherwise updated and check here.

When appropriate, please attach additional page(s) containing a list and explanatory statement of amendment(s) or update(s).

GENERAL INFORMATION

1. Name under which the business of the foreign board of trade will be conducted, if different than name specified above:
2. List of principal office(s) where foreign board of trade activities are/will be conducted (please use multiple entries, when applicable):

   Office (name and/or location): ____________________________
   Address: ____________________________________________
   ____________________________________________
   ____________________________________________
   Phone Number: ____________________________
   Fax Number: ____________________________
   Website Address: ____________________________

3. Contact Information.

3a. Primary Contact for Form FBOT (i.e., the person authorized to receive Commission correspondence in connection with this Form FBOT and to whom questions regarding the submission should be directed):

   Name: ____________________________
   Title: ____________________________
   Email Address: ____________________________
   Mailing Address: ____________________________
   ____________________________________________
   ____________________________________________
   Phone Number: ____________________________
   Fax Number: ____________________________
3b. If different than above, primary contact at the foreign board of trade that is authorized to receive all forms of Commission correspondence:

Name:

Title:

Email Address:

Mailing Address:

Phone Number:

Fax Number:

BUSINESS ORGANIZATION

Describe organizational history, including date and, if applicable, location of filing of original organizational documentation, and describe all substantial amendments or changes thereto. For example:

[Foreign Board of Trade] is a [corporation, partnership, limited liability company, or other applicable organizational designation], having filed its [articles of incorporation, certificate of formation, articles of organization, other applicable organizational formation document] with the [applicable regulatory body] in [city, state/province, country] on [applicable date].
INSTRUCTIONS FOR EXHIBITS TO FORM FBOT

1. The following exhibits must be filed with the Commission by any foreign board of trade (1) seeking registration for purposes of granting direct access to its members and other participants or (2) amending a previously submitted application, pursuant to

SIGNATURES

By signing and submitting this Form FBOT, the applicant agrees to and consents that the notice of any proceeding before the Commission in connection with the foreign board of trade’s application for registration or registration with the Commission may be given by sending such notice by certified mail or similar secured correspondence to the persons specified in sections 3a and 3b above.

______________ [Name of the Foreign Board of Trade] has duly caused this Form FBOT to be signed on its behalf by the undersigned, hereunto duly authorized, this ____________ [Number] day of ________________________ [Month], _______ [Year]. ________________ [Name of the Foreign Board of Trade] and the undersigned represent that all information and representations contained herein are true, current, and complete. It is understood that all information, documentation, and exhibits are considered integral parts of this Form FBOT. The submission of any amendment to Form FBOT represents that all items and exhibits not so amended remain true, current, and complete as previously filed.

__________________________
Signature of Chief Executive Officer (or functional equivalent), on behalf of the Foreign Board of Trade

__________________________
Title

__________________________
Name of Foreign Board of Trade
Commodity Futures Trading Commission

2. The exhibits should be filed in accordance with the General Instructions to this Form FBOT and labeled as specified herein. If any exhibit is not applicable, please specify the exhibit letter and number and indicate by marking “none” or “N/A.” If any exhibit may be satisfied by documentation or information submitted in a different exhibit, the documentation or information need not be submitted more than once—please use internal cross-references where appropriate.

GENERAL REQUIREMENTS

A foreign board of trade applying for registration must submit sufficient information and documentation to successfully demonstrate to Commission staff that the foreign board of trade and its clearing organization satisfy all of the requirements of Commission regulation 48.7. With respect to its review of the foreign board of trade, the Commission anticipates that such information and documentation would necessarily include, but not be limited to, the following:

ATTACH EXHIBIT A—GENERAL INFORMATION AND DOCUMENTATION

Attach, as Exhibit A–1, a description of the following for the foreign board of trade: Location, history, size, ownership and corporate structure, governance and committee structure, current or anticipated presence of offices or staff in the United States, and anticipated volume of business emanating from members and other participants that will be provided direct access to the foreign board of trade’s trading system.

Attach, as Exhibit A–2, the following:

(i) Professional Qualification. A description of the specific professional requirements, qualifications, and/or competencies required of members or other participants and/or their staff and a description of the process by which the foreign board of trade confirms compliance with these requirements. The description should include, but not be limited to, the following:

(ii) Authorization, Licensure and Registration. A description of any regulatory and self-regulatory authorization, licensure or registration requirements that the foreign board of trade imposes upon, or enforces against, its members and other participants including, but not limited to any authorization, licensure or registration requirements imposed by the regulatory regime/authority in the home country jurisdiction(s) of the foreign board of trade. Please also include a description of the process by which the foreign board of trade confirms compliance with such requirements.

(iii) Financial Integrity. A description of the following:
(A) The financial resource requirements, standards, guides or thresholds required of members and other participants.

(B) The manner in which the foreign board of trade evaluates the financial resources/holdings of its members or participants.

(C) The process by which applicants demonstrate compliance with financial requirements for membership or participation including, as applicable:

(i) Working capital and collateral requirements, and

(ii) Risk management mechanisms for members allowing customers to place orders.

(iv) Fit and Proper Standards. A description of how the foreign board of trade ensures that potential members/other participants meet fit and proper standards.

EXHIBIT C—BOARD AND/OR COMMITTEE MEMBERSHIP

Attach, as Exhibit C, the following:

(1) A description of the requirements applicable to membership on the governing board and significant committees of the foreign board of trade.

(2) A description of the process by which the foreign board of trade ensures that potential governing board and committee members/other participants meet these standards.

(3) A description of the provisions to minimize and resolve conflicts of interest with respect to membership on the governing board and significant committees of the foreign board of trade.

(4) A description of the rules with respect to the disclosure of material non-public information obtained as a result of a member’s or other participant’s performance on the governing board or significant committee.

EXHIBIT D—THE AUTOMATED TRADING SYSTEM

Attach, as Exhibit D–1, a description of the automated trading system, separately labeling each description:

(1) The order matching/trade execution system, including a complete description of all permitted ways in which members or other participants (or their customers) may connect to the trade matching/executing system and the related requirements (for example, authorization agreements).

(2) The architecture of the systems, including hardware and distribution network, as well as any pre- and post-trade risk-management controls that are made available to system users.

(3) The security features of the systems.

(4) The length of time such systems have been operating.

(6) Any significant system failures or interruptions.

(6) The nature of any technical review of the order matching/trade execution system performed by the foreign board of trade, the home country regulator, or a third party.

(7) Trading hours.

(8) Types and duration of orders accepted.

(9) Information that must be included on orders.

(10) Trade confirmation and error trade procedures.

(11) Anonymity of participants.

(12) Trading system connectivity with clearing system.

(13) Response time.

(14) Ability to determine depth of market.

(15) Market continuity provisions.

(16) Reporting and recordkeeping requirements.

Attach, as Exhibit D–2, a description of the manner in which the foreign board of trade assures the following with respect to the trading system, separately labeling each description:

(1) Algorithm. The trade matching algorithm matches trades fairly and timely.

(2) IOSCO Principles. The trading system complies with the Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions (IOSCO Principles). Provide a copy of any independent certification received or self-certification performed and identify any system deficiencies with respect to the IOSCO Principles.

(3) Audit Trail.

(i) The audit trail timely captures all relevant data, including changes to orders.

(ii) Audit trail data is securely maintained and available for an adequate time period.

(4) Public Data. Adequate and appropriate trade data is available to users and the public.

(5) Reliability. The trading system has demonstrated reliability.

(6) Secure Access. Access to the trading system is secure and protected.

(7) Emergency Provisions. There are adequate provisions for emergency operations and disaster recovery.

(8) Data Loss Prevention. Trading data is backed up to prevent loss of data.

(9) Contracts Available. Mechanisms are available to ensure that only those futures, option or swap contracts that have been identified to the Commission as part of the application or permitted to be made available for trading by direct access pursuant to the procedures set forth in §48.10 are made available for trading by direct access.

(10) Predominance of the Centralized Market. Mechanisms are available that ensure a competitive, open, and efficient market and mechanism for executing transactions.
EXHIBIT E—THE TERMS AND CONDITIONS OF CONTRACTS PROPOSED TO BE MADE AVAILABLE IN THE UNITED STATES

Attach, as Exhibit E–1, a description of the terms and conditions of futures, option or swap contracts intended to be made available for direct access. With respect to each contract, indicate whether the contract is registered or otherwise treated as a futures, option or swap contract in the regulatory regime(s) of the foreign board of trade’s home country.

As Exhibit E–2, demonstrate that the contracts are not prohibited from being traded by United States persons, i.e., the contracts are not prohibited security futures or single stock contracts or narrow-based index contracts. For non-narrow based stock index futures contracts, demonstrate that the contracts have received Commission certification pursuant to the procedures set forth in §30.13 and appendix D to part 30 of this chapter.

As Exhibit E–3, demonstrate that the contracts are required to be cleared.

As Exhibit E–4, identify any contracts that are linked to a contract listed for trading on a United States-registered entity, as defined in section 1a(40) of the Act. A linked contract is a contract that settles against any price (including the daily or final settlement price) of one or more contracts listed for trading on such registered entity.

As Exhibit E–5, identify any contracts that have any other relationship with a contract listed for trading on a registered entity, i.e., both the foreign board of trade’s and the registered entity’s contract settle to the price of the same third party-constructed index.

As Exhibit E–6, demonstrate that the contracts are not readily susceptible to manipulation. In addition, for each contract to be listed, describe each investigation, action, proceeding or case involving manipulation and involving such contract in the three years preceding the application date, whether initiated by the foreign board of trade, a regulatory or self-regulatory authority or agency or other government or prosecutorial agency. For each such action, proceeding or case, describe the alleged manipulative activity and the current status or resolution thereof.

EXHIBIT F—THE REGULATORY REGIME GOVERNING THE FOREIGN BOARD OF TRADE IN ITS HOME COUNTRY OR COUNTRIES

With respect to each relevant regulatory regime or authority governing the foreign board of trade, attach, as Exhibit F, the following (including, where appropriate, an indication as to whether the applicable regulatory regime is dependent on the home country’s classification of the product being traded on the foreign board of trade as a futures, option, swap, or otherwise, and a description of any difference between the applicable regulatory regime for each product classification type):

1. A description of the regulatory regime/authority’s structure, resources, staff, and scope of authority; the regulatory regime/authority’s authorizing statutes, including the source of its authority to supervise the foreign board of trade; the rules and policy statements issued by the regulator with respect to the authorization and continuing oversight of markets, electronic trading systems, and clearing organizations; and the financial protections afforded customer funds.
2. A description of and, where applicable, copies of the laws, rules, regulations and policies applicable to:
   (i) The authorization, licensure or registration of the foreign board of trade.
   (ii) The regulatory regime/authority’s program for the ongoing supervision and oversight of the foreign board of trade and the enforcement of its trading rules.
   (iii) The financial resource requirements applicable to the authorization, licensure or registration of the foreign board of trade and the continued operations thereof.
   (iv) The extent to which the IOSCO Principles are used or applied by the regulatory regime/authority in its supervision and oversight of the foreign board of trade or are incorporated into its rules and regulations and the extent to which the regulatory regime/authority reviews the applicable trading systems for compliance therewith.

Where multiple foreign boards of trade subject to the same regulatory regime/authority and are similarly regulated are applying for registration at the same time, a single Exhibit E–1 may be submitted as part of the application for all such foreign boards of trade either by one of the applicant foreign boards of trade or by the regulatory regime/authority with responsibility to oversee each of the multiple foreign boards of trade applying for registration. Where an FBOT applying for registration is located in the same jurisdiction and subject to the same regulatory regime as a registered FBOT, the FBOT applying for registration may include by reference, as part of its application, information about the regulatory regime that is posted on the Commission’s Web site. The FBOT applying for registration must certify that the information thus included in the application is directly applicable to it and remains current and valid.

To the extent that any such laws, rules, regulations or policies were provided as part of Exhibit A–5, they need not be duplicated. They may be cross-referenced.
(v) The extent to which the regulatory regime/authority reviews and/or approves the trading rules of the foreign board of trade prior to their implementation.

(vi) The extent to which the regulatory regime/authority reviews and/or approves futures, option or swap contracts prior to their being listed for trading.

(vii) The regulatory regime/authority’s approach to the detection and deterrence of abusive trading practices, market manipulation, and other unfair trading practices or disruptions of the market.

(3) A description of the laws, rules, regulations and policies that govern the authorization and ongoing supervision and oversight of market intermediaries who may deal with members and other participants located in the United States participants, including:

(i) Recordkeeping requirements.

(ii) The protection of customer funds.

(iii) Procedures for dealing with the failure of a market intermediary in order to minimize damage and loss to investors and to contain systemic risk.

(4) A description of the regulatory regime/authority’s inspection, investigation and surveillance powers; and the program pursuant to which the regulatory regime/authority uses those powers to inspect, investigate, and enforce rules applicable to the foreign board of trade.

(5) For both the foreign board of trade and the clearing organization (unless addressed in Supplement S–1), a report confirming that the foreign board of trade and clearing organization are in regulatory good standing, which report should be prepared subsequent to consulting with the regulatory regime/authority governing the activities of the foreign board of trade and any associated clearing organization. The report should include:

(i) Confirmation of regulatory status (including proper authorization, licensure and registration) of the foreign board of trade and clearing organization.

(ii) Any oversight reports generated by the regulatory regime/authority that are, in the judgment of the regulatory regime/authority, relevant to the foreign board of trade’s status as a registered foreign board of trade.

(iii) Disclosure of any significant regulatory concerns, inquiries or investigations by the regulatory regime/authority, including any concerns, inquiries or investigations with regard to the foreign board of trade’s arrangements to monitor trading by members or other participants located in the United States or the adequacy of the risk management controls of the trading or of the clearing system.

(iv) A description of any investigations (formal or informal) or disciplinary actions initiated by the regulatory regime/authority or any other self-regulatory, regulatory or governmental entity against the foreign board of trade, the clearing organization or any of their respective senior officers during the past year.

(6) For both the foreign board of trade and the clearing organization (unless addressed in Supplement S–1), a confirmation that the regulatory regime/authority governing the activities of the foreign board of trade and the clearing organization agree to cooperate with a Commission staff on a “as needed basis,” the objectives of which will be to, among other things, familiarize Commission staff with supervisory staff of the regulatory regime/authority; discuss the laws, rules and regulations that formed the basis of the application and any changes thereto; discuss the cooperation and coordination between the authorities, including, without limitation, information sharing arrangements; and discuss issues of concern as they may develop from time to time (for example, linked contracts or unusual trading that may be of concern to Commission surveillance staff).

EXHIBIT G—THE RULES OF THE FOREIGN BOARD OF TRADE AND ENFORCEMENT THEREOF

Attach, as Exhibit G–1, the following:

A description of the foreign board of trade’s regulatory or compliance department, including its size, experience level, competencies, duties and responsibilities.

Attach, as Exhibit G–2, the following:

A description of the foreign board of trade’s trade practice rules, including but not limited to rules that address the following:

(1) Capacity of the foreign board of trade to detect, investigate, and sanction persons who violate foreign board of trade rules.

(2) Prohibition of fraud and abuse, as well as abusive trading practices including, but not limited to, wash sales and trading ahead, and other market abuses.

(3) A trade surveillance system appropriate to the foreign board of trade and capable of detecting and investigating potential trade practice violations.

(4) An audit trail that captures and retains sufficient order and trade-related data to allow the compliance staff to detect trading and market abuses and to reconstruct all transactions within a reasonable period of time.

(5) Appropriate resources to conduct real-time supervision of trading.

(6) Sufficient compliance staff and resources, including those outsourced or delegated to third parties, to fulfill regulatory responsibilities.

(7) Rules that authorize compliance staff to obtain, from market participants, information and cooperation necessary to conduct effective rule enforcement and investigations.
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(8) Staff investigations and investigation reports demonstrating that the compliance staff investigates suspected rule violations and prepares reports of their finding and recommendations.

(9) Rules determining access requirements with respect to the persons that may trade on the foreign board of trade, and the means by which they connect to it.

(10) The requirement that market participants submit to the foreign board of trade's jurisdiction as a condition of access to the market.

Attach, as Exhibit G–4, the following:

A description of the foreign board of trade's disciplinary rules, including but not limited to rules that address the following—

(1) Disciplinary authority and procedures that empower staff to recommend and prosecute disciplinary actions for suspected rule violations and that provide the authority to fine, suspend, or expel any market participant pursuant to fair and clear standards.

(2) The issuance of warning letters and/or summary fines for specified rule violations.

(3) The review of investigation reports by a disciplinary panel or other authority for issuance of charges or instructions to investigate further, or findings that an insufficient basis exists to issue charges.

(4) Disciplinary committees of the foreign board of trade that take disciplinary action via formal disciplinary processes.

(5) Whether and how the foreign board of trade articulates its rationale for disciplinary decisions.

(6) The sanctions for particular violations and a discussion of the adequacy of sanctions with respect to the violations committed and their effectiveness as a deterrent to future violations.

Attach, as Exhibit G–5, the following:

A description of the market surveillance program (and any related rules), addressing the following—

The dedicated market surveillance department or the delegation or outsourcing of that function, including a general description of the staff; the data collected on traders' market activity; data collected to determine whether prices are responding to supply and demand; data on the size and ownership of deliverable supplies; a description of the manner in which the foreign board of trade detects and deters market manipulation; for cash-settled contracts, methods of monitoring the settlement price or value; and any foreign board of trade position limit, position management, large trader or other position reporting system.

EXHIBIT H—INFORMATION SHARING AGREEMENTS AMONG THE COMMISSION, THE FOREIGN BOARD OF TRADE, THE CLEARING ORGANIZATION, AND RELEVANT REGULATORY AUTHORITIES

Attach, as Exhibit H, the following:

(1) A description of the arrangements among the Commission, the foreign board of trade, the clearing organization, and the relevant foreign regulatory authorities that govern the sharing of information regarding the transactions that will be executed pursuant to the foreign board of trade's registration with the Commission and the clearing and settlement of those transactions. This description should address or identify whether and how the foreign board of trade, clearing organization, and the regulatory authorities governing the activities of the foreign board of trade and clearing organization agree to provide directly to the Commission information and documentation requested by Commission staff that Commission staff determines is needed:

(i) To evaluate the continued eligibility of the foreign board of trade for registration.

(ii) To enforce compliance with the specified conditions of the registration.

(iii) To enable the CFTC to carry out its duties under the Act and Commission regulations and to provide adequate protection to the public or registered entities.

(iv) To respond to potential market abuse associated with trading by direct access on the registered foreign board of trade.

(v) To enable Commission staff to effectively accomplish its surveillance responsibilities with respect to a registered entity where Commission staff, in its discretion, determines that a contract traded on a registered foreign board of trade may affect such ability.

(2) A statement as to whether and how the foreign board of trade has executed the International Information Sharing Memorandum of Understanding and Agreement.

(3) A statement as to whether the regulatory authorities governing the activities of the foreign board of trade and clearing organization are signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding. If not, describe any substitute information-sharing arrangements that are in place.

(4) A statement as to whether the regulatory authorities governing the activities of the foreign board of trade and clearing organization are signatories to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations. If not, a statement as to whether and how they have committed to share the types of information contemplated by the International Information Sharing
Memorandum of Understanding and Agreement with the Commission, whether pursuant to an existing memorandum of understanding or some other arrangement.

EXHIBIT I—ADDITIONAL INFORMATION AND DOCUMENTATION

Attach, as Exhibit I, any additional information or documentation necessary to demonstrate that the requirements for registration applicable to the foreign board of trade set forth in Commission regulation 48.7 are satisfied.

CONTINUATION OF APPENDIX TO PART 48—SUPPLEMENT S–1 TO FORM FBOT

COMMODOITY FUTURES TRADING COMMISSION

SUPPLEMENT S–1 TO FORM FBOT CLEARING ORGANIZATION SUPPLEMENT TO FOREIGN BOARD OF TRADE APPLICATION FOR REGISTRATION

SUPPLEMENT INSTRUCTIONS

DEFINITIONS

1. Unless the context requires otherwise, all terms used in this supplement have the same meaning as in the Commodity Exchange Act, as amended (CEA or Act), and in the regulations of the Commodity Futures Trading Commission (Commission or CFTC).9

2. For the purposes of this Supplement S–1, the term “applicant” refers to the foreign board of trade applying for registration pursuant to CEA section 4(b) and part 48 of the Commission’s regulations. The term “clearing organization” refers to the clearing organization that will be clearing trades executed on the trading system of such foreign board of trade.

GENERAL INSTRUCTIONS

1. A Supplement S–1 (including exhibits) shall be completed by each clearing organization that will be clearing trades executed on the trading system of a foreign board of trade applying for registration with the Commission pursuant to CEA section 4(b) and part 48 of the Commission’s regulations. Each clearing organization shall submit a separate Supplement S–1.

2. In the event that the clearing functions of the foreign board of trade applying for registration will be performed by the foreign board of trade itself, the foreign board of trade shall complete this Supplement S–1, but need not duplicate information provided on its Form FBOT. Specific reference to or incorporation of information or documentation (including exhibits) on the associated Form FBOT, where appropriate, is acceptable. To the extent a singular document or description is responsive to more than one request for information in this Supplement S–1, the document or description need only be provided once and may be cross-referenced elsewhere.

3. Supplement S–1, including exhibits, should accompany the foreign board of trade’s Form FBOT and must be filed electronically with the Secretary of the Commission at FBOTApplications@cftc.gov. Clearing organizations may prepare their own Supplement S–1, but must follow the format prescribed herein.

4. The name of any individual listed in Supplement S–1 shall be provided in full (Last Name, First Name and Middle Name or Initial).

5. Supplement S–1 must be signed by the Chief Executive Officer (or the functional equivalent) of the clearing organization who must possess the authority to bind the clearing organization.

6. If this Supplement S–1 is being filed in connection with a new application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by marking “none” or “N/A.”

7. Submission of a complete Form FBOT and Supplement S–1 (including all information, documentation and exhibits requested therein) is mandatory and must be received by the Commission before it will begin to process a foreign board of trade’s application for registration. The information provided with a Form FBOT and Supplement S–1 will be used to determine whether the Commission should approve or deny registration to an applicant. Pursuant to its regulations, the Commission may determine that information and/or documentation in addition to that requested in the Form FBOT and Supplement S–1 is required from the applicant and/or its clearing organization(s) in order to process the application for registration or to determine whether registration is appropriate.

8. Pursuant to Commission regulations, an applicant or its clearing organization must identify with particularity any information in the application (including, but not limited to, any information contained in this Supplement S–1), that will be the subject of a request for confidential treatment and must provide support for any request for confidential treatment pursuant to the procedures set forth in Commission regulation 145.9.10

Except in cases where confidential treatment is granted by the Commission, pursuant to the Freedom of Information Act and Commission regulations, information supplied in the Supplement S–1 will be included

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9 17 CFR chapter I.

10 17 CFR 145.9.
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routinely in the public files of the Commission and will be available for inspection by any interested person.

9. A Supplement S–1 that is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of either a Form FBOT or Supplement S–1 by the Commission, however, shall not constitute a finding that the either have been filed as required or that the information submitted is verified to be true, current, or complete. The Commission may revoke a foreign board of trade’s registration, after appropriate notice and an opportunity to respond, if the Commission determines that a representation made in this Supplement S–1 is found to be untrue or materially misleading or if the foreign board of trade and/or clearing organization failed to include information in this Supplement S–1 that would have been material to the Commission’s determination as to whether to issue an Order of Registration.

10. All documents submitted as part of this Supplement S–1 (or exhibits thereto) must be written in English or accompanied by a certified English translation.

UPDATING INFORMATION

Pursuant to the Commission’s regulations, if any information or documentation contained in this Supplement S–1 (including exhibits) is or becomes inaccurate for any reason prior to the issuance of an Order of Registration, an amendment correcting such information must be filed promptly with the Commission. A clearing organization also may submit an amendment to this Supplement S–1 to correct information that has become inaccurate subsequent to the issuance of an Order of Registration.
COMMODITY FUTURES TRADING COMMISSION

SUPPLEMENT S-1 to FORM FBOT

CLEARING ORGANIZATION SUPPLEMENT TO

FOREIGN BOARD OF TRADE APPLICATION FOR REGISTRATION

Name of clearing organization as specified in organizational documents

Address of principal executive office

Name of the foreign board of trade on associated Form FBOT

☐ If this Supplement S-1 is accompanying a new application for registration, please complete in full and check here.

☐ If this Supplement S-1 is an amendment to a pending application for registration, or to a final application that resulted in the issuance of an Order of Registration, please list all items that are amended or otherwise updated and check here.

When appropriate, please attach additional page(s) containing a list and explanatory statement of amendment(s) or update(s).
REGISTERED DERIVATIVES CLEARING ORGANIZATIONS

If the clearing organization is registered with the Commission in good standing as a derivatives clearing organization (DCO), please indicate by checking here:

☐ CFTC-registered DCO.

If the clearing organization is registered with the Commission in good standing as a DCO, the clearing organization need not complete the remainder of the Supplement S-1.

GENERAL INFORMATION

1. Name under which the business of the clearing organization will be conducted, if different than name specified above:

2. List of principal office(s) where clearing organization activities are/will be conducted (please use multiple entries, when applicable):

   Office (name and/or location):

   Address:

   Phone Number:

   Fax Number:
3. Contact Information.

3a. Primary Contact for Supplement S-1 (i.e., the person authorized to receive Commission correspondence in connection with this Supplement S-1 and to whom questions regarding the submission should be directed):

Name: 
Title: 
Email Address: 
Mailing Address: 

Phone Number: 
Fax Number: 

3b. If different than above, primary contact at the clearing organization that is authorized to receive all forms of Commission correspondence:

Name: 
Title: 
Email Address: 
Mailing Address: 

...
BUSDNESS ORGANIZATION

Describe organization history, including date and, if applicable, location of filing of original organizational documentation, and describe all substantial amendments or changes thereto. For example:

[Clearing organization] is a [corporation, partnership, limited liability company, or other applicable organizational designation], having filed its [articles of incorporation, certificate of formation, articles of organization, other applicable organizational formation document] with the [applicable regulatory body] in [city, state/province, country] on [applicable date].

SIGNATURES

By signing and submitting this Supplement S-1, the clearing organization agrees to and consents that the notice of any proceeding before the Commission in connection with the associated foreign board of trade’s application for registration or registration with the Commission may be given by sending such notice by certified mail or similar secured correspondence to the persons specified in sections 3a and 3b above.
INSTRUCTIONS FOR EXHIBITS TO SUPPLEMENT S-1

1. The following exhibits must be filed with the Commission by the clearing organization(s) that will be clearing trades executed on the trading system of a foreign board of trade applying for registration with the Commission pursuant to CEA section 4(b) and part 48 of Commission’s regulations. The information and documentation requested relates to the activities of the clearing organization.
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2. The exhibits should be filed in accordance with the General Instructions to this Supplement S–1 and labeled as specified herein. If any exhibit is not applicable, please specify the exhibit letter and number and indicate by marking “none” or “N/A.” If any exhibit may be satisfied by documentation or information submitted in a different exhibit, the documentation or information need not be submitted more than once—please use internal cross-references where appropriate.

GENERAL REQUIREMENTS

A foreign board of trade applying for registration must submit sufficient information and documentation to successfully demonstrate to Commission staff that the foreign board of trade and its clearing organization satisfy all of the requirements of Commission regulation 48.7. With respect to its review of the foreign board of trade’s clearing organization, the Commission anticipates that such information and documentation would necessarily include, but not be limited to, the following:

EXHIBIT A—GENERAL INFORMATION AND DOCUMENTATION

Attach, as EXHIBIT A–1, a description of the following for the clearing organization:
Location, history, size, ownership and corporate structure, governance and committee structure, and current or anticipated presence of staff in the United States.

Attach, as EXHIBIT A–2, the following:
Articles of association, constitution, or other similar organizational documents.

Attach, as EXHIBIT A–3, the following:
(a) The categories of membership and participation agreements.
(b) Clearing agreements.

c. The national statutes, laws and regulations governing the activities of the clearing organization and its members.

Attach, as EXHIBIT A–4, the following:
The current rules, regulations, guidelines and bylaws of the clearing organization.

Attach, as EXHIBIT A–5, the following:
Evidence of the authorization, licensure or registration of the clearing organization pursuant to the regulatory regime in its home country jurisdiction(s) and a representation by its regulator(s) that it is in good regulatory standing in the capacity in which it is authorized, licensed or registered.

Attach, as EXHIBIT A–6, the following document:
A summary of any disciplinary or enforcement actions or proceedings that have been brought against the clearing organization, or any of the senior officers thereof, in the past five years and the resolution of those actions or proceedings.

Attach, as EXHIBIT A–7, the following document:
An undertaking by the chief executive officer(s) (or functional equivalent[s]) of the clearing organization to notify Commission staff promptly if any of the representations made in connection with this supplement cease to be true or correct, or become incomplete or misleading.

EXHIBIT B—MEMBERSHIP CRITERIA

Attach, as EXHIBIT B, the following, separately labeling each description:
(i) Professional Qualification. A description of the specific professional requirements, qualifications, and/or competencies required of members or other participants and/or their staff and a description of the process by which the clearing organization confirms compliance with such requirements.

(ii) Authorization, Licensure and Registration. A description of all requirements for each category of membership and participation and the manner in which members and other participants are required to demonstrate their compliance with these requirements. The description should include, but not be limited to, the following:

(a) The financial resource requirements, standards, guides or thresholds required of members or other participants.

(b) The manner in which the clearing organization evaluates the financial resources/holdings of its members or other participants including, but not limited to any authorization, licensure or registration requirements imposed by the regulatory regime/authority in the home country jurisdiction(s) of the clearing organization, and a description of the process by which the clearing organization confirms compliance with such requirements.

(iii) Financial Integrity. A description of the following:

(a) The financial resource requirements, standards, guides or thresholds required of members or other participants.

(b) The manner in which the clearing organization evaluates the financial resources/holdings of its members or other participants.

(c) The process by which applicants for clearing membership or participation demonstrate compliance with financial requirements including:

(1) Working capital and collateral requirements.

(2) Risk management mechanisms.

(iv) Fit and Proper Standards. A description of any other ways in which the clearing organization
organization ensures that potential members/other participants meet fit and proper standards.

EXHIBIT C—BOARD AND/OR COMMITTEE MEMBERSHIP

Attach, as Exhibit C, the following:

(1) A description of the requirements applicable to membership on the governing board and significant committees of the clearing organization.

(2) A description of the clearing organization’s provisions to minimize and resolve conflicts of interest with respect to membership on the governing board and significant committees of the clearing organization.

(4) A description of the clearing organization’s role and responsibilities of the clearing organization.

(5) A description of the clearing organization’s policies and procedures to minimize and resolve conflicts of interest with respect to membership on the governing board and significant committees of the clearing organization.

EXHIBIT D—SETTLEMENT AND CLEARING

Attach, as Exhibit D–1, the following:

A description of the clearing and settlement systems, including, but not limited to, the manner in which such systems interface with the foreign board of trade’s trading system and its members and other participants.

Attach, as Exhibit D–2, the following:

A certification, signed by the chief executive officer (or functional equivalent) of the clearing organization, that the clearing system observes (1) the current Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, as updated, revised or otherwise amended, or (2) successor standards, principles and guidance for central counterparties or financial market infrastructures adopted jointly by the Committee on Payment and Settlement Systems or the International Organization of Securities Commissions (RCCPs).

Attach, as Exhibit D–3, the following:

A detailed description of the manner in which the clearing organization observes each of the RCCPs or successor standards and documentation supporting the representations made, including any relevant rules or written policies or procedures of the clearing organization. Each RCCP should be addressed separately within the exhibit.

EXHIBIT E—THE REGULATORY REGIME GOVERNING THE CLEARING ORGANIZATION IN ITS HOME COUNTRY OR COUNTRIES

With respect to each relevant regulatory regime or authority governing the clearing organization, attach, as Exhibit E, the following:

(1) A description of the regulatory regime/authority’s structure, resources, staff and scope of authority.

(2) The regulatory regime/authority’s authorizing statutes, including the source of its authority to supervise the clearing organization.

(3) A description of and, where applicable, copies of the laws, rules, regulations and policies applicable to:

(i) The authorization, licensure or registration of the clearing organization.

(ii) The financial resource requirements applicable to the authorization, licensure or registration of the clearing organization and the continued operations thereof.

(iii) The regulatory regime/authority’s program for the ongoing supervision and oversight of the clearing organization and the enforcement of its clearing rules.

(iv) The extent to which the current RCCPs are used or applied by the regulatory regime/authority in its supervision and oversight of the clearing organization or are incorporated into its rules and regulations and the extent to which the regulatory regime/authority reviews the clearing systems for compliance therewith.

(v) The extent to which the regulatory regime/authority reviews and/or approves the rules of the clearing organization prior to their implementation.

(vi) The regulatory regime/authority’s inspection, investigation and surveillance powers; and the program pursuant to which the regulatory regime/authority uses those powers to inspect, investigate, sanction, and enforce rules applicable to the clearing organization.

(vii) The financial protection afforded customer funds.

EXHIBIT F—THE RULES OF THE CLEARING ORGANIZATION AND ENFORCEMENT THEREOF

Attach, as Exhibit F–1, the following:

A description of the clearing organization’s regulatory or compliance department, including its size, experience level, competencies, duties and responsibilities of staff.

Attach, as Exhibit F–2, the following:

To the extent that any such laws, rules, regulations or policies were provided as part of Exhibit A–4, they need not be duplicated. They may be cross-referenced.
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A description of the clearing organization’s rules and how they are enforced, with reference to any rules provided as part of Exhibit A–5 that require the clearing organization to comply with one or more of the RCCPs.

Attach, as Exhibit P–3, the following, to the extent not included in Exhibit F–2:

A description of the clearing organization’s disciplinary rules, including but not limited to rules that address the following—

(1) Disciplinary authority and procedures that empower staff to recommend and prosecute disciplinary actions for suspected rule violations and that provide the authority to fine, suspend, or expel any clearing participant pursuant to fair and clear standards.

(2) The issuance of warning letters and/or summary fines for specified rule violations.

(3) The review of investigation reports by a disciplinary panel or other authority for issuance of charges or instructions to investigate further, or findings that an insufficient basis exists to issue charges.

(4) Disciplinary committees of the clearing organization that take disciplinary action via formal disciplinary processes.

(5) Whether and how the clearing organization articulates its rationale for disciplinary decisions.

(6) The sanctions for particular violations and a discussion of the adequacy of sanctions with respect to the violations committed and their effectiveness as deterrents to future violations.

Attach, as Exhibit P–4, the following, to the extent not provided in Exhibit F–2:

A demonstration that the clearing organization is authorized by rule or contractual agreement to obtain, from members and other participants, any information and cooperation necessary to conduct investigations, to effectively enforce its rules, and to ensure compliance with the conditions of registration.

EXHIBIT G—INFORMATION SHARING AGREEMENTS AMONG THE COMMISSION, THE FOREIGN BOARD OF TRADE, THE CLEARING ORGANIZATION, AND RELEVANT REGULATORY AUTHORITIES

Attach, as Exhibit G, the following:

(1) A description of the arrangements among the Commission, the foreign board of trade, the clearing organization, and the relevant foreign regulatory authorities that govern the sharing of information regarding the transactions that will be executed pursuant to the foreign board of trade’s registration with the Commission and the clearing and settlement of those transactions. This description should address or identify whether and how the foreign board of trade, clearing organization, and the regulatory authorities governing the activities of the foreign board of trade and clearing organization agree to provide directly to the Commission information and documentation requested by Commission staff that Commission staff determines is needed:

(i) To evaluate the continued eligibility of the foreign board of trade for registration.

(ii) To enforce compliance with the specified conditions of the registration.

(iii) To enable the CFTC to carry out its duties under the Act and Commission regulations and to provide adequate protection to the public.

(iv) To respond to potential market abuse associated with trading by direct access on the registered foreign board of trade.

(2) A statement as to whether the regulatory authorities governing the activities of the foreign board of trade and clearing organization are signatories to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations. If not, a statement as to whether and how the foreign board of trade and clearing organization are signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding. If not, describe any substitute information-sharing arrangements that are in place.

(3) A statement as to whether the regulatory authorities governing the activities of the foreign board of trade and clearing organization are signatories to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations. If not, a statement as to whether and how they have committed to share the types of information contemplated by the International Information Sharing Memorandum of Understanding and Agreement with the Commission, whether pursuant to an existing memorandum of understanding or some other arrangement.

EXHIBIT H—ADDITIONAL INFORMATION AND DOCUMENTATION

Attach, as Exhibit H, any additional information or documentation necessary to demonstrate that the requirements for registration applicable to the clearing organization or clearing system set forth in Commission regulation 48.7 are satisfied.

PART 49—SWAP DATA REPOSITORIES

Sec.
49.1 Scope.
49.2 Definitions.
49.3 Procedures for registration.
49.4 Withdrawal from registration.
49.5 Equity interest transfers.
49.6 Registration of successor entities.
49.7 Swap data repositories located in foreign jurisdictions.
§ 49.1 Scope.
The provisions of this part apply to any swap data repository as defined under Section 1a(48) of the Act which is registered or is required to register as such with the Commission pursuant to Section 21(a) of the Act.

§ 49.2 Definitions.
(a) As used in this part:
(1) Affiliate. The term “affiliate” means a person that directly, or indirectly, controls, is controlled by, or is under common control with, the swap data repository.
(2) Asset Class. The term “asset class” means the particular broad category of goods, services or commodities underlying a swap. The asset classes include credit, equity, interest rates, foreign exchange, other commodities, and such other asset classes as may be determined by the Commission.
(3) Commercial Use. The term “commercial use” means the use of swap data held and maintained by a registered swap data repository for a profit or business purposes. The use of swap data for regulatory purposes and/or responsibilities by a registered swap data repository would not be considered a commercial use regardless of whether the registered swap data repository charges a fee for reporting such swap data.
(4) Control. The term “control” (including the terms “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.
(5) Foreign Regulator. The term “foreign regulator” means a foreign futures authority as defined in Section 1a(26) of the Act, foreign financial supervisors, foreign central banks and foreign ministries.
(6) Independent Perspective. The term “independent perspective” means a viewpoint that is impartial regarding competitive, commercial, or industry concerns and contemplates the effect of a decision on all constituencies involved.
(7) Market Participant. The term “market participant” means any person participating in the swap market, including, but not limited to, designated contract markets, derivatives clearing organizations, swaps execution facilities, swap dealers, major swap participants, and any other counterparties to a swap transaction.
(8) Non-affiliated third party. The term “non-affiliated third party” means any person except:
(i) The swap data repository;
(ii) The swap data repository’s affiliate; or
(iii) A person employed by a swap data repository and any entity that is not the swap data repository’s affiliate (and “non-affiliated third party” includes such entity that jointly employs the person).
(9) Person Associated with a Swap Data Repository. The term “person associated with a swap data repository” means:
(i) Any partner, officer, or director of such swap data repository (or any person occupying a similar status or performing similar functions);
(ii) Any person directly or indirectly controlling, controlled by, or under common control with such swap data repository; or
(iii) Any person employed by such swap data repository.

(10) Position. The term “position” means the gross and net notional amounts of open swap transactions aggregated by one or more attributes, including, but not limited to, the:
(i) Underlying instrument;
(ii) Index, or reference entity;
(iii) Counterparty;
(iv) Asset class;
(v) Long risk of the underlying instrument, index, or reference entity; and
(vi) Short risk of the underlying instrument, index, or reference entity.

(11) Registered Swap Data Repository. The term “registered swap data repository” means a swap data repository that is registered under Section 21 of the Act.

(12) Reporting Entity. The term “reporting entity” means those entities that are required to report swap data to a registered swap data repository. These reporting entities include designated contract markets, swaps execution facilities, derivatives clearing organizations, swap dealers, major swap participants and certain non-swap dealers/non-major swap participant counterparties.

(13) SDR Information. The term “SDR Information” means any information that the swap data repository receives or maintains.

(14) Section & Material. The term “Section & Material” means the business transactions, trade data, or market positions of any person and trade secrets or names of customers.

(15) Swap Data. The term “swap data” means the specific data elements and information set forth in part 45 of this chapter that is required to be reported by a reporting entity to a registered swap data repository.

(b) Defined Terms. Capitalized terms not defined in this part shall have the meanings assigned to them in §1.3 of this chapter.

§ 49.3 Procedures for registration.

(a) Application procedures. (1) An applicant, person or entity desiring to be registered as a swap data repository shall file electronically an application for registration on Form SDR provided in appendix A to this part, with the Secretary of the Commission at its headquarters in Washington, DC in a format and in the manner specified by the Secretary of the Commission in accordance with the instructions contained therein.

(2) The application shall include information sufficient to demonstrate compliance with core principles specified in Section 21 of the Act and the regulations thereunder. Form SDR consists of instructions, general questions and a list of Exhibits (documents, information and evidence) required by the Commission in order to determine whether an applicant is able to comply with the core principles. An application will not be considered to be materially complete unless the applicant has submitted, at a minimum, the exhibits as required in Form SDR. If the application is not materially complete, the Commission shall notify the applicant that the application will not be deemed to have been submitted for purposes of the 180-day review procedures.

(3) 180-Day review procedures. The Commission will review the application for registration as a swap data repository within 180 days of the date of the filing of such application. In considering an application for registration as a swap data repository, the staff of the Commission shall include in its review, an applicant’s past relevant submissions and compliance history. At or prior to the conclusion of the 180-day period, the Commission will either by order grant registration; extend, by order, the 180-day review period for good cause; or deny the application for registration as a swap data repository. The 180-day review period shall commence once a completed submission on Form SDR is submitted to the Commission. The determination of when such submission on Form SDR is complete shall be at the sole discretion of the Commission. If deemed appropriate, the Commission may grant registration as a swap data repository subject to conditions. If the Commission
denies an application for registration as a swap data repository, it shall specify the grounds for such denial. In the event of a denial of registration for a swap data repository, any person so denied shall be afforded an opportunity for a hearing before the Commission.

(4) Standard for approval. The Commission shall grant the registration of a swap data repository if the Commission finds that such swap data repository is appropriately organized, and has the capacity: to ensure the prompt, accurate and reliable performance of its functions as a swap data repository; comply with any applicable provisions of the Act and regulations thereunder; carry out its functions in a manner consistent with the purposes of Section 21 of the Act and the regulations thereunder; and operate in a fair, equitable and consistent manner. The Commission shall deny registration of a swap data repository if it appears that the application is materially incomplete; fails in form or substance to meet the requirements of Section 21 of the Act and part 49; or is amended or supplemented in a manner that is inconsistent with this § 49.3. The Commission shall notify the applicant seeking registration that the Commission is denying the application setting forth the deficiencies in the application, and/or the manner in which the application fails to meet the requirements of this part.

(5) Amendments and annual filing. If any information reported on Form SDR or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the application for registration has been granted, the swap data repository shall promptly file an amendment on Form SDR updating such information. In addition, the swap data repository shall annually file an amendment on Form SDR within 60 days after the end of each fiscal year.

(6) Service of process. Each swap data repository shall designate and authorize on Form SDR an agent in the United States, other than a Commission official, who shall accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the swap data repository to enforce the Act and the regulations thereunder.

(b) Provisional registration. The Commission, upon the request of an applicant, may grant provisional registration of a swap data repository if such applicant is in substantial compliance with the standards set forth in paragraph (a)(4) of this section and is able to demonstrate operational capability, real-time processing, multiple redundancy and robust security controls. Such provisional registration of a swap data repository shall expire on the earlier of: the date that the Commission grants or denies registration of the swap data repository; or the date that the Commission rescinds the temporary registration of the swap data repository. This paragraph (b) shall terminate within such time as determined by the Commission. A provisional registration granted by the Commission does not affect the right of the Commission to grant or deny permanent registration as provided under paragraph (a)(3) of this section.

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

(d) Reinstatement of dormant registration. Before accepting or re-accepting swap transaction data, a dormant registered swap data repository as defined in § 40.1(e) of this chapter shall reinstate its registration under the procedures set forth in paragraph (a) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(e) Delegation of authority. (1) The Commission hereby delegates, until it orders otherwise, to the Director of the
Division of Market Oversight or the Director’s delegates, with the consultation of the General Counsel or the General Counsel’s delegates, the authority to notify an applicant seeking registration as a swap data repository pursuant to Section 21 of the Act that the application is materially incomplete and the 180-day period review period is extended.

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

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

(f) Request for confidential treatment. An applicant for registration may request confidential treatment for materials submitted in its application as set forth in §§ 40.8 and 145.9 of this chapter. The applicant shall identify with particularity information in the application that will be subject to a request for confidential treatment.

§ 49.4 Withdrawal from registration.

(a)(1) A registered swap data repository may withdraw its registration by giving notice in writing to the Commission requesting that its registration as a swap data repository be withdrawn, which notice shall be served at least sixty days prior to the date named therein as the date when the withdrawal of registration shall take effect. The request to withdraw shall be made by a person duly authorized by the registrant and shall specify:

(i) The name of the registrant for which withdrawal of registration is being requested;

(ii) The name, address and telephone number of the swap data repository that will have custody of data and records of the registrant;

(iii) The address where such data and records will be located; and

(iv) A statement that the custodial swap data repository is authorized to make such data and records available in accordance with §1.44.

(2) Prior to filing a request to withdraw, a registered swap data repository shall file an amended Form SDR to update any inaccurate information. A withdrawal of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the facility was designated by the Commission.

(b) A notice of withdrawal from registration filed by a swap data repository shall become effective for all matters (except as provided in this paragraph (b)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such swap data repository consents or which the Commission, by order, may determine as necessary or appropriate in the public interest.

(c) Revocation of Registration for False Application. If, after notice and opportunity for hearing, the Commission finds that any registered swap data repository has obtained its registration by making any false or misleading statements with respect to any material fact or has violated or failed to comply with any provision of the Act and regulations thereunder, the Commission, by order, may revoke the registration. Pending final determination whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate and in the public interest.

§ 49.5 Equity interest transfers.

(a) Equity transfer notification. Upon entering into any agreement(s) that could result in an equity interest transfer of ten percent or more in the swap data repository, the swap data repository shall file a notification of the equity interest transfer with the Secretary of the Commission at its headquarters in Washington, DC in a format and in the manner specified by the Secretary of the Commission, no later than the business day, as defined in §40.1 of this chapter, following the date on which the swap data repository enters into a firm obligation to transfer the equity interest. The swap data repository shall also amend any information that is no longer accurate on Form SDR consistent with the procedures set forth in §49.3 of this part.
(b) Required information. The notification must include and be accompanied by: any relevant agreement(s), including any preliminary agreements; any associated changes to relevant corporate documents; a chart outlining any new ownership or corporate or organizational structure; a brief description of the purpose and any impact of the equity interest transfer; and a representation from the swap data repository that it meets all of the requirements of Section 21 of the Act and Commission regulations adopted thereunder. The swap data repository shall keep the Commission apprised of the projected date that the transaction resulting in the equity interest transfer will be consummated, and must provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to this section. The swap data repository shall notify the Commission of the consummation of the transaction on the day in which it occurs.

(c) Certification. (1) Upon a transfer of an equity interest of ten percent or more in a registered swap data repository, the registered swap data repository shall file with the Secretary of the Commission at its headquarters in Washington, DC in a format and in the manner specified by the Secretary of the Commission, a certification that the registered swap data repository meets all of the requirements of Section 21 of the Act and Commission regulations adopted thereunder, no later than two business days, as defined in §40.1 of this chapter, following the date on which the equity interest transfer will be consummated, and must provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to this section. This certification shall state whether changes to any aspects of the swap data repository's operations were made as a result of such change in ownership, and include a description of any such change(s).

(2) The certification required under this paragraph may rely on and be supported by reference to an application for registration as a swap data repository or prior filings made pursuant to a rule submission requirement, along with any necessary new filings, including new filings that provide any and all material updates of prior submissions.
the Commission approve under Section 5c(c) of the Act, any or all of its rules and subsequent amendments thereto, prior to their implementation or, notwithstanding the provisions of Section 5c(c)(2) of the Act, at anytime thereafter, under the procedures of §40.5 of this chapter.

(b) Notwithstanding the timeline under §40.5(c) of this chapter, the rules of a swap data repository that have been submitted for Commission approval at the same time as an application for registration under §49.3 of this part or to reinstate the registration of a dormant registered swap data repository, as defined in §40.1 of this chapter, will be deemed approved by the Commission no earlier than when the swap data repository is deemed to be registered or reinstated.

(c) Self-certification of rules. Rules of a registered swap data repository not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section must be submitted to the Commission with a certification that the rule or rule amendment complies with the Act or rules thereunder pursuant to the procedures of §40.6 of this chapter, as applicable.

§ 49.9 Duties of registered swap data repositories.

(a) Duties. To be registered, and maintain registration, as a swap data repository, a registered swap data repository shall:

(1) Accept swap data as prescribed in §49.10 for each swap;
(2) Confirm, as prescribed in §49.11, with both counterparties to the swap the accuracy of the swap data that was submitted;
(3) Maintain, as prescribed in §49.12, the swap data described in part 45 of the Commission’s Regulations in such form and manner as provided therein and in the Act and the rules and regulations thereunder;
(4) Provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity) as prescribed in §49.17;
(5) Provide the information set forth in §49.15 to comply with the public reporting requirements set forth in Section 2(a)(13) of the Act;

(b) This Regulation is not intended to limit, or restrict, the applicability of other provisions of the Act, including, but not limited to, Section 2(a)(13) of the Act and rules and regulations promulgated thereunder.

§ 49.10 Acceptance of data.

(a) A registered swap data repository shall establish, maintain, and enforce policies and procedures for the reporting of swap data to the registered swap data repository and shall accept and promptly record all swap data in its selected asset class and other regulatory information that is required to be reported pursuant to part 45 and part 43 of this chapter by designated contract markets, derivatives clearing organizations, swap execution facilities, swap dealers, major swap participants and/or non-swap dealer/non-major swap participant counterparties.

(1) Electronic connectivity. For the purpose of accepting all swap data as required by part 45 and part 43, the registered swap data repository shall adopt policies and procedures, including technological protocols, which provide for electronic connectivity between the swap data repository and
§ 49.11 Confirmation of data accuracy.

(a) A registered swap data repository shall establish policies and procedures to ensure the accuracy of swap data and other regulatory information required to be reported by part 45 that it receives from reporting entities or certain third-party service providers acting on their behalf, such as confirmation or matching service providers.

(b) A registered swap data repository shall confirm the accuracy of all swap data that is submitted pursuant to part 45. (1) Confirmation of data accuracy for swap creation data as defined in part 45.

(i) A registered swap data repository has confirmed the accuracy of swap creation data that was submitted directly by a counterparty if the swap data repository has notified both counterparties of the data that was submitted and received from both counterparties acknowledgement of the accuracy of the swap data and corrections for any errors.

(ii) A registered swap data repository has confirmed the accuracy of swap creation data that was submitted by a swap execution facility, designated contract market, derivatives clearing organization, or third-party service provider who is acting on behalf of a counterparty, if the swap data repository has complied with each of the following:

(A) The swap data repository has formed a reasonable belief that the swap data is accurate;

(B) The swap data that was submitted, or any accompanying information, evidences that both counterparties agreed to the data; and

(C) The swap data repository has provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the swap data.

(2) Confirmation of data accuracy for swap continuation data as defined in part 45. (i) A registered swap data repository has confirmed the accuracy of the swap continuation data that was submitted directly by a counterparty if the swap data repository has notified both counterparties of the data that was submitted and provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the data.

(ii) A registered swap data repository has confirmed the accuracy of swap continuation data that was submitted by a swap execution facility, designated contract market, derivatives clearing organization, or third-party service provider who is acting on behalf of a counterparty, if the swap data repository has complied with each of the following:
(A) The swap data repository has formed a reasonable belief that the swap data is accurate; and

(B) The swap data repository has provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the swap data.

(c) A registered swap data repository shall keep a record of corrected errors that is available upon request to the Commission.

§ 49.12 Swap data repository record-keeping requirements.

(a) A registered swap data repository shall maintain its books and records in accordance with the requirements of part 45 of this chapter regarding the swap data required to be reported to the swap data repository.

(b) A registered swap data repository shall maintain swap data (including all historical positions) throughout the existence of the swap and for five years following final termination of the swap, during which time the records must be readily accessible by the swap data repository and available to the Commission via real-time electronic access; and in archival storage for which such swap data is retrievable by the swap data repository within three business days.

(c) All records required to be kept pursuant to this Regulation shall be open to inspection upon request by any representative of the Commission and the United States Department of Justice. Copies of all such records shall be provided, at the expense of the swap data repository or person required to keep the record, to any representative of the Commission upon request, either by electronic means, in hard copy, or both, as requested by the Commission.

(d) A registered swap data repository shall comply with the real time public reporting and recordkeeping requirements prescribed in § 49.15 and part 43 of this chapter.

(e) A registered swap data repository shall establish policies and procedures to calculate positions for position limits and any other purpose as required by the Commission, for all persons with swaps that have not expired maintained by the registered swap data repository.

§ 49.13 Monitoring, screening and analyzing swap data.

(a) Duty to monitor, screen and analyze data. A registered swap data repository shall monitor, screen, and analyze all swap data in its possession in such a manner as the Commission may require. A swap data repository shall routinely monitor, screen, and analyze swap data for the purpose of any standing swap surveillance objectives which the Commission may establish as well as perform specific monitoring, screening, and analysis tasks based on ad hoc requests by the Commission.

(b) Capacity to monitor, screen and analyze data. A registered swap data repository shall establish and maintain sufficient information technology, staff, and other resources to fulfill the requirements in this § 49.13 in a manner prescribed by the Commission. A swap data repository shall monitor the sufficiency of such resources at least annually, and adjust its resources as its responsibilities, or the volume of swap transactions subject to monitoring, screening, and analysis, increase.

§ 49.14 Monitoring, screening and analyzing end-user clearing exemption claims by individual and affiliated entities.

A registered swap data repository shall have automated systems capable of identifying, aggregating, sorting, and filtering all swap transactions that are reported to it which are exempt from clearing pursuant to Section 2(h)(7) of the Act. Such capabilities shall be applicable to any information provided to a swap data repository by or on behalf of an end user regarding how such end user meets the requirements of Sections 2(h)(7)(A)(i), 2(h)(7)(A)(ii), and 2(h)(7)(A)(iii) of the Act and any Commission regulations thereunder.

§ 49.15 Real-time public reporting of swap data.

(a) Scope. The provisions of this § 49.15 apply to real-time public reporting of swap data, as defined in part 43 of this chapter.
§ 49.16 Privacy and confidentiality requirements of swap data repositories.

(a) Each swap data repository shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy and confidentiality of any and all SDR Information that is not subject to real-time public reporting set forth in part 43 of this chapter. Such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy and confidentiality of any and all SDR Information (except for swap data disseminated under part 43) that the swap data repository shares with affiliates and non-affiliated third parties; and

(2) Establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of:

(i) Section 8 Material;

(ii) Other SDR Information; and/or

(iii) Intellectual property, such as trading strategies or portfolio positions, by the swap data repository or any person associated with the swap data repository. Such safeguards, policies, and procedures shall include, but are not limited to,

(A) limiting access to such Section 8 Material, other SDR Information, and intellectual property,

(B) standards controlling persons associated with the swap data repository trading for their personal benefit or the benefit of others, and

(C) adequate oversight to ensure compliance with this subparagraph.

(b) Swap data repositories shall not, as a condition of accepting swap data from reporting entities, require the waiver of any privacy rights by such reporting entities.

(c) Subject to Section 8 of the Act, swap data repositories may disclose aggregated swap data on a voluntary basis or as requested, in the form and manner, prescribed by the Commission.

§ 49.17 Access to SDR data.

(a) Purpose. This Section provides a procedure by which the Commission, other domestic regulators and foreign regulators may obtain access to the swaps data held and maintained by registered swap data repositories. Except as specifically set forth in this Regulation, the Commission’s duties and obligations regarding the confidentiality of business transactions or market positions of any person and trade secrets or names of customers identified in Section 8 of the Act are not affected.

(b) Definitions. For purposes of this § 49.17, the following terms shall be defined as follows:

(1) Appropriate Domestic Regulator. The term “Appropriate Domestic Regulator” shall mean:

(i) The Securities and Exchange Commission;

(ii) Each prudential regulator identified in Section 1a(39) of the Act with respect to requests related to any of such regulator’s statutory authorities, without limitation to the activities listed for each regulator in Section 1a(39);

(iii) The Financial Stability Oversight Council;

(iv) The Department of Justice;

(v) Any Federal Reserve Bank;

(vi) The Office of Financial Research; and

(vii) Any other person the Commission deems appropriate.

(2) Appropriate Foreign Regulator. The term “Appropriate Foreign Regulator” shall mean those Foreign Regulators
with an existing memorandum of understanding or other similar type of information sharing arrangement executed with the Commission and/or Foreign Regulators without an MOU as determined on a case-by-case basis by the Commission.

(i) Filing requirements. For those Foreign Regulators who do not currently have a memorandum of understanding with the Commission, the Commission has determined to provide the following filing process for those Foreign Regulators that may require swap data or information maintained by a registered swap data repository. The filing requirement set forth in this §49.17 will assist the Commission in its analysis of whether a specific Foreign Regulator should be considered “appropriate” for purposes of Section 21(c)(7) of the Act.

(A) The Foreign Regulator is required to file an application in the form and manner prescribed by the Commission.

(B) The Foreign Regulator in its application is required to provide sufficient facts and procedures to permit the Commission to analyze whether the Foreign Regulator employs appropriate confidentiality procedures and to satisfy itself that the information will be disclosed only as permitted by Section 8(e) of the Act.

(ii) The Commission in its analysis of Foreign Regulator applications shall be satisfied that any information potentially provided by a registered swap data repository will not be disclosed except in limited circumstances, such as an adjudicatory action or proceeding involving the Foreign Regulator, as identified in Section 8 of the Act.

(iii) The Commission reserves the right in connection with any determination of an “Appropriate Foreign Regulator” to revisit or reassess a prior determination consistent with the Act.

(3) Direct electronic access. For the purposes of this regulation, the term “direct electronic access” shall mean an electronic system, platform or framework that provides Internet or Web-based access to real-time swap transaction data and also provides scheduled data transfers to Commission electronic systems.

(c) Commission access.—(1) Direct electronic access. A registered swap data repository shall provide direct electronic access to the Commission or the Commission’s designee, including another registered entity, in order for the Commission to carry out its legal and statutory responsibilities under the Act and related regulations.

(2) Monitoring tools. A registered swap data repository is required to provide the Commission with proper tools for the monitoring, screening and analyzing of swap transaction data, including, but not limited to, Web-based services, services that provide automated transfer of data to Commission systems, various software and access to the staff of the swap data repository and/or third-party service providers or agents familiar with the operations of the registered swap data repository, which can provide assistance to the Commission regarding data structure and content. These monitoring tools shall be substantially similar in analytical capability as those provided to the compliance staff and the Chief Compliance Officer of the swap data repository.

(3) Authorized users. The swap transaction data provided to the Commission by a registered swap data repository shall be accessible only by authorized users. The swap data repository shall maintain and provide a list of authorized users in the manner and frequency determined by the Commission.

(d) Other regulators—(1) General Procedure for Gaining Access to Registered Swap Data Repository Data. Appropriate Domestic Regulators and Appropriate Foreign Regulators seeking to gain access to the swap data maintained by a swap data repository are required to apply for access by filing a request for access with the registered swap data repository and certifying that it is acting within the scope of its jurisdiction. (2) Appropriate domestic regulator with regulatory responsibility over a swap data repository. An Appropriate Domestic Regulator that has regulatory jurisdiction over a swap data repository registered with it pursuant to a separate statutory authority that is also registered with the Commission pursuant to this chapter is not subject to this
paragraph (d) and § 49.18(b) as long as the following conditions are met:

(i) The appropriate domestic regulator executes a memorandum of understanding or similar information sharing arrangement with the Commission; and

(ii) The Commission, consistent with Section 21(c)(4)(A) of the Act, designates the Appropriate Domestic Regulator to receive direct electronic access.

(3) Appropriate foreign regulator with regulatory responsibility over a swap data repository. An Appropriate Foreign Regulator that has supervisory authority over a swap data repository registered with it pursuant to foreign law and/or regulation that is also registered with the Commission pursuant to this chapter is not otherwise subject to this paragraph (d) and § 49.18(b).

(4) Obligations of the registered swap data repository in connection with appropriate domestic regulator or appropriate foreign regulator requests for data access.

(i) A registered swap data repository shall promptly notify the Commission regarding any request received by an Appropriate Domestic Regulator or Appropriate Foreign Regulator to gain access to the swaps transaction data maintained by such swap data repository.

(ii) The registered swap data repository shall notify the Commission electronically in a format specified by the Secretary of the Commission.

(5) Timing. Once the swap data repository provides the Commission with notification of a request for data access by an Appropriate Domestic Regulator or Appropriate Foreign Regulator as required by paragraph (d)(2) of this section, such swap data repository shall provide access to the requested swap data.

(6) Confidentiality and indemnification agreement. Consistent with § 49.18 of this part, the Appropriate Domestic Regulator or Appropriate Foreign Regulator prior to receipt of any requested data or information shall execute a “Confidentiality and Indemnification Agreement” with the registered swap data repository as set forth in Section 21(d) of the Act.

(e) Third-party service providers to a registered swap data repository. Access to the data and information maintained by a registered swap data repository may be necessary for certain third parties that provide various technology and data-related services to a registered swap data repository. Third-party access to the swap data maintained by a swap data repository is permissible subject to the following conditions:

(1) Both the registered swap data repository and the third party service provider shall have strict confidentiality procedures that protect data and information from improper disclosure.

(2) Prior to swap data access, the third-party service provider and the registered swap data repository shall execute a “Confidentiality Agreement” setting forth minimum confidentiality procedures and permissible uses of the information maintained by the swap data repository that are equivalent to the privacy procedures for swap data repositories outlined in § 49.16.

(f) Access by market participants—(1) General. Access of swap data maintained by the registered swap data repository to market participants is generally prohibited.

(2) Exception. Data and information related to a particular swap that is maintained by the registered swap data repository may be accessed by either counterparty to that particular swap.

(g) Commercial uses of data accepted and maintained by the registered swap data repository prohibited. Swap data accepted and maintained by the swap data repository generally may not be used for commercial or business purposes by the swap data repository or any of its affiliated entities.

(1) The registered swap data repository is required to adopt and implement adequate “firewalls” or controls to protect the reported swap data required to be maintained under § 49.12 of this part and Section 21(b) of the Act from any improper commercial use.

(2) Exception. (A) The swap dealer, counterparty or any other registered entity that submits the swap data maintained by the registered swap data repository may permit the commercial or business use of that data by express written consent.
(B) Swap data repositories shall not as a condition of the reporting of swap transaction data require a reporting party to consent to the use of any reported data for commercial or business purposes.

(3) Swap data repositories responsible for the public dissemination of real-time swap data shall not make commercial use of such data prior to its public dissemination.

§ 49.18 Confidentiality and indemnification agreement.

(a) Purpose. This section sets forth the obligations of registered swap data repositories to execute a “Confidentiality and Indemnification Agreement” in connection with providing access to swap data to certain domestic and foreign regulators.

(b) Confidentiality and indemnification agreement. Prior to the registered swap data repository providing access to the swap data with any Appropriate Domestic Regulator or Appropriate Foreign Regulator as defined in § 49.17(b), the swap data repository shall receive a written agreement from each such entity stating that the entity shall abide by the confidentiality requirements described in Section 8 of the Act relating to the swap data that is provided; and each such entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation relating to the information provided under Section 8 of the Act.

(c) Certain appropriate domestic and foreign regulators with regulatory responsibility over a swap data repository. The requirements set forth above in paragraph (b) shall not apply to certain Appropriate Domestic and Foreign Regulators with regulatory responsibility over a swap data repository as described in § 49.17(d)(2) and (3). The swap data repository and such Appropriate Domestic or Foreign Regulator in each case is required to comply with Section 8 of the Act and any other relevant statutory confidentiality provisions.

§ 49.19 Core principles applicable to registered swap data repositories.

(a) Compliance with core principles. To be registered and maintain registration, a swap data repository shall comply with the core principles as described in this paragraph. Unless otherwise determined by the Commission by rule or regulation, a swap data repository shall have reasonable discretion in establishing the manner in which the swap data repository complies with the core principles described in this paragraph.

(b) Antitrust considerations (Core Principle 1). Unless necessary or appropriate to achieve the purposes of the Act, a registered swap data repository shall avoid adopting any rule or taking any action that results in any unreasonable restraint of trade; or imposing any material anticompetitive burden on trading, clearing, or reporting swaps.

(c) Governance arrangements (Core Principle 2). Registered swap data repositories shall establish governance arrangements as set forth in § 49.20.

(d) Conflicts of interest (Core Principle 3). Registered swap data repositories shall manage and minimize conflicts of interest and establish processes for resolving such conflicts of interest as set forth in § 49.21.

(e) Additional duties (Core Principle 4). Registered swap data repositories shall also comply with the following additional duties:

(1) Financial resources. Registered swap data repositories shall maintain sufficient financial resources as set forth in § 49.25;

(2) Disclosure requirements of registered swap data repositories. Registered swap data repositories shall furnish an appropriate disclosure document setting forth the risks and costs of swap data repository services as detailed in § 49.26; and

(3) Access and Fees. Registered swap data repositories shall adhere to Commission requirements regarding fair and open access and the charging of any fees, dues or other similar type charges as detailed in § 49.27.

§ 49.20 Governance arrangements (Core Principle 2).

(a) General. (1) Each registered swap data repository shall establish governance arrangements that are transparent to fulfill public interest requirements, and to support the objectives of the Federal Government, owners, and participants.
(2) Each registered swap data repository shall establish governance arrangements that are well-defined and include a clear organizational structure with consistent lines of responsibility and effective internal controls, including with respect to administration, accounting, and the disclosure of confidential information. § 49.22 of this part contains rules on internal controls applicable to administration and accounting. § 49.16 of this part contains rules on internal controls applicable to the disclosure of confidential information.

(b) Transparency of Governance Arrangements. (1) Each registered swap data repository shall state in its charter documents that its governance arrangements are transparent to support, among other things, the objectives of the Federal Government pursuant to Section 21(f)(2) of the Act.

(2) Each registered swap data repository shall, at a minimum, make the following information available to the public and relevant authorities, including the Commission:

(i) The mission statement of the registered swap data repository;

(ii) The mission statement and/or charter of the board of directors, as well as of each committee of the registered swap data repository that has:

(A) The authority to act on behalf of the board of directors or

(B) The authority to amend or constrain actions of the board of directors;

(iii) The board of directors nomination process for the registered swap data repository, as well as the process for assigning members of the board of directors or other persons to any committee referenced in paragraph (b)(2)(ii) of this section;

(iv) For the board of directors and each committee referenced in paragraph (b)(2)(ii) of this section, the names of all members;

(v) A description of the manner in which the board of directors, as well as any committee referenced in paragraph (b)(2)(ii) of this section, considers an Independent Perspective in its decision-making process, as §49.2(a)(14) of this part defines such term;

(vi) The lines of responsibility and accountability for each operational unit of the registered swap data repository to any committee thereof and/or the board of directors; and

(vii) Summaries of significant decisions implicating the public interest, the rationale for such decisions, and the process for reaching such decisions. Such significant decisions shall include decisions relating to pricing of repository services, offering of ancillary services, access to swap data, and use of Section 8 Material, other SDR Information, and intellectual property (as referenced in §49.16 of this part). Such summaries of significant decisions shall not require the registered swap data repository to disclose Section 8 Material or, where appropriate, information that the swap data repository received on a confidential basis from a reporting entity.

(3) The registered swap data repository shall ensure that the information specified in paragraph (b)(2)(i) to (vii) of this section is current, accurate, clear, and readily accessible, for example, on its Web site. The swap data repository shall set forth such information in a language commonly used in the commodity futures and swap markets and at least one of the domestic language(s) of the jurisdiction in which the swap data repository is located.

(4) Furthermore, the registered swap data repository shall disclose the information specified in paragraph (b)(2)(vii) of this section in a sufficiently comprehensive and detailed fashion so as to permit the public and relevant authorities, including the Commission, to understand the policies or procedures of the swap data repository implicated and the manner in which the decision implements or amends such policies or procedures. A swap data repository shall not disclose minutes from meetings of its board of directors or committees to the public, although it shall disclose such minutes to the Commission upon request.

(c) The board of directors—(1) General. (i) Each registered swap data repository shall establish, maintain, and enforce (including, without limitation, pursuant to paragraph (c)(4) of this Regulation) written policies or procedures:

(A) To ensure that its board of directors, as well as any committee that has:
§ 49.21 Conflicts of interest (Core Principle 3).

(a) General. (1) Each registered swap data repository shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the swap data repository, and establish a process for resolving such conflicts of interest.

(2) Nothing in this section shall supersede any requirement applicable to the swap data repository pursuant to §49.20 of this part.

(b) Policies and procedures. (1) Each registered swap data repository shall establish, maintain, and enforce written procedures to:

(i) Identify, on an ongoing basis, existing and potential conflicts of interest; and

(ii) Make decisions in the event of a conflict of interest. Such procedures shall include rules regarding the recusal, in applicable circumstances, of parties involved in the making of decisions.

(2) As further described in §49.20 of this part, the chief compliance officer of the registered swap data repository shall, in consultation with the board of directors or a senior officer of the swap data repository, as applicable, resolve any such conflicts of interest.
§ 49.22 Compliance with core principle.
The chief compliance officer of the registered swap data repository shall review the compliance of the swap data repository with this core principle.

§ 49.22 Chief compliance officer.
(a) Definition of Board of Directors. For purposes of this part 49, the term “board of directors” means the board of directors of a registered swap data repository, or for those swap data repositories whose organizational structure does not include a board of directors, a body performing a function similar to that of a board of directors.

(b) Designation and qualifications of chief compliance officer — (1) Chief Compliance Officer required. Each registered swap data repository shall establish the position of chief compliance officer, and designate an individual to serve in that capacity.
   (i) The position of chief compliance officer shall carry with it the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations.
   (ii) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer.

(2) Qualifications of Chief Compliance Officer. The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position and shall be subject to the following requirements:
   (i) No individual disqualified from registration pursuant to Sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.
   (ii) The chief compliance officer may not be a member of the swap data repository’s legal department or serve as its general counsel.

(c) Appointment, supervision, and removal of chief compliance officer — (1) Appointment and Compensation of Chief Compliance Officer Determined by Board of Directors. A registered swap data repository’s chief compliance officer shall be appointed by its board of directors. The board of directors shall also approve the compensation of the chief compliance officer and shall meet with the chief compliance officer at least annually. The appointment of the chief compliance officer and approval of the chief compliance officer’s compensation shall require the approval of the board of directors. The senior officer of the swap data repository may fulfill these responsibilities. A swap data repository shall notify the Commission of the appointment of a new chief compliance officer within two business days of such appointment.
   (2) Supervision of chief compliance officer. A registered swap data repository’s chief compliance officer shall report directly to the board of directors or to the senior officer of the swap data repository, at the swap data repository’s discretion.

(3) Removal of chief compliance officer by board of directors. (i) Removal of a registered swap data repository’s chief compliance officer shall require the approval of the swap data repository’s board of directors. If the swap data repository does not have a board of directors, then the chief compliance officer may be removed by the senior officer of the swap data repository;
   (ii) The swap data repository shall notify the Commission of such removal within two business days; and
   (iii) The swap data repository shall notify the Commission within two business days of appointing any new chief compliance officer, whether interim or permanent.

(d) Duties of chief compliance officer. The chief compliance officer’s duties shall include, but are not limited to, the following:
   (1) Overseeing and reviewing the swap data repository’s compliance with Section 21 of the Act and any related rules adopted by the Commission;
   (2) In consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the swap data repository, resolving any conflicts of interest that may arise including:
      (i) Conflicts between business considerations and compliance requirements;
      (ii) Conflicts between business considerations and the requirement that the registered swap data repository provide fair and open access as set forth in §49.27 of this part; and
(iii) Conflicts between a registered swap data repository’s management and members of the board of directors;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violation of the Act and any rules adopted by the Commission;

(4) Taking reasonable steps to ensure compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations under Section 21 of the Act, including confidentiality and indemnification agreements entered into with foreign or domestic regulators pursuant to Section 21(d) of the Act;

(5) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues; and

(7) Establishing and administering a written code of ethics designed to prevent ethical violations and to promote honesty and ethical conduct.

(e) Annual compliance report prepared by chief compliance officer. The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report, that at a minimum, contains the following information covering the time period since the date on which the swap data repository became registered with the Commission or since the end of the period covered by a previously filed annual compliance report, as applicable:

(1) A description of the registered swap data repository’s written policies and procedures, including the code of ethics and conflict of interest policies;

(2) A review of applicable Commission regulations and each subsection and core principle of Section 21 of the Act, that, with respect to each:

(i) Identifies the policies and procedures that are designed to ensure compliance with each subsection and core principle, including each duty specified in Section 21(c);

(ii) Provides a self-assessment as to the effectiveness of these policies and procedures; and

(iii) Discusses areas for improvement, and recommends potential or prospective changes or improvements to its compliance program and resources;

(3) A list of any material changes to compliance policies and procedures since the last annual compliance report;

(4) A description of the financial, managerial, and operational resources set aside for compliance with respect to the Act and Commission regulations;

(5) A description of any material compliance matters, including noncompliance issues identified through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint, and explains how they were resolved; and

(6) A certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete.

(f) Submission of annual compliance report by chief compliance officer to the Commission. (1) Prior to submission of the annual compliance report to the Commission, the chief compliance officer shall provide the annual compliance report to the board of the registered swap data repository for its review. If the swap data repository does not have a board, then the annual compliance report shall be provided to the senior officer for their review. Members of the board and the senior officer may not require the chief compliance officer to make any changes to the report. Submission of the report to the board or senior officer, and any subsequent discussion of the report, shall be recorded in board minutes or similar written record, as evidence of compliance with this requirement.

(2) The annual compliance report shall be provided electronically to the Commission not more than 60 days after the end of the registered swap data repository’s fiscal year, concurrently with the filing of the annual amendment to Form SDR that must be
§ 49.23 Emergency authority policies and procedures.

(a) Emergency policies and procedures required. A registered swap data repository shall establish policies and procedures for the exercise of emergency authority in the event of any emergency, including but not limited to natural, man-made, and information technology emergencies. Such policies and procedures shall also require a swap data repository to exercise its emergency authority upon request by the Commission. A swap data repository’s policies and procedures for the exercise of emergency authority shall be transparent to the Commission and to market participants whose swap transaction data resides at the swap data repository.

(b) Invocation of emergency authority. A registered swap data repository’s policies and procedures for the exercise of emergency authority shall enumerate the circumstances under which the swap data repository is authorized to invoke its emergency authority and the procedures that it shall follow to declare an emergency. Such policies and procedures shall also address the range of measures that it is authorized to take when exercising such emergency authority.

(c) Designation of persons authorized to act in an emergency. A registered swap data repository shall designate one or more officials of the swap data repository as persons authorized to exercise emergency authority on its behalf. A swap data repository shall also establish a chain of command to be used in the event that the designated person(s) is unavailable. A swap data repository shall notify the Commission of the person(s) designated to exercise emergency authority.

(d) Conflicts of interest. A registered swap data repository’s policies and procedures for the exercise of emergency authority shall include provisions to avoid conflicts of interest in any decisions made pursuant to emergency authority. Such policies and procedures shall also include provisions to consult the swap data repository’s chief compliance officer in any emergency decision that may raise potential conflicts of interest.

(e) Notification to the commission. A registered swap data repository’s policies and procedures for the exercise of emergency authority shall include provisions to notify the Commission as
Commodity Futures Trading Commission

§ 49.24 System safeguards.

(a) Each registered swap data repository shall, with respect to all swap data in its custody:
   (1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that are reliable, secure, and have adequate scalable capacity;
   (2) Establish and maintain emergency procedures, backup facilities, and a business continuity-disaster recovery plan that allow for the timely recovery and resumption of operations and the fulfillment of the duties and obligations of the swap data repository; and
   (3) Periodically conduct tests to verify that backup resources are sufficient to ensure continued fulfillment of all duties of the swap data repository established by the Act or the Commission’s regulations.

(b) A registered swap data repository’s program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:
   (1) Information security;
   (2) Business continuity—disaster recovery planning and resources;
   (3) Capacity and performance planning;
   (4) Systems operations;
   (5) Systems development and quality assurance; and
   (6) Physical security and environmental controls.

(c) In addressing the categories of risk analysis and oversight required under paragraph (b) of this section, a registered swap data repository should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(d) A registered swap data repository shall maintain a business continuity—disaster recovery plan and business continuity—disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as a swap data repository following any disruption of its operations. Such duties and obligations include, without limitation, the duties set forth in §49.9 and the core principles set forth in §49.19; and maintenance of a comprehensive audit trail. The swap data repository’s business continuity—disaster recovery plan and resources generally should enable resumption of the swap data repository’s operations and resumption of ongoing fulfillment of the swap data repository’s duties and obligations during the next business day following the disruption.

(e) Registered swap data repositories determined by the Commission to be critical swap data repositories are subject to more stringent requirements as set forth below.

   (1) Each swap data repository that the Commission determines is critical must maintain a disaster recovery plan and business continuity and disaster recovery resources, including infrastructure and personnel, sufficient to enable it to achieve a same-day recovery time objective in the event that its normal capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

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

   (3) To ensure its ability to achieve a same-day recovery time objective in the event of a wide-scale disruption, each swap data repository that the Commission determines is critical must maintain a degree of geographic dispersal of both infrastructure and personnel such that:
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(i) Infrastructure sufficient to enable the swap data repository to meet a same-day recovery time objective after interruption is located outside the relevant area of the infrastructure the entity normally relies upon to conduct activities necessary to the reporting, recordkeeping and/or dissemination of swap data, and does not rely on the same critical transportation, telecommunications, power, water, or other critical infrastructure components the entity normally relies upon for such activities; and

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

(4) Each swap data repository that the Commission determines is critical must conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve a same-day recovery time objective in the event of a wide-scale disruption. The swap data repository shall keep records of the results of such tests, and make the results available to the Commission upon request.

(f) A registered swap data repository that is not determined by the Commission to be a critical swap data repository satisfies the requirement to be able to resume operations and resume ongoing fulfillment of the swap data repository’s duties and obligations during the next business day following a disruption by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations, both with respect to all swaps reported to the swap data repository and with respect to all swap data contained in the swap data repository.

(g) A registered swap data repository shall notify Commission staff promptly of all:

(1) Systems malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(3) Any activation of the swap data repository’s business continuity-disaster recovery plan.

(h) A registered swap data repository shall give Commission staff timely advance notice of all:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the swap data repository’s program of risk analysis and oversight.

(i) A registered swap data repository shall provide to the Commission upon request current copies of its business continuity and disaster recovery plan and other emergency procedures, its assessments of its operational risks, and other documents requested by Commission staff for the purpose of maintaining a current profile of the swap data repository’s automated systems.

(j) A registered swap data repository shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Both types of testing should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the swap data repository, but should not be persons responsible for development or operation of the systems or capabilities being tested. Pursuant to §§1.31, 49.12 and 45.2 of the Commission’s Regulations, the swap data repository shall keep records of all such tests, and make all test results available to the Commission upon request.
(k) To the extent practicable, a registered swap data repository should:

(1) Coordinate its business continuity-disaster recovery plan with those of swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants who report swap data to the swap data repository, and with those regulators identified in Section 21(c)(7) of the Act, in a manner adequate to enable effective resumption of the registered swap data repository’s fulfillment of its duties and obligations following a disruption causing activation of the swap data repository’s business continuity and disaster recovery plan;

(2) Participate in periodic, synchronized testing of its business continuity-disaster recovery plan and the business continuity—disaster recovery plans of swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants who report swap data to the registered swap data repository, and the business continuity—disaster recovery plans required by the regulators identified in Section 21(c)(7) of the Act; and

(3) Ensure that its business continuity—disaster recovery plan takes into account the business continuity—disaster recovery plans of its telecommunications, power, water, and other essential service providers.

§ 49.25 Financial resources.

(a) General rule. (1) A registered swap data repository shall maintain sufficient financial resources to perform its statutory duties set forth in §49.9 and the core principles set forth in §49.19.

(2) An entity that operates as both a swap data repository and a derivatives clearing organization shall also comply with the financial resources requirements applicable to derivatives clearing organizations under §39.11 of this chapter.

(3) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the swap data repository, or applicant for registration, to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(b) Types of financial resources. Financial resources available to satisfy the requirements of paragraph (a) of this section may include:

(1) The swap data repository’s own capital; and

(2) Any other financial resource deemed acceptable by the Commission.

(c) Computation of financial resource requirement. A registered swap data repository shall, on a quarterly basis, based upon its fiscal year, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a) of this section. The swap data repository shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

(d) Valuation of financial resources. At appropriate intervals, but not less than quarterly, a registered swap data repository shall compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect market and credit risk (haircuts) shall be applied as appropriate.

(e) Liquidity of financial resources. The financial resources allocated by the registered swap data repository to meet the requirements of paragraph (a) shall include unencumbered, liquid financial assets (i.e., cash and/or highly liquid securities) equal to at least six months’ operating costs. If any portion of such financial resources is not sufficiently liquid, the swap data repository may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(f) Reporting requirements. (1) Each fiscal quarter, or at any time upon Commission request, a registered swap data repository shall report to the Commission the amount of financial resources necessary to meet the requirements of paragraph (a), the value of each financial resource available, computed in
§ 49.26 Disclosure requirements of swap data repositories.

Before accepting any swap data from a reporting entity or upon a reporting entity’s request, a registered swap data repository shall furnish to the reporting entity a disclosure document that contains the following written information, which shall reasonably enable the reporting entity to identify and evaluate accurately the risks and costs associated with using the services of the swap data repository:

(a) The registered swap data repository’s criteria for providing others with access to services offered and swap data maintained by the swap data repository;

(b) The registered swap data repository’s criteria for those seeking to connect to or link with the swap data repository;

(c) A description of the registered swap data repository’s policies and procedures regarding the safeguarding of swap data and operational reliability to protect the confidentiality and security of such data, as described in §49.23;

(d) The registered swap data repository’s policies and procedures reasonably designed to protect the privacy of any and all swap data that the swap data repository receives from a reporting entity, as described in §49.16;

(e) The registered swap data repository’s policies and procedures regarding its non-commercial and/or commercial use of the swap data that it receives from a market participant, any registered entity, or any other person;

(f) The registered swap data repository’s dispute resolution procedures;

(g) A description of all the registered swap data repository’s services, including any ancillary services;

(h) The registered swap data repository’s updated schedule of any fees, rates, dues, unbundled prices, or other charges for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates;

(i) A description of the registered swap data repository’s governance arrangements.

§ 49.27 Access and fees.

(a) Fair, open and equal access. (1) A registered swap data repository, consistent with Section 21 of the Act, shall provide its services to market participants, including but not limited to designated contract markets, swap execution facilities, derivatives clearing organizations, swap dealers, major swap participants and any other counterparties, on a fair, open and equal basis. For this purpose, a swap data repository shall not provide access to its services on a discriminatory basis but is required to provide its services to all market participants for swaps it accepts in an asset class.

(2) Consistent with the principles of open access set forth in paragraph (a)(1) of this Regulation, a registered swap data repository shall not tie or bundle the offering of mandated regulatory services with other ancillary services that a swap data repository may provide to market participants.

(b) Fees. (1) Any fees or charges imposed by a registered swap data repository in connection with the reporting of swap data and any other supplemental or ancillary services provided by such swap data repository shall be equitable and established in a uniform and non-discriminatory manner. Fees or charges shall not be used as an artificial barrier to access to the swap data repository. Swap data repositories
Commodity Futures Trading Commission

shall not offer preferential pricing arrangements to any market participant on any basis, including volume discounts or reductions unless such discounts or reductions apply to all market participants uniformly and are not otherwise established in a manner that would effectively limit the application of such discount or reduction to a select number of market participants.

(2) All fees or charges are to be fully disclosed and transparent to market participants. At a minimum, the registered swap data repository shall provide a schedule of fees and charges that is accessible by all market participants on its Web site.

(3) The Commission notes that it will not specifically approve the fees charged by registered swap data repositories. However, any and all fees charged by swap data repositories must be consistent with the principles set forth in paragraph (b)(1) of this section.

APPENDIX A TO PART 49—FORM SDR

COMMODITY FUTURES TRADING COMMISSION

FORM SDR

SWAP DATA REPOSITORY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

INSTRUCTIONS

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form SDR have the same meaning as in the Commodity Exchange Act, as amended, and in the Regulations of the Commission thereunder.

For the purposes of this Form SDR, the term “Applicant” shall include any applicant for registration as a swap data repository or any registered swap data repository that is amending Form SDR.

GENERAL INSTRUCTIONS

1. Form SDR and Exhibits thereto are to be filed with the Commodity Futures Trading Commission by Applicants for registration as a swap data repository, or by a registered swap data repository amending such registration, pursuant to Section 21 of the Commodity Exchange Act and the regulations thereunder. Upon the filing of an application for registration, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and arguments concerning such application. No application for registration shall be effective unless the Commission, by order, grants such registration.

2. Individuals’ names shall be given in full (Last Name, First Name, Middle Name).

3. Signatures must accompany each copy of the Form SDR filed with the Commission. If this Form SDR is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, this Form SDR must be signed in the name of the limited liability company by a member duly authorized to sign on the limited liability company’s behalf; if filed by a partnership, this Form SDR must be signed in the name of the partnership by a general partner authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of the organization or association by the manager, i.e., a duly authorized person who directs, manages or who participates in the directing or managing of its affairs.

4. If Form SDR is being filed as an initial application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by “none,” “not applicable,” or “N/A” as appropriate.

5. Under Section 21 of the Commodity Exchange Act and the regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this form from Applicants for registration as a swap data repository and from registered swap data repositories amending their registration. Disclosure of the information specified on this form is mandatory prior to processing of an application for registration as a swap data repository. The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. An Applicant is therefore encouraged to supplement this Form SDR with any additional information that may be significant to its operation as a swap data repository and to the Commission’s review of its application. A Form SDR which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SDR, however, shall not constitute any finding that the Form SDR has been filed as required or that the information submitted is true, current or complete.

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission pursuant to the Freedom of Information Act and Commission
Regulation §145.9, information supplied on this form will be included routinely in the public files of the Commission and will be available for inspection by any interested person. The Applicant must identify with particularity the information in these exhibits that will be subject to a request for confidential treatment and supporting documentation for such request pursuant to Commission Regulations §40.8, and §145.9.

UPDATING INFORMATION ON THE FORM SDR

1. Section 21 requires that if any information contained in Items 1 through 17, 23, 29, and Item 53 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment must be filed promptly, unless otherwise specified, on Form SDR correcting such information.

2. Registrants filing Form SDR as an amendment (other than an annual amendment) need file only the first page of Form SDR, the signature page (Item 13), and any pages on which an answer is being amended, together with such exhibits as are being amended. The submission of an amendment represents that all unamended items and exhibits remain true, current and complete as previously filed.

ANNUAL AMENDMENT ON THE FORM SDR

Annual amendments on the Form SDR shall be submitted within 60 days of the end of the Applicant’s fiscal year. Applicants must complete the first page and provide updated information or exhibits.

An Applicant may request an extension of time for submitting the annual amendment with the Secretary of the Commission based on substantial, undue hardship. Extensions for filing annual amendments may be granted at the discretion of the Commission.

WHERE TO FILE

File registration application and appropriate exhibits electronically with the Commission at the Washington, D.C. headquarters in a format and in the manner specified by the Secretary of the Commission.
**FORM SDR**

**SWAP DATA REPOSITORY**

**APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION**

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**Exact name of Applicant as specified in charter**

---

**Address of principal executive offices**

- [ ] If this is a **APPLICATION** for registration, complete in full and check here.

- [ ] If this is a **APPLICATION FOR PROVISIONAL REGISTRATION**, complete in full and check here.

- [ ] If this is an **AMENDMENT** to an application, or to an effective registration (other than an annual amendment) list all items that are amended and check here and list below.

- [ ] If this is an **ANNUAL AMENDMENT** to an application, or to an effective registration (other than an annual amendment) list all items that are amended and check here and list below.

---

**GENERAL INFORMATION**

1. Name under which business is/will be conducted, if different than name specified above:

---

2. If name of business is being amended, state previous business name:

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3. Contact information, including mailing address if different than address specified above:

<table>
<thead>
<tr>
<th>Number and Street</th>
<th>City</th>
<th>State</th>
<th>Country</th>
<th>Zip Code</th>
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<tbody>
<tr>
<td>Main Phone Number</td>
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<td></td>
<td></td>
<td>Fax</td>
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<tr>
<td>Website URL</td>
<td></td>
<td></td>
<td></td>
<td>E-mail Address</td>
</tr>
</tbody>
</table>

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4. List of principal office(s) and address(es) where swap data repositories activities are conducted

<table>
<thead>
<tr>
<th>Office</th>
<th>Address</th>
</tr>
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<tbody>
<tr>
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</tbody>
</table>

5. If Applicant is a successor to a previously registered swap data repository, please complete the following:
   a. Date of succession
      ____________________________________________
   b. Full name and address of predecessor registrant
      ____________________________________________
      ____________________________________________
      ____________________________________________
      ____________________________________________

<table>
<thead>
<tr>
<th>Number and Street</th>
<th>City</th>
<th>State</th>
<th>Country</th>
<th>Zip Code</th>
</tr>
</thead>
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<th>Fax Number</th>
<th>E-mail Address</th>
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</table>

6. Furnish a description of the function(s) that the Applicant performs or proposes to perform:
   ____________________________________________

Please indicate which asset class(es) the Applicant intends to serve:

- [ ] Interest Rate
- [ ] Equity
- [ ] Credit
- [ ] Foreign Exchange
- [ ] Commodity (Specify) ________________________
- [ ] Other (Specify) ____________________________

BUSINESS ORGANIZATION

7. Applicant is a:
   - [ ] Corporation
   - [ ] Partnership
   - [ ] Limited Liability Company
Commodity Futures Trading Commission

☐ Other (Specify) __________________________

8. Date of formation: __________________________

9. Jurisdiction of organization: __________________________

List all other jurisdictions in which Applicant is qualified to do business (including non-US jurisdictions):

________________________________________________________________________

________________________________________________________________________

10. List all other regulatory licenses or registrations of Applicant (or exemptions from any licensing requirement) including with non-US regulators:

________________________________________________________________________

________________________________________________________________________

11. Fiscal Year End: __________________________

12. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with its application may be given by sending such notice by certified mail to the person named below at the address given.

Print Name and Title

Number and Street

<table>
<thead>
<tr>
<th>City</th>
<th>State</th>
<th>Zip Code</th>
</tr>
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Phone Number | Fax Number | E-mail Address
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SIGNATURES

The Applicant had duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this ___ day of ___ , 20___. The Applicant and the undersigned represent hereby that all information contained herein is true, current and complete. It is understood that all required items and Exhibits are considered integral parts of this form and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

Name of Applicant

By: __________________________

Manual Signature of Authorized Person

Print Name and Title of Signatory)
EXHIBITS INSTRUCTIONS

The following exhibits must be included as part of Form SDR and filed with the Commodity Futures Trading Commission by each Applicant seeking registration as a swap data repository, or by a registered swap data repository amending such registration, pursuant to Section 2.1 of the Commodity Exchange Act and regulations thereto. Such exhibits must be labeled according to the items specified in this Form. If any exhibit is not applicable, please specify the exhibit letter and indicate by “none,” “not applicable,” or “N/A” as appropriate. The Applicant must identify with particularity the information in these exhibits that will be subject to a request for confidential treatment and supporting documentation for such request pursuant to Commission Regulation §40.8, and §145.9.

If the Applicant is a newly formed enterprise and does not have the financial statements required pursuant to Items 25 and 26 of this form, the Applicant should provide pro forma financial statements for the most recent six months or since inception, whichever is less.

EXHIBITS I – BUSINESS ORGANIZATION

14. Attach as Exhibit A any person who owns ten (10) percent or more of Applicant’s equity or possesses voting power of any class, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of Applicant. “Control” for this purpose is defined in Commission Regulation §49.2(a)(3).

State in Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

15. Attach as Exhibit B to this application a narrative that sets forth the fitness standards for the board of directors and its composition including the number or percentage of public directors.

Attach a list of the present officers, directors (including an identification of the public directors), governors (and, in the case of an Applicant not a corporation, the members of all standing committees grouped by committee), or persons performing functions similar to any of the foregoing, of the swap data repository or of the entity identified in Item 16 that performs the swap data repository activities of the Applicant, indicating for each:

a. Name
b. Title
c. Date of commencement and, if appropriate, termination of present term of position
d. Length of time each present officer, director, or governor has held the same position
e. Brief account of the business experience of each officer and director over the last five (5) years
f. Any other business affiliations in the securities industry or OTC derivatives industry
g. A description of:
   (1) any order of the Commission with respect to such person pursuant to Section 5e of the Act;
   (2) any conviction or injunction within the past 10 years;
   (3) any disciplinary action with respect to such person within the last five (5) years;
   (4) any disqualification under Sections 8h, and 8d of the Act.
   (5) any disciplinary action under Section 8c of the Act.
   (6) any violation pursuant to Section 9 of the Act.

h. For directors, list any committees on which they serve and any compensation received by virtue of their directorship.
16. Attach as Exhibit C to this application the following information about the chief compliance officer who has been appointed by the board of directors of the swap data repository or a person or group performing a function similar to such board of directors:
   a. Name
   b. Title
   c. Dates of commencement and termination of present term of office or position
   d. Length of time the chief compliance officer has held the same office or position
   e. Brief account of the business experience of the chief compliance officer over the last five (5) years
   f. Any other business affiliations in the derivatives/securities industry or swap data repository industry
   g. A description of:
      (1) any order of the Commission with respect to such person pursuant to Section 5e of the Act;
      (2) any conviction or injunction within the past 10 years;
      (3) any disciplinary action with respect to such person within the last five (5) years;
      (4) any disqualification under Sections 8b, and 8d of the Act.
      (5) any disciplinary action under Section 8c of the Act.
      (6) any violation pursuant to Section 9 of the Act.

17. Attach as Exhibit D a copy of documents relating to the governance arrangements of the Applicant, including, but not limited to:
   a. the nomination and selection process of the members on the Applicant’s board of directors, a person or group performing a function similar to a board of directors (collectively, “board”), or any committee that has the authority to act on behalf of the board, the responsibilities of each of the board and such committee, and the composition of each board and such committee; and
   b. a description of the manner in which the composition of the board allows the Applicant comply with applicable core principles, regulations, as well as the rules of the Applicant.
   c. a description of the procedures to remove a member of the board of directors, where the conduct of such member is likely to be prejudicial to the sound and prudent management of the swap data repository.

18. Attach as Exhibit E a narrative or graphic description of the organizational structure of the Applicant. Note: If the swap data repository activities are conducted primarily by a division, subdivision, or other segregable entity within the Applicant’s corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit E only such description as applies to the segregable entity. Additionally, prove any relevant jurisdictional information, including any and all jurisdictions in which the Applicant or any affiliated entity is doing business and registration status, including pending application (e.g., country, regulator, registration category, date of registration). In addition, include a description of the lines of responsibility and accountability for each operational unit of the Applicant to (i) any committee thereof and/or (ii) the board.

19. Attach as Exhibit F a copy of the conflicts of interest policies and procedures implemented by the Applicant to minimize conflicts of interest in the decision-making process of the swap data repository and to establish a process for the resolution of any such conflicts of interest.

20. Attach as Exhibit G, a list of all affiliates of the swap data repository and indicate the general nature of the affiliation. Provide a copy of any agreements entered into or to be entered by the swap data repository, including partnerships or joint ventures, or its participants, that will enable the Applicant to comply with the registration requirements and core principles specified in Section 21 of the Commodity Exchange Act. With regard to an affiliate that is a parent company of the Applicant, if such parent controls the Applicant, an Applicant must provide (i) the board composition of the parent, including public directors, and (ii) all ownership information requested in Exhibit A for the parent. “Control” for this purpose is defined in Commission Regulation §49.2(a)(3).

21. Attach as Exhibit H to this application a copy of the constitution, articles of incorporation or association with all amendments thereto, and existing by-laws, rules or instruments corresponding
thereto, of the Applicant. A certificate of good standing dated within one week of the date of the application shall be provided.

22. Where the Applicant is a foreign entity seeking registration or filing an amendment to an existing registration, attach as Exhibit I, an opinion of counsel that the swap data repository, as a matter of law, is able to provide the Commission with prompt access to the books and records of such swap data repository and that the swap data repository can submit to onsite inspection and examination by the Commission.

23. Where the Applicant is a foreign entity seeking registration, attach as Exhibit I-1, to designate and authorize an agent in the United States, other than a Commission official, to accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the swap data repository to enforce the Act and the regulations thereunder.

24. Attach as Exhibit J, a current copy of the Applicant’s rules as defined in Commission Regulation §40.1, consisting of all the rules necessary to carry out the duties as a swap data repository.

25. Attach as Exhibit K, a description of the Applicant’s internal disciplinary and enforcement protocols, tools, and procedures. Include the procedures for dispute resolution.

26. Attach as Exhibit L, a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency in which the proceeding(s) are pending, the date(s) instituted, and the principal parties thereto, a description of the factual basis alleged to underlie the proceeding(s) and the relief sought. Include similar information as to any such proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS II — FINANCIAL INFORMATION

27. Attach as Exhibit M a balance sheet, statement of income and expenses, statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant. If a balance sheet and statements certified by an independent public accountant are available, such balance sheet and statement shall be submitted as Exhibit M.

28. Attach as Exhibit N a balance sheet and an income and expense statement for each affiliate of the swap data repository that also engages in swap data repository activities as of the end of the most recent fiscal year of each such affiliate.

29. Attach as Exhibit O the following:
   a. A complete list of all dues, fees and other charges imposed, or to be imposed, by or on behalf of Applicant for its swap data repository services and identify the service or services provided for each such due, fee, or other charge.
   b. Furnish a description of the basis and methods used in determining the level and structure of the dues, fees and other charges listed in paragraph a of this item.
   c. If the Applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar services, so state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differentiations.

EXHIBITS III — OPERATIONAL CAPABILITY

30. Attach as Exhibit P copies of all material contracts with any swap execution facility, clearing agency, central counterparty, or third-party service provider. To the extent that form contracts are used by the Applicant, submit a sample of each type of form contract used. In addition, include a list of swap execution facilities, clearing agencies, central counterparties, and third-party service providers with
whom the Applicant has entered into material contracts. Where swap data repository functions are
performed by a third party, attach any agreements between or among the Applicant and such third
party, and identify the services that will be provided.

31. Attach as Exhibit Q any technical manuals, other guides or instructions for users of, or participants in,
the market.

32. Attach as Exhibit R a description of system test procedures, test conducted or test results that will
enable the Applicant to comply, or demonstrate the Applicant’s ability to comply with the core
principles for swap data repositories.

33. Attach as Exhibit S a description in narrative form or by the inclusion of functional specifications, of
each service or function performed as a swap data repository. Include in Exhibit S a description of all
procedures utilized for the collection, processing, distribution, publication and retention (e.g., magnetic
tape) of information with respect to transactions or positions in, or the terms and conditions of, swaps
entered into by market participants.

34. Attach as Exhibit T a list of all computer hardware utilized by the Applicant to perform swap data
repository functions, indicating where such equipment (terminals and other access devices) is
physically located.

35. Attach as Exhibit U a description of the personnel qualifications for each category of professional
employees employed by the swap data repository or the division, subdivision, or other segregable entity
within the swap data repository as described in Item 16.

36. Attach as Exhibit V a description of the measures or procedures implemented by Applicant to provide
for the security of any system employed to perform the functions of a swap data repository. Include a
general description of any physical and operational safeguards designed to prevent unauthorized access
(whether by input or retrieval) to the system. Describe any circumstances within the past year in which
the described security measures or safeguards failed to prevent any such unauthorized access to the
system and any measures taken to prevent a reoccurrence. Describe any measures used to verify the
accuracy of information received or disseminated by the system.

37. Attach as Exhibit W copies of emergency policies and procedures and Applicant’s business continuity-
disaster recovery plan. Include a general description of any business continuity-disaster recovery
resources, emergency procedures, and backup facilities sufficient to enable timely recovery and
resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as a
swap data repository following any disruption of its operations.

38. Where swap data repository functions are performed by automated facilities or systems, attach as
Exhibit X a description of all backup systems or subsystems that are designed to prevent interruptions
in the performance of any swap data repository function as a result of technical malfunctions or
otherwise in the system itself, in any permitted input or output system connection, or as a result of any
independent source. Include a narrative description of each type of interruption that has lasted for more
than two minutes and has occurred within the six (6) months preceding the date of the filing, including
the date of each interruption, the cause and duration. Also state the total number of interruptions that
have lasted two minutes or less.

39. Attach as Exhibit Y the following:
   a. For each of the swap data repository functions:
      (1) quantify in appropriate units of measure the limits on the swap data repository’s
capacity to receive (or collect), process, store or display (or disseminate for display
or other use) the data elements included within each function (e.g., number of
inquiries from remote terminals);
      (2) identify the factors (mechanical, electronic or other) that account for the current
limitations reported in answer to (1) on the swap data repository’s capacity to
receive (or collect), process, store or display (or disseminate for display or other use) the data elements included within each function;

b. If the Applicant is able to employ, or presently employs, the central processing units of its system(s) for any use other than for performing the functions of a swap data repository, state the priorities of assignment of capacity between such functions and such other uses, and state the methods used or able to be used to divert capacity between such functions and such other uses.

EXHIBITS IV — ACCESS TO SERVICES AND DATA

40. Attach as Exhibit Z the following:

a. As to each swap data repository service that the Applicant provides, state the number of persons who presently utilize, or who have notified the Applicant of their intention to utilize, the services of the swap data repository.

b. For each instance during the past year in which any person has been prohibited or limited in respect of access to services offered by the Applicant as a swap data repository, indicate the name of each such person and the reason for the prohibition or limitation.

c. Define the data elements for purposes of the swap data repository’s real-time public reporting obligation. Appendix A to Part 43 of the Commission’s Regulations (Data Elements and Form for Real-Time Reporting for Particular Markets and Contracts) sets forth the specific data elements for real-time public reporting.

41. Attach as Exhibit AA copies of any agreements governing the terms by which information may be shared by the swap data repository, including with market participants. To the extent that form contracts are used by the Applicant, submit a sample of each type of form contract used.

42. Attach as Exhibit BB a description of any specifications, qualifications or other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any swap data repository services furnished by the Applicant and state the reasons for imposing such specifications, qualifications, or other criteria, including whether such specifications, qualifications or other criteria are imposed.

43. Attach as Exhibit CC any specifications, qualifications, or other criteria required of participants who utilize the services of the Applicant for collection, processing, preparing for distribution, or public dissemination by the Applicant.

44. Attach as Exhibit DD any specifications, qualifications, or other criteria required of any person, including, but not limited to, regulators, market participants, market infrastructures, venues from which data could be submitted to the Applicant, and third-party service providers who request access to data maintained by the Applicant.

45. Attach as Exhibit EE policies and procedures implemented by the Applicant to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the Applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.

EXHIBITS — OTHER POLICIES AND PROCEDURES

46. Attach as Exhibit FF, a narrative and supporting documents that may be provided under other Exhibits herein, that describe the manner in which the Applicant is able to comply with each core principle and other requirements pursuant to Commission Regulation §49.19.
Commodity Futures Trading Commission

PART 50—CLEARING REQUIREMENT

Subpart A—Definitions and Clearing Requirement

§ 50.1 Definitions.
For the purposes of this part,

Business day means any day other than a Saturday, Sunday, or legal holiday.

Day of execution means the calendar day of the party to the swap that ends latest, provided that if a swap is:

(1) Entered into after 4:00 p.m. in the location of a party; or
(2) Entered into on a day that is not a business day in the location of a party, then such swap shall be deemed to have been entered into by that party on the immediately succeeding business day of that party, and the day of execution shall be determined with reference to such business day.

Source: 77 FR 44455, July 30, 2012, unless otherwise noted.

Subpart B—Compliance Schedule

50.25 Clearing requirement compliance schedule.

50.26–50.49 [Reserved]

Subpart C—Exceptions and Exemptions to Clearing Requirement

50.50 Exceptions to the clearing requirement.

§ 50.2 Treatment of swaps subject to a clearing requirement.

(a) All persons executing a swap that:

1. Is not subject to an exception under section 2(h)(7) of the Act or § 50.50 of this part; and

2. Is included in a class of swaps identified in §50.4 of this part, shall submit such swap to any eligible derivatives clearing organization that accepts such swap for clearing as soon as technically practicable after execution, but in any event by the end of the day of execution.

(b) Each person subject to the requirements of paragraph (a) of this section shall undertake reasonable efforts to verify whether a swap is required to be cleared.

(c) For purposes of paragraph (a) of this section, persons that are not clearing members of an eligible derivatives clearing organization shall be deemed to have complied with paragraph (a) of this section upon submission of such swap to a futures commission merchant or clearing member of a derivatives clearing organization, provided that submission occurs as soon as technologically practicable after execution, but in any event by the end of the day of execution.

§ 50.3 Notice to the public.

(a) In addition to its obligations under §39.21(c)(1), each derivatives clearing organization shall make publicly available on its Web site a list of all swaps that it will accept for clearing and identify which swaps on the list are required to be cleared under section 2(h)(1) of the Act and this part.

(b) The Commission shall maintain a current list of all swaps that are required to be cleared and all derivatives clearing organizations that are eligible to clear such swaps on its Web site.

§ 50.4 Classes of swaps required to be cleared.

(a) Interest rate swaps. Swaps that have the following specifications are required to be cleared under section 2(h)(1) of the Act, and shall be cleared pursuant to the rules of any derivatives clearing organization eligible to clear such swaps under §39.5(a) of this chapter.

<table>
<thead>
<tr>
<th>Specification</th>
<th>Fixed-to-floating swap class</th>
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<tbody>
<tr>
<td>Currency .................</td>
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<tr>
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<td>Stated Termination Date Range.</td>
<td>28 days to 50 years.</td>
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<tr>
<td>Optionality .............</td>
<td>No</td>
</tr>
<tr>
<td>Dual Currencies ..........</td>
<td>No</td>
</tr>
<tr>
<td>Conditional Notional Amounts.</td>
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<td>U.S. dollar (USD)</td>
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<tr>
<td>Floating Rate Indexes</td>
<td>LIBOR</td>
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<tr>
<td>Stated Termination Date Range.</td>
<td>28 days to 50 years.</td>
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<tr>
<td>Optionality .............</td>
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<tr>
<td>Dual Currencies ..........</td>
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<td>Conditional Notional Amounts.</td>
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</table>

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<th>Forward rate agreement class</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
<tr>
<td>Floating Rate Indexes</td>
<td>LIBOR</td>
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<td>Specification</td>
<td>North American untranch CDS indices class</td>
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<tr>
<td>---------------</td>
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<td>Region</td>
<td>North America.</td>
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<tr>
<td>Indices</td>
<td>CDX.NA.IG: 3Y, 5Y, 7Y, 10Y; CDX.NA.HY: 5Y.</td>
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<td>Tenor</td>
<td>CDX.NA.IG: Series 15 and all subsequent Series, up to and including the current Series. CDX.NA.IG 5Y: Series 11 and all subsequent Series, up to and including the current Series. CDX.NA.IG 7Y: Series 8 and all subsequent Series, up to and including the current Series. CDX.NA.IG 10Y: Series 8 and all subsequent Series, up to and including the current Series.</td>
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<tr>
<td>Applicable Series</td>
<td>CDX.NA.IG 3Y: Series 15 and all subsequent Series, up to and including the current Series.</td>
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<td>Tranched</td>
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(b) Credit default swaps. Swaps that have the following specifications are required to be cleared under section 2(h)(1) of the Act, and shall be cleared pursuant to the rules of any derivatives clearing organization eligible to clear such swaps under §39.5(a) of this chapter.

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<tr>
<th>Specification</th>
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<tr>
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<td>Indices</td>
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</tr>
<tr>
<td>Tranched</td>
<td>No.</td>
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§ 50.5 Swaps exempt from a clearing requirement.

(a) Swaps entered into before July 21, 2010 shall be exempt from the clearing requirement under § 50.2 of this part if reported to a swap data repository pursuant to section 2(h)(5)(A) of the Act and § 46.3(a) of this chapter.

(b) Swaps entered into before the application of the clearing requirement for a particular class of swaps under §§ 50.2 and 50.4 of this part shall be exempt from the clearing requirement if reported to a swap data repository pursuant to section 2(h)(6)(B) of the Act and either § 46.3(a) or §§ 45.3 and 45.4 of this chapter, as appropriate.

§ 50.6 Delegation of authority.

(a) The Commission hereby delegates to the Director of the Division of Clearing and Risk or such other employee or employees as the Director may designate from time to time, with the consultation of the General Counsel or such other employee or employees as the General Counsel may designate from time to time, the authority:

(1) After prior notice to the Commission, to determine whether one or more swaps submitted by a derivatives clearing organization under § 39.5 falls within a class of swaps as described in § 50.4, provided that inclusion of such swaps is consistent with the Commission’s clearing requirement determination for that class of swaps; and

(2) To notify all relevant derivatives clearing organizations of that determination.

(b) The Director of the Division of Clearing and Risk may submit to the Commission for its consideration any matter which has been delegated in this section. Nothing in this section prohibits the Commission from exercising the authority delegated in this section.

§ 50.10 Prevention of evasion of the clearing requirement and abuse of an exception or exemption to the clearing requirement.

(a) It shall be unlawful for any person to knowingly or recklessly evade or participate in or facilitate an evasion of the requirements of section 2(h) of the Act or any Commission rule or regulation promulgated thereunder.

(b) It shall be unlawful for any person to abuse the exception to the clearing requirement as provided under section 2(h)(7) of the Act or an exception or exemption under this chapter.

(c) It shall be unlawful for any person to abuse any exemption or exception to the requirements of section 2(h) of the Act, including any exemption or exception as the Commission may provide by rule, regulation, or order.

§ 50.11–50.24 [Reserved]
2(h)(2) of the Act, the Commission may determine, based on the group, category, type, or class of swaps subject to such determination, that the following schedule for compliance with the requirements of section 2(h)(1)(A) of the Act shall apply:

(1) A swap between a Category 1 Entity and another Category 1 Entity, or any other entity that desires to clear the transaction, must comply with the requirements of section 2(h)(1)(A) of the Act no later than ninety (90) days from the date of publication of such clearing requirement determination in the Federal Register.

(2) A swap between a Category 2 Entity and a Category 1 Entity, another Category 2 Entity, or any other entity that desires to clear the transaction, must comply with the requirements of section 2(h)(1)(A) of the Act no later than one hundred and eighty (180) days from the date of publication of such clearing requirement determination in the Federal Register.

(3) All other swaps for which neither of the parties to the swap is eligible to claim the exception from the clearing requirement set forth in section 2(h)(7)(A) of the Act and §39.6, must comply with the requirements of section 2(h)(1)(A) of the Act no later than two hundred and seventy (270) days from the date of publication of such clearing requirement determination in the Federal Register.

(c) Nothing in this rule shall be construed to prohibit any person from voluntarily complying with the requirements of section 2(h)(1)(A) of the Act sooner than the implementation schedule provided under paragraph (b).

[77 FR 44455, July 30, 2012]

§§ 50.26–50.49 [Reserved]

Subpart C—Exceptions and Exemptions to Clearing Requirement

SOURCE: 77 FR 74337, Dec. 13, 2012, unless otherwise noted.

§ 50.50 Exceptions to the clearing requirement.

(a) Non-financial entities. (1) A counterparty to a swap may elect the exception to the clearing requirement under section 2(h)(7)(A) of the Act if the counterparty:

(i) Is not a “financial entity” as defined in section 2(h)(7)(C)(i) of the Act;

(ii) Is using the swap to hedge or mitigate commercial risk as provided in paragraph (c) of this section; and

(iii) Provides, or causes to be provided, the information specified in paragraph (b) of this section to a registered swap data repository or, if no registered swap data repository is available to receive the information from the reporting counterparty, to the Commission. A counterparty that satisfies the criteria in this paragraph (a)(1) and elects the exception is an “electing counterparty.”

(2) If there is more than one electing counterparty to a swap, the information specified in paragraph (b) of this section shall be provided with respect to each of the electing counterparties.

(b) Reporting. (1) When a counterparty elects the exception to the clearing requirement under section 2(h)(7)(A) of the Act, one of the counterparties to the swap (the “reporting counterparty,” as determined in accordance with §45.8 of this part) shall provide, or cause to be provided, the following information to a registered swap data repository or, if no registered swap data repository is available to receive the information from the reporting counterparty, to the Commission, in the form and manner specified by the Commission:

(i) Notice of the election of the exception;

(ii) The identity of the electing counterparty to the swap; and

(iii) The following information, unless such information has previously been provided by the electing counterparty in a current annual filing pursuant to paragraph (b)(2) of this section:

(A) Whether the electing counterparty is a “financial entity” as defined in section 2(h)(7)(C)(i) of the Act, and if the electing counterparty is a financial entity, whether it is:

(1) Electing the exception in accordance with section 2(h)(7)(C)(iii) or section 2(h)(7)(D) of the Act; or
(2) Exempt from the definition of “financial entity” as described in paragraph (d) of this section; 
(B) Whether the swap or swaps for which the electing counterparty is electing the exception are used by the electing counterparty to hedge or mitigate commercial risk as provided in paragraph (c) of this section; 
(C) How the electing counterparty generally meets its financial obligations associated with entering into non-cleared swaps by identifying one or more of the following categories, as applicable: 
(i) A written credit support agreement; 
(ii) Pledged or segregated assets (including posting or receiving margin pursuant to a credit support agreement or otherwise); 
(iii) A written third-party guarantee; 
(iv) The electing counterparty’s available financial resources; or 
(v) Means other than those described in paragraphs (b)(1)(iii)(C)(1), (2), (3) or (4) of this section; and 
(D) Whether the electing counterparty is an entity that is an issuer of securities registered under section 12 of, or is required to file reports under section 15(d) of, the Securities Exchange Act of 1934, and if so: 
(i) The relevant SEC Central Index Key number for that counterparty; and 
(ii) Whether an appropriate committee of that counterparty’s board of directors (or equivalent body) has reviewed and approved the decision to enter into swaps that are exempt from the requirements of sections 2(h)(1) and 2(h)(8) of the Act. 
(2) An entity that qualifies for an exception to the clearing requirement under this section may report the information listed in paragraph (b)(1)(iii) of this section annually in anticipation of electing the exception for one or more swaps. Any such reporting under this paragraph shall be effective for purposes of paragraph (b)(1)(iii) of this section for swaps entered into by the entity for 365 days following the date of such reporting. During such period, the entity shall amend such information as necessary to reflect any material changes to the information reported. 
(3) Each reporting counterparty shall have a reasonable basis to believe that the electing counterparty meets the requirements for an exception to the clearing requirement under this section. 
(c) Hedging or mitigating commercial risk. For purposes of section 2(h)(7)(A)(ii) of the Act and paragraph (b)(1)(iii)(B) of this section, a swap is used to hedge or mitigate commercial risk if: 
(1) Such swap: 
(i) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, where the risks arise from: 
(A) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise; 
(B) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise; 
(C) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise; 
(D) The potential change in the value of assets, services, inputs, products, or commodities that a person owns, produces, manufactures, processes, merchandises, leases, or sells, or reasonably anticipates owning, producing, manufacturing, processing, merchandising, leasing, or selling in the ordinary course of business of the enterprise; 
(E) Any potential change in value related to any of the foregoing arising from interest, currency, or foreign exchange rate movements associated with such assets, liabilities, services, inputs, products, or commodities; or 
(F) Any fluctuation in interest, currency, or foreign exchange rate exposures arising from a person’s current or anticipated assets or liabilities; or 
(ii) Qualifies as bona fide hedging for purposes of an exemption from position limits under the Act; or 
(iii) Qualifies for hedging treatment under:
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(A) Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging (formerly known as Statement No. 133); or

(B) Governmental Accounting Standards Board Statement 53, Accounting and Financial Reporting for Derivative Instruments; and

(2) Such swap is:

(i) Not used for a purpose that is in the nature of speculation, investing, or trading; and

(ii) Not used to hedge or mitigate the risk of another swap or security-based swap position, unless that other position itself is used to hedge or mitigate commercial risk as defined by this rule or §240.3a67–4 of this title.

(d) For purposes of section 2(h)(7)(A) of the Act, a person that is a “financial entity” solely because of section 2(h)(7)(C)(i)(VIII) shall be exempt from the definition of “financial entity” if such person:

(1) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and

(2) Has total assets of $10,000,000,000 or less on the last day of such person’s most recent fiscal year.

PART 100—DELIVERY PERIOD REQUIRED

AUTHORITY: 7 U.S.C. 7a(a)(4) and 12a.

§100.1 Delivery period required with respect to certain grains.

A period of seven business days is required during which contracts for future delivery in the current delivery month of wheat, corn, oats, barley, rye, or flaxseed may be settled by delivery of the actual cash commodity after trading in such contracts has ceased, for each delivery month after May 1938, on all contract markets on which there is trading in futures in any of such commodities, and such contract markets, and each of them, are directed to provide therefor.

[41 FR 3211, Jan. 21, 1976]

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

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Subpart A—Organization

§ 140.1 Headquarters office.

(a) General. The headquarters office of the Commission is located at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
(b) [Reserved]

[48 FR 2734, Jan. 21, 1983, as amended at 60 FR 49335, Sept. 25, 1995]

§ 140.2 Regional office—regional coordinators.

Each of the Regional offices described herein functions as set forth in this section under the direction of a Regional Coordinator who, as a collateral duty, oversees the administration of the office and represents the Commission in negotiations with employee union officials and in interactions with external parties. Each regional office has delegated authority for the enforcement of the Act and administration of the programs of the Commission in the particular regions.

(a) The Eastern Regional Office is located at 140 Broadway, New York, New York, 10005 and is responsible for enforcement of the Act and administration of programs of the Commission in the States of Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and West Virginia.

(b) The Central Regional Office is located at 525 West Monroe Street, Suite 1100, Chicago, Illinois 60661 and is responsible for enforcement of the Act and administration of programs of the Commission in the States of Illinois, Indiana, Michigan, Ohio and Wisconsin.

(c) The Southwestern Regional Office is located at Two Emanuel Cleaver II Blvd., Suite 300, Kansas City, Missouri 64112, and is responsible for enforcement of the Act and administration of the programs of the Commission in the States of Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

[69 FR 41426, July 9, 2004, as amended at 72 FR 16269, Apr. 4, 2007]

Subpart B—Functions

§ 140.10 The Commission.

The Commission is composed of a Chairman and four other Commissioners, not more than three of whom may be members of the same political party, who are appointed by the President, with the advice and consent of the Senate, for 5-year terms, one term ending each year. The Commission is
assisted by a staff, which includes lawyers, economists, accountants, investigators and examiners, as well as administrative and clerical employees.

[41 FR 28474, July 12, 1976]

§ 140.11 Emergency action by the senior Commissioner available.

(a) Authority of senior Commissioner. When it is not feasible to convene a quorum of the Commission, the Senior Commissioner present at the principal offices of the Commission (or, during non-business hours, available in the Washington, DC area) may take emergency action on behalf of and in the name of the Commission in accordance with the procedures set forth in this section. Members of the Commission shall be considered senior in the following order: The Chairman, the Vice-Chairman, and other Commissioners in order of their length of service on the Commission. Where two or more Commissioners have commenced their service on the same date, the Commissioner whose unexpired term in office is the longest will be considered senior.

(b) Exercise of authority. Subject to the right of the Commission to review any emergency action taken as hereinafter provided, the Senior Commissioner may act on behalf of and in the name of the Commission with respect to all of the functions of the Commission except general rulemaking functions: Provided, however, That the Senior Commissioner shall not exercise any authority on behalf of the Commission on the same date, the Commissioner whose unexpired term in office is the longest will be considered senior.

(c) Report to the Commission. The exercise of Senior Commissioner authority shall be reported to the Commission within one business day thereafter either by the Senior Commissioner or at his direction, and shall be recorded by the Secretariat in the Minute Record of all official actions of the Commission. The Secretariat shall promptly notify any directly affected person of the action taken and that it was the Senior Commissioner available, rather than the Commission as a whole, who took the action.

(d) Review by the Commission. The Commission may, in the following circumstances, review any action taken under Senior Commissioner authority and may affirm, modify, alter or set aside the decision:

(1) Upon the request of any member of the Commission, any action taken by a Senior Commissioner shall be reviewed by the Commission.

(2) In the event action by a Senior Commissioner suspends, denies or revokes or otherwise directly and adversely affects any license, right or privilege of any person, that person may in writing request review by the Commission and shall be entitled to have the action of the Senior Commissioner reviewed by the Commission.

(3) The Commission may, in its discretion, review any action taken by a Senior Commissioner upon petition by any other person.

(e) Final effect of action by Senior Commissioner. In any matter, the action taken under Senior Commissioner authority shall be deemed the action of the Commission unless and until the Commission shall otherwise direct.

[41 FR 28474, July 12, 1976]

§ 140.12 Disposition of business by se-riatim Commission consideration.

(a) Whenever the Chairman of the Commission is of the opinion that joint deliberation among the members of the Commission upon any matter is unnecessary in light of the nature of the matter, impracticable, or would impede the orderly disposition of agency business, but is of the view that such matter should be the subject of a vote of the Commission, such matter may be disposed of by circulation of any relevant materials concerning the matter.
The relevant materials shall be circulated to each member of the Commission, unless a member is unavailable or has determined not to participate in the matter. A written record of the vote of each participating Commission member shall be reported to the Secretariat who shall retain it in the records of the Commission.

(b) Whenever any member of the Commission so requests, any matter circulated for disposition pursuant to paragraph (a) of this section shall be withdrawn from circulation and scheduled instead for a Commission meeting.

[43 FR 43452, Sept. 26, 1978]

§ 140.13 Vacancy in position of Chairman.

At any time that a vacancy exists in the position of Chairman of the Commission the remaining members of the Commission shall elect a member to serve as acting Chairman who shall exercise the executive and administrative functions of the Commission that would otherwise be exercised by a Chairman in accordance with section 2(a)(6) of the Commodity Exchange Act, as amended, until a new Chairman has been appointed by the President and confirmed by the Senate: Provided, however, That if the President shall appoint a new Chairman from among the existing members of the Commission, that Commissioner shall serve as acting Chairman for these purposes until such time as his appointment as Chairman has been confirmed or rejected by the Senate.

[43 FR 50167, Oct. 27, 1978]

§ 140.14 Delegation of authority to the Secretary of the Commission.

After the Commission has formally reached a decision or taken other action on a matter, has agreed upon the language of the document which embodies the Commission decision or other action, including, but not limited to, a rule, regulation or order, and has directed that the document be issued, the Secretary of the Commission (or a person designated in writing by the Secretary) shall sign the document on behalf of the Commission. Signature by the Secretary shall be a ministerial function and shall not be discretionary.

The delegation to the Secretary of the authority to sign documents on the Commission’s behalf shall not affect any other delegation which the Commission has made, or may make, which authorizes any other officer or employee of the Commission to take action and to sign documents on the Commission’s behalf. In addition, the Commission reserves the authority to provide for signature on its behalf by the Chairman or any other member of the Commission in particular circumstances.

[44 FR 33677, June 12, 1979]

§ 140.20 Designation of senior official to oversee Commission use of national security information.

(a) The Executive Director is hereby designated to oversee the Commission’s program to ensure the safeguarding of national security information received by the Commission from other agencies, to chair a Commission committee composed of members of the staff selected by him with authority to act on all suggestions and complaints with respect to the Commission administration of its information security program, and, in conjunction with the Security Officer of the Commission, to ensure that practices for safeguarding national security information are systematically reviewed and that those practices which are duplicative or unnecessary are eliminated.

(b) The Executive Director may submit any matter for which he has been designated under paragraph (a) of this section to the Commission for its consideration.

[44 FR 65736, Nov. 15, 1979, as amended at 61 FR 21955, May 13, 1996]

§ 140.21 Definitions.

(a) Classified information. Information or material that is:

(1) Owned by, produced for or by, or under control of the United States Government, and

(2) Determined pursuant to Executive Order 12356 or prior or succeeding orders to require protection against unauthorized disclosure, and

(3) So designated.
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§ 140.24 Control and accountability procedures.

Persons entrusted with classified information shall be responsible for providing protection and accountability for such information at all times and for locking classified information in approved security equipment whenever it is not in use or under direct supervision of authorized persons.

(a) General safeguards.
(1) Classified material must not be left in unoccupied rooms or be left inadequately protected in an occupied office, or one occupied by other than security cleared employees. Under no circumstances shall classified material be placed in desk drawers or anywhere other than in approved storage containers.

(2) Employees using classified material shall take every precaution to prevent deliberate or casual inspection of it by unauthorized persons. Classified material shall be kept under constant surveillance and face down or covered when not in use.

(3) All copies of classified documents and any informal material such as memoranda, rough drafts, shorthand notes, carbon copies, carbon paper, typewriter ribbons, recording discs, spools and tapes shall be given the same classification and secure handling as the classified information they contain.

(4) Commission personnel authorized to use classified materials will obtain them from the Executive Director or his delegee on the day required and return them to the Executive Director or his delegee before the close of business on the same day.

(5) Classified information shall not be revealed in telephone or telecommunications conversations.

(6) Any person who has knowledge of the loss or possible compromise of classified information shall immediately having been granted a security clearance. A person must also have a need for access to the particular classified information sought in connection with the performance of official government duties or contractual obligations. The determination of that need shall be made by officials having responsibility for the classified information.

[48 FR 15464, Apr. 11, 1983]
report the circumstances either to the Security Officer or to the Executive Director or his delegate. The Executive Director or his delegate shall initiate a preliminary inquiry to determine the circumstances surrounding an actual or possible compromise, and to determine what corrective measures and administrative, disciplinary, or legal action is necessary.

(b) Reproduction controls. (1) The number of copies of documents containing classified information must be kept to the minimum required by operational necessity to decrease the risk of compromise and reduce storage costs.

(2) Top Secret documents, except for the controlled initial distribution of information processed or received electrically, shall not be reproduced without the consent of the originator.

(3) Unless restricted by the originating agency, Secret and Confidential documents may be reproduced to the extent required by operational needs.

(4) Reproduced copies of classified documents shall be subject to the same accountability and controls as the original documents.

(5) Classified reproduction shall be controlled by persons with the proper level of security clearance.

(6) Records shall be maintained to show the number and distribution of reproduced copies to all Top Secret documents, of all classified documents covered by special access programs distributed outside the originating agency, and of all Secret and Confidential documents which are marked with special dissemination and reproduction limitations.

(7) Unauthorized reproduction of classified material will be subject to appropriate disciplinary action.

(c) Storage of classified material. (1) All classified material in the custody of the Commission will be stored in accordance with the guidelines set forth in 32 CFR 2001.43.

(2) In addition, the Commission remains subject to the provisions of 32 CFR part 2001, et seq., insofar as they are applicable to classified materials held by the Commission.

§ 140.72 Delegation of authority to disclose confidential information to a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization.

(a) Pursuant to the authority granted under sections 2(a)(11), 8a(5) and 8a(6) of the Act, the Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director, the Deputy Executive Director, the Special Assistant to the Executive Director, the Director of the Division of Clearing and Intermediary Oversight, each Deputy Director of the Division of Clearing and Intermediary Oversight, the Chief Accountant, the General Counsel, each Deputy General Counsel, the Director of the Division of Market Oversight, each Deputy Director of the Division of Market Oversight, the Deputy Director of the Market and Trade Practice Surveillance Branch, the Director of the Division of Enforcement, each Deputy Director of the Division of Enforcement, each Associate Director of the Division of Enforcement, the Chief Counsel of the Division of Enforcement, each Regional Counsel of the Division of Enforcement, each of the Regional Administrators, the Chief Economist of the Office of the Chief Economist, the Deputy Chief Economist of the Office of the Chief Economist, the Director of the Office of International Affairs, and the Deputy Director of the Office of International Affairs, the authority to disclose to an official of any contract market, swap execution facility, swap data repository, registered futures association, or self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934, any information necessary or appropriate to effectuate the purposes of the Act, including, but not limited to, the full facts concerning any transaction or market operation, including the names of the parties thereto. This authority to disclose shall be based on a determination that the transaction or market operation disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors or that disclosure is necessary or appropriate.
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§ 140.73 Delegation of authority to disclose information to United States, States, and foreign government agencies and foreign futures authorities.

(a) Pursuant to sections 2(a)(11), 8a(5) and 8(e) of the Act, the Commission hereby delegates, until such time as the Commission orders otherwise, to the General Counsel or, in his or her absence, to each Deputy General Counsel, the Director of the Division of Enforcement, each Deputy Director of the Division of Enforcement, the Chief Counsel of the Division of Enforcement, each Associate Director of the Division of Enforcement, each Regional Counsel of the Division of Enforcement, the Director of the Division of Market Oversight or, in his or her absence, each Deputy Director of the Division of Market Oversight, the Director of the Division of Clearing and Intermediary Oversight, the Director of the Division of Clearing and Intermediary Oversight, the Chief Economist of the Office of the Chief Economist, the Deputy Chief Economist of the Office of the Chief Economist, and the Director of the Office of International Affairs or, in his or her absence, each Director of the Office of International Affairs, the authority to furnish information in the possession of the Commission obtained 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, 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.

(c) Notwithstanding the provisions of paragraph (a) of this section, in any case in which a Commission employee delegated authority under this section believes it appropriate, he or she may submit to the Commission for its consideration the question of whether disclosure of information should be made.

(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.

(e) For the purposes of this section, the term “self-regulatory organization” shall mean the same as that defined in section 3(a) (26) of the Securities Exchange Act of 1934.

(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.

in connection with the administration of the Act, upon written request, to:

1. Any department or agency of the United States, including for this purpose an independent regulatory agency, acting within the scope of its jurisdiction;

2. Any department or agency of any State or any political subdivision thereof, acting within the scope of its jurisdiction; or

3. Any foreign futures authority, as defined in section 1a(10) of the Act, or any department or agency of any foreign government or political subdivision thereof, acting within the scope of its jurisdiction, provided that the Commission official making the disclosure is satisfied that the information will not be disclosed except in connection with an adjudicatory action or proceeding brought under the laws of such foreign government or political subdivision to which such foreign government or political subdivision or any department or agency thereof, or foreign futures authority is a party.

(b) Any disclosure made pursuant to paragraph (a) of this section shall be made with the concurrence of the Director of the Division of Enforcement or in his or her absence a Deputy Director of the Division of Enforcement. Provided, however, that no such concurrence is necessary for the Director of the Division of Market Oversight or in his or her absence each Deputy Director of the Division or for the Director of the Market Surveillance Section to release information under paragraph (a)(1) of this section concerning current or on-going market transactions or operations.

(c) In furnishing information under this delegation pursuant to paragraphs (a)(1) and (2) of this section, the Commission official making the disclosure shall remind the department or agency involved that section 8(e) of the Act prohibits the disclosure by such department or agency of information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers except in an action or proceeding under the laws of the United States, the State, or a political subdivision thereof to which the department or the agency of either the state or political subdivision, the Commission, or the United States is a party.

(d) This delegation shall not affect any other delegation which the Commission has made or may make, which authorizes any other officer or employee of the Commission to furnish information to governmental bodies on the Commission’s behalf.

(e) Notwithstanding the provisions of paragraph (a) of this section, in any case in which any employee delegated authority therein believes it appropriate the matter may be submitted to the Commission for its consideration. Nothing in this section shall prohibit the Commission from exercising the authority delegated in paragraph (a) of this section.

§ 140.74 Delegation of authority to issue special calls for Series 03 Reports and Form 40.

(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, the authority to issue special calls under Commission Rule 18.00 for series 03 reports, and under Commission Rule 18.04 for a Form 40.

(b) The Director of the Division of Market Oversight may submit any matter which has been delegated to the Director under paragraph (a) of this section to the Commission for its consideration.

(c) Nothing in this section may prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Market Oversight under paragraph (a) of this section.

§ 140.75 Delegation of authority to the Director of the Division of Clearing and Intermediary Oversight.

Pursuant to sections 2(a)(11), 8a(5) and 8(g) of the Act, the Commission hereby delegates to the Director of the Division of Clearing and Intermediary
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§ 140.80 Disclosure of information pursuant to a subpoena or summons.

The Commission shall provide notice to any person who has submitted information to the Commission when a summons or subpoena seeking the submitted information is received by the

(b) Notwithstanding the provisions of paragraph (a), in any case in which the Director of the Division of Enforcement, the Director of the Division of Clearing and Intermediary Oversight, the General Counsel, or any employee designated by them to make disclosures pursuant to this section believes it appropriate, the matter may be submitted to the Commission for consideration. In addition, the Commission reserves to itself the authority to determine whether to grant a request for information in any particular case.

§ 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.

(b) The Director of the Division of Market Oversight may submit any matter which has been delegated to the Director under paragraph (a) of this section to the Commission for its consideration.

(c) Nothing in this section may prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Market Oversight under paragraph (a) of this section.

§ 140.76 Delegation of authority to disclose information in a receivership or bankruptcy proceeding.

(a) Pursuant to sections 2(a)(11) and 8(b) of the Act, the Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Enforcement, the Director of the Division of Clearing and Intermediary Oversight, the General Counsel or any Commission employee under their direction as they may designate, the authority to disclose data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers, when such disclosure is made in any receivership proceeding involving a receiver appointed in a judicial proceeding brought under the Act, or in any bankruptcy proceeding in which the Commission has intervened or in which the Commission has the right to appear and be heard under title 11 of the United States Code.

§ 140.81 Delegation of authority to the Director of the Division of Trading and Markets.  
(a) The Commission hereby delegates, until such time as the Commission orders otherwise, the following functions to the Director of the Division of Clearing and Intermediary Oversight and to such members of the Commission’s staff acting under his direction as he may designate from time to time:  
(1) All functions reserved to the Commission in §1.10 of this chapter, except for those relating to nonpublic treatment of reports set forth in §1.10(g) of this chapter;  
(2) All functions reserved to the Commission in §1.12 of this chapter;  
(3) All functions reserved to the Commission in §1.14 of this chapter;  
(4) All functions reserved to the Commission in §1.15 of this chapter;  
(5) All functions reserved to the Commission in §1.16 of this chapter; and  
(6) All functions reserved to the Commission in §1.17 of this chapter, except for those relating to non-enumerated cover cases set forth in §1.17(j)(3) of this chapter;  
(7) All functions reserved to the Commission in §1.25 of this chapter.  

(8) All functions reserved to the Commission in §41.41 of this chapter. Any action taken pursuant to the delegation of authority under this paragraph (a)(8) shall be made with the concurrence of the General Counsel or, in his or her absence, a Deputy General Counsel.

(b) The Director of the Division of Clearing and Intermediary Oversight may submit any matter which has been delegated to him under paragraph (a) of this section to the Commission for its consideration.

[49 FR 4464, Feb. 7, 1984]

§ 140.81 [Reserved]

§ 140.82 Delegation of authority to grant registrations and renewals thereof.  
(a) The Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and to such members of the Commission’s staff acting under his direction as he may designate, the authority to grant registrations and renewals thereof.

(b) The Director of the Division of Clearing and Intermediary Oversight may submit any matter which has been delegated to him under paragraph (a) of this section to the Commission for its consideration.

(c) Nothing in this section may prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Clearing and Intermediary Oversight under paragraph (a) of this section.


§ 140.83 Delegation of authority to the Director of the Division of Clearing and Intermediary Oversight.  
(a) The Commission hereby delegates, until such time as the Commission orders otherwise, the following functions to the Director of the Division of Clearing and Intermediary Oversight and to such members of the Commission’s staff acting under his direction as he may designate from time to time:
§ 140.95 Delegation of authority with respect to withdrawals from registration.

(a) The Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight and to such members of the Commission’s staff acting under his direction as he may designate, the authority to review, postpone, condition, deny, or otherwise act upon a request for withdrawal from registration.

(b) The Director of the Division of Clearing and Intermediary Oversight may submit any matter which has been delegated to him under paragraph (a) of this section to the Commission for its consideration.

(c) Nothing in this section may prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Clearing and Intermediary Oversight under paragraph (a) of this section.

§ 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 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.

(c) The Director of the Division of Market Oversight or the Director of the Division of Clearing and Intermediary Oversight may submit any matter which has been delegated to such Director under paragraphs (a) or (b) of this section to the Commission for its consideration.

(d) Nothing in this section may prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Market Oversight and to the Director of the Division of Clearing and Intermediary Oversight under paragraphs (a) and (b) of this section.

§ 140.97 Delegation of authority regarding requests for classification of positions as bona fide hedging.

(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, all functions reserved to the Commission in §§1.47 and 1.48 of this chapter.

(b) The Director of the Division of Market Oversight may submit any matter which has been delegated to the Director under paragraph (a) of this section to the Commission for its consideration.

(c) Nothing in this section may prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Market Oversight under paragraph (a) of this section.

§ 140.98 Publication of no-action, interpretative and exemption letters and other written communications.

(a) Except as provided in paragraphs (b) and (c) of this section, and except for applications for orders granting exemptions submitted pursuant to section 4(c) of the Commodity Exchange Act and any written responses thereto, each written response by the Commission or its staff to a letter or other written communication requesting:
Commodity Futures Trading Commission

§ 140.99 Requests for exemptive, no-action and interpretative letters.

(a) Definitions. For the purpose of this section:

(1) Exemptive letter means a written grant of relief issued by the staff of a Division of the Commission from the applicability of a specific provision of the Act or of a rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted by the Beneficiary. An exemptive letter may only be issued by staff of a Division when the Commission itself has exemptive authority and that authority has been delegated by the Commission to the Division in question. An exemptive letter binds the Commission and its staff with respect to the relief provided therein. Only the Beneficiary may rely upon the exemptive letter.

(2) No-action letter means a written statement issued by the staff of a Division of the Commission or of the Office of the General Counsel that it will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted by the Beneficiary. A no-action letter binds only the issuing Division or the Office of the General Counsel, as applicable, and not the Commission or other Commission staff. Only the Beneficiary may rely upon the no-action letter.

(3) Interpretative letter means written advice or guidance issued by the staff...
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of a Division of the Commission or the Office of the General Counsel. An interpretative letter binds only the issuing Division or the Office of the General Counsel, as applicable, and does not bind the Commission or other Commission staff. An interpretative letter may be relied upon by persons in addition to the Beneficiary.

(4) Letter means an exemptive, no-action or interpretative letter.

(5) Division means the Division of Clearing and Intermediary Oversight or the Division of Market Oversight.

(b) General requirements.

(1) Issuance of a Letter is entirely within the discretion of Commission staff.

(2) Each request for a Letter must comply with the requirements of this section. Commission staff may reject or decline to respond to a request that does not comply with the requirements of this section.

(3) The request must relate to a proposed transaction or a proposed activity. Absent extraordinary circumstances, Commission staff will not issue a Letter based upon transactions or activities that have been completed or activities that have been conducted prior to the date upon which the request is filed with the Commission.

(4) The request must be made by or on behalf of the person whose activities or transactions are the subject of the request. Commission staff will not respond to a request for a Letter that is made by or on behalf of an unidentified person.

(5)(i) The request must set forth as completely as possible all material facts and circumstances giving rise to the request.

(ii) Commission staff will not respond to a request based on a hypothetical situation. However, a requester may set forth one or more alternative structures or fact situations for a proposed transaction or activity: Provided, That the request complies with this section with respect to each alternative structure or fact situation.

(c) Information requirements. Each request for a Letter must comply with the following information requirements:

(i) A request made by the person on whose behalf the Letter is sought must contain:

(A) The name, main business address, main telephone number and, if applicable, the National Futures Association registration identification number of such person; and

(B) The name and, if applicable, the National Futures Association registration identification number of each other person for whose benefit the person is seeking the Letter.

(ii) When made by a requester other than the person on whose behalf the Letter is sought, the request must contain:

(A) The name, main business address and main business telephone number of the requester;

(B) The name and, if applicable, the National Futures Association registration identification number of the person on whose behalf the Letter is sought; and

(C) The name and, if applicable, the National Futures Association registration identification number of each other person for whose benefit the requester is seeking the Letter.

(iii) The request must provide the name, address and telephone number of a contact person from whom Commission staff may obtain additional information if necessary.

(2) The section number of the particular provision of the Act and/or Commission rules, regulations or orders to which the request relates must be set forth in the upper right-hand corner of the first page of the request.

(3) The request must be accompanied by:

(i) A certification by a person with knowledge of the facts that the material facts as represented in the request are true and complete. The following form of certification is sufficient for this purpose:

I hereby certify that the material facts set forth in the attached letter dated ______ are true and complete to the best of my knowledge.

(name and title)

and

(ii) An undertaking made by the person on whose behalf the Letter is sought or by that person’s authorized representative that, if at any time prior to issuance of a Letter, any material representation made in the request
ceases to be true and complete, the person who made the undertaking will ensure that Commission staff is informed promptly in writing of all materially changed facts and circumstances. If a material change in facts or circumstances occurs subsequent to issuance of a Letter, the person on whose behalf the Letter is sought (or that person’s authorized representative at the time of the change) must promptly so inform Commission staff.

(4) The request must identify the type of relief requested and Letter sought and must clearly state why a Letter is needed. The request must identify all relevant legal and factual issues and discuss the legal and public policy bases supporting issuance of the Letter.

(5) The request must contain references to all relevant authorities, including applicable provisions of the Act, Commission rules, regulations and orders, judicial decisions, administrative decisions, relevant statutory interpretations and policy statements. Adverse authority must be cited and discussed.

(6) The request must identify prior publicly available Letters issued by Commission staff in response to circumstances similar to those surrounding the request (including adverse Letters), and must identify any conditions imposed by prior Letters as prerequisites for the issuance of those Letters. Citation of a representative sample of prior Letters is sufficient where a comprehensive recitation of prior Letters on a given topic would be repetitious or would not assist the staff in considering the request.

(7) Requests may ask that, if the requested exemptive relief, no-action position or interpretative guidance is denied, the staff consider granting alternative relief or adopting an alternative position.

(d) Filing requirements. Each request for a Letter must comply with the following filing requirements:

(1) The request must be in writing and signed.

(2) A request for a Letter relating to the provisions of the Act or the Commission’s rules, regulations or orders governing designated contract markets, registered swap execution facilities, registered swap data repositories, exempt commercial markets, exempt boards of trade, the nature of particular transactions and whether they are exempt or excluded from being required to be traded on one of the foregoing entities, foreign trading terminals, hedging exemptions, and the reporting of market positions shall be filed with the Director, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. A request for a Letter relating to all other provisions of the Act or Commission rules shall be filed with the Director, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. The request must be submitted electronically using the email address dmoletters@cftc.gov (for requests filed with the Division of Market Oversight), or dcioletters@cftc.gov (for requests filed with the Division of Clearing and Intermediary Oversight), as appropriate, and a properly signed paper copy of the request must be provided to the Division of Market Oversight or the Division of Clearing and Intermediary Oversight, as appropriate, within ten days for purposes of verification of the electronic submission.

(e) Form of staff response. No response to any request governed by this section is effective unless it is in writing, signed by appropriate Commission staff, and transmitted in final form to the recipient. Failure by Commission staff to respond to a request for a Letter does not constitute approval of the request. Nothing in this section shall preclude Commission staff from responding to a request for a Letter by way of endorsement or any other abbreviated, written form of response.

(f) Withdrawal of requests. (1) A request for a Letter may be withdrawn by filing with Commission staff a written request for withdrawal, signed by the person on whose behalf the Letter was sought or by that person’s authorized representative, that states whether the person on whose behalf the Letter was sought will proceed with the proposed transaction or activity.
§ 140.735–1 Authority and purpose.

This subpart sets forth specific standards of conduct required of Commission members, employees of the Commission, and special government employees as well as regulations concerning former Commissioners, employees, and special government employees of the Commodity Futures Trading Commission. These rules are separate from and in addition to the Office of Government Ethics’ conduct rules, Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635. In addition, this subpart contains references to various statutes governing employee conduct in order to aid Commission members, employees of the Commission and others in their understanding of statutory restrictions and requirements.1 Absent compelling countervailing reasons, all Commission members and employees are subject to all the terms of this section.

[67 FR 5939, Feb. 8, 2002]

§ 140.735–2 Prohibited transactions.

(a) Application. This section applies to all transactions effected by or on behalf of a Commission member or employee of the Commission, including transactions for the account of other persons effected by the member or employee, directly or indirectly under a power of attorney or otherwise. A member or employee shall be deemed to have a sufficient interest in the transactions of his or her spouse, minor child, or other relative who is a resident of the immediate household of the member or employee so that such transactions must be reported and are subject to all the terms of this section.

(b) Prohibitions. Except as otherwise provided in this subsection, no member or employee of the Commission shall:

(1) Participate, directly or indirectly, in any transaction:

(i) In swaps;

(ii) In commodity futures;

1These references, however, do not purport to cover all restrictions and requirements, and paraphrased restatements of statutory provisions are not intended to be, and should not be construed as, verbatim quotations of the law. Statutory text should be consulted in any situation in which it might apply.
(iii) In retail forex transactions, as that term is defined in §5.1(m) of this chapter;
(iv) Involving any commodity that is of the character of or which is commonly known to the trade as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, or decline guaranty; or
(v) For the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract;
(2) Effect any purchase or sale of a commodity option, futures contract, or swap involving a security or group of securities;
(3) Sell a security which he or she does not own or consummate a sale by the delivery of a security borrowed by or for his or her account;
(4) Participate, directly or indirectly, in any investment transaction in an actual commodity if:
(i) Nonpublic information is used in the investment transaction;
(ii) It is prohibited by rule or regulation of the Commission; or
(iii) It is effected by means of any instrument regulated by the Commission and is not otherwise permitted by an exception under this section;
(5) Purchase or sell any securities of a company which, to his or her knowledge, is involved in any:
(i) Pending investigation by the Commission;
(ii) Proceeding before the Commission or to which the Commission is a party;
(iii) Other matter under consideration by the Commission that could have a direct and predictable effect upon the company; or
(6) Recommend or suggest to another person any transaction in which the member or employee is not permitted to participate in any circumstance where the member or employee could reasonably expect to benefit or where
the member or employee has or may have control or substantial influence over such person.

(c) Exception for farming, ranching, and natural resource operations. The prohibitions in paragraphs (b)(1)(i), (ii), and (iv) of this section shall not apply to a transaction in connection with any farming, ranching, oil and gas, mineral rights, or other natural resource operation in which the member or employee has a financial interest, if he or she is not involved in the decision to engage in, and does not have prior knowledge of, the actual futures, commodity option, or swap transaction and has previously notified the General Counsel 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; or
(d) Other exceptions. The prohibitions in paragraphs (b)(1), (2) and (3) of this section shall not apply to:
(1) A transaction entered into by any publicly-available pooled investment

2As 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.
3Although not required, if they choose to do so, members or employees may use powers of attorney or other arrangements in order to meet the notice requirements of, and to assure that they have no control or knowledge of, futures, commodity option, or swap transactions permitted under paragraph (c) of this section. A member or employee considering such arrangements should consult with the Office of General Counsel in advance for approval. Should a member or employee gain knowledge of an actual futures, commodity option, or swap transaction entered into by an operation described in paragraph (c) of this section that has already taken place and the market position represented by that transaction remains open, he or she should promptly report that fact and all other details to the General Counsel and seek advice as to what action, including recusal from any particular matter that will have a direct and predictable effect on the financial interest in question, may be appropriate.
§ 140.735–2a Prohibited interests.

(a) Application. This section applies to all financial interests of a Commission member or employee of the Commission, including financial interests held by the member or employee for the account of other persons. A member or employee shall be deemed to have a sufficient interest in the financial interests of his or her spouse, minor child, or other relative who is a resident of the immediate household of

vehicle (such as a mutual fund or exchange-traded fund) other than one operated by a person who is a commodity pool operator with respect to such entity if the direct or indirect ownership interest of the member or employee neither exercises control nor has the ability to exercise control over the transactions entered into by such vehicle; 4

(2) The acceptance or exercise of any stock option or similar right granted by an employer as part of a compensation package to a spouse or minor child or other related member of the immediate household of a member or employee, or to the exercise of any stock option or similar right granted to the member or employee by a previous employer prior to commencement of the member’s or employee’s tenure with the Commission as part of such member’s or employee’s compensation package from such previous employer;

(3) A transaction by any trust or estate of which the member or employee or the spouse, minor child, or other related member of the immediate household of the member or employee is solely a beneficiary, has no power to control, and does not in fact control or advise with respect to the investments of the trust or estate;

(4) The exercise of any privilege to convert or exchange securities, of rights accruing unconditionally by virtue of ownership of other securities (as distinguished from a contingent right to acquire securities not subscribed for by others), or of rights in order to round out fractional shares in securities;

(5) The acceptance of stock dividends on securities already owned, the reinvestment of cash dividends on a security already owned, or the participa-

4Section 9(c) of the Commodity Exchange Act makes it a felony for any member or employee, or agent thereof, to participate, directly or indirectly in, inter alia, any transaction in commodity futures, option, leverage transaction, or other arrangement that the Commission determines serves the same function, unless authorized to do so by Commission rule or regulation. 17 CFR 4.5 excludes certain otherwise regulated persons from the definition of “commodity pool operator” with respect to operation of specific investment entities enumerated in the regulation.

17 CFR Ch. I (4–1–13 Edition)
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.

Attention is directed to 18 U.S.C. 208.

§ 140.735–2a

the member or employee, so that such financial interests must be reported and are subject to all the terms of this section.

(b) Prohibitions. Except as otherwise provided in this subsection, no member or employee of the Commission shall:

(1) Have a financial interest, through ownership of securities or otherwise, in any person registered with the Commission (including futures commission merchants, associated persons and agents of futures commission merchants, floor brokers, commodity trading advisors and commodity pool operators, and any other persons required to be registered in a fashion similar to any of the above under the Commodity Exchange Act or pursuant to any rule or regulation promulgated by the Commission), or any contract market, swap execution facility, swap data repository, board of trade, or other trading facility, or any derivatives clearing organization subject to regulation or oversight by the Commission;

(c) Exceptions. The prohibitions in paragraph (b) of this section shall not apply to:

(1) A financial interest in any publicly-available pooled investment vehicle (such as a mutual fund or exchange-traded fund) other than one operated by a person who is a commodity pool operator with respect to such entity if such vehicle does not have invested, or indicate in its prospectus the intent to invest, ten percent or more of its assets in securities of persons described in paragraph (b) of this section and the member or employee neither exercises control nor has the ability to exercise control over the financial interests held in such vehicle;

(2) A financial interest in any corporate parent or affiliate of a person described in paragraph (b)(1) of this section if the operations of such person provide less than ten percent of the gross revenues of the corporate parent or affiliate;

(3) A financial interest in any trust or estate of which the member or employee is solely a beneficiary, has no power to control, and does not in fact control or advise with respect to the investments of the trust or estate; except that such interest is subject to the provisions of paragraphs (d) and (f) of this section.

(d) Retention or passive acquisition of prohibited financial interests. Nothing in this section shall prohibit a member or employee, or a spouse or minor child or other related member of the immediate household of the member or employee, from:

(1) Retaining a financial interest that was permitted to be retained by the member or employee prior to the adoption of this regulation, was obtained prior to the commencement of employment with the Commission, or was acquired by a spouse prior to marriage to the member or employee; or

(2) Acquiring, retaining, or controlling an otherwise prohibited financial interest, including but not limited to any security or option on a security (but not a security futures product), where the financial interest was acquired by inheritance, gift, stock split, involuntary stock dividend, merger, acquisition, or other change in corporate ownership, exercise of preemptive right, or otherwise without specific intent to acquire the financial interest, or by a spouse or minor child or other related member of the immediate household of the member or employee as part of an employment compensation package; provided, however, that retention of any interest allowed by paragraph (c)(3) or (d) of this section is permitted only where the employee:

\[\text{It is the member’s or employee’s responsibility to monitor his or her financial interests and those of a spouse or minor child or other related member of his or her immediate household, to promptly report relevant changes to the General Counsel in writing, and to seek the advice of the General Counsel as to what action may be appropriate. In this regard, attention is directed to 18 U.S.C. 208, which bars an employee from participating in any particular matter that will have a direct and predictable effect on the financial interest in question.}\]
Changes in holdings, other than by purchase, which do not affect disqualification, such as those resulting from the automatic reinvestment of dividends, stock splits, stock dividends or reclassifications, may be reported on the annual statement, SF 278 or SF 450;9 and

(iii) Will be disqualified in accordance with 5 CFR part 2635, subpart D, and 18 U.S.C. 208 from participating in any particular matter that will have a direct and predictable effect on the financial interest in question. Any Commission member or employee affected by this section may, pursuant to 18 U.S.C. 208(b)(1) and 5 CFR 2640.301–303, request a waiver of the disqualification requirement.

NOTE: With respect to any financial interest retained under paragraph (c)(3) or (d) of this section, Commission members and employees are reminded of their obligations under 18 U.S.C. 208 and 5 CFR part 2635, subpart D, to disqualify themselves from participating in any particular matter in which they, their spouses or minor children have a financial interest.

(e) Exception applicable to legally separated employees. This section shall not apply to the financial interests of a legally separated spouse of a Commission member or employee, including transactions for the benefit of a minor child, if the member or employee has no power to control and does not, in fact, advise or control with respect to such transactions. If the member or employee has actual or constructive knowledge of such financial interests held by a legally separated spouse or for the benefit of a minor child, the disqualification provisions of paragraphs (d)(2)(i)–(iii) of this section and 18 U.S.C. 208 are applicable.

(f) Divestiture. Based upon a determination of substantial conflict under 5 CFR 2635.403(b) and 18 U.S.C. 208, the Commission, or its designee, may require in writing that a member or employee, or the spouse or minor child or other related member of the immediate household of a member or employee, divest a financial interest that he or she is otherwise authorized to retain under this section.10

§ 140.735–3 Non-governmental employment and other outside activity

A Commission member or employee shall not accept employment or compensation from any person, exchange, swap execution facility, swap data repository or derivatives clearing organization subject to regulation by the Commission. For purposes of this section, a person subject to regulation by the Commission includes but is not limited to a contract market, swap execution facility, swap data repository or derivatives clearing organization or member thereof, a registered futures commission merchant, any person associated with a futures commission merchant or with any agent of a futures commission merchant, floor broker, commodity trading advisor, commodity pool operator or any person required to be registered in a fashion similar to any of the above or file reports under the Act or pursuant to any rule or regulation promulgated by the Commission.11

9Changes in holdings, other than by purchase, which do not affect disqualification, such as those resulting from the automatic reinvestment of dividends, stock splits, stock dividends or reclassifications, may be reported on the annual statement, SF 278 or SF 450, rather than when notification of the transaction is received. Acquisition by, for example, gifts, inheritance, or spinoffs, which may result in additional disqualifications pursuant to paragraph (d)(2)(iii) of this section and 18 U.S.C. 208 shall be reported to the General Counsel within 20 days of the receipt of actual or constructive notice thereof.

10Any evidence of a violation of 18 U.S.C. 208 must be reported by the General Counsel to the Commission, which may refer the matter to the Criminal Division of the Department of Justice and the United States Attorney in whose venue the violations lie. See 28 U.S.C. 535.

11Attention is directed to section 2(a)(8) of the Commodity Exchange Act, which provides, among other things, that no Commission member or employee shall accept employment or compensation from any person, exchange or derivatives clearing organization (“clearinghouse”) subject to regulation by the Commission, or participate, directly
§ 140.735–4 Receipt and disposition of foreign gifts and decorations.

(a) For purposes of this section only:

(1) Commission member or employee means any Commission member or any person employed by or who occupies an office or a position in the Commission; an expert or consultant under contract with the Commission, or in the case of an organization performing services under such contract, any individual involved in the performance of such service; and the spouse, unless the individual and his or her spouse are separated, and any dependent, as defined by section 152 of the Internal Revenue Code of 1954, of any such person.

(2) Foreign government means:

(A) Any unit of foreign governmental authority, including any foreign national, state, local, and municipal government;

(B) Any international or multinational organization whose membership is composed of any unit of foreign government described in paragraph (a)(2)(A) of this section; and

(C) Any agent or representative of any such unit or such organization, while acting as such.

(3) Gift means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government, except grants and other forms of assistance to which section 108A of the Mutual Educational and Cultural Exchange Act of 1961 applies.

(4) Decoration means an order, device, medal, badge, insignia, emblem, or award tendered by, or received from, a foreign government.

(5) Minimal value means a retail value in the United States at the time of acceptance of $140 or less, except as refined to reflect changes in the consumer price index at three year intervals by the Administrator of General Services pursuant to authority granted in 5 U.S.C. 7342(a)(5)(A).

(b) Commission members and employees shall not:

(1) Request or otherwise encourage the tender of a gift or decoration;

(2) Accept a gift of currency, except that which has an historical or numismatic value;

(3) Accept gifts of travel or gifts of expenses for travel, such as transportation, food and lodging, from foreign governments, other than those authorized in paragraph (c)(5) of this section; or

(4) Accept any gift or decoration, except as authorized by this section.

(c) Gifts which may be accepted:

(1) Commission members and employees may accept and retain gifts of minimal value tendered or received as a souvenir or mark of courtesy from a foreign government without further approval. If the value of a gift is uncertain, the recipient shall be responsible for establishing that it is of minimal value, as defined in this section. Documentary evidence may be required in support of the valuation.

(2) Commission members and employees may accept, on behalf of the United States, gifts of more than minimal value tendered or received from a foreign government when it appears that to refuse the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. When a tangible gift of more than minimal value is accepted on behalf of the United States, it becomes the property of the United States.

(3) Commission members and employees may accept a gift of more than minimal value where such gift is in the nature of an educational scholarship or medical treatment.

(4) Within 60 days after accepting a tangible gift of more than minimal value, other than a gift described in paragraph (c)(5) of this section, a Commission member or employee shall file a statement with the Executive Director of the Commission which shall include the following information:

(A) The name and position of the Commission member or employee;

(B) A brief description of the gift and the circumstances justify acceptance;

(C) The identity, if known, of the foreign government and the name and position of the individual who presented the gift;

(D) The date of acceptance of the gift;
(E) The estimated value in the United States of the gift at the time of acceptance; and
(F) The disposition or current location of the gift.

(5) Commission members and employees are authorized to accept from a foreign government gifts of travel or gifts of expenses for travel taking place entirely outside the United States, such as transportation, food and lodging, of more than minimal value if the acceptance is approved by the Executive Director, upon a finding that it is consistent with the interests of the Commission. Either prior to or within 30 days after accepting each gift of travel or gift of travel expenses pursuant to this paragraph, the Commission member or employee concerned shall file a statement with the Executive Director containing the following information:
(A) The name and position of the Commission member or employee;
(B) A brief description of the gift and the circumstances justifying acceptance;
(C) The identity, if known, of the foreign government and the name and position of the individual who presented the gift; and
(D) The date of acceptance.

(6) Not later than January 31 of each year the Executive Director shall compile a listing of all statements filed during the preceding year by Commission members and employees pursuant to paragraphs (c)(4) and (c)(5) of this section and shall transmit the listing to the Secretary of State.

(d) Commission members or employees may accept, retain and wear decorations tendered by a foreign government in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance, subject to the approval of the Executive Director. Without this approval, a decoration is deemed to have been accepted on behalf of the United States, shall become the property of the United States, and shall be deposited by the employee, within 60 days of acceptance, with the Executive Director for official use or forwarding to the Administrator of General Services in accordance with paragraph (g) of this section. Under normal circumstances, it can be expected that a Commission member or employee will be notified of the intent of a foreign government to award him or her a decoration for outstanding or unusually meritorious service sufficiently in advance so that the approval required can be sought prior to its acceptance. A request for the approval of the Executive Director shall be submitted in writing, stating the nature of the decoration and the reason why it is being awarded. Whenever possible, the request should also be accompanied by a statement from the foreign government, preferably in the form of the citation, which shows the basis for the tender of the award, whether it is in recognition of active field service in time of combat operations or for other outstanding or unusually meritorious performance.

(e) Within 60 days after acceptance of a tangible gift of more than minimal value or a decoration for which the Executive Director has not given approval, a Commission member or employee shall:
(1) Deposit the gift or decoration for disposal with the Executive Director; or
(2) Subject to the approval of the Commission, upon the recommendation of the Executive Director, deposit the gift or decoration with the Commission for official use.

A gift or decoration may be retained for official use if the Commission determines that it can be properly displayed in an area accessible to employees and members of the public. Within 30 days after termination of the official use of a gift, the Executive Director shall forward the gift to the Administrator of General Services in accordance with paragraph (g) of this section.

(f) Whenever possible, gifts and decorations that have been deposited with the Executive Director for disposal shall be returned to the donor. The Executive Director, in coordination with the Office of the General Counsel, shall examine the circumstances surrounding the donation, assessing whether any adverse effect on the foreign relations of the United States might result from the return of the gift or decoration to the donor. The appropriate Department of State officials
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§ 140.735–5 Disclosure of information.

A Commission employee or former employee shall not divulge, or cause or allow to be divulged, confidential or non-public commercial, economic or official information to any unauthorized person, or release such information in advance of authorization for its release. Except as directed by the Commission or its General Counsel as provided in these regulations, no Commission employee or former employee is authorized to accept service of any subpoena for documentary information contained in or relating to the files of the Commission. Any employee or former employee who is served with a subpoena requiring testimony regarding non-public information or documents shall, unless the Commission authorizes the disclosure of such information, respectfully decline to disclose the information or produce the documents called for, basing his refusal on these regulations. Any employee or former employee who is served with a subpoena calling for information regarding the Commission’s business shall be consulted if a question of adverse effect on United States foreign relations arises.

(g) Gifts and decorations that have not been returned to the donor, retained for official use, or for which official use has terminated, shall be forwarded by the Executive Director to the Administrator of General Services for transfer, donation, or other disposal in accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended, and 5 U.S.C. 7342.

(h) In accordance with 5 U.S.C. 7342(h), the U.S. Attorney General may bring a civil action in any United States district court against any Commission member or employee who knowingly solicits or accepts a gift from a foreign government not consented to by the Congress of the United States in 5 U.S.C. 7342, or who fails to deposit or report such gift as required by 5 U.S.C. 7342. The court may assess a penalty against such Commission member or employee in any amount not exceeding the retail value of the gift improperly solicited or received plus $5,000.

(i) The burden of proving minimal value shall be on the recipient. In the event of a dispute over the value of a gift, the Executive Director shall arrange for an outside appraiser to determine whether the gift is of more or less than minimal value.

(k) No appropriated funds of the Commission may be used to buy any tangible gift of more than minimal value for any foreign individual, unless the gift has been approved by Congress.


Footnotes:
9 Attention is directed to section 9(d) of the Commodity Exchange Act, which provides that it shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution—(1) for any Commissioner of the Commission or any employee or agent thereof, who, by virtue of his employment or position, acquires information which may affect or tend to affect the price of any commodity future or commodity and which information has not been promptly made public, to impart such information with intent to assist another person, directly or indirectly, to participate in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an option, privilege, indemnity, bid, offer, put, call, advance guaranty or decline guaranty, or in any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account or leverage contract, or under any contract or other arrangement that the Commission determines to serve the same function or is marketed in the same manner as such standardized contract, and (2) for any person to acquire such information from any Commissioner of the Commission or any employee or agent thereof and to use such information in any of the foregoing transactions.
10 No employee shall disclose such information unless directed to do so by the Commission.
§ 140.735–6 Practice by former members and employees of the Commission.

(a) Personal and substantial participation or nonpublic knowledge of a particular matter. No person who has been a member or employee of the Commission shall ever knowingly make, with the intent to influence, any communication to or appearance before the Commission in connection with any particular matter involving a specific party or parties in which such person, or one participating with him or her in the particular matter, participated personally and substantially, or gained nonpublic knowledge of facts thereof, while with the Commission.13

13 The prohibitions regarding confidential or nonpublic information stated above are intended to cover the matters addressed in sections 4(c), 8, and 9(d) of the Commodity Exchange Act as well as nonpublic information under the Freedom of Information Act, 5 U.S.C. 552, the rules of the Commission thereunder, 17 CFR part 145, the Privacy Act, 5 U.S.C. 552a, the rules of the Commission thereunder, 17 CFR part 146, and cases where, apart from specific prohibitions in any statute or rule, the disclosure or use of such information would be unethical.

(b) Particular matter under an individual’s official responsibility. No person who has been a member or employee of the Commission shall, within two years after that employment has ceased, knowingly make, with the intent to influence, any communication to or appearance before the Commission in connection with a particular matter involving a specific party or parties which was actually pending under his official responsibility as a member or employee of the Commission at any time within one year prior to the termination of government service.14

14 Attention is directed to 18 U.S.C. 207(a)(2), as amended. Section 207(a)(2) generally prohibits former Federal officers and employees, within two years after their Federal employment has ceased, from knowingly making, with the intent to influence, any communication to or appearance before any Federal (or District of Columbia) department, agency or court, or court martial, or any officer or employee thereof, in connection with any particular matter involving a specific party or parties in which the United States (or the District of Columbia) is a party or has a direct and substantial interest and in which the former officer or employee participated personally and substantially while with the government.

As used in paragraph (b) of this section, the term “official responsibility” has the meaning assigned to it in 18 U.S.C. 202(b), namely, the “direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.”
Commodity Futures Trading Commission § 140.735–6

Communication to or appearance before the Commission on behalf of any other person in connection with any matter in which such person seeks official action by the Commission. 15

(d) Exceptions. The prohibitions contained in paragraphs (a), (b), and (c) of this section do not apply to communications solely for the purpose of furnishing scientific or technological information if approved by the Commission or generally to giving testimony under oath or making a statement which is subject to penalty or perjury. Further, the prohibition contained in paragraph (c) of this section does not apply to an uncompensated statement in a particular area within the special knowledge of the former Commission member or employee. 16

(e) Reporting requirement. Any former member or employee of the Commission who, within two years after ceasing to be such, is employed or retained as the representative of any person (except the United States) in connection

15Attention is directed to 18 U.S.C. 207(c), as amended, which places restrictions on the representational activities of certain senior officers and employees after their departure from a senior position. Section 207(c) generally makes it unlawful for one year after service in a “senior” position terminates for a former “senior” Federal employee to knowingly make, with the intent to influence, any communication to or appearance before an employee of a department or agency in which he served in any capacity during the one year period prior to termination from “senior” service, if that communication or appearance is on behalf of any other person (except the United States), in connection with any matter concerning which he seeks official action by that employee.

Note that the one year period is measured from the date when the employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. This provision prohibits communications to or appearances before the Government and does not prohibit “behind-the-scenes” assistance. The restriction does not require that the former employee have ever been in any way involved in the matter that is the subject of the communication or appearance. The restriction applies with respect to any matter, whether or not involving a specific party.

16Attention is directed to 18 U.S.C. 207(j), as amended (listing other exceptions). Self-representation is not prohibited under section 207.

with a matter in which it is contemplated that he will appear before or communicate with the Commission shall, within ten days of such retainer or employment, or of the time when appearance before or communication with the Commission is first contemplated, file with the General Counsel of the Commission a statement as to the nature thereof together with any desired explanation as to why it is deemed consistent with this section. Employment of a recurrent character may be covered by a single comprehensive statement. Each such statement should include an appropriate caption indicating that it is filed pursuant to this section. The reporting requirement of this paragraph does not apply to communications incidental to court appearances in litigation involving the Commission.

(f) Definitions. As used in this section, the phrase “appearance before the Commission” means any formal or informal appearance on behalf of any person (except the United States) before the Commission, or any member or employee thereof with an intent to influence. As used in this section, the phrase “communication with the Commission” means any oral or written communication made to the Commission, or any member or employee thereof, on behalf of any person (except the United States) with an intent to influence.

(g) Advisory ruling. Persons in doubt as to the applicability of this section may apply for an advisory ruling by addressing a letter requesting such a ruling to the General Counsel.

(h) Procedures for administrative enforcement of statutory restrictions on post-government employment conflicts of interest 17—(1) Scope. The provisions of this paragraph prescribe procedures for administrative enforcement of the restrictions which 18 U.S.C. 207 (a), (b), and (c), as amended, place on appearances before or communications with Federal (and District of Columbia) departments, agencies and courts, and other enumerated entities, as well as the officers and employees thereof, by

17This section does not apply to employees who leave service after December 31, 1990.
§ 140.735–7 17 CFR Ch. I (4–1–13 Edition)

former Commission members and employees.

(2) Investigations. The General Counsel of the Commission, or his or her designee, shall conduct such investigations as he or she deems appropriate to determine whether any former Commission member or employee have violated 18 U.S.C. 207 (a), (b) or (c), as amended. The General Counsel shall report the results of his or her investigations to the Commission and shall recommend to the Commission such action as he or she deems appropriate.

(3) Hearings. Hearings required to be held under the provisions of this section shall be held before an Administrative Law Judge, utilizing the procedures prescribed by the Commission’s rules of practice for adjudicatory proceedings (17 CFR part 10), except to the extent that those rules are inconsistent with the provisions of this section. Any proceeding brought under the provisions of this section shall be prosecuted by the General Counsel or his or her designee.

(4) Sanctions. If the Commission finds, after notice and opportunity for a hearing, that a former Commission member or employee has violated 18 U.S.C. 207 (a), (b) or (c), as amended, the Commission may prohibit that person from making, on behalf of any other person (except the United States), any formal or informal appearance before, or with the intent to influence any oral or written communication to, the Commission on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action.

[58 FR 52658, Oct. 12, 1993; 58 FR 58593, Nov. 2, 1993]

§ 140.735–7 Statutory violations applicable to conduct of Commission members and employees.

A violation of section 2(a)(7), 8 or 9 (c) or (d) of the Commodity Exchange Act, as amended, shall be deemed to be a violation of this subpart as well.

[58 FR 52660, Oct. 12, 1993]

§ 140.735–8 Interpretative and advisory service.

(a) Counselor for the Commission. The General Counsel, or his or her designee, will serve as Counselor for the Commission and as the Commission’s representative to the Office of Government Ethics, on matters covered by this subpart. The General Counsel will also serve as the Commission’s designated agency ethics official to review the financial reports filed by high-level Commission officials under title II of the Ethics in Government Act, as well as otherwise to coordinate and manage the Commission’s ethics program.

(b) Duties of the Counselor. The Counselor shall:

(1) Coordinate the agency’s counseling services and assure that counseling and interpretations on questions of conflict of interests and other matters covered by the regulations in this subpart are available as needed to Regional Deputy Counselors, who shall be appointed by the General Counsel, in coordination with the Chairman of the Commission, for each Regional Office of the Commission;

(2) Render authoritative advice and guidance on matters covered by the regulations in this subpart which are presented to him or her by employees in the Washington, DC headquarters office; and

(3) Receive information on, and resolve or forward to the Commission for consideration, any conflict of interests or apparent conflict of interests which appears in the annual financial disclosure (Standard Form 278 or Standard Form 450), or is disclosed to the General Counsel by a member or employee pursuant to §140.735-2a(d) of this part, or otherwise is made known to the General Counsel.

(i) A conflict of interests or apparent conflict of interests is considered resolved by the General Counsel when the affected member or employee has executed an ethics agreement pursuant to 5 CFR 2634.801 et seq. to undertake specific actions in order to resolve the actual or apparent conflict.

(ii) If, after advice and guidance from the General Counsel, a member or employee does not execute an ethics agreement, the conflict of interests is considered unresolved and must be referred to the Commission for resolution or further action consistent with 18 U.S.C. 298 and 28 U.S.C. 535.

(iii) Where an unresolved conflict of interests or apparent conflict of interests is
to be forwarded to the Commission by the General Counsel, the General Counsel will promptly notify the affected member or employee in writing of his or her intent to forward the matter to the Commission. Any member or employee so affected will be afforded an opportunity to be heard by the Commission through written submission.

(c) Regional Deputy Counselors. Regional Deputy Counselors shall:

(1) Give advice and guidance as requested to the employees assigned to their respective Regional Offices; and

(2) Receive information on and refer to the Director of Human Resources, any conflict of interests or appearance of conflict of interests in Statements of Employment and Financial Interests submitted by employees to whom they are required to give advice and guidance.

(d) Confidentiality of communications. Communications between the Counselor and Regional Deputy Counselors and an employee shall be confidential, except as deemed necessary by the Commission or the Counselor to carry out the purposes of this subpart and of the laws of the United States.

(e) Furnishing of conduct regulations. The Director of Human Resources shall furnish a copy of this Conduct Regulation to each member, employee, and special government employee immediately upon his or her entrance on duty and shall thereafter, annually, and at such other times as circumstances warrant, bring to the attention of each member and employee this Conduct Regulation and all revisions thereof.

(f) Availability of counseling services. The Director of Human Resources shall notify each member, employee, and special government employee of the availability of counseling services and of how and where these services are available at the time of entrance on duty and periodically thereafter.

§ 141.1 Purpose and scope.

(a) This regulation provides procedures for the collection by administrative offset of a federal employee’s salary without his/her consent to satisfy certain debts owed to the federal government. These regulations apply to employees of other federal agencies and current employees of the Commission who owe debts to the Commission and to current employees of the Commission who owe debts to other federal agencies. This regulation does not apply when the employee consents to recovery from his/her current pay account.

(b) This regulation does not apply to debts or claims arising under:

(1) The Internal Revenue Code of 1954, as amended, 26 U.S.C. 1 et seq.;

(2) The Social Security Act, 42 U.S.C. 301 et seq.;

(3) The tariff laws of the United States; or

(4) Any case where a collection of a debt by salary offset is explicitly provided for or prohibited by another statute.

(c) This regulation does not apply to any adjustment to pay arising out of an employee’s selection of coverage or employment.
§ 141.2 Definitions.

For the purposes of this part the following definitions will apply:

Agency means an executive agency as defined at 5 U.S.C. 105 including the U.S. Postal Service, the U.S. Postal Commission, a military department as defined at 5 U.S.C. 102, an agency or court in the judicial branch, an agency of the legislative branch including the U.S. Senate and House of Representatives and other independent establishments that are entitles of the Federal government.

Creditor agency means the agency to which the debt is owed.

Debt means an amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interests, fines, forfeitures (except those arising under the Uniform Code of Military Justice), and all other similar sources.

Disposable pay means the amount that remains from an employee’s federal pay after required deductions for social security, federal, state or local income tax, health insurance premiums, retirement contributions, life insurance premiums, federal employment taxes, and any other deductions that are required to be withheld by law.

Hearing official means an individual responsible for conducting any hearing with respect to the existence or amount of a debt claimed, and who renders a decision on the basis of such hearing. A hearing official shall be an impartial member of the Office of the Executive Director not under the supervision or control of the head of the Commission.

Paying agency means the agency that employs the individual who owes the debt and authorizes the payment of his/her current pay.

Salary offset means an administrative offset to collect a debt pursuant to 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of an employee without his/her consent.

§ 141.3 Applicability.

These regulations are to be followed when:

(a) The Commission is owed a debt by an individual currently employed by another federal agency;

(b) The Commission is owed a debt by an individual who is a current employee of the Commission;

(c) The Commission employs an individual who owes a debt to another federal agency.

§ 141.4 Notice requirements.

(a) Deductions shall not be made unless the employee is provided with written notice of the debt at least 30 days before salary offset commences.

(b) The written notice shall contain:

(1) A statement that the debt is owed and an explanation of its nature, and amount;
§ 141.7 Coordinating offset with another Federal agency.

(a) The Commission as the creditor agency. When the Commission determines that an employee of another federal agency owes a delinquent debt to the Commission, the Commission shall as appropriate:

(1) Arrange for a hearing upon the proper petitioning by the employee;

(2) Certify to the paying agency in writing that the employee owes the debt, the amount and basis of the debt, the date on which payment is due, the date the Government’s right to collect the debt accrued, and that Commission regulations for salary offset have been approved by the Office of Personnel Management;

(3) The agency’s intention to collect the debt by deducting from the employee’s current disposable pay account;

(4) An explanation of interest, penalties, and administrative charges, including a statement that such charges will be assessed unless excused in accordance with the Federal Claims Collections Standards at 4 CFR 101.1 et seq.;

(5) The employee’s right to inspect, request, and receive a copy of government records relating to the debt;

(6) The opportunity to establish a written schedule for the voluntary repayment of the debt;

(7) The right to a hearing conducted by an impartial hearing official;

(8) The methods and time period for petitioning for hearings;

(9) A statement that the timely filing of a petition for a hearing will stay the commencement of collection proceedings;

(10) A statement that a final decision on the hearing will be issued not later than 60 days after the filing of the petition requesting the hearing unless the employee requests and the hearing official grants a delay in the proceedings;

(11) A statement that knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(i) Disciplinary procedures appropriate under chapter 75 of 5 U.S.C., 5 CFR part 752, or any other applicable statutes or regulations;

(ii) Penalties under the False Claims Act, 31 U.S.C. 3729–3731, or any other applicable statutory authority; or

(iii) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002 or any other applicable statutory authority.

(12) A statement of other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(13) Unless there are contractual or statutory provisions to the contrary, a statement that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.
§ 141.8 Procedures for salary offset.

(a) Deductions to liquidate an employee’s debt will be by the method and in the amount stated in the Commission’s notice of intention to offset as provided in §141.4. Debts will be collected in one lump sum where possible. If the employee is financially unable to pay in one lump sum, collection must be made in installments.

(b) Debts will be collected by deduction at officially established pay intervals from an employee’s current pay account unless alternative arrangements for repayment are made.

(c) Installment deductions will be made over a period not greater than the anticipated period of employment. The size of installment deductions must bear a reasonable relationship to the size of the debt and the employee’s ability to pay. The deduction for the pay intervals for any period must not exceed 15% of disposable pay unless the employee has agreed in writing to a deduction of a greater amount.

(d) Unliquidated debts may be offset against any financial payment due to a separated employee including but not limited to final salary or leave payments in accordance with 31 U.S.C. 3716.

§ 141.9 Refunds.

(a) The Commission will refund promptly any amounts deducted to satisfy debts owed to the Commission when the debt is waived, found not owed to the Commission or when directed by an administrative or judicial order.

(b) The creditor agency will promptly return any amounts deducted by the Commission to satisfy debts owed to the creditor agency when the debt is waived, found not owed, or when directed by an administrative or judicial order.
(c) Unless required by law, refunds under this subsection shall not bear interest.

§ 141.10 Statute of limitations.
If a debt has been outstanding for more than 10 years after the agency’s right to collect the debt first accrued, the agency may not collect by salary offset unless facts material to the Government’s right to collect were not known and could not reasonably have been known by the official or officials who were charged with the responsibility for discovery and collection of such debts.

§ 141.11 Non-waiver of rights.
An employee’s involuntary payment of all or any part of a debt collected under these regulations will not be construed as a waiver of any rights that employee may have under 5 U.S.C. 5514 or any other provision of contract or law unless there are statutes or contract(s) to the contrary.

§ 141.12 Interest, penalties, and administrative costs.
Charges may be assessed for interest, penalties, and administrative costs in accordance with the Federal Claims Collection Standards, 4 CFR 102.13.

PART 142—INDEMNIFICATION OF CFTC EMPLOYEES

Sec. 142.1 Purpose and scope.
142.2 Policy.
AUTHORITY: 7 U.S.C. 4a(j).
SOURCE: 54 FR 25234, June 14, 1989, unless otherwise noted.

§ 142.1 Purpose and scope.
This part sets forth the policy and procedure with respect to the indemnification of Commission employees who are sued in their individual capacities and suffer an adverse judgment as a result of conduct taken within the scope of employment. (For purposes of this part the term Commission employees includes all present and former Commissioners and employees of the Commission). This part is intended to provide indemnification for adverse judgments for constitutional and federal statutory torts excepted from the Federal Tort Claims Act exclusive remedy provision 28 U.S.C. 2679(b) (as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Pub. L. 100–694)). In any lawsuit which is filed against the employee alleging a common law tort occurring within the scope of employment, the United States may be substituted for the individual employee and any liability which may be found will be assessed against the government, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988.

§ 142.2 Policy.
(a) The Commission may indemnify its employees by the payment of available funds, in whole, or in part, for any verdict, judgment or other monetary award which is rendered against any employee, provided that the conduct giving rise to the verdict, judgment or award was taken within the scope of his or her employment with the Commission and that such indemnification is in the interest of the United States, as determined by the Commission.

(b) The Commission may settle or compromise a personal damage claim against its employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damage claim was taken within the scope of employment and that such settlement is in the interest of the United States as determined by the Commission in its discretion.

(c) Absent exceptional circumstances, as determined by the Commission, the Commission will not entertain a request either to agree to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment or monetary award.

(d) When an employee of the Commission becomes aware that an action may be or has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should immediately notify the Commission’s Office of General Counsel that such an action is pending or threatened.
(e) The employee may thereafter request either (1) indemnification to satisfy a verdict, judgment or award entered against the employee or (2) payment to satisfy the requirements of a settlement proposal. The employee shall submit a written request, with documentation including copies of the verdict, judgment, award or settlement proposal, as appropriate, to the head of his or her division or office, who thereupon shall submit to the General Counsel, in a timely manner, a recommended disposition of the request. The General Counsel shall also seek the views of the Department of Justice. The General Counsel shall forward the request, the division or office’s recommendation and the General Counsel’s recommendation to the Commission for decision.

(f) Any payment under this section either to indemnify a Commodity Futures Trading Commission employee or to settle a personal damage claim shall be contingent upon the availability of appropriated funds of the Commodity Futures Trading Commission.

PART 143—COLLECTION OF CLAIMS OWED THE UNITED STATES ARISING FROM ACTIVITIES UNDER THE COMMISSION’S JURISDICTION

Sec.
143.1 Purpose.

Subpart A—General Provisions

143.2 Notice of claim.
143.3 Interest, penalty charges, and administrative costs.
143.4 Collection by offset.
143.5 Collection by compromise.
143.6 Referral for litigation.
143.7 Delegation of authority to the Executive Director.
143.8 Inflation-adjusted civil monetary penalties.

Subpart B—Administrative Wage Garnishment

143.9 Administrative wage garnishment orders.
143.10 Garnishment hearings.

Authority: 7 U.S.C. 9 and 15, 9a, 12a(5), 13a, 13a–1(d), and 13(a); 31 U.S.C. 3701–3720E; 28 U.S.C. 2461 note.
§ 143.7 Delegation of authority to the Executive Director.

(a) The Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director or to any Commission employee under the Executive Director’s supervision as he or she may designate, authority to take action to carry out subpart A and subpart B of this part and the requirements of 31 CFR parts 900–905 and 31 CFR 285.11.
§ 143.8 Inflation-adjusted civil monetary penalties.

(b) Delegated waivers or compromise under this part shall be with the concurrence of the General Counsel and the Director of the Division of Enforcement or of their respective designees.

50 FR 5384, Feb. 8, 1985, as amended at 69 FR 52997, Aug. 31, 2004

§ 143.8 Inflation-adjusted civil monetary penalties.

(a) Unless otherwise amended by an act of Congress, the inflation-adjusted maximum civil monetary penalty for each violation of the Commodity Exchange Act or the rules, regulations or orders promulgated thereunder that may be assessed or enforced under the Commodity Exchange Act in an administrative proceeding before the Commission or a civil action in Federal court will be:

1. For a civil penalty assessed pursuant to Section 6(c) of the Commodity Exchange Act, 7 U.S.C. 9, against any person (other than a registered entity):
   (i) For manipulation or attempted manipulation violations:
       (A) Committed on or after May 22, 2008, not more than the greater of $1,000,000 or triple the monetary gain to such person for each such violation; and
       (B) [Reserved]
   (ii) For all other violations:
       (A) Committed between November 27, 1996 and October 22, 2000, not more than the greater of $110,000 or triple the monetary gain to such person for each such violation;
       (B) Committed between October 23, 2000 and October 22, 2004, not more than the greater of $120,000 or triple the monetary gain to such person for each such violation;
       (C) Committed between October 23, 2004 and October 22, 2008, not more than the greater of $130,000 or triple the monetary gain to such person for each such violation; and
       (D) Committed on or after October 23, 2008, not more than the greater of $140,000 or triple the monetary gain to such person for each such violation; and
   (ii) [Reserved]

2. For a civil monetary penalty assessed pursuant to Section 6(d) of the Commodity Exchange Act, 7 U.S.C. 13b, against any person (other than a registered entity):
   (i) For violations committed on or after August 15, 2011, not more than the greater of $140,000 or triple the monetary gain to such person for each such violation; and
   (ii) [Reserved]

(3) For a civil monetary penalty assessed pursuant to Section 6b of the Commodity Exchange Act, 7 U.S.C. 13a, against any registered entity or any director, officer, agent, or employee of any registered entity:

1. For manipulation or attempted manipulation violations:
   (A) Committed between May 22, 2008 and August 14, 2011, not more than the greater of $1,000,000 or triple the monetary gain to such person for each such violation;
   (B) committed on or after August 15, 2011, not more than the greater of $1,025,000 or triple the monetary gain to such person for each such violation; and
   (ii) [Reserved]

2. For a civil monetary penalty assessed pursuant to Section 6c of the Commodity Exchange Act, 7 U.S.C. 13a–1, against any registered entity or other person:

1. For manipulation or attempted manipulation violations:
   (A) Committed between May 22, 2008 and August 14, 2011, not more than the greater of $1,000,000 or triple the monetary gain to such person for each such violation; and
   (B) Committed on or after August 15, 2011, not more than the greater of $1,025,000 or triple the monetary gain
to such person for each such violation; and

(ii) For all other violations:

(A) Committed between November 27, 1996 and October 22, 2000, not more than the greater of $110,000 or triple the monetary gain to such person for each such violation;

(B) Committed between October 23, 2000 and October 22, 2004, not more than the greater of $120,000 or triple the monetary gain to such person for each such violation;

(C) Committed between October 23, 2004 and October 22, 2008, not more than the greater of $130,000 or triple the monetary gain to such person for each such violation; and

(D) Committed on or after October 23, 2008, not more than the greater of $140,000 or triple the monetary gain to such person for each such violation.

(b) The Commission will adjust for inflation the maximum penalties set forth in this section at least once every four years.

(c) Unless otherwise amended by an act of Congress, the penalties set forth in this section or any penalty adjusted for inflation in the future pursuant to paragraph (b) of this section shall be applicable only to violations of the Commodity Exchange Act, Commission rules, or Commission orders which occur after the date on which such future inflation adjustments become effective.


Subpart B—Administrative Wage Garnishment

Source: 69 FR 52997, Aug. 31, 2004, unless otherwise noted.

§ 143.9 Administrative wage garnishment orders.

Whenever an individual owes the United States a delinquent non-tax debt arising from activities under the Commission’s jurisdiction, the Commission, or another federal agency collecting the debt on behalf of the Commission, may initiate administrative proceedings to garnish the disposable income of the delinquent debtor in accordance with the requirements of, and the procedures set forth in, 31 CFR 265.11. The Commission’s use of other debt-collection measures set forth in subpart A of this part does not preclude the initiation of an administrative wage garnishment proceeding against a delinquent debtor.

§ 143.10 Garnishment hearings.

Any oral or written hearing required to establish the Commission’s right to collect a delinquent debt through administrative wage garnishment shall be presided over by a hearing official designated by the Executive Director, with the concurrence of the General Counsel or the General Counsel’s designee. Any qualified and impartial employee of the Commission designated by the Executive Director may serve as a hearing official. Except as otherwise provided in this section, the hearing shall be conducted in accordance with the requirements of, and the procedures set forth in, 31 CFR 265.11(f). All documents presented to the hearing official for his or her consideration shall be marked as exhibits and retained in the record. All testimony given at an oral hearing, either in person or by telephone, shall be under oath or affirmation; a transcript of the hearing shall be prepared and made part of the record. When a debtor requests a hearing, the designated hearing official shall hold the hearing and issue his or her decision within 60 days of the Commission’s receipt of the request, unless otherwise approved, in writing, by the Executive Director.
§ 144.0 Purpose and scope.

(a) The regulations in this part set forth procedures to be followed with respect to the disclosure, in response to a subpoena, order or other demand (collectively “demand”) of a court or other authority of any material contained in the files of the Commission, of any information relating to material contained in the files of the Commission or any information acquired by any person while such person is or was an employee of the Commission as part of the performance of that person’s official duties or by virtue of that person’s official status. Employee as used in this part includes both members and employees of the Commission. Demand as used in this part does not include requests for the production of documents in compliance with Fed. R. Civ. P. 34.

(b) Nothing in this part affects disclosure of information under the Freedom of Information Act (FOIA), 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, the Sunshine Act, 552b, or the Commission’s implementing regulations in part 145, 17 CFR 145.0, et seq., or pursuant to Congressional subpoena or pursuant to other Commission regulation. Nothing in this part otherwise permits disclosure of information by the Commission except as is provided by statute or other applicable law.

(c) This part is intended to provide guidance for the internal operations of the Commission and is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law against the Commission.

§ 144.1 Service upon the Commission.

(a) Subject to paragraph (e) of this section, the Secretary of the Commission is the only person authorized to accept service of a demand directed to the Commission or to an employee of the Commission for documentary information contained in or relating to information contained in the files of the Commission.

(b) Any such demand must be addressed to the Secretary of the Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(c) In the event that any such demand is attempted to be served upon an employee of the Commission other than the Secretary of the Commission, unless otherwise directed by the Commission’s General Counsel, that employee shall respectfully decline to accept service on the ground that the employee is without authority to do so.

(d) The Secretary shall promptly advise the General Counsel of any service of any demand, and the General Counsel shall thereafter advise the Commission regarding the matter.

(e) A demand for information contained in the Commission’s files concerning the registration of persons or entities for which authority has been delegated to the National Futures Association must be served upon the National Futures Association, 200 West Madison Street, Suite 1600, Chicago, Illinois 60606, to the attention of the General Counsel.

[50 FR 11149, Mar. 20, 1985, as amended at 60 FR 49335, Sept. 25, 1995]
Commodity Futures Trading Commission

§ 144.5 Procedures when production or disclosure of Commission records or information relating to Commission business is sought.

(a) If in any proceeding oral testimony of an employee or former employee of the Commission is sought concerning matters related to the business of the Commission, an affidavit or, if that is not feasible, a signed statement by the party seeking the testimony or by his attorney, setting forth with particularity a summary of the testimony sought and its relevance to the proceeding, must be furnished to the Commission’s General Counsel at the Commission’s office in Washington, DC. When authorization by the Commission is required, any authorization shall be limited to the scope of the demand as summarized in such statement.

(b) If a response to a demand by a court or other authority is required before instructions from the Commission are received, and Commission authorization is required, a Commission attorney shall be designated by the General Counsel to appear and to inform the court or other authority of these regulations and that the subpoena or demand has been referred for prompt consideration by the Commission. The Commission attorney shall request a stay of the demand pending receipt of instructions.

(c) In the event that the court or other authority declines to stay the effect of the demand pending receipt of instructions or in the event that the court rules that there must be compliance with the demand irrespective of instructions not to produce the material or disclose the information sought,
the Commission employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand.

§ 144.6 Fees.

The provisions of §145.8 of these regulations with respect to fees for production of documents pursuant to the FOIA are applicable to this part.

PART 145—COMMISSION RECORDS AND INFORMATION

Sec.
145.0 Definitions.
145.1 Information published in the FEDERAL REGISTER.
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145.4 Public records available with identifying details deleted; nonpublic records available in abridged or summary form.
145.5 Disclosure of nonpublic records.
145.6 Commission offices to contact for assistance; registration records available.
145.7 Requests for Commission records and copies thereof.
145.8 Fees for records services.
145.9 Petition for confidential treatment of information submitted to the Commission.

APPENDIX A TO PART 145—Compilation of Commission Records Available to the Public

APPENDIX B TO PART 145—Schedule of Fees

APPENDIX C TO PART 145 [Reserved]


§ 145.0 Definitions.

For the purposes of part 145 the following definitions are applicable:

Assistant Secretary—refers to the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance.

Compliance staff—refers to the FOI, Privacy and Sunshine Acts Compliance staff of the Office of the Secretariat at the Commission’s principal office in Washington, DC assigned to respond to requests for information and to handle various other matters under the Freedom of Information Act, the Privacy Act of 1974, and the Government in the Sunshine Act.

Public records—in addition to the records described in §145.1 (material published in the FEDERAL REGISTER) and in §145.2 (records required to be made publicly available under the Freedom of Information Act), includes those records that have been determined by the Commission to be generally available to the public directly upon oral or written request from the Commission office or division responsible for the maintenance of such records. A compilation of Commission records routinely available to the public upon request appears in appendix A to this part 145.

Nonpublic records—are records not identified in §145.1, §145.2, or appendix A of this part 145. Nonpublic records must be requested, in writing, in accordance with the provisions of §145.7.

Record—is any information or agency record maintained by the Commission in any format, including an electronic format. It includes any document, writing, photograph, sound or magnetic recording, videotape, microfiche, drawing, or computer-stored information or output in the possession of the Commission. The term “record” does not include personal convenience materials over which the Commission has no control, such as appointment calendars and handwritten notes, which may be retained or destroyed at an employee’s discretion.

[62 FR 17069, Apr. 9, 1997]

§ 145.1 Information published in the Federal Register.

Except as provided in §145.5, pertaining to nonpublic matters, the following materials shall be published in the FEDERAL REGISTER for the guidance of the public:

(a) Description of the Commission’s central and field organization and the established place at which, the employees from whom, and the methods whereby the public may obtain information, make submittals or requests, or obtain decisions;

(b) Statements of the general course and method by which the Commission’s
functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
(c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Commission; and
(e) Each amendment, revision, or repeal of the foregoing.
[41 FR 16290, Apr. 16, 1976]

§ 145.2 Records available for public inspection and copying; documents published and indexed.

Except as provided in §145.5, pertaining to nonpublic matters, and in addition to those documents listed in appendix A to part 145, Compilation of Commission Records Available to the Public, the following materials are available for public inspection and copying during normal business hours at the Commission’s Public Reading Room, located at the principal office of the Commission in Washington, DC and at the regional offices of the Commission:
(a) A guide for requesting records or publicly available information from the Commission which includes:
(1) An index of all publicly available information of the Commission;
(2) A description of major information and record locator systems;
(3) Guidance for obtaining various types and categories of public information from the Commission;
(b) Final opinions and orders of the Commission in the adjudication of cases, including concurring and dissenting opinions;
(c) Statements of policy and interpretations which have been adopted by the Commission and are not published in the FEDERAL REGISTER;
(d) Records released in response to FOIA requests that have been, or the Commission anticipates will be, the subject of additional FOIA requests;
(e) Administrative manuals and instructions that affect the public; and
(f) Indices providing identifying information to the public as to the materials made available pursuant to paragraphs (a) through (e) of this section.
[62 FR 17069, Apr. 9, 1997]

§ 145.3 [Reserved]

§ 145.4 Public records available with identifying details deleted; nonpublic records available in abridged or summary form.
(a) To the extent required to prevent a clearly unwarranted invasion of personal privacy, the Commission may delete identifying details when it makes available “public records” as defined in §145.0(c). In such instances, the Commission shall explain the justification for the deletion fully in writing.
(b) Certain “nonpublic records,” as defined in §145.0(d), may, as authorized by the Commission, be made available for public inspection and copying in an abridged or summary form, with identifying details deleted.
[51 FR 26869, July 28, 1986]

§ 145.5 Disclosure of nonpublic records.
The Commission may decline to publish or make available to the public any “nonpublic records,” as defined in §145.0(d), if those records fall within the descriptions in paragraphs (a) through (i) of this section. The Commission shall publish or make available reasonably segregable portions of “nonpublic records” subject to a request under §145.7 if those portions do not fall within the descriptions in paragraphs (a) through (i) of this section. Requests for confidential treatment of segregable public information will not be processed.
(a)(1) Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, and (2) in fact properly classified pursuant to such executive order;
(b) Related solely to the internal personnel rules and practices of the Commission or any other agency of the Government of the United States, including operation rules, guidelines, and manuals of procedure for investigators, auditors, and other employees (other than those rules and practices which
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establish legal requirements to which members of the public are expected to conform;

(c) Specifically exempted from disclosure by statute, including:

(1) Data and information which would separately disclose the business transactions or market positions of any person and trade secrets or names of customers; and

(2) Any data or information concerning or obtained in connection with any pending investigation of any person;

(d) Trade secrets and commercial or financial information obtained from a person and privileged or confidential, including, but not limited to:

(i) Reports of stocks of grain, such as Forms 38, 38C, 38M and 38T required to be filed pursuant to 17 CFR 1.44;

(ii) Statements of reporting traders on Form 40 required to be filed pursuant to 17 CFR 18.04;

(iii) Statements concerning special calls on positions required to be filed pursuant to 17 CFR part 21;

(iv) Statements concerning identification of special accounts on Form 102 required to be filed pursuant to 17 CFR 17.61;

(v) Reports required to be filed pursuant to parts 15 through 21 of this chapter;

(vi) Reports concerning option positions of large traders required to be filed pursuant to part 16 of this chapter;

(vii) Form 188; and

(viii) The following reports and statements that are also set forth in paragraph (h) of this section, except as specified in 17 CFR 1.10(g)(2) or 17 CFR 31.13(m): Forms 1–FR required to be filed pursuant to 17 CFR 1.10; POCUS reports that are filed in lieu of Forms 1–FR pursuant to 17 CFR 1.10(h); Forms 2–FR required to be filed pursuant to 17 CFR 31.13; the accountant’s report on material inadequacies filed in accordance with 17 CFR 1.16(c)(5); all reports and statements required to be filed pursuant to 17 CFR 1.17(c)(6); and

(A)(i) The following portions of Form CPO–PQR required to be filed pursuant to 17 CFR 4.27: Schedule A: Question 2, subparts (b) and (d); Question 3, subparts (g) and (h); Question 9; Question 10, subparts (b), (c), (d), (e), and (g); Question 11; Question 12; and Schedules B and C;

(2) The following portions of Form CTA–PR required to be filed pursuant to 17 CFR 4.27: Question 2, subparts (c) and (d);

(2) Information contained in reports, summaries, analyses, transcripts, letters or memoranda arising out of, in anticipation of or in connection with an examination or inspection of the books and records of any person or any other formal or informal inquiry or investigation; and

(3) Information for which confidential treatment has been requested and granted in accordance with §145.9;

(e) Inter-agency or intra-agency memoranda or letters, except those which by law would routinely be made available to a party other than an agency in litigation with the Commission, including:

(1) Records which reflect discussions between or consideration by members of the Commission or members of its staff, or both, of any action taken or proposed to be taken by the Commission or by any member of its staff; and

(2) Reports, summaries, analyses, conclusions, or any other work product of members of the Commission or of attorneys, accountants, economists, analysts, or other members of the Commission’s staff, prepared in the course of an inspection of the books or records of any person whose affairs are regulated by the Commission, or prepared otherwise in the course of any formal or informal inquiry, examination or investigation or related litigation conducted by or on behalf of the Commission;

(f) Personnel files, medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, including but not limited to, information of that character contained in:

(1) Files concerning employees of the Commission;

(2) Files concerning persons subject to regulation by the Commission, including files with respect to applications for registration and biographical supplements submitted with such applications. Examples of the information on the applications and biographical supplements which may be protected are an individual’s home address.
and telephone number, social security number, date and place of birth, fingerprints and, in appropriate cases, the information concerning prior arrests, indictments, criminal convictions or other judgments or sanctions imposed by State or Federal courts or regulatory authorities;

(3) Files concerning information for which confidential treatment has been requested and granted in accordance with §145.9;

(g) Records or information compiled for law enforcement purposes to the extent that the production of such records or information:

(1) Could reasonably be expected to interfere with enforcement activities undertaken or likely to be undertaken by the Commission or any other authority including, but not limited to, the Department of Justice or any United States Attorney or any Federal, State, local, or foreign governmental authority or any futures or securities industry self-regulatory organization;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques or procedures or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(h) Contained in or related to examinations, operating, or condition reports prepared by, on behalf of, or for the use of the Commission or any other agency responsible for the regulation or supervision of financial institutions, including, but not limited to the following reports and statements that are also set forth in paragraph (d)(1)(viii) of this section, except as specified in 17 CFR 1.10(g)(2) and 17 CFR 31.13(m): Forms 1–FR required to be filed pursuant to 17 CFR 1.10; FOCUS reports that are filed in lieu of Forms 1–FR pursuant to 17 CFR 1.10(h); Forms 2–FR required to be filed pursuant to 17 CFR 31.13; the accountant’s report on material inadequacies filed in accordance with 17 CFR 1.16(c)(5); all reports and statements required to be filed pursuant to 17 CFR 1.17(c)(6); and

(1) The following portions of Form CPO–PQR required to be filed pursuant to 17 CFR 4.27: Schedule A: Question 2, subparts (b) and (d); Question 3, subparts (g) and (h); Question 9; Question 10, subparts (b), (c), (d), (e), and (g); Question 11; Question 12; and Question 13; and Schedules B and C;

(2) The following portions of Form CTA–PR required to be filed pursuant to 17 CFR 4.27: Question 2, subparts (c) and (d); and

(i) Geological and geophysical information and data, including maps, concerning wells.

(5 U.S.C. 552, 5 U.S.C. 552b, and secs. 2(a)(11), 4b, 4f, 4g, 5a, 8a, and 17 of the Commodity Exchange Act, 7 U.S.C. 2, 4a(j), 6b, 6f, 6g, 7a, 12a, and 21, as amended, 92 Stat. 865 et seq.; secs. 2(a)(1), 4(c)(a)(d), 4d, 4f, 4g, 4k, 4m, 4n, 4o, 8a, 15 and 17, Commodity Exchange Act (7 U.S.C. 2, 4, 6c(a)(d), 6f, 6g, 6k, 6m, 6n, 12a, 19 and 21; 5 U.S.C. 552 and 552b); secs. 2(a)(11) and 8 of the Commodity Exchange Act, 7 U.S.C. 4(j) and 12 (1983); secs. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982); 5 U.S.C. 552 and 552b)


§ 145.6 Commission offices to contact for assistance; registration records available.

(a) Whenever this part directs that a request be directed to the Assistant Secretary of the Commission for FOI,
§ 145.7 Requests for Commission records and copies thereof.

Requests for Commission records and copies thereof shall specify the preferred form or format (including electronic formats) of the response. The Commission will accommodate requesters as to form or format if the record is readily available in that form or format. When requesters do not specify the form or format of the response, the Commission will respond in the form or format in which the document is most accessible to the Commission.

(a) Public inquiries and inspection of public records. Information concerning the nature and extent of available public records may be obtained in person, by telephone, via Internet (http://www.cftc.gov), or by writing to the Commission offices designated in §§145.2 and 145.6.

(b) Requests for nonpublic records. Except as provided in paragraph (a) of this section with respect to public records, all requests for records maintained by the Commission shall be in writing, shall be addressed to the Assistant Secretary of the Commission
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for FOI, Privacy and Sunshine Acts Compliance, and shall be clearly marked “Freedom of Information Act Request”.

(c) Misdirected written requests/oral requests. (1) The Commission cannot assure that a timely or satisfactory response will be given to requests for records that are directed to the Commission other than in the manner prescribed in paragraph (b) of this section. Any misdirected written request for nonpublic records should be promptly forwarded to the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance. Misdirected requests for nonpublic records will be considered to have been received for purposes of this section only when they actually have been received by the Assistant Secretary. The Commission will not entertain an appeal under paragraph (h) of this section from an alleged denial or failure to comply with a misdirected request, unless the request was in fact received by the Assistant Secretary for FOI, Privacy and Sunshine Acts Compliance. The Commission need not create a new record in response to a FOIA request.

(2) While the Commission will attempt to comply with oral requests for copies of records designated by the Commission as public records, the Commission cannot assure a timely or satisfactory response to such requests. The Commission will not consider an oral request for nonpublic records. An appeal under paragraph (h) of this section from an alleged denial or failure to comply with an oral request will not be considered. Any person who has orally requested a copy of a record and who believes that the request was denied improperly should resubmit the request in writing in accordance with paragraph (b) of this section.

(d) Description of requested records. Each written request for Commission records made under paragraph (b) of this section shall reasonably describe the records sought with sufficient specificity to permit the records to be located among the records maintained by or for the Commission. The Commission staff may communicate with the requester (by telephone when practicable) in an effort to reduce the administrative burden of processing a broad request and to minimize fees for copying and search services.

(e) Description of requester and intended use of requested records. In each request for records, requesters shall reasonable identify themselves as a commercial user, educational institution, noncommercial scientific institution, or representative of the news media if one of these categories is applicable. The requester shall describe the use to which the records will be put.

(f) Request for existing records. The Commission’s response to a request for nonpublic records will encompass all nonpublic records identifiable as responsive to the request that are in existence on the date that the written request is received by the Assistant Secretary for FOI, Privacy and Sunshine Acts Compliance. The Commission need not create a new record in response to a FOIA request.

(g) Fee agreement. A request for copies of records pursuant to paragraph (b) of this section must indicate the requester’s agreement to pay all fees that are associated with the processing of the request, in accordance with the rates set forth in appendix B to part 145, or the requester’s intention to limit the fees incurred to a stated amount. If the requester states a fee limitation, no work will be done that will result in fees beyond the stated amount. A requester who seeks a waiver or reduction of fees pursuant to paragraph (a)(8) of appendix B of this part must show that such a waiver or reduction would be in the public interest. If the Assistant Secretary receives a request for records under paragraph (b) of this section from a requester who has not paid fees from a previous request in accordance with appendix B of this part, the staff will decline to process the request until such fees have been paid.

(h) Initial determination, denials. (1) With respect to any request for nonpublic records as defined in §145.0(d), the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance, or his or her designee, will forward the request to the Commission divisions or offices likely to maintain records that are responsive to the request. If a responsive record is located, the Assistant Secretary, or designee, will, in consultation with the Commission office in which the record
was located, determine whether to comply with such request. The Assistant Secretary may, in his or her discretion, determine whether to comply with any portion of a request for non-public records before considering the remainder of the request.

(2) Where it is determined to deny, in whole or in part, a request for non-public records, the Assistant Secretary, or designee, will notify the requester of the denial, citing applicable exemptions of the Freedom of Information Act or other provisions of law that require or allow the records to be withheld. The Assistant Secretary’s response to the FOIA request should describe in general terms what categories of documents are being withheld under which applicable FOIA exemption or exemptions. The Assistant Secretary, in denying an initial request for records, is not required to provide the requester with an inventory of those documents determined to be exempt from disclosure.

(3) The Assistant Secretary, or his or her designee, will issue an initial determination with respect to a FOIA request within twenty business days after receipt by the Assistant Secretary. In unusual circumstances, as defined in this paragraph, the prescribed time limit may be extended by written notice to the person making a request for a record or a copy. The notice shall set forth the reasons for the extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten business days. As used in this paragraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of a particular request:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components in the Commission having substantial subject matter interest therein;

(iv) The need to coordinate a response with several Commission offices;

(v) The need to obtain records currently being used by members of the Commission, the Commission staff, or the public;

(vi) The need to respond to a large number of previously-filed FOIA requests.

(i) Administrative review. (1) Any person who has been notified pursuant to paragraph (g) of this section that his request for records has been denied in whole or in part may file an application for review as set forth below.

(2) An application for review must be received by the Office of General Counsel within 30 days of the date of the denial by the Assistant Secretary. This 30-day period shall not begin to run until the Assistant Secretary has issued an initial determination with respect to all portions of the request for nonpublic records. An application for review shall be in writing and shall be marked “Freedom of Information Act Appeal.” The original shall be sent to the Commission’s Office of General Counsel. If the appeal involves information as to which the FOIA requester has received a detailed written justification of a request for confidential treatment pursuant to §145.9(e), the requester must also serve a copy of the appeal on the submitter of the information.

(3) The applicant must attach to the application for review a copy of all correspondence relevant to the request, i.e., the initial request, any correspondence amending or modifying the request, and all correspondence from the staff responding to the request.

(4) The application for review shall state such facts and cite such legal or other authorities as the applicant may consider appropriate. The application may, in addition, include a description of the general benefit to the public from disclosure of that information.
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(5) If the appeal involves information that is subject to a petition for confidential treatment filed under §145.9, the submitter of the information shall have an opportunity to respond in writing to the appeal within 10 business days of the date of filing of the appeal. Any response shall be sent to the Commission’s Office of General Counsel. Copies shall be sent to the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance and to the person requesting the information.

(6) The General Counsel, or his or her designee, shall have the authority to consider all appeals under this section from initial determinations of the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance. The General Counsel may:

(i) Determine either to affirm or to reverse the initial determination in whole or in part;

(ii) Determine to disclose a record, even if exempt, if good cause for doing so either is shown by the application or otherwise appears;

(iii) Remand the matter to the Assistant Secretary (A) to correct a deficiency in the initial processing of the request, or (B) when an investigation as to which the staff originally claimed exemption from mandatory disclosure on the basis of 5 U.S.C. 555(b)(7)(A) or 7 U.S.C. 12(a) is subsequently closed; or;

(iv) Refer the matter to the Commission for a decision.

(7) If the initial denial of the request for nonpublic records is reversed, the Office of General Counsel shall, in writing, advise the requester that the records will be available on or after a specified date. If, on appeal, the denial of access to a record is affirmed in whole or in part, the person who requested the information shall be notified in writing of (1) the reasons for the denial and (2) the provisions of 5 U.S.C. 552(a)(4) providing for judicial review of a determination to withhold records.

(i) Expedited processing. A request may be given expedited processing if the requester demonstrates a compelling need for the requested records. For purposes of this provision, the term “compelling need” means: That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged federal government activity. A requester who seeks expedited processing must demonstrate a compelling need by submitting a statement that is certified by the requester to be true and correct to the best of that person’s knowledge and belief. The Assistant Secretary, or his or her designee, will determine whether to provide expedited processing, and notice of the determination will be provided to the requester, within ten days after the date of the request. If the request for expedited processing is denied, the requester may file an appeal with the Office of General Counsel within ten days of the date of the denial by the Assistant Secretary. The Office of General Counsel will respond to the appeal within ten days after the date of the appeal.


§ 145.8 Fees for records services.

A schedule of fees for record services, including locating, and making records available, and copying, appears in appendix B to this part 145. Copies of the schedule of fees may also be obtained upon request made in person, by telephone or by mail from the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat or at any regional office of the Commission.

(7 U.S.C. 4a(j) and 16a as amended by Pub. L. 97–444, 96 Stat. 2294 (1983), and 5 U.S.C. 552, 552a and 552b)

[41 FR 16290, Apr. 16, 1976, as amended at 49 FR 12684, Mar. 30, 1984]

§ 145.9 Petition for confidential treatment of information submitted to the Commission.

(a) Purpose. This section provides a procedure by which persons submitting information in any form to the Commission can request that the information not be disclosed pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552. This section does
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not affect the Commission’s right, au-
thority, or obligation to disclose in-
formation in any other context.

(b) Scope. The provisions of this sec-
tion shall apply only where the Com-
mission has not specified that an alter-
native procedure be utilized in connec-
tion with a particular study, report, in-
vestigation, or other matter. See 40.8
for procedures to be utilized in connec-
tion with filing information required to
be filed pursuant to 17 CFR parts 40 and
41.

(c) Definitions. The following defini-
tions apply to this section:

(1) Submitter. A “submitter” is any
person who submits any information or
material to the Commission or who
permits any information or material to
be submitted to the Commission. For
purposes of paragraph (d)(1)(i) of this
section only, “submitter” includes any
person whose information has been
submitted to a designated contract
market, derivatives clearing organiza-
tion, swap execution facility, swap
data repository or registered futures
association that in turn has submitted
the information to the Commission.

(2) FOIA requester. A “FOIA re-
quester” is any person who files with
the Commission a request to inspect or
copy Commission records or documents
pursuant to the Freedom of Informa-
tion Act, 5 U.S.C. 552.

(d) Written request for confidential
treatment. (1) Any submitter may re-
quest in writing that the Commission
afford confidential treatment under the
Freedom of Information Act to any in-
formation 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 treat-
ment 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 re-
quested only on the grounds that dis-
closure:

(i) Is specifically exempted by a stat-
ute that either requires that the mat-
ters be withheld from the public in
such manner as to leave no discretion
on the issue or establishes particular
criteria for withholding or refers to
particular types of matters to be with-
held.

(ii) Would reveal the submitter’s
trade secrets or confidential commer-
cial or financial information.

(iii) Would constitute a clearly un-
warranted invasion of the submitter’s
personal privacy.

(iv) Would reveal investigatory
records compiled for law enforcement
purposes whose disclosure would de-
prive the submitter of a right to a fair
trial or an impartial adjudication.

(v) Would reveal investigatory
records compiled for law enforcement
purposes whose disclosure would con-
istute an unwarranted invasion of the
personal privacy of the submitter.

(vi) Would reveal investigatory
records compiled for law enforcement
purposes when disclosure would inter-
fere with enforcement proceedings or
disclose investigative techniques and
procedures, provided, that the claim
may be made only by a designated con-
tract market, derivatives clearing or-
ganization, swap execution facility,
swap data repository or registered fu-
tures association with regard to its
own investigatory records.

(2) The original of any written re-
quest for confidential treatment must
be sent to the Assistant Secretary of
the Commission for FOI, Privacy and
Sunshine Acts Compliance. A copy of
any request for confidential treatment
shall be sent to the Commission divi-
sion or office receiving the original of
any material for which confidential
treatment is being sought.

(3) A request for confidential treat-
ment shall be clearly marked “FOIA
Confidential Treatment Request” and
shall contain the name, address, and
telephone number of the submitter.
The submitter is responsible for in-
forming the Assistant Secretary of the
Commission for FOI, Privacy and Sun-
shine Acts Compliance of any changes
in his or her name, address, and tele-
phone number.

(4) A request for confidential treat-
ment should accompany the material
for which confidential treatment is
being sought. If a request for confiden-
tial treatment is filed after the filing
of such material, the submitter shall
have the burden of showing that it was
not possible to request confidential treatment for that material at the time the material was filed. A request for confidential treatment of a future submission will not be processed. All records which contain information for which a request for confidential treatment is made or the appropriate segregable portions thereof should be marked by the person submitting the records with a prominent stamp, typed legend, or other suitable form of notice on each page or segregable portion of each page stating "Confidential Treatment Requested by [name]." If such marking is impractical under the circumstances, a cover sheet prominently marked "Confidential Treatment Requested by [name]" should be securely attached to each group of records submitted for which confidential treatment is requested. Each of the records transmitted in this matter should be individually marked with an identifying number and code so that they are separately identifiable. In some circumstances, such as when a person is testifying in the course of a Commission investigation or providing documents requested in the course of a Commission inspection, it may be impractical to submit a written request for confidential treatment at the time the information is first provided to the Commission. In no circumstances can the need to comply with the requirements of this section justify or excuse any delay in submitting information to the Commission. Rather, in such circumstances, the person testifying or otherwise submitting information should inform the Commission employee receiving the information, at the time the information is submitted or as soon thereafter as practicable, that the person is requesting confidential treatment for the information. The person shall then submit a written request for confidential treatment within 30 days of the submission of the information. If access is requested under the Freedom of Information Act with respect to material for which no timely request for confidential treatment has been made, it may be presumed that the submitter of the information has waived any interest in asserting that the material is confidential.

(5) A request for confidential treatment shall state the length of time for which confidential treatment is being sought.

(6) A request for confidential treatment (as distinguishing from the material that is the subject of the request) shall be considered a public document. When a submitter deems it necessary to include, in its request for confidential treatment, information for which it seeks confidential treatment, the submitter shall place that information in an appendix to the request.

(7) On 10 business days notice from the Assistant Secretary, a submitter shall submit a detailed written justification of a request for confidential treatment, as specified in paragraph (e) of this section. Upon request and for good cause shown, the Assistant Secretary may grant an extension of such time. The Assistant Secretary will notify the submitter that failure to provide timely a detailed written justification will be deemed a waiver of the submitter's opportunity to appeal an adverse determination.

(8)(i) Requests for confidential treatment for any reasonably segregable material that is not exempt from public disclosure under the Freedom of Information Act, as implemented in §145.5, shall be summarily rejected under §145.9(d)(9). Requests for confidential treatment of public information contained in financial reports as specified in §1.10 shall not be processed. A submitter has the burden of specifying clearly and precisely the material that is the subject of the confidential treatment request. A submitter may be able to meet this burden in various ways, including:
(A) Segregating material for which confidential treatment is being sought;
(B) Submitting two copies of the submission: a copy from which material for which confidential treatment is being sought has been obliterated, deleted, or clearly marked and an unmarked copy; and
(C) Clearly describing the material within a submission for which confidential treatment is being sought.

(ii) A submitter shall not employ a method of specifying the material for which confidential treatment is being sought if that method makes it unduly
difficult for the Commission to read the full submission, including all portion claimed to be confidential, in its entirely.

(9) If a submitter fails to follow the procedures set forth in paragraphs (d)(1) through (d)(8) of this section, the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance or his or her designee may summarily reject the submitter’s request for confidential treatment with leave to the submitter to refile a proper petition. Failure of the Assistant Secretary or his or her designee summarily to reject a confidential treatment request pursuant to this paragraph shall not be construed to indicate that the submitter has complied with the procedures set forth in paragraphs (d)(1) through (d)(8) of this section.

(10) Except as provided in paragraph (d)(9) of this section, no determination with respect to any request for confidential treatment will be made until the Commission receives a Freedom of Information Act request for the material for which confidential treatment is being sought.

(e) Detailed written justification of request for confidential treatment. (1) If the Assistant Secretary or his or her designee determines that a FOIA request seeks material for which confidential treatment has been requested pursuant to §145.9, the Assistant Secretary or his or her designee shall require the submitter to file a detailed written justification of the confidential request within ten business days (unless under §145.9(d)(7) an extension of time has been granted) of that determination unless, pursuant to an earlier FOIA request, a prior determination to release or withhold the material has been made, the submitter has already provided sufficient information to grant the request for confidential treatment; or the material is otherwise in the public domain. The detailed written justification shall be filed with the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance. It shall be clearly marked “Detailed Written Justification of FOIA Confidential Treatment Request” and shall contain the request number supplied by the Commission. The submitter shall also send a copy of the detailed written justification to the FOIA requester at the address specified by the Commission.

(2) The period for filing a detailed written justification may be extended upon request and for good cause shown.

(3) The detailed written justification of the confidential treatment request shall contain:

(i) The reasons, referring to the specific exemptive provisions of the Freedom of Information Act listed in paragraph (d)(1) of this section, why the information that is the subject of the FOIA request should be withheld from access under the Freedom of Information Act;

(ii) The applicability of any specific statutory or regulatory provisions that govern or may govern the treatment of the information;

(iii) The existence and applicability of prior determinations by the Commission, other federal agencies, or courts concerning the specific exemptive provisions of the Freedom of Information Act pursuant to which confidential treatment is being requested. Submitters shall satisfy any evidentiary burdens imposed upon them by applicable Freedom of Information Act case law.

(iv) Such additional facts and authorities as the submitter may consider appropriate.

(4) The detailed written justification of a confidential treatment request shall be accompanied by affidavits to the extent necessary to establish the facts necessary to satisfy the submitter’s evidentiary burden.

(5) The detailed written justification of a confidential treatment request (as distinguished from the material that is the subject of the request) shall be considered a public document. However, a submitter will be permitted to submit to the Commission supplementary confidential affidavits with his or her detailed written justification if that is the only way in which he or she can convincingly demonstrate that the material that is the subject of the confidential treatment request should not be disclosed to the FOIA requester.

(f) Initial determination with respect to petition for confidential treatment. (1)
Commodity Futures Trading Commission § 145.9

The Assistant Secretary for FOI, Privacy and Sunshine Acts Compliance or his or her designee, in consultation with the Office in which the record was located, shall issue an initial determination with respect to a confidential treatment request for material that is responsive to the FOIA request. This determination shall be issued at the same time as the initial determination with respect to the FOIA request. See §145.7(g). To the extent that the initial determination grants a confidential treatment request in full or in part, it should specify the FOIA exemptions upon which this determination is based and briefly describe the material to which each exemption applies. See §145.7(g)(2). To the extent that the initial determination denies confidential treatment to any material for which confidential treatment was requested, it should briefly describe the material for which confidential treatment is denied.

(2) If the Assistant Secretary or his or her designee determines that a confidential treatment request shall be denied in full or in part, the submitter shall be informed of his or her right to appeal to the Commission’s General Counsel in accordance with the procedures set forth in paragraph (g) of this section. The material for which confidential treatment was denied shall be released to the FOIA requester if the submitter does not file an appeal within 10 business days of the date on which his or her request was denied.

(3) If the Assistant Secretary or his or her designee determines that a confidential treatment request shall be granted in full or in part, the FOIA requester shall be informed of his or her right to appeal to the Commission’s General Counsel in accordance with the procedures set forth in §145.7(h).

(g) Appeal from initial determination that confidential treatment is not warranted. (1) An appeal from an initial determination to deny a confidential treatment request in full or in part shall be filed with the General Counsel of the Commission. No disclosure of the material that is the subject of the appeal shall be made until the appeal is resolved. If both a submitter and a FOIA requester appeal to the General Counsel from a partial grant and partial denial of a confidential treatment request, those appeals shall be consolidated.

(2) Any appeal of a denial of a request for confidential treatment shall be in writing, and shall be clearly marked “FOIA Confidential Treatment Appeal.” The appeal shall include a copy of the initial determination and shall clearly indicate the portions of the initial determination from which an appeal is being taken.

(3) The appeal shall be sent to the Commission’s Office of General Counsel. A copy of the appeal shall be sent to the FOIA requester. The General Counsel or his or her designee shall have the authority to consider all appeals from initial determinations of the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts compliance. The General Counsel may, in his sole and unfettered discretion, refer such appeals and questions concerning stays under paragraph (g)(10) of this section to the Commission for decision.

(4) In the appeal, the submitter may supply additional substantiation for his or her request for confidential treatment, including additional affidavits and additional legal argument. Such submissions shall be governed by paragraph (e)(5) of this section.

(5) The FOIA requester shall have an opportunity to respond in writing to the appeal within 10 business days of the date of filing of the FOIA Confidential Treatment Appeal. The FOIA requester need not respond, however. Any response shall be sent to the Commission’s Office of General Counsel. A copy shall be sent to the submitter.

(6) All FOIA Confidential Treatment Appeals and all responses thereto shall be considered public documents.

(7) The General Counsel will make a determination with respect to any appeal within twenty business days after receipt by the Office of General Counsel of such appeal or within such extended period as may be permitted in accordance with the standards set forth in §145.7(g)(3). Although other procedures may be employed, to the extent possible the General Counsel will
decide the appeal on the basis of the affidavits and other documentary evidence submitted by the submitter and the FOIA requests.

(8) The General Counsel or his or her designee shall have the authority to remand any matter to the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance to correct deficiencies in the initial processing of the confidential treatment request.

(9) If the General Counsel or his or her designee denies a confidential treatment appeal in full or in part, the information for which confidential treatment is denied shall be disclosed to the FOIA requester 10 business days later, subject to any stay entered pursuant to paragraph (g)(10) of this section.

(10) The General Counsel or his or her designee shall have the authority to enter and vacate stays as set forth below. If, within 10 business days of the date of issuance of a determination by the General Counsel or his or her designee to disclose information for which a submitter sought confidential treatment, the submitter commences an action in federal court concerning that determination, the General Counsel will stay the public disclosure of the information pending final judicial resolution of the matter. The General Counsel or his or her designee may vacate the stay entered under this section, either on his or her own motion or at the request of the FOIA requester. If such a stay is vacated, the information will be released to the requester 10 business days after the submitter is notified of this action, unless a court orders otherwise.

(b) Extensions of time limits. Any time limit under this section may be extended for good cause shown, in the discretion of the Commission, the Commission’s General Counsel, or the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance.

(i) A submitter whose confidential treatment request has been upheld by the Commission shall, upon request of the General Counsel, aid the Commission in defending a court action to compel the Commission to disclose the information subject to the confidential treatment request. If the submitter is unwilling to aid the Commission in this regard, the General Counsel may, in appropriate cases, make the information available to the public.


APPENDIX A TO PART 145—COMPILATION OF COMMISSION RECORDS AVAILABLE TO THE PUBLIC

The following documents are available, upon request, directly from the office indicated. Unless otherwise noted, the mailing address for the Commission offices listed below is Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(a) Office of External Affairs.

(1) Commitments of Traders Reports.


(3) Studies Prepared by Commission staff.

(4) Educational material (e.g., newsletters, brochures, annual reports, conference or advisory meetings, technical information about specific markets or contracts).

(5) Press releases.

(6) Rule enforcement and financial reviews (public version).

(7) CFTC litigation documents (e.g. administrative and civil complaints, injunctions, initial decisions, opinions and orders).

(8) Commission rules and regulations, Federal Register notices, interpretative letters.

(9) Speeches, Commissioner biographies and photographs.

(10) Statistical data concerning the Commission’s budget.

(b) Office of the Secretariat (Public reading area with copying facilities available).

(1) Comment letters and CFTC summaries of comment letters.

(2) Terms and conditions of proposed contracts.

(3) Registered entity filings relating to rules as defined in §40.1 of this chapter, unless covered by a request for confidential treatment.

(4) National Futures Association (NFA) rule amendments.

(5) Exchange and NFA disciplinary action notifications.

(6) Open Commission meeting minutes.

(7) Sunshine certificates for closed Commission meetings.

(8) CFTC Advisory Committee final reports.

(9) Opinions and orders of the Commission.
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(10) Reparations orders and enforcement orders index.
(11) Rulemaking index.
(12) Exchange membership notification.
(13) Publicly available portions of applications to become a registered entity including the transmittal letter, first page of the application cover sheet, proposed rules, proposed bylaws, corporate documents, any overview or similar summary provided by the applicant, any documents pertaining to the applicant’s legal status and governance structure, including governance fitness information, and any other part of the application not covered by a request for confidential treatment.
(c) Office of Proceedings. (1) Documents contained in reparations and enforcement cases, unless subject to protective order.
(2) Complaint packages, which contain the Reparations Rules, Brochure “Questions and Answers About How You Can Resolve a Commodity-Market Related Dispute,” and the complaint form.
(3) Rules of Practice concerning administrative enforcement proceedings.
(d) Executive Director, Administrative Services Section. Information Collection requests submitted to the Office of Management and Budget relating to requirements under the Paperwork Reduction Act of 1980, Pub. L. 96–511.
(e) Division of Market Oversight. (1) Weekly stocks of grain reports.
(2) Weekly cotton or call reports.
(f) Division of Enforcement. Complaint package containing Division of Enforcement Questionnaire and list of federal, state and local enforcement authorities.
(g) Division of Clearing and Intermediary Oversight. Publicly available portions of registration documents are available from the National Futures Association, 200 West Madison Street, Chicago, Illinois 60606. See Commission Rule 145.6.
APPENDIX B TO PART 145—SCHEDULE OF FEES
(a) Charges for requests. The following charges may be made where applicable for responding to requests for records.
(1) $4.75 for each quarter hour spent by clerical personnel in searching for or reviewing records.
(2) When a search or review cannot be performed by clerical personnel, $10.25 for each quarter hour spent by professional personnel in searching or reviewing records.
(d) When searches require the expertise of a computer specialist, staff time for programming and performing searches will be charged at $10.25 per quarter hour. For searches of records stored on personal computers used as workstations by Commission staff and shared access network servers, the computer processing time is included in the search time for the staff member using the workstation as set forth in paragraph (a) of this appendix.
(4) Document duplication, including computer printouts, will be charged at $0.15 per page.
(5) For copies of materials other than paper records, the requester will be charged the actual cost of materials and reproduction, including the time of clerical personnel at a rate of $4.75 per quarter hour.
(6) When a request has been made and granted to examine Commission records at an office of the Commission other than the office in which the records are routinely maintained, the requester:
(i) Will reimburse the Commission for the actual cost of transporting the records; and
(ii) Will be charged at a rate of $4.75 for each quarter hour spent by clerical personnel in preparing the records for transit.
(7) For certifying that requested records are true copies, the charge will be $3.00 per certification.
(b) Waiver or reduction of fees. Fees will be waived or reduced by the Commission if:
(1) The fee is less than or equal to $10.00, the approximate cost to the Commission of collecting the fee; or,
(2) If the Commission determines that the disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.
(c) Applicability of fees. Fees shall be charged even if no records are ultimately furnished to the requester. Fees apply to various types of requests as follows.
(1) Commercial use request. Fees for search time, review time and duplication of records will be charged to requests from or on behalf of one who seeks information for a user or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is made.
(2) Educational institution or noncommercial scientific institution. Only duplication fees will be charged to schools or to organizations which operate solely for the purpose of scientific research, the results of which are not intended to promote any particular product or industry. No charge will be made for the first 100 pages duplicated or for search or review time.
(3) Representative of the news media. Only duplication fees will be charged to any person actively gathering news for an entity...
that is organized and operated to publish or broadcast news to the public. No charge will be made for the first 100 pages duplicated or for search or review time.

(4) Other requesters. Fees for search time and duplication will be charged to requesters who are not covered by one of the categories above. No charge will be made for the first two hours of search time, the first 100 pages of duplication, or for review time. If the search is for records stored in a computer format, a combination of computer operation charges and search time charges will be waived up to the equivalent of two hours of professional search time.

(d) Aggregation of requests. For purposes of determining fees, the Commission may aggregate reasonably related requests if multiple requests are made within a 30-day period or if there is a solid basis for believing that multiple requests were made solely to avoid fees.

(e) Notification of fees. A request for Commission records may state that the party is willing to pay fees up to a stated limit for services to be provided in searching, reviewing and duplicating requested records. If such a statement is made, no work will be done that will result in fees beyond the stated limit without written authorization. If no limit is stated, no work will be done that will result in fees in excess of $25.00 without written authorization from the requester.

(f) Advance payment of fees. The Commission may request advance payment of all or part of the fee (i) when fees are expected to exceed $250; or (ii) when a requester has previously failed to pay fees in a timely fashion.

(g) Payment of fees. Payment should be made by check or money order payable to the Commodity Futures Trading Commission.

(h) Interest on fees. The Commission will begin charging interest on unpaid bills starting on the 31st day following the day on which the bill was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717.

(i) Collection of fees. If fees not paid, the Commission may disclose debts to appropriate authorities for collection or to consumer reporting agencies.


APPENDIX C TO PART 145 [RESERVED]

PART 146—RECORDS MAINTAINED ON INDIVIDUALS

Sec.
146.1 Purpose and scope.
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APPENDIX A TO PART 146—FEES FOR COPIES OF RECORDS REQUESTED UNDER THE PRIVACY ACT OF 1974


SOURCE: 41 FR 3212, Jan. 21, 1976, unless otherwise noted.

§ 146.1 Purpose and scope.

(a) This part contains the rules of the Commodity Futures Trading Commission implementing the Privacy Act of 1974 (Pub. L. 93–579, 5 U.S.C. 552a). These rules apply to all records maintained by this Commission which are not excepted or exempted as set forth in §146.12, insofar as they contain personal information concerning an individual, identify that individual by name or other symbol and are contained in a system of records from which information is retrieved by the individual’s name or identifying symbol. Among the primary purposes of these rules are to permit individuals to determine whether information about them is contained in Commission files and, if so, to obtain access to that information; to establish procedures whereby individuals may have accurate and incomplete information corrected; and, to restrict access by unauthorized persons to that information.

(b) In this part the Commission is also exempting certain Commission systems of records from some of the provisions of the Privacy Act of 1974 that would otherwise be applicable to those systems. These exemptions are authorized under the Privacy Act, 5 U.S.C. 552a(k).

§ 146.2 Definitions.

For purposes of this part 146:
(a) The term Commission means the Commodity Futures Trading Commission;

(b) The term Executive Director refers to the executive level staff official appointed pursuant to section 2(a)(5) of the Commodity Exchange Act.

(c) The term FOI, Privacy and Sunshine Acts compliance staff refers to the staff in the Office of the Secretariat in the Commission’s principal office in Washington, DC who are assigned to respond to requests and handle various other matters under the Freedom of Information Act, the Privacy Act of 1974 and the Government in the Sunshine Act;

(d) The term individual means a citizen of the United States or an alien lawfully admitted for permanent residence;

(e) The term maintain includes maintain, collect, use, or disseminate;

(f) The term record means any item, collection, or grouping of information about an individual that is maintained by the Commission, including but not limited to, his education, financial transactions, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual;

(g) The term system of records means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(h) The term system notice means a notice of the existence and character of the Commission’s system of records published in the FEDERAL REGISTER pursuant to §146.11(a) of these rules;

(i) The term routine use means, with respect to the disclosure of a record, the use of that record for a purpose which is compatible with the purpose for which it was collected;


(k) The term agency means any executive department, military department, Government corporation, Government controlled corporation or other establishment in the Executive branch of the Government or any independent regulatory agency.

(41 FR 3212, Jan. 21, 1976, as amended at 45 FR 26954, Apr. 22, 1980)

§146.3 Requests by an individual for information or access.

(a) Any individual may request information on whether a system of records maintained by the Commission contains any information pertaining to him, or may request access to his record or to any information pertaining to him which is contained in a system of records. All requests shall be directed to the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(b) A request for information or for access to records under this part may be made by mail or in person. The request shall:

(1) Be in writing and signed by the individual making the request;

(2) Include the full name (including the middle name) of the individual seeking the information or record, his home address and telephone number, his business address and telephone number; and

(3) If he is or ever has been registered with the Commission or its predecessor agency, or associated with a firm so registered as a partner, officer or director or 10% shareholder, state in what capacity he is or was registered.

(c) For each system of records from which information is sought, the request shall:

(1) Specify the title and identifying number for that system as it appears in the system notice published by the Commission;

(2) Provide additional identifying information, if any, specified in the system notice;

(3) Describe the specific information or kind of information sought within that system of records; and

(4) Set forth any special arrangements sought concerning the time, place, or form of access. A description of the information contained in a system notice and instructions on how to
§ 146.4 Procedures for identifying the individual making the request.

When a request for information or for access to records has been made pursuant to §146.3, before information is given or access is granted pursuant to §146.5 of these rules the Commission shall require reasonable identification of the person making the request to ensure that information is given and records are disclosed only to the proper person.

(a) An individual may establish his identity by:

(1) Submitting with his request for information or for access a photocopy of two pieces of identification bearing his name and signature, one of which shall bear his current home or business address; or

(2) Appearing at any office of the Commission (located at the addresses set forth in §145.6 of these rules) during the regular working hours for that office and presenting either:

(i) One piece of identification containing a photograph and signature, such as a drivers license or passport or

(ii) Two pieces of identification bearing his name and signature, one of which shall bear his current home or business address; or

(3) Providing such other proof of identity as the Commission deems satisfactory in the circumstances of a particular request.

(b) If the Executive Director or other designated Commission official determines that the data in a requested record is so sensitive that unauthorized access could cause harm or embarrassment to the person whose record is involved, or if the person making the request is unable to produce satisfactory evidence of identity under paragraph (a) of this section, the individual making the request may be required to submit a notarized statement attesting to his identity and that he is familiar with and understands the criminal penalties provided under section 1001 of title 18 of the U.S. Code for making false statements to a Government agency and under the Privacy Act, section 552a(i)(3) of title 5 of the U.S. Code, for obtaining records under false pretenses. Copies of these statutory provisions and forms for such notarized statements may be attained upon request from the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(c) The parent or guardian of a minor or a person judicially determined to be incompetent, in addition to establishing the identity of the person he represents as described in the previous paragraphs of this section, shall establish his own identity and his parentage or guardianship by furnishing a copy of a birth certificate showing parentage or a court order establishing the guardianship.

(d) Nothing in this section shall preclude the Commission from requiring additional identification before granting access to the records if there is reason to believe that the person making the request may not be the individual to whom the record pertains, or where the sensitivity of the data warrants it.

(e) The requirements of this section shall not apply if the records involved would be available to any person pursuant to the Commission’s rules under the Freedom of Information Act as set forth in part 145 of this chapter.

[41 FR 3212, Jan. 21, 1976, as amended at 41 FR 28260, July 9, 1976; 60 FR 49335, Sept. 25, 1995]
§ 146.5 Disclosure of requested information to individuals; fee for copies of records.

(a) Any individual who has requested access to his record or to any information pertaining to him in the manner prescribed in § 146.3, and has identified himself as prescribed in § 146.4, shall be permitted to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, subject to fees for copying services set forth in appendix A to this part. Upon his request persons of his own choosing may accompany him, but the individual shall first furnish a written statement authorizing discussion of that individual’s record in the accompanying persons’ presence.

(b) Access will generally be granted in the office of the Commission where the records are maintained during normal business hours, but for good cause shown the Commission may grant access at another office of the Commission or at different times for the convenience of the individual making the request.

(c) Where a document containing information about an individual also contains information not pertaining to him, the portion not pertaining to the individual shall not be disclosed to him except to the extent the information is available to any person under the Freedom of Information Act. If the records sought cannot be provided for review and copying in a meaningful form, the Commission shall provide to the individual a report of the information concerning the individual contained in the record or records which shall be complete and accurate in all material aspects.

(d) Where the disclosure involves medical records, the records may be provided only to a physician designated in writing by the individual.

(e) Requests for copies of documents may be directed to the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Payment should be made by check or money order payable to the Commodity Futures Trading Commission. Advance payment of all or part of the fee may be required at the discretion of the Commission, but generally this will not be required for requests where the anticipated fee is less than $25.

(g) Nothing in this section or in § 146.3 shall:

1. Require the disclosure of investigatory records exempted under § 146.12 of these rules;
2. Allow an individual access to any information compiled in reasonable anticipation of a civil action, administrative proceeding or a criminal proceeding;
3. Require the furnishing of information or records which cannot be retrieved by the name or other identifier of the individual making the request.

[41 FR 3212, Jan. 21, 1976, as amended at 41 FR 28261, July 9, 1976; 45 FR 26954, Apr. 22, 1980; 60 FR 49335, Sept. 25, 1995]

§ 146.6 Disclosure to third parties.

(a) The Commission shall not disclose to any agency or to any person by any means of communication a record pertaining to an individual which is contained in a system of records, except under the following circumstances:

1. The individual to whom the record pertains has given his written consent to the disclosure;
2. The disclosure is to officers and employees of the Commission who need it in the performance of their duties;
3. Disclosure is required under the Freedom of Information Act (5 U.S.C. 552);
4. Disclosure is for a routine use as defined in § 146.2(i) and described in the system notice for that system of records;
5. The disclosure is made to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity;
6. The disclosure is made to a recipient who has provided the agency with
advance adequate written assurance
that the record will be used solely as a
statistical research or reporting
record, and the record is to be trans-
ferral in a form that is not individ-
ually identifiable;
(7) The disclosure is made to another
agency or to an instrumentality of any
Governmental jurisdiction within or
under the control of the United States
for a civil or criminal law enforcement
activity if the activity is authorized by
law and if the head of the agency or in-
strumentality has made a written re-
quest to the Commission specifying the
particular portion desired and the law
enforcement activity for which the
record is sought;
(8) The disclosure is made to a person
pursuant to a showing of compelling
circumstances affecting the health or
safety of an individual if upon such dis-
closure notification is transmitted to
the last known address of such indi-
vidual;
(9) The disclosure is made to either
House of Congress, or, to the extent of
matter within its jurisdiction, any
committee or subcommittee thereof,
any joint committee of Congress or
subcommittee of any such joint com-
mittee;
(10) The disclosure is made to the
Comptroller General, or any of his au-
thorized representatives, in the course
of the performance of the duties of the
General Accounting Office; or
(11) The disclosure is pursuant to the
order of a court of competent jurisdic-
tion.
(12) The disclosure is made, upon re-
quest, to a department or agency of
any state or political subdivision
thereof acting within the scope of its
jurisdiction as permitted by section
8(e) of the Act and subject to the limi-
tations of further dissemination as
contained in section 8(e). Information
disclosed pursuant to this paragraph
may also include registration informa-
tion maintained by the Commission on
any registrant as authorized to be dis-
closed by section 8(g) of the Act. Reg-
istration information may be furnished
to a department or agency of any state
or political subdivision thereof upon
reasonable request made by the depart-
ment or agency or without request
whenever the Commission or an em-
ployee designated by §140.75 of this
chapter determines that such informa-
tion may be appropriate for use by the
department or agency.
(13) The disclosure is made, upon re-
quest, to a department or agency of
any foreign government or any polit-
ical subdivision thereof, acting within
the scope of its jurisdiction, provided
that, prior to disclosure, the Commis-
sion or an employee delegated author-
ity by §140.73 of this chapter to disclose
information pursuant to section 8(e) of
the Act is satisfied that the informa-
tion will not be disclosed by such de-
partment or agency except in connec-
tion with an adjudicatory action or
proceeding brought under the laws of
such foreign government or political
subdivision to which such foreign gov-
ernment or political subdivision or any
department or agency thereof is a
party.
(b) The Commission will make rea-
sonable efforts to serve notice on an in-
dividual when any record on such indi-
vidual is made available to any person
under compulsory legal process when
such process becomes a matter of pub-
lic record. In any instance where a
record on an individual, which has been
submitted to the Commission by such
individual, is sought pursuant to a
summons or subpoena, notice will be
given in accordance with the provisions
of section 8(f) of the Commodity Ex-
change Act, and §140.80 of this chapter,
at least fourteen days prior to disclo-
sure. Notice will not, however, be given
with regard to any information as to
which the submitter has waived the no-
notice requirements of §140.80.
(c) The Commission, with respect to
each system of records under its con-
trol, shall keep an accurate accounting
of certain disclosures.
(1) A record shall be kept of all dis-
closures made under paragraph (a) of
§146.6, except disclosures made with
the consent of the individual to whom
the record pertains (paragraph (a)(1) of
this section), disclosures to authorized
employees (paragraph (a)(2) of this sec-
tion) and disclosures required under
the Freedom of Information Act (para-
graph (a)(3) of this section).
(2) The record shall include:
§ 146.8 Amendment of a record.

(a) Any individual may request amendment of information pertaining to him which is contained in a system of records maintained by the Commission and which is filed under his name or other individual identifier if he believes the information is not accurate, relevant, timely or complete. A request for amendment shall be directed to the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(b) A request for amendment may be made by mail or in person and shall: (1) Be in writing and signed by the person making the request; (2) describe the particular record to be amended with sufficient specificity to permit the record to be located among those maintained by the Commission; and (3) specify the nature of the amendment sought and the justification for the requested change. The person making the request may be required to provide the information specified in §§146.3 and 146.4 of these rules in order to simplify identification of the record and permit verification of the identity of the person making the request for amendment.

(c) Receipt of a request for amendment will be acknowledged in writing within ten days (excluding Saturdays,
§ 146.9 Appeals to the Commission.

(a) Any individual may petition the Commission:

(1) To review a refusal to comply with an individual request for access to records pursuant to the Privacy Act, 5 U.S.C. 552a(d)(1), and §§146.3 and 146.5 of the rules in this part;

(2) To review denial of a request for amendment made pursuant to §146.8;

(3) To correct any determination that may have been made adverse to the individual based in whole or in part upon inaccurate, irrelevant, untimely or incomplete information;

(4) To correct a failure to comply with any other provision of the Privacy Act, 5 U.S.C. 552a, and the rules of this part 146, which has had an adverse effect on the individual.

(b) The petition to the Commission shall be in writing and shall (1) state in what manner it is claimed the Commission or any Commission employee has failed or refused to comply with provisions of the Privacy Act or of the rules contained in this part 146, and (2) set forth the corrective action the petitioner wishes the Commission to take. The petitioner may, if he wishes, state such facts and cite such legal or other authorities as he considers appropriate.

(c) The petition shall be directed to the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(d) The Commission will make a determination of any petition filed pursuant to this §146.9 within thirty days (excluding Saturdays, Sundays and legal public holidays) after receipt by the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat of the petition, unless for good cause shown, the Commission extends
§ 146.10 Information supplied by the Commission when collecting information from an individual.

The Commission will inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual:

(a) The authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(b) The principal purpose or purposes for which the information is intended to be used;

(c) The routine uses which may be made of the information, as published in the Federal Register; and

(d) The effects on him, if any, of not providing all or any part of the requested information.

§ 146.11 Public notice of records systems.

(a) The Commission will publish in the Federal Register at least biennially a notice of the existence and character of each of its systems of records, which notice shall include:

1. The name and location of the system;

2. The categories of individuals on whom records are maintained in the system;

3. The categories of records maintained in the system;

4. Each routine use of the records contained in the system, including the categories of users and the purpose of such use;

5. The policies and practices of the Commission regarding storage, retrievability, access controls, retention, and disposal of the records;

6. The title and business address of the Commission official who is responsible for the system of records;

7. The procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

8. The procedures whereby an individual can be notified at his request how he can gain access to any record.
§ 146.12 Exemptions.
(a) Investigatory materials compiled for law enforcement purposes are exempt from portions of the Privacy Act of 1974 and of these rules as set forth in paragraph (c) of this section, on the basis and to the extent that individual access to these files could impair the effectiveness and orderly conduct of the Commission’s regulatory and enforcement program. Materials exempted under this paragraph are contained in the system of records entitled “Exempted Investigatory Records” and/or in the system of records entitled “Exempted Closed Commission Meetings.”

(b) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for employment with the Commission are exempt from portions of the Privacy Act of 1974 and of these rules as set forth in paragraph (c) of this section, to the extent that it identifies a confidential source. This is done in order to encourage persons from whom information is sought to provide information to the Commission which, absent assurances of confidentiality, they would be unwilling to give. However, if practicable, material identifying a confidential source shall be extracted or summarized in a manner which protects the source and the summary or extract shall be maintained in a comparable nonexempted system of records.

(c) The systems set forth in paragraphs (a) and (b) of this section are hereby exempted from the provisions of sections 552a(c), (3)(d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f) of title 5 of the U.S. Code (the Privacy Act of 1974), and are also exempted from the following sections of these rules: §146.3 (requests for information and for access); §146.5 (access to records); §146.6(d) (accounting of disclosures to be made available to the individual); §146.11(a) (7), (8), (9) (content of the system notice); and §146.7(a) (relevancy of records).

§ 146.13 Inspector General exemptions.
(a) Pursuant to section (j) of the Privacy Act of 1974, the Commission has deemed it necessary to adopt the following exemptions to specified provisions of the Privacy Act:

(1) Pursuant to, and limited by 5 U.S.C. 552a(j)(2), the system of records maintained by the Office of the Inspector General of the Commission entitled “Office of the Inspector General Investigative Files,” shall be exempted from...
§ 147.1 General policy considerations, purpose and scope of rules relating to open Commission meetings.


(b) The Commission may, upon application by the individual, furnish any records with- out charge or at a reduced rate, if it determines that such waiver or reduction of fee is in the public interest.

(c) Requests for copies of documents shall be addressed to FOI, Privacy and Sunshine Acts compliance staff, Office of Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

c. Payment should be made by check or money order payable to the Commodity Futures Trading Commission.

d. Advance payment of all or part of the fee may be required at the discretion of the Commission. Generally, advance payment will not be required where the anticipated fee is less than $25.

APPENDIX A TO PART 146—FEES FOR COPIES OF RECORDS REQUESTED UNDER THE PRIVACY ACT OF 1974

a. The following schedule of fees shall apply to copies of records requested pursuant to the Privacy Act of 1974, 5 U.S.C. 552a and §146.5(f).

1. For requests for copies of documents, the charge will be 15 cents per page.

2. For materials other than paper records, including computer and cassette tapes, the direct cost of the materials and, if required, time spent by clerical personnel copying the materials shall be charged. Persons making the request shall be notified of the amount of the charge and shall give specific approval before the request is processed.

3. For certifying that requested records are true copies, the fee will be $3.00 per certification in addition to other fees, if any.

4. Upon request, records will be mailed by means of an overnight/express service at the fee of $10.00 per unit mailed.

5. The Commission may, upon application by the individual, furnish any records without charge or at a reduced rate, if it determines that such waiver or reduction of fee is in the public interest.

6. Requests for copies of documents shall be addressed to FOI, Privacy and Sunshine Acts compliance staff, Office of Secretariat, Commodity Futures Trading Commission.
§ 147.2 Definitions.

For purposes of this part:

(a) Agency includes the Commodity Futures Trading Commission;

(b) Commission means the Commodity Futures Trading Commission;

(c) Commissioner means a member of the Commodity Futures Trading Commission duly appointed as a Commissioner in accordance with section 2(a)(2) of the Commodity Exchange Act, as amended, 7 U.S.C. 4a(a);

(d) Meeting means the deliberations of a quorum of Commissioners that determine or result in the joint conduct or disposition of official Commission business, but does not include deliberations required or permitted by §147.4, §147.5 or §147.6;

(e) Person includes an individual, partnership, corporation, association, exchange or other entity or organization;

(f) Quorum means at least the minimum number of Commissioners required to take action on behalf of the Commission;

(g) The term FOI, Privacy and Sunshine Acts compliance staff refers to the staff in the Office of the Secretariat in the Commission’s principal office in Washington, DC who are assigned to respond to requests and handle various other matters under the Freedom of Information Act, the Privacy Act of 1974 and the Government in the Sunshine Act.

§ 147.3 General requirement of open meetings; grounds upon which meetings may be closed.

(a) Commissioners shall not jointly conduct or dispose of agency business other than in accordance with the rules of this part, and meetings shall not be held in places which restrict membership or attendance or otherwise discriminate on the basis of race, color, creed, national origin, ancestry, religion or sex. Except as provided in paragraph (b) of this section, every portion of every meeting of the Commission shall be open to public observation.

(b) Except where the Commission finds that the public interest requires otherwise, meetings or portions of meetings shall not be open to public observation, and the requirements of §§147.4, 147.5 and 147.6 shall not apply to any information pertaining to such meetings or portions of meetings otherwise required by the rules of this part to be publicly disclosed, where the Commission determines that such meetings or portions of meetings or the disclosure of such information is likely to:

1. Disclose matters that (i) are specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy, and (ii) are in fact properly classified pursuant to such Executive order;

2. Relate solely to the internal personnel rules and personnel practices of the Commission or any other agency of the Government of the United States, including, but not limited to, operational rules, guidelines, and manuals of procedure for investigators, auditors, and other employees (other than those rules and practices which establish legal requirements to which members of the public are expected to conform);

3. Disclose matters specifically exempted from disclosure by statute (other than the Freedom of Information Act, as amended, 5 U.S.C. 552), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld. This includes,
but is not limited to, data and information which would separately disclose the business transactions or market positions of any person and trade secrets or names of customers and data and information concerning or obtained in connection with any pending investigation of any person;

(4)(i) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential including, but not limited to:

(A) Reports of stocks of grain, such as Forms 38, 38C, 38M and 38T, required to be filed pursuant to 17 CFR 1.44;

(B) Statements of reporting traders on Form 40 required to be filed pursuant to 17 CFR 18.04;

(C) Statements concerning special calls on positions required to be filed pursuant to 17 CFR part 21;

(D) Statements concerning identification of special accounts on Form 102 required to be filed pursuant to 17 CFR 17.01;

(E) Reports required to be filed pursuant to parts 15 through 21 of this chapter;

(F) Reports concerning option positions of large traders required to be filed pursuant to part 16 of this chapter;

(G) Form 188; and

(H) The following reports and statements that are also set forth in paragraph (b)(8) of this section, except as specified in 17 CFR 1.10(g)(2) or 17 CFR 31.13(m); Forms 1–FR required to be filed pursuant to 17 CFR 1.10; FOCUS reports that are filed in lieu of Forms 1–FR pursuant to 17 CFR 1.10(h); Forms 2–FR required to be filed pursuant to 17 CFR 31.13; the accountant’s report on material inadequacies filed in accordance with 17 CFR 1.16(c)(5); all reports and statements required to be filed pursuant to 17 CFR 1.17(c)(6); the following portions of Form CPO–PQR required to be filed pursuant to 17 CFR 4.27: Schedule A: Question 2, subparts (b) and (d); Question 3, subparts (g) and (h); Question 9; Question 10, subparts (b), (c), (d), (e), and (g); Question 11; and Question 12; and Schedules B and C; and the following portions of Form CTA–PR required to be filed pursuant to 17 CFR 4.27: Question 2, subparts (c) and (d);

(ii) Information contained in reports, summaries, analyses, transcripts, letters or memoranda arising out of, in anticipation of or in connection with an examination or inspection of the books and records of any person or any other formal or informal inquiry or investigation; and

(iii) Information for which confidential treatment has been requested and granted in accordance with 17 CFR 145.9;

(5) Involve accusing any person of a crime, or formally censuring any person, including but not limited to:

(i) Requests by the Commission that the Attorney General of the United States institute a criminal action against any person believed to have violated any provision of the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq., or any rule, regulation or order thereunder;

(ii) The consideration of any administrative proceeding instituted or to be instituted by the Commission against any person for a violation of the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq., or any rule, regulation or order thereunder;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy, including, but not limited to, information of that character contained in:

(i) Files concerning employees of the Commission;

(ii) Files concerning persons subject to regulation by the Commission, including files with respect to applications for registration and biographical supplements submitted with such applications. Examples of the information on the applications and biographical supplements which may be protected are an individual’s home address and telephone number, social security number, date and place of birth, fingerprints and, in appropriate cases, the information concerning prior arrests, indictments, criminal convictions or other judgments or sanctions imposed by State or Federal courts or regulatory authorities; and

(iii) Files containing information for which confidential treatment has been requested and granted in accordance with 17 CFR 145.9;
§ 147.3

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, to the extent that production of such records or information would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel. Investigatory records and information include all documents, records, transcripts, correspondence and related memoranda and work-product concerning examinations and other inquiries or investigations and related litigation as authorized by law, which pertain to or may disclose the possible violations by any person of any provision of law, including the Commodity Exchange Act, as amended, or of any rule or regulation adopted by the Commission or which pertain to the qualifications of any person registered or seeking registration under that Act or of any person affiliated with such person; and all written communications from or to any person who has confidentially complained or otherwise furnished information respecting such possible violations, as well as all correspondence and memoranda in connection with such confidential complaints or information;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Commission or any other agency responsible for the regulation or supervision of financial institutions, including, but not limited to the following reports and statements that are also set forth in paragraph (b)(4)(i)(H) of this section, except as specified in 17 CFR 1.10(g)(2) or 17 CFR 31.13(m): Forms 1–FR required to be filed pursuant to 17 CFR 1.10; FOCUS reports that are filed in lieu of Forms 1–FR pursuant to 17 CFR 1.10(h); Forms 2–FR pursuant to 17 CFR 31.13; the accountant’s report on material inadequacies filed in accordance with 1.16(c)(5); and all reports and statements required to be filed pursuant to 17 CFR 1.17(c)(6); and

(i) The following portions of Form CPO–PQR required to be filed pursuant to 17 CFR 4.27: Schedule A: Question 2, subparts (b) and D; Question 3, subparts (g) and (h); Question 10, subparts (b), (c), (d), (e), and (g); Question 11; Question 12; and Question 13; and Schedules B and C; and

(ii) The following portions of Form CTA–PR required to be filed pursuant to 17 CFR 4.27: Schedule B: Question 4, subparts (b), (c), (d), and (e); Question 5; and Question 6;

(9) Disclose information the premature disclosure of which would be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, (ii) significantly endanger the stability of any financial institution, or (iii) frustrate significantly the implementation of a proposed Commission action, except where the Commission has already disclosed to the public the content or nature of its proposed action, or where the Commission is required by law to make such disclosure on its own initiative prior to taking final Commission action on such proposal; or

(10) Specifically concern the Commission’s issuance of a subpoena, or the Commission’s participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the Commission of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise
§ 147.4 Procedure for announcing meetings.

(a) Advance notice of all meetings of the Commission shall be provided to the public. In the case of each meeting, except as provided in paragraph (b) of this section and in § 147.6, the Commission shall, except to the extent that such information is exempt from disclosure under the provisions of § 147.3(b), make a public announcement, at least one week before the date of the meeting of the time, place and subject matter of the meeting and which portions of the meeting shall be open or closed to the public, and shall indicate an official of the Commission who may be contacted at a designated telephone number for information about the meeting.

(c)(1) When it becomes necessary to change the time or place of a meeting for which a public announcement has been made pursuant to paragraphs (a) or (b) of this section, the Commission shall publicly announce such change at the earliest practicable time.

(2) When it becomes necessary with respect to a meeting for which a public announcement has already been made pursuant to paragraphs (a), (b) or (c)(1) of this section to change the subject matter of a meeting, or change the Commission’s determination as to which portions of a meeting shall be open or closed to the public, a majority of all Commissioners shall determine by a recorded vote that Commission business requires such a change and that no earlier announcement of the change was possible, and the Commission shall publicly announce such change and the vote of each Commissioner upon such change at the earliest practicable time.

(d) Public announcement of meetings, as required by this section, shall be provided as follows:

(1) A public calendar shall be printed and distributed by the Commission on a regular basis to interested persons to provide advance public notice of meetings as required by paragraph (a) of this section, and, to the extent practicable, as required by paragraphs (b) and (c) of this section. Upon request in writing to the Office of Public Affairs, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, any person or organization will be sent the public calendar on a regular basis free of charge. Copies of the public calendar also will be publicly available in the Commission’s Office of Public Affairs.

(e) Immediately following each public announcement required by this section, the Commission shall submit for publication in the Federal Register, except to the extent that such information is exempt from disclosure under the provisions of § 147.3(b), notice of the
§ 147.5 General procedure for closing meetings.

(a) The Commission shall determine that a meeting or portion of a meeting will be closed to public observation pursuant to §147.3(b) only upon the majority vote of all Commissioners. The vote of each Commissioner shall be recorded, and the use of proxies shall be prohibited.

(b) A separate vote of Commissioners shall be taken with respect to each meeting a portion or portions of which are proposed to be closed to the public pursuant to §147.3(b), or with respect to any information which is proposed to be withheld under §147.3(b).

(c) A single vote of Commissioners may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, when each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series.

(d) Whenever any person whose interests may be directly affected by a portion of a meeting requests in writing to the Commission that the meeting be closed to the public for any of the reasons set forth in §147.3(b) (5), (6) or (7), the Commission, upon the request of any Commissioner, shall vote by recorded vote whether to close that portion of the meeting.

(e) Whenever any Commission employee whose appointment, employment or dismissal is to be the subject of a meeting or portion of meeting closed to the public pursuant to §147.3(b) requests in writing to the Commission that the Commission open that meeting or portion of meeting, the Commission shall open that meeting or portion of meeting to the public.

(f) Within one day of any vote taken pursuant to paragraphs (b), (c) or (d) of this section, the Commission shall make publicly available a written copy of that vote reflecting the vote of each Commissioner on the question. If the Commission determines by a vote taken pursuant to paragraphs (b), (c) or (d) of this section that a portion of a meeting is to be closed to the public, the Commission shall, within one day of such vote, make publicly available a full written explanation of its action closing the portion of the meeting together with a list of all persons expected to attend the meeting and their affiliations, except to the extent that such information is exempt from disclosure under the provisions of §147.3(b).

(g) Before any meeting or portion of a meeting may be closed pursuant to §147.3(b), the Commission’s General Counsel shall publicly certify that, in his or her opinion, the meeting or portion of meeting may be closed to the public, and shall state each relevant exemptive provision.

(h) Written copies of votes to close meetings and written explanations of Commission actions closing portions of meetings to the public required to be made publicly available by paragraph (f) of this section shall be available for public inspection in the offices of the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(i) A copy of the certification of the Commission’s General Counsel required by paragraph (g) of this section, together with a statement from the presiding officer at any meeting closed, in whole or in part, pursuant to §147.3(b), setting forth the time and place of the meeting, and the persons present, shall be retained by the Commission and, except to the extent that such information is exempt from disclosure under the provisions of §147.3(b), shall be available for public inspection in the offices of the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette
§ 147.6 Special procedure for closing certain meetings.

(a) Any meeting or portion of meeting that may properly be closed to the public pursuant to §147.3(b) (4), (8), (9)(i), (9)(ii) or (10), or any combination thereof, may be closed if a majority of Commissioners votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting.

(b) The provisions of §147.4, and of §147.5 (a), (b), (c), (d), (e), (f) and (h) shall not apply to any portion of a meeting to which paragraph (a) of this section is applied. The provisions of §147.5(g) and (i) shall apply to any such portions of meetings.

(c) A written copy of all votes taken pursuant to paragraph (a) of this section reflecting the vote of each Commissioner on the question shall be made available for public inspection in the offices of the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(d) The Commission shall, except to the extent that such information is exempt from disclosure under the provisions of §147.3(b), make public announcement at the earliest practicable time of the time, place, and subject matter of any portion of a meeting to which paragraph (a) of this section is applied. Such public announcement shall be provided, to the extent practicable, through the Commission’s public calendar as described in §147.4(d)(1), and by the Commission’s Office of the Secretariat as set forth in §147.4(d)(2).

§ 147.7 Maintenance of transcripts, recordings and minutes of closed meetings.

(a) The Commission shall make and maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting or portion of meeting closed to the public, except as provided in paragraph (b) of this section.

(b)(1) In the case of each meeting or portion of meeting closed to the public pursuant to §147.3(b) (8), (9)(i), (9)(ii) or (10), or any combination thereof, the Commission shall make and maintain either a complete transcript or recording as described in paragraph (a) of this section, or a set of minutes.

(2) When the Commission elects to keep minutes under paragraph (b)(1) of this section, the minutes shall fully and clearly describe all matters discussed at the closed meeting or closed portion thereof, and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item, and a record of any roll call vote taken which reflects the vote of each Commissioner on the question. All documents considered in connection with any actions taken shall be identified in such minutes.

§ 147.8 Public availability of transcripts, recordings and minutes of closed meetings.

(a) The Commission shall make promptly available to the public, in the offices of the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, the transcript, electronic recording or set of minutes of the discussion of any item on the agenda of any closed meeting or closed portion thereof (as required by §147.7), or of any item of the testimony of any witness received at such meeting or portion thereof, except for such item or items of such discussion or testimony that are determined, in accordance with the procedure set forth in paragraph (b) of this section, to contain information which may be withheld under §147.3(b).

(b)(1) All determinations made pursuant to paragraph (a) of this section that items of discussion or testimony reflected in transcripts, recordings or sets of minutes of closed meetings or closed portions thereof are exempt from disclosure pursuant to §147.3(b),...
shall be made by the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts compliance after due consultation with the Office of the Commission’s General Counsel and the Director of any affected staff division.

(2) Any person who objects to any determination made pursuant to paragraph (b)(1) of this section may seek Commission review of that determination by filing with the Commission’s Office of the Secretariat a brief written statement that review is sought which contains a concise statement of the reasons why the determination should be set aside.

(c) The Commission shall maintain a complete verbatim copy of the transcript, a complete electronic recording or a complete copy of the minutes of each meeting or portion of a meeting closed to the public, which are made in accordance with §147.7(a) or §147.7(b), for a period of at least two years after such meeting or portion of meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion thereof was held, whichever occurs later.


§ 147.10 Interpretation of this part with other provisions.

(a) Nothing in this part shall be interpreted as:

(1) Expanding or limiting the present rights of any person under part 145 of this title (implementing the provisions of the Freedom of Information Act, 5 U.S.C. 552), except that the exemptions set forth in §147.3(b) of this part shall govern in the case of any request made pursuant to part 145 to copy or inspect the transcripts, recordings or sets of minutes described in this part; or

(2) Authorizing the Commission to withhold from any person any record, including transcripts, recordings or sets of minutes required by this part, which is otherwise accessible to such individual under part 146 of this title (implementing the provisions of the Privacy Act, 5 U.S.C. 552a).

(b) The requirements of chapter 33 of title 44, U.S. Code (with respect to the disposal of records), shall not apply to the transcripts, recordings and minutes described in this part.

PART 148—IMPLEMENTATION OF THE EQUAl ACCESS TO JUSTICE ACT IN COVERED ADJUDICATORY PROCEEDINGS BEFORE THE COMMISSION

Subpart A—General Provisions

Sec. 148.1 Purpose of these rules.
148.2 When the Act applies.
148.3 Proceedings covered.
148.4 Eligibility of applicants.
148.5 Standards for awards.
148.6 Allowable fees and expenses.
148.7 Rulemaking on maximum rates for attorney fees.
148.8 Awards against other agencies.

Subpart B—Information Required from Applicants

148.11 Contents of application.
Commodity Futures Trading Commission

§ 148.3

Proceedings covered.

(a) The Act applies to adjudicatory proceedings conducted by the Commission. These are adjudications under 5 U.S.C. 554 in which the position of the Commission or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. Reparation proceedings under section 14 of the Commodity Exchange Act, 7 U.S.C. 18, Commission review of exchange disciplinary and access denial actions under section 8c of the Commodity Exchange Act, 7 U.S.C. 12c, and registered futures association disciplinary and membership denial actions under section 17 of the Commodity Exchange Act, 7 U.S.C. 21, are not covered by the Act. Proceedings brought to determine whether or not to grant or renew registrations pursuant to sections 8a or 17(o), of the Commodity Exchange Act, 7 U.S.C. 8, 12a and 21(o), or contract market designations pursuant to section 6(a) of the Commodity Exchange Act, 7 U.S.C. 8(a), are excluded, but proceedings brought to suspend or revoke registrations or contract market designations are covered if they are otherwise adjudicatory proceedings. For the Commission, the types of proceedings generally covered are adjudicatory proceedings as defined in §10.2(b) of this chapter; part 14 proceedings, if they involve a hearing, are also covered.

(b) The Commission’s decision not to identify a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in the proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 148.4 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adjudicatory proceeding for which it seeks an award. The term “party” is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more that 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the adjudicatory proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for compensation for the applicant, under the applicant’s direction and control. The term “employee” also embraces all the agents of an applicant, by whatever title or label they may be known, for whose acts or omissions the applicant may be held liable under the Commodity Exchange Act. See 7 U.S.C. 4. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Presiding Officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Presiding Officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.


§ 148.5 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with an adjudicatory proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Commission was substantially justified. The position of the Commission includes, in addition to the position taken by the Commission in the adversary adjudication, the action or failure to act by the Commission upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant is on the Commission.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adjudicatory proceedings.
Commodity Futures Trading Commission

§ 148.11 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the adjudicatory proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Commission or other agency that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant’s net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates).

§ 148.6 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75 per hour. No award to compensate an expert witness may exceed the maximum daily rate prescribed for GS–18 under section 5332 of title 5 of the U.S. Code. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Presiding Officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adjudicatory proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant’s case.

§ 148.7 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by this part. The Commission will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553.

(b) Any person may file with the Commission a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with §13.2 of this chapter.

§ 148.8 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in an adjudicatory proceeding before the Commission and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

Subpart B—Information Required from Applicants

§ 148.11 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the adjudicatory proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Commission or other agency that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant’s net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates).
However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant’s belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.


§ 148.12 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §148.4(f) of this part) when the adjudicatory proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant’s and its affiliates’ assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Presiding Officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the adjudicatory proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the Presiding Officer in a sealed envelope labeled “Confidential Financial Information,” accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the Commission or other agency against which the applicant seeks an award, but need not be served on any other party to the adjudicatory proceeding. If the Presiding Officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the adjudicatory proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission’s established procedures under the Freedom of Information Act as provided in part 145 of this chapter. For that purpose, the applicant shall file a copy of its motion with the Commission’s Freedom of Information Act Compliance Staff in the Office of the Secretariat, Washington, DC.

§ 148.13 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by
any other person or entity for the services provided. The Presiding Officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 148.14 When an application may be filed.
(a) An application may be filed whenever the applicant has prevailed in the adjudicatory proceeding or in a significant and discrete substantive portion of the proceeding, subject to the separate hearing procedure pursuant to §10.63(b) of this chapter, but in no case later than 30 days after the Commission's final disposition of the adjudicatory proceeding.
(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of
(1) The date on which an initial decision by the Presiding Officer becomes final pursuant to §10.84 of this chapter;
(2) Issuance of an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding pursuant to §10.106 of the Rules of Practice;
(3) If no petition for reconsideration is filed, the last date on which such a petition could have been filed pursuant to §10.106 of the Rules of Practice; or
(4) Issuance of a final Commission order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

Subpart C—Procedures for Considering Applications

§ 148.21 Filing and service of documents.
Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the adjudicatory proceeding, except as provided in §148.12(b) for confidential financial information.

§ 148.22 Answer to application.
(a) Within 30 days after service of an application, counsel representing the Commission or other agency against which an award is sought may file an answer to the application. Unless counsel for the Commission or for another relevant agency requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.
(b) If counsel for the Commission or for another relevant agency and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the Presiding Officer upon request by counsel for the Commission or for another relevant agency and the applicant.

(c) Any answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the position of counsel for the Commission or for another relevant agency. If the answer is based on any alleged facts not already in the record of the adjudicatory proceeding, counsel for the Commission or for another relevant agency shall include with the answer either supporting affidavits or a request for further proceedings under §148.26 of this part.

§ 148.23 Reply.
Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the adjudicatory proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under §148.26 of this part.

§ 148.24 Comments by other parties.
Any party to an adjudicatory proceeding other than the applicant and counsel for the Commission or for another relevant agency may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Presiding Officer determines
that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 148.25 Settlement.

The applicant may propose settlement of the award to the Commission before final action on the application, either in connection with a settlement of the adjudicatory proceeding, or after the adjudicatory proceeding has been concluded, in either case in accordance with §10.108 of this chapter. If a prevailing party offers a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 148.26 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or counsel for the Commission or for another relevant agency, or on his or her own initiative, the Presiding Officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the Commission was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. No discovery and/or evidentiary proceedings shall be permitted into the question of whether the agency’s position was substantially justified.

(b) A request that the Presiding Officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why additional proceedings are necessary to resolve the issues.


§ 148.27 Decision.

The Presiding Officer shall issue an initial decision on the application in accordance with the provisions of §10.84 of this chapter. The decision shall include written findings and conclusions on the applicant’s eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Commission’s position was substantially justified, whether the applicant unduly or unreasonably protracted the adjudicatory proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

§ 148.28 Appeal to the Commission.

(a) Either the applicant or counsel for the Commission or for another relevant agency may appeal the initial decision on the fee application by complying with the requirements of this section. An appealing party shall serve upon opposing parties and shall file with the Proceedings Clerk a notice of appeal within fifteen (15) days after service of the initial decision. The notice need consist only of a brief statement indicating the filing party’s intent to appeal the initial decision, and shall include the date upon which the initial decision was rendered, the name of the proceeding, and the docket number of the proceeding. The failure of a party timely to file and serve a notice of appeal in accordance with this paragraph, or to perfect the appeal in accordance with paragraph (b) of this section, shall constitute a voluntary waiver of any objection to the initial decision, and of all further administrative or judicial review under these rules and the Equal Access to Justice Act.

(b) An appeal shall be perfected by the appealing party by timely filing with the Proceedings Clerk an appeal brief which meets the requirements of paragraphs (b) and (d) of this section. An original and one copy of the appeal brief shall be filed within thirty (30) days after filing of the notice of appeal. By motion of the appealing party, the Commission may, for good cause
shown, extend the time for filing the appeal brief. If the appeal brief is not filed within the time prescribed in this subparagraph, the Commission may, upon its own motion or upon motion by a party, dismiss the appeal, in which event the initial decision shall become the final decision and order of the Commission, effective upon service of the order of dismissal.

(c) The opposing party may, within thirty (30) days after service of the appeal brief, file an original and one copy of an answering brief, and serve one copy thereof, unless the time limit is extended by the Commission upon motion of the party and for good cause shown.

(d) Parties filing an appeal brief or answering brief shall meet the requirements of §10.12 of this chapter as to form. The content of briefs shall satisfy the requirements of §10.102(d) of this chapter, except that any party, with leave of the Commission, may file an informal document in lieu of a brief. No brief shall exceed thirty-five (35) pages in length without advance leave of the Commission.

(e) On review, the Commission may, in its discretion, consider sua sponte any issues arising from the record and may base its determination thereon, or limit the issues to those presented in the statement of issues in the briefs, treating those issues not raised as waived.

[51 FR 18881, May 23, 1986]

§ 148.29 Judicial review.

Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 148.30 Payment of award.

An applicant seeking payment of an award from the Commission shall submit to the Executive Director of the Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, a copy of the Commission’s final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. At the same time, the applicant shall provide a copy of his submissions to counsel for the Commission. The Commission will, within 60 days of receipt of the applicant’s submissions, forward to the United States Department of the Treasury a Standard Form 1166, “Voucher and Schedule of Payments,” so as to have the Treasury Department issue a check in the amount awarded in the Commission’s decision, unless judicial review of the award or of the underlying decision in the adjudicatory proceeding has been sought by the applicant or any other party to the adjudicatory proceeding.

[46 FR 57671, Nov. 25, 1981, as amended at 60 FR 49336, Sept. 25, 1995]

PART 149—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE COMMODITY FUTURES TRADING COMMISSION

Sec. 149.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the U.S. Postal Service.
§ 149.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 149.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD’s), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) Physical or mental impairment includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term “physical or mental impairment” includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) Major life activities includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) Is regarded as having an impairment means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.
(1) With respect to preschool, elementary, or secondary education services provided by the agency, a handicapped person who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency.

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) Qualified handicapped person is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §149.140.


Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 149.129–149.129 [Reserved]

§ 149.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(b)(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or
activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap; nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 149.131–149.139 [Reserved]

§ 149.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 149.141–149.148 [Reserved]

§ 149.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 149.150, no qualified handicapped person shall, because the agency’s facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 149.150 Program accessibility: Existing facilities.

(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where
agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §149.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) Methods—(1) General. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of §149.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to handicapped persons. In cases where a physical alteration to an historic property is not required because of §149.150(a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide handicapped persons into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. The agency shall comply with the obligations established under this section by October 21, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by August 22, 1989, but in any event as expeditiously as possible.

(d) Transition plan. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by February 23, 1987, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency’s facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.
§ 149.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 149.152–149.159 [Reserved]

§ 149.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf person (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §149.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 149.161–149.169 [Reserved]

§ 149.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Executive Director of the Commission shall be responsible for coordinating implementation of this section. Complaints may be sent to the Equal Employment Opportunity Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180...
days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §149.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.


**PART 150—LIMITS ON POSITIONS**

Sec.

150.1 Definitions.

150.2 Position limits.

150.3 Exemptions.

150.4 Aggregation of positions.

150.5 Exchange-set speculative position limits.

150.6 Responsibility of contract markets.


Source: 52 FR 38923, Oct. 20, 1987, unless otherwise noted.

§ 150.1 Definitions.

As used in this part—

(a) Spot month means the futures contract next to expire during that period of time beginning at the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization of a contract market.

(b) Single month means each separate futures trading month, other than the spot month future.

(c) All-months means the sum of all futures trading months including the spot month future.

(d) Eligible entity means—

A commodity pool operator, the operator of a trading vehicle which is excluded or who itself has qualified for exclusion from the definition of the term “pool” or commodity pool operator,” respectively, under §4.5 of this chapter; the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under §4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities.

(1) Which authorizes an independent account controller independently to control all trading decisions for positions it holds directly or indirectly, or
on its behalf, but without its day-to-day direction; and
(2) Which maintains:
   (i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or
   (ii) If a limited partner or shareholder of a commodity pool the operator of which is exempt from registration under §4.13 of this chapter, only such limited control as is consistent with its status.

(e) Independent account controller means a person—
   (1) Who specifically is authorized by an eligible entity, as defined in paragraph (d) of this section, independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity;
   (2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;
   (3) Who trades independently of the eligible entity and of any other independent account controller trading for the eligible entity;
   (4) Who has no knowledge of trading decisions by any other independent account controller; and
   (5) Who is registered as a futures commission merchant, an introducing broker, a commodity trading advisor, an associated person or any such registrant, or is a general partner of a commodity pool the operator of which is exempt from registration under §4.13 of this chapter.

(f) Futures-equivalent means an option contract which has been adjusted by the previous day’s risk factor, or delta coefficient, for that option which has been calculated at the close of trading and published by the applicable exchange under §16.01 of this chapter.

(g) Long position means a long call option, a short put option or a long underlying futures contract.

(h) Short position means a short call option, a long put option or a short underlying futures contract.

(i) For the following commodities, the first delivery month of the “crop year” is as follows:

<table>
<thead>
<tr>
<th>Commodity</th>
<th>Beginning delivery month</th>
</tr>
</thead>
<tbody>
<tr>
<td>corn</td>
<td>December</td>
</tr>
<tr>
<td>cotton</td>
<td>October</td>
</tr>
<tr>
<td>oats</td>
<td>July</td>
</tr>
<tr>
<td>soybeans</td>
<td>September</td>
</tr>
<tr>
<td>soybean meal</td>
<td>October</td>
</tr>
<tr>
<td>soybean oil</td>
<td>October</td>
</tr>
<tr>
<td>wheat (spring)</td>
<td>September</td>
</tr>
<tr>
<td>wheat (winter)</td>
<td>July</td>
</tr>
</tbody>
</table>


§ 150.2 Position limits.

No person may hold or control positions, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon, in excess of the following:

<table>
<thead>
<tr>
<th>Contract</th>
<th>Limits by number of contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Spot month</td>
</tr>
<tr>
<td>Corn and Mini-Corn</td>
<td>600</td>
</tr>
<tr>
<td>Oats</td>
<td>600</td>
</tr>
<tr>
<td>Soybeans and Mini-Soybeans</td>
<td>600</td>
</tr>
<tr>
<td>Wheat and Mini-Wheat</td>
<td>600</td>
</tr>
<tr>
<td>Soybean Oil</td>
<td>540</td>
</tr>
<tr>
<td>Soybean Meal</td>
<td>720</td>
</tr>
</tbody>
</table>
§ 150.3 Exemptions.

(a) Positions which may exceed limits. The position limits set forth in §150.2 of this part may be exceeded to the extent such position are:

(1) Bona fide hedging transactions as defined in §1.3(z) of this chapter;

(2) [Reserved]

(3) Spread or arbitrage positions between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; provided however, that such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in §150.2; or

(4) Carried for an eligible entity as defined in §150.1(d), in the separate account or accounts of an independent account controller, as defined in §150.1(e), and not in the spot month if there is a position limit which applies to individual trading months during their expiration; provided, however, that the overall positions held or controlled by each such independent account controller may not exceed the limits specified in §150.2.

(i) Additional Requirements for Exemption of Affiliated Entities. If the independent account controller is affiliated with the eligible entity or another independent account controller, each of the affiliated entities must:

(A) Have, and enforce, written procedures to preclude the affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities; provided, however, that such procedures may provide for the disclosure of information which is reasonably necessary for an eligible entity to maintain the level of control consistent with its fiduciary responsibilities and necessary to fulfill its duty to supervise diligently the trading done on its behalf;

(B) Trade such accounts pursuant to separately-developed and independent trading systems;

(C) Market such trading systems separately; and

(D) Solicit funds for such trading by separate Disclosure Documents that meet the standards of §4.24 or §4.34 of this chapter, as applicable, where such Disclosure Documents are required under part 4 of this chapter.

(ii) [Reserved]

(b) Call for information. Upon call by the Commission, the Director of the Division of Market Oversight or the Director’s delegate, any person claiming an exemption from speculative position limits under this section must provide to the Commission such information as specified in the call relating to the positions owned or controlled by that person; trading done pursuant to the claimed exemption; the futures, options or cash market positions which support the claim of exemption; and


<table>
<thead>
<tr>
<th>Contract</th>
<th>Limits by number of contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Spot month</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Minneapolis Grain Exchange</td>
<td></td>
</tr>
<tr>
<td>Hard Red Spring Wheat</td>
<td>600</td>
</tr>
<tr>
<td>ICE Futures U.S.</td>
<td></td>
</tr>
<tr>
<td>Cotton No. 2</td>
<td>300</td>
</tr>
<tr>
<td>Kansas City Board of Trade</td>
<td></td>
</tr>
<tr>
<td>Hard Winter Wheat</td>
<td>600</td>
</tr>
</tbody>
</table>

1 For purposes of compliance with these limits, positions in the regular sized and mini-sized contracts shall be aggregated.

[76 FR 71684, Nov. 18, 2011]
§ 150.4 Aggregation of positions.

(a) Positions to be aggregated. The position limits set forth in §510.2 of this part shall apply to all positions in accounts for which any person by power of attorney or otherwise directly or indirectly holds positions or controls trading or to positions held by two or more persons acting pursuant to an expressed or implied agreement or understanding the same as if the positions were held by, or the trading of the position were done by, a single individual.

(b) Ownership of accounts. For the purpose of applying the position limits set forth in §510.2, except for the ownership interest of limited partners, shareholders, members of a limited liability company, beneficiaries of a trust or similar type of pool participant in a commodity pool subject to the provisos set forth in paragraph (c) of this section, any trader holding positions in more than one account, or holding accounts or positions in which the trader by power of attorney or otherwise directly or indirectly has a 10% or greater ownership or equity interest, must aggregate all such accounts or positions.

(c) Ownership by limited partners, shareholders or other pool participants. For the purpose of applying the position limits set forth in §150.2:

(1) A commodity pool operator having ownership or equity interest of 10% or greater in an account or positions as a limited partner, shareholder or other similar type of pool participant must aggregate those accounts or positions with all other accounts or positions owned or controlled by the commodity pool operator;

(2) A trader that is a limited partner, shareholder or other similar type of pool participant with an ownership or equity interest of 10% or greater in a pooled account or positions with a principal or affiliate of the operator of the pooled account must aggregate the pooled account or positions with all other accounts or positions owned or controlled by that trader, provided, however, that the trader need not aggregate such pooled positions or accounts if:

(i) The pool operator has, and enforces, written procedures to preclude the trader from having knowledge of, gaining access to, or receiving data about the trading or positions of the pool;

(ii) The trader does not have direct, day-to-day supervisory authority or control over the pool’s trading decisions; and

(iii) The trader, if a principal of the commodity pool operator, maintains only such minimum control over the commodity pool operator as is consistent with its responsibilities as a principal and necessary to fulfill its duty to supervise the trading activities of the commodity pool;

(3) Each limited partner, shareholder, or other similar type of pool participant having an ownership or equity interest of 25% or greater in a commodity pool the operator of which is exempt from registration under §4.13 of this chapter must aggregate the pooled account or positions with all other accounts or positions owned or controlled by that trader.

(d) Trading control by futures commission merchants. The position limits set forth in §150.2 of this part shall be construed to apply to all positions held by a futures commission merchant or its separately organized affiliates in a discretionary account, or in an account which is part of, or participates in, or receives trading advice from a customer trading program of a futures commission merchant or any of the officers, partners, or employees of such futures commission merchant or its separately organized affiliates, unless:

(1) A trader other than the futures commission merchant or the affiliate directs trading in such an account;

(2) The futures commission merchant or the affiliate maintains only such minimum control over the trading in such an account as is necessary to fulfill its duty to supervise diligently trading in the account; and

(3) Each trading decision of the discretionary account or the customer trading program is determined independently of all trading decisions in
other accounts which the futures commission merchant or the affiliate holds, has a financial interest of 10% or more in, or controls.

(e) Call for information. Upon call by the Commission, the Director of the Division of Market Oversight or the Director’s delegatee, any person claiming an exemption under paragraphs (c) or (d) of this section must provide to the Commission such information as specified in the call relating to the positions owned or controlled by that person, trading done pursuant to the claimed exemption, or the relevant business relationships supporting a claim of exemption.


§ 150.5 Exchange-set speculative position limits.

(a) Exchange limits. Each contract market as a condition of designation under part 5, appendix A, of this chapter shall be bylaw, rule, regulation, or resolution limit the maximum number of contracts a person may hold or control, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon. This section shall not apply to a contract market for which position limits are set forth in § 150.2 of this part or for a futures or option contract market on a major foreign currency, for which there is no legal impediment to delivery and for which there exists a highly liquid cash market. Nothing in this section shall be construed to prohibit a contract market from fixing different and separate position limits for different types of futures contracts based on the same commodity, or from fixing different position limits for different futures or for different delivery months, or from exempting positions which are normally known in the trade as “spreads, straddles, or arbitrage,” of from fixing limits which apply to such positions which are different from limits fixed for other positions.

(b) Levels at designation. At the time of its initial designation, a contract market must provide for speculative position limit levels as follows:

(1) For physical delivery contracts, the spot month limit level must be no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed, and for cash settled contracts, the spot month limit level must be no greater than necessary to minimize the potential for manipulation or distortion of the contract’s or the underlying commodity’s price;

(2) Individual nonspot or all-months-combined levels must be no greater than 1,000 contracts for tangible commodities other than energy products;

(3) Individual nonspot or all-months-combined levels must be no greater than 5,000 contracts for energy products and nontangible commodities, including contracts on financial products.

(c) Adjustments to levels. Contract markets may adjust their speculative limit levels as follows:

(1) For physical delivery contracts, the spot month limit level must be no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed, and for cash settled contracts, the spot month limit level must be no greater than necessary to minimize the potential for manipulation or distortion of the contract’s or the underlying commodity’s price; and

(2) Individual nonspot or all-months-combined levels must be no greater than 10% of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year up to 25,000 contracts with a marginal increase of 2.5% thereafter or be based on position sizes customarily held by speculative traders on the contract market, which shall not be extraordinarily large relative to total open positions in the contract, the breadth and liquidity of the cash market underlying each delivery month and the opportunity for arbitrage between the futures market and the cash market in the commodity underlying the futures contract.

(d) Hedge exemption. (1) No exchange bylaw, rule, regulation, or resolution adopted pursuant to this section shall apply to bona fide hedging positions as defined by a contract market in accordance with § 1.3(z)(1) of this chapter.
Provided, however, that the contract market may limit bona fide hedging positions or any other positions which have been exempted pursuant to paragraph (e) of this section which it determines are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.

(2) Traders must apply to the contract market for exemption from its speculative position limit rules. In considering whether to grant such an application for exemption, contract markets must take into account the factors contained in paragraph (d)(1) of this section.

(e) Trader accountability exemption. Twelve months after a contract market's initial listing for trading or at any time thereafter, contract markets may submit for Commission approval under section 5a(a)(12) of the Act and §1.41(b) of this chapter a bylaw, rule, regulation, or resolution, substituting for the position limits required under paragraphs (a), (b) and (c) of this section an exchange rule requiring traders to be accountable for large positions as follows:

(1) For futures and option contracts on a financial instrument or product having an average open interest of 50,000 contracts and an average daily trading volume of 100,000 contracts and a very highly liquid cash market, an exchange bylaw, regulation or resolution requiring traders to provide information about their position upon request by the exchange;

(2) For futures and option contracts on a financial instrument or product or on an intangible commodity having an average moth-end open interest of 50,000 and an average daily volume of 25,000 contracts and a highly liquid cash market, an exchange bylaw, regulation or resolution requiring traders to provide information about their position upon request by the exchange;

(3) For futures and option contracts on a tangible commodity, including but not limited to metals, energy products, or international soft agricultural products, having an average moth-end open interest of 50,000 contracts and an average daily volume of 5,000 contracts and a liquid cash market, an exchange bylaw, regulation or resolution requiring traders to provide information about their position upon request by the exchange and to consent to halt increasing further a trader's positions if so ordered by the exchange. provided, however, such contract markets are not exempt from the requirement of paragraphs (b) or (c) that they adopt an exchange bylaw, regulation or resolution setting a spot month speculative position limit with a level no grater than one quarter of the estimated spot month deliverable supply;

(4) For purposes of this paragraph, trading volume and open interest shall be calculated by combining the month-end futures and its related option contract, on a delta-adjusted basis, for all months listed during the most recent calendar year.

(g) Other exemptions. Exchange speculative position limits adopted pursuant to this section shall not apply to any position acquired in good faith prior to the effective date of any bylaw, rule, regulation, or resolution which specifies such limit or to a person that is registered as a futures commission merchant or as a floor broker under authority of the Act except to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. In addition to the express exemptions specified in this section, a contract market may propose such other exemptions from the requirements of this section consistent with the purposes of this section and shall submit such rules Commission review under section 5a(1)(12) of the Act and §1.41(b) of this chapter.

(g) Aggregation. In determining whether any person has exceeded the limits established under this section, all positions in accounts for which such person by power of attorney or otherwise directly or indirectly controls trading shall be included with the positions held by such person; such limits upon positions shall apply to positions held by two or more person acting pursuant to an express or implied agreement or understanding, the same as if
the positions were held by a single person.  
[64 FR 24048, May 5, 1999]

§ 150.6 Responsibility of contract markets.  
Nothing in this part shall be construed to affect any provisions of the Act relating to manipulation or corners nor to relieve any contract market or its governing board from responsibility under section 5(4) of the Act to prevent manipulation and corners.  

PART 151—POSITION LIMITS FOR FUTURES AND SWAPS

Sec.  
151.1 Definitions.  
151.2 Core Referenced Futures Contracts.  
151.3 Spot months for Referenced Contracts.  
151.4 Position limits for Referenced Contracts.  
151.5 Bona fide hedging and other exemptions for Referenced Contracts.  
151.6 Position viability.  
151.7 Aggregation of positions.  
151.8 Foreign boards of trade.  
151.9 Pre-existing positions.  
151.10 Form and manner of reporting and submitting information or filings.  
151.11 Designated contract market and swap execution facility position limits and accountability rules.  
151.12 Delegation of authority to the Director of the Division of Market Oversight.  
151.13 Severability.  
APPENDIX A TO PART 151—SPOT-MONTH POSITION LIMITS  
APPENDIX B TO PART 151—EXAMPLES OF BONA FIDE HEDGING TRANSACTIONS AND POSITIONS

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6t, 12a, 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).  

Source: 76 FR 71684, Nov. 18, 2011, unless otherwise noted.

§ 151.1 Definitions.  
As used in this part—  
Basis contract means an agreement, contract or transaction that is cash-settled based on the difference in price of the same commodity (or substantially the same commodity) at different delivery locations;  
Calendar spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract or transaction and the settlement price of another contract month or another series of contract months’ settlement prices for the same agreement, contract or transaction.  
Commodity index contract means an agreement, contract, or transaction that is not a basis or any type of spread contract, based on an index comprised of prices of commodities that are not the same or substantially the same; provided that, a commodity index contract used to circumvent speculative position limits shall be considered to be a Referenced Contract for the purpose of applying the position limits of §151.4.  
Core Referenced Futures Contract means a futures contract that is listed in §151.2.  
Eligible Entity means a commodity pool operator; the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term “pool” or “commodity pool operator,” respectively, under §4.5 of this chapter the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under §4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:  
(1) Which authorizes an independent account controller independently to control all trading decisions with respect to the eligible entity’s client positions and accounts that the independent account controller holds directly or indirectly, or on the eligible entity’s behalf; but without the eligible entity’s day-to-day direction; and  
(2) Which maintains:  
(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities to the managed positions and accounts, and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or
§ 151.2 Core Referenced Futures Contracts.

(a) Agricultural commodities. Core Referenced Futures Contracts in agricultural commodities include the following futures contracts and options thereon:

(1) Core Referenced Futures Contracts in legacy agricultural commodities:

(i) Chicago Board of Trade Corn (C);

(ii) Chicago Board of Trade Oats (O);

(iii) Chicago Board of Trade Soybeans (S);

(iv) Chicago Board of Trade Soybean Meal (SM);

(ii) If a limited partner or shareholder of a commodity pool the operator of which is exempt from registration under §4.13 of this chapter, only such limited control as is consistent with its status.

Entity means a “person” as defined in section 1a of the Act.

Excluded commodity means an “excluded commodity” as defined in section 1a of the Act.

Independent Account Controller means a person:

(1) Who specifically is authorized by an eligible entity independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity;

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities for managed positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

(3) Who trades independently of the eligible entity and of any other independent account controller trading for the eligible entity;

(4) Who has no knowledge of trading decisions by any other independent account controller; and

(5) Who is registered as a futures commission merchant, an introducing broker, a commodity trading advisor, or an associated person of any such registrant, or is a general partner of a commodity pool the operator of which is exempt from registration under §4.13 of this chapter.

Intercommodity spread contract means a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a Referenced Contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.

Referenced Contract means, on a futures equivalent basis with respect to a particular Core Referenced Futures Contract, a Core Referenced Futures Contract listed in §151.2, or a futures contract, options contract, swap or swaption, other than a basis contract or commodity index contract, that is:

(1) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular Core Referenced Futures Contract; or

(2) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular Core Referenced Futures Contract for delivery at the same location or locations as specified in that particular Core Referenced Futures Contract.

Spot month means, for Referenced Contracts, the spot month defined in §151.3.

Spot-month, single-month, and all-months-combined position limits mean, for Referenced Contracts based on a commodity identified in §151.2, the maximum number of contracts a trader may hold as set forth in §151.4.

Spread contract means either a calendar spread contract or an intercommodity spread contract.

Swap means “swap” as defined in section 1a of the Act and as further defined by the Commission.

Swap dealer means “swap dealer” as that term is defined in section 1a of the Act and as further defined by the Commission.

Swaption means an option to enter into a swap or a physical commodity option.

Trader means a person that, for its own account or for an account that it controls, makes transactions in Referenced Contracts or has such transactions made.
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§ 151.3 Spot months for Referenced Contracts.

(a) Agricultural commodities. For Referenced Contracts based on agricultural commodities, the spot month shall be the period of time commencing:

(1) At the close of business on the business day prior to the first notice day for any delivery month and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the following Referenced Contracts:

(i) ICE Futures U.S. Cocoa (CC) contract;

(ii) ICE Futures U.S. Coffee C (KC) contract;

(iii) ICE Futures U.S. Cotton No. 2 (CT) contract;

(iv) ICE Futures U.S. FCOJ–A (OJ) contract;

(v) Chicago Board of Trade Corn (C) contract;

(vi) Chicago Board of Trade Oats (O) contract;

(vii) Chicago Board of Trade Rough Rice (RR) contract;

(viii) Chicago Board of Trade Soybeans (S) contract;

(ix) Chicago Board of Trade Soybean Meal (SM) contract;

(x) Chicago Board of Trade Soybean Oil (BO) contract;

(xi) Chicago Board of Trade Wheat (W) contract;

(xii) Kansas City Board of Trade Hard Red Winter Wheat (KW) contract; and


(2) At the close of business on the sixth business day prior to the last trading day and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for
§ 151.4 Position limits for Referenced Contracts.

(a) Spot-month position limits. In accordance with the procedure in paragraph (d) of this section, and except as provided or as otherwise authorized by §151.5, no trader may hold or control a position, separately or in combination, net long or net short, in Referenced Contracts in the same commodity when such position is in excess of:

(1) For physical-delivery Referenced Contracts, a spot-month position limit that shall be based on one-quarter of the estimated spot-month deliverable supply as established by the Commission pursuant to paragraphs (d)(1) and (d)(2) of this section; and

(2) For cash-settled Referenced Contracts:

(A) A spot-month position limit equal to five times the spot-month position limit established by the Commission for the physical-delivery New York Mercantile Exchange Henry Hub Natural Gas Referenced Contract pursuant to paragraph (a)(1); and

(B) An aggregate spot-month position limit for physical-delivery and cash-settled New York Mercantile Exchange Henry Hub Natural Gas Referenced Contract pursuant to paragraph (a)(1).

(b) Non-spot-month position limits. In accordance with the procedure in paragraph (d) of this section, and except as otherwise authorized in §151.5, no person may hold or control positions, separately or in combination, net long or net short, in the same commodity


declared futures contract:

(4) At the close of business on the business day immediately preceding the last five business days of the contract month and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the Chicago Mercantile Exchange Live Cattle (LC) Referenced Contract;

(5) On the ninth trading day prior to the last trading day and terminating on the last trading day for Chicago Mercantile Exchange Feeder Cattle (FC) contract;

(6) On the first trading day of the contract month and terminating on the last trading day for the Chicago Mercantile Exchange Class III Milk (DA) contract; and

(7) At the close of business on the fifth business day prior to the last trading day and terminating on the last trading day for the Chicago Mercantile Exchange Lean Hog (LH) contract.

(b) Metal commodities. The spot month shall be the period of time commencing at the close of business on the business day prior to the first notice day for any delivery month and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the following Referenced Contracts:

(1) Commodity Exchange, Inc. Gold (GC) contract;

(2) Commodity Exchange, Inc. Silver (SI) contract;

(3) Commodity Exchange, Inc. Copper (HG) contract;

(4) New York Mercantile Exchange Palladium (PA) contract; and


(c) Energy commodities. The spot month shall be the period of time commencing at the close of business of the third business day prior to the last day of trading in the underlying Core Referenced Futures Contract and terminating at the end of the delivery period for the following Referenced Contracts:

(1) New York Mercantile Exchange Light Sweet Crude Oil (CL) contract;

(2) New York Mercantile Exchange New York Harbor No. 2 Heating Oil (HO) contract;

(3) New York Mercantile Exchange New York Harbor Gasoline Blendstock (RB) contract; and

(4) New York Mercantile Exchange Henry Hub Natural Gas (NG) contract.
when such positions, in all months combined (including the spot month) or in a single month, are in excess of:

(1) \textit{Non-legacy Referenced Contract position limits.} All-months-combined aggregate and single-month position limits, fixed by the Commission based on 10 percent of the first 25,000 contracts of average all-months-combined aggregated open interest with a marginal increase of 2.5 percent thereafter as established by the Commission pursuant to paragraph (d)(3) of this section;

(2) \textit{Aggregate open interest calculations for non-spot-month position limits for non-legacy Referenced Contracts.} (i) For the purpose of fixing the speculative position limits for non-legacy Referenced Contracts in paragraph (b)(1) of this section, the Commission shall determine:

(A) The average all-months-combined aggregate open interest, which shall be equal to the sum, for 12 or 24 months of values obtained under paragraph (B) and (C) of this section for a period of 12 or 24 months prior to the fixing date divided by 12 or 24 respectively as of the last day of each calendar month;

(B) The all-months-combined futures open interest of a Referenced Contract is equal to the sum of the month-end open interest for all of the Referenced Contract’s open contract months in futures and option contracts (on a delta adjusted basis) across all designated contract markets; and

(C) The all-months-combined swaps open interest is equal to the sum of all of a Referenced Contract’s month-end open swaps positions, considering open positions attributed to both cleared and uncleared swaps, where the uncleared all-months-combined swaps open positions shall be the absolute sum of swap dealers’ net uncleared open swaps positions by counterparty and by single Referenced Contract month as reported to the Commission pursuant to part 20 of this chapter, provided that, other than for the purpose of determining initial non-spot-month position limits, open swaps positions attributed to swaps with two swap dealer counterparties shall be counted once for the purpose of determining uncleared all-months-combined swaps open positions, provided further that, upon entry of an order under §20.9 of this chapter determining that operating swap data repositories are processing positional data that will enable the Commission effectively to conduct surveillance in swaps, the Commission shall rely on data from such swap data repositories to compute the all-months-combined swaps open interest;

(ii) Notwithstanding the provisions of this section, for the purpose of determining initial non-spot-month position limits for non-legacy Referenced Contracts, the Commission may estimate uncleared all-months-combined swaps open positions based on uncleared open swaps positions reported to the Commission pursuant to part 20 of this chapter by clearing organizations or clearing members that are swap dealers; and

(3) \textit{Legacy agricultural Referenced Contract position limits.} All-months-combined aggregate and single-month position limits, fixed by the Commission at the levels provided below as established by the Commission pursuant to paragraph (d)(4) of this section:

<table>
<thead>
<tr>
<th>Referenced contract</th>
<th>Position limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Chicago Board of Trade Corn (C) contract</td>
<td>33,000</td>
</tr>
<tr>
<td>(ii) Chicago Board of Trade Oats (O) contract</td>
<td>2,000</td>
</tr>
<tr>
<td>(iii) Chicago Board of Trade Soybeans (S) contract</td>
<td>15,000</td>
</tr>
<tr>
<td>(iv) Chicago Board of Trade Wheat (W) contract</td>
<td>12,000</td>
</tr>
<tr>
<td>(v) Chicago Board of Trade Soybean Oil (BO) contract</td>
<td>8,000</td>
</tr>
<tr>
<td>(vi) Chicago Board of Trade Soybean Meal (SM) contract</td>
<td>6,500</td>
</tr>
<tr>
<td>(vii) Minneapolis Grain Exchange Hard Red Winter Wheat (MW) contract</td>
<td>12,000</td>
</tr>
<tr>
<td>(viii) ICE Futures U.S. Cotton No. 2 (CT) contract</td>
<td>5,000</td>
</tr>
<tr>
<td>(ix) Kansas City Board of Trade Hard Red Winter Wheat (KW) contract</td>
<td>12,000</td>
</tr>
</tbody>
</table>
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(c) Netting of positions—

(1) For Referenced Contracts in the spot month. (i) For the spot-month position limit in paragraph (a) of this section, a trader’s positions in the physical-delivery Referenced Contract and cash-settled Referenced Contract are calculated separately. A trader cannot net any physical-delivery Referenced Contract with cash-settled Referenced Contracts towards determining the trader’s positions in each of the physical-delivery Referenced Contract and cash-settled Referenced Contracts in paragraph (a) of this section. However, a trader can net positions in cash-settled Referenced Contracts in the same commodity.

(ii) Notwithstanding the netting provision in paragraph (c)(1)(i) of this section, for the aggregate spot-month position limit in New York Mercantile Exchange Henry Hub Natural Gas Referenced Contracts in paragraph (a)(2)(ii) of this section, a trader’s positions shall be combined and the net resulting position in the physical-delivery Referenced Contract and cash-settled Referenced Contracts shall be applied towards determining the trader’s aggregate position.

(2) For the purpose of applying non-spot-month position limits, a trader’s position in a Referenced Contract shall be combined and the net resulting position shall be applied towards determining the trader’s aggregate single-month and all-months-combined position.

(d) Establishing and effective dates of position limits—

(1) Initial spot-month position limits for Referenced Contracts—(i) Sixty days after the term “swap” is further defined under the Wall Street Transparency and Accountability Act of 2010, the Commission shall fix position limits for Referenced Contracts referred to in appendix A that shall apply to all the provisions of this part.

(ii) Subsequent spot-month position limits for Referenced Contracts. (i) Commencing January 1st of the second calendar year after the term “swap” is further defined under the Wall Street Transparency and Accountability Act of 2010, the Commission shall fix position limits by Commission order that shall supersede the initial limits established under paragraph (d)(1) of this section.

(ii) In fixing spot-month position limits for Referenced Contracts, the Commission shall utilize the estimates of deliverable supply provided by a designated contract market under paragraph (d)(2)(ii) of this section unless the Commission determines to rely on its own estimate of deliverable supply.

(iii) Each designated contract market shall submit to the Commission an estimate of deliverable supply for each Core Referenced Futures Contract that is subject to a spot-month position limit and listed or executed pursuant to the rules of the designated contract market according to the following schedule commencing January 1st of the second calendar year after the term “swap” is further defined under the Wall Street Transparency and Accountability Act of 2010:

(A) For metal Core Referenced Futures Contracts listed in §151.2(b), by the 31st of December and biennially thereafter;

(B) For energy Core Referenced Futures Contracts listed in §151.2(c), by the 31st of March and biennially thereafter;

(C) For corn, wheat, oat, rough rice, soybean and soybean products, livestock, milk, cotton, and frozen concentrated orange juice Core Referenced Futures Contracts, by the 31st of July, and annually thereafter;

(D) For coffee, sugar, and cocoa Core Referenced Futures Contracts, by the 30th of September, and annually thereafter.

(iv) For purposes of estimating deliverable supply, a designated contract market may use any guidance adopted in the Acceptable Practices for Compliance with Core Principle 3 found in part 38 of the Commission’s regulations.

(v) The estimate submitted under paragraph (d)(2)(iii) of this section shall be accompanied by a description of the methodology used to derive the estimate along with any statistical data supporting the designated contract market’s estimate of deliverable supply.

(vi) The Commission shall fix and publish pursuant to paragraph (e) of
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this section, the spot-month limits by Commission order, no later than:

(A) For metal Referenced Contracts listed in §151.2(b), by the 28th of February following the submission of estimates of deliverable supply provided to the Commission under paragraph (d)(2)(ii)(A) of this section and biennially thereafter;

(B) For energy Referenced Contracts listed in §151.2(c), by the 31st of May following the submission of estimates of deliverable supply provided to the Commission under paragraph (d)(2)(ii)(B) of this section and biennially thereafter;

(C) For corn, wheat, oat, rough rice, soybean and soybean products, livestock, milk, cotton, and frozen concentrated orange juice Referenced Contracts, by the 30th of September following the submission of estimates of deliverable supply provided to the Commission under paragraph (d)(2)(ii)(C) of this section and biennially thereafter;

(D) For coffee, sugar, and cocoa Referenced Contracts, by the 30th of November following the submission of estimates of deliverable supply provided to the Commission under paragraph (d)(2)(ii)(D) of this section and biennially thereafter.

(3) Non-spot-month position limits for non-legacy Referenced Contract. (i) Initial non-spot-month limits for non-legacy Referenced Contracts shall be fixed and published within one month after the Commission has obtained or estimated 12 months of values pursuant to paragraphs (b)(2)(i)(B), (b)(2)(i)(C), and (b)(2)(ii) of this section, and shall be fixed and made effective as provided in paragraph (b)(2) and (e) of this section.

(ii) Subsequent non-spot-month limits for non-legacy Referenced Contracts shall be fixed and published within one month after two years following the fixing and publication of initial non-spot-month position limits and shall be based on the higher of 12 months average all-months-combined aggregate open interest, or 24 months average all-months-combined aggregate open interest, as provided for in paragraphs (b)(2) and (e) of this section.

(iii) Initial non-spot-month limits for non-legacy Referenced Contracts shall be made effective by Commission order.

(4) Non-spot-month legacy limits for legacy agricultural Referenced Contracts. The non-spot-month position limits for legacy agricultural Referenced Contracts shall be effective sixty days after the term “swap” is further defined under the Wall Street Transparency and Accountability Act of 2010, and shall apply to all the provisions of this part.

(e) Publication. The Commission shall publish position limits on the Commission’s Web site at http://www.cftc.gov prior to making such limits effective, other than those limits specified under paragraph (b)(3) of this section and appendix A to this part.

(1) Spot-month position limits shall be effective:

(i) For metal Referenced Contracts listed in §151.2(b), on the 1st of May after the Commission has fixed and published such limits under paragraph (d)(2)(vi)(A) of this section;

(ii) For energy Referenced Contracts listed in §151.2(c), on the 1st of August after the Commission has fixed and published such limits under paragraph (d)(2)(vi)(B) of this section;

(iii) For corn, wheat, oat, rough rice, soybean and soybean products, livestock, milk, cotton, and frozen concentrated orange juice Referenced Contracts, on the 1st of December after the Commission has fixed and published such limits under paragraph (d)(2)(vi)(C) of this section;

(iv) For coffee, sugar, and cocoa Referenced Contracts, on the 1st of February after the Commission has fixed and published such limits under paragraph (d)(2)(vi)(D) of this section.

(2) The Commission shall publish month-end all-months-combined futures open interest and all-months-combined swaps open interest figures within one month, as practicable, after such data is submitted to the Commission.

(3) Non-spot-month position limits established under paragraph (b)(2) of this section shall be effective on the 1st calendar day of the third calendar month immediately following publication on the Commission’s Web site under paragraph (d)(3) of this section.
§ 151.5 Bona fide hedging and other exemptions for Referenced Contracts.

(a) Bona fide hedging transactions or positions. (1) Any person that complies with the requirements of this section may exceed the position limits set forth in §151.4 to the extent that a transaction or position in a Referenced Contract:

(i) Represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel;

(ii) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and

(iii) Arises from the potential change in the value of one or several—

(A) Assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(B) Liabilities that a person owns or anticipates incurring; or

(C) Services that a person provides, purchases, or anticipates providing or purchasing; or

(iv) Reduces risks attendant to a position resulting from a swap that—

(A) Was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to paragraph (a)(1)(i) through (iii) of this section; or

(B) Meets the requirements of paragraphs (a)(1)(i) through (iii) of this section.

(v) Notwithstanding the foregoing, no transactions or positions shall be classified as bona fide hedging for purposes of §151.4 unless such transactions or positions are established and liquidated in an orderly manner in accordance with sound commercial practices and the provisions of paragraph (a)(2) of this section regarding enumerated hedging transactions and positions or paragraphs (a)(3) or (4) of this section regarding pass-through swaps of this section have been satisfied.

(2) Enumerated hedging transactions and positions. Bona fide hedging transactions and positions for the purposes of this paragraph mean any of the following specific transactions and positions:

(i) Sales of Referenced Contracts that do not exceed in quantity:

(A) Ownership or fixed-price purchase of the contract’s underlying cash commodity by the same person; and

(B) Unsold anticipated production of the same commodity, which may not exceed one year of production for an agricultural commodity, by the same person provided that no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(ii) Purchases of Referenced Contracts that do not exceed in quantity:

(A) The fixed-price sale of the contract’s underlying cash commodity by the same person;

(B) The quantity equivalent of fixed-price sales of the cash products and by-products of such commodity by the same person; and

(C) Unfilled anticipated requirements of the same cash commodity, which may not exceed one year for agricultural Referenced Contracts, for processing, manufacturing, or use by the same person, provided that no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(iii) Offsetting sales and purchases in Referenced Contracts that do not exceed in quantity that amount of the same cash commodity that has been bought and sold by the same person at unfixed prices basis different delivery months, provided that no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.
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(iv) Purchases or sales by an agent who does not own or has not contracted to sell or purchase the offsetting cash commodity at a fixed price, provided that the agent is responsible for the merchandising of the cash positions that is being offset in Referenced Contracts and the agent has a contractual arrangement with the person who owns the commodity or holds the cash market commitment being offset.

(v) Anticipated merchandising hedges. Offsetting sales and purchases in Referenced Contracts that do not exceed in quantity the amount of the same cash commodity that is anticipated to be merchandised, provided that:

(A) The quantity of offsetting sales and purchases is not larger than the current or anticipated unfilled storage capacity owned or leased by the same person during the period of anticipated merchandising activity, which may not exceed one year;

(B) The offsetting sales and purchases in Referenced Contracts are in different contract months, which settle in not more than one year; and

(C) No such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(vi) Anticipated royalty hedges. Sales or purchases in Referenced Contracts offset by the anticipated change in value of royalty rights that are owned by the same person provided that:

(A) The royalty rights arise out of the production, manufacturing, processing, use, or transportation of the commodity underlying the Referenced Contract, which may not exceed one year for agricultural Referenced Contracts;

(B) The fluctuations in the value of the position in Referenced Contracts are substantially related to the fluctuations in value of receipts or payments due or expected to be due under a contract for services; and

(C) No such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(vii) Service hedges. Sales or purchases in Referenced Contracts offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services held by the same person provided that:

(A) The contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the Referenced Contract, which may not exceed one year for agricultural Referenced Contracts;

(B) The fluctuations in the value of the position in Referenced Contracts are substantially related to the fluctuations in value of receipts or payments due or expected to be due under a contract for services; and

(C) No such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(viii) Cross-commodity hedges. Sales or purchases in Referenced Contracts described in paragraphs (a)(2)(i) through (vii) of this section may also be offset other than by the same quantity of the same cash commodity, provided that:

(A) The fluctuations in value of the position in Referenced Contracts are substantially related to the fluctuations in value of the actual or anticipated cash position; and

(B) No such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

(3) Pass-through swaps. Bona fide hedging transactions and positions for the purposes of this paragraph include the purchase or sales of Referenced Contracts that reduce the risks attendant to a position resulting from a swap that was executed opposite a counterparty for whom the swap transaction would qualify as a bona fide hedging transaction pursuant to paragraph (a)(2) of this section ("pass-through swaps"), provided that no such position is maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts unless such pass-
through swap position continues to off-set the cash market commodity price risk of the bona fide hedging counterparty.

(4) Pass-through swap offsets. For swaps executed opposite a counterparty for whom the swap transaction would qualify as a bona fide hedging transaction pursuant to paragraph (a)(2) of this section (pass-through swaps), such pass-through swaps shall also be classified as a bona fide hedging transaction for the counterparty for whom the swap would not otherwise qualify as a bona fide hedging transaction pursuant to paragraph (a)(2) of this section (‘‘non-hedging counterparty’’), provided that the non-hedging counterparty purchases or sells Referenced Contracts that reduce the risks attendant to such pass-through swaps. Provided further, that the pass-through swap shall constitute a bona fide hedging transaction only to the extent the non-hedging counterparty purchases or sells Referenced Contracts that reduce the risks attendant to the pass-through swap.

(5) Any person engaging in other risk-reducing practices commonly used in the market which they believe may not be specifically enumerated in §151.5(a)(2) may request relief from Commission staff under §140.99 of this chapter or the Commission under section 4a(a)(7) of the Act concerning the applicability of the bona fide hedging transaction exemption.

(b) Aggregation of accounts. Entities required to aggregate accounts or positions under §151.7 shall be considered the same person for the purpose of determining whether a person or persons are eligible for a bona fide hedge exemption under §151.5(a).

(c) Information on cash market commodity activities. Any person with a position that exceeds the position limits set forth in §151.4 pursuant to paragraphs (a)(2)(i)(A), (a)(2)(i)(A), (a)(2)(i)(B), (a)(2)(i)(B), (a)(2)(i)(i), or (a)(2)(i)(v) of this section shall submit to the Commission a 404 filing, in the form and manner provided for in §151.10.

(1) The 404 filing shall contain the following information with respect to such position for each business day the same person exceeds the limits set forth in §151.4, up to and through the day the person’s position first falls below the position limits:

(i) The date of the bona fide hedging position, an indication of under which enumerated hedge exemption or exemptions the position qualifies for bona fide hedging, the corresponding Core Referenced Futures Contract, the cash market commodity hedged, and the units in which the cash market commodity is measured;

(ii) The entire quantity of stocks owned of the cash market commodity that is being hedged;

(iii) The entire quantity of fixed-price purchase commitments of the cash market commodity that is being hedged;

(iv) The sum of the entire quantity of stocks owned of the cash market commodity and the entire quantity of fixed-price purchase commitments of the cash market commodity that is being hedged;

(v) The entire quantity of fixed-price sale commitments of the cash commodity that is being hedged;

(vi) The quantity of long and short Referenced Contracts, measured on a futures-equivalent basis to the applicable Core Referenced Futures Contract, in the nearby contract month that are being used to hedge the long and short cash market positions;

(vii) The total number of long and short Referenced Contracts, measured on a futures equivalent basis to the applicable Core Referenced Futures Contract, that are being used to hedge the long and short cash market positions; and

(viii) Cross-commodity hedging information as required under paragraph (g) of this section.

(2) Notice filing. Persons seeking an exemption under this paragraph shall file a notice with the Commission, which shall be effective upon the date of the submission of the notice.

(d) Information on anticipated cash market commodity activities—(1) Initial statement. Any person who intends to exceed the position limits set forth in §151.4 pursuant to paragraph (a)(2)(i)(B), (a)(2)(i)(C), (a)(2)(v), (a)(2)(vi), or (a)(2)(vii) of this section in order to hedge anticipated production,
requirements, merchandising, royalties, or services connected to a commodity underlying a Referenced Contract, shall submit to the Commission a 404A filing in the form and manner provided in §151.10. The 404A filing shall contain the following information with respect to such activities, by Referenced Contract:

(i) A description of the type of anticipated cash market activity to be hedged; how the purchases or sales of Referenced Contracts are consistent with the provisions of (a)(1) of this section; and the units in which the cash commodity is measured;

(ii) The time period for which the person claims the anticipatory hedge exemption is required, which may not exceed one year for agricultural commodities or one year for anticipated merchandising activity;

(iii) The actual use, production, processing, merchandising (bought and sold), royalties and service payments and receipts of that cash market commodity during each of the three complete fiscal years preceding the current fiscal year;

(iv) The anticipated use, production, or commercial or merchandising requirements (purchases and sales), anticipated royalties, or service contract receipts or payments of that cash market commodity which are applicable to the anticipated activity to be hedged for the period specified in (d)(1)(ii) of this section;

(v) The unsold anticipated production or unfilled anticipated commercial or merchandising requirements of that cash market commodity which are applicable to the anticipated activity to be hedged for the period specified in (d)(1)(ii) of this section;

(vi) The maximum number of Referenced Contracts long and short (on an all-months-combined basis) that are expected to be used for each anticipatory hedging activity for the period specified in (d)(1)(ii) of this section on a futures equivalent basis;

(vii) If the hedge exemption sought is for anticipated merchandising pursuant to (a)(2)(v) of this section, a description of the storage capacity related to the anticipated merchandising transactions, including:

(A) The anticipated total storage capacity, the anticipated merchandising quantity, and purchase and sales commitments for the period specified in (d)(1)(ii) of this section;

(B) Current inventory; and

(C) The total storage capacity and quantity of commodity moved through the storage capacity for each of the three complete fiscal years preceding the current fiscal year; and

(viii) Cross-commodity hedging information as required under paragraph (g) of this section.

(2) Notice filing. Persons seeking an exemption under this paragraph shall file a notice with the Commission. Such a notice shall be filed at least ten days in advance of a date the person expects to exceed the position limits established under this part, and shall be effective after that ten day period unless otherwise notified by the Commission.

(3) Supplemental reports for 404A filings. Whenever a person intends to exceed the amounts determined by the Commission to constitute a bona fide hedge for anticipated activity in the most recent statement or filing, such person shall file with the Commission a statement that updates the information provided in the person’s most recent filing at least ten days in advance of the date that person wishes to exceed those amounts.

(e) Review of notice filings. (1) The Commission may require persons submitting notice filings provided for under paragraphs (c)(2) and (d)(2) of this section to submit such other information, before or after the effective date of a notice, which is necessary to enable the Commission to make a determination whether the transactions or positions under the notice filing fall within the scope of bona fide hedging transactions or positions described under paragraph (a) of this section.

(2) The transactions and positions described in the notice filing shall not be considered, in part or in whole, as bona fide hedging transactions or positions if such person is so notified by the Commission.

(f) Additional information from swap counterparties to bona fide hedging transactions. All persons that maintain positions in excess of the limits set forth in
§ 151.4 in reliance upon the exemptions set forth in paragraphs (a)(3) and (4) of this section shall submit to the Commission a 404S filing, in the form and manner provided for in §151.10. Such 404S filing shall contain the following information with respect to such position for each business day that the same person exceeds the limits set forth in §151.4, up to and through the day the person’s position first falls below the position limit that was exceeded:

(1) By Referenced Contract;
(2) By commodity reference price and units of measurement used for the swaps that would qualify as a bona fide hedging transaction or position gross long and gross short positions; and
(3) Cross-commodity hedging information as required under paragraph (g) of this section.

(g) Conversion methodology for cross-commodity hedges. In addition to the information required under this section, persons who avail themselves of cross-commodity hedges pursuant to (a)(2)(viii) of this section shall submit to the Commission a form 404, 404A, or 404S filing, as appropriate. The first time such a form is filed where a cross-commodity hedge is claimed, it should contain a description of the conversion methodology. That description should explain the conversion from the actual commodity used in the person’s normal course of business to the Referenced Contract that is being used for hedging, including an explanation of the methodology used for determining the ratio of conversion between the actual or anticipated cash positions and the person’s positions in the Referenced Contract.

(h) Recordkeeping. Persons who avail themselves of bona fide hedge exemptions shall keep and maintain complete books and records concerning all of their related cash, futures, and swap positions and transactions and make such books and records, along with a list of pass-through swap counterparties for pass-through swap exemptions under (a)(3) of this section, available to the Commission upon request.

(i) Additional requirements for pass-through swap counterparties. A party seeking to rely upon §151.5(a)(3) to exceed the position limits of §151.4 with respect to such a swap may only do so if its counterparty provides a written representation (e.g., in the form of a field or other representation contained in a mutually executed trade confirmation) that, as to such counterparty, the swap qualifies in good faith as a bona fide hedging transaction under paragraph (a)(3) of this section at the time the swap was executed. That written representation shall be retained by the parties to the swap for a period of at least two years following the expiration of the swap and furnished to the Commission upon request. Any person that represents to another person that the swap qualifies as a pass-through swap under paragraph (a)(3) of this section shall keep and make available to the Commission upon request all relevant books and records supporting such a representation for a period of at least two years following the expiration of the swap.

(j) Financial distress exemption. Upon specific request made to the Commission, the Commission may exempt a person or related persons under financial distress circumstances for a time certain from any of the requirements of this part. Financial distress circumstances are situations involving the potential default or bankruptcy of a customer of the requesting person or persons, affiliate of the requesting person or persons, or potential acquisition target of the requesting person or persons. Such exemptions shall be granted by Commission order.

§ 151.6 Position visibility.

(a) Visibility levels. A person holding or controlling positions, separately or in combination, net long or net short, in Referenced Contracts that equal or exceed the following levels in all months or in any single month (including the spot month), shall comply with the reporting requirements of paragraphs (b) and (c) of this section:

(1) Visibility Levels for Metal Referenced Contracts

(i) Commodity Exchange, Inc. Copper (HG) ................................................. 8,500
(ii) Commodity Exchange, Inc. Gold (GC) .................................................... 30,000
(iv) Commodity Exchange, Inc. Silver (SI) .................................................... 8,500
(v) New York Mercantile Exchange Palladium (PA) ..................................... 1,500
(vi) New York Mercantile Exchange Platinum (PL) ....................................... 2,000

(2) Visibility Levels for Energy Referenced Contracts

<table>
<thead>
<tr>
<th>Contract Description</th>
<th>Visibility Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) New York Mercantile Exchange Light Sweet Crude Oil (CL)</td>
<td>50,000</td>
</tr>
<tr>
<td>(ii) New York Mercantile Exchange Henry Hub Natural Gas (NG)</td>
<td>50,000</td>
</tr>
<tr>
<td>(iii) New York Mercantile Exchange New York Harbor Gasoline Blendstock (RB)</td>
<td>10,000</td>
</tr>
<tr>
<td>(iv) New York Mercantile Exchange New York Harbor No. 2 Heating Oil (HO)</td>
<td>16,000</td>
</tr>
</tbody>
</table>

(b) Statement of person exceeding visibility level. Persons meeting the provisions of paragraph (a) of this section, shall submit to the Commission a 401 filing in the form and manner provided for in §151.10. The 401 filing shall contain the following information, by Referenced Contract:

1. A list of dates, within the applicable calendar quarter, on which the person held or controlled a position that equaled or exceeded such visibility levels; and

2. As of the first business Tuesday following the applicable calendar quarter and as of the day, within the applicable calendar quarter, in which the person held the largest net position in excess of the level in paragraph (a) of this section:

   (i) Separately by futures, options and swaps, gross long and gross short futures equivalent positions in all months in the applicable Referenced Contract(s) (using economically reasonable and analytically supported deltas) on a futures-equivalent basis; and

   (ii) If applicable, by commodity referenced price, gross long and gross short uncleared swap positions in all months basis in the applicable Referenced Contract(s) futures-equivalent basis (using economically reasonable and analytically supported deltas).

(c) 404 filing. A person that holds a position in a Referenced Contract that equals or exceeds a visibility level in a calendar quarter shall submit to the Commission a 404 filing in the form and manner provided for in §151.10, and it shall contain the information regarding such positions as described in §151.5(c) as of the first business Tuesday following the applicable calendar quarter and as of the day, within the applicable calendar quarter, in which the person held the largest net position in excess of the level in all months.

(d) Alternative filing. With the express written permission of the Commission or its designees, the submission of a swaps or physical commodity portfolio summary statement spreadsheet in digital format, only insofar as the spreadsheet provides at least the same data as that required by paragraphs (b) or (c) of this section respectively may be substituted for the 401 or 404 filing respectively.

(e) Precedence of other reporting obligations. Reporting obligations imposed by regulations other than those contained in this section shall supersede the reporting requirements of paragraphs (b) and (c) of this section but only insofar as other reporting obligations provide at least the same data and are submitted to the Commission or its designees at least as often as the reporting requirements of paragraphs (b) and (c) of this section.

(f) Compliance date. The compliance date of this section shall be sixty days after the term “swap” is further defined under the Wall Street Transparency and Accountability Act of 2010. A document will be published in the Federal Register establishing the compliance date.

§ 151.7 Aggregation of positions.

(a) Positions to be aggregated. The position limits set forth in §151.4 shall apply to all positions in accounts for which any person by power of attorney or otherwise directly or indirectly holds positions or controls trading and
to positions held by two or more persons acting pursuant to an expressed or implied agreement or understanding the same as if the positions were held by, or the trading of the position were done by, a single individual.

(b) Ownership of accounts generally. For the purpose of applying the position limits set forth in §151.4, except for the ownership interest of limited partners, shareholders, members of a limited liability company, beneficiaries of a trust or similar type of pool participant in a commodity pool subject to the provisos set forth in paragraph (c) of this section or in accounts or positions in multiple pools as set forth in paragraph (d) of this section, any person holding positions in more than one account, or holding accounts or positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest, must aggregate all such accounts or positions.

(c) Ownership by limited partners, shareholders or other pool participants. (1) Except as provided in paragraphs (c)(2) and (3) of this section, a person that is a limited partner, shareholder or other similar type of pool participant with an ownership or equity interest of 10 percent or greater in a pooled account or positions who is also a principal or affiliate of the operator of the pooled account must aggregate the pooled account or positions with all other accounts or positions owned or controlled by that person, unless:

(i) The pool operator has, and enforces, written procedures to preclude the person from having knowledge of, gaining access to, or receiving data about the trading or positions of the pool;

(ii) The person does not have direct, day-to-day supervisory authority or control over the pool's trading decisions; and

(iii) The pool operator has complied with the requirements of paragraph (b) of this section on behalf of the person or class of persons.

(2) A commodity pool operator having ownership or equity interest of 10 percent or greater in an account or positions as a limited partner, shareholder or other similar type of pool participant must aggregate those accounts or positions with all other accounts or positions owned or controlled by the commodity pool operator.

(3) Each limited partner, shareholder, or other similar type of pool participant having an ownership or equity interest of 25 percent or greater in a commodity pool the operator of which is exempt from registration under §4.13 of this chapter must aggregate the pooled account or positions with all other accounts or positions owned or controlled by that person.

(d) Identical trading. Notwithstanding any other provision of this section, for the purpose of applying the position limits set forth in §151.4, any person that holds or controls the trading of positions, by power of attorney or otherwise, in more than one account, or that holds or controls trading of accounts or positions in multiple pools with identical trading strategies must aggregate all such accounts or positions that a person holds or controls.

(e) Trading control by futures commission merchants. The position limits set forth in §151.4 shall be construed to apply to all positions held by a futures commission merchant or its separately organized affiliates in a discretionary account, or in an account which is part of, or participates in, or receives trading advice from a customer trading program of a futures commission merchant or any of the officers, partners, or employees of such futures commission merchant or its separately organized affiliates, unless:

(1) A trader other than the futures commission merchant or the affiliate directs trading in such an account;

(2) The futures commission merchant or the affiliate maintains only such minimum control over the trading in such an account as is necessary to fulfill its duty to supervise diligently trading in the account; and

(3) Each trading decision of the discretionary account or the customer trading program is determined independently of all trading decisions in other accounts which the futures commission merchant or the affiliate holds, has a financial interest of 10 percent or more in, or controls.

(f) Independent Account Controller. An eligible entity need not aggregate its
positions with the eligible entity’s client positions or accounts carried by an authorized independent account controller, as defined in §151.1, except for the spot month provided in physical-delivery Referenced Contracts, provided, however, that the eligible entity has complied with the requirements of paragraph (h) of this section, and that the overall positions held or controlled by such independent account controller may not exceed the limits specified in §151.4.

(1) Additional requirements for exemption of Affiliated Entities. If the independent account controller is affiliated with the eligible entity or another independent account controller, each of the affiliated entities must:

(i) Have, and enforce, written procedures to preclude the affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities; provided, however, that such procedures may provide for the disclosure of information which is reasonably necessary for an eligible entity to maintain the level of control consistent with its fiduciary responsibilities and necessary to fulfill its duty to supervise diligently the trading done on its behalf;

(ii) Trade such accounts pursuant to separately developed and independent trading systems;

(iii) Market such trading systems separately; and

(iv) Solicit funds for such trading by separate disclosure documents that meet the standards of §4.24 or §4.34 of this chapter, as applicable where such disclosure documents are required under part 4 of this chapter.

(g) Exemption for underwriting. Notwithstanding any of the provisions of this section, a person need not aggregate the positions or accounts of an owned entity if the ownership interest is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(h) Notice filing for exemption. (1) Persons seeking an aggregation exemption under paragraph (c), (e), (f), or (i) of this section shall file a notice with the Commission, which shall be effective upon submission of the notice, and shall include:

(i) A description of the relevant circumstances that warrant disaggregation; and

(ii) A statement certifying that the conditions set forth in the applicable aggregation exemption provision has been met.

(2) Upon call by the Commission, any person claiming an aggregation exemption under this section shall provide to the Commission such information concerning the person’s claim for exemption. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person’s aggregation exemption for failure to comply with the provisions of this section.

(3) In the event of a material change to the information provided in the notice filed under this paragraph, an updated or amended notice shall promptly be filed detailing the material change.

(4) A notice shall be submitted in the form and manner provided for in §151.10.

(i) Exemption for federal law information sharing restriction. Notwithstanding any provision of this section, a person is not subject to the aggregation requirements of this section if the sharing of information associated with such aggregation would cause either person to violate Federal law or regulations adopted thereunder and provided that such a person does not have actual knowledge of information associated with such aggregation. Provided, however, that such person file a prior notice with the Commission detailing the circumstances of the exemption and an opinion of counsel that the sharing of information would cause a violation of Federal law or regulations adopted thereunder.

§ 151.8 Foreign boards of trade.

The aggregate position limits in §151.4 shall apply to a trader with positions in Referenced Contracts executed
on, or pursuant to the rules of a foreign board of trade, provided that:

(a) Such Referenced Contracts settle against any price (including the daily or final settlement price) of one or more contracts listed for trading on a designated contract market or swap execution facility that is a trading facility; and

(b) The foreign board of trade makes available such Referenced Contracts to its members or other participants located in the United States through direct access to its electronic trading and order matching system.

§ 151.9 Pre-existing positions.

(a) Non-spot-month position limits. The position limits set forth in §151.4(b) of this chapter may be exceeded to the extent that positions in Referenced Contracts remain open and were entered into in good faith prior to the effective date of any rule, regulation, or order that specifies a position limit under this part.

(b) Spot-month position limits. Notwithstanding the pre-existing exemption in non-spot months, a person must comply with spot month limits.

(c) Pre-Dodd-Frank and transition period swaps. The initial position limits established under §151.4 shall not apply to any swap positions entered into in good faith prior to the effective date of such initial limits. Swap positions in Referenced Contracts entered into in good faith prior to the effective date of such initial limits may be netted with post-effective date swap and swaptions for the purpose of applying any position limit.

(d) Exemptions. Exemptions granted by the Commission under §1.47 for swap risk management shall not apply to swap positions entered into after the effective date of initial position limits established under §151.4.

§ 151.10 Form and manner of reporting and submitting information or filings.

Unless otherwise instructed by the Commission or its designee, any person submitting reports under this section shall submit the corresponding required filings and any other information required under this part to the Commission as follows:

(a) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission; and

(b) Not later than 9 a.m. Eastern Time on the next business day following the reporting or filing obligation is incurred unless:

1. A 404A filing is submitted pursuant §151.5(d), in which case the filing must be submitted at least ten business days in advance of the date that transactions and positions would be established that would exceed a position limit set forth in §151.4;

2. A 404 filing is submitted pursuant to §151.5(c) or a 404S is submitted pursuant to §151.5(f), the filing must be submitted not later than 9 a.m. on the third business day following a position that has exceeded the level in a Referenced Contract for the first time and not later than the third business day following each calendar month in which the person exceeded such levels;

3. The filing is submitted pursuant to §151.6, then the 401 or 404, or their respective alternatives as provided for under §151.6(d), shall be submitted within ten business days following the quarter in which the person holds a position in excess in the visibility levels provided in §151.6(a); or

4. A notice of disaggregation is filed pursuant to §151.7(h), in which case the notice shall be submitted within five business days of when the person claims a disaggregation exemption.

(e) When the reporting entity discovers errors or omissions to past reports, the entity so notifies the Commission and files corrected information in a form and manner and at a time as may be instructed by the Commission or its designee.

§ 151.11 Designated contract market and swap execution facility position limits and accountability rules.

(a) Spot-month limits. (1) For all Referenced Contracts executed pursuant to their rules, swap execution facilities that are trading facilities and designated contract markets shall adopt, enforce, and, establish rules and procedures for monitoring and enforcing spot-month position limits set at levels no greater than those established by the Commission under §151.4.
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(2) For all agreements, contracts, or transactions executed pursuant to their rules that are not subject to the limits set forth in paragraph (a)(1) of this section, it shall be an acceptable practice for swap execution facilities that are trading facilities and designated contract markets to adopt, enforce, and establish rules and procedures for monitoring and enforcing spot-month position limits set at levels no greater than 25 percent of estimated deliverable supply, consistent with Commission guidance set forth in this title.

(b) Non-spot-month limits—(1) Referenced Contracts. For Referenced Contracts executed pursuant to their rules, swap execution facilities that are trading facilities and designated contract markets shall adopt, enforce, and establish rules and procedures for monitoring and enforcing single month and all-months limits at levels no greater than the position limits established by the Commission under §151.4(d)(3) or (4).

(2) Non-referenced contracts. For all other agreements, contracts, or transactions executed pursuant to their rules that are not subject to the limits set forth in §151.4, except as provided in §151.11(b)(3) and (c), it shall be an acceptable practice for swap execution facilities that are trading facilities and designated contract markets to adopt, enforce, and establish rules and procedures for monitoring and enforcing single-month and all-months combined position limits at levels no greater than ten percent of the average delta-adjusted futures, swaps, and options month-end all months open interest in the same contract or economically equivalent contracts executed pursuant to the rules of the designated contract market or swap execution facility that is a trading facility (on a delta-adjusted basis, as appropriate) for all months listed during the most recent one or two calendar years.

(c) Alternatives. In lieu of the limits provided for under §151.11(a)(2) or (b)(2), it shall be an acceptable practice for swap execution facilities that are trading facilities and designated contract markets to adopt, enforce, and establish rules and procedures for monitoring and enforcing position accountability rules with respect to any agreement, contract, or transaction executed pursuant to their rules requiring traders to provide information about their position upon request by the exchange and to consent to halt increasing further a trader’s position upon request by the exchange as follows:

(1) On an agricultural or exempt commodity that is not subject to the limits set forth in §151.4, having an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 contracts and a liquid cash market, provided, however, such swap execution facilities that are trading facilities and designated contract markets are not exempt from the requirement set forth in paragraph (a)(2) that they adopt a spot-month position limit with a level no greater than 25 percent of estimated deliverable supply; or

(2) On a major foreign currency, for which there is no legal impediment to delivery and for which there exists a highly liquid cash market; or
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(3) On an excluded commodity that is an index or measure of inflation, or other macroeconomic index or measure; or

(4) On an excluded commodity that meets the definition of section 1a(19)(ii), (iii), or (iv) of the Act.

(d) Securities futures products. Position limits for securities futures products are specified in 17 CFR part 41.

(e) Aggregation. Position limits or accountability rules established under this section shall be subject to the aggregation standards of §151.7.

(f) Exemptions—(1) Hedge exemptions. (i) For purposes of exempt and agricultural commodities, no designated contract market or swap execution facility that is a trading facility bylaw, rule, regulation, or resolution adopted pursuant to this section shall apply to any position that would otherwise be exempt from the applicable Federal speculative position limits as determined by §151.5; provided, however, that the designated contract market or swap execution facility that is a trading facility may limit bona fide hedging positions or any other positions which have been exempted pursuant to §151.5 which it determines are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.

(ii) For purposes of excluded commodities, no designated contract market or swap execution facility that is a trading facility by law, rule, regulation, or resolution adopted pursuant to this section shall apply to any transaction or position defined under §1.3(z) of this chapter; provided, however, that the designated contract market or swap execution facility that is a trading facility may limit bona fide hedging positions that it determines are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.

(i) Compliance date. The compliance date of this section shall be 60 days after the term “swap” is further defined under the Wall Street Transparency and Accountability Act of 2010. A document will be published in the Federal Register establishing the compliance date.

(j) Notwithstanding paragraph (i) of this section, the compliance date of provisions of paragraph (b)(1) of this section as it applies to non-legacy Referenced Contracts shall be upon the establishment of any non-spot-month position limits pursuant to §151.4(d)(3). In the period prior to the establishment of any non-spot-month position limits pursuant to §151.4(d)(3) it shall be an acceptable practice for a designated
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contract market or swap execution facility to either:

(1) Retain existing non-spot-month position limits or accountability rules; or

(2) Establish non-spot-month positional accountability levels pursuant to the acceptable practice described in §151.4(d)(3)(ii) to fix non-spot-month limits or accountability rules;

(3) In §151.6 for accepting alternative position visibility filings under paragraphs (c)(2) and (d) therein;

(4) In §151.7(h)(2) to call for additional information from a trader claiming an aggregation exemption;

(5) In §151.10 for providing instructions or determining the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(b) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(c) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§ 151.13 Severability.

If any provision of this part, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or application of such provision to other persons or circumstances which can be given effect without the invalid provision or application.

APPENDIX A TO PART 151—SPOT-MONTH POSITION LIMITS

<table>
<thead>
<tr>
<th>Contract</th>
<th>Reference contract spot-month limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agricultural Referenced Contracts</td>
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<tr>
<td>ICE Futures U.S. Cocoa</td>
<td>1,000</td>
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<td>ICE Futures U.S. Coffee C</td>
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<tr>
<td>Chicago Board of Trade Corn</td>
<td>600</td>
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<td>ICE Futures U.S. Cotton No. 2</td>
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<td>Chicago Mercantile Exchange Class III Milk</td>
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<td>Chicago Mercantile Exchange Live Cattle</td>
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<tr>
<td>Chicago Board of Trade Oats</td>
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<td>Chicago Board of Trade Rough Rice</td>
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<td>Chicago Board of Trade Soybeans</td>
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<td>Chicago Board of Trade Soybean Meal</td>
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<td>Chicago Board of Trade Soybean Oil</td>
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<tr>
<td>ICE Futures U.S. Sugar No. 11</td>
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<td>ICE Futures U.S. Sugar No. 16</td>
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<tr>
<td>Chicago Board of Trade Wheat</td>
<td>600</td>
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<tr>
<td>Minneapolis Grain Exchange Hard Red Spring Wheat</td>
<td>600</td>
</tr>
<tr>
<td>Kansas City Board of Trade Hard Winter Wheat</td>
<td>600</td>
</tr>
</tbody>
</table>

| Metal Referenced Contracts                   |                                     |
| Commodity Exchange, Inc. Copper              | 1,200                               |

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APPENDIX B TO PART 151—EXAMPLES OF BONA FIDE HEDGING TRANSACTIONS AND POSITIONS

A non-exhaustive list of examples of bona fide hedging transactions or positions under §151.5 is presented below. A transaction or position qualifies as a bona fide hedging transaction or position when it meets the requirements under §151.5(a)(1) and one of the enumerated provisions under §151.5(a)(2).

With respect to a transaction or position that does not fall within an example in this appendix, a person seeking to rely on a bona fide hedging exemption under §151.5 may seek guidance from the Division of Market Oversight.

1. ROYALTY PAYMENTS

a. Fact Pattern: In order to develop an oil field, Company A approaches Bank B for financing. To facilitate the loan, Bank B first establishes an independent legal entity commonly known as a special purpose vehicle (SPV). Bank B then provides a loan to the SPV. Payments of principal and interest from the SPV to the Bank are based on a fixed price for crude oil. The SPV in turn makes a production loan to Company A. The terms of the production loan require Company A to provide the SPV with volumetric production payments (VPPs) based on the SPV’s share of the production and the prevailing price of crude oil. Because the price of crude may fall, the SPV reduces that risk by entering into a NYMEX Light Sweet Crude Oil crude oil swap with Swap Dealer C. The swap requires the SPV to pay Swap Dealer C the floating price of crude oil and for Swap Dealer C to pay a fixed price. The notional quantity for the swap is equal to the expected production underlying the VPPs to the SPV.

Analysis: The swap between Swap Dealer C and the SPV meets the general requirements for a bona fide hedging transaction (§151.5(a)(1)(i)-(iii)) and the specific requirements for royalty payments (§151.5(a)(2)(vi)). The VPPs that the SPV receives represent anticipated royalty payments from the oil field’s production. The swap represents a substitute for transactions to be made in the physical marketing channel. The SPV’s swap position qualifies as a hedge because it is economically appropriate to the reduction of risk. The SPV is reasonably certain that the notional quantity of the swap is equal to the expected production underlying the VPPs. The swap reduces the risk associated with a change in value of a royalty asset. The fluctuations in value of the SPV’s anticipated royalties are substantially related to the fluctuations in value of the NYMEX Light Sweet Crude Oil Referenced Contract swap with Swap Dealer C. The risk-reducing position will not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the spot month.

b. Continuation of Fact Pattern: Swap Dealer C offsets the risk associated with the swap to the SPV by selling Referenced Contracts. The notional quantity of the Referenced Contracts sold by Swap Dealer C exactly matches the notional quantity of the swap with the SPV.

Analysis: Because the SPV enters the swap as a bona fide hedger under §151.5(a)(2)(vi), the offset of the risk of the swap in a Referenced Contract by Swap Dealer C qualifies as a bona fide hedging transaction under §151.5(a)(3). As provided in §151.5(a)(3), the risk reducing position of Swap Dealer C does not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the spot month.

2. SOVEREIGNS

a. Fact Pattern: A Sovereign induces a farmer to sell his anticipated production of 100,000 bushels of corn forward to User A at a fixed price for delivery during the expected harvest. In return for the farmer entering into the fixed-price forward sale, the Sovereign agrees to pay the farmer the difference between the market price at the time of harvest and the price of the fixed-price forward. In the event that the market price is above the price of the forward. The fixed-price forward sale of 100,000 bushels of corn reduces the farmer’s downside price risk associated with his anticipated agricultural

Energy Referenced Contracts

<table>
<thead>
<tr>
<th>Contract</th>
<th>Reference contract spot-month limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York Mercantile Exchange Paladium</td>
<td>650</td>
</tr>
<tr>
<td>New York Mercantile Exchange Platinum</td>
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<td>Commodity Exchange, Inc. Gold</td>
<td>3,000</td>
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<tr>
<td>Commodity Exchange, Inc. Silver</td>
<td>1,500</td>
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</tbody>
</table>
Commodity Futures Trading Commission

Fact Pattern: A City contracts with Firm A to provide waste management services. The contract requires that the trucks used to transport the solid waste use natural gas as a power source. According to the contract, the City will pay for the cost of the natural gas used to transport the solid waste by Firm A. In the event that natural gas prices rise, the City’s waste transport expenses may increase.

Analysis: This transaction meets the general requirements for bona fide hedging transactions (§151.5(a)1(i)–(iii)) and the specific provisions for services (§151.5(a)2(vii)). Because the City is responsible for paying the cash price for the natural gas used to power the trucks that transport the solid waste under the services agreement, the long hedge is a substitute for transactions to be taken at a later time in the physical marketing channel. The transaction is economically appropriate to the reduction of risk because the total notional quantity of the positions referenced Contracts purchased equals the expected use of natural gas over the life of the contract. The positions in Referenced Contracts reduce the risk associated with an increase in anticipated liabilities that the City may incur in the event that the price of natural gas increases. The service contract involves the use of a commodity underlying a Referenced Contract. As provided under §151.5(a)2(vii), the risk reducing position will not qualify as a bona fide hedge during the spot month of the physical-delivery Referenced Contract.

b. Fact Pattern: A City contracts with Firm A to provide waste management services. The contract requires that the trucks used to transport the solid waste use natural gas as a power source. According to the contract, the City will pay for the cost of the natural gas used to transport the solid waste by Firm A. In the event that natural gas prices rise, the City’s waste transport expenses may increase.

Analysis: This transaction meets the general requirements for bona fide hedging transactions (§151.5(a)1(i)–(iii)) and the specific provisions for services (§151.5(a)2(vii)). Because the City is responsible for paying the cash price for the natural gas used to power the trucks that transport the solid waste under the services agreement, the long hedge is a substitute for transactions to be taken at a later time in the physical marketing channel. The transaction is economically appropriate to the reduction of risk because the total notional quantity of the positions referenced Contracts purchased equals the expected use of natural gas over the life of the contract. The positions in Referenced Contracts reduce the risk associated with an increase in anticipated liabilities that the City may incur in the event that the price of natural gas increases. The service contract involves the use of a commodity underlying a Referenced Contract. As provided under §151.5(a)2(vii), the risk reducing position will not qualify as a bona fide hedge during the spot month of the physical-delivery Referenced Contract.

c. Fact Pattern: Natural Gas Producer A induces Pipeline Operator B to build a pipeline between Producer A’s natural gas wells and the Henry Hub pipeline interconnection by entering into a fixed-price contract for natural gas transportation that guarantees a specified quantity of gas to be transported over the pipeline. With the construction of the new pipeline, Producer A plans to deliver...
natural gas to Henry Hub at a price differential between his gas wells and Henry Hub that is higher than its transportation cost. Producer A is concerned, however, that the price differential may decline. To lock in the price differential, Producer A decides to sell outright NYMEX Henry Hub Natural Gas Referenced Contracts cash-settled futures contracts and buy an outright swap that NYMEX Henry Hub Natural Gas at his gas wells.

**Analysis:** This transaction satisfies the general requirements for a bona fide hedge exemption (§§151.5(a)(1)(i)–(iii)) and specific provisions for owning a commodity (§151.5a(a)(2)(vii)). The hedge represents a substitute for transactions to be taken in the future (e.g., selling natural gas at Henry Hub). The hedge is economically appropriate to the reduction of risk that the location differential will decline, provided the hedge is not larger than the quantity equivalent of the cash market commodity to be produced and transported. As provided under §151.5a(a)(2)(vii), the risk reducing position will not qualify as a bona fide hedge during the spot month of the physical-delivery Referenced Contract.

4. **LENDING A COMMODITY**

a. **Fact Pattern:** Bank B lends 1,000 ounces of gold to Jewelry Fabricator J at LIBOR plus a differential. Under the terms of the loan, Jewelry Fabricator J may later purchase the gold at a differential to the prevailing price of Commodity Exchange, Inc. (“COMEX”) Gold (e.g., an open-price purchase agreement embedded in the terms of the loan). Jewelry Fabricator J intends to use the gold to make jewelry and reimburse Bank B for the loan using the proceeds from jewelry sales. Because Bank B is concerned about its potential loss if the price of gold drops, it reduces the risk of a potential loss in the value of the gold by selling COMEX Gold Referenced Contracts with an equivalent notional quantity of 1,000 ounces of gold.

**Analysis:** This transaction meets the general bona fide hedge exemption requirements (§§151.5(a)(1)(i)–(iii)) and the specific requirements associated with owning a cash commodity (§151.5(a)(2)(i)). Bank B’s short hedge of the gold represents a substitute for a transaction to be made in the physical marketing channel. Because the total notional quantity of the amount of gold contracts sold is equal to the amount of gold that Bank B owns, the hedge is economically appropriate to the reduction of risk. Finally, the transactions in Referenced Contracts arise from a potential change in the value of the gold owned by Bank B.

b. **Fact Pattern:** Silver Processor A agrees to purchase scrap metal from a Scrap Yard that will be processed into 5,000 ounces of silver. To finance the purchase, Silver Processor A borrows 5,000 ounces of silver from Bank B and sells the silver in the cash market. Using the proceeds from the sale of silver in the cash market, Silver Processor A pays the Scrap Yard for the scrap metal containing 5,000 ounces of silver at a negotiated discount from the current spot price. To repay Bank B, Silver Processor A may either: Provide Bank B with 5,000 ounces of silver and an interest payment based on a differential to LIBOR; or repay Bank B at the current COMEX Silver settlement price plus an interest payment based on a differential to LIBOR (e.g., an open-price purchase agreement). Silver Processor A processes and refines the scrap to repay Bank B. Although Bank B has lent the silver, it is still exposed to a reduction in value if the price of silver falls. Bank B reduces the risk of a possible decline in the value of their silver asset over the loan period by selling COMEX Silver Referenced Contracts with a total notional quantity equal to 5,000 ounces.

**Analysis:** This transaction meets the general requirements for a bona fide hedging transaction (§§151.5(a)(1)(i)–(iii)) and specific provisions for owning a commodity (§151.5(a)(2)(i)). Bank B’s hedge of the silver that it owns represents a substitute for a transaction in the physical marketing channel. The hedge is economically appropriate to the reduction of risk because the bank owns 5,000 ounces of silver. The hedge reduces the risk of a potential change in the value of the silver that it owns.

5. **PROCESSOR MARGINS**

a. **Fact Pattern:** Soybean Processor A has a total throughput capacity of 100 million tons of soybeans per year. Soybean Processor A “crushes” soybeans into products (soybean oil and meal). It currently has 20 million tons of soybeans in storage and has offset that risk through fixed-price forward sales of the amount of products expected to be produced from crushing 20 million tons of soybeans, thus locking in the crushing margin on 20 million tons of soybeans. Because it has consistently operated its plant at full capacity over the last three years, it anticipates purchasing another 80 million tons of soybeans over the next year. It has not sold the crushed products forward. Processor A faces the risk that the difference in price between soybeans and the crushed products could change such that crush products (i.e., the crush spread) will be insufficient to cover its operating margins. To lock in the crush spread, Processor A purchases 80 million tons of CBOT Soybean Referenced Contracts.
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6. PORTFOLIO HEDGING

a. Fact Pattern: It is currently January and Participant A owns five million bushels of corn located in its warehouses. Participant A has entered into fixed-price forward sale contracts with several processors for a total of five million bushels of corn that will be delivered in May of this year. Participant A has separately entered into fixed-price purchase contracts with several processors for a total of two million bushels of corn to be delivered in March of this year. Participant A’s gross long cash position is equal to seven million bushels of corn. Because Participant A has sold forward five million bushels of corn, its net cash position is equal to long two million bushels of corn. To reduce its price risk, Participant A chooses to sell the quantity equivalent of two million bushels of CBOT Corn Referenced Contracts.

Analysis: The cash position and the fixed-price forward sale and purchases are all in the same crop year. Participant A currently owns five million bushels of corn and has effectively sold that amount forward. The firm is concerned that the remaining amount—two million bushels worth of fixed-price purchase contracts—will fall in value. Because the firm’s net cash position is equal to long two million bushels of corn, the firm is exposed to price risk. Selling the quantity equivalent of two million bushels of CBOT Corn Referenced Contracts satisfies the general requirements for bona fide hedging transactions (§§ 151.5(a)(2)(i)–(iii)) and the specific provisions associated with owning a commodity (§151.5(a)(2)(i)).523 Participant A’s hedge of the two million bushels represents a substitute for a fixed-price forward sale at a later time in the physical marketing channel. The transaction is economically appropriate to the reduction of risk because the amount of Referenced Contracts sold does not exceed the quantity equivalent risk exposure (on a net basis) in the cash commodity in the current crop year. Lastly, the hedge arises from a potential change in the value of corn owned by Participant A.

7. ANTICIPATED MERCHANDISING

a. Fact Pattern: Elevator A, a grain merchandiser, owns a 31 million bushel storage facility. The facility currently has 1 million bushels of corn in storage. Based upon its historical purchasing and selling patterns for the last three years, Elevator A expects that in September it will enter into fixed-price

523Participant A could also choose to hedge on a gross basis. In that event, Participant A would sell the quantity equivalent of seven million bushels of March Chicago Board of Trade Corn Referenced Contracts, and separately purchase the quantity equivalent of five million bushels of May Chicago Board of Trade Corn Referenced Contracts.
forward purchase contracts for 30 million bushels of corn that it expects to sell in December. Currently the December corn futures price is substantially higher than the September corn futures price. In order to reduce the risk that its unfilled storage capacity will not be utilized over this period and in turn reduce Elevator A’s profitability, Elevator A purchases the quantity equivalent of 30 million bushels of September CBOT Corn Referenced Contracts and sells 30 million bushels of December CBOT Corn Referenced Contracts.

**Analysis:** This hedging transaction meets the general requirements for bona fide hedging transactions (§§151.5(a)(1)(i)-(iii)) and specific provisions associated with anticipated merchandising (§151.5(a)(2)(v)). The hedging transaction is a substitute for transactions to be taken at a later time in the physical marketing channel. The hedge is economically appropriate to the reduction of risk associated with the firm’s unfilled storage capacity because: (1) The December CBOT Corn futures price is substantially above the September CBOT Corn futures price; and (2) Elevator A reasonably expects to engage in the anticipated merchandising activity based on a review of its historical purchasing and selling patterns at that time of the year. The risk arises from a change in the value of an asset that the firm owns. As provided by §151.5(a)(2)(v), the size of the hedge is equal to the firm’s unfilled storage capacity relating to its anticipated merchandising activity. The purchase and sale of outstanding Referenced Contracts are in different months, which settle in not more than twelve months. As provided under §151.5(a)(2)(v), the risk reducing position will not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the last 5 trading days of the September contract.

**8. AGGREGATION OF PERSONS**

**a. Fact Pattern:** Company A owns 100 percent of Company B. Company B currently owns 1 million bushels of wheat. To reduce some of its price risk, Company B decides to sell the quantity equivalent of 600,000 bushels of CBOT Wheat Referenced Contracts. After communicating with Company B, Company A decides to sell the quantity equivalent of 400,000 bushels of CBOT Wheat Referenced Contracts.

**Analysis:** Because Company A owns more than 10 percent of Company B, Company A and B are aggregated together as one person under §151.7. Under §151.5(h), entities required to aggregate accounts or positions under §151.7 shall be considered the same person for the purpose of determining whether a person or persons are eligible for a bona fide hedge exemption under paragraph §151.5(a). The sale of wheat Referenced Contracts by Company A and B meets the general requirements for bona fide hedging transactions (§§151.5(a)(1)(i)-(iii)) and the specific provisions for owning a cash commodity (§151.5(a)(2)(i)). The transactions in Referenced Contracts by Company A and B represent a substitute for transactions to be taken at a later time in the physical marketing channel. The transactions in Referenced Contracts by Company A and B are economically appropriate to the reduction of risk because the combined total of 1,000,000 bushels of CBOT Wheat Referenced Contracts sold by Company A and Company B does not exceed the 1,000,000 bushels of wheat that is owned by Company A. The risk exposure for Company A and B results from a potential change in the value of wheat.

**9. REPURCHASE AGREEMENTS**

**a. Fact Pattern:** When Elevator A purchased 500,000 bushels of wheat in April it decided to reduce its price risk by selling the quantity equivalent of 500,000 bushels of CBOT Wheat Referenced Contracts. Because the price of wheat has steadily risen since April, Elevator A has had to make substantial maintenance margin payments. To alleviate its concern about further margin payments, Elevator A decides to enter into a repurchase agreement with Bank B. The repurchase agreement involves two separate contracts: a fixed-price sale from Elevator A to Bank B at today’s spot price; and an open-priced purchase agreement that will allow Elevator A to repurchase the wheat from Bank B at the prevailing spot price three months from now. Because Bank B obtains title to the wheat under the fixed-price purchase agreement, it is exposed to price risk should the price of wheat drop. It therefore decides to sell the quantity equivalent of 500,000 bushels of CBOT Wheat Referenced Contracts.

**Analysis:** Bank B’s hedging transaction meets the general requirements for bona fide hedging transactions (§§151.5(a)(1)(i)-(iii)) and the specific provisions for owning the cash commodity (§151.5(a)(2)(i)). The sale of Referenced Contracts by Bank B is a substitute for a transaction to be taken at a later time in the physical marketing channel either to Elevator A or to another commercial party. The transaction is economically appropriate to the reduction of risk in the conduct and management of the commercial enterprise of Bank B because the notional quantity of Referenced Contracts sold by Bank B is not larger than the quantity of cash wheat purchased by Bank B. Finally, the purchase of CBOT Wheat Referenced Contracts reduces the risk associated with owning cash wheat.
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§ 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:

(a) Prohibit such member from purchasing any commodity for future delivery, purchasing any call option, or selling any put option, for his own account or for any account in which he has an interest, while holding an order of another person for the (1) purchase of any future, (2) purchase of any call option, or (3) sale of any put option, in the same commodity which is executable at the market price or at the price at which such purchase or sale can be made for the member’s own account or any account in which he has an interest.

(b) Prohibit such member from selling any commodity for future delivery, selling any call option, or purchasing any put option, for his own account or for any account in which he has an interest, while holding an order of another person for the (1) sale of any future, (2) sale of any call option, or (3) purchase of any put option, in the same commodity which is executable at the market price or at the price at which such sale or purchase can be made for the member’s own account or any account in which he has an interest.

(c) Prohibit such member from executing any transaction for any account of another person for which buying and/or selling orders can be placed or originated, or for which transactions can be executed, by such member without the prior specific consent of the account owner, regardless of whether the general authorization for such orders or transactions is pursuant to a written agreement, except that orders for such an account may be placed with another member for execution.

(d) Prohibit such member from disclosing at any time that he is holding an order of another person or from divulging any order revealed to him by reason of his relationship to such other person, except pursuant to paragraph (c) of this section or at the request of an authorized representative of the Commission or the contract market.

(e) Prohibit such member from taking, directly or indirectly, the other
§ 155.3 Trading standards for futures commission merchants.

(a) Each futures commission merchant shall, at a minimum, establish and enforce internal rules, procedures and controls to:

(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

(2) Prevent affiliated persons from placing orders, directly or indirectly, with another futures commission merchant in a manner designed to circumvent the provisions of paragraph (a)(1) of this section.

(b) No futures commission merchant or any of its affiliated persons shall:

(1) Disclose that an order of another person is being held by the futures commission merchant or any of its affiliated persons, unless such disclosure is necessary to the effective execution of such order or is made at the request of an authorized representative of the

side of any order of another person revealed to him by reason of his relationship to such other person, except with such other person's prior consent and in conformity with contract market rules approved by the Commission.

(f) Prohibit such member from making any purchase or sale which has been directly or indirectly pre-arranged.

(g) Prohibit such member from allocating trades among accounts except in accordance with rules of the contract market which have been approved by the Commission.

(h) Prohibit such member from withholding or withdrawing from the market any order or part of an order of another person for the convenience of another member.

(i) Require that every execution of a transaction on the floor by such member be confirmed promptly with the opposite floor broker or floor trader; such confirmation shall identify price or premium, quantity, future or commodity option and respective clearing members. In the event a contract market cannot require prompt identification of respective clearing members without seriously disrupting the functions of its marketplace, the contract market may petition the Commission for exemption from this requirement. Such petition shall include:

(1) An explanation of why the contract market cannot require the prompt identification of respective clearing members without seriously disrupting the functions of its marketplace, and

(2) A proposed contract market rule which will insure that the opposite sides of every trade executed on the contract market can be effectively matched and will be accepted by a clearing member for clearance or will be otherwise sufficiently guaranteed.

The Commission may, in its discretion and upon such terms and conditions as it deems appropriate, grant such petition for exemption upon finding that the functions of the contract market may be seriously disrupted by requiring the prompt identification of respective clearing members and that the contract market appears to have adequately insured that every trade executed thereon can be effectively matched and will be accepted by a clearing member for clearance or will be otherwise sufficiently guaranteed.
Commodity Futures Trading Commission § 155.4

Commission, the contract market on which such order is to be executed, or a futures association registered with the Commission pursuant to section 17 of the Act; or

(2)(i) Knowingly take, directly or indirectly, the other side of any order of another person revealed to the futures commission merchant or any of its affiliated persons by reason of their relationship to such other person, except with such other person’s prior consent and in conformity with contract market rules approved by or certified to the Commission.

(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) No futures commission merchant shall knowingly handle the account of any affiliated person of another futures commission merchant or of an introducing broker unless the futures commission merchant:

(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;

(2) Prepares immediately upon receipt of an order for such account a written record of such order, including the account identification and order number, and records thereon, by time-stamp or other timing device, the date and time, to the nearest minute, the order is received; and

(3) Transmits on a regular basis to such other futures commission merchant or introducing broker copies of all statements for such account pursuant to paragraph (c)(2) of this section.

(d) No affiliated person of a futures commission merchant shall have an account, directly or indirectly, with another futures commission merchant unless:

(1) Such affiliated person receives written authorization to maintain such an account from a person designated by the futures commission merchant with which such person is affiliated with responsibility for the surveillance over such account pursuant to paragraph (a)(2) of this section; and

(2) Copies of all statements for such account and of all written records prepared by such other futures commission merchant upon receipt of orders for such account pursuant to paragraph (c)(2) of this section are transmitted on a regular basis to the future commission merchant with which such person is affiliated.

(Approved by the Office of Management and Budget under control numbers 3038–0007 and 3038–0022)

§ 155.4 Trading standards for introducing brokers.

(a) Each introducing broker shall, at a minimum, establish and enforce internal rules, procedures and controls to:

(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
(2) Prevent affiliated persons from placing orders, directly or indirectly, with any futures commission merchant in a manner designed to circumvent the provisions of paragraph (a)(1) of this section.

(b) No introducing broker or any of its affiliated persons shall:

(1) Disclose that an order of another person is being held by the introducing broker or any of its affiliated persons, unless such disclosure is necessary to the effective execution of such order or is made at the request of an authorized representative of the Commission, the contract market on which such order is to be executed, or a futures association registered with the Commission pursuant to section 17 of the Act; or

(2)(i) Knowingly take, directly or indirectly, the other side of any order of another person revealed to the introducing broker or any of its affiliated persons by reason of their relationship to such other person, except with such other persons's prior consent and in conformity with contract market rules approved by or certified to the Commission.

(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) No affiliated person of an introducing broker shall have an account, directly or indirectly, with any futures commission merchant unless:

(1) Such affiliated person receives written authorization to maintain such an account from a person designated by the introducing broker with which such person is affiliated with responsibility for the surveillance over such account pursuant to paragraph (a)(2) of this section; and

(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.


§§ 155.5–155.6 [Reserved]

§ 155.10 Exemptions.

Except as otherwise provided in this part, the Commission may, in its discretion and upon such terms and conditions as it deems appropriate, exempt any contract market or other person from any of the provisions of this part.

(Approved by the Office of Management and Budget under control numbers 3038–0007 and 3038–0022)


PART 156—BROKER ASSOCIATIONS

Sec.
156.1 Definition.
156.2 Registration of broker association.
156.3 Contract market program for enforcement.
156.4 Disclosure of Broker Association Membership.

AUTHORITY: 7 U.S.C. 6b, 6c, 6j(d), 7a(b), and 12a.

SOURCE: 58 FR 31171, June 1, 1993, unless otherwise noted.

§ 156.1 Definition.

For the purposes of this part, the term broker association as applied to each board of trade shall include two or more contract market members with floor trading privileges, of whom at least one is acting as a floor broker, who:

(1) Engage in floor brokerage activity on behalf of the same employer,

(2) have an employer and employee relationship which relates to floor brokerage activity, (3) share profits and losses associated with their brokerage or trading activity, or (4) regularly share a deck of orders.

§ 156.2 Registration of broker association.

(a) Registration required. It shall be unlawful for any member of a broker association to receive or to execute an order unless the broker association is
registered with the appropriate contract market in accordance with part (b) of this section.

(b) Contract market rules required. Each contract market must adopt and maintain in effect rules, which have been submitted to the Commission pursuant to section 5a(a)(12)(A) of the Act and Commission Regulation 1.41 that, at a minimum, (1) define the term “broker association” to include the relationships set forth in §156.1 of this part, (2) prohibit conduct described in paragraph (a) of this section, and (3) require registration of each relationship defined by its rules as a broker association no later than 10 days after establishment of such relationship. Contract market records of registration shall include the following information with respect to each broker association, if applicable:

(i) Name;
(ii) Form of organization, e.g., partnership, corporation, trust, etc.;
(iii) Name of each person who is a member or otherwise has a direct beneficial interest in the association;
(iv) Badge symbols and numbers for all members;
(v) Account numbers for all accounts of any member, accounts in which any member(s) has an interest, and any proprietary or customer accounts controlled by any member(s);
(vi) Identification of all other broker associations with which each member is associated; and
(vii) Individual(s) authorized to represent the association in connection with its registration obligations.

Any registration information provided to the contract market which becomes deficient or inaccurate must be updated or corrected promptly.

(c) Other contract market rules. (1) Each contract market may submit rules pursuant to section 5a(a)(12)(A) of the Act and Commission Regulation 1.41 that interpret when contract market members would be deemed to “regularly share a deck of orders.” In the absence of such rules, a contract market must make such a determination on a case-by-case basis. The basis for a determination whether brokers “regularly share a deck of orders” must be documented.

(2) Each contract market may adopt rules, which must be submitted to the Commission pursuant to section 5a(a)(12)(A) of the Act and Commission Regulation 1.41, which set forth the basis and procedures for granting exemptions from the registration requirement contained in paragraph (b) of this section for de minimis activity.

§156.3 Contract market program for enforcement.

A contract market must, as part of its responsibilities pursuant to the Act and §1.51, demonstrate effective use of broker association registration information to monitor the trading activity of broker associations and their members for potential abuse and to secure compliance with all other contract market bylaws, rules, regulations and resolutions which may pertain to such associations or their members.

§156.4 Disclosure of Broker Association Membership.

Each contract market shall make available to the public generally and upon request a list of all registered broker associations which identifies for each such association the name of each person who is a member or otherwise has a direct beneficial interest in the association. This list shall be updated at least semi-annually.

[61 FR 41498, Aug. 9, 1996]
§ 160.1 Purpose and scope.

(a) Purpose. This part governs the treatment of nonpublic personal information about consumers by the financial institutions listed in paragraph (b) of this section. This part:

(1) Requires a financial institution to provide notice to customers about its privacy policies and practices;

(2) Describes the conditions under which a financial institution may disclose nonpublic personal information about consumers to nonaffiliated third parties; and

(3) Provides a method for consumers to prevent a financial institution from disclosing nonpublic personal information to most nonaffiliated third parties by “opting out” of that disclosure, subject to the exceptions in §§160.13, 160.14, and 160.15.

(b) Scope. This part applies only to nonpublic personal information about individuals who obtain financial products or services primarily for personal, family, or household purposes from the institutions listed below. This part does not apply to information about companies or about individuals who obtain financial products or services primarily for business, commercial, or agricultural purposes. This part applies to all futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers that are subject to the jurisdiction of the Commission, regardless whether they are required to register with the Commission. These entities are herein-after referred to in this part as “you.”

This part does not apply to foreign (non-resident) futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers that are not registered with the Commission.


§ 160.2 Model privacy form and examples.

(a) Model privacy form. Use of the model privacy form in appendix A of this part, consistent with the instructions in appendix A, constitutes compliance with the notice content requirements of §§160.6 and 160.7 of this part, although use of the model privacy form is not required.

(b) Examples. The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

[74 FR 62974, Dec. 1, 2009]

§ 160.3 Definitions.

For purposes of this part, unless the context requires otherwise:

(a) Affiliate of a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer means any company that controls, is controlled by, or is under...
common control with a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer that is subject to the jurisdiction of the Commission. In addition, a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer subject to the jurisdiction of the Commission will be deemed an affiliate of a company for purposes of this part if:

(1) That company is regulated under title V of the GLB Act by the Bureau of Consumer Financial Protection or by a Federal functional regulator other than the Commission; and

(2) Rules adopted by the Bureau of Consumer Financial Protection or another Federal functional regulator under title V of the GLB Act treat the futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer as an affiliate of that company.

(b)(1) Clear and conspicuous means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

(b)(2) Examples—(i) Reasonably understandable. Your notice will be reasonably understandable if you:

(A) Present the information in the notice in clear, concise sentences, paragraphs and sections;

(B) Use short explanatory sentences or bullet lists whenever possible;

(C) Use definite, concrete, everyday words and active voice whenever possible;

(D) Avoid multiple negatives;

(E) Avoid legal and highly technical business terminology whenever possible; and

(F) Avoid explanations that are imprecise and readily subject to different interpretations.

(ii) Designed to call attention. Your notice is designed to call attention to the nature and significance of the information in it if you:

(A) Use a plain-language heading to call attention to the notice;

(b)(1) Consumer means an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family
or household purposes, or that individual's legal representative.

(2) Examples. (i) An individual is your consumer if he or she provides non-public personal information to you in connection with obtaining or seeking to obtain brokerage or advisory services, whether or not you provide services to the individual or establish a continuing relationship with the individual.

(ii) An individual is not your consumer if he or she provides you only with his or her name, address and general areas of investment interest in connection with a request for a brochure or other information about financial products or services.

(iii) An individual is not your consumer if he or she has an account with another futures commission merchant (originating futures commission merchant) for which you provide clearing services for an account in the name of the originating futures commission merchant.

(iv) An individual who is a consumer of another financial institution is not your consumer solely because you act as agent for, or provide processing or other services to, that financial institution.

(v) An individual is not your consumer solely because he or she has designated you as trustee for a trust.

(vi) An individual is not your consumer solely because he or she is a beneficiary of a trust for which you are a trustee.

(vii) An individual is not your consumer solely because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary.

(i) Consumer reporting agency has the same meaning as in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

(j) Control of a company means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of a company will be presumed not to control the company.

(k) Customer means a consumer who has a customer relationship with you.

(l)(1) Customer relationship means a continuing relationship between a consumer and you under which you provide one or more financial products or services to the consumer that are to be used primarily for personal, family or household purposes.

(2) Examples—(i) Continuing relationship. A consumer has a continuing relationship with you if:

(A) You are a futures commission merchant through whom a consumer has opened an account, or that carries the consumer's account on a fully-disclosed basis, or that effects or engages in commodity interest transactions with or for a consumer, even if you do not hold any assets of the consumer.

(B) You are a retail foreign exchange dealer with whom a consumer has opened an account, or that effects or engages in retail forex transactions with or for a consumer, even if you do not hold any assets of the consumer;

(C) You are an introducing broker that solicits or accepts specific orders for trades;

(D) You are a commodity trading advisor with whom a consumer has a contract or subscription, either written or oral, regardless of whether the advice is standardized, or is based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of the particular consumer;

(E) You are a commodity pool operator, and you accept or receive from the consumer, funds, securities, or property for the purpose of purchasing an interest in a commodity pool;

(F) You hold securities or other assets as collateral for a loan made to the consumer, even if you did not make the loan or do not effect any transactions on behalf of the consumer; or

(G) You regularly effect or engage in commodity interest transactions with or for a consumer even if you do not hold any assets of the consumer.

(ii) No continuing relationship. A consumer does not have a continuing relationship with you if:
(A) You have acted solely as a “finder” for a futures commission merchant, and you do not solicit or accept specific orders for trades; or

(B) You have solicited the consumer to participate in a pool or to direct his or her account and he or she has not provided you with funds to participate in a pool or entered into any agreement for you to direct his or her account.

(m) Federal functional regulator means:

(1) The Board of Governors of the Federal Reserve System;

(2) The Office of the Comptroller of the Currency;

(3) The Board of Directors of the Federal Deposit Insurance Corporation;

(4) The Director of the Office of Thrift Supervision;

(5) The National Credit Union Administration Board;

(6) The Securities and Exchange Commission; and

(7) The Commodity Futures Trading Commission.

(n)(1) Financial institution means:

(i) Any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer that is registered with the Commission as such or is otherwise subject to the Commission’s jurisdiction; and

(ii) Financial service includes your evaluation or brokerage of information that you collect in connection with a request or an application from a consumer for a financial product or service.

(o)(1) Financial product or service means:

(i) Any product or service that a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer could offer that is financial in nature or incidental to such a financial activity under section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k).

(ii) Any product or service that any other financial institution could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k).

(p) Futures commission merchant has the same meaning as in section 1a(20) of the Commodity Exchange Act, as amended, and includes any person registered as such under the Act.

(q) GLB Act means the Gramm-Leach-Bliley Act (Pub. L. No. 106-102, 113 Stat. 1338 (1999)).

(r) Introducing broker has the same meaning as in section 1a(23) of the Commodity Exchange Act, as amended, and includes any person registered as such under the Act.

(s) Major swap participant. The term “major swap participant” has the same meaning as in section 1a(33) of the Commodity Exchange Act, 7 U.S.C. 1 et seq., as may be further defined by this title, and includes any person registered as such thereunder.

(t)(1) Nonaffiliated third party means any person except:

(i) Your affiliate; or

(ii) A person employed jointly by you and any company that is not your affiliate, but nonaffiliated third party includes the other company that jointly employs the person.

(2) Nonaffiliated third party includes any company that is an affiliate solely by virtue of your or your affiliate’s direct or indirect ownership or control of the company in conducting merchant activities.
banking or investment banking activities of the type described in section 4(k)(4)(H) or insurance company investment activities of the type described in section 4(k)(4)(I) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k)(4)(H) and (I).

(u)(1) Nonpublic personal information means:

(i) Personally identifiable financial information; and

(ii) Any list, description or other grouping of consumers, and publicly available information pertaining to them, that is derived using any personally identifiable financial information that is not publicly available information.

(2) Nonpublic personal information does not include:

(i) Publicly available information, except as included on a list described in paragraph (t)(1)(ii) of this section or when the publicly available information is disclosed in a manner that indicates the individual is or has been your consumer; or

(ii) Any list, description or other grouping of consumers, and publicly available information pertaining to them, that is derived without using any personally identifiable financial information that is not publicly available information.

(3) Examples of lists. (i) Nonpublic personal information includes any list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information that is not publicly available information, such as account numbers.

(ii) Nonpublic personal information does not include any list of individuals' names and addresses that contains only publicly available information, is not derived in whole or in part using personally identifiable financial information that is not publicly available information, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution.

(v)(1) Personally identifiable financial information means any information:

(i) A consumer provides to you to obtain a financial product or service from you;

(ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or

(iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.

(2) Examples—(i) Information included. Personally identifiable financial information includes:

(A) Information a consumer provides to you on an application to open a commodity interest trading account, to invest in a commodity pool, or to obtain another financial product or service;

(B) Account balance information, payment history, overdraft history, margin call history, trading history, and credit or debit card purchase information;

(C) The fact that an individual is or has been one of your customers or has obtained a financial product or service from you;

(D) Any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;

(E) Any information you collect through an Internet "cookie" (an information-collecting device from a web server); and

(F) Information from a consumer report.

(ii) Information not included. Personally identifiable financial information does not include:

(A) A list of names and addresses of customers of an entity that is not a financial institution; or

(B) Information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names or addresses.

(w)(1) Publicly available information means any information that you reasonably believe is lawfully made available to the general public from:

(i) Federal, state or local government records;

(ii) Widely distributed media; or

(iii) Disclosures to the general public that are required to be made by federal, state or local law.
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(2) Examples—(i) Reasonable belief. (A) You have a reasonable belief that information about your consumer is made available to the general public if you have confirmed, or your consumer has represented to you, that the information is publicly available from a source described in paragraphs (v)(1)(i)–(iii) of this section.

(B) You have a reasonable belief that information about your consumer is made available to the general public if you have taken steps to submit the information, in accordance with your internal procedures and policies and with applicable law, to a keeper of federal, state or local government records that is required by law to make the information publicly available.

(C) You have a reasonable belief that an individual’s telephone number is lawfully made available to the general public if you have located the telephone number in the telephone book or on an internet listing service, or the consumer has informed you that the telephone number is not unlisted.

(D) You do not have a reasonable belief that information about a consumer is publicly available solely because that information would normally be recorded with a keeper of federal, state or local government records that is required by law to make the information publicly available, if the consumer has the ability in accordance with applicable law to keep that information non-public, such as where a consumer may record a deed in the name of a blind trust.

(ii) Government records. Publicly available information in government records includes information in government real estate records and security interest filings.

(iii) Widely distributed media. Publicly available information from widely distributed media includes information from a telephone book, a television or radio program, a newspaper, or a web site that is available to the general public on an unrestricted basis. A web site is not restricted merely because an Internet service provider or a site operator requires a fee or password, so long as access is available to the general public.

(x) Swap dealer. The term “swap dealer” has the same meaning as in section 1a(49) of the Commodity Exchange Act, 7 U.S.C. 1 et seq., as may be further defined by this title, and includes any person registered as such thereunder.

(y) You means:

(1) Any futures commission merchant;

(2) Any retail foreign exchange dealer;

(3) Any commodity trading advisor;

(4) Any commodity pool operator;

(5) Any introducing broker;

(6) Any major swap participant; and

(7) Any swap dealer.

(2) Retail foreign exchange dealer has the same meaning as in §5.3(1)(1) of this chapter.


Subpart A—Privacy and Opt Out Notices

§ 160.4 Initial privacy notice to consumers required.

(a) Initial notice requirement. You must provide a clear and conspicuous notice that accurately reflects your privacy policies and practices to:

(1) Customer. An individual who becomes your customer, not later than when you establish a customer relationship, except as provided in paragraph (e) of this section; and

(2) Consumer. A consumer, before you disclose any nonpublic personal information about the consumer to any nonaffiliated third party, if you make such a disclosure other than as authorized by §§160.14 and 160.15.

(b) When initial notice to a consumer is not required. You are not required to provide an initial notice to a consumer under paragraph (a) of this section if:

(1) You do not disclose any nonpublic personal information about the consumer to any nonaffiliated third party other than as authorized by §§160.14 and 160.15; and

(2) You do not have a customer relationship with the consumer.

(c) When you establish a customer relationship—(1) General rule. You establish a customer relationship when you and the consumer enter into a continuing relationship.
(2) Examples of establishing customer relationship. You establish a customer relationship when the consumer:

(i) Instructs you to execute a commodity interest transaction for the consumer;

(ii) Opens a retail forex account, or opens a commodity interest account through an introducing broker or with a futures commission merchant that clears transactions for its customers through you on a fully-disclosed basis;

(iii) Transmits specific orders for commodity interest transactions to you that you pass on to a futures commission merchant for execution, if you are an introducing broker;

(iv) Enters into an advisory contract or subscription with you, whether in writing or orally, and whether you provide standardized, or individually tailored commodity trading advice based on the customer’s commodity interest or cash market positions or other circumstances or characteristics, if you are a commodity trading adviser; or

(v) Provides to you funds, securities, or property for an interest in a commodity pool, if you are a commodity pool operator.

(d) Existing customers. When an existing customer obtains a new financial product or service from you that is to be used primarily for personal, family or household purposes, you satisfy the initial notice requirements of paragraph (a) of this section as follows:

(1) You may provide a revised privacy notice under §160.8 that covers the customer’s new financial product or service; or

(2) If the initial, revised or annual notice that you most recently provided to that customer was accurate with respect to the new financial product or service, you do not need to provide a new privacy notice under paragraph (a) of this section.

(e) Exceptions to allow subsequent delivery of notice. (1) You may provide the initial notice required by paragraph (a)(1) of this section within a reasonable time after you establish a customer relationship if:

(i) Establishing the customer relationship is not at the customer’s election;

(ii) Providing notice not later than when you establish a customer relationship would substantially delay the customer’s transaction and the customer agrees to receive the notice at a later time;

(iii) A nonaffiliated financial institution establishes a customer relationship between you and a consumer without your prior knowledge; or

(iv) You have established a customer relationship with a customer in a bulk transfer in accordance with §1.65, if you are a transferee futures commission merchant, retail foreign exchange dealer or introducing broker.

(2) Examples of exceptions—(i) Not at customer’s election. Establishing a customer relationship is not at the customer’s election if you acquire the customer’s commodity interest account from another financial institution and the customer does not have a choice about your acquisition.

(ii) Substantial delay of customer’s transaction. Providing notice not later than when you establish a customer relationship would substantially delay the customer’s transaction when you and the individual agree over the telephone to enter into a customer relationship involving prompt delivery of the financial product or service.

(iii) No substantial delay of customer’s transaction. Providing notice not later than when you establish a customer relationship would not substantially delay the customer’s transaction when the relationship is initiated in person at your office or through other means by which the customer may view the notice, such as on a web site.

(f) Delivery of notice. When you are required by this section to deliver an initial privacy notice, you must deliver it according to the provisions of §160.9. If you use a short-form initial notice for non-customers according to §160.6(d), you may deliver your privacy notice as provided in section §160.6(d)(3).

§160.5 Annual privacy notice to customers required.

(a)(1) General rule. You must provide a clear and conspicuous notice to customers that accurately reflects your privacy policies and practices not less than annually during the life of the customer relationship. Annually means...
§ 160.6 Information to be included in privacy notices.

(a) General rule. The initial, annual, and revised privacy notices that you provide under §§160.4, 160.5 and 160.8 must include each of the following items of information that applies to you or to the consumers to whom you send your privacy notice, in addition to any other information you wish to provide:

(1) The categories of nonpublic personal information that you collect;

(2) The categories of nonpublic personal information that you disclose;

(3) The categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information, other than those parties to whom you disclose information under §§160.14 and 160.15;

(4) The categories of nonpublic personal information about your former customers that you disclose and the categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information about your former customers, other than those parties to whom you disclose information under §§160.14 and 160.15;

(5) If you disclose nonpublic personal information to a nonaffiliated third party under §160.13 (and no other exception applies to that disclosure), a separate statement of the categories of information you disclose and the categories of third parties with whom you have contracted;

(6) An explanation of the consumer’s rights under §160.10(a) to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the method(s) by which the consumer may exercise that right at that time;

(7) Any disclosures that you make under §603(d)(2)(A)(iii) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(A)(iii)) (that is, notices regarding the ability to opt out of disclosures of information among affiliates);

(8) Your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information; and

(9) Any disclosure that you make under paragraph (b) of this section.

(b) Description of nonaffiliated third parties subject to exceptions. If you disclose nonpublic personal information to third parties as authorized under §§160.14 and 160.15, you are not required to list those exceptions in the initial or annual privacy notices required by §§160.4 and 160.5. When describing the categories with respect to those parties, it is sufficient to state that you make disclosures to other nonaffiliated companies:

(1) For your everyday business purposes, such as [include all that apply] to process transactions, maintain account(s), respond to court orders and legal investigations, or report to credit bureaus; or

(2) As permitted by law.

(c) Examples—(1) Categories of nonpublic personal information that you collect. You satisfy the requirement to categorize the nonpublic personal information that you collect if you list the following categories, as applicable:

at least once in any period of 12 consecutive months during which that relationship exists. You may define the 12-consecutive-month period, but you must apply it to the customer on a consistent basis.

(2) Example. You provide notice annually if you define the 12-consecutive-month period as a calendar year and provide the annual notice to the customer once in each calendar year following the calendar year in which you provided the initial notice. For example, if a customer opens an account on any day of year 1, you must provide an annual notice to that customer by December 31 of year 2.

(b)(1) Termination of customer relationship. You are not required to provide an annual notice to a former customer.

(2) Examples. Your customer becomes a former customer when:

(i) The individual’s commodity interest account is closed;

(ii) The individual’s advisory contract or subscription is terminated or expires; or

(iii) The individual has redeemed all of his or her units in your pool.

(c) Delivery of notice. When you are required by this section to deliver an annual privacy notice, you must deliver it in the manner provided by §160.9.
(i) Information from the consumer;
(ii) Information about the consumer's transactions with you or your affiliates;
(iii) Information about the consumer's transactions with nonaffiliated third parties; and
(iv) Information from a consumer reporting agency.

(2) Categories of nonpublic personal information you disclose. (i) You satisfy the requirement to categorize the nonpublic personal information you disclose if you list the categories described in paragraph (e)(1) of this section, as applicable, and a few examples to illustrate the types of information in each category.
(ii) If you reserve the right to disclose all of the nonpublic personal information about consumers that you collect, you may simply state that fact without describing the categories or examples of the nonpublic personal information you disclose.

(3) Categories of affiliates and nonaffiliated third parties to whom you disclose. You satisfy the requirement to categorize the affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information if you list the following categories, as applicable, and a few examples to illustrate the types of third parties in each category:
(i) Financial service providers;
(ii) Non-financial companies; and
(iii) Others.

(4) Disclosures under exception for service providers and joint marketers. If you disclose nonpublic personal information under the exception in §160.13 to a nonaffiliated third party to market products or services that you offer alone or jointly with another financial institution, you satisfy the disclosure requirement of paragraph (a)(5) of this section if you:
(i) List the categories of nonpublic personal information you disclose, using the same categories and examples you used to meet the requirements of paragraph (a)(2) of this section, as applicable; and
(ii) State whether the third party is:
(A) A service provider that performs marketing services on your behalf or on behalf of you and another financial institution; or
(B) A financial institution with which you have a joint marketing agreement.

(5) Simplified notices. If you do not disclose, and do not wish to reserve the right to disclose, nonpublic personal information to affiliates or nonaffiliated third parties except as authorized under §§160.14 and 160.15, you may simply state that fact, in addition to information you must provide under paragraphs (a)(1), (a)(8), (a)(9) and (b) of this section.

(6) Confidentiality and security. You describe your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information if you do both of the following:
(i) Describe in general terms who is authorized to have access to the information; and
(ii) State whether you have security practices and procedures in place to ensure the confidentiality of the information in accordance with your policy. You are not required to describe technical information about the safeguards you use.

(d) Short-form initial notice with opt out notice for non-customers. (1) You may satisfy the initial notice requirements in §§160.4(a)(2), 160.7(b) and 160.7(c) for a consumer who is not a customer by providing a short-form initial notice at the same time as you deliver an opt out notice as required in 160.7.
(ii) A short-form initial notice must:
(i) Be clear and conspicuous;
(ii) State that your privacy notice is available upon request; and
(iii) Explain a reasonable means by which the consumer may obtain your privacy notice.

(3) You must deliver your short-form initial notice according to §160.9. You are not required to deliver your privacy notice with your short-form initial notice. You instead may simply provide the consumer a reasonable means to obtain your privacy notice. If a consumer who receives your short-form notice requests your privacy notice, you must deliver your privacy notice according to §160.9.

(4) Examples of obtaining privacy notice. You provide a reasonable means by
which a consumer may obtain a copy of your privacy notice if you:
   (i) Provide a toll-free telephone number that the consumer may call to request the notice; or
   (ii) For a consumer who conducts business in person at your office, maintain copies of the notice on hand that you provide to the consumer immediately upon request.

(e) Future disclosures. Your notice may include:
   (1) Categories of nonpublic personal information that you reserve the right to disclose in the future, but do not currently disclose; and
   (2) Categories of affiliates and nonaffiliated third parties to whom you reserve the right in the future to disclose, but to whom you do not currently disclose, nonpublic personal information.

(f) Model privacy form. Pursuant to §160.2(a) of this part, a model privacy form that meets the notice content requirements of this section is included in appendix A of this part.

§ 160.7 Form of opt out notice to consumers; opt out methods.

(a)(1) Form of opt out notice. If you are required to provide an opt out notice under §160.10(a), you must provide a clear and conspicuous notice to each of your consumers that accurately explains the right to opt out under that section. The notice must state:
   (i) That you disclose or reserve the right to disclose nonpublic personal information about your consumer to a nonaffiliated third party;
   (ii) That the consumer has the right to opt out of that disclosure; and
   (iii) A reasonable means by which the consumer may exercise the opt out right.

(2) Examples—(i) Adequate opt out notice. You provide adequate notice that the consumer can opt out of the disclosure of nonpublic personal information to a nonaffiliated third party if you:
   (A) Identify all of the categories of nonpublic personal information that you disclose or reserve the right to disclose, and all of the categories of nonaffiliated third parties to which you disclose the information, as described in §160.6(a)(2) and (3), and state that the consumer can opt out of the disclosure of that information; and
   (B) Identify the financial products or services that the consumer obtains from you, either singly or jointly, to which the opt out direction would apply.
   (ii) Reasonable means to opt out. You provide a reasonable means to exercise an opt out right if you:
      (A) Designate check-off boxes in a prominent position on the relevant forms with the opt out notice;
      (B) Include a reply form together with the opt out notice;
      (C) Provide an electronic means to opt out, such as a form that can be sent via electronic mail or a process at your web site, if the consumer agrees to the electronic delivery of information; or
      (D) Provide a toll-free telephone number that consumers may call to opt out.
   (iii) Unreasonable opt out means. You do not provide a reasonable means of opting out if:
      (A) The only means of opting out is for the consumer to write his or her own letter to exercise that opt out right; or
      (B) The only means of opting out as described in any notice subsequent to the initial notice is to use a check-off box that you provided with the initial notice but did not include with the subsequent notice.

(iv) Specific opt out means. You may require each consumer to opt out through a specific means, as long as that means is reasonable for the consumer.

(b) Same form as initial notice permitted. You may provide the opt out notice together with or on the same written or electronic form, as the initial notice you provide in accordance with §160.4.

(c) Initial notice required when opt out notice delivered subsequent to initial notice. If you provide the opt out notice after the initial notice in accordance with §160.4, you must also include a copy of the initial notice with the opt out notice in writing, or, if the consumer agrees, electronically.

(d) Joint relationships. (1) If two or more consumers jointly obtain a financial product or service from you, you
may provide a single opt out notice; however, you must honor a request from one or more joint account holders for a separate opt out notice. Your opt out notice must explain how you will treat an opt out direction by a joint consumer.

(2) Any of the joint consumers may exercise the right to opt out. You may either:
   (i) Treat an opt out direction by a joint consumer as applying to all of the associated joint consumers; or
   (ii) Permit each joint consumer to opt out separately.

(3) If you permit each joint consumer to opt out separately, you must permit one of the joint consumers to opt out on behalf of all of the joint consumers.

(4) You may not require all joint consumers to opt out before you implement any opt out direction.

(5) Example. If John and Mary have a joint trading account with you and arrange for you to send statements to John’s address, you may do any of the following, but you must explain in your opt out notice which opt out policy you will follow:
   (i) Send a single opt out notice to John’s address, but you must accept an opt out direction from either John or Mary;
   (ii) Treat an opt out direction by either John or Mary as applying to the entire account. If you do so, and John opts out, you may not require Mary to opt out as well before implementing John’s opt out direction; or
   (iii) Permit John and Mary to make different opt out directions. If you do so:
      (A) You must permit John and Mary to opt out for each other.
      (B) If both opt out, you must permit both to notify you in a single response (such as on a form or through a telephone call).
      (C) If John opts out and Mary does not, you may only disclose nonpublic personal information about Mary, but not about John, and not about John and Mary jointly.

   (f) Time to comply with opt out. You must comply with a consumer’s opt out direction as soon as reasonably practicable after you receive it.

(f) Continuing right to opt out. A consumer may exercise the right to opt out at any time.

(g) Duration of consumer’s opt out direction. (1) A consumer’s direction to opt out under this section is effective until the consumer revokes it in writing, either by hard copy or, if the consumer agrees, electronically.

(2) When a customer relationship terminates, the customer’s opt out direction continues to apply to the nonpublic personal information that you collected during or related to that relationship. If the individual subsequently establishes a new customer relationship with you, the opt out direction that applied to the former relationship does not apply to the new relationship.

(h) Delivery. When you are required by this section to deliver an opt out notice, you must deliver it according to §160.9.

(i) Model privacy form. Pursuant to §160.2(a) of this part, a model privacy form that meets the notice content requirements of this section is included in appendix A of this part.

[66 FR 21252, Apr. 27, 2001, as amended at 74 FR 62974, December 1, 2009]
(i) Disclose a new category of nonpublic personal information to any nonaffiliated third party;
(ii) Disclose nonpublic personal information to a new category of nonaffiliated third party; or
(iii) Disclose nonpublic personal information about a former customer to a nonaffiliated third party, if that former customer has not had the opportunity to exercise an opt out right regarding that disclosure.

(2) A revised notice is not required if you disclose nonpublic personal information to a new nonaffiliated third party that you adequately described in your prior notice.

(c) Delivery. When you are required to deliver a revised privacy notice by this section, you must deliver it according to §160.9.

§ 160.9 Delivering privacy and opt out notices.

(a) How to provide notices. You must provide any privacy notices and opt out notices, including short-form initial notices that this part requires so that each consumer can reasonably be expected to receive actual notice in writing either in hard copy or, if the consumer agrees, electronically.

(b)(1) Examples of reasonable expectation of actual notice. You may reasonably expect that a consumer will receive actual notice if you:
   (i) Hand-deliver a printed copy of the notice to the consumer;
   (ii) Mail a printed copy of the notice to the last known address of the consumer; or
   (iii) For the consumer who conducts transactions electronically, post the notice on the electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular financial service or product.

   (2) Examples of unreasonable expectation of actual notice. You may not, however, reasonably expect that a consumer will receive actual notice of your privacy policies and practices if you:
   (i) Only post a sign in your branch or office or generally publish advertisements of your privacy policies and practices; or
   (ii) Send the notice via electronic mail to a consumer who does not obtain a financial product or service from you electronically.

(c) Annual notices only. You may reasonably expect that a consumer will receive actual notice of your annual privacy notice if:
   (1) The customer uses your web site to access financial products and services electronically and agrees to receive notices at the web site and you post your current privacy notice continuously in a clear and conspicuous manner on the web site; or
   (2) The customer has requested that you refrain from sending any information regarding the customer relationship, and your current privacy notice remains available to the customer upon request.

(d) Oral description of notice insufficient. You may not provide any notice required by this part solely by orally explaining the notice, either in person or over the telephone.

(e) Retention or accessibility of notices for customers. (1) For customers only, you must provide the initial notice required by §160.4(a)(1), the annual notice required by §160.5(a), and the revised notice required by §160.6, so that the customer can retain them or obtain them later in writing or, if the customer agrees, electronically.

(2) Examples of retention or accessibility. You provide a privacy notice to the customer so that the customer can retain it or obtain it later if you:
   (i) Hand-deliver a printed copy of the notice to the customer;
   (ii) Mail a printed copy of the notice to the last known address of the customer; or
   (iii) Make your current privacy notice available on a web site (or a link to another web site) for the customer who obtains a financial product or service electronically and agrees to receive the notice at the web site.

(f) Joint notice with other financial institutions. You may provide a joint notice from you and one or more of your affiliates or other financial institutions, as identified in the notice, as long as the notice is accurate with respect to you and the other institutions.

(g) Joint relationships. If two or more customers jointly obtain a financial
product or service from you, you may satisfy the initial, annual, and revised notice requirements of paragraph (a) of this section by providing one notice to those customers jointly; however, you must honor a request by one or more joint account holders for a separate notice.

Subpart B—Limits on Disclosures

§ 160.10 Limits on disclosure of nonpublic personal information to nonaffiliated third parties.

(a)(1) Conditions for disclosure. Except as otherwise authorized in this part, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless:

(i) You have provided to the consumer an initial notice as required under §160.4;

(ii) You have provided to the consumer an opt out notice as required in §160.7;

(iii) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and

(iv) The consumer does not opt out.

(2) Opt out definition. Opt out means a direction by the consumer that you not disclose nonpublic personal information about that consumer to a nonaffiliated third party that you have collected, regardless of whether you have collected it before or after receiving the direction to opt out from the consumer.

(b) Application of opt out to all consumers and all nonpublic personal information. (i) You must comply with this section, regardless of whether you and the consumer have established a customer relationship.

(ii) Unless you comply with this section, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer that you have collected, regardless of whether you have collected it before or after receiving the direction to opt out from the consumer.

(c) Partial opt out. You may allow a consumer to select certain nonpublic personal information or certain nonaffiliated third parties with respect to which the consumer wishes to opt out.

§ 160.11 Limits on redisclosure and reuse of information.

(a) (1) Information you receive under an exception. If you receive nonpublic personal information from a nonaffiliated financial institution under an exception in §§160.13, 160.14 and 160.15, your disclosure and use of that information is limited as follows:

(i) You may disclose the information to the affiliate of the financial institution from which you received the information;

(ii) You may disclose the information to your affiliates, but your affiliates may, in turn, disclose and use the information only to the extent that you may disclose and use the information; and

(iii) You may disclose and use the information pursuant to an exception in §§160.14 or 160.15 in the ordinary course of business to carry out the activity covered by the exception under which you received the information.

(b) Example. If you receive a customer list from a nonaffiliated financial institution in order to provide account-
§ 160.12 Limits on sharing account number information for marketing purposes.

(a) General prohibition on disclosure of account numbers. You must not, directly or through an affiliate, disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a consumer’s credit card account, deposit account or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing or other marketing through electronic mail to the consumer.

(b) Exceptions. Paragraph (a) of this section does not apply if you disclose an account number or similar form of access number or access code:

(1) To your agent or service provider solely in order to perform marketing for your own services or products, as long as the agent or service provider is processing services under the exception in §160.14(a), you may disclose that information under any exception in §§160.14 or 160.15 in the ordinary course of business in order to provide those services. For example, you could disclose that information in response to a properly authorized subpoena or in the ordinary course of business to your attorneys, accountants, and auditors. You could not disclose that information to a third party for marketing purposes or use that information for your own marketing purposes.

(b)(1) Information you receive outside of an exception. If you receive nonpublic personal information from a nonaffiliated financial institution other than under an exception in §§160.14 or 160.15, you may disclose the information only:

(i) To the affiliates of the financial institution from which you received the information;

(ii) To your affiliates, but your affiliates may, in turn, disclose the information only to the extent that you can disclose the information; and

(iii) To any other person, if the disclosure would be lawful if made directly to that person by the financial institution from which you received the information.

(2) Example. If you obtain a customer list from a nonaffiliated financial institution outside of the exceptions in §§160.14 and 160.15:

(i) You may use that list for your own purposes;

(ii) You may disclose that list to another nonaffiliated third party only if the financial institution from which you purchased the list could have lawfully disclosed that list to that third party. That is, you may disclose the list in accordance with the privacy policy of the financial institution from which you received the list as limited by the opt out direction of each consumer whose nonpublic personal information you intend to disclose, and you may disclose the list in accordance with an exception in §§160.14 and 160.15, such as in the ordinary course of business to your attorneys, accountants, or auditors.

(c) Information you disclose under an exception. If you disclose nonpublic personal information to a nonaffiliated third party under an exception in §§160.14 or 160.15, the third party may disclose and use that information only as follows:

(1) The third party may disclose the information to your affiliates;

(2) The third party may disclose the information to its affiliates, but its affiliates may, in turn, disclose and use the information only to the extent that the third party may disclose and use the information; and

(3) The third party may disclose and use the information pursuant to an exception in §§160.14 or 160.15 in the ordinary course of business to carry out the activity covered by the exception under which it received the information.
§ 160.13 Exception to opt out requirements for service providers and joint marketing.

(a) General rule. (1) The opt out requirements in §§160.7 and 160.10 do not apply when you provide nonpublic personal information to a nonaffiliated third party to perform services for you or functions on your behalf if you:
   (i) Provide the initial notice in accordance with §160.4; and
   (ii) Enter into a contractual agreement with the third party that prohibits the third party from disclosing or using the information other than to carry out the purposes for which you disclosed the information, including use under an exception in §§160.14 or 160.15 in the ordinary course of business to carry out those purposes.

(2) Example. If you disclose nonpublic personal information under this section to a financial institution with which you perform joint marketing, your contractual agreement with that institution meets the requirements of paragraph (a)(1)(ii) of this section if it prohibits the institution from disclosing or using the nonpublic personal information except as necessary to carry out the joint marketing or under an exception in §§160.14 or 160.15 in the ordinary course of business to carry out that joint marketing.

(b) Service may include joint marketing. The services a nonaffiliated third party performs for you under paragraph (a) of this section may include marketing of your own products or services or marketing of financial products or services offered pursuant to joint agreements between you and one or more financial institutions.

(c) Definition of joint agreement. For purposes of this section, joint agreement means a written contract pursuant to which you and one or more financial institutions jointly offer, endorse or sponsor a financial product or service.

§ 160.14 Exceptions to notice and opt out requirements for processing and servicing transactions.

(a) Exceptions for processing and servicing transactions at consumer’s request. The requirements for initial notice in §160.4(a)(2), for the opt out in §§160.7 and 160.10, and for initial notice in §160.13 in connection with service providers and joint marketing, do not apply if you disclose nonpublic personal information as necessary to effect, administer, or enforce a transaction that a consumer requests or authorizes, or in connection with:

   (1) Processing or servicing a financial product or service that a consumer requests or authorizes;

   (2) Maintaining or servicing the consumer’s account with you, or with another entity as part of an extension of credit on behalf of such entity as part of a private label credit card program or other extension of credit on behalf of such entity; or

   (3) A proposed or actual securitization, secondary market sale or similar transaction related to a transaction of the consumer.

(b) Necessary to effect, administer or enforce a transaction means that the disclosure is:

   (1) Required, or is one of the lawful or appropriate methods, to enforce your rights or the rights of other persons engaged in carrying out the financial transaction or providing the product or service; or

   (2) Required, or is a usual, appropriate or acceptable method:

      (i) To carry out the transaction or the product or service business of which the transaction is a part, and record, service or maintain the consumer’s account in the ordinary course of providing the financial service or financial product;

      (ii) To administer or service benefits or claims relating to the transaction or
Commodity Futures Trading Commission

§ 160.15

the product or service business of which it is a part;
(iii) To provide a confirmation, statement or other record of the transaction, or information on the status or value of the financial service or financial product to the consumer or the consumer’s agent or broker;
(iv) To accrue or recognize incentives or bonuses associated with the transaction that are provided by you or any other party;
(v) In connection with:
(A) The authorization, settlement, billing, processing, clearing, transferring, reconciling or collection of amounts charged, debited or otherwise paid using a debit, credit or other payment card, check or account number, or by other payment means;
(B) The transfer of receivables, accounts or interests therein; or
(C) The audit of debit, credit or other payment information.

§ 160.15 Other exceptions to notice and opt out requirements.

(a) Exceptions to notice and opt out requirements. The requirements for initial notice in §160.4(a)(2), for the opt out in §§160.7 and 160.10, and for initial notice in §160.13 in connection with service providers and joint marketing do not apply when you disclose nonpublic personal information:
(1) With the consent or at the direction of the consumer, provided that the consumer has not revoked the consent or direction;
(2) To protect the confidentiality or security or your records pertaining to the consumer, service, product or transaction;
(i) To prevent or to detect actual or potential fraud, unauthorized transactions, claims or other liability;
(ii) For required institutional risk control or for resolving consumer disputes or inquiries;
(iii) To persons holding a legal or beneficial interest relating to the consumer;
or
(iv) To persons acting in a fiduciary or representative capacity on behalf of the consumer;
(3) To provide information to insurance rate advisory organizations, guaranty funds or agencies, agencies that are rating you, persons that are assessing your compliance with industry standards, and your attorneys, accountants and auditors;
(4) To the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq., to law enforcement agencies (including a Federal functional regulator, the Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping), a State insurance authority, with respect to any person domiciled in that insurance authority’s state that is engaged in providing insurance, and the Bureau of Consumer Financial Protection), self-regulatory organizations, or for an investigation on a matter related to public safety;
(5)(i) To a consumer reporting agency in accordance with the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.; or
(ii) From a consumer report reported by a consumer reporting agency;
(6) In connection with a proposed or actual sale, merger, transfer or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of such business or unit; or
(7)(i) To comply with federal, state or local laws, rules and other applicable legal requirements;
(ii) To comply with a properly authorized civil, criminal or regulatory investigation, or subpoena or summons by federal, state or local authorities; or
(iii) To respond to judicial process or government regulatory authorities having jurisdiction over you for examination, compliance or other purposes as authorized by law.
(b) Examples of consent and revocation of consent. (1) A consumer may specifically consent to your disclosure to a nonaffiliated mortgage lender of the value of the assets in the customer’s account so that the lender can evaluate the consumer’s application for a mortgage loan.
(2) A consumer may revoke consent by subsequently exercising the right to
opt out of future disclosures of non-public personal information as permitted under §160.7(f).


Subpart D—Relation to Other Laws; Effective Date

§ 160.16 Protection of Fair Credit Reporting Act.

Nothing in this part shall be construed to modify, limit or supersede the operation of the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., and no inference shall be drawn on the basis of the provisions of this part regarding whether information is transaction or experience information under section 603 of that Act.

§ 160.17 Relation to state laws.

(a) In general. This part shall not be construed as superseding, altering or affecting any statute, regulation, order or interpretation in effect in any state, except to the extent that such state statute, regulation, order or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) Greater protection under state law. For purposes of this section, a state statute, regulation, order or interpretation affords any person protection greater than the protection provided under this part, as determined by the Bureau of Consumer Financial Protection, after consultation with the Commission, on its own motion or upon the petition of any interested party.


§ 160.18 Effective date; compliance date; transition rule.

(a) Effective date. This part is effective on June 21, 2001. In order to provide sufficient time for you to establish policies and systems to comply with the requirements for this part, the compliance date for this part is March 31, 2002.

(b)(1) Notice requirement for consumers who are your customers on the effective date. By March 31, 2002, you must have provided an initial notice, as required by §160.4, to consumers who are your customers on March 31, 2002.

(2) Example. You provide an initial notice to consumers who are your customers on March 31, 2002 if, by that date, you have established a system for providing an initial notice to all new customers and have mailed the initial notice to all your existing customers.

(c) One-year grandfathering of service agreements. Until March 31, 2003, a contract that you have entered into with a nonaffiliated third party to perform services for you or functions on your behalf satisfies the provisions of §160.13(a)(1)(ii) even if the contract does not include a requirement that the third party maintain the confidentiality of nonpublic personal information, as long as you entered into the agreement on or before March 31, 2002.


§§ 160.19–160.29 [Reserved]

§ 160.30 Procedures to safeguard customer records and information.

Every futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, and swap dealer subject to the jurisdiction of the Commission must adopt policies and procedures that address administrative, technical and physical safeguards for the protection of customer records and information.

[76 FR 43879, July 22, 2011]

APPENDIX A TO PART 160—MODEL PRIVACY FORM

A. The Model Privacy Form
**FACTS**

### Why?
Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.

### What?
The types of personal information we collect and share depend on the product or service you have with us. This information can include:
- Social Security number and [income]
- [account balances] and [payment history]
- [credit history] and [credit scores]

When you are no longer our customer, we continue to share your information as described in this notice.

### How?
All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.

<table>
<thead>
<tr>
<th>Reasons we can share your personal information</th>
<th>Does [name of financial institution] share?</th>
<th>Can you limit this sharing?</th>
</tr>
</thead>
<tbody>
<tr>
<td>For our everyday business purposes — such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For our marketing purposes — to offer our products and services to you</td>
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<td>For joint marketing with other financial companies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For our affiliates' everyday business purposes — information about your transactions and experiences</td>
<td></td>
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<tr>
<td>For our affiliates' everyday business purposes — information about your creditworthiness</td>
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<tr>
<td>For our affiliates to market to you</td>
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<td></td>
</tr>
<tr>
<td>For nonaffiliates to market to you</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Questions?
Call [phone number] or go to [website]
### Who we are

Who is providing this notice? [insert]

### What we do

**How does [name of financial institution] protect my personal information?**

To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings.

[insert]

**How does [name of financial institution] collect my personal information?**

We collect your personal information, for example, when you
- [open an account] or [deposit money]
- [pay your bills] or [apply for a loan]
- [use your credit or debit card]

[We also collect your personal information from other companies.] OR
[We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.]

### Why can’t I limit all sharing?

Federal law gives you the right to limit only
- sharing for affiliates' everyday business purposes—information about your creditworthiness
- affiliates from using your information to market to you
- sharing for nonaffiliates to market to you

State laws and individual companies may give you additional rights to limit sharing. [See below for more on your rights under state law.]

### Definitions

**Affiliates**

Companies related by common ownership or control. They can be financial and nonfinancial companies.

- [affiliate information]

**Nonaffiliates**

Companies not related by common ownership or control. They can be financial and nonfinancial companies.

- [nonaffiliate information]

**Joint marketing**

A formal agreement between nonaffiliated financial companies that together market financial products or services to you.

- [joint marketing information]

### Other important information

[insert other important information]
### FACTS

**WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION?**

**Why?** Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.

**What?** The types of personal information we collect and share depend on the product or service you have with us. This information can include:
- Social Security number and [income]
- [account balances] and [payment history]
- [credit history] and [credit scores]

**How?** All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.

### Reasons we can share your personal information

<table>
<thead>
<tr>
<th>Reasons we can share your personal information</th>
<th>Does [name of financial institution] share?</th>
<th>Can you limit this sharing?</th>
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<td>For our everyday business purposes—such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus</td>
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<tr>
<td>For nonaffiliates to market to you</td>
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</tr>
</tbody>
</table>

### To limit our sharing

- Call [phone number]—our menu will prompt you through your choice(s) or
- Visit us online: [website]  
**Please note:**  
If you are a new customer, we can begin sharing your information [30] days from the date we sent this notice. When you are no longer our customer, we continue to share your information as described in this notice.  
However, you can contact us at any time to limit our sharing.

### Questions?

Call [phone number] or go to [website]
<table>
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<th>What we do</th>
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<tbody>
<tr>
<td>How does [name of financial institution] protect my personal information?</td>
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<td>How does [name of financial institution] collect my personal information?</td>
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<th>Other important information</th>
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<td>[insert other important information]</td>
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Version 3: Model Form with Mail-In Opt-Out Form.

**FACTS**

**WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION?**

**Why?**
Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.

**What?**
The types of personal information we collect and share depend on the product or service you have with us. This information can include:
- Social Security number and [income]
- [account balances] and [payment history]
- [credit history] and [credit scores]

**How?**
All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.

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**To limit our sharing**
- Call [phone number]|—our menu will prompt you through your choice(s) |
- Visit us online |[website] or |
- Mail the form below

**Questions?**
Call [phone number] or go to [website]

Mail-in Form

**Leave Blank OR**
- If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below.
- Apply my choices only to me]

**Mark any/all you want to limit:**
- Do not share information about my creditworthiness with your affiliates for their everyday business purposes.
- Do not allow your affiliates to use my personal information to market to me.
- Do not share my personal information with nonaffiliates to market their products and services to me.

**Name**

**Address**

**City, State, Zip**

**Mail to:**

[Name of Financial Institution]

[Address]

[City, [ST] [ZIP]]

1039
<table>
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<th>Who we are</th>
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<td>[Your choices will apply to everyone on your account—unless you tell us otherwise.]</td>
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<tr>
<td>A formal agreement between nonaffiliated financial companies that together market financial products or services to you.</td>
</tr>
<tr>
<td>■ [joint marketing information]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other important information</th>
</tr>
</thead>
<tbody>
<tr>
<td>[insert other important information]</td>
</tr>
</tbody>
</table>
B. General Instructions

1. How the Model Privacy Form Is Used

(a) The model form may be used, at the option of a financial institution, including a group of financial institutions that use a common privacy notice, to meet the content requirements of the privacy notice and opt-out notice set forth in §§160.6 and 160.7 of this part.

(b) The model form is a standardized form, including page layout, content, format, style, pagination, and shading. Institutions seeking to obtain the safe harbor through use of the model form may modify it only as described in these Instructions.

(c) Note that disclosure of certain information, such as assets, income, and information from a consumer reporting agency, may give rise to obligations under the Fair Credit Reporting Act [15 U.S.C. 1681–1681x] (FCRA), such as a requirement to permit a consumer to opt out of disclosures to affiliates or designation as a consumer reporting agency if disclosures are made to nonaffiliated third parties.

(d) The word “customer” may be replaced by the word “member” whenever it appears in the model form, as appropriate.

2. The Contents of the Model Privacy Form

The model form consists of two pages, which may be printed on both sides of a single sheet of paper, or may appear on two separate pages. Where an institution provides a long list of institutions at the end of the model form in accordance with Instruction C.3(a)(1), or provides additional information in accordance with Instruction C.3(c), and such list or additional information exceeds the space available on page two of the model form, such list or additional information may extend to a third page.

(a) Page One. The first page consists of the following components:

1. Date last revised (upper right-hand corner).
2. Title.
3. Key frame (Why?, What?, How?).

(b) Page Two. The second page consists of the following components:

1. Heading (Page 2).
2. Frequently Asked Questions (“Who we are” and “What we do”).
3. Definitions.
4. “Other important information” box, as needed.

3. The Format of the Model Privacy Form

The format of the model form may be modified only as described below.

(a) Easily readable type font. Financial institutions that use the model form must use an easily readable type font. While a number of factors together produce easily readable type font, institutions are required to use a minimum of 10-point font (unless otherwise expressly permitted in these Instructions) and sufficient spacing between the lines of type.

(b) Logo. A financial institution may include a corporate logo on any page of the notice, so long as it does not interfere with the readability of the model form or the space constraints of each page.

(c) Page size and orientation. Each page of the model form must be printed on paper in portrait orientation, the size of which must be sufficient to meet the layout and minimum font size requirements, with sufficient white space on the top, bottom, and sides of the content.

(d) Color. The model form must be printed on white or light color paper (such as cream) with black or other contrasting ink color. Spot color may be used to achieve visual interest, so long as the color contrast is distinctive and the color does not detract from the readability of the model form. Logos may also be printed in color.
(e) Languages. The model form may be translated into languages other than English.

C. Information Required in the Model Privacy Form

The information in the model form may be modified only as described below:

1. Name of the Institution or Group of Affiliated Institutions Providing the Notice

Insert the name of the financial institution providing the notice or a common identity of affiliated institutions jointly providing the notice on the form wherever [name of financial institution] appears.

2. Page One

(a) Last revised date. The financial institution must insert in the upper right-hand corner the date on which the notice was last revised. The information shall appear in minimum 8-point font as “rev. [month/year]” using either the name or number of the month, such as “rev. July 2009” or “rev. 7/09”.
(b) General instructions for the “What?” box.
(1) The bulleted list identifies the types of personal information that the institution collects and shares. All institutions must use the term “Social Security number” in the first bullet.
(2) Institutions must use five (5) of the following terms to complete the bulleted list: Income; account balances; payment history; transaction history; transaction or loss history; credit history; credit scores; assets; investment experience; credit-based insurance scores; insurance claim history; medical information; overdraft history; purchase history; account transactions; risk tolerance; medical-related debts; credit card or other debt; mortgage rates and payments; retirement assets; checking account information; employment information; wire transfer instructions.
(c) General instructions for the disclosure table. The left column lists reasons for sharing or using personal information. Each reason correlates to a specific legal provision described in paragraph C.2(d) of this Instruction. In the middle column, each institution must provide a “Yes” or “No” response that accurately reflects its information sharing policies and practices with respect to the reason listed on the left. In the right column, each institution must provide in each box one of the following three (3) responses, as applicable, that reflects whether a consumer can limit such sharing: “Yes” if it is required to or voluntarily provides an opt-out; “No” if it does not provide an opt-out; or “We don’t share” if it answers “No” in the middle column. Only the sixth row (“For our affiliates to market to you”) may be omitted at the option of the institution. See paragraph C.2(d)(6) of this Instruction.
(d) Specific disclosures and corresponding legal provisions.
(1) For our everyday business purposes. This reason incorporates sharing information under §§160.14 and 160.15 and with service providers pursuant to §160.13 of this part other than the purposes specified in paragraphs C.2(d)(2) or C.2(d)(3) of these Instructions.
(2) For our marketing purposes. This reason incorporates sharing information with service providers by an institution for its own marketing pursuant to §160.13 of this part. An institution that shares for this reason may choose to provide an opt-out.
(3) For joint marketing with other financial companies. This reason incorporates sharing information under joint marketing agreements between two or more financial institutions and with any service provider used in connection with such agreements pursuant to §160.13 of this part. An institution that shares for this reason may choose to provide an opt-out.
(4) For our affiliates’ everyday business purposes—information about transactions and experiences. This reason incorporates sharing information specified in sections 603(d)(2)(A)(i) and (ii) of the FCRA. An institution that shares for this reason may choose to provide an opt-out.
(5) For our affiliates’ everyday business purposes—information about creditworthiness. This reason incorporates sharing information pursuant to section 603(d)(2)(A)(iii) of the FCRA. An institution that shares for this reason must provide an opt-out.
(6) For our affiliates to market to you. This reason incorporates sharing information specified in section 624 of the FCRA. This reason may be omitted from the disclosure table when: the institution does not have affiliates (or does not disclose personal information to its affiliates); the institution’s affiliates do not use personal information in a manner that requires an opt-out; or the institution provides the affiliate marketing notice separately. Institutions that include this reason must provide an opt-out of indefinite duration. An institution not required to provide an opt-out under this subparagraph may elect to include this reason in the model form. Note: The CFTC’s Regulations do not address the affiliate marketing rule.
(7) For nonaffiliates to market to you. This reason incorporates sharing described in §§160.7 and 160.10(a) of this part. An institution that shares personal information for this reason must provide an opt-out.
(e) To limit our sharing: A financial institution must include this section of the model form only if it provides an opt-out. The word “‘choice’” may be written in either the singular or plural, as appropriate. Institutions
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must select one or more of the applicable opt-out methods described: telephone, such as by a toll-free number; a Web site; or use of a mail-in opt-out form. Institutions may include the word "toll-free" before telephone, as appropriate. An institution that allows consumers to opt out online must provide either a specific Web address that takes consumers to any part of the mail-in opt-out page or a general Web address that provides a clear and conspicuous direct link to the opt-out page. The opt-out choices made available to the consumer who contacts the institution through these methods must correspond accurately to the "Yes" responses in the third column of the disclosure table. In the part titled "Please note" institutions may insert a number that is 30 or greater in the space marked "[30]." Instructions on voluntary or state privacy law opt-out information are in paragraph C.2(g)(5) of these Instructions.

(1) Questions box. Customer service contact information must be inserted as appropriate, where [phone number] or [Web site] appear. Institutions may elect to provide either a phone number, such as a toll-free number, or a Web address, or both. Institutions may include the words "toll-free" before the telephone number, as appropriate.

(g) Mail-in opt-out form. Financial institutions that include this mail-in form only if they state in the "To limit our sharing" box that consumers can opt out by mail. The mail-in form must provide opt-out options that correspond accurately to the "Yes" responses in the third column in the disclosure table. Institutions that require customers to provide only name and address may omit the section identified as "[account "]". Institutions that require additional or different information, such as a random opt-out number or a truncated account number, to implement an opt-out election should modify the "[account "]" reference accordingly. This includes institutions that require customers with multiple accounts to identify each account to which the opt-out should apply. An institution must enter its opt-out mailing address in the far right of this form (see version 3); or below the form (see version 4). The reverse side of the mail-in opt-out form must not include any content of the model form.

(1) Joint account holder. Only institutions that provide their joint account holders the choice to opt out for only one account holder, in accordance with paragraph C.3(a)(5) of these Instructions, must include in the far left column of the mail-in form the following statement: "If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below. Apply my choice(s) only to me. "The word "choice" may be written in either the singular or plural, as appropriate. Financial institutions that provide insurance products or services, provide this option, and elect to use the model form may substitute the word "policy" for "account" in this statement. Institutions that do not provide this option may eliminate this left column from the mail-in form.

(2) FCRA Section 603(d)(2)(A)(ii) opt-out. If the institution shares personal information pursuant to section 603(d)(2)(A)(ii) of the FCRA, it must include in the mail-in opt-out form the following statement: "Do not share information about my creditworthiness with your affiliates for their everyday business purposes."

(3) FCRA Section 634 opt-out. If the institution incorporates section 634 of the FCRA in accord with paragraph C.2(d)(6) of these Instructions, it must include in the mail-in opt-out form the following statement: "Do not allow your affiliates to use my personal information to market to me."

(4) Nonaffiliate opt-out. If the financial institution shares personal information pursuant to §186.18(a) of this part, it must include in the mail-in opt-out form the following statement: "Do not share my personal information with nonaffiliates to market their products and services to me."

(5) Additional opt-outs. Financial institutions that use the disclosure table to provide opt-out options beyond those required by Federal law must provide those opt-outs in this section of the model form. A financial institution that chooses to offer an opt-out for its own marketing in the mail-in opt-out form must include one of the two following statements: "Do not share my personal information to market to me." or "Do not use my personal information to market to me."

A financial institution that chooses to offer an opt-out for joint marketing must include the following statement: "Do not share my personal information with other financial institutions to jointly market to me."

(h) Barcodes. A financial institution may elect to include a barcode and/or "tagline" (an internal identifier) in 6-point font at the bottom of page one, as needed for information internal to the institution, so long as these do not interfere with the clarity or text of the form.

3. Page Two

(a) General Instructions for the Questions. Certain of the Questions may be customized as follows:

(1) "Who is providing this notice?" This question may be omitted where only one financial institution provides the model form and that institution is clearly identified in the title on page one. Two or more financial institutions that jointly provide the model form must use this question to identify themselves as required by §186.9(f) of this part. Where the list of institutions exceeds four (4) lines, the institution must describe in the response to this question the general types of institutions jointly providing the
notice and must separately identify those institutions, in minimum 8-point font, directly following the “Other important information” box, or, if that box is not included in the institution’s form, directly following the “Definitions.” The list may appear in a multi-column format.

(2) “How does [name of financial institution] protect my personal information?” The financial institution may only provide additional information pertaining to its safeguards practices following the designated response to this question. Such information may include information about the institution’s use of cookies or other measures it uses to safeguard personal information. Institutions are limited to a maximum of 30 additional words.

(3) “How does [name of financial institution] collect my personal information?” Institutions must use five (5) of the following terms to complete the bulleted list for this question: Open an account; deposit money; pay your bills; apply for a loan; use your credit or debit card; seek financial or tax advice; apply for insurance; pay insurance premiums; file an insurance claim; seek advice about your investments; buy securities from us; sell securities to us; direct us to buy securities; make deposits or withdrawals from your account; enter into an investment advisory contract; give us your income information; provide employment information; give us your employment history; tell us about your investment or retirement portfolio; tell us about your investment or retirement earnings; apply for financing; apply for a lease; provide account information; give us your contact information; pay us by check; give us your wage statements; provide your mortgage information; make a wire transfer; tell us who receives the money; tell us where to send the money; show your government-issued ID; show your driver’s license; order a commodity futures or option trade. Institutions that collect personal information from their affiliates and/or credit bureaus must include after the bulleted list the following statement: “We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.” Institutions that do not collect personal information from their affiliates or credit bureaus must do collect information from other companies but do collect information from other companies must include the following statement instead: “We also collect your personal information from other companies.” Only institutions that do not collect any personal information from affiliates, credit bureaus, or other companies can omit both statements.

(4) “Why can’t I limit all sharing?” Institutions that describe state privacy law provisions in the “Other important information” box must use the bracketed sentence: “See below for more on your rights under state law.” Other institutions must omit this sentence.

(5) “What happens when I limit sharing for an account I hold jointly with someone else?” Only financial institutions that provide opt-out options must use this question. Other institutions must omit this question. Institutions must choose one of the following two statements to respond to this question: “Your choices will apply to everyone on your account.” or “Your choices will apply to everyone on your account—unless you tell us otherwise.” Financial institutions that provide insurance products or services and elect to use the model form may substitute the word “policy” for “account” in these statements.

(b) General Instructions for the Definitions.
The financial institution must customize the space below the responses to the three definitions in this section. This specific information must be in italicized lettering to set off the information from the standardized definitions.

(1) Affiliates. As required by §160.6(a)(5) of this part, where [affiliates information] appears, the financial institution must:
(i) If it has no affiliates, state: “[name of financial institution] has no affiliates”;
(ii) If it has affiliates but does not share personal information, state: “[name of financial institution] does not share with our affiliates”;
(iii) If it shares with its affiliates, state, as applicable: “Our affiliates include companies with a common corporate identity of financial institution name; financial companies such as [insert illustrative list of companies]; nonprofit organizations such as [insert illustrative list of companies]; and others, such as [insert illustrative list].”

(2) Nonaffiliates. As required by §160.6(c)(3) of this part, where [nonaffiliates information] appears, the financial institution must:
(i) If it does not share with nonaffiliated third parties, state: “[name of financial institution] does not share with nonaffiliates so they can market to you”; or
(ii) If it shares with nonaffiliated third parties, state, as applicable: “Nonaffiliates we share with can include [list categories of companies such as mortgage companies, insurance companies, direct marketing companies, and nonprofit organizations].”

(3) Joint Marketing. As required by §160.13 of this part, where [jointmarketing information] appears, the financial institution must:
(i) If it does not engage in joint marketing, state: “[name of financial institution] doesn’t jointly market”; or
(ii) If it shares personal information for joint marketing, state, as applicable: “Our joint marketing partners include [list categories of companies such as credit card companies].”

(c) General instructions for the “Other important information” box. This box is optional. The space provided for information in this
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box is not limited. Only the following types of information can appear in this box.
(1) State and/or international privacy law information; and/or
(2) Acknowledgment of receipt form.

[74 FR 62975, Dec. 1, 2009]

APPENDIX B TO PART 160—SAMPLE CLAUSES

This appendix only applies to privacy notices provided before January 1, 2011. Financial institutions, including a group of financial holding company affiliates that use a common privacy notice, may use the following sample clauses, if the clause is accurate for each institution that uses the notice. Note that disclosure of certain information, such as assets, income and information from a consumer reporting agency, may give rise to obligations under the Fair Credit Reporting Act, such as a requirement to permit a consumer to opt out of disclosures to affiliates or designation as a consumer reporting agency if disclosures are made to nonaffiliated third parties.

A–1—CATEGORIES OF INFORMATION YOU COLLECT (ALL INSTITUTIONS)

You may use this clause, as applicable, to meet the requirement of §160.6(a)(1) to describe the categories of nonpublic personal information you collect.

Sample Clause A–1

We collect nonpublic personal information about you from the following sources:

• Information we receive from you on applications or other forms;
• Information about your transactions with us, our affiliates or others; and
• Information we receive from a consumer reporting agency.

A–2—CATEGORIES OF INFORMATION YOU DISCLOSE (INSTITUTIONS THAT DISCLOSE OUTSIDE OF THE EXCEPTIONS)

You may use one of these clauses, as applicable, to meet the requirements of §§160.6(a)(2), (3) and (4) to describe the categories of nonpublic personal information about customers and former customers that you disclose and the categories of affiliates and nonaffiliated third parties to whom you disclose. You may use this clause if you do not disclose nonpublic personal information to any party, other than as is permitted by law.

Sample Clause A–2, Alternative 1

We may disclose nonpublic personal information about you to the following types of third parties:

• Financial service providers, such as [provide illustrative examples, such as “mortgage bankers”];
• Non-financial companies, such as [provide illustrative examples, such as “retailers, direct marketers, airlines and publishers”]; and
• Others, such as [provide illustrative examples, such as “non-profit organizations”].

Sample Clause A–2, Alternative 2

We may disclose all of the information that we collect, as described [describe location in the notice, such as “above” or “below”].

A–3—CATEGORIES OF INFORMATION YOU DISCLOSE AND PARTIES TO WHOM YOU DISCLOSE (INSTITUTIONS THAT DO NOT DISCLOSE OUTSIDE OF THE EXCEPTIONS)

You may use this clause, as applicable, to meet the requirements of §§160.6(a)(2), (3) and (4) to describe the categories of nonpublic personal information about customers and former customers that you disclose and the categories of affiliates and nonaffiliated third parties to whom you disclose. You may use this clause if you do not disclose nonpublic personal information to any party, other than as is permitted by the exceptions in §§160.14 and 160.15.

Sample Clause A–3

We do not disclose any nonpublic personal information about our customers or former customers to anyone, except as permitted by law.

A–4—CATEGORIES OF PARTIES TO WHOM YOU DISCLOSE (INSTITUTIONS THAT DISCLOSE OUTSIDE OF THE EXCEPTIONS)

You may use this clause, as applicable, to describe the categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information other than as permitted by the exceptions in §§160.13, 160.14 and 160.15.

Sample Clause A–4

We may disclose nonpublic personal information about you to the following types of third parties:

• Information about your transactions with us, our affiliates or others, such as [provide illustrative examples, such as “your account balance, payment history, parties to transactions and credit card usage”]; and
• Information we receive from a consumer reporting agency, such as [provide illustrative examples, such as “your creditworthiness and credit history”].
We may also disclose nonpublic personal information about you to nonaffiliated third parties as permitted by law.

A–5—Service Provider/Joint Marketing Exception

You may use one of these clauses, as applicable, to meet the requirements of §160.6(a)(5) related to the exception for service providers and joint marketers in §160.13. If you disclose nonpublic personal information under this exception, you must describe the categories of nonpublic personal information you disclose and the categories of third parties with whom you have contracted.

Sample Clause A–5, Alternative 1

We may disclose the following information to companies that perform marketing services on our behalf or to other financial institutions with which we have joint marketing agreements:

- Information we receive from you on applications or other forms, such as [provide illustrative examples, such as "your name, address, Social Security number, assets and income"];
- Information about your transactions with us, our affiliates, or others, such as [provide illustrative examples, such as "your account balance, payment history, parties to transactions and credit card usage"]; and
- Information we receive from a consumer reporting agency, such as [provide illustrative examples, such as "your creditworthiness and credit history"].

Sample Clause A–5, Alternative 2

We may disclose all of the information we collect, as described [describe location in the notice, such as "above" or "below"] to companies that perform marketing services on our behalf or to other financial institutions with which we have joint marketing agreements.

A–7—Confidentiality and Security (All Institutions)

You may use this clause, as applicable, to meet the requirement of §160.6(a)(6) to describe your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information.

Sample Clause A–7

We restrict access to nonpublic personal information about you to [provide an appropriate description, such as "those employees who need to know that information to provide products or services to you"]. We maintain physical, electronic and procedural safeguards that comply with federal standards to safeguard your nonpublic personal information.

§ 162.1 Purpose and scope.

(a) Purpose. The purpose of this part is to implement various provisions in the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq. (“FCRA”), which provide certain protections to consumer information.

(b) Scope. This part applies to certain consumer information held by the entities listed below. This part shall apply to futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers, regardless of whether they are required to register with the Commission. This part does not apply to foreign futures commission merchants, foreign retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers unless such entity registers with the Commission. Nothing in this part modifies limits or supersedes the requirements set forth in part 160 of this title.

(c) Examples. The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a section illustrate only the issue described in the section and do not illustrate any other issue that may arise in this part.

§ 162.2 Definitions.

(a) Affiliate. The term “affiliate” for the purposes of this part means any person that is related by common ownership or common corporate control with a covered affiliate.

(b) Clear and conspicuous. The term “clear and conspicuous” means reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice.

(c) Common ownership or common corporate control. The term “common ownership or common corporate control” for the purposes of this part means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of a company will be presumed not to control the company.

(d) Company. The term “company” means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) Concise.—

(1) In general. The term “concise” means a reasonably brief expression or statement.

(2) Combination with other required disclosures. A notice required by this part may be concise even if it is combined with other disclosures required or authorized by Federal or state law.

(f) Consumer. Except as otherwise provided, the term “consumer” means an individual person. The term consumer does not include market makers, floor brokers, locals, or individual persons whose information is not collected to determine eligibility for personal, family, or household purposes.

(g) Consumer information. The term “consumer information” means any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report (as defined in section 603(d)(2) of the FCRA). Consumer information also means a compilation of such records. Consumer information does not include information that does not identify individuals, such as aggregate information or blind data.

(h) Covered affiliate. The term “covered affiliate” means a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant or swap dealer, which is subject to the jurisdiction of the Commission.

(i) Dispose or Disposal.—

(1) In general. The terms “dispose” or “disposal” means:

(i) The discarding or abandonment of consumer information; or

(ii) The sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored.
(2) Sale, donation, or transfer of consumer information. The sale, donation, or transfer of consumer information is not considered disposal for the purposes of subpart B.


(k) Eligibility information. The term “eligibility information” means any information that would be a consumer report if the exclusions from the definition of “consumer report” in section 603(d)(2)(A) of the FCRA did not apply. Examples of the type of information that would fall within the definition of eligibility information include an affiliate’s own transaction or experience information, such as information about a consumer’s account history with that affiliate, and other information, such as information from credit bureau reports or applications. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(l) FCRA. The term “FCRA” means the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.).

(m) Financial product or service. The term “financial product or service” means any product or service that a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant or swap dealer could offer that is subject to the Commission’s jurisdiction.


(o) Major swap participant. The term “major swap participant” has the same meaning as in section 1a(33) of the Commodity Exchange Act, 7 U.S.C. 1 et seq., as may be further defined by this title, and includes any person registered as such thereunder.

(p) Person. The term “person” means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

(q) Pre-existing business relationship. The term “pre-existing business relationship” means a relationship between a person, or a person’s licensed agent, and a consumer based on—

(1) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation by this part;

(2) The purchase, rental, or lease by the consumer of a persons’ services or a financial transaction (including holding an active account or policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this part; or

(3) An inquiry or application by the consumer regarding a financial product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this part.

(r) Solicitation—(1) In general. The term “solicitation” means the marketing of a financial product or service initiated by an affiliate to a particular consumer that is—

(i) Based on eligibility information communicated to that covered affiliate by an affiliate that has or previously had the pre-existing business relationship with a consumer as described in this part; and

(ii) Intended to encourage the consumer to purchase or obtain such financial product or service. A solicitation does not include marketing communications that are directed at the general public.

(2) Examples. Examples of what communications constitute solicitations include communications such as a telemarketing solicitation, direct mail, or e-mail, when those communications are directed to a specific consumer based on eligibility information. A solicitation does not include communications that are directed at the general public without regard to eligibility information, even if those communications are intended to encourage consumers to purchase financial products and services from the affiliate initiating the communications.

(s) Swap dealer. The term “swap dealer” has the same meaning as in section 1a(49) of the Commodity Exchange Act,

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§ 162.3 Affiliate marketing opt out and exceptions.

(a) Initial notice and opt out. A covered affiliate may not use eligibility information about a consumer that the covered affiliate receives from an affiliate with the consumer to make a solicitation for marketing purposes to such consumer unless—

(1) It is clearly and conspicuously disclosed to the consumer in writing or if the consumer agrees, electronically, in a concise notice that the person may use shared eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to such consumer; and

(2) The consumer is provided a reasonable opportunity and a reasonable and simple method to opt out, or prohibit the covered affiliate from using eligibility information to make solicitations for marketing purposes to the consumer; and

(3) The consumer has not opted out.

(b) Persons responsible for satisfying the notice requirement. The notice required by this section must be provided:

(1) By an affiliate that has or previously had a pre-existing business relationship with a consumer; or

(2) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or previously had a pre-existing business relationship with the consumer.

(c) Exceptions. These proposed regulations would not apply to the following covered affiliate:

(1) A covered affiliate that has a pre-existing business relationship with a consumer;

(2) Communications between an employer and employee-consumer (or his or her beneficiary) in connection with an employee benefit plan;

(3) A covered affiliate that is currently providing services to the consumer;

(4) If the consumer initiated the communication with the covered affiliate by oral, electronic, or written means;

(5) If the consumer authorized or requested the covered affiliate’s solicitation; or

(6) If compliance by a person with these regulations would prevent that person’s compliance with state insurance laws pertaining to unfair discrimination.

(d) Making solicitations.—(1) When a solicitation occurs. A covered affiliate makes a solicitation for marketing purposes if the person—

(i) Receives eligibility information from an affiliate;

(ii) Uses that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation about the covered affiliate’s financial products or services; or

(C) Decide which of the services or contracts to market to the consumer or tailor the solicitation to that consumer; and

(ii) As a result of the covered affiliate’s use of the eligibility information, the consumer is provided a solicitation.

(2) Receipt of eligibility information. A covered affiliate may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that the covered affiliate may access.

(3) Service providers. Except as provided in paragraph (d)(1)(i) of this section, a covered affiliate receives or uses an affiliate’s eligibility information if a service provider acting on the covered affiliate’s behalf (regardless of whether such service provider is a third party or an affiliate of the covered affiliate) receives or uses that information in the manner described in paragraph (d)(1)(i) or (d)(1)(ii) of this section. All relevant facts and circumstances will determine whether a service provider is acting on behalf of a covered affiliate when it receives or uses an affiliate’s eligibility information in connection with marketing the covered affiliate’s financial products or services.
(4) Use by an affiliate of its own eligibility information. Unless a covered affiliate uses eligibility information that the covered affiliate receives from an affiliate in the manner described in paragraph (d)(2) of this section, the covered affiliate does not make a solicitation subject to this subpart:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or previously had with the consumer to market the covered affiliate’s financial products or services to the consumer; or

(ii) Directs its service provider to use the affiliate’s own eligibility information that it obtained in connection with a pre-existing business relationship it has or previously had with the consumer to market the covered affiliate’s financial products or services to the consumer, and the covered affiliate does not communicate directly with the service provider regarding that use.

(5) Use of eligibility information by a service provider—(i) In general. A covered affiliate does not make a solicitation subject to this subpart if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the covered affiliate may access) receives eligibility information from an affiliate that has or previously had a pre-existing business relationship with the consumer and uses that eligibility information to market the covered affiliate’s financial products or services to the consumer, so long as—

(A) The affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market the covered affiliate’s financial products or services);

(B) The affiliate establishes specific terms and conditions under which the service provider may access and use such affiliate’s eligibility information to market the covered affiliate’s financial products or services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose financial products or services may be marketed to the consumer by the service provider, the types of financial products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider’s compliance with those terms and conditions;

(C) The affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses such affiliate’s eligibility information in accordance with the terms and conditions established by such affiliate relating to the marketing of the covered affiliate’s financial products or services;

(D) The affiliate is identified on or with the marketing materials provided to the consumer; and

(E) The covered affiliate does not directly use its affiliate’s eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) Writing requirements. (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between the affiliate that has or previously had a pre-existing business relationship with the consumer and the service provider; and

(B) The specific terms and conditions established by the affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(e) Relation to affiliate-sharing notice and opt out. Nothing in this rulemaking will limit the responsibility of a covered affiliate to comply with the notice and opt-out provisions under other privacy rules under the FCRA, the GLB Act or the CEA.

§ 162.4 Scope and duration of opt out.

(a) Scope of opt-out election—(1) In general. The consumer’s election to opt out prohibits any covered affiliate subject to the scope of the opt-out notice from using eligibility information received from another affiliate to make solicitations to the consumer.

(2) Continuing relationship—(i) In general. If the consumer establishes a continuing relationship with a covered affiliate or its affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships
that the consumer establishes with a covered affiliate or its affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt out; or
(B) Any other transaction between the consumer and the covered affiliate or its affiliates as described in the notice.

(ii) **Examples of a continuing relationship.** A consumer has a continuing relationship with a covered affiliate or its affiliate if:

(A) The covered affiliate is a futures commission merchant through whom a consumer has opened an account, or that carries the consumer’s account on a fully-disclosed basis, or that effects or engages in commodity interest transactions with or for a consumer, even if the covered affiliate does not hold any assets of the consumer;

(B) The covered affiliate is an introducing broker that solicits or accepts specific orders for trades;

(C) The covered affiliate is a commodity trading advisor with whom a consumer has a contract or subscription, either written or oral, regardless of whether the advice is standardized, or is based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of the particular consumer;

(D) The covered affiliate is a commodity pool operator, and accepts or receives from the consumer, funds, securities, or property for the purpose of purchasing an interest in a commodity pool;

(E) The covered affiliate is a major swap participant that holds securities or other assets as collateral for a loan made to the consumer, even if the covered affiliate did not make the loan or do not affect any transactions on behalf of the consumer; or

(F) The covered affiliate is a swap dealer that regularly effects or engages in swap transactions with or for a consumer even if the covered affiliate does not hold any assets of the consumer.

(3) **No continuing relationship—(i) In general.** If there is no continuing relationship between a consumer and the covered affiliate or its affiliate, and the covered affiliate or its affiliate obtains eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) **Examples of no continuing relationship.** A consumer does not have a continuing relationship with a covered affiliate or its affiliate if:

(A) The covered affiliate has acted solely as a “finder” for a futures commission merchant, and the covered affiliate does not solicit or accept specific orders for trades; or

(B) The covered affiliate has solicited the consumer to participate in a pool or to direct his or her account and he or she has not provided the covered affiliate with funds to participate in a pool or entered into any agreement with the covered affiliate to direct his or her account.

(4) **Menu of alternatives.** A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) **Special rule for a notice following termination of all continuing relationships.** A consumer must be given a new opt-out notice if, after all continuing relationships with the covered affiliate or its affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with the covered affiliate or its affiliate(s) and the consumer’s eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent
§ 162.5 Contents of opt-out notice; consolidated and equivalent notices.

(a) Contents of the opt-out notice—(1) In general. An opt-out notice must be in writing, be clear and conspicuous, as well as concise, and must accurately disclose the following:

(i) The name of the affiliate that has or previously had a pre-existing business relationship with a consumer, which is providing the notice; or

(ii) The list of affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer;

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) A statement that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) A statement that the consumer’s election will apply for the specified period of time and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who have previously elected to opt out, that such consumer does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) Specifying length of time period. If consumer is granted an opt-out period longer than a five-year duration, the opt-out notice must specify the length of the opt-out period.

(3) No revised notice for extension of opt-out period. The duration of an opt-out period may be increased for a period longer than the period specified in the opt-out notice without having to provide a revised notice of the increase to the consumer.

(b) Joint relationships. (1) If two or more consumers jointly obtain a financial product or service, a single opt-out notice may be provided to joint consumers.

(2) Any of the joint consumers may exercise the right to opt out on behalf of each joint consumer.

(3) The opt-out election notice must explain how an opt-out election by a joint consumer will be treated. That is, the notice should specify whether an opt-out election by a joint consumer will be treated as applying to all of the associated joint consumers, or as applying to each joint consumer separately.

(4) If the opt-out election notice provides that each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumer must be
permitted to exercise his or her separate rights to opt out in a single response.

(5) A covered affiliate cannot require all joint consumers to opt out before implementing any opt-out election.

(c) Alternative contents. If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer’s opt-out rights.

(d) Coordinated and consolidated consumer notices. A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the covered affiliate providing the notice, including but not limited to notices in the FCRA or the GLB Act privacy notices.

(e) Equivalent notices. A notice or disclosure that is equivalent to the notice required by this part in terms of content, and that is provided to a consumer together with a notice required by any other provision of law, satisfies the requirements of this section.

(f) Model notices. Model notices are provided in appendix A of this part. These notices were meant to facilitate compliance with this subpart; provided, however, that nothing herein shall be interpreted to require persons subject to this part to use the model notices.

§ 162.7 Reasonable and simple methods of opting out.

(a) In general. A covered affiliate shall be prohibited from using eligibility information about a consumer received from an affiliate to make a solicitation to the consumer about the covered affiliate’s financial products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by this subpart.

(b) Examples. Reasonable and simple methods of opting out include:

(1) Designating a check-off box in a prominent position on an opt-out election form;
(2) Including a reply form and a self-addressed envelope (in a mailing);
(3) Providing an electronic means, if the consumer agrees, that can be electronically mailed or processed through an Internet Web site;
(4) Providing a toll-free telephone number; or
(5) Exercising an opt-out election through whatever means are acceptable under a consolidated privacy notice required under other laws.
§ 162.8 Acceptable delivery methods of opt-out notices.

(a) In general. The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice.

(b) Electronic notices. For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in §1.4 of this title or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq.

§ 162.9 Renewal of opt out.

(a) Renewal notice and opt-out requirement—(1) In general. Since the FCRA provides that opt-out elections can expire in a period of no less than five years, an affiliate that has or previously had a pre-existing business relationship with a consumer must provide a renewal notice to the consumer after such time in order to allow its affiliates to make solicitations. After the opt-out election period expires, its affiliates may make solicitations unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§162.6 through 162.8 of this subpart, and a reasonable opportunity and a reasonable and simple method to renew the opt-out election, and the consumer does not renew the opt out; or

(ii) An exception in Sec. 162.3(c) of this subpart applies.

(2) Renewal period. Each opt-out renewal must be effective for a period of at least five years as provided in §162.4(b) of this subpart.

(3) Affiliates who may provide the renewal notice. The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

(b) Contents of renewal or extension notice. The contents of the renewal notice must include all of the same contents of the initial notices, but also must include:

(1) A statement that the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(2) A statement that the consumer may elect to renew the consumer's previous election; and

(3) If applicable, a statement that the consumer's election to renew will apply for a specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires.

(c) Timing of renewal notice. Renewal notices must be provided in a reasonable period of time before the expiration of the opt-out election period or any time after the expiration of the opt-out period, but before solicitations that would have been prohibited by the expired opt-out election are made to the consumer.

(d) No effect on opt-out period. An opt-out period may not be shortened by sending a renewal notice to the consumer before the expiration of the opt-out period, even if the consumer does not renew the opt-out election.

§§ 162.10–162.20 [Reserved]

Subpart B—Disposal Rules

§ 162.21 Proper disposal of consumer information.

(a) In general. Any covered affiliate must adopt and implement written policies and procedures that address administrative, technical, and physical safeguards for the protection of consumer information. These written policies and procedures must be reasonably designed to:

(1) Insure the security and confidentiality of consumer information;

(2) Protect against any anticipated threats or hazards to the security or integrity of consumer information; and

(3) Protect against unauthorized access to or use of consumer information that could result in substantial harm or inconvenience to any consumer.
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(b) Standard. Any covered affiliate under this part who maintains or otherwise possesses consumer information for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.

(c) Examples. The following examples are “reasonable” disposal measures for the purposes of this subpart—

(1) Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing consumer information so that the information cannot practically be read or reconstructed;

(2) Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information so that the information cannot practically be read or reconstructed; and

(3) After due diligence, entering into and monitoring compliance with a written contract with another party engaged in the business of record destruction to dispose of consumer information in a manner that is consistent with this rule.

(d) Relation to other laws. Nothing in this section shall be construed:

(1) To require a person to maintain or destroy any record pertaining to a consumer that is imposed under Sec. 1.31 or any other provision of law; or

(2) To alter or affect any requirement imposed under any other provision of law; or

(3) To alter or affect any requirement imposed under any other provision of law; or

(4) To alter or affect any requirement imposed under any other provision of law; or

(5) To alter or affect any requirement imposed under any other provision of law; or

(6) To alter or affect any requirement imposed under any other provision of law; or

(7) To alter or affect any requirement imposed under any other provision of law; or

(8) To alter or affect any requirement imposed under any other provision of law; or

(9) To alter or affect any requirement imposed under any other provision of law; or

APPENDIX A TO PART 162—SAMPLE CLAUSES

A. Although use of the model forms is not required, use of the model forms in this appendix (as applicable) complies with the requirement in section 624 of the FCRA for clear, conspicuous, and concise notices.

B. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to “your income”, “your account history”, and “your credit score”.

2. Substituting other types of information for “income”, “account history”, or “credit score” for accuracy, such as “payment history”, “credit history”, or “claims history”.

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as “the [ABC] group of companies,” including without limitation a statement that the entity providing the notice recently purchased the consumer’s account.

4. Substituting other types of affiliates covered by the notice for “commodity advisor”, “futures clearing merchant”, or “swap dealer” affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: “If you previously opted out, you do not need to do so again.”

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address.

A–1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)

A–2 Model Form for Initial Opt-out Notice (Joint Notice)

A–3 Model Form for Renewal Notice (Single-Affiliate Notice)

A–4 Model Form for Renewal Notice (Joint Notice)

A–5 Model Form for Voluntary “No Marketing” Notice

A–1 MODEL FORM FOR INITIAL OPT-OUT NOTICE (SINGLE-AFFILIATE NOTICE)

[YOUR CHOICE TO LIMIT MARKETING]/

[MARKETING OPT OUT]

[Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

You may limit our affiliates in the [ABC] group of companies, such as our [commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that

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we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].

Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice][for x years from when you tell us your choice][for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.]

Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates [for another x years][at least another 5 years].

[Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

—By telephone: 1-877-###-####
—On the Web: www.—.com
—By mail: check the box and complete the form below, and send the form to:
—[Company name]
—[Company address]

Do not allow your affiliates to use my personal information to market to me.

A–2 MODEL FORM FOR INITIAL OPT-OUT NOTICE (JOINT NOTICE)

[YOUR CHOICE TO LIMIT MARKETING]/[MARKETING OPT OUT]

—The [ABC group of companies] is providing this notice.

—[Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

—You may limit the [ABC companies], such as the [ABC commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that we share with them.

—Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

By telephone: 1-877-###-####
On the Web: www.—.com
By mail: check the box and complete the form below, and send the form to:
[Company name]
[Company address]

Your choice to limit marketing offers from [the ABC] companies will apply [until you tell us to change your choice][for x years from when you tell us your choice][for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.]

Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years][at least another 5 years].

A–4 MODEL FORM FOR RENEWAL NOTICE (SINGLE-AFFILIATE NOTICE)

[RENEWING YOUR CHOICE TO LIMIT MARKETING]/[RENEWING YOUR MARKETING OPT OUT]

—[Name of Affiliate] is providing this notice.

—[Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

—You previously chose to limit our affiliates in the [ABC] group of companies, such as our [commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].

—Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

By telephone: 1-877-###-####
On the Web: www.—.com
By mail: check the box and complete the form below, and send the form to:
[Company name]
[Company address]

Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice][for x years from when you tell us your choice][for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.]

Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years][at least another 5 years].
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PART 165—WHISTLEBLOWER RULES

§ 165.2 Definitions.

As used in this part:

165.12 Payment of awards from the Fund, financing of customer education initiatives, and deposits and credits to the Fund.

165.13 Appeals.

165.14 Procedures applicable to the payment of awards.

165.15 Delegations of authority.

165.16 No immunity.

165.17 Awards to whistleblowers who engage in culpable conduct.

165.18 Staff communications with whistleblowers from represented entities.

165.19 Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.

APPENDIX A TO PART 165—GUIDANCE WITH RESPECT TO THE PROTECTION OF WHISTLEBLOWERS AGAINST RETALIATION


SOURCE: 76 FR 53200, Aug. 25, 2011, unless otherwise noted.

§ 165.1 General.

Section 23 of the Commodity Exchange Act, entitled “Commodity Whistleblower Incentives and Protection,” requires the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about violations of the Commodity Exchange Act. This part 165 describes the whistleblower program that the Commission intends to establish to implement the provisions of Section 23, and explains the procedures the whistleblower will need to follow in order to be eligible for an award. Whistleblowers should read these procedures carefully, because the failure to take certain required steps within the time frames described in this part may result in disqualification from receiving an award. Unless expressly provided for in this part, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof.

§ 165.2 Definitions.

As used in this part:
(a) Action. The term “action” generally means a single captioned judicial or administrative proceeding. Notwithstanding the foregoing:

(1) For purposes of making an award under §165.7, the Commission will treat as a Commission action two or more administrative or judicial proceedings brought by the Commission if these proceedings arise out of the same nucleus of operative facts; or

(2) For purposes of determining the payment on an award under §165.14, the Commission will deem as part of the Commission action upon which the award was based any subsequent Commission proceeding that, individually, results in a monetary sanction of $1,000,000 or less, and that arises out of the same nucleus of operative facts.

(b) Aggregate amount. The phrase “aggregate amount” means the total amount of an award granted to one or more whistleblowers pursuant to §165.8.

(c) Analysis. The term “analysis” means the whistleblower’s examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public.

(d) Collected by the Commission. The phrase “collected by the Commission” refers to any funds received, and confirmed by the U.S. Department of the Treasury, in satisfaction of part or all of a civil monetary penalty, disgorgement obligation, or fine owed to the Commission.

(e) Covered judicial or administrative action. The phrase “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the Commodity Exchange Act whose successful resolution results in monetary sanctions exceeding $1,000,000.


(g) Independent knowledge. The phrase “independent knowledge” means factual information in the whistleblower’s possession that is not generally known or available to the public. The whistleblower may gain independent knowledge from the whistleblower’s experiences, communications and observations in the whistleblower’s personal business or social interactions. The Commission will not consider the whistleblower’s information to be derived from the whistleblower’s independent knowledge if the whistleblower obtained the information:

(1) From sources generally available to the public such as corporate filings and the media, including the Internet;

(2) Through a communication that was subject to the attorney-client privilege, unless the disclosure is otherwise permitted by the applicable federal or state attorney conduct rules;

(3) In connection with the legal representation of a client on whose behalf the whistleblower, or the whistleblower’s employer or firm, have been providing services, and the whistleblower seek to use the information to make a whistleblower submission for the whistleblower’s own benefit, unless disclosure is authorized by the applicable federal or state attorney conduct rules;

(4) Because the whistleblower was an officer, director, trustee, or partner of an entity and another person informed the whistleblower of allegations of misconduct, or the whistleblower learned the information in connection with the entity’s processes for identifying, reporting, and addressing possible violations of law;

(5) Because the whistleblower was an employee whose principal duties involved compliance or internal audit responsibilities; or

(6) By a means or in a manner that is determined by a United States court to violate applicable Federal or state criminal law.

(7) Exceptions. Paragraphs (g)(4) and (5) of this section shall not apply if:

(i) The whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;

(ii) The whistleblower has a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct; or

(iii) At least 120 days have elapsed since the whistleblower provided the
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information to the relevant entity’s audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower’s supervisor, or since the whistleblower received the information, if the whistleblower received it under circumstances indicating that the entity’s audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower’s supervisor was already aware of the information.

(h) Independent analysis. The phrase “independent analysis” means the whistleblower’s own analysis, whether done alone or in combination with others.

(i) Information that led to successful enforcement. The Commission will consider that the whistleblower provided original information that led to the successful enforcement of a judicial or administrative action, or related action, in the following circumstances:

(1) The whistleblower gave the Commission original information that was sufficiently specific, credible, and timely to cause the Commission staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of the whistleblower’s original information; or

(2) The whistleblower gave the Commission original information about conduct that was already under examination or investigation by the Commission, the Congress, any other authority of the federal government, a state Attorney General, or securities regulatory authority, any self-regulatory organization, futures association or the Public Company Accounting Oversight Board (except in cases where the whistleblower was an original source of this information as defined in paragraph (i)(1) of this section), and the whistleblower’s submission significantly contributed to the success of the action.

(j) Monetary sanctions. The phrase “monetary sanctions,” when used with respect to any judicial or administrative action, or related action, means—

(1) Any monies, including penalties, disgorgement, restitution, and interest ordered to be paid; and

(2) Any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)) as a result of such action or any settlement of such action.

(k) Original information. The phrase “original information” means information that—

(1) Is derived from the independent knowledge or independent analysis of a whistleblower;

(2) Is not already known to the Commission from any other source, unless the whistleblower is the original source of the information;

(3) Is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information; and

(4) Is submitted to the Commission for the first time after July 21, 2010 (the date of enactment of the Wall Street Transparency and Accountability Act of 2010).

(5) Original information shall not lose its status as original information solely because the whistleblower submitted such information prior to October 24, 2011, provided such information was submitted after July 21, 2010, the
date of enactment of the Wall Street Transparency and Accountability Act of 2010. In order to be eligible for an award, a whistleblower who submits original information to the Commission after July 21, 2010, but prior to October 24, 2011, must comply with the procedure set forth in §165.3(d).

(l) Original source. The whistleblower must satisfy the whistleblower’s status as the original source of information to the Commission’s satisfaction.

(1) Information obtained from another source. The Commission will consider the whistleblower to be an “original source” of the same information that the Commission obtains from another source if the information the whistleblower provide satisfies the definition of original information and the other source obtained the information from the whistleblower or the whistleblower’s representative.

(i) In order to be considered an original source of information that the Commission receives from Congress, any other federal, state or local authority, or any self-regulatory organization, the whistleblower must have voluntarily given such authorities the information within the meaning of this part. In determining whether the whistleblower is the original source of information, the Commission may seek assistance and confirmation from the other authorities or persons described above.

(ii) In the event that the whistleblower claims to be the original source of information that an authority or other entity, other than as set forth in paragraph (l)(1)(i) of this section, provided to the Commission, the Commission may seek assistance and confirmation from such authorities or other entity.

(2) Information first provided to another authority or person. If the whistleblower provides information to Congress, any other federal or state authority, a registered entity, a registered futures association, a self-regulatory organization, or to any of any of the persons described in paragraphs (g)(4) and (5) of this section, and the whistleblower, within 120 days, make a submission to the Commission pursuant to §165.3, as the whistleblower must do in order for the whistleblower to be eligible to be considered for an award, then, for purposes of evaluating the whistleblower’s claim to an award under §165.7, the Commission will consider that the whistleblower provided original information as of the date of the whistleblower’s original disclosure, report, or submission to one of these other authorities or persons. The whistleblower must establish the whistleblower’s status as the original source of such information, as well as the effective date of any prior disclosure, report, or submission, to the Commission’s satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(3) Information already known by the Commission. If the Commission already knows some information about a matter from other sources at the time the whistleblower makes the whistleblower’s submission, and the whistleblower is not an original source of that information, as described above, the Commission will consider the whistleblower an “original source” of any information the whistleblower separately provides that is original information that materially adds to the information that the Commission already possesses.

(m) Related action. The phrase “related action,” when used with respect to any judicial or administrative action brought by the Commission under the Commodity Exchange Act, means any judicial or administrative action brought by an entity listed in §165.11(a) that is based upon the original information voluntarily submitted by a whistleblower to the Commission pursuant to §165.3 that led to the successful resolution of the Commission action.

(n) Successful resolution. The phrase “successful resolution,” when used with respect to any judicial or administrative action brought by the Commission under the Commodity Exchange Act, includes any settlement of such action or final judgment in favor of the Commission. It shall also have the same meaning as “successful enforcement.”

(o) Voluntary submission or voluntarily submitted. (1) The phrase “voluntary
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submission” or “voluntarily submitted” within the context of submission of original information to the Commission under this part, shall mean the provision of information made prior to any request from the Commission, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization to the whistleblower or anyone representing the whistleblower (such as an attorney) about a matter to which the information in the whistleblower’s submission is relevant. If the Commission or any of these other authorities makes a request, inquiry, or demand to the whistleblower or the whistleblower’s representative first, the whistleblower’s submission will not be considered voluntary, and the whistleblower will not be eligible for an award, even if the whistleblower’s response is not compelled by subpoena or other applicable law. For purposes of this paragraph, the whistleblower will be considered to have received a request, inquiry or demand if documents or information from the whistleblower is within the scope of a request, inquiry, or demand that the whistleblower’s employer receives, unless, after receiving the documents or information from the whistleblower, the whistleblower’s employer fails to provide the whistleblower’s documents or information to the requesting authority in a timely manner.

(2) In addition, the whistleblower’s submission will not be considered voluntary if the whistleblower is under a pre-existing legal or contractual duty to report the violations that are the subject of the whistleblower’s original information to the Commission, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization, or a duty that arises out of a judicial or administrative order.

(p) Whistleblower(s). (1) The term “whistleblower” or “whistleblowers” means any individual, or two (2) or more individuals acting jointly, who provides information relating to a potential violation of the Commodity Exchange Act to the Commission, in the manner established by §165.3. A company or another entity is not eligible to be a whistleblower.

(2) Prohibition against retaliation. The anti-retaliation protections under Section 23(h) of the Commodity Exchange Act apply whether or not the whistleblower satisfies the requirements, procedures and conditions to qualify for an award. For purposes of the anti-retaliation protections afforded by Section 23(h)(1)(A)(i) of the Commodity Exchange Act, the whistleblower is a whistleblower if:

(i) The whistleblower possess a reasonable belief that the information the whistleblower is providing relates to a possible violation of the CEA, or the rules or regulations thereunder, that has occurred, is ongoing, or is about to occur; and

(ii) The whistleblower provides that information in a manner described in §165.3.

§ 165.3 Procedures for submitting original information.

A whistleblower’s submission of information to the Commission will be a two-step process.

(a) First, the whistleblower will need to submit the whistleblower’s information to the Commission. The whistleblower may submit the whistleblower’s information:

(1) By completing and submitting a Form TCR online and submitting it electronically through the Commission’s Web site at http://www.cftc.gov; or

(2) By completing the Form TCR and mailing or faxing the form to the Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Fax (202) 418–5975.

(b) Further, to be eligible for an award, the whistleblower must declare under penalty of perjury at the time the whistleblower submits the whistleblower’s information:

(1) By completing and submitting a Form TCR online and submitting it electronically through the Commission’s Web site at http://www.cftc.gov; or

(2) By completing the Form TCR and mailing or faxing the form to the Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Fax (202) 418–5975.

(c) Notwithstanding paragraph (b) of this section, if the whistleblower submitted the whistleblower’s original information to the Commission anonymously, then the whistleblower’s identity must be disclosed to the Commission and verified in a form and manner
§ 165.4 Confidentiality.

(a) In general. Section 23(h)(2) of the Commodity Exchange Act requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except that the Commission may disclose such information in the following circumstances:

(1) When disclosure is required to a defendant or respondent in connection with a public proceeding that the Commission institutes or in another public proceeding that is filed by an authority to which the Commission provides the information, as described below;

(2) When the Commission determines that it is necessary to accomplish the purposes of the Commodity Exchange Act and to protect customers, it may provide whistleblower information to:

The Department of Justice; an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction; a registered entity, registered futures association, or a self-regulatory organization; a state attorney general in connection with a criminal investigation; any appropriate state department or agency, acting within the scope of its jurisdiction; or a foreign futures authority; and


(b) Anonymous whistleblowers. A whistleblower may anonymously submit information to the Commission, however, the whistleblower must follow the procedures in §165.3(c) for submitting original information anonymously. Such whistleblower who anonymously submits information to the Commission must also follow the procedures in §165.7(c) in submitting to the Commission an application for a whistleblower award.

§ 165.5 Prerequisites to the consideration of an award.

(a) Subject to the eligibility requirements described in these rules, the Commission will pay an award to one or more whistleblowers who:

(1) Provide a voluntary submission to the Commission;

(2) That contains original information; and

(3) That leads to the successful resolution of a covered Commission judicial or administrative action or successful enforcement of a related action; and

(b) In order to be eligible, the whistleblower must:

(1) Have given the Commission original information in the form and manner that the Commission requires in §165.3 and be the original source of information;

(2) Provide the Commission, upon its staff’s request, certain additional information, including: explanations and other assistance, in the manner and form that staff may request, in order that the staff may evaluate the use of the information submitted; all additional information in the whistleblower’s possession that is related to the subject matter of the whistleblower’s submission; and testimony or other evidence acceptable to the staff relating to the whistleblower’s eligibility for an award; and

(3) If requested by Commission staff, enter into a confidentiality agreement in a form acceptable to the Commission, including a provision that a violation of the confidentiality agreement may lead to the whistleblower’s ineligibility to receive an award.
§ 165.6 Whistleblowers ineligible for an award.

(a) No award under §165.7 shall be made:

(1) To any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of:

- the Board of Governors of the Federal Reserve System;
- the Office of the Comptroller of the Currency;
- the Board of Directors of the Federal Deposit Insurance Corporation;
- the Director of the Office of Thrift Supervision;
- the National Credit Union Administration Board;
- the Securities and Exchange Commission;
- the Department of Justice;
- a registered entity; a registered futures association; a self-regulatory organization; or a law enforcement organization;

(2) To any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under §165.7;

(3) To any whistleblower who submits information to the Commission that is based on the facts underlying the covered judicial or administrative action submitted previously by another whistleblower;

(4) To any whistleblower who acquired the information the whistleblower gave the Commission from any of the individuals described in paragraphs (a)(1), (2), (3) or (6) of this section;

(5) To any whistleblower who, in the whistleblower’s submission, the whistleblower’s other dealings with the Commission, or the whistleblower’s dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry, or omitted any material fact, where, in the absence of such fact, other statements or representations made by the whistleblower would be misleading;

(6) To any whistleblower who acquired the original information reported to the Commission as a result of the whistleblower’s role as a member, officer or employee of either a foreign regulatory authority or law enforcement organization;

(7) To any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of a foreign regulatory authority or law enforcement organization; or

(8) To any whistleblower who acquired the original information the whistleblower gave the Commission from any other person with the intent to evade any provision of these rules.

(b) Notwithstanding a whistleblower’s ineligibility for an award for any reason set forth in paragraph (a) of this section, the whistleblower will remain eligible for the anti-retaliation protections set forth in Section 23(h)(1) of the Commodity Exchange Act.

§ 165.7 Procedures for award applications and Commission award determinations.

(a) Whenever a Commission judicial or administrative action results in monetary sanctions totaling more than $1,000,000 (i.e., a covered judicial or administrative action) the Commission will publish on the Commission’s Web site a “Notice of Covered Action.” Such Notice of Covered Action will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission covered administrative or judicial action, exceeds $1,000,000 in monetary sanctions. The Commission will not contact whistleblower claimants directly as to Notices of Covered Actions; prospective claimants should monitor the Commission Web site for such Notices. A whistleblower claimant will have 90 days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.

(b) To file a claim for a whistleblower award, the whistleblower must file Form WB–APP, Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act. The whistleblower must sign this form as the claimant and submit it to the Commission by mail or fax to Commodity Futures Trading Commission.
§ 165.8 Amount of award.

If all of the conditions are met for a whistleblower award in connection with a covered judicial or administrative action or a related action, the Commission will then decide the amount of the award pursuant to § 165.7.

(a) Whistleblower awards shall be in an aggregate amount equal to—

(1) Not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the covered judicial or administrative action or related actions; and

(2) Not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the covered judicial or administrative action or related actions.

(b) If the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers as a group be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

§ 165.9 Criteria for determining amount of award.

The determination of the amount of an award shall be in the discretion of the Commission. The Commission may exercise this discretion directly or through delegated authority pursuant to § 165.15.
(a) In determining the amount of an award, the Commission shall take into consideration—

(1) The significance of the information provided by the whistleblower to the success of the covered judicial or administrative action or related action;

(2) The degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action or related action;

(3) The programmatic interest of the Commission in deterring violations of the Commodity Exchange Act by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws;

(4) Whether the award otherwise enhances the Commission’s ability to enforce the Commodity Exchange Act, protect customers, and encourage the submission of high quality information from whistleblowers; and

(5) Potential adverse incentives from oversize awards.

(b) Factors that may increase the amount of a whistleblower's award. In determining whether to increase the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) Significance of the information provided by the whistleblower. The Commission will assess the significance of the information provided by a whistleblower to the success of the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) The nature of the information provided by the whistleblower and how it related to the successful enforcement action, including whether the reliability and completeness of the information provided to the Commission by the whistleblower resulted in the conservation of Commission resources; and

(ii) The degree to which the information provided by the whistleblower supported one or more successful claims brought in the Commission action or related action.

(2) Assistance provided by the whistleblower. The Commission will assess the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower provided ongoing, extensive, and timely cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry;

(ii) The timeliness of the whistleblower’s initial report to the Commission or to an internal compliance or reporting system of business organizations committing, or impacted by, the violations of the Commodity Exchange Act, where appropriate;

(iii) The resources conserved as a result of the whistleblower’s assistance;

(iv) Whether the whistleblower appropriately encouraged or authorized others to assist the staff of the Commission who might otherwise not have participated in the investigation or related action;

(v) The efforts undertaken by the whistleblower to remediate the harm caused by the violations of the Commodity Exchange Act, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations; and

(vi) Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action.

(3) Law enforcement interest. The Commission will assess its programmatic interest in deterring violations of the Commodity Exchange Act by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws. In considering this factor, the Commission may take into account, among other things:

(i) The degree to which an award enhances the Commission’s ability to enforce the commodity laws;

(ii) The degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblower submissions of significant information and assistance, even in cases where the
monetary sanctions available for collection are limited or potential monetary sanctions were reduced or eliminated by the Commission because an entity self-reported a commodities violation following the whistleblower’s related internal disclosure, report, or submission;

(iii) Whether the subject matter of the action is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, whether the whistleblower exposed an industry-wide practice, the type and severity of the commodity violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations;

(iv) The dangers to market participants or others presented by the underlying violations involved in the enforcement action, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed; and

(v) The degree, reliability and effectiveness of the whistleblower’s assistance, including the consideration of the whistleblower’s complete, timely truthful assistance to the Commission and criminal authorities.

(4) Participation in internal compliance systems. The Commission will assess whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems. In considering this factor, the Commission may take into account, among other things:

(i) Whether, and the extent to which, a whistleblower reported the possible Commodity Exchange Act violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and

(ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported Commodity Exchange Act violations.

(c) Factors that may decrease the amount of a whistleblower’s award. In determining whether to decrease the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) Culpability. The Commission will assess the culpability or involvement of the whistleblower in matters associated with the Commission’s action or related actions. In considering this factor, the Commission may take into account, among other things:

(i) The whistleblower’s role in the Commodity Exchange Act violations;

(ii) The whistleblower’s education, training, experience, and position of responsibility at the time the violations occurred;

(iii) Whether the whistleblower acted with scienter, both generally and in relation to others who participated in the violations;

(iv) Whether the whistleblower financially benefitted from the violations;

(v) Whether the whistleblower is a recidivist;

(vi) The egregiousness of any wrongdoing committed by the whistleblower; and

(vii) Whether the whistleblower knowingly interfered with the Commission’s investigation of the violations or related enforcement actions.

(2) Unreasonable reporting delay. The Commission will assess whether the whistleblower unreasonably delayed reporting the Commodity Exchange Act violations. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing;

(ii) Whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry, investigation, or enforcement action; and

(iii) Whether there was a legitimate reason for the whistleblower to delay reporting the violations.

(3) Interference with internal compliance and reporting systems. The Commission will assess, in cases where the whistleblower interacted with his or her entity’s internal compliance or reporting system, whether the whistleblower undermined the integrity of
such system. In considering this factor, the Commission will take into account whether there is evidence provided to the Commission that the whistleblower knowingly:

(i) Interfered with an entity's established legal, compliance, or audit procedures to prevent or delay detection of the reported Commodity Exchange Act violation;

(ii) Made any material false, fictitious, or fraudulent statements or representations that hindered an entity's efforts to detect, investigate, or remediate the reported Commodity Exchange Act violations; or

(iii) Provided any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an entity's efforts to detect, investigate, or remediate the reported Commodity Exchange Act violations.

(d) The Commission shall not take into consideration the balance of the Fund in determining the amount of an award.

§ 165.11 Awards based upon related actions.

Provided that a whistleblower or whistleblowers comply with the requirements in §§ 165.3, 165.5 and 165.7, and pursuant to § 165.8, the Commission or its delegate may grant an award based on the amount of monetary sanctions collected in a "related action" or "related actions" rather than on the amount collected in a covered judicial or administrative action, where:

(a) A "related action" is a judicial or administrative action that is brought by:

(1) The Department of Justice;

(2) An appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction;

(3) A registered entity, registered futures association, or self-regulatory organization;

(4) A State criminal or appropriate civil agency, acting within the scope of its jurisdiction; or

(5) A foreign futures authority; and

(b) The record upon which the award determinations under § 165.7 shall be made shall not include any Commission pre-decisional, attorney-client privilege, attorney work product privilege, or internal deliberative process materials related to the Commission or its staff's determination. To file or settle the related covered judicial or administrative action; and/or whether, to whom and in what amount to make a whistleblower award. Further, the record upon which the award determination under § 165.7 shall be made shall not include any other entity's pre-decisional, attorney-client privilege, attorney work product privilege, or internal deliberative process materials related to its or its staff's determination to file or settle a related action.

§ 165.111 Contents of record for award determinations.

(a) The following items constitute the record upon which the award determination under § 165.7 shall be made:

(1) The whistleblower's Form TCR, "Tip, Complaint or Referral," including related attachments, and other documentation provided by the whistleblower to the Commission;

(2) The whistleblower's Form WB–APP, "Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act," and related attachments;

(3) The complaint, notice of hearing, answers and any amendments thereto;

(4) The final judgment, consent order, or administrative speaking order;

(5) The transcript of the related administrative hearing or civil injunctive proceeding, including any exhibits entered at the hearing or proceeding;

(6) Any other documents that appear on the docket of the proceeding; and

(7) Sworn declarations (including attachments) from the Commission's Division of Enforcement staff regarding any matters relevant to the award determination.
§ 165.12 Payment of awards from the Fund, financing of customer education initiatives, and deposits and credits to the Fund.

(a) The Commission shall pay awards to whistleblowers from the Fund.

(b) The Commission shall deposit into or credit to the Fund:

(1) Any monetary sanctions collected by the Commission in any covered judicial or administrative action that is not otherwise distributed, or ordered to be distributed, to victims of a violation of the Commodity Exchange Act underlying such action, unless the balance of the Fund at the time the monetary sanctions are collected exceeds $100,000,000. In the event the Fund’s value exceeds $100,000,000, any monetary sanctions collected by the Commission in a covered judicial or administrative action that is not otherwise distributed, or ordered to be distributed, to victims of violations of the Commodity Exchange Act or the rules and regulations thereunder underlying such action, shall be deposited into the general fund of the U.S. Treasury.

(2) In the event that the amounts deposited into or credited to the Fund under paragraph (b)(1) of this section are not sufficient to satisfy an award made pursuant to §165.7, then, pursuant to Section 23(g)(3)(B) of the Commodity Exchange Act:

(i) An amount equal to the unsatisfied portion of the award;

(ii) Shall be deposited into or credited to the Fund;

(iii) From any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the Commodity Exchange Act, regardless of whether it qualifies as a “covered judicial or administrative action”; provided, however, that such judicial or administrative action is based on information provided by a whistleblower.

(c) Office of Consumer Outreach. The Commission shall undertake and maintain customer education initiatives through its Office of Consumer Outreach. The initiatives shall be designed to help customers protect themselves against fraud or other violations of the Commodity Exchange Act, or the rules or regulations thereunder. The Commission shall fund the initiatives and may utilize funds deposited into the Fund during any fiscal year in which the beginning (October 1) balance of the Fund is greater than $10,000,000. The Commission shall budget, on an annual basis, the amount used to finance customer education initiatives, taking into consideration the balance of the Fund.

§ 165.13 Appeals.

(a) Any Final Order of the Commission relating to a whistleblower award determination, including whether, to whom, or in what amount to make whistleblower awards, may be appealed to the appropriate court of appeals of the United States not more than 30 days after the Final Order of the Commission is issued.

(b) The record on appeal shall consist of:

(1) The Contents of Record for Award Determinations, as set forth in §165.9; and

(2) The Final Order of the Commission, as set forth in §165.7.

§ 165.14 Procedures applicable to the payment of awards.

(a) A recipient of a whistleblower award is entitled to payment on the award only to the extent that the monetary sanction upon which the award is based is collected in the Commission judicial or administrative action or in a related action.

(b) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made within a reasonable time following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a covered judicial or administrative action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.

(c) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a
reasonable period of time from the time for payment specified by paragraph (b) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:

(1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the Final Order of the Commission is made. If two or more of these Final Orders of the Commission are entered on the same date, then those whistleblowers owed payments will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

(2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

§ 165.15 Delegations of authority.

(a) Delegation of authority to the Executive Director. The Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director or to any Commission employee under the Executive Director’s supervision as he or she may designate, the authority to take the following actions to carry out this part 165 and the requirements of Section 23(h) of Commodity Exchange Act.

(1) Delegated authority under § 165.12(a), (b). The Executive Director’s delegated authority to deposit into or credit collected monetary sanctions to the Fund and the payment of awards therefrom shall be with the concurrence of the General Counsel and the Director of the Division of Enforcement or of their respective designees.

(2) Delegated authority to select a Whistleblower Award Determination Panel that shall be composed of three of the Commission’s Offices or Divisions. The Whistleblower Award Determination Panel shall include neither the Division of Enforcement nor the Office of General Counsel.

(b) Delegation of Authority to Whistleblower Award Determination Panel. The Commission hereby delegates, until such time as the Commission orders otherwise, to the Whistleblower Award Determination Panel the authority to make whistleblower award determinations under this part 165, including the determinations as whether, to whom, or in what amount to make awards. Award determinations in matters involving monetary sanctions in either the Commission’s action or a related action that total more than $15,000,000 (i.e., matters with a maximum potential whistleblower award greater than $5,000,000) must be determined by the heads of the Offices or Divisions comprising the Whistleblower Award Determination Panel. In all other matters, award determinations may be determined by the employee designees of the heads of the Offices or Divisions comprising the Whistleblower Award Determination Panel.

(c) Delegation of Authority to the Whistleblower Office. With the exception of § 165.12, the Commission hereby delegates, until such time as the Commission orders otherwise, to the head of the Whistleblower Office the authority to take any action under this part 165 that is not otherwise delegated to either the Executive Director or the Whistleblower Award Determination Panel under this section, including the authority to administer the Commission’s whistleblower program and liaise with whistleblowers.

§ 165.16 No immunity.

The Commodity Whistleblower Incentives and Protections provisions set forth in Section 23(h) of Commodity Exchange Act and this part 165 do not provide individuals who provide information to the Commission with immunity from prosecution. The fact that an individual may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against the whistleblower based upon the whistleblower’s own conduct in connection with violations of the Commodity Exchange Act and the Commission’s regulations. If such
§ 165.17 Awards to whistleblowers who engage in culpable conduct.

In determining whether the required $1,000,000 threshold has been satisfied for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that is ordered against any entity whose liability is based primarily on conduct that the whistleblower principally directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments pursuant to §165.14.

§ 165.18 Staff communications with whistleblowers from represented entities.

If the whistleblower is a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel, and the whistleblower has initiated communication with the Commission relating to a potential violation of the Commodity Exchange Act, the Commission's staff is authorized to communicate directly with the whistleblower regarding the subject of the whistleblower's communication without seeking the consent of the entity's counsel.

§ 165.19 Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.

The rights and remedies provided for in this part 165 of the Commission's regulations may not be waived by any agreement, policy, form, or condition of employment, including by a predispute arbitration agreement. No predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this Part.

APPENDIX A TO PART 165—GUIDANCE WITH RESPECT TO THE PROTECTION OF WHISTLEBLOWERS AGAINST RETALIATION

Section 23(h)(1) of Commodity Exchange Act prohibits employers from engaging in retaliation against whistleblowers. This provision provides whistleblowers with certain protections against retaliation, including: A federal cause of action against the employer, which must be filed in the appropriate district court of the United States within two (2) years of the employer's retaliatory act; and potential relief for prevailing whistleblowers, including reinstatement, back pay, and compensation for other expenses, including reasonable attorney's fees.

(a) In General. No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(1) In providing information to the Commission in accordance with this part 165; or

(2) In assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.

(b) Enforcement—(1) Cause of Action.—An individual who alleges discharge or other discrimination in violation of section 23(h)(1)(A) of the Commodity Exchange Act may bring an action under section 23(h)(1)(B) of the Commodity Exchange Act in the appropriate district court of the United States for the relief provided in section 23(h)(1)(C) of the Commodity Exchange Act, unless the individual who is alleging discharge or other discrimination in violation of section 23(h)(1)(A) of the Commodity Exchange Act is an employee of the Federal Government, in which case the individual shall only bring an action under section 1221 of title 5, United States Code.

(2) Subpoenas.—A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 23(h)(1)(A) of the Commodity Exchange Act may be served at any place in the United States.

(3) Statute of Limitations.—An action under section 23(h)(1)(B) of the Commodity Exchange Act may not be brought more than 2 years after the date on which the violation reported in Section 23(h)(1)(A) of the Commodity Exchange Act is committed.

(c) Relief.—Relief for an individual prevailing in an action brought under section 23(h)(1)(B) of the Commodity Exchange Act shall include—

1070
Reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(2) The amount of back pay otherwise owed to the individual, with interest; and

(3) Compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney’s fees.

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**COMPLAINTANT 1:**

<table>
<thead>
<tr>
<th>2. Street Address</th>
<th>Apartment/ Unit #</th>
</tr>
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<tbody>
<tr>
<td>City</td>
<td>State/ Province</td>
</tr>
<tr>
<td>State/ Province</td>
<td>ZIP/ Postal Code</td>
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<td>ZIP/ Postal Code</td>
<td>Country</td>
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</table>

| 3. Telephone | Alt. Phone | E-mail Address | Preferred Method of Communication |

| 4. Occupation |

**COMPLAINTANT 2:**

<table>
<thead>
<tr>
<th>1. Last Name</th>
<th>First</th>
<th>M.I.</th>
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<td>Country</td>
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</table>

| 3. Telephone | Alt. Phone | E-mail Address | Preferred Method of Communication |

| 4. Occupation |

**B. ATTORNEY’S INFORMATION (If Applicable – See Instructions)**

1. Attorney’s Name
<table>
<thead>
<tr>
<th>2. Firm Name</th>
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<table>
<thead>
<tr>
<th>C. TELL US ABOUT THE INDIVIDUAL AND/OR ENTITY THE WHISTLEBLOWER HAS A COMPLAINT AGAINST</th>
</tr>
</thead>
<tbody>
<tr>
<td>INDIVIDUAL/ENTITY 1:</td>
</tr>
<tr>
<td>1. Type: Individual ☐ Entity ☐</td>
</tr>
<tr>
<td>If An Individual, Specify Profession:</td>
</tr>
<tr>
<td>If An Entity, Specify Type:</td>
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<tr>
<td>2. Name</td>
</tr>
<tr>
<td></td>
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<tr>
<td>3. Street Address</td>
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<td>4. Phone</td>
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<td>ZIP/Postal Code</td>
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<td>Country</td>
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</tbody>
</table>

| INDIVIDUAL/ENTITY 2:                                                                  |
| 1. Type: Individual ☐ Entity ☐                                                        |
| If an individual, specify profession:                                                 |
| If an entity, specify type:                                                          |
| 2. Name                                                                                 |
|                                                                                       |
| 3. Street Address                                                                      |
| City                                                                                   |
| State/Province                                                                        |
| ZIP/Postal Code                                                                       |
| Country                                                                               |
### D. TELL US ABOUT THE WHISTLEBLOWER’S COMPLAINT

<table>
<thead>
<tr>
<th>4. Phone</th>
<th>E-mail Address</th>
<th>Internet Address</th>
</tr>
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</table>

1. Occurrence Date (mm/dd/yyyy): / 2. Nature of Complaint: /

3a. Has the complainant or counsel had any prior communication(s) with the CFTC concerning this matter?  
YES ☐ | NO ☐

3b. If the answer to 3a is “Yes,” name of CFTC staff member with whom the complainant or counsel communicated.

4a. Have you or your counsel provided the information to any other agency or organization, or has any other agency or organization requested the information or related information from you?  
YES ☐ | NO ☐

4b. If the answer to 4a is “Yes,” please provide details. Use additional sheets, if necessary.

4c. Name and contact information for point of contact at other agency or organization, if known.

5a. Does this complaint relate to an entity of which the complainant is or was an officer, director, counsel, employee, consultant or contractor?  
YES ☐ | NO ☐

5b. If the answer to question 5a is “yes,” has the complainant reported this violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations?  
YES ☐ | NO ☐

5c. If the answer to question 5b is “yes,” please provide details. Use additional sheets, if necessary.
5d. Date on which the complainant took the action(s) described in question 5b (mm/dd/yyyy):
   /    /  

6a. Have you taken any other action regarding your complaint?
   YES ☐   NO ☐

6b. If the answer to question 6a is “yes,” please provide details. Use additional sheets, if necessary.

7a. Type of financial product or investment, if relevant.

7b. Name of financial product or investment, if relevant.

8. State in detail all facts pertinent to the alleged violation. Explain why the complainant believes the facts described constitute a violation of the Commodity Exchange Act (CEA). Use additional sheets, if necessary.

9. Describe all supporting materials in the complainant’s possession and the availability and location of any additional supporting materials not in complainant’s possession. Use additional sheets, if necessary.
10. Describe how and from whom the complainant obtained the information that supports this claim. If any information was obtained from an attorney or in a communication where an attorney was present, identify such information with as much particularity as possible. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. Use additional sheets, if necessary.
11. Identify with particularity any documents or other information in the whistleblower’s submission that the whistleblower believes could reasonably be expected to reveal the whistleblower’s identity and explain the basis for the whistleblower’s belief that the whistleblower’s identity would be revealed if the documents or information were disclosed to a third party.

12. Provide any additional information the whistleblower thinks may be relevant.

**E. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION**

1. Are you, or was the whistleblower at the time the whistleblower acquired the original information, the whistleblower is submitting to the Commission a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Securities and Exchange Commission, a registered entity, a registered futures association, a self-regulatory organization, or any law enforcement organization?

   YES ☐ NO ☐
2. Is the whistleblower providing this information pursuant to a cooperation agreement with the Commodity Futures Trading Commission or another agency or organization?  
   YES ☐ NO ☐

3. Is the whistleblower providing this information before the whistleblower (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of the whistleblower’s submission (i) from the Commodity Futures Trading Commission, (ii) in connection with an investigation, inspection or examination by any registered entity, registered futures association or self-regulatory organization, or (iii) in connection with an investigation by the Congress, or any other federal or state authority?  
   YES ☐ NO ☐

4. Is the whistleblower currently a subject or target of a criminal investigation, or have the whistleblower been convicted of a criminal violation, in connection with the information the whistleblower is submitting to the Commodity Futures Trading Commission?  
   YES ☐ NO ☐

5. Did the whistleblower acquire the information being provided to us from any person described in questions E1 through E5?  
   YES ☐ NO ☐

6. Are you, or was the whistleblower at the time the whistleblower acquired the original information the whistleblower is submitting to the Commission a member, officer, or employee of a foreign regulatory authority or law enforcement organization?  
   YES ☐ NO ☐

7. Use this space to provide additional details relating to the whistleblower’s responses to questions 1 through 5. Use additional sheets, if necessary.

---

**F. WHISTLEBLOWER’S DECLARATION**

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the Commodity Futures Trading Commission, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Print Name

Signature ____________________________ Date ________________

---

**G. COUNSEL CERTIFICATION**
I certify that I have reviewed this form for completeness and accuracy and that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I further certify that I have verified the identity of the whistleblower on whose behalf this form is being submitted by viewing the whistleblower’s valid, unexpired government issued identification (e.g., driver’s license, passport) and will retain an original, signed copy of this form, with Section F signed by the whistleblower, in my records. I further certify that I have obtained the whistleblower’s non-waiveable consent to provide to the Commodity Futures Trading Commission with his or her original signed Form TCR upon request in the event that the Commodity Futures Trading Commission requests it due to concerns that the whistleblower may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry; and that I consent to be legally obligated to do so within 7 calendar days of receiving such a request from the Commodity Futures Trading Commission.

Signature                                      Date

PRIVACY ACT STATEMENT
This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Commodity Futures Trading Commission (CFTC or Commission) inform individuals of the following when asking for information. This form may be used by anyone wishing to provide the CFTC with information concerning a violation of the Commodity Exchange Act or the Commission’s regulations. If the whistleblower is submitting this information for the Commission’s whistleblower award program pursuant to Section 23 of the Commodity Exchange Act, the information provided will enable the Commission to determine the whistleblower’s eligibility for payment of an award. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing laws, rules, or regulations implicated by the information consistent with the confidentiality requirements set forth therein, including pursuant to Section 23 of the Commodity Exchange Act and part 165 of the Commission’s regulations thereunder. Furnishing the information is voluntary, but a decision not to do so may result in the whistleblower not being eligible for award consideration.

Questions concerning this form may be directed to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUBMISSION PROCEDURES
• After completing this Form TCR, please send it electronically, by mail, e-mail or delivery to the Commission: electronically via the Commission’s Web site; by mail or delivery to the Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581; by e-mail to XXXXX.gov; or by facsimile to (202) XXX–XXXX.
  • The whistleblower has the right to submit information anonymously.
  • If the whistleblower is submitting information for the Commission’s whistleblower award program, the whistleblower must submit the whistleblower’s information using this Form TCR.

INSTRUCTIONS FOR COMPLETING FORM TCR

Section A: Information About You
Questions 1–4: Please provide the following information about yourself:
• Last name, first name, and middle initial;
• Complete address, including city, state and zip code;
• Telephone number and, if available, an alternate number where the whistleblower can be reached;
• The whistleblower’s e-mail address (to facilitate communications, we strongly encourage the whistleblower to provide the whistleblower’s email address);
• The whistleblower’s preferred method of communication; and
• The whistleblower’s occupation.

Section B: Information about the Whistleblower’s Attorney. Complete this Section Only if the Whistleblower is Represented by an Attorney in this Matter
Questions 1–4: Provide the following information about the attorney representing the whistleblower in this matter:
• Attorney’s name;
• Firm name;
• Complete address, including city, state and zip code;
• Telephone number and fax number; and
• E-mail address.
Commodity Futures Trading Commission

Section C: Tell Us About the Individual and/or Entity The Whistleblower Has a Complaint Against

If the whistleblower’s complaint relates to more than two individuals and/or entities, the whistleblower may use additional sheets, if necessary.

Question 1: Choose one of the following that best describes the individual’s profession or entity’s type to which the whistleblower’s complaint relates:
- For Individuals: Accountant, analyst, associated person, attorney, auditor, broker, commodity trading advisor, commodity pool operator, compliance officer, employee, executing broker, executive officer or director, financial planner, floor broker, floor trader, trader, unknown, or other (specify).
- For Entities: Bank, commodity trading advisor, commodity pool operator, commodity pool, futures commission merchant, hedge fund, introducing broker, major swap participant, retail foreign exchange dealer, swap dealer, unknown, or other (specify).

Questions 2–4: For each individual and/or entity, provide the following information, if known:
- Full name;
- Complete address, including city, state and zip code;
- Telephone number;
- E-mail address; and
- Internet address, if applicable.

Section D: Tell Us About the Whistleblower’s Complaint

Question 1: State the date (mm/dd/yyyy) that the alleged conduct began.

Question 2: Choose the option that the whistleblower believes best describes the nature of the whistleblower’s complaint. If the whistleblower is alleging more than one violation, please list all that the whistleblower believes may apply. Use additional sheets, if necessary.
- Theft/misappropriation;
- Misrepresentation/omission (i.e., false/misleading marketing/sales literature; inaccurate, misleading or non-disclosure by commodity pool operator, commodity trading advisor, futures commission merchant, introducing broker, retail foreign exchange dealer, major swap participant, swap dealer, or their associated person(s); false/material misstatements in any report or statement);
- Ponzi/pyramid scheme;
- Off-exchange foreign currency, commodity, or precious metal fraud;
- Registration violations (including unregistered commodity pool operator; commodity trading advisor; futures commission merchant; introducing broker; retail foreign exchange dealer; swap dealer; or their associated person(s));
- Trading (after hours trading; algorithmic trading; disruptive trading; front running; insider trading; manipulation/attempted manipulation of commodity prices; market timing; inaccurate quotes/pricing information; program trading; trading suspensions; volatility);
- Fees/mark-ups/commissions (excessive, unnecessary or unearned administrative, commission or sales fees; failure to disclose fees; insufficient notice of change in fees; excessive or otherwise improper spreads or fills);
- Sales and advisory practices (background information on past violations/integrity; breach of fiduciary duty/responsibility; churning/excessive trading; cold calling; conflict of interest; abuse of authority in discretionary trading; failure to respond to client, customer or participant; guarantee against loss; promise to profit; high pressure sales techniques; instructions by client, customer or participant not followed; investment objectives not followed; solicitation methods (e.g., cold calling; seminars);
- Customer accounts (unauthorized trading); identity theft affecting account; inaccurate valuation of Net Asset Value; or
- Other (analyztic complaints; market maker activities; employer/employee disputes; specify other).

Question 3a: State whether the whistleblower or the whistleblower’s counsel has had any prior communications with the CFTC concerning this matter.

Question 3b: If the answer to question 3a is yes, provide the name of the CFTC staff member with whom the whistleblower or the whistleblower’s counsel communicated.

Question 4a: Indicate whether the whistleblower or the whistleblower’s counsel has provided the information the whistleblower is providing to the CFTC to any other agency or organization.

Question 4b: If the answer to question 4a is yes, provide details.

Question 4c: Indicate whether the whistleblower or the whistleblower’s counsel has had any prior communications with the CFTC concerning this matter.

Question 4d: If the answer to question 4b is yes, provide details.

Question 5a: Indicate whether the whistleblower’s complaint relates to an entity of which the whistleblower is, or was in the past, an officer, director, counsel, employee, consultant, or contractor.

Question 5b: If the answer to question 5a is yes, state whether the whistleblower has reported this violation to the whistleblower’s supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations.

Question 5c: If the answer to question 5b is yes, provide details.

Question 5d: Provide the date on which the whistleblower took the actions described in questions 5a and 5b.

Question 6a: Indicate whether the whistleblower has taken any other action regarding the whistleblower’s complaint, including
Section E: Eligibility Requirements

Question 1: State whether the whistleblower is currently, or was at the time the whistleblower acquired the original information that the whistleblower is submitting to the Commodity Futures Trading Commission, a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, National Credit Union Administration, the Securities and Exchange Commission, a registered entity, a registered futures association, a self-regulatory organization, or any law enforcement organization.

Question 2: State whether the whistleblower is providing the information pursuant to a cooperation agreement with the Commodity Futures Trading Commission or with any other agency or organization.

Question 3: State whether the whistleblower is providing this information before the whistleblower (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of the whistleblower’s submission: (i) From the CFTC; (ii) in connection with an investigation, inspection or examination by any registered entity, registered futures association or self-regulatory organization; or (iii) in connection with an investigation by the Congress, or any other federal or state authority.

Question 4: State whether the whistleblower is currently a subject or target of a criminal investigation, or has the whistleblower been convicted of a criminal violation, in connection with the information the whistleblower is submitting to the Commodity Futures Trading Commission.

Question 5: State whether the whistleblower acquired the information the whistleblower is providing to the Securities and Exchange Commission from any individual described in Questions 1 through 5 of this Section.

Question 6: State whether the whistleblower is currently, or was at the time the whistleblower acquired the original information that the whistleblower is submitting to the Commodity Futures Trading Commission, a member, officer, or employee of a foreign regulatory authority or law enforcement organization.

Question 7: Use this space to provide additional details relating to the whistleblower’s responses to questions 1 through 6. Use additional sheets, if necessary.

Section F: Whistleblower’s Declaration

The whistleblower must sign this Declaration if the whistleblower is submitting this information pursuant to the Commodity Futures Trading Commission whistleblower
program and wish to be considered for an award. If the whistleblower is submitting the whistleblower’s information anonymously, the whistleblower must still sign this Declaration, and the whistleblower must provide the whistleblower’s attorney with the original of this signed form.

If the whistleblower is not submitting the whistleblower’s information pursuant to the Commodity Futures Trading Commission whistleblower program, the whistleblower do not need to sign this Declaration.

Section G: Counsel Certification

If the whistleblower is submitting this information pursuant to the Commodity Futures Trading Commission whistleblower program and is doing so anonymously through an attorney, the whistleblower’s attorney must sign the Counsel Certification section.

If the whistleblower is represented in this matter but the whistleblower is not submitting the whistleblower’s information pursuant to the Commodity Futures Trading Commission whistleblower program, the whistleblower’s attorney does not need to sign the Counsel Certification Section.
**A. APPLICANT’S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)**

<table>
<thead>
<tr>
<th>1. Last Name</th>
<th>First</th>
<th>M.I.</th>
<th>Social Security No.</th>
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<tbody>
<tr>
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<tr>
<td>3. Telephone</td>
<td>Alt. Phone</td>
<td>E-mail Address</td>
<td></td>
</tr>
</tbody>
</table>

**B. ATTORNEY’S INFORMATION (IF APPLICABLE – SEE INSTRUCTIONS)**

| 1. Attorney’s Name | |
| 2. Firm Name | |
| 3. Street Address | |
| City | Province | Zip/Postal Code | Country |
| 4. Telephone | Fax | E-mail Address | |

**C. TIP/COMPLAINT DETAILS**

| 1. Manner in which original information was submitted to CFTC | CFTC website | Mail | Fax | Other |
| 2a. Tip, Complaint or Referral (TCR) Number | 2b. Date TCR referred to in 2a submitted to CFTC |
| 2c. Subject(s) of the Tip, Complaint or Referral: | |

**D. NOTICE OF COVERED ACTION**


### E. CLAIMS PERTAINING TO RELATED ACTIONS

1. Name of agency or organization to which the whistleblower provided the whistleblower’s information.

2. Name and contact information for point of contact at agency or organization, if known.

3a. Date the whistleblower provided the whistleblower’s information (mm/dd/yyyy)  
3b. Date action filed by agency/organization (mm/dd/yyyy)  

4a. Case Name  
4b. Case Number  

### F. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION

1. Is the whistleblower currently, or was the whistleblower at the time the whistleblower acquired the original information the whistleblower submitted to the CFTC, a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Securities and Exchange Commission, a registered entity, a registered futures association, a self-regulatory organization, any law enforcement organization, or a foreign regulatory authority or law enforcement organization?  
   YES ☐ NO ☐

2. Did the whistleblower provide the information identified in Section C above pursuant to a cooperation agreement with the CFTC or another agency or organization?  
   YES ☐ NO ☐

3. Did the whistleblower acquire the information the whistleblower provided to the CFTC from any person described in questions F1 through F2?  
   YES ☐ NO ☐

4. If the whistleblower answered “yes” to any of questions 1 through 3 above, please provide details. Use additional sheets, if necessary.

5a. Did the whistleblower provide the information identified in Section C above before the whistleblower (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of the whistleblower’s submission: (i) from the CFTC; (ii) in connection with an investigation, inspection or examination by any registered entity, registered futures association or self-regulatory organization; or (iii) in connection with an investigation by the Congress, or any other federal or state authority?  
   YES ☐ NO ☐
5b. If the whistleblower answered “yes” to question 5a, please provide details. Use additional sheets, if necessary.

6a. Is the whistleblower currently a subject or target of a criminal investigation, or have the whistleblower been convicted of a criminal violation, in connection with the information identified in Section C above and upon which the whistleblower’s application for an award is based? YES ☐ NO ☐

6b. If the whistleblower answered “Yes” to question 6a, please provide details. Use additional sheets, if necessary.

G. ENTITLEMENT TO AWARD

Explain the basis for the whistleblower’s belief that the whistleblower is entitled to an award in connection with the whistleblower’s submission of information to the CFTC, or to another agency in a related action. Provide any additional information the whistleblower thinks may be relevant in light of the criteria for determining the amount of an award set forth in Section 23 of the Commodity Exchange Act and Part 165 of the Commission’s Regulations thereunder. Include any supporting documents in the whistleblower’s possession or control, and use additional sheets, if necessary.

H. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the CFTC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

<table>
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<th>Print Name</th>
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<tbody>
<tr>
<td>Signature</td>
<td>Date</td>
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</table>
Questions concerning this form may be directed to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

GENERAL

• This form should be used by persons making a claim for a whistleblower award in connection with information provided to the CFTC or to another agency in a related action. In order to be deemed eligible for an award, the whistleblower must meet all the requirements set forth in Section 23 of the Commodities Exchange Act and the rules thereunder.

• The whistleblower must sign the Form WB–APP as the claimant. If the whistleblower provided the whistleblower’s information to the CFTC anonymously, the whistleblower must now disclose the whistleblower’s identity on this form and the whistleblower’s identity must be verified in a form and manner that is acceptable to the CFTC prior to the payment of any award.

• If the whistleblower is filing the whistleblower’s claim in connection with information that the whistleblower provided to the CFTC, then the whistleblower’s Form WB–APP, and any attachments thereto, must be received by the CFTC within ninety (90) days of the date of the Notice of Covered Action or the date of a final judgment in a related action to which the claim relates.

• If the whistleblower is filing the whistleblower’s claim in connection with information the whistleblower provided to another agency in a related action, then the whistleblower’s Form WB–APP, and any attachments there to, must be received by the CFTC prior to the payment of any award.

INSTRUCTIONS FOR COMPLETING FORM WB–APP

Section A: Applicant’s Information

Questions 1–3: Provide the following information about yourself:

• First and last name, and middle initial, and social security number;

• Complete address, including city, state and zip code;

• Telephone number and, if available, an alternate number where the whistleblower can be reached; and

• E-mail address.

Section B: Attorney’s Information

If the whistleblower is represented by an attorney in this matter, provide the information requested. If the whistleblower is not represented by an attorney in this matter, leave this Section blank.

Questions 1–4: Provide the following information about the attorney representing the whistleblower in this matter:

• Attorney’s name;

• Firm name;

• Complete address, including city, state and zip code;

• Telephone number and fax number; and

• E-mail address.

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which the whistleblower’s original information was submitted to the CFTC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number to which this claim relates.

Question 2b: Provide the date on which the whistleblower submitted the whistleblower’s information to the CFTC.

Question 2c: Provide the name of the individual(s) or entity(s) to which the whistleblower’s tip, complaint, or referral related.

Section D: Notice of Covered Action

The process for making a claim for a whistleblower award begins with the publication of a “Notice of a Covered Action” on the Commission’s Web site. This Notice is published whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000. The Notice is published on the Commission’s Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold required for a whistleblower to be potentially eligible for an award. The Commission
will not contact whistleblower claimants directly as to Notices of Covered Actions; prospective claimants should monitor the Commission Web site for such Notices.

**Section E: Claims Pertaining to Related Actions**

**Question 1:** Provide the name of the agency or organization to which the whistleblower provided the whistleblower’s information.

**Question 2:** Provide the name and contact information for the whistleblower’s point of contact at the agency or organization, if known.

**Question 3a:** Provide the date on which the whistleblower provided the whistleblower’s information to the agency or organization referenced in question E1.

**Question 3b:** Provide the case number referenced in Notice of Covered Action.

**Question 4a:** Provide the case name referenced in Notice of Covered Action.

**Question 4b:** Provide the date on which the whistleblower provided the whistleblower’s information.

**Question 5a:** State whether the whistleblower was a subject or target of a judicial or administrative action filed by the Commission or to another agency in connection with an investigation, inspection or examination by any registered entity, self-regulatory organization or self-regulatory organization, any law enforcement or law enforcement organization, foreign regulatory authority or law enforcement organization.

**Question 5b:** If the whistleblower answered “yes” to question 5a, please provide details. Use additional sheets if necessary.

**Question 6a:** State whether the whistleblower voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission or to another agency in connection with an investigation, inspection or examination by any registered entity, self-regulatory organization or self-regulatory organization, any law enforcement or law enforcement organization, or a foreign regulatory authority or law enforcement organization.

**Question 6b:** If the whistleblower answered “yes” to question 6a, please provide details. Use additional sheets if necessary.

**Section F: Eligibility Requirements and Other Information**

**Question 1:** State whether the whistleblower is the subject or target of a criminal investigation, or has been convicted of a criminal violation, in connection with the information upon which the whistleblower’s application for an award is based.

**Question 2:** Provide the notice number of the Commission’s regulations applying to this Section.

**Question 3:** Provide the date on which that administrative action was filed by the Commission or to another agency in connection with an investigation, inspection or examination by any registered entity, self-regulatory organization, any law enforcement or law enforcement organization, or a foreign regulatory authority or law enforcement organization.

**Question 4:** Provide the case name referenced in Notice of Covered Action.

**Question 5:** If the whistleblower answered “yes” to questions 1 through 3 of this Section, please provide details.

**Question 6:** State whether the whistleblower provided the information submitted to the CFTC before the whistleblower (or anyone representing the whistleblower) received any request, inquiry or demand that relates to the subject matter of the whistleblower’s submission: (i) From the CFTC; (ii) in connection with an investigation, inspection or examination by any registered entity, self-regulatory organization or self-regulatory organization, or (iii) in connection with an investigation by the Congress, or any other federal or state authority.

**Question 7:** If the whistleblower answered “yes” to question 6a, please provide details. Use additional sheets if necessary.

**Section G: Entitlement to Award**

**This section is optional.** Use this section to explain the basis for the whistleblower’s belief that the whistleblower is entitled to an award in connection with the whistleblower’s submission of information to the Commission or to another agency in connection with a related action. Specifically, address how the whistleblower believes the whistleblower voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission, or a related action. Refer to §165.11 of part 165 of the Commission’s Regulations for further information concerning the relevant award criteria. The whistleblower may use additional sheets, if necessary.

**Section 23(c)(1)(B) of the CEA requires the Commission to consider in determining the amount of an award the following factors:** (a) The significance of the information provided by a whistleblower to the success of the Commission action or related action; (b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (c) the programmatic interest of the Commission in deterring violations of the Commodity Exchange Act (including Regulations under the Act) by making
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awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (d) whether the award otherwise enhances the Commission’s ability to enforce the Commodity Exchange Act, protect customers, and encourage the submission of high quality information from whistleblowers. Address these factors in the whistleblower’s response as well.

Section H: Declaration

This section must be signed by the claimant.

PART 166—CUSTOMER PROTECTION RULES

Sec.
166.1 Definitions.
166.2 Authorization to trade.
166.3 Supervision.
166.4 Branch offices.
166.5 Dispute settlement procedures.

AUTHORITY: 7 U.S.C. 1a, 2, 6b, 6d, 6g, 6h, 6k, 6l, 6o, 7, 12a, 21, and 23, as amended by the Commodity Futures Modernization Act of 2000, appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

§ 166.1 Definitions.

(a) The term Commission registrant as used in this part means any person who is registered or required to be registered with the Commission pursuant to the Act or any rule, regulation, or order thereunder.

(b) [Reserved]

(c) The term customer as used in this part means any person trading, intending to trade, or receiving or seeking advice concerning any commodity interest, including any existing or prospective client or subscriber of a commodity trading advisor or existing or prospective participant in a commodity pool, but the term does not include a person who is acting in the capacity of a Commission registrant with respect to the trade.

(d) The term commodity account as used in this part means the account of a customer in which any commodity interest is, or is intended to be, traded.


§ 166.2 Authorization to trade.

No futures commission merchant, retail foreign exchange dealer, introducing broker or any of their associated persons may directly or indirectly effect a transaction in a commodity interest for the account of any customer unless before the transaction the customer, or person designated by the customer to control the account:

(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—

(1) The precise commodity interest to be purchased or sold; and

(2) The exact amount of the commodity interest to be purchased or sold); or

(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.


§ 166.3 Supervision.

Each Commission registrant, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to
§ 166.4 Branch offices.

Each branch office of each Commission registrant must use the name of the firm of which it is a branch for all purposes, and must hold itself out to the public under such name. The act, omission or failure of any person acting for the branch office, within the scope of his employment or office, shall be deemed the act, omission or failure of the Commission registrant as well as of such person.

[48 FR 35304, Aug. 3, 1983]

§ 166.5 Dispute settlement procedures.

(a) Definitions. (1) The term claim or grievance as used in this section shall mean any dispute that:

(A) Arises out of any transaction executed on or subject to the rules of a designated contract market,

(B) Is executed or effected through a member of such facility, a participant transacting on or through such facility or an employee of such facility, and

(C) Does not require for adjudication the presence of essential witnesses or third parties over whom the facility does not have jurisdiction and who are not otherwise available.

(ii) Arises out of any retail forex transaction (as defined in § 5.1(m) of this chapter).

(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.

(3) The term Commission registrant as used in this section means a person registered under the Act as a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, or associated person.

(b) Voluntariness. The use by customers of dispute settlement procedures shall be voluntary as provided in paragraphs (c) and (g) of this section.

(c) Customers. No Commission registrant shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows:

(1) Signing the agreement must not be made a condition for the customer to utilize the services offered by the Commission registrant.

(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and provisions specified in this section. A futures commission merchant or introducing broker may obtain such endorsement as provided in § 1.55(d) of this chapter for the following classes of customers only:

(i) A plan defined as a government plan or church plan in section 3(32) or section 3(33) of title I of the Employee Retirement Income Security Act of 1974 or a foreign person performing a similar role or function subject as such to comparable foreign regulation; and

(ii) A person who is a “qualified eligible participant” or a “qualified eligible client” as defined in § 4.7 of this chapter.

(3) The agreement may not require any customer to waive the right to seek reparations under section 14 of the Act and part 12 of this chapter. Accordingly, such customer must be advised in writing that he or she may seek reparations under section 14 of the Act by an election made within 45 days after the Commission registrant notifies the customer that arbitration will be demanded under the agreement. This notice must be given at the time when the Commission registrant notifies the customer of an intention to arbitrate. The customer must also be advised that if he or she seeks reparations under section 14 of the Act and the Commission declines to institute reparations proceedings, the claim or
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grievance will be subject to the pre-existing arbitration agreement and must also be advised that aspects of the claim or grievance that are not subject to the reparations procedure (i.e., do not constitute a violation of the Act or rules thereunder) may be required to be submitted to the arbitration or other dispute settlement procedure set forth in the pre-existing arbitration agreement.

(4) The agreement must advise the customer that, at such time as he or she may notify the Commission registrant that he or she intends to submit a claim to arbitration, or at such time as such person notifies the customer of its intent to submit a claim to arbitration, the customer will have the opportunity to elect a qualified forum for conducting the proceeding.

(5) Election of forum. (i) Within ten business days after receipt of notice from the customer that he or she intends to submit a claim to arbitration, or at the time a Commission registrant notifies the customer of its intent to submit a claim to arbitration, the Commission registrant must provide the customer with a list of organizations whose procedures meet Acceptable Practices established by the Commission for dispute resolution, together with a copy of the rules of each forum listed. The list must include:

(A) The designated contract market, if applicable and if available, upon which the transaction giving rise to the dispute was executed or could have been executed;

(B) A registered futures association;

(C) At least one other organization that will provide the customer with the opportunity to select the location of the arbitration proceeding from among several major cities in diverse geographic regions and that will provide the customer with the choice of a panel or other decision-maker composed of at least one or more persons, of which at least a majority are not members or associated with a member of the designated contract market, if applicable, or employee thereof, and that are not otherwise associated with the designated contract market (mixed panel), if applicable. Provided, however, that the list of qualified organizations provided by a Commission registrant that is a floor broker need not include a registered futures association unless a registered futures association has been authorized to act as a decision-maker in such matters.

(ii) The customer shall, within forty-five days after receipt of such list, notify the opposing party of the organization selected. A customer’s failure to provide such notice shall give the opposing party the right to select an organization from the list.

(6) Fees. The agreement must acknowledge that the Commission registrant will pay any incremental fees that may be assessed by a qualified forum for provision of a mixed panel, unless the arbitrators in a particular proceeding determine that the customer has acted in bad faith in initiating or conducting that proceeding.

(7) Cautionary Language. The agreement must include the following language printed in large boldface type:

Three forums exist for the resolution of commodity disputes: civil court litigation, reparations at the Commodity Futures Trading Commission (CFTC) and arbitration conducted by a self-regulatory or other private organization.

The CFTC recognizes that the opportunity to settle disputes by arbitration may in some cases provide many benefits to customers, including the ability to obtain an expeditious and final resolution of disputes without incurring substantial costs. The CFTC requires, however, that each customer individually examine the relative merits of arbitration and that your consent to this arbitration agreement be voluntary.

By signing this agreement, you: (1) May be waiving your right to sue in a court of law; and (2) are agreeing to be bound by arbitration of any claims or counterclaims which you or [name] may submit to arbitration under this agreement. You are not, however, waiving your right to elect instead to petition the CFTC to institute reparations proceedings under Section 14 of the Commodity Exchange Act with respect to any dispute that may be arbitrated pursuant to this agreement. In the event a dispute arises, you will be notified if [name] intends to submit the dispute to arbitration. If you believe a violation of the Commodity Exchange Act is involved and if you prefer to request a section 14 “Reparations” proceeding before the CFTC, you will have 45 days from the date of such notice in which to make that election.

You need not sign this agreement to open or maintain an account with [name]. See 17 CFR 166.5.
(d) Enforceability. A dispute settlement procedure may require parties utilizing such procedure to agree, under applicable state law, submission agreement or otherwise, to be bound by an award rendered in the procedure, provided that the agreement to submit the claim or grievance to the procedure was made in accordance with paragraph (c) or (g) of this section or that the agreement to submit the claim or grievance was made after the claim or grievance arose. Any award so rendered shall be enforceable in accordance with applicable law.

(e) Time limits for submission of claims. The dispute settlement procedure established by a designated contract market shall not include any unreasonably short limitation period foreclosing submission of customers' claims or grievances or counterclaims.

(f) Counterclaims. A procedure established by a designated contract market under the Act for the settlement of customers' claims or grievances against a member or employee thereof may permit the submission of a counterclaim in the procedure by a person against whom a claim or grievance is brought. The designated contract market may permit such a counterclaim where the counterclaim arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties, or third persons over whom the designated contract market does not have jurisdiction. Other counterclaims arising out of a transaction subject to the Act and rules promulgated thereunder for which the customer utilizes the services of the registrant may be permissible where the counterclaim arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties, or third persons over whom the designated contract market does not have jurisdiction. Other counterclaims arising out of a transaction subject to the Act and rules promulgated thereunder for which the customer utilizes the services of the registrant may be permissible where the counterclaim arises out of a transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties, or third persons over whom the designated contract market does not have jurisdiction.

(g) Eligible contract participants. A person who is an "eligible contract participant" as defined in section 1a(12) of the Act may negotiate any term of an agreement or understanding with a Commission registrant in which the eligible contract participant agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure provided for in the agreement.

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Subpart A—Standards Governing Commission Review of Applications for Registration as a Futures Association Under Section 17 of the Act

§ 170.1 Demonstration of purposes (section 17(b)(1) of the Act).

A futures association must demonstrate that it will be able to carry out the purposes of section 17 of the Act. Since a basic purpose of a futures association is to regulate the practices of its members, an association should demonstrate that it will require its members to adhere to regulatory requirements governing their business practices at least as stringent as those imposed by the Commission. For example, the association should be prepared to establish and maintain in accordance with §1.52 of this chapter, a financial compliance program for those members of the association who are futures commission merchants.

§ 170.2 Membership restrictions (section 17(b)(2) of the Act).

If it appears to the Commission to be necessary or appropriate in the public interest and to carry out the purposes of section 17 of the Act, a futures association may restrict its membership to individuals registered by the Commission in a particular capacity or to individuals doing business in a particular geographical region or to firms having a particular level of capital assets or which engage in a specified amount of business per year.

[48 FR 35305, Aug. 3, 1983]

§ 170.3 Fair and equitable representation of members (section 17(b)(5) of the Act).

A futures association must assure fair and equitable representation of the views and interests of all association members in the procedures providing for the adoption, amendment or repeal of any association rule, in an association’s procedure for the selection of association officers and directors and in all other phases of the association’s affairs and activities, including disciplinary and membership hearings. No single group or class of association members shall dominate or otherwise exercise disproportionate influence on any governing board of an association or on any disciplinary or membership panel of such an association. Non-members of the association shall be represented wherever practicable on any board or hearing panel of the association.

§ 170.4 Allocation of dues (section 17(b)(6) of the Act).

Dues imposed on members of a futures association must be allocated equitably among members and may not be structured in a manner constituting a barrier to entry of any person seeking to engage in commodity-related business activities.

§ 170.5 Prevention of fraudulent and manipulative practices (section 17(b)(7) of the Act).

A futures association must establish and maintain a program for the protection of customers and option customers, including the adoption of rules to protect customers and option customers and customer funds and to promote fair dealing with the public. These rules shall set forth the ethical standards for members of the association in their business dealings with the public. An applicant association must also demonstrate its capability to foster a professional atmosphere among its members, including an acceptance of an adherence to the ethical standards, and to monitor and enforce compliance with the customer and option customer protection program.

(Secs. 2(a)(1), 4c(a)–(d), 4d, 4f, 4g, 4k, 4m, 4n, 8a, 15 and 17, Commodity Exchange Act (7 U.S.C. 2, 4, 6c(a)–(d), 6d, 6f, 6g, 6k, 6m, 6n, 12a, 19 and 21; 5 U.S.C. 552 and 552b))

[47 FR 57020, Dec. 22, 1982]

§ 170.6 Disciplinary proceedings (sections 17(b)(8) and (b)(9) of the Act).

A futures association must provide a fair and orderly procedure with respect to disciplinary actions brought against association members or persons associated with members. These rules governing such disciplinary actions shall contain, at a minimum, the procedural safeguards contained in section 17(b)(9) of the Act. In addition, an association, in disciplining its members should demonstrate that it will:

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§ 170.7  Membership denial (section 17(b)(9) of the Act).

A futures association must provide a fair and orderly procedure for processing membership applications and for affording any person to be denied membership an opportunity to submit evidence in response to the grounds for denial stated by the association. The procedures governing denials of membership in the association shall contain, at a minimum, the procedural safeguards contained in section 17(b)(9) of the Act.

(Approved by the Office of Management and Budget under control number 3038-0022)

§ 170.8  Settlement of customer disputes (section 17(b)(10) of the Act).

A futures association must be able to demonstrate its capacity to promulgate rules and to conduct proceedings that provide a fair, equitable and expeditious procedure, through arbitration or otherwise, for the voluntary settlement of a customer’s claim or grievance brought against any member of the association or any employee of a member of the association. Such rules shall conform to and be consistent with section 17(b)(10) of the Act and be consistent with the guidelines and acceptable practices for dispute resolution found within appendix A and appendix B to part 38 of this chapter.

([66 FR 42288, Aug. 10, 2001])

§ 170.9  General standard.

An applicant seeking registration as a futures association by the Commission must demonstrate the association’s ability to comply with standards and requirements set forth in this part. The applicant must also demonstrate its ability to satisfy the provisions of section 17 of the Act as well as other applicable legal considerations, including that the association will promote fair and open competition among its members and will conduct its affairs consistent with the public interest to be protected by the antitrust laws. The Commission shall not register an applicant association unless the Commission finds that the applicant has satisfied the conditions and requirements of section 17 of the Act and of this part and that registration will be in the public interest.

§ 170.10  Proficiency examinations (sections 4p and 17(p) of the Act).

A futures association may prescribe different training standards and proficiency examinations for persons registered in more than one capacity: Provided, That nothing contained in the Act or these regulations, including any exemption from registration for persons registered in another capacity, shall be deemed to preclude the establishment of training standards and a proficiency examination requirement for functions performed in such other capacity.

([48 FR 35305, Aug. 3, 1983])

Subpart B—Registration Statement of Futures Associations to be Submitted to the Commission

§ 170.11  Form of registration statement; review of registration statement.

(a) Any association seeking registration by the Commission as a futures association must file with the Commission a letter requesting that the association be registered by the Commission as a futures association and accompany the letter with the following:
(1) The constitution, charter or articles of incorporation of the association,
(2) the bylaws of the association,
(3) any other rules, resolutions or regulations of the association corresponding to the foregoing,
(4) a detailed description of the association’s organization, membership and rules of procedure and
(5) a detailed statement of the association’s capability to comply with the provisions of section 17 of the Act and this
part. This letter and the accompanying information shall be considered as the registration statement of the association. This letter and the accompanying information shall be filed with the Secretariat of the Commission at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(b) At any time after an applicant’s registration statement has been filed, the applicant association shall submit to the Commission any supporting or additional information concerning the application of the association as the Commission may request.

(c) If it appears to the Commission, after reviewing any registration statement filed by an applicant association, that the applicant has not satisfied the requirements for registration set forth in section 17 of the Act or of this part, the Commission may, in its discretion, notify the applicant in writing to that effect. Such notice shall specify those requirements of section 17 or of this part which do not appear to have been satisfied and shall afford the applicant a period of at least 60 days in which to respond to the Commission’s notice by demonstrating or achieving compliance with the requirements specified by the Commission or otherwise. An applicant may withdraw its registration statement from Commission consideration at any time within such 60 day period.

(Approved by the Office of Management and Budget under control number 3038-0022)

[44 FR 20651, Apr. 6, 1979, as amended at 67 FR 62353, Oct. 7, 2002]

§ 170.12 Delegation of authority to Director of the Division of Clearing and Intermediary Oversight.

The Commission hereby delegates, until the Commission orders otherwise, to the Director of the Division of Clearing and Intermediary Oversight the authority to take any of the actions enumerated in §§170.11 (b) and (c). Notwithstanding the provisions of this section, if the Director believes it appropriate, he may submit the matter to the Commission for its consideration.

[44 FR 20651, Apr. 6, 1979, as amended at 67 FR 62353, Oct. 7, 2002]
§ 171.1 Scope of rules.

(a) Matters included. Unless specifically excluded by subsection (b), this part governs review by the Commission, pursuant to sections 17(h), (i) and (o) of the Commodity Exchange Act ("Act"), as amended, of any disciplinary action, membership denial action, registration action or member responsibility action taken by the National Futures Association or any registered futures association. Unless specifically indicated, references in this part to the National Futures Association shall also include any other registered futures association.

(b) Matters excluded. The Commission will not review under these rules the following decisions by the National Futures Association:

(1) A decision in a disciplinary action if the party aggrieved by the decision knowingly failed to pursue the right to appeal an adverse decision to the Appeals Committee of the National Futures Association and there are no extraordinary circumstances that otherwise warrant Commission consideration of the aggrieved party’s appeal;

(2) A decision in an arbitration action brought pursuant to section 17(b)(10) of the Act or any rule of the National Futures Association;

(3) Suspension of a member based solely on that member’s failure to pay National Futures Association dues;

(4) A decision to disqualify any member for service on the National Futures Association Board of Directors, Business Conduct Committees, Hearing Committee or arbitration panels pursuant to the standards for service adopted by the National Futures Association to implement Commission rule 1.63;

(5) Suspension of a member or a person associated with a member based solely on that person’s failure to pay an arbitration award or a settlement agreement resulting from an arbitration action brought pursuant to section 17(b)(10) of the Act or rules and regulations of the National Futures Association, or a settlement agreement resulting from a mediation proceeding sponsored by the National Futures Association, unless there are extraordinary circumstances that involve something more than the ministerial application of a predetermined sanction, or raise a colorable claim that the National Futures Association has acted arbitrarily.

Subpart B—Notice and Effective Date of Final Decisions in Disciplinary, Membership Denial and Registration Actions

171.20 Notice of final decision.
171.21 Effective date of final decisions in disciplinary, membership denial and registration actions.
171.22 Notice of appeal.
171.23 Submission of the record.
171.24 Appeal brief.
171.25 Answering brief.
171.26 Limited participation by interested persons.

Subpart C—Commission Review of Final Decisions in Disciplinary, Membership Denial and Registration Actions

171.30 Scope of review.
171.31 Commission review in the absence of an appeal.
171.32 Oral argument.
171.33 Final decision by the Commission.
171.34 Standards of review.

Subpart D—Commission Review of Decisions by the National Futures Association in Member Responsibility Actions

171.40 Notice of the commencement of a member responsibility action.
171.41 Petition for a stay of effective date of a member responsibility action pending a hearing by the National Futures Association.
171.42 Notice of a final decision of the National Futures Association in a member responsibility action.
171.43 Petition for a stay of the effective date of a final decision of the National Futures Association in a member responsibility action.
171.44 Notice of appeal.
171.45 General procedures.
171.46 Standards of review.

Subpart E—Delegation of Functions

171.50 Delegation to the General Counsel.

Authority: 7 U.S.C. 4a, 12a and 21, unless otherwise noted.

Source: 55 FR 41068, Oct. 9, 1990, unless otherwise noted.

Subpart A—General Provisions
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(c) Appeals from excluded decisions. If the General Counsel, or any employee under the General Counsel’s supervision as the General Counsel may designate, determines that a notice of appeal submitted to the Commission is from a decision that is excluded from review under this part, the notice of appeal may be stricken and ordered to be returned to the aggrieved party who submitted it.

(d) Applicability of these part 171 rules. Unless otherwise ordered, these rules will apply in their entirety to all appeals and matters relating thereto filed on or after October 31, 1990. Any part 171 proceeding commenced prior to October 31, 1990 continues to be governed by the procedures established in former subpart F of part 3 of the Commission’s regulations, if applicable, or by the procedures established for that proceeding by Commission order. Parties to any proceeding pending on October 31, 1990 may, within 30 days after October 31, 1990 by written stipulation executed by all parties, and filed with the Proceedings Clerk before the Commission’s final decision is rendered, elect to have the matter governed by the provisions of these part 171 rules.

§ 171.2 Definitions.

For purposes of this part:

(a) Commission decisional employee includes any member of the Commission staff who participates in, or may be reasonably expected to participate in, the decisionmaking process in any proceeding under this part. It does not include Commissioners or members of their personal staff.

(b) Disciplinary action includes any proceeding brought by the National Futures Association to enforce its rules that may result in expulsion, suspension, censure, bar from association with a member, fine in excess of $100 or any comparable sanction being imposed on a member or a person associated with a member.

(c) Ex parte communication shall include any communication, whether written or oral, which is both (1) not preceded by reasonable notice to all parties to a proceeding, and (2) not made on the public record. It shall not include requests made to the Commission’s Opinions Section or Office of Proceedings for status reports or for an interpretation of these rules.

(d) Final Decision means the decision that terminates the proceeding before the National Futures Association on the action that is the subject of the notice of appeal filed with the Commission.

(e) To mail means to place in the United States mail (or to deliver to an overnight delivery service of established reliability) a properly addressed and post-paid document. Unless otherwise provided, documents filed and served by mail must be sent by no less expeditious means than first class United States mail.

(f) Member includes any person admitted to membership by the National Futures Association.

(g) Member Responsibility Action includes any action in which, based on a finding by the National Futures Association that there is reason to believe that summary action is necessary to protect the commodity futures markets, customers or other members of the association, a member or person associated with a member may be summarily suspended from membership or association with a member, required to restrict operations or otherwise directed to take remedial action.

(h) Membership denial action includes any proceeding brought by the National Futures Association to (1) determine whether an applicant should be admitted to membership or be permitted to be associated with a member, (2) determine whether an applicant should be admitted to membership or be permitted to be associated with a member on a conditional basis, or (3) determine whether to revoke or restrict the membership or association status of any person who is a member or is associated with a member.

(i) Party includes any person who has been the subject of a disciplinary action, membership denial action, or registration action by the National Futures Association; the National Futures Association itself; any person granted permission to participate as a party pursuant to §171.27 of these rules; and any Division of the Commission.
§ 171.3 Business address; hours.

The principal office of the Commission is located at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. It is open each day, except Saturdays, Sundays, and legal public holidays, from 8:15 a.m. until 4:45 p.m., eastern standard time or eastern daylight savings time, whichever is currently in effect in Washington, DC.

§ 171.4 Computation of time.

(a) In general. In computing any period of time prescribed by these rules or allowed by the Commission, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday. In the latter circumstances, the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. Intermediate Saturdays, Sundays, and legal holidays shall be included in the computation unless the period of time prescribed or allowed is less than seven (7) days.

(b) Date of service of orders. In computing any period of time involving the date of service of an order, the date of service shall be the date the order is mailed or hand delivered by the Proceedings Clerk, which, unless otherwise indicated, shall be the date stamped on the order by the Proceedings Clerk.

§ 171.5 Extension of time.

(a) In general. Except as otherwise provided by these rules, for good cause shown, on its own motion or the motion of a party, the Commission may at any time extend or shorten the time prescribed by the rules for filing any document. In any instance in which a specific time period is not prescribed in this part for an action to be taken concerning any matter, the Commission may establish a time for that action.

(b) Filing of motion. Absent extraordinary circumstances, when the time period that has been prescribed for an action to be taken concerning any matter exceeds seven days, requests for extension of that time period shall be filed at least five days prior to the expiration of the time period provided and shall include an explanation of the facts and circumstances that justify the extension.

§ 171.6 Ex parte communications.

(a) Prohibition of ex parte communications. (1) No party to a proceeding before the Commission under these rules and no person outside the Commission who has a direct or indirect interest (pecuniary or otherwise) in the outcome of the proceeding or might be aggrieved by the outcome of the proceeding shall make or knowingly cause to be made an ex parte communication relevant to the merits of the proceeding subject to these rules to a Commissioner, member of the personal staff of a Commissioner or Commission decisional employee.

(2) No Commissioner, member of the personal staff of a Commissioner or Commission decisional employee shall make or knowingly cause to be made to a party to a proceeding subject to these rules or to any person outside the Commission who has a direct or indirect interest (pecuniary or otherwise) in the outcome of the proceeding or might be aggrieved by the outcome of the proceeding.
the proceeding, an ex parte communication relevant to the merits of the proceeding subject to these rules.

(b) Procedure for handling. Any Commissioner, member of a Commissioner's personal staff or Commission decisional employee who receives, or who makes or knowingly causes to be made, an ex parte communication prohibited by paragraph (a) of this section shall:

(1) Place on the public record of the proceeding:
   (i) All such written communications; and
   (ii) Memoranda stating the substance of all such oral communications; and
   (iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (b)(1)(i) and (b)(1)(ii) of this section; and

(2) Promptly give written notice of such communications and responses thereto to all parties to the proceeding to which the communication or responses relate.

(c) Sanctions. (1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (a)(1) of this section, the Commission may, to the extent consistent with the interests of justice and the policies of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any Commissioner, member of a Commissioner's personal staff or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (a)(2) of this section may be deemed to have engaged in conduct of the type proscribed by 17 CFR 140.735–3(b)(3).

(d) Applicability of prohibitions and sanctions against ex parte communications. (1) The prohibitions of this section shall begin to apply at the time that a copy of a notice of appeal has been filed in accordance with §171.22, §171.41 or §171.43 of this part. The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review by the Commission or to review by any court.

(ii) The Commission may, by specific order entered in a particular proceeding, determine that these prohibitions shall commence from some date prior, or shall continue until a date subsequent, to the times specified in paragraph (d)(1)(i) of this section.

2 The sanctions in paragraph (c)(1) of this section shall not apply to a person making a prohibited communication (or causing it to be made) absent evidence that the person acted with actual or constructive knowledge that the person receiving the communication was a Commissioner, member of the personal staff of a Commissioner or a Commission decisional employee.

§ 171.7 [Reserved]

§ 171.8 Filing with the Proceedings Clerk.

(a) How to file. Any document that is required by this part to be filed with the Proceedings Clerk shall be filed by delivering it in person or by first-class mail or a more expeditious form of United States mail, or by overnight or similar commercial delivery service to: Proceedings Clerk, Office of Proceedings, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581; or faxing the document to (202) 418-5532 or emailing it to PROC_Filings@cftc.gov. To be timely filed under this part, a document must be delivered or mailed to the Proceedings Clerk within the time prescribed for filing.

(b) Proof of filing. Proof of filing shall be made by attaching to the document for filing an affidavit of filing executed by any person 18 years of age or older or a proof of filing executed by an attorney-at-law qualified for practice before the Commission. The proof of filing shall certify that the attached document was delivered by hand to the Proceedings Clerk or deposited in the United States mail, with first-class postage prepaid (or delivered to an
overnight delivery service of established reliability), addressed to the Proceedings Clerk, Office of Proceedings, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, on the date specified in the affidavit.

(c) Formalities of filing—(1) Number of copies. Unless otherwise provided, any person filing a document with the Proceedings Clerk shall provide two conforming copies in addition to the original.

(2) Title page. All documents filed with the Proceedings Clerk shall include, at the head thereof, or on a title page, the name of the Commission, the title of the proceeding, the docket number (if one has been assigned by the Proceedings Clerk), the subject of the particular document and the name of the person on whose behalf the document is being filed.

(3) Paper, spacing, type. All documents filed with the Proceedings Clerk shall be typewritten, must be on one grade of good white paper no less than 8 or more than 8½ inches wide and no less than 10½ or more than 11½ inches long, and must be bound on the top only. They must be double-spaced, except for long quotations (3 or more lines) and footnotes which should be single-spaced.

(4) Signature—(i) By whom. All documents filed with the Proceedings Clerk shall be signed personally in ink:

(A) By the person or persons on whose behalf they are tendered for filing;

(B) By a general partner, officer or director of a partnership, corporation, association, or other legal entity; or

(C) By an attorney-at-law having authority with respect thereto. The Proceedings Clerk may require appropriate evidence of the authority of a person subscribing a document on behalf of another person.

(ii) Effect. The signature on any document of any person acting either for himself or as attorney or agent for another constitutes certification by him that:

(A) He has read the document subscribed and knows the contents thereof;

(B) If executed in any representative capacity, it was done with full power and authority to do so;

(C) To the best of his knowledge, information, and belief, every statement contained in the document is true and not misleading; and

(D) The document is not being interposed for delay.

§ 171.9 Service.

(a) General requirements. Unless otherwise provided, all documents filed with the Proceedings Clerk must be served upon all parties on the same day.

(b) Manner of service. Service may be made by personal delivery (effective upon receipt), mail (effective upon deposit), facsimile (effective upon receipt) or electronic mail (effective upon receipt). When service is effected by mail, the time within which the person served may respond thereto shall be increased by five days. Parties who consent to accepting service of documents by electronic means in the underlying NFA action also consent to accepting service by the same means in proceedings under this part 171.

(c) Proof of service. Proof of service shall be made by filing with the Proceedings Clerk, at the same time as the relevant document is filed, an affidavit of service executed by a person 18 years of age or older or a certificate of service executed by an attorney qualified to practice before the Commission. The proof of service shall state that service has been made and identify the person served, the date of service and the manner of service.

(d) Designation of person to receive service. The first document filed in a proceeding by or on behalf of any party must state on the first page the name, postal address and telephone number of the person authorized to receive service for the party of all documents filed in the proceeding. Thereafter, service of documents shall be made upon the person authorized unless service on a different authorized person or on the party himself is authorized by the Commission, or unless pursuant to §171.8 the person authorized is changed by the party upon due notice to all other parties. Parties shall file and serve notification of any changes in the information provided pursuant to this
subparagraph as soon as practicable after the change occurs.

(e) Service of orders and decisions. A copy of all notices, rulings, opinions and orders of the Commission shall be served on each of the parties by the Proceedings Clerk. Service will be deemed complete upon deposit in the mail.


§ 171.10 Motions.

(a) In general. An application for a form of relief not otherwise specifically provided for in this part shall be made by a written motion, filed with the Proceedings Clerk. The motion shall state the relief sought, basis for the relief and the authority relied upon.

(b) Answers to motions. Unless otherwise provided, a party may file a written response to a motion within five days after service of the motion.

(c) Motions for procedural orders. Motions for procedural orders, including motions for extensions of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of the action.

(d) Dilatory motions. Frivolous or repetitive motions dealing with the same subject matter shall not be permitted.

§ 171.11 Sanctions.

In the event a party fails to fulfill his obligations under these Rules, the Commission may impose appropriate sanctions including dismissal of the appeal or summary reversal of the decision under appeal. Sanctions may be imposed on the motion of a party or on the Commission’s own motion.

§ 171.12 Settlement.

At any time before the Commission has reached a final determination in a proceeding, the parties may request dismissal of the appeal based on a settlement agreement. If, in its view, the settlement is consistent with the public interest, the Commission will dismiss the proceeding.

§ 171.13 Practice before the Commission.

(a) Practice—(1) By non-attorneys. An individual may appear pro se (on his own behalf); a general partner may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

(2) By attorneys. An attorney-at-law who is admitted to practice before the highest court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with the provisions of part 14 of this chapter may represent parties as an attorney in proceedings before the Commission.

(b) Debarment of counsel or representative during the course of a proceeding. Whenever, while a proceeding is pending before the Commission, the Commission finds that a person acting as counsel or representative for any party to the proceeding is guilty of contumacious conduct, the Commission may order that such person be precluded from further acting as counsel or representative in a proceeding subject to these rules. The Commission may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(c) Withdrawal from representation. Withdrawal from representation of a party will be only by leave of the Commission. Such leave to withdraw may be subject to conditions including submission of an affidavit averring that the party represented has actual knowledge of the withdrawal and providing the name and address of a successor counsel (or representative) or a statement that the represented party has determined to proceed pro se. If the party proceeds pro se, the statement shall include the address where the party can thereafter be served.

§ 171.14 Waiver of rules.

To prevent undue hardship on any party or for other good cause shown, the Commission may waive any rule in this part in a particular case and may order proceedings in accordance with its direction. Such an order shall be based upon a determination that no
§ 171.20 Notice of final decision.

(a) When required. The National Futures Association shall promptly serve all parties, as well as the Proceedings Clerk and the Secretary of the Commission, with a written notice of any final decision in a disciplinary action, membership denial action or registration action subject to these rules. The notice may be contained in the written decision issued by the National Futures Association.

(b) Content of the notice. At a minimum, the notice shall provide the following information:

(1) The names of the parties to the proceeding;

(2) The date the notice was served and the effective date of the decision;

(3) A statement informing the parties of their right to appeal the decision to the Commission pursuant to § 171.28 as well as their right to seek a stay of the effective date of the decision pursuant to § 171.27.

(4) For a disciplinary action:

(i) A statement setting forth the relevant acts of practices engaged in or omitted by the parties to the proceeding;

(ii) A statement setting forth the specific rule or rules of the association violated by the relevant acts or practices or omissions to act of the parties to the proceeding;

(iii) A statement setting forth the penalty imposed and the basis for its imposition.

(5) For a membership action:

(i) The specific grounds for the denial, bar, expulsion, or restriction;

(ii) The findings made concerning those grounds;

(iii) An explanation of the result reached in light of the grounds for ineligibility found and the findings made.

(6) For a registration action:

(i) The statutory disqualification at issue;

(ii) The findings made concerning the statutory disqualification;

(iii) An explanation of the result reached in light of the statutory disqualification shown and the findings made.

(c) Effect of inadequate notice. (1) If the National Futures Association issues a notice of a final decision subject to these rules that is not substantially consistent with the requirements of this section, and the record does not establish that the errors therein are harmless, the notice may be stricken. The Commission may act on its own motion or on the motion of a party.

(2) When a notice is stricken, the final decision of the National Futures Association shall not be effective until a proper notice is served.

§ 171.22 Effective date of final decisions in disciplinary, membership denial and registration actions.

(a) General rule. A final decision of the National Futures Association in a disciplinary action, membership denial action or registration action shall be effective thirty days after service of the notice described in § 171.21.

(b) Petitions for stay pending review or for an emergency effective date—(1) Stay pending review. Within ten days of service of the notice described in § 171.21, any aggrieved party may seek from the Commission a stay pending consideration of the merits of an appeal by filing and serving an appropriate petition. The mere filing of such a petition shall not stay the effective date of the decision. The burden of persuasion shall rest with the party seeking the stay. If the Commission does not grant the petition prior to the effective date of the decision under review, it shall be deemed denied. All petitions for stay must be accompanied by a notice of appeal.

(2) Emergency effective date. Within ten days of service of the notice described in § 171.21, the National Futures Association may seek from the Commission an order establishing an emergency effective date for the decision by filing and serving an appropriate petition. The mere filing of such a petition
shall not alter the effective date of the decision. The burden of persuasion rests with the National Futures Association. If the Commission does not grant the petition by the date specified as the emergency effective date, it shall be deemed denied.

(3) **Contents of petition for stay and petition for an emergency effective date.** A petition for stay or for an emergency effective date shall be in writing. Material factual allegations shall be supported by an affidavit or other sworn statement unless the parties stipulate that the material facts are not in dispute.

(4) **Response.** Within five days of the service of the petition, a party may file in opposition to the petition. Material factual allegations shall be supported by an affidavit or other sworn statement unless the parties stipulate that the material facts are not in dispute.

(c) **Standards for determining petitions for a stay or an emergency effective date petition.** In reviewing petitions filed under this section, the Commission shall consider:

(1) The likelihood that a challenge to the merits of the decision will be successful; and

(2) The likelihood that the denial of the petition would result in irreparable harm to the petitioner; and

(3) The effect a grant of the petition would have on the opposing party; and

(4) The effect a grant or denial of the petition would have on the public interest.

(d) **Expedited consideration.** If, in its view, it is necessary to protect the petitioner’s right to a meaningful determination of the issues raised in the petition, the Commission may act upon a petition for a stay or for an emergency effective date prior to its receipt of an opposing party’s response. Any party aggrieved by such expedited consideration may seek reconsideration within seven days of service of the decision.

§ 171.23 **Notice of appeal.**

(a) **Time to file.** Any party aggrieved by the final decision of the National Futures Association in a disciplinary, membership denial or registration action may, within thirty days of the National Futures Association’s service of the notice described in §171.21, file a notice of appeal with the Proceedings Clerk. The filing of such a notice shall not stay the effective date of the decision.

(b) **Contents.** The notice of appeal shall consist of a brief statement indicating that the party is requesting Commission review of an action of the National Futures Association. It should identify:

(1) The name and address of the person appealing and, if represented, the name and address of his representative;

(2) The case name and docket number of the National Futures Association proceeding; and

(3) The date of the decision.

(c) **Filing fee.** Each notice of appeal must be accompanied by a nonrefundable filing fee of $100. This amount may be paid by check, bank draft or money order, payable to the Commodity Futures Trading Commission.

(d) **Defective notices of appeal.** Notices of appeal that are untimely or not accompanied by the filing fee shall not be accepted by the Proceedings Clerk absent a showing, by motion, of excusable neglect.

§ 171.24 **Submission of the record.**

Within thirty days after service of a notice of appeal, the National Futures Association shall file with the Proceedings Clerk two copies of the record of the proceeding (as defined by §171.2(k)). The record shall be bound as a unit, chronologically indexed and tabbed, and certified as correct by a duly authorized official, agent or employee of the National Futures Association. The National Futures Association shall serve on the party appealing, in lieu of the record, a copy of the index of the record and a copy of any document in the record not previously served on the party appealing. If the party appealing objects to the materials included or excluded in preparing the record, he shall file his objections with his brief on appeal. The Commission may, at any time, direct that an omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

§ 171.25 **Appeal brief.**

(a) **Time to file.** Any person who has filed a notice of appeal in accordance
with the provisions of §171.23, shall per-
fect the appeal by filing an appeal brief
with the Proceedings Clerk within thir-
ty days after service of the record by
the National Futures Association. The
Commission may dismiss any appeal
for which an appeal brief is not timely
filed.

(b) Contents. Each appeal brief sub-
mitted to the Commission pursuant to
this section shall include, in the order
indicated:

(1) A statement of the issues pre-
sented for review;

(2) A statement of the case. The
statement shall indicate briefly the na-
ture of the case and include a full de-
scription of the action being chal-
lenged. There shall follow a clear and
concise statement of all facts relevant
to the consideration of the appeal with
appropriate citations to the record;

(3) An argument. The argument shall
contain the contentions of the appel-
lant with respect to the issues pre-
sented and the reasons supporting
those contentions. It shall cite specifi-
cally to the relevant authorities and to
those parts of the record that support
appellant’s contentions; and

(4) A conclusion stating the precise
relief sought.

(c) Length of appeal brief. Without
prior leave of the Commission, the ap-
peal brief may not exceed thirty five
pages, exclusive of any table of
contents, table of cases, index and ap-
pendix containing transcripts of testi-
mony, exhibits, statutes, rules, regula-
tions or similar materials.

§171.27 Limited participation by inter-
ested persons.

(a) Upon motion of any interested
person or, on its own motion, the Com-
mision may permit, or solicit, limited
participation in the proceeding by such
interested person. A motion for leave
to participate in the proceeding shall
be filed promptly, shall identify the in-
terest of that person and shall show
why participation in the proceeding by
that person would serve the public in-
terest. If the Commission determines
that participation would serve the pub-
lic interest, it shall by order establish
a supplementary briefing schedule for
the interested person and the parties to
the proceeding.

(b) For purposes of this subsection,
interested person shall include parties
and any other persons who might be
adversely affected or aggrieved by the
outcome of a proceeding; their officers,
agents, employees, associates, affilia-
tes, attorneys, accountants or other
representatives; and any other person
having a direct or indirect pecuniary or
other interest in the outcome of a pro-
ceeding.

§171.28 Participation by Commission
staff.

The Division of Enforcement, the Di-
vision of Clearing and Intermediary
Oversight or the Division of Market
Oversight may participate in any pro-
ceeding by filing a notice of appear-
ance. Such a notice shall be filed and
served on or before the twentieth day
following the date of service of its brief
by the National Futures Association.
The Commission shall by order estab-
lish a supplementary briefing schedule
for the Commission staff and other par-
ties to the proceeding. If it concludes
that participation of the Commission
staff will not serve the public interest,
the Commission shall prohibit further
participation.

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§ 171.30 Scope of review.
On review, the Commission may, in its discretion and after appropriate consideration of the notice given to the parties, consider sua sponte any issues arising from the record before it and may base its determination thereon. The Commission may also limit its consideration to those issues specifically raised in the parties’ briefs, treating all other issues as waived.

§ 171.31 Commission review in the absence of an appeal.
(a) Request by Commission staff. At any time prior to the effective date of a final decision of the National Futures Association in a disciplinary, membership denial or registration action, the Division of Enforcement, the Division of Clearing and Intermediary Oversight or the Division of Market Oversight may file and serve a memorandum requesting the Commission to institute review of the National Futures Association proceeding. The filing of such a memorandum shall stay the effective date of the decision at issue for twenty days.

(b) Response by the National Futures Association. The National Futures Association may file a response to the memorandum of the Commission staff within fifteen days of the service of the memorandum.

(c) Commission determination of staff request. To preserve the status quo while it determines whether review is appropriate, the Commission may extend the stay of the effective date of the decision at issue for an additional 30 days. If the Commission decides to take review, the effective date of the decision at issue shall be stayed pending the decision of the Commission, unless otherwise ordered. The Commission shall by order establish the procedure for submission of both the record of the proceeding and the briefs of the parties to the proceeding.

(d) Commission review on its own motion. At any time prior to the effective date of a final decision of the National Futures Association in a disciplinary, membership denial or registration action, the Commission may take review of a decision by issuing an appropriate order. If the Commission determines that it is appropriate to take review on its own motion, it shall by order establish the procedure for submission of both the record of the proceeding and the briefs of the parties.


§ 171.32 Oral argument.
(a) On motion of Commission. On its own motion, the Commission may, in its discretion, hear oral argument in a proceeding.

(b) On request of party. Any party may file with the Proceedings Clerk a request in writing for the opportunity to present oral argument before the Commission, which the Commission may, in its discretion, grant or deny. A request under this paragraph must be filed concurrently with the party’s brief.

(c) Reporting and transcription. Oral argument before the Commission will be recorded and transcribed unless the Commission directs otherwise. In the event the Commission affords the parties the opportunity to present oral argument before the Commission, the oral argument will proceed in accordance with the provisions of §10.103(b) of this chapter.

§ 171.33 Final decision by the Commission.
(a) Opinion and order. Upon review, the Commission may affirm, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the National Futures Association. The Commission’s decision will be contained in its opinion and order which will be based upon the record before it, including the record of the registered futures association proceeding, briefs submitted to the Commission by the parties and any oral argument made in accordance with §171.32. Except as provided in paragraph (b) of this section, the opinion and order will constitute the final decision of the Commission, effective upon service on
§ 171.34 Standards of review.

(a) Disciplinary actions. In reviewing a final decision of the National Futures Association in a disciplinary action, the Commission shall affirm the order of the National Futures Association, unless the Commission finds that:

(1) The proceedings were not conducted in a manner consistent with fundamental fairness;

(2) The proceedings were not conducted in a manner consistent with the rules of the National Futures Association;

(3) The weight of the evidence does not support the findings of the National Futures Association concerning the relevant acts or practices engaged in or omitted;

(4) The determination that the acts or practices engaged in or omitted violated rules of the National Futures Association does not rest on a reasonable interpretation of the rules at issue;

(5) The National Futures Association’s application of its rules is not consistent with the purposes of the Act;

(6) The National Futures Association’s choice of sanction is excessive or oppressive in light of the violations found having due regard for the public interest.

(b) Membership denial actions. In reviewing a final decision of the National Futures Association in a membership denial action, the Commission shall affirm the order of the National Futures Association, unless the Commission finds that:

(1) The proceedings were not conducted in a manner consistent with fundamental fairness;

(2) The proceedings were not conducted in a manner consistent with the rules of the National Futures Association;

(3) The weight of the evidence does not support the findings made or adopted in the final decision;

(4) The conclusion of the National Futures Association is not consistent with the purposes of the Act.

(c) Registration actions. In reviewing a decision of the National Futures Association in a registration action, the Commission shall affirm the order of the National Futures Association unless the Commission finds that:

(1) The proceedings were not conducted in a manner consistent with fundamental fairness;

(2) The proceedings were not conducted in a manner consistent with the rules of the National Futures Association;

(3) The weight of the evidence does not support the findings made or adopted in the final decision;

(4) The conclusion of the National Futures Association is not consistent with the purposes of the Act.

Subpart D—Commission Review of Decisions by the National Futures Association in Member Responsibility Actions

§ 171.40 Notice of the commencement of a member responsibility action.

The notice of a Member Responsibility Action provided by the National Futures Association pursuant to its rules shall advise the affected parties of their right to petition the Commission pursuant to § 171.41 to stay the effective date of the action pending a hearing before the National Futures
Commodity Futures Trading Commission

§ 171.42 Notice of a final decision of the National Futures Association in a member responsibility action.

(a) When required. The National Futures Association shall promptly serve all parties, as well as the Proceeding Clerk and Secretary of the Commission, with a written notice of any final decision in a member responsibility action. The notice may be contained in the written decision issued by the National Futures Association. If the National Futures Association determines that the decision shall be effective upon issuance, in addition to serving a written notice, it shall also contact the parties and the Proceedings Clerk by telephone to inform them of its determination.
§ 171.43 Petition for a stay of the effective date of a final decision of the National Futures Association in a member responsibility action.

(a) Filing the petition. Within ten days of the service of the notice described in §171.42, any aggrieved party may seek from the Commission a stay of the effective date of the decision of the National Futures Association pending consideration of the merits of an appeal by filing and serving an appropriate petition. The mere filing of such a petition shall not stay the effective date of the decision. The burden of persuasion shall rest with the party seeking the stay.

(b) Contents. A petition for a stay shall be in writing. Material factual allegations shall be supported by an affidavit or other sworn statement unless the parties stipulate that the material facts are not in dispute.

(c) Response. Within five days of the service of the petition, the National Futures Association may file an opposition to the petition. Material factual allegations shall be supported by an affidavit or other sworn statement unless the parties stipulate that the material facts are not in dispute.

(d) Standards for determining petitions for a stay. In reviewing petitions filed under this section, the Commission shall consider:

1. The likelihood that petitioner’s challenge to the merits of the decision will be successful; and
2. The likelihood that the denial of the petition would result in irreparable harm to the petitioner; and
3. The effect a grant of the petition would have on the National Futures Association; and
4. The effect a grant or denial of the petition would have on the public interest.

(e) Expedited consideration. If the suspension, restriction or remedial action imposed by the National Futures Association in a member responsibility action is effective at the time a petition for a stay is filed with the Commission, the Commission shall not delay its decision on the petition to await the receipt of the National Futures Association’s response. If the decision is not effective at the time the petition is filed, the Commission will not act upon the petition prior to the receipt of a response from the National Futures Association unless, in its view, expedited action on the petition is necessary to protect petitioner’s right to a meaningful determination of the right to a stay. If the Commission grants the petition prior to the receipt of the response of the National Futures Association, the association may seek reconsideration of the Commission’s action within seven days of service of the decision.

§ 171.44 Notice of appeal.

(a) Time to file. Any party aggrieved by a final decision of the National Futures Association in a member responsibility action may, within thirty days of the service of the notice described in §171.42, file with the Proceedings Clerk and serve on the National Futures Association a notice of appeal. The filing of such a notice shall not stay the effective date of the decision.

(b) Contents. The notice of appeal shall meet the content requirements of §171.23(b).

(c) Filing fee. Each notice of appeal must be accompanied by a nonrefundable filing fee of $100. This amount may be paid by check, bank draft or money order, payable to the Commodity Futures Trading Commission.
§ 171.50 Delegation to the General Counsel.

(a) The Commission hereby delegates, until it orders otherwise, to the General Counsel, or any employee under the General Counsel’s supervision as the General Counsel may designate, the authority:

(1) To waive or modify any of the requirements of §§ 171.25, 171.26, 171.27 and to waive or modify any requirement of the part 171 Rules insofar as it pertains to changes in the time permitted for filing, or the form, execution, service and filing of documents;

(2) To enter orders under §§ 171.10, 171.12, 171.21 and 171.31(c);

(3) To decline to accept any notice of appeal, or petition for stay pending review, of matters specified in § 171.1(b) and to so notify the appellant and the registered futures association;

(4) To stay the effective date of a decision of the National Futures Association in a disciplinary, membership denial or registration action, or a decision relating to such actions issued by the Commission pursuant to these rules, for a reasonable period of time, not to exceed 10 days, when such a stay is necessary to allow the Commission to consider a petition to stay the effective date of such a decision or a motion for similar relief;

(5) To decline to accept any document which has not been filed or perfected as specified in these rules;

(6) To determine motions seeking permission to participate in a proceeding under § 171.27 and to establish the related briefing schedule;

(7) To establish briefing schedules under § 171.28; and

(8) To enter any order which, in his judgment, will facilitate or expedite Commission review of a decision by the National Futures Association in a disciplinary, membership denial or registration action.

(b) Within seven days after service of a ruling issued pursuant to paragraph
(a) of this section, a party may file with the Proceedings Clerk a petition for Commission reconsideration of the ruling. Unless the Commission orders otherwise, the filing of a petition for reconsideration will not operate to stay the effective date of such ruling.

(c) The General Counsel, or his designee, may submit to the Commission for its consideration any matter which has been delegated pursuant to paragraph (a) of this section.

(d) Nothing in this section will be deemed to prohibit the Commission, at its election, from exercising the authority delegated to the General Counsel, or his designee, under this section.


PART 180—PROHIBITION AGAINST MANIPULATION

Sec. 180.1 Prohibition on the employment, or attempted employment, of manipulative and deceptive devices.

(a) It shall be unlawful for any person, directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly:

(1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;

(2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;

(3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or,

(4) Deliver or cause to be delivered, or attempt to deliver or cause to be delivered, for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate. Notwithstanding the foregoing, no violation of this subsection shall exist where the person mistakenly transmits, in good faith, false or misleading or inaccurate information to a price reporting service.

(b) Nothing in this section shall be construed to require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.

(c) Nothing in this section shall affect, or be construed to affect, the applicability of Commodity Exchange Act section 9(a)(2).

§ 180.2 Prohibition on price manipulation.

It shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.

PART 190—BANKRUPTCY

Sec.

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190.03 Operation of the debtor’s estate subsequent to the primary liquidation date.

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§ 190.01 Definitions.

For purposes of this part:

(a)(1) Account class means each of the following types of customer accounts which must be recognized as a separate class of account by the trustee: futures accounts, foreign futures accounts, leverage accounts, delivery accounts as defined in §190.05(a)(2) of this part, and cleared swaps accounts.

(ii) To the extent that the equity balance, as defined in §190.07 of this part, of a customer in a commodity option, as defined in §1.3 of this chapter, may be commingled with the equity balance of such customer in any domestic commodity futures contract pursuant to regulations under the Act, the aggregate shall be treated for purposes of this part as being held in a futures account.

(ii) To the extent that such equity balance of a customer in a commodity option may be commingled with the equity balance of such customer in any cleared swaps account pursuant to regulations under this act, the aggregate shall be treated for purposes of this part as being held in a cleared swaps account.

(iii) If positions or transactions in commodity contracts that would otherwise belong to one account class (and the money, securities, or other property margining, guaranteeing, or securing such positions or transactions), are, pursuant to a Commission rule, regulation, or order (or a derivatives clearing organization rule approved in accordance with §39.15(b)(2) of this chapter), held separately from other positions and transactions in that account class, and are commingled with positions or transactions in commodity contracts of another account class (and the money, securities, or other property margining, guaranteeing, or securing such positions or transactions), then the former positions (and the relevant money, securities, or other property) shall be treated, for purposes of this part, as being held in an account of the latter account class.

(b) Allowed net equity means the amount calculated as allowed net equity in accordance with §190.07(a).

(c) Bankruptcy Code means, except as the context of the regulations in this part otherwise requires, those provisions of the Bankruptcy Reform Act of 1978, as amended from time to time, relating to ordinary bankruptcies (chapters 1 through 5) and to liquidations (chapter 7 with the exception of subchapter III), together with the Federal rules of bankruptcy procedure relating thereto.

(d) Business day means weekdays, not including Federal holidays.

(e) Calendar day. A calendar day includes the time from midnight to midnight.

(f) Clearing organization shall have the same meaning as that set forth in section 761(2) of the Bankruptcy Code.

(g) Commodity broker means any person who is registered or required to register as a futures commission merchant under the Commodity Exchange Act including a person registered or required to be registered as such under Parts 32 and 33 of this chapter, and a "commodity options dealer," "foreign futures commission merchant," "clearing organization," and "leverage transaction merchant" with respect to which there is a "customer" as those terms are defined in this section, but excluding a person registered as a futures commission merchant under section 4(f)(2) of the Commodity Exchange Act.

(h) Commodity contract shall have the same meaning, subject to paragraph (nn) of this section, as that set forth in section 761(4) of the Bankruptcy Code.

(i) Commodity options dealer shall have the same meaning as that set forth in section 761(6) of the Bankruptcy Code.

(j) Court means the bankruptcy court having jurisdiction over the debtor’s estate.

(k) Cover shall have the same meaning as that set forth in §1.17(j) of this chapter.
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(1) **Customer** shall have the same meaning as that set forth in section 761(9) of the Bankruptcy Code.

(m) **Customer claim of record** means a customer claim which is determinable solely by reference to the records of the debtor.

(n) **Customer class** means each of the following two classes of customers which must be recognized by the trustee: public customers and non-public customers.

(o) **Customer property, customer estate** are used interchangeably to mean the property subject to pro rata distribution in a commodity broker bankruptcy which is entitled to the priority set forth in section 766(h) of the Bankruptcy Code and includes certain cash, securities, and other property as set forth in §190.08(a).

(p) **Dealer option** means an option granted, offered or sold pursuant to section 4c(d) of the Act and the Commission's regulations thereunder.

(q) **Debtor** means an individual, association, partnership, corporation, or trust with respect to which a proceeding is commenced under subchapter IV of chapter 7 of the Bankruptcy Code.

(r) **Equity** means the amount calculated as equity in accordance with §190.07(b)(1).

(s) **Filing date** means the date a petition commencing a proceeding under the Bankruptcy Code is filed.

(t) **Final net equity determination date** means the latest of:

(1) The day immediately following the day on which all commodity contracts held by or for the account of customers of the debtor have been transferred, liquidated or satisfied by exercise or delivery,

(2) The day immediately following the day on which all property other than commodity contracts held for the account of customers has been transferred, returned or liquidated,

(3) The bar date for filing customer proofs of claim, or

(4) The day following the disposition of all disputed claims.

(u) **Foreign future** shall have the same meaning as that set forth in section 761(11) of the Bankruptcy Code.

(v) **Foreign futures commission merchant** shall have the same meaning as that set forth in section 761(12) of the Bankruptcy Code.

(w) **Funded balance** means the amount calculated as funded balance in accordance with §190.07(c).

(x) **House account** means any commodity contract account owned by the debtor.

(y) **In-the-money amount** means:

(1) With respect to a call option, the amount by which the value of the physical commodity or the contract for sale of a commodity for future delivery which is the subject of the option exceeds the strike price of the option; and

(2) With respect to a put option, the amount by which the value of the physical commodity or the contract for sale of a commodity for future delivery which is the subject of the option is exceeded by the strike price of the option.

(z) **Joint account** means any commodity contract account held by more than one person and includes any account of a commodity pool which is not a legal entity.

(aa) **Leverage transaction merchant** shall have the same meaning as that set forth in section 761(14) of the Bankruptcy Code.

(bb) **Net equity** means the amount calculated as net equity in accordance with §190.07(b).

(cc) **Non-public customer** means any person enumerated in the definition of Proprietary Account in §1.3 or §31.4(e) of this chapter, any person excluded from the definition of “foreign futures or foreign options customer” in the proviso to section 30.1(c) of this chapter, or any person enumerated in the definition of Cleared Swaps Proprietary Account in §22.1 of this chapter, in each case, if such person is defined as a “customer” under paragraph (k) of this section.

(dd) **Open commodity contract** means a commodity contract which has been established in fact and which has not expired, been redeemed, been fulfilled by delivery or exercise, or been offset by another commodity contract.

(ee) **Order for relief** means the filing of the petition in bankruptcy in a voluntary case and the adjudication of bankruptcy in an involuntary case.
(ff) Premium means the amount agreed upon between the purchaser and seller, or their agents, for the purchase or sale of a commodity option.

(gg) Primary liquidation date means the first business day immediately following the day on which all commodity contracts have been liquidated or transferred which are not being held open for later transfer in accordance with §190.03.

(hh) Principal contract means a contract which is not traded on a designated contract market, and includes leverage contracts and dealer options, but does not include:

(1) Transactions executed off the floor of a designated contract market pursuant to rules approved by the Commission or rules which the designated contract market is required to enforce, or pursuant to rules of a foreign board of trade located outside the United States, its territories or possessions; or

(2) Cleared swaps contracts.

(ii) Public customer means any person defined as a customer under paragraph (k) of this section except a non-public customer.

(jj) Security shall have the same meaning as that set forth in section 101(36) of the Bankruptcy Code.

(kk) Short term obligation means any security, note, or other obligation with a duration or maturity date of 180 days or less.

(ll) Specifically identifiable property means:

(1) With respect to the following property received, acquired, or held by or for the account of the debtor from or for the account of a customer to margin, guarantee or secure an open commodity contract:

(i) Any security which as of the filing date is:

(A) Held for the account of a customer;

(B) Registered in such customer’s name;

(C) Not transferable by delivery; and

(D) Not a short term obligation; or

(ii) Any warehouse receipt, bill of lading or other document of title which as of the filing date:

(A) Can be identified on the books and records of the debtor as held for the account of a particular customer; and

(B) Is not in bearer form and is not otherwise transferable by delivery.

(2) With respect to open commodity contracts, and except as otherwise provided in paragraph (kk)(7) of this section, any such contract which:

(i) As of the filing date is identified on the books and records of the debtor as held for the account of a particular customer;

(ii) Is a bona fide hedging position or transaction as defined in §1.3 of this chapter or is a commodity option transaction which has been determined by the registered entity to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been approved by the Commission pursuant to section 5c(c) of the Commodity Exchange Act; and

(iii) Is in an account designated in the accounting records of the debtor as a hedging account in accordance with §190.04(e)(1).

(3) With respect to warehouse receipts, bills of lading or other documents of title, or physical commodities received, acquired, or held by or for the account of the debtor for the purpose of making or taking delivery or exercise from or for the account of a customer, any such document of title or commodity which as of the entry of the order for relief can be identified on the books and records of the debtor as received from or for the account of a particular customer as held specifically for the purpose of delivery or exercise.

(4) Any cash or other property deposited prior to the entry of the order for relief to pay for the taking of physical delivery on a long commodity contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date, which cash or other property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the
§ 190.02 Operation of the debtor’s estate subsequent to the filing date and prior to the primary liquidation date.

Subsequent to the filing date and prior to the primary liquidation date, the debtor’s estate shall be operated as follows:

(a) Notices to the Commission and Designated Self-Regulatory Organizations—

(1) General. Each commodity broker which files a petition in bankruptcy shall, at or before the time of such filing, and each commodity broker against which such a petition is filed shall, as soon as possible, but no later than one calendar day after the receipt of notice of such filing, notify the Commission and such broker’s designated self-regulatory organization, if any, in accordance with §190.10(a) of the filing date, the court in which the proceeding has been filed, and the docket number assigned to that proceeding by the court.

(2) Of transfers under section 764(b) of the Bankruptcy Code. As soon as possible, but in no event later than the close of business on third calendar day...
after the order for relief, the trustee, the applicable self-regulatory organization, or the commodity broker must notify the Commission in accordance with §190.10(a) whether such entity or organization intends to transfer or to apply to transfer open commodity contracts on behalf of the commodity broker in accordance with section 764(b) of the Bankruptcy Code and §190.06(e) or (f).

(b) Notices to customers—(1) Specifically identifiable property other than commodity contracts. The trustee must use its best efforts to promptly, but in no event later than two calendar days after entry of the order for relief, commence to publish in a daily newspaper or newspapers of general circulation approved by the court serving the location of each branch office of the commodity broker, for two consecutive days a notice to customers stating that all specifically identifiable property of customers other than open commodity contracts which has not otherwise been liquidated will be liquidated commencing on the sixth calendar day after the second publication date if the customer has not instructed the trustee in writing on or before the fifth calendar day after the second publication date to return such property pursuant to the terms for distribution of specifically identifiable property contained in §190.08(d)(1) and, on the seventh calendar day after such second publication date, if such property has not been returned in accordance with such terms on or prior to that date. Such notice must describe specifically identifiable property in accordance with the definition in this part and must specify the terms upon which that property may be returned. Publication of the form of notice set forth in the appendix to this part will constitute sufficient notice for purposes of this paragraph (b)(1).

(2) Request for instructions regarding transfer of open commodity contracts. The trustee must use its best efforts to request promptly, but in no event later than two calendar days after entry of an order for relief, customer instructions concerning the transfer or liquidation of the specifically identifiable open commodity contracts, if any, not required to be liquidated under paragraph (f)(1) of this section. The request for customer instructions required by this paragraph (b)(2) must state that the trustee is required to liquidate any such commodity contract for which transfer instructions have not been received on or before the seventh calendar day after entry of the order for relief, at an hour specified by the trustee, and any such commodity contract for which instructions have been received which has not been transferred in accordance with §190.08(d)(2) on or before the seventh calendar day after entry of the order for relief. A form of notice is set forth in the appendix to this part.

(3) Involuntary cases. Prior to entry of an order for relief, and upon leave of the court, the trustee appointed in an involuntary proceeding may notify customers of the commencement of such proceeding and may request customer instructions with respect to the return, liquidation or transfer of specifically identifiable property, including open commodity contracts.

(4) Notice of bankruptcy and request for proof of customer claim. The trustee must promptly notify each customer of record in writing that an order for relief has been entered and must instruct each such customer to file a proof of customer claim containing the information specified in paragraph (d) of this section. Such notice may be given separately from the notices required by paragraphs (b)(1) and (3) of this section.

(c) Disposition of customer instructions in the event of a transfer pursuant to section 764(b) of the Bankruptcy Code. If the debtor’s open commodity contracts have been, or are to be, transferred in accordance with section 764(b) of the Bankruptcy Code and §190.06, customer instructions previously received by the trustee with respect to open commodity contracts, or with respect to specifically identifiable property which is to be transferred with such contracts, shall be transmitted to the transferee of such contracts or property who shall comply therewith to the extent practicable.

(d) Proof of customer claim. The trustee shall cause the proof of customer claim form referred to in paragraph (b)(4) of this section to set forth the
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bar date for its filing and to request that customers provide, to the extent reasonably possible, information sufficient to determine a customer’s claim in accordance with the regulations contained in this part, including in the discretion of the trustee:

(1) The class of commodity contract account upon which each claim is based;

(2) The number of accounts held by each claimant, and the capacity in which they are held;

(3) The equity as of the filing date of each account based on commodity contract transactions in that account;

(4) Whether each account is a public or a non-public customer account;

(5) Whether any account is a discretionary account;

(6) A description of all claims against the debtor not based upon a commodity contract account of the claimant;

(7) A description of all claims of the debtor against the claimant not included in the equity of a commodity contract account of the claimant;

(8) A description of any deposits of money, securities or property with the debtor made by the claimant indicating the portion of such, if any, which was contained in the information provided in paragraph (d)(3) of this section and identifying any such property which would be specifically identifiable property as defined in §190.01(kk);

(9) Whether the claimant is or was an “affiliate,” “insider,” or “relative” of the debtor as these terms are defined by sections 101 (2), (25), and (34), respectively, of the Bankruptcy Code;

(10) The amount of the claimant’s percentage interest in any joint account;

(11) Whether the claimant’s positions in security futures products are held in a futures account or a securities account, as these terms are defined in §13 of this chapter;

(12) Whether the claimant wishes to receive payment in kind, to the extent possible, for any claim for securities; and

(13) Copies of any documents which support the information contained in the proof of customer claim, including without limitation, customer confirmations, account statements, and statements of purchase or sale.

A proof of claim form which may be used by the trustee is set forth in the appendix to this part.

(e) Transfers—(1) All cases. The trustee for a commodity broker must immediately use its best efforts to effect a transfer in accordance with §190.06 (e) and (f) no later than the seventh calendar day after the order for relief of the open commodity contracts and equity held by the commodity broker for or on behalf of its customers.

(2) Involuntary cases. A commodity broker against which an involuntary petition in bankruptcy is filed, or the trustee if a trustee has been appointed in such case, must use its best efforts to effect a transfer in accordance with §190.06 (e) and (f) of all open commodity contracts and equity held by the commodity broker for or on behalf of its customers and such other property as the Commission in its discretion may authorize, on or before the seventh calendar day after the filing date, and immediately cease doing business: Provided, however, That the commodity broker may trade for liquidation only, unless otherwise directed by the Commission, by any applicable self-regulatory organization or by the court: And, Provided further, That if the commodity broker demonstrates to the Commission within such period that it was in compliance with the segregation and financial requirements of this chapter on the filing date, and the Commission determines, in its sole discretion, that such transfer or liquidation is neither appropriate nor in the public interest, the commodity broker may continue in business subject to applicable provisions of the Bankruptcy Code and of this chapter.

(f) Liquidation or offset. After entry of the order for relief and subject to paragraph (e) of this section, which requires the trustee to attempt to make certain transfers permitted by §190.06 and section 764(b) of the Bankruptcy Code, the following commodity contracts and other property held by or for the account of a debtor must be liquidated or offset by the trustee promptly and in an orderly manner, subject to limit
moves and to applicable procedures under the Bankruptcy Code:

(1) Open commodity contracts. All open commodity contracts except:

(i) Dealer option contracts, if the dealer option grantor is not the debtor, which cannot be transferred on or before the seventh calendar day after the order for relief; and

(ii) Specifically identifiable commodity contracts as defined in §190.01(kk)(2) for which an instruction prohibiting liquidation is noted prominently in the accounting records of the debtor and timely received under paragraph (b)(2) of this section. Notwithstanding the foregoing, an open commodity contract must be offset if: such contract is a futures contract or a Cleared Swaps contract which cannot be settled in cash and which would otherwise remain open either beyond the last day of trading (if applicable), or the first day on which notice of intent to deliver may be tendered with respect thereto, whichever occurs first; such contract is a long option on a physical commodity which cannot be settled in cash and which would be automatically exercised, has value and would remain open beyond the last day for exercise; such contract is a short option on a physical commodity which cannot be settled in cash; or, as otherwise specified in these rules.

(2) Specifically identifiable property other than open commodity contracts. Specifically identifiable property other than open commodity contracts to the extent that:

(i) The fair market value of such property is less than 90% of its fair market value on the date of entry of the order for relief; or

(ii) The trustee has not received instructions to return, or has not returned, such property upon the terms contained in §190.08(d)(1) on or before the end of the period set forth in paragraph (b)(1) of this section.

(3) All other property. All other property not required to be transferred or returned pursuant to customer instructions which has not been liquidated in accordance with paragraphs (f)(1) and (f)(2) of this section.

(g) Treatment of open commodity contracts—(1) Margin payments by the trustee. Prior to the primary liquidation date, the trustee may make variation and maintenance margin payments to a commodity broker carrying the account of the debtor, as appropriate, pending liquidation of any open commodity contracts required to be liquidated under paragraph (f)(1) of this section, whether or not such contracts are specifically identifiable to a particular customer: Provided, That:

(i) No payments may be made on behalf of accounts which are in deficit,

(ii) No payments may be made on behalf of non-public customers or the debtor from funds which are segregated for the benefit of public customers,

(iii) The trustee must make margin payments if payments of margin are received from customers after bankruptcy in response to margin calls, and

(iv) No payments need be made to restore initial margin.

(2) Margin calls. The trustee, or in the case of an involuntary bankruptcy, the commodity broker against which the petition is filed or the trustee if a trustee has been appointed, must issue margin calls with respect to any account in which the funded balance less the value on the date of return or transfer of any property previously returned or transferred does not equal or exceed:

(i) 100% of the maintenance margin requirements of the applicable designated trade execution facility, if any, with respect to the open commodity contracts in such account; or

(ii) If there are no such maintenance margin requirements, 100% of the clearing organization margin requirements applicable to the open commodity contracts in such account; or

(iii) If there are no maintenance margin requirements or clearing organization margin requirements, then 50% of the initial margin applicable to the open commodity contracts in such account:

Provided. That no margin calls need be made by the trustee to restore initial margin. A margin call for such accounts should be made as soon as possible following the order for relief and the trustee shall be authorized, but not obligated, to liquidate any account for which such margin call is not met within a reasonable time as defined in
§ 190.03 Operation of the debtor's estate subsequent to the primary liquidation date.

Subsequent to the primary liquidation date, accounts which contain open commodity contracts not required to be liquidated under §190.02 (f)(1) shall be operated by the trustee as follows:

(a) Operation of accounts held open for transfer—(1) Establishment of transfer accounts. On the primary liquidation date, the trustee must generate a new statement of account for each class of account of a customer which contains a commodity contract not required to be liquidated under §190.02(f)(1). The opening balance of such statement must be equal to its funded balance, less the value on the date of its transfer or return of any property transferred or returned with respect to the net equity claim for such account prior to the primary liquidation date.

(2) Accounting for transfer accounts. The opening balance of any statement generated on the primary liquidation date in accordance with paragraph (a)(1) of this section must be adjusted for operations on or subsequent to the primary liquidation date in the same manner as the equity in a commodity contract account maintained for or on behalf of a customer would be adjusted in the ordinary course of business prior to the filing date: Provided, however, That such statement of account must also be adjusted to reflect certain adjustments to the funded balance in accordance with §190.07(c)(2), such that the balance in that account will always be equal to the funded balance of the claimant’s net equity claim adjusted for corrections and subsequent operations less the value on the date of transfer or return of any property transferred or returned with respect to that claim prior to the primary liquidation date.

(3) Margin calls. The trustee must promptly issue margin calls with respect to any account referred to under paragraph (a)(1) of this section in which the balance does not equal or exceed 100% of the maintenance margin requirements of the applicable designated contract market or swap execution facility, if any, with respect to the open commodity contracts in such account, or if there are no such maintenance margin requirements, 100% of the clearing organization’s initial margin requirements applicable to the open commodity contracts in such account, or if there are no such maintenance margin requirements or clearing organization initial margin requirements, then 50% of the customer initial margin applicable to the commodity contracts in such account: Provided, That no margin calls need be made to restore customer initial margin.

(4) Margin payments. The trustee may make variation or maintenance margin payments to the broker carrying any account referred to in paragraph (a)(1) of this section as appropriate if such payments do not exceed the balance of the statement of account generated under paragraph (a)(1) of this section with respect to which such payments are credited. Any customer for whom commodity contracts remain open subsequent to the primary liquidation date will not be relieved of the obligation to make margin payments by reason of the bankruptcy of the commodity broker: Provided, That the full amount of any margin payment made by a customer subsequent to the primary liquidation date must be credited to the account referred to in paragraph (a)(1) of this section for which it was made.

(5) Distribution. No distribution of equity may be made to or on behalf of customers by the trustee with respect to an account established in accordance with paragraph (a)(1) of this section, except pursuant to paragraph (a)(4) of this section and to §190.08(d).

(b) Liquidation of open commodity contracts. Commodity contracts held open
Commodity Futures Trading Commission

§ 190.04 Operation of the debtor's estate—general.

(a) Compliance with the Act and regulations. Except as specifically provided otherwise in this part, the trustee shall comply with all of the provisions of the Act and of the regulations thereunder as if it were the debtor.

(b) Computation of funded balance. Using the information available, the trustee must compute a funded balance for each customer account which contains open commodity contracts as of the close of business each day subsequent to the order for relief until the final liquidation date. Such computation must be completed prior to noon on the next business day.

(c) Records—(1) Maintenance. Subject to the requirements of the Bankruptcy Code, records of the computations required by this part shall be maintained in accordance with § 190.08(d)(2) on or before the seventh calendar day after entry of the order for relief; or

(2) Accessibility. The records required to be maintained by paragraph (c)(1) of this section shall be available during business hours to the Court, parties in interest, the Commission and the U.S. Department of Justice. At any time on or after the filing date, the commodity broker, or the trustee if a trustee has been appointed, shall be required to give the Commission and the U.S. Department of Justice immediate access to all records of the debtor, including records required to be retained in accordance with § 1.31 of this chapter and all other records of the commodity broker, whether or not the Act or this chapter would require such records to be maintained by the commodity broker.

(d) Liquidation—(1) Order of liquidation—(i) In the market. Liquidation of open commodity contracts held for a house account or customer account by or on behalf of a commodity broker which is a debtor shall be accomplished pursuant to the rules of a clearing organization, a designated contract market, or a swap execution facility, as applicable. Such rules shall ensure that the process for liquidating open commodity contracts, whether for the house account or customer account, results in competitive pricing, to the extent feasible under market conditions at the time of liquidation. Such rules must be submitted to the Commission for approval, pursuant to section 5c(c) of the Act, and be approved by the Commission. Alternatively, such rules must otherwise be submitted to and approved by the Commission (or its delegate pursuant to

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by the trustee in accordance with paragraph (a)(1) of this section must be liquidated promptly and in an orderly manner, if:

(1) Any payment of margin would result in a deficit in the account in which they are held;

(2) The customer for, or on whose behalf, the account is held fails to meet a margin call within a reasonable time;

(3) The trustee has received no customer instructions with respect to such contract by the sixth calendar day after entry of the order for relief;

(4) The commodity contract has not been transferred in accordance with § 190.08(d)(2) on or before the seventh calendar day after entry of the order for relief; or

(5) The commodity contract would otherwise remain open (e.g., because it cannot be settled in cash) beyond the last day of trading in such contract (if applicable) or the first day on which notice of delivery may be tendered with respect to such contract, whichever occurs first.

(c) Liquidation of specifically identifiable property other than open commodity contracts. All specifically identifiable property other than open commodity contracts which have not been liquidated prior to the primary liquidation date, and for which no customer instructions have been timely received must be liquidated, to the extent reasonably possible, no later than the sixth calendar day after final publication of the notice referred to in § 190.02(b)(1). All other specifically identifiable property must be liquidated or returned, to the extent reasonably possible, no later than the seventh calendar day after final publication of such notice.

§ 190.10(d) of this part prior to their application.

(ii) Book entry. Notwithstanding paragraph (d)(1) of this section, in appropriate cases, upon application by the trustee or the affected clearing organization, the Commission may permit open commodity contracts to be liquidated, or settlement on such contracts to be made, by book entry. Such book entry shall offset open commodity contracts, whether matched or not matched on the books of the commodity broker, using the settlement price for such commodity contracts as determined by the clearing organization. Such settlement price shall be determined by the rules of the clearing organization, which shall ensure that such settlement price is established in a competitive manner, to the extent feasible under market conditions at the time of liquidation. Such rules must be submitted to the Commission for approval pursuant to section 5c(c) of the Act, and be approved by the Commission. Alternatively, such rules must otherwise be approved by the Commission (or its delegate pursuant to § 190.10(d) of this part) prior to their application.

(2) Liquidation only. Nothing in this part shall be interpreted to permit the trustee to purchase or sell new commodity contracts for customers of the debtor except to offset open commodity contracts or to transfer any transferable notice received by the debtor or the trustee under any commodity contract: Provided, however, that the trustee may, in its discretion and with approval of the Commission, cover uncovered inventory or commodity contracts of the debtor which cannot be liquidated immediately because of price limits or other market conditions, or may take an offsetting position in a new month or at a strike price for which limits have not been reached.

(3) Exception to liquidation only. Notwithstanding paragraph (d)(2) of this section, the trustee may, with the written permission of the Commission, operate the business of the debtor in the ordinary course, including the purchase or sale of new commodity contracts on behalf of the customers of the debtor under appropriate circumstances, as determined by the Commission.

(e) Other matters—(1) Determination as to bona fide hedges. In determining which commodity contracts are eligible to be held open for transfer pursuant to customer instruction, the trustee may rely on the designation in the accounting records of the commodity broker that the account for or on behalf of which the contract is held is a hedging account. Commodity contracts maintained in a hedging account may be treated by the trustee as specifically identifiable.

(2) Disbursements. The trustee shall make no disbursements to customers prior to final distribution except with approval of the court or in accordance with §190.08(d).

(3) Investment. The trustee shall promptly invest the equity resulting from the liquidation of commodity contracts, and the proceeds of the liquidation of specifically identifiable property, in obligations of the United States and obligations fully guaranteed as to principal and interest by the United States, and may similarly invest any customer equity in accounts which remain open in accordance with §190.03: Provided, That such obligations are maintained in a depository located in the United States, its territories or possessions.

(4) Margin calls—reasonable time. Except as otherwise provided in this part, a reasonable time for meeting margin calls made by the trustee shall be deemed to be one hour, or such greater period not to exceed one business day, as the trustee may determine in its sole discretion.

(5) Management of long option contracts. Subject to the applicable liquidation provisions the trustee must use its best efforts to assure that a
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§ 190.05 Making and taking delivery on commodity contracts.

(a) General. (1) In the event that the trustee is unable to liquidate an open commodity contract subject to physical delivery or an option on a physical commodity, which cannot be settled in cash, prior to the last day of trading in that contract as required by §§ 190.02(f)(1) and 190.03(b)(5), the trustee must use its best efforts to prevent property which is to be delivered for or on behalf of a customer to fulfill that contract, or property for which delivery is being taken with respect to a customer pursuant to that contract, from becoming part of the debtor’s estate.

(2) Delivery account shall mean any account prominently designated as such in the records of the debtor which contains only the specifically identifiable property associated with delivery set forth in § 190.01(kk) (3), (4), and (5), except that with respect to § 190.01(kk) (4) and (5), delivery need not be made or taken and exercise need not be effected for such property to be included in a delivery account.

(3) The portion of the price or the proceeds of a commodity contract upon delivery which is not specifically identifiable property associated with delivery set forth in §190.01(kk) (3), (4), and (5), except that with respect to §190.01(kk) (4) and (5), delivery need not be made or taken and exercise need not be effected for such property to be included in a delivery account.

(b) Rules for deliveries on behalf of a customer of a debtor. Except in the case of a commodity contract which is settled in cash, each designated contract market, swap execution facility, or clearing organization shall adopt, maintain in effect and enforce rules which have been submitted in accordance with section 5c(c) of the Act for approval by the Commission, which:

(1) Permit the making and taking of delivery to fulfill a commodity contract for a physical commodity or an option on a physical commodity, which has not become part of the debtor’s estate on the date of the entry of the order for relief but with respect to which commodity contract:

(i) Trading has ceased on the date of the entry of the order for relief;

(ii) Notice of delivery has been tendered on or before the date of the entry of the order for relief; or,

(iii) Trading ceases before it can be liquidated by the trustee, to be effected directly between the customer of the debtor and the person identified by the clearing organization as the party to whom delivery should be made or from whom delivery should be taken by such customer of the debtor without intervention of the trustee and without including such physical commodity or the payment for such physical commodity in any bankruptcy distribution: Provided, however, That a customer shall not be relieved of his obligation to make or take delivery for the sole reason that delivery must be made or taken from a commodity broker which is a debtor; and

(2) Recognize that the equity of a customer of the debtor in a commodity contract upon which delivery is made or taken must be included in the net equity claim of that customer and, as such, can only be distributed pro rata at the time of, and as part of, any distributions to customers made by the trustee.

(3) Delivery made or taken within the debtor’s estate. (1) Any property in a delivery account which is part of the debtor’s estate on the date of the order for relief may be returned under the terms set forth in § 190.08(d)(1)(i).

(2) If the property to be delivered is part of the debtor’s estate on the date of the order for relief and a customer of the debtor is required to make delivery, the trustee must make delivery in the same manner as if no bankruptcy had occurred and the party by whom delivery is taken must pay the full notice price or strike price for delivery.
§ 190.06 Transfers.

(a) Transfer rules. No clearing organization or other self-regulatory organization may adopt, maintain in effect or enforce rules which:

(1) Are inconsistent with the provisions of this part;

(2) Interfere with the acceptance by its members of open commodity contracts and the equity margining or securing such contracts from futures commission merchants, or persons which are required to be registered as futures commission merchants, which are required to transfer accounts pursuant to §1.17(a)(4) of this chapter; or

(3) Prevent the acceptance by its members of transfers of open commodity contracts and the equity margining or securing such contracts from futures commission merchants with respect to which a petition in bankruptcy has been filed, if such transfers have been approved by the Commission. Provided, however, that this paragraph shall not limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate open commodity contracts.

(b) Notice. Unless notice has been filed pursuant to §1.65(b) of this chapter, if a futures commission merchant, or a person required to be registered as a futures commission merchant, intends to transfer commodity contracts held by or for a commodity broker from or for the account of a customer to another person registered as a futures commission merchant after a petition in bankruptcy has been filed by or against such commodity broker, the transferor must notify the Commission no later than is required under §190.02(a)(2).

(c) Financial requirements for transferees. (1) No transfer may be made which would cause the transferee to be in violation of the minimum financial requirements set forth in this chapter.

(2) A transferee may accept a transfer of open commodity contracts even though the money, securities and other property eligible for transfer under the regulations contained in this part is insufficient to fully margin such positions, if the transferee agrees to accept the transfer subject to any loss due to the failure to recover such deficiency from the customers whose contracts it has accepted or from the estate of the debtor.

(3) The transferee of a commodity contract for which notice is given under §190.06(b)(2) must keep that contract open one business day after its receipt, unless the customer for whom the transfer is made fails to respond within a reasonable time to a margin call for the difference between the margin transferred with such contract and the margin which such transferee would require with respect to a similar commodity contract held for the account of a customer in the ordinary course of business.

(4) No commission may be collected by the transferor with respect to the transfer of an open commodity contract for which notice is given under §190.06(b)(2).

(d) Customer instructions—(1) Customer instructions. A commodity broker must provide an opportunity for each customer to specify when undertaking its first hedging contract whether, in the event of bankruptcy, such customer prefers that open commodity contracts held in a hedging account be liquidated by the trustee without seeking customer instructions. Such commodity broker may obtain evidence of the customer instructions as provided in §1.55(d) of this chapter.

(2) Record of customer instructions. Each futures commission merchant

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must indicate prominently in the accounting records in which it maintains open trade balances any customer accounts which are hedging accounts for which the customer has not specified that it prefers open contracts to be liquidated in bankruptcy by the trustee without instruction.

(e) Eligibility for transfer under section 764(b) of the Bankruptcy Code—(1) Accounts eligible for transfer. Subject to the requirements of paragraph (e)(2) of this section, all accounts are eligible for transfer after the filing date pursuant to section 764(b) of the Bankruptcy Code, except:

(i) House accounts or the accounts of general partners of the debtor if the debtor is a partnership;

(ii) Leverage accounts, if the debtor is the leverage transaction merchant with respect to such accounts;

(iii) Dealer option accounts, if the debtor is the dealer option grantor with respect to such accounts; or

(iv) Accounts which are in deficit.

(2) Amount of equity which may be transferred. In no case may money, securities or property be transferred in respect of any eligible account if the value of such money, securities or property would exceed the funded balance of such account based on available information as of the calendar day immediately preceding transfer less the value on the date of return or transfer of any property previously returned or transferred with respect thereto.

(f) Special rules for transfers under section 764(b) of the Bankruptcy Code—(1) Dealer options—(i) Eligibility for transfer. Prior to exercise, any dealer option contract held by or for the account of a debtor which is a futures commission merchant from or for the account of a customer may be transferred even if the funded balance available for transfer which is attributable to such contract does not equal 100% of the portion of the purchase price required to be segregated with respect to such contract: Provided, That a dealer option contract will be eligible for transfer only if any deficiency in the funded balance of the customer account in which it is held is not due to amounts owed by such customer to the debtor; and, Provided further, That the transferee of any dealer option contract need not segregate more than an amount equal to that portion of the purchase price due the grantor which is transferred with the contract which should be equal to the grantor’s funded balance in the portion of the purchase price segregated less any reasonable reserve established by the trustee for the nonrecovery of overpayments.

(ii) Obligation of the dealer option grantor. In the event of the transfer of a dealer option contract pursuant to this section, the failure of the debtor futures commission merchant to segregate 100% of the purchase price due the grantor for such contract, or the failure of the dealer option grantor to collect 100% of such purchase price due the grantor, shall not excuse the dealer option grantor from its obligation to perform such contract in full upon its exercise, without any setoff or set aside for the premium deficiency.

(2) Clearing organizations. Commodity contracts held by a clearing organization which is a debtor may not be transferred.

(3) Partial transfers—(i) Of the customer estate. If all eligible customer accounts held by a debtor cannot be transferred under this section, a partial transfer may nonetheless be made. The Commission will not disapprove such a transfer for the sole reason that it was a partial transfer if it would prefer the transfer of accounts, the liquidation of which could adversely affect the market or the bankrupt estate. Any dealer option contract held by or for the account of a debtor which is a futures commission merchant from or for the account of a customer which has not previously been transferred, and is eligible for transfer, must be transferred on or before the seventh calendar day after entry of the order for relief.

(ii) Of a customer account. If all of a customer’s open commodity contracts cannot be transferred under this section, a partial transfer of contracts may be made. A partial transfer may be effected by liquidating that portion of the open commodity contracts held by a customer which represents sufficient equity to permit the transfer of the remainder. Any commodity contracts to be transferred in a partial
§ 190.07 Calculation of allowed net equity.

Allowed net equity shall be computed as follows:

(a) Allowed claim. The allowed net equity claim of a customer shall be equal to the aggregate of the funded balances of such customer’s net equity claim for each account class plus or minus the adjustments specified in paragraph (d) of this section.

(b) Net equity. Net equity means the total claim of a customer against the estate of the debtor based on the commodity contracts held by the debtor for

(A) On or before the seventh calendar day after the entry of the order for relief; and

(B) The Commission is notified in accordance with §190.02(a)(2) prior to the transfer and does not disapprove the transfer; or

(ii) The transfer of a customer account at the direction of the Commission on or before the seventh calendar day after the order for relief upon such terms and conditions as the Commission may deem appropriate and in the public interest.

(3) Withdrawals prior to bankruptcy. The withdrawal or settlement of a commodity contract account by a public customer including a public customer which is a commodity broker, prior to the filing date may not be avoided by a trustee unless:

(i) The customer making the withdrawal or settlement acted in collusion with the debtor or its principals to obtain a greater share of the bankruptcy estate than that to which such customer would be entitled in a bankruptcy distribution; or

(ii) The withdrawal or settlement is disapproved by the Commission.

(h) Commission action. Notwithstanding any other provision of this section, in appropriate cases and to protect the public interest, the Commission may:

(1) Prohibit the transfer of customer accounts; or

(2) Permit transfers of accounts which do not comply with the requirements of this section.

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or on behalf of such customer less any indebtedness of the customer to the
developer. Net equity shall be calculated as follows:

(1) **Step 1—Equity determination.** Determine the equity balance of each cus-
tomer account by computing, with respect to such account, the sum of:

(i) The ledger balance;
(ii) The open trade balance; and
(iii) The current realizable market value, determined as of the close of the market on the last preceding market day, of any securities or other property held by or for the debtor from or for such account, plus accrued interest, if any.

(A) For the purposes of this paragraph (b)(1), the ledger balance of a customer account shall be calculated by adding:

(1) Cash deposited to purchase, mar-
gin, guarantee, secure, or settle a com-
modity contract;

(2) Except as is otherwise provided in paragraph (b)(1), the open trade balance of a customer account shall be calculated by subtracting:

(i) Losses realized on trades;

(ii) Disbursements to or on behalf of the customer; and

(iii) The normal costs attributable to
the payment of commissions, broker-
age, interest, taxes, storage, trans-
action fees, insurance and other costs and charges lawfully incurred in connec-
tion with the purchase, sale, exercise, or liquidation of any commodity contract in such account. For purposes of this paragraph (b)(1), the open trade balance of a customer’s account shall be computed by subtracting the unrealized loss in value of the open commodity contracts held by or for such account. In calcul-
ating the ledger balance or open trade balance of any customer, exclude any
security futures products, any gains or losses realized on trades in such prod-
ucts, any property received to margin, guarantee or secure such products (in-
cluding interest thereon or the pro-
ceeds thereof), to the extent any of the foregoing are held in a securities ac-
count, and any disbursements to or on behalf of such customer in connection
with such products or such property held in a securities account.

(2) **Step 2—Customer determination (ag-
gregation).** Aggregate the credit and debit equity balances of all accounts of the same class held by a customer in the same capacity. Paragraphs (b)(2)(i)
through (b)(2)(xiii) of this section pre-
scribe which accounts must be treated
as being held in the same capacity and
which accounts must be treated as
being held in a separate capacity.

(i) Except as otherwise provided in
paragraph (b)(2), all accounts which are maintained with a debtor in a
person’s name and which, under this
paragraph (b)(2), are deemed to be held
by that person in its individual capac-
ity shall be deemed to be held in the
same capacity.

(ii) An account maintained with a
debtor by a guardian, custodian, or
conservator for the benefit of a ward,
or for the benefit of a minor under the
Uniform Gift to Minors Act, shall be
deemed to be held in a separate capac-
ity from accounts held by such guard-
ian, custodian or conservator in its in-
dividual capacity.

(iii) An account maintained with a
debtor in the name of an executor or
administrator of an estate shall be
deemed to be held in a separate capac-
ity from accounts held by such execu-
tor or administrator in its individual
capacity.

(iv) Subject to paragraph (b)(2)(iii) of
this section, an account maintained
with a debtor in the name of a dece-
dent, in the name of the decedent’s es-
teate, or in the name of the executor or
administrator of such estate shall be
deemed to be held in the same capacity.

(v) An account maintained with a
debtor by a trustee shall be deemed to
be held in the individual capacity of the
grantor of the trust unless the trust
is created by a valid written instru-
ment for a purpose other than
avoidance of an offset under the regula-
tions contained in this part. A trust
account which is not deemed to be held in
the individual capacity of its grantor
under paragraph (b)(2)(v) of this section

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shall be deemed to be held in a separate capacity from accounts held in an individual capacity by the trustee, by the grantor or any successor in interest of the grantor, or by any trust beneficiary, and from accounts held by any other trust.

(vi) An account maintained with a debtor by a corporation, partnership, or unincorporated association shall be deemed to be held in a separate capacity from accounts held by the shareholders, partners or members of such corporation, partnership or unincorporated association, if such entity was created for purposes other than avoidance of an offset under the regulations contained in this part.

(vii) A hedging account of a person shall be deemed to be held in the same capacity as a speculative account of such person.

(viii) Subject to paragraph (b)(2)(ix) of this section, the futures accounts, leverage accounts, options accounts, foreign futures accounts, delivery accounts (as defined in § 190.05(a)(2)), and cleared swaps accounts of the same person shall not be deemed to be held in separate capacities: Provided, however, that such accounts may be aggregated only in accordance with paragraph (b)(3) of this section.

(ix) An omnibus customer account of a futures commission merchant maintained with a debtor shall be deemed to be held in a separate capacity from the house account and any other omnibus customer account of such futures commission merchant.

(x) A joint account maintained with the debtor shall be deemed to be held in a separate capacity from any account held in an individual capacity by the participants in such account, from any account held in an individual capacity by a commodity pool operator or commodity trading advisor for such account, and from any other joint account: Provided, however, That if such account is not transferred in accordance with § 190.06, it shall be deemed to be held in the same capacity as any other joint account held by identical participants and a participant’s percentage interest therein shall be deemed to be held in the same capacity as any account held in an individual capacity by such participant.

(xi) An account maintained with a debtor in the name of a plan which, on the filing date, has in effect a registration statement in accordance with the requirements of section 1031 of the Employee Retirement Income Security Act of 1974 and the regulations thereunder shall be deemed to be held in a separate capacity from an account held in an individual capacity by the plan administrator, any employer, employee, participant, or beneficiary with respect to such plan.

(xii) Except as otherwise provided in this section, an account maintained with a debtor by an agent or nominee for a principal or a beneficial owner shall be deemed to be an account held in the individual capacity of such principal or beneficial owner.

(xiii) With respect to the cleared swaps account class, each individual customer account within each omnibus customer account referred to in paragraph (ix) of this section shall be deemed to be accounts of different customers. The burden of proving that an account is held in a separate capacity shall be upon the customer.

(xiv) Accounts held by a customer in separate capacities shall be deemed to be accounts of different customers. The net equity of one customer account may not be offset against the net equity of any other customer.

(3) Step 3—Setoffs. (i) The net equity of one customer account may not be offset against the net equity of any other customer.

(ii) Any obligation which is not required to be included in computing the equity of a customer under paragraph (b)(1) of this section, but which is owed by such customer to the debtor must be deducted from any obligation not required to be included in computing the equity of a customer which is owed by such debtor to the customer. If the former amount exceeds the latter, the excess must be deducted from the equity balance of the customer obtained after performing the preceding calculations required by paragraph (b) of this section: Provided, That if the customer owns more than two classes of accounts the excess must be offset against each positive equity balance in the same proportion as that positive
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equity balance bears to the total of all positive equity balances of accounts of different classes held by such customer.

(iii) A negative equity balance obtained with respect to one customer account class must be set off against a positive equity balance in any other account class of such customer held in the same capacity: Provided, That if a customer owns more than two classes of accounts such balance must be offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity balances in accounts of different classes held by such customer.

(iv) To the extent any indebtedness of the debtor to the customer which is not required to be included in computing the equity of such customer under paragraph (b)(1) of this section exceeds such indebtedness of the customer to the debtor, the customer claim therefor will constitute a general creditor’s claim rather than a customer property claim, and the net equity therefor shall be separately calculated.

(v) The rules pertaining to separate capacities and permitted setoffs contained in this section must be applied subsequent to the entry of an order for relief; prior to the filing date, the provisions of §1.22 of this chapter and of sections 4d(a)(2) and 4d(f) of the Act (and, in each case, the regulations promulgated thereunder) shall govern what setoffs are permitted.

(4) **Step 4—Correction for distributions.** The value on the date of transfer or distribution of any property transferred or distributed subsequent to the filing date and prior to the primary liquidation data with respect to each class of account held by a customer must be added to the equity obtained for that customer for accounts of that class after performing the steps contained in paragraphs (b)(1)-(3) of this section: Provided, however, That if all accounts for which there are customer claims of record and 100% of the equity pertaining thereto are transferred in accordance with §190.06 and section 764(b) of the Bankruptcy Code, net equity shall be computed based solely upon those customer claims, if any, filed subsequent to bankruptcy which are not claims of record on the filing date.

(5) **Step 5—Correction for subsequent events.** Compute any adjustments to Steps 1 through 4 of this paragraph (b) required to correct misestimates or errors including, without limitation, corrections for subsequent events such as the liquidation of unliquidated claims at a value different from the estimated value previously used in computing net equity.

(6) **Step 6—Net equity of accounts which remain open subsequent to the primary liquidation date.** If the accounts of a customer contain commodity contracts which remain open subsequent to the primary liquidation date, the trustee must adjust the net equity obtained for that customer pursuant to the steps contained in paragraphs (b) (1) through (5) of this section as provided in paragraphs (d)(1) and (d)(2) of this section.

(c) **Calculation of funded balance.** "Funded balance" means a customer’s pro rata share of the customer estate with respect to each account class available as of the primary liquidation date for distribution to customers of the same class.

(1) The funded balance of any customer claim shall be computed by:

(i) Multiplying the ratio of the amount of the net equity claim less the amounts referred to in paragraph (c)(1)(ii) of this section of such customer for any account class bears to the sum of the net equity claims less the amounts referred to in paragraph (c)(1)(ii) of this section of all customers for accounts of that class by the sum of:

(A) The value of the money, securities or property segregated on behalf of all accounts of the same class less the amounts referred to in paragraph (c)(1)(ii) of this section;

(B) The value of any money, securities or property which must be allocated under §190.08 to customer accounts of the same class; and

(C) The amount of any add-back required under paragraph (b)(4) of this section; and

(ii) Then adding 100% of any margin payment made between the entry of the order for relief and the primary liquidation date.
(2) Corrections to funded balance. The funded balance must be adjusted, as of the primary liquidation date, to correct for subsequent events including, without limitation:

(i) Added claimants;
(ii) Disallowed claims;
(iii) Liquidation of unliquidated claims at a value other than their estimated value;
(iv) Recovery of property; and
(v) Deficits generated by the continued operation of accounts after the primary liquidation date which cannot be fully adjusted under paragraph (d) of this section.

(d) Adjustments to funded balance for operations subsequent to the primary liquidation date. If accounts of a customer contain commodity contracts which remain open subsequent to the primary liquidation date, the funded balance for each class must be adjusted until liquidation or transfer of all such open commodity contracts of that customer of the same class, as follows:

(1) Unrealized and realized gains and any receipts of margin with respect thereto must be added to the funded balance;
(2) Unrealized and realized losses, and the normal costs attributable to the payment of commissions, brokerage, interest, taxes, storage, transaction fees and other costs and charges lawfully incurred with respect to the maintenance or liquidation of such open commodity contracts, and any distributions must be subtracted from the funded balance; and
(3) Subject to claims against the trustee for failure to liquidate, any deficit which is not recovered from the customer on whose behalf it is incurred must be charged against the funded balance of each account which remained open on the date the deficit occurred in the same proportion as the funded balance of each account bears to all the funded balances of all accounts which remained open on that date.

(e) Valuation. In computing net equity, commodity contracts and other property held by or for a commodity broker must be valued as provided in this paragraph (e): Provided, however, that for all commodity contracts other than those listed in paragraph (e)(1) of this section, if identical commodity contracts, securities, or other property are liquidated on the same date, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer holding such contracts, securities, or property.

(1) Commodity Contracts. Unless otherwise specified in this paragraph (e), the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules: Provided, that such rules must either be submitted to the Commission, pursuant to section 5c(c)(4) of the Act and be approved by the Commission, or such rules must be otherwise approved by the Commission (or its delegate pursuant to §190.10(d) of this part) prior to their application; Provided, further, that if such contract is transferred its value shall be determined as of the end of the settlement cycle in which it is transferred; and Provided, finally, that if such contract is liquidated, its value shall be equal to the net proceeds of liquidation.

(2) Principal contracts. The valuation date of principal contracts which are not transferred shall be the date of the order for relief unless there is specific property which constitutes cover by the principal for the principal contract in which case it shall be the date of liquidation of the cover. For purposes of valuing contracts for which there is no established secondary market:

(i) Cash price series approved by Commission. The market value of the physical commodity which is the subject of a principal contract shall be computed using a cash price series approved by the Commission for use by the dealer option grantor, in the case of dealer options, and by the leverage transaction merchant, in the case of leverage contracts.

(ii) No cash price series approved by Commission. If no applicable cash price series has been submitted to the Commission, or if such a cash price series has been submitted, but has not been approved by the Commission, the market value of the physical commodity which is the subject of a principal contract shall be equal to the lesser of:
(A) The market value of the physical commodity as of the close of business on the local cash market most proximate to the debtor’s principal place of business; or
(B) The spot month settlement price on a designated contract market which trades contracts in that physical commodity most proximate to the debtor’s principal place of business: Provided, That where there is more than one local market as described in paragraphs (e)(2)(ii) (A) or (B) of this section, the trustee should use the most active market.

(iii) Special rule for valuing dealer options. A dealer option which is in-the-money will be deemed to have been exercised for purposes of determining its value which shall be equal to the greater of:
(A) The in-the-money amount; or
(B) The premium paid for such option divided by the number of days contained in the option period and multiplied by the number of days remaining in such period on the liquidation date: Provided, That in the trustee’s sole discretion, the trustee may reduce such value to an amount which does not exceed the average of the premiums recently paid for similar options granted by the same grantor.

Any time value not reflected in this computation claimed by a customer must be treated as a general creditor’s claim.

(iv) Special rule for valuing leverage contracts. Notwithstanding paragraphs (e)(2) (i) and (ii) of this section, if the records of the debtor are not sufficient to substantiate customer claims for profits and to identify the owners of contracts with losses, the liquidation value of a leverage contract shall be deemed to be an amount equal to the total deposit made by a customer in respect to such contract.

(3) Bucketed contracts. The value of a commodity contract which has not been established in fact shall be deemed to be equal to the value of the total deposit made by a customer in respect to such contract.

(4) Securities. The value of a listed security shall be equal to the closing price for such security on the exchange upon which it is traded. The value of all securities not traded on an exchange shall be equal in the case of a long position, to the average of the bid prices for long positions, and in the case of a short position, to the average of the asking prices for the short positions. If liquidated prior to the primary liquidation date, the value of such security shall be equal to the net proceeds of its liquidation. Securities which are not publicly traded shall be valued by the trustee, subject to approval of the court, using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances.

(5) Property. Cash commodities held in inventory, as collateral or otherwise, shall be valued at their fair market value. Subject to the other provisions of this paragraph (e), all other property shall be valued by the trustee subject to approval by the court, using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances: Provided, however, That if such property is sold, its value for purposes of the calculations required by this part shall be the net proceeds of such sale: Provided further, That the sale is made in compliance with all applicable statutes, rules and orders of any court or governmental entity with jurisdiction thereover.

§ 190.08 Allocation of property and allowance of claims.

The property of the debtor’s estate must be allocated among account classes and between customer classes as provided in this section, except for special distributions required under appendix B to this part. The property so allocated will constitute a separate estate of the customer class and the account class to which it is allocated, and will be designated by reference to such customer class and account class.

(a) Scope of customer property. (1) Customer property includes the following:
(i) All cash, securities, or other property or the proceeds of such cash, securities or other property received, acquired, or held by or for the account of
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the debtor, from or for the account of a customer, including a non-public customer, which is:

(A) Property received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract;

(B) Open commodity contracts;

(C) Warehouse receipts, bills of lading, or other documents of title or property held or acquired by the debtor to fulfill a commodity contract;

(D) Profits or contractual rights accruing to a customer as the result of a commodity contract;

(E) The full proceeds of a letter of credit if such letter of credit was received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract;

(F) Property hypothecated under §1.30 of this chapter to the extent that the value of such property exceeds the proceeds of any loan of margin made with respect thereto, and

(ii) All cash, securities, or other property which:

(A) Is segregated on the filing date;

(B) Is a security owned by the debtor to the extent there are customer claims for securities of the same class and series of an issuer;

(C) Is specifically identifiable to a customer;

(D) Is property of a type described in paragraph (a)(1)(i)(A) of this section which has been withdrawn and subsequently is recovered by the avoidance powers of the trustee;

(E) Represents recovery of any debit balance, margin deficit, or other claim of the debtor against a customer account;

(F) Was unlawfully converted but is part of the debtor’s estate;

(G) Is property of the debtor that any applicable law, rule, regulation, or order requires to be set aside for the benefit of customers, unless including such property in the customer estate would not significantly increase the customer estate;

(H) Is property of the debtor’s estate recovered by the Commission in any proceeding brought against the principals, agents, or employees of the debtor;

(I) Is proceeds from the investment of customer property by the trustee pending final distribution; or

(J) Is cash, securities or other property of the debtor’s estate, including the debtor’s trading or operating accounts and commodities of the debtor held in inventory, but only to the extent that the property enumerated in paragraphs (a)(1)(i)(E) and (a)(1)(i)(A) through (a)(1)(ii)(H) of this section is insufficient to satisfy in full all claims of public customers.

(2) Customer property will not include:

(i) Claims against the debtor for damages for any wrongdoing of the debtor, including claims for misrepresentation or fraud, or for any violation of the Act or of the regulations thereunder;

(ii) Other claims for property which are not based upon property received, acquired or held by or for the account of the debtor, from or for the account of the customer;

(iii) Forward contracts;

(iv) Property delivered to or from a customer to or by another customer to fulfill a commodity contract held for or on behalf of either customer by the debtor if such delivery is effected pursuant to §190.05 by a commodity broker other than the debtor;

(v) Property deposited by a customer with a commodity broker after the entry of an order for relief which is not necessary to meet the maintenance margin requirements applicable to the accounts of such customer;

(vi) Property hypothecated pursuant to §1.30 of this chapter to the extent of the loan of margin with respect thereto; and

(vii) Money, securities or property held to margin, guarantee or secure security futures products, or accruing as a result of such products, if held in a securities account.

(b) Allocation of property between customer classes. No portion of the customer estate may be allocated to pay non-public customer claims until all public customer claims have been satisfied in full. Any property segregated on behalf of non-public customers must be treated initially as part of the public customer estate and allocated under paragraph (c)(2) of this section.

(c) Allocation of property among account classes—(1) Segregated property.
Subject to paragraph (b) of this section, property held by or for the account of a customer, which is segregated on behalf of a specific account class, or readily traceable on the filing date to customers of such account class, must be allocated to the customer estate of the account class for which it is segregated or to which it is readily traceable.

(2) All other property. Money, securities and property received from or for the account of customers on behalf of any account class which is recovered on behalf of the customer estate and which cannot be allocated in accordance with paragraph (c)(1) of this section, must be allocated as of the primary liquidation date in the following order:

(i) To the estate of the account class for which, after the allocation required in paragraph (c)(1) of this section, the percentage of each public customer net equity claim which is funded is the lowest, until the funded percentage of net equity claims of such class equals the percentage of each public customer’s net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and then

(ii) To the estate of the two account classes referred to in paragraph (c)(2)(i) of this section so that the percentage of each public customer net equity claim which is funded equals the percentage of each public customer’s net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and then

(iii) Among account classes in the same proportion as the public customer net equity claims for each such account class bears to the total of public customer net equity claims of all account classes until the public customer claims of each account class are paid in full; and, thereafter,

(iv) To the non-public customer estate for each account class in the same order as is prescribed in paragraphs (c)(2)(i) to (iii) of this section for the allocation of the customer estate among account classes.

(d) Distribution of customer property—

(1) Return or transfer of specifically identifiable property other than a commodity contract. Specifically identifiable property other than an open commodity contract not required to be liquidated under §190.02(f)(2) may be returned or transferred on behalf of the customer to which it is identified:

(i) If it is margining an open commodity contract, only if cash is first deposited with the trustee in an amount equal to the greater of the full fair market value of such property on the return date or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security; or

(ii) If it is not so margining an open contract, at the option of the customer, either pursuant to the terms of paragraph (d)(1)(i) of this section, or pursuant to the following terms: such customer first deposits cash with the trustee in an amount equal to the amount by which the greater of the value of the specifically identifiable property to be transferred or returned on the date of such transfer or return or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security, plus a reasonable reserve in the trustee’s sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with respect to the customer’s net equity claim for such account;

Provided, That adequate security for the nonrecovery of any overpayments by the trustee is provided to the debtor’s estate by the customer.

(2) Transfers of specifically identifiable commodity contracts under section 766 of the Bankruptcy Code. Any specifically identifiable commodity contract which is not required to be liquidated under §190.02(f)(1) or §190.03(b), and which is not otherwise liquidated, may be transferred on behalf of a customer:

Provided, That such customer must first
§ 190.09 Member property.

(a) Member property. “Member property” means, in connection with a clearing organization bankruptcy, the property which may be used to pay that portion of the net equity claim of a member which is based on its house account.

(b) Scope of Member Property. Member property shall include all money, securities and property received, acquired, or held by a clearing organization to margin, guarantee or secure, on behalf of a clearing member, the proprietary account, as defined in §1.3 of this chapter, any account not belonging to a foreign futures or foreign options customer pursuant to the proviso in §30.1(c), and any Cleared Swaps Proprietary Account, as defined in §22.1: Provided, however, that any guaranty deposit or similar payment or deposit made by such member and any capital stock, or membership of such member in the clearing organization shall also be included in member property after payment in full of that portion of the net equity claim of the member based on its customer account and of any obligations due to the clearing organization to customers or other members.

§ 190.10 General.

(a) Notices. Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this part shall
be directed by electronic mail to bankruptcyfilings@cftc.gov, with a copy sent by overnight mail to Director, Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. For purposes of this part, notice to the Commission shall be deemed to be given only upon actual receipt.

(b) Request for exemption from time limit. (1) A trustee or any other person charged with the management of a commodity broker which has filed a petition in bankruptcy, or against which such a petition has been filed, may for good cause shown request from the Commission an exemption from, or extension of, any time limit prescribed by this part 190: Provided, That no such exemption or extension will be granted for any time period established by the Bankruptcy Code, as amended, 11 U.S.C. 101 et seq.

(2) Such a request shall be made ex parte and by any means of communication, written or oral: Provided, That an oral request shall be confirmed in writing within one business day and such confirmation shall contain all the information required by paragraph (b)(3) of this section. Any such request shall be directed to the person as provided in paragraph (a) of this section, and at the address provided therein.

(3) Such a request shall state the particular provision of the part 190 rules with respect to which the exemption or extension is sought, the reason for the requested exemption or extension, the amount of time sought if the request is for an extension, and the reason why such exemption or extension would not be contrary to the purposes of the Bankruptcy Code and the Commission’s part 190 regulations promulgated thereunder.

(4) The Director of the Division of Clearing and Intermediary Oversight, or such members of the Commission’s staff acting under his direction as he may designate, on the basis of the information provided in any such request, shall determine, in his sole discretion, whether to grant, deny or otherwise respond to a request, and shall communicate that determination by the most appropriate means to the person making the request and to the bankruptcy court with jurisdiction over the case.

(c) Disclosure statement for non-cash margin. (1) Except as provided in §1.65 of this chapter, no commodity broker (other than a clearing organization) may accept property other than cash from or for the account of a customer, other than a customer specified in §1.55(f) of this chapter, to margin, guarantee, or secure a commodity contract unless the commodity broker first furnishes the customer with the disclosure statement set forth in paragraph (c)(2) of this section in boldface print in at least 10 point type which may be provided as either a separate, written document or incorporated into the customer agreement, or with another statement approved under §1.55(c) of this chapter and set forth in appendix A to §1.55 which the Commission finds satisfies this requirement.

(2) The disclosure statement required by paragraph (c)(1) of this section is as follows:

THIS STATEMENT IS FURNISHED TO YOU BECAUSE RULE 190.10 (c) OF THE COMMODITY FUTURES TRADING COMMISSION REQUIRES IT FOR REASONS OF FAIR NOTICE UNRELATED TO THIS COMPANY’S CURRENT FINANCIAL CONDITION.

1. YOU SHOULD KNOW THAT IN THE UNLIKELY EVENT OF THIS COMPANY’S BANKRUPTCY, PROPERTY, INCLUDING PROPERTY SPECIFICALLY TRACEABLE TO YOU, WILL BE RETURNED, TRANSFERRED OR DISTRIBUTED TO YOU, OR ON YOUR BEHALF, ONLY TO THE EXTENT OF YOUR PRO RATA SHARE OF ALL PROPERTY AVAILABLE FOR DISTRIBUTION TO CUSTOMERS.

2. NOTICE CONCERNING THE TERMS FOR THE RETURN OF SPECIFICALLY IDENTIFIABLE PROPERTY WILL BE BY PUBLICATION IN A NEWSPAPER OF GENERAL CIRCULATION.

3. THE COMMISSION’S REGULATIONS CONCERNING BANKRUPTCIES OF COMMODITY BROKERS CAN BE FOUND AT 17 CODE OF FEDERAL REGULATIONS PART 190.

(3) The statement contained in paragraph (c)(2) of this section need be furnished only once to each customer to whom it is required to be furnished by this section.

(d) Delegation of authority to the Director of the Division of Clearing and Intermediary Oversight. (1) Until such time
as the Commission orders otherwise, the Commission hereby delegates to the Director of the Division of Clearing and Intermediary Oversight, and to such members of the Commission’s staff acting under his direction as he may designate, all the functions of the Commission set forth in this part except the authority to approve or disapprove a withdrawal or settlement of a commodity contract account by a public customer pursuant to §190.06(g)(3).

(2) The Director of the Division of Clearing and Intermediary Oversight may submit to the Commission for its consideration any matter which has been delegated to him pursuant to paragraph (d)(1) of this section.

(3) Nothing in this section shall prohibit the Commission, at its election, from exercising its authority delegated to the Director of the Division of Clearing and Intermediary Oversight under paragraph (d)(1) of this section.

(e) Forward contracts. For purposes of this part, an entity for or with whom the debtor deals who holds a claim against the debtor solely on account of a forward contract will not be deemed to be a customer.

(f) Notice of court papers pertaining to the operation of the estate. The trustee shall promptly provide the Commission with copies of any complaint, motion, or petition filed in a commodity broker bankruptcy which concerns the disposition of customer property. Court papers shall be directed to the Washington, DC headquarters of the Commission addressed as provided in paragraph (a) of this section.

(g) Other. The Bankruptcy Code will not be construed by the Commission to prohibit a commodity broker from doing business as any combination of the following: futures commission merchant, commodity option dealer, foreign futures commission merchant or leverage transaction merchant, nor will the Commission construe the Bankruptcy Code to permit any operation, trade or business, or any combination of the foregoing, otherwise prohibited by the Act or by any rule, regulation or order of the Commission thereunder.

(b) Rule of construction. Contracts in security futures products held in a securities account shall not be considered to be “from or for the commodity contract account” or “from or for the commodity options account” of such customers, as such terms are used in section 761(9) of the Bankruptcy Code.

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3. Attempt to estimate shortfall of customer funds segregated pursuant to sections 4(a) and (b) of the Act; customer funds segregated pursuant to section 4f of the Act; and the foreign futures or foreign options secured amount, as defined in §1.3 of this chapter.
   a. The trustee should:
      i. Contact the DSRO (if any) and the clearing organizations and attempt to effectuate a transfer with such shortfall under section 764(b) of the Code; notify the Commission for assistance (§190.02(a)(2) and (e)(1), §190.06(b)(2), (e), (f)(3), (g)(2), and (h)) but recognize that if there is a substantial shortfall, a transfer of such funds or amounts is highly unlikely.
      ii. If a transfer cannot be effectuated, liquidate all customer commodity contracts that are margined, guaranteed, or secured by funds or amounts with such shortfall, except dealer options and specifically identifiable commodity contracts which are bona fide hedging positions (as defined in §190.02(kk)(2)) with instructions not to be liquidated. (See §§190.02(f) and 190.06(d)(1)).
      (In this connection, depending upon the size of the debtor and other complications of liquidation, the trustee should be aware of special liquidation rules, and in particular the availability under certain circumstances of book-entry liquidation (§190.06(d)(1))).
   b. If there is a small shortfall in any of the funds or amounts listed in paragraph 2, negotiate with the clearing organization to effect a transfer; notify the Commission (§§190.02(a)(2) and (e)(1), 190.06(b)(2), (e), (f)(3), (g)(2), and (h)).
   4. Whether or not a transfer has occurred, liquidate or offset open commodity contracts not eligible for transfer (e.g., deficit accounts) (§190.06(e)(1)).
   5. Offset all futures contracts and Cleared Swaps contracts which cannot be settled in cash and which would otherwise remain open either beyond the last day of trading (if applicable) or the first day on which notice of intent to deliver may be tendered with respect thereto, whichever occurs first; offset all long options on a physical commodity which cannot be settled in cash, have value and would be automatically exercised or would remain open beyond the last day of exercise; and offset all short options on a physical commodity which cannot be settled in cash (§190.02(y)(1)).
   6. Compute estimated funded balance for each customer commodity contract account containing open commodity contracts (§190.04(b)(1)) (daily thereafter).
   7. Make margin calls if necessary (§190.02(g)(1)) (daily thereafter).
   8. Liquidate or offset any open commodity contract account for which a customer has failed to meet a margin call (§190.02(f)(1)) (daily thereafter).
   9. Commence liquidation or offset of specifically identifiable property described in §190.02(f)(2)(I) (property which has lost 10% or more of value) (and as appropriate thereafter).
   10. Commence liquidation or offset of property described in §190.02(f)(3) (“all other property”).
   11. Be aware of any contracts in delivery position and rules pertaining to such contracts (§190.06).

First Calendar Day After the Entry of an Order for Relief

1. If a transfer occurred on the date of entry of the order for relief:
   a. Liquidate any remaining open commodity contracts, except any dealer option or specifically identifiable commodity contract [hedge] (See §190.01(kk)(2) and §190.02(f)(1)), and not otherwise transferred in the transfer.
   b. Primary liquidation date for transferred or liquidated commodity contracts (§190.02(a)(2) and (e)(1)).
   2. If no transfer has yet been effected, continue attempt to negotiate transfer of open commodity contracts and dealer options (§190.02(c)(1)).
   3. Provide the clearing organization or Collecting Futures Commission Merchant (as such term is defined in §22.1) with assurances to prevent liquidation of open commodity contract accounts available for transfer at the customer’s instruction or liquidate all open commodity contracts except those available for transfer at a customer’s instruction and dealer options.

Second Calendar Day After the Entry of an Order for Relief

If no transfer has yet been effected, request direct customer instructions regarding transfer of open commodity contracts and publish notice for customer instructions regarding the return of specifically identifiable property other than commodity contracts (§§190.02(b)(1) and (2)).

Third Calendar Day After the Entry of an Order for Relief

1. Second publication date for customer instructions (§190.02(b)(1)) (publication is to be made on two consecutive days, whether or not the second day is a business day).
   2. Last day on which to notify the Commission with regard to whether a transfer in accordance with section 764(b) of the Bankruptcy Code will take place (§190.02(a)(2) and §190.06(e)).

Sixth Calendar Day After the Entry of an Order for Relief

Last day for customers to instruct the trustee concerning open commodity contracts (§190.02(b)(2)).
Seventh Calendar Day After the Entry of an Order for Relief

1. If not previously concluded, conclude transfers under §190.06(e) and (f). (See §190.02(e)(1) and §190.06(g)(2)(v)(A)).
2. Transfer all open dealer option contracts which have not previously been transferred (§190.06(f)(3)(i)).
3. Primary liquidation date (§190.01(ff)) (assuming no transfers and liquidation effected for all open commodity contracts for which no customer instructions were received by the sixth calendar day).
4. Establishment of transfer accounts (§190.02(b)(1)) (assuming this is the primary liquidation date); mark such accounts to market (§190.03(a)(2)) (daily thereafter until closed).
5. Liquidate or offset all remaining open commodity contracts (§190.02(b)(2)).
6. If not done previously, notify customers of bankruptcy and request customer proof of claim (§190.02(b)(4)).

Eighth Calendar Day After the Entry of an Order for Relief

Customer instructions due to trustee concerning specifically identifiable property (§190.02(b)(1)).

Ninth Calendar Day After the Entry of an Order for Relief

Commence liquidation of specifically identifiable property for which no arrangements for return have been made in accordance with customer instructions (§§190.02(b)(1), 190.03(c)).

Tenth Calendar Day After the Entry of an Order for Relief

Complete liquidation to the extent reasonably possible of specifically identifiable property which has yet to be liquidated and for which no customer instructions have been received (§190.03(c)).

Separate Procedures for Involuntary Petitions for Bankruptcy

1. Within one calendar day after notice of receipt of filing of the petition in bankruptcy, the trustee should assure that proper notification has been given to the Commission, the commodity broker’s designated self-regulatory organization (§190.02(a)(1)) (if any), and all applicable clearing organizations; margin calls should be issued if necessary (§190.02(g)(2)).
2. On or before the seventh calendar day after the filing of a petition in bankruptcy, the trustee should use his best efforts to effect a transfer in accordance with §190.06(e) and (f) of all open commodity contracts and equity held for or on behalf of customers of the commodity broker (§190.02(e)(2)) unless the debtor can provide certain assurances to the trustee.

Bankruptcy Appendix Form 2—Request for Instructions Concerning Non-Cash Property Deposited With (Commodity Broker)

Please take notice: On [date], a petition in bankruptcy was filed by [against] (commodity broker). Those customers of (commodity broker) who deposited certain kinds of non-cash property (see below) with (commodity broker) may instruct the trustee of the estate to return their property to them as provided below.

As no customer may obtain more than his or her proportionate share of the property available to satisfy customer claims, if you instruct the trustee to return your property to you, you will be required to pay the estate, as a condition to the return of your property, an amount determined by the trustee. If your property is not margining an open contract, this amount will approximate the difference between the market value of your property and your pro rata share of the estate, as estimated by the trustee. If your property is margining an open commodity contract, this amount will be approximately the full fair market value of the property on the date of its return.

Kinds of Property to Which This Notice Applies

1. Any security deposited as margin which, as of [date petition was filed], was securing an open commodity contract and is:
   —registered in your name,
   —not transferrable by delivery, and
   —not a short-term obligation.
2. Any fully-paid, non-exempt security held for your account in which there were no open commodity contracts as of [date petition was filed]. (Rather than the return, at this time, of the specific securities you deposited with (commodity broker), you may instead request now, or at any later time, that the trustee purchase “like-kind” securities of a fair market value which does not exceed your proportionate share of the estate).
3. Any warehouse receipt, bill of lading or other document of title deposited as margin which, as of [date petition was filed], was securing an open commodity contract and—can be identified in (commodity broker)’s records as being held for your account, and—is neither in bearer form nor otherwise transferable by delivery.
4. Any warehouse receipt, bill of lading or other document of title, or any commodity received, acquired or held by (commodity broker) to make or take delivery or exercise from or for your account and which—can be identified in (commodity broker)’s records as received from or for your account as held specifically for the purpose of delivery or exercise.
5. Any cash or other property deposited to make or take delivery on a commodity contract may be eligible to be returned. The trustee should be contacted directly for further instructions if you have deposited such property with (commodity broker) and desire its return.

Instructions must be received by (the 5th calendar day after 2d publication date) or the trustee will liquidate your property. (If you own such property but fail to provide the trustee with instructions, you will still have a claim against (commodity broker) but you will not be able to have your specific property returned to you).

Note: Prior to receipt of your instructions, circumstances may require the trustee to liquidate your property, transfer your property to another broker if it is margining open commodity contracts. If your property is transferred and your instructions were received within the required time, your instructions will be forwarded to the new broker.

Instructions should be directed to: (Trustee’s name, address, and/or telephone).

Even if you request the return of your property, you must also pay the trustee the amount he specifies and provide the trustee with proof of your claim before (the 7th calendar day after 2d publication date) or your property will be liquidated. (Upon receipt of customer instructions to return property, the trustee will mail the sender a form which describes the information he must provide to substantiate his claim). Noted: The trustee is required to liquidate your property despite the timely receipt of your instructions, money and proof of claim if, for any reason, you have not made arrangements to transfer and/or your contracts are not transferred by (7 calendar days after entry of order for relief).

Instructions should be sent to: (Trustee’s or designee’s name, address, and/or telephone). [Instructions may also be provided by phone].

BANKRUPTCY APPENDIX FORM 4—Proof of Claim

(Note to trustee: As indicated in §190.02(d), this form is provided as a guide to the trustee and should be modified as necessary depending upon the information which the trustee needs at the time a proof of claim is requested and the time provided for a response.)

Proof of Claim

United States Bankruptcy Court __ District of __ In re __, Debtor, No. __. Return this form by ____ or your claim will be barred (unless extended, for good cause only).

I. [If claimant is an individual claiming for himself] The undersigned, who is the claimant herein, resides at __. If claimant is a partnership claiming through a member] The undersigned, who resides at __ is a member of __, a partnership, composed of the undersigned and __, and doing business at __, and is duly authorized to make this proof of claim on behalf of the partnership.

[If claimant is a corporation claiming through a duly authorized officer] The undersigned, who resides at __ is the ___ of __, a corporation organized under the laws of __ and doing business at __, and is duly authorized to make this proof of claim on behalf of the corporation.

[If claim is made by agent] The undersigned, who resides at __, is the agent of __.
and is duly authorized to make this proof of claim on behalf of the claimant.

II. The debtor was, at the time of the filing of the petition initiating this case, and still is, indebted to this claimant for the total sum of $ ______.

III. List EACH account on behalf of which a claim is being made by number and name of account holder(s), and for EACH account, specify the following information:

a. Whether the account is a futures, foreign futures, leverage, option (if an option account, specify whether exchange-traded, dealer or cleared swap), “delivery” account, or a cleared swaps account. A “delivery” account is one which contains only documents of title, commodities, cash, or other property identified to the claimant and deposited for the purposes of making or taking delivery on a commodity underlying a commodity contract or for payment of the strike price upon exercise of an option.

b. The capacity in which the account is held, as follows (and if more than one is applicable, so state):

1. [The account is held in the name of the undersigned in his individual capacity];
2. [The account is held by the undersigned as guardian, custodian, or conservator for the benefit of a ward or a minor under the Uniform Gift to Minors Act];
3. [The account is held by the undersigned as executor or administrator of an estate];
4. [The account is held by the undersigned as trustee for the trust beneficiary];
5. [The account is held by the undersigned in the name of a corporation, partnership, or unincorporated association];
6. [The account is held as an omnibus customer account of the undersigned futures commission merchant];
7. [The account is held by the undersigned as part owner of a joint account];
8. [The account is held by the undersigned in the name of a plan which, on the date the petition in bankruptcy was filed, had in effect a registration statement in accordance with the requirements of §1031 of the Employee Retirement Income Security Act of 1974 and the regulations thereunder]; or
9. [The account is held by the undersigned as agent or nominee for a principal or beneficial owner (not described above in items 1-8 of this II, b)].

A. Such individual—
B. Relative (as defined below in item 8 of this III.d) of the debtor or of a general partner of the debtor;
C. Partnership in which the debtor is a general partner;
D. General partner of the debtor;
E. Corporation of which the debtor is a director, officer, or person in control;
F. If the debtor is a partnership—
   A. Such partnership;
   B. General partner in the debtor;
   C. Such person as defined in item 8 of this III.d) of a general partner in, general partner of, or person in control of the debtor;
   D. Partnership in which the debtor is a general partner;
   E. General partner of the debtor;
   F. Person in control of the debtor;
   G. If the debtor is a limited partnership—
      A. Such limited partnership;
      B. Limited or special partner in such partnership whose duties include:
         i. The management of the partnership business or any part thereof;
         ii. The handling of the trades or customer funds of customers of such partnership;
         iii. The keeping of records pertaining to the trades or customer funds of customers of such partnership;
         iv. The signing or co-signing of checks or drafts on behalf of such partnership;
      4. [If the debtor is a corporation or association (except a debtor which is a futures commission merchant and is also a cooperative association of producers)]—
         A. Such corporation or association;
         B. Director of the debtor;
         C. Officer of the debtor;
         D. Person in control of the debtor;
         E. Partnership in which the debtor is a general partner;
         F. General partner of the debtor;
         G. Relative (as defined in item 8 of this III.d) of a general partner, director, officer, or person in control of the debtor;
         H. An officer, director or owner of ten percent or more of the capital stock of such organization;
   5. [If the debtor is a futures commission merchant which is a cooperative association of producers—
      A. Shareholder or member of the debtor which is an officer, director or manager;
      B. The handling of the trades or customer funds of customers of such individual, partnership, limited partnership, corporation or association;
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C. The keeping of records pertaining to the trades or funds of customers of such individual, partnership, limited partnership, corporation or association; or
D. The signing of checks or drafts on behalf of such individual, partnership, limited partnership, corporation or association;
7. [Managing agent of the debtor];
8. [A spouse or minor dependent living in the same household of ANY OF THE FOREGOING PERSONS, or any other relative, regardless of residency, (unless previously described in items 1-B, 2-C, or 4-G of this III.d) defined as an individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such degree];
9. ["Affiliate" of the debtor, defined as:
   A. Entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—
      i. In a fiduciary or agency capacity without sole discretionary power to vote such securities; or
      ii. Solely to secure a debt, if such entity has not in fact exercised such power to vote;
   B. Corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, con-trolled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—
      i. In a fiduciary or agency capacity without sole discretionary power to vote such securities; or
      ii. Solely to secure a debt, if such entity has not in fact exercised such power to vote;
   C. Person whose business is operated under a lease or operating agreement by the debtor, or, person substantially all of whose property is operated under an operating agreement with the debtor;
   D. Entity that otherwise, directly or indirectly, is controlled by or is under common control with the debtor;]
E. Entity that operates the business or all or substantially all of the property of the debtor under a lease or operating agreement; or
F. Entity that otherwise, directly or indirectly, controls the debtor; or
10. [Any of the persons listed in items 1-7 above in this III.d if such person is associated with an affiliate (see item 9 above) of the debtor as if the affiliate were the debtor].
e. Whether the account is a discretionary account. (If it is, the name in which the "attorney in fact" is held);
f. If the account is a joint account, the amount of the claimant’s percentage interest in the account. (Also specify whether participants in a joint account are claiming separately or jointly).
g. Whether the claimant’s positions in security futures products are held in a futures account or securities account, as those terms are defined in §1.3 of this chapter.
IV. Describe all claims against the debtor not based upon a commodity contract account of the claimant (e.g., if landlord, for rent; if customer, for misrepresentation or fraud).
V. Describe all claims of the DEBTOR against the CLAIMANT not already included in the equity of a commodity contract account(s) of the claimant (see III.c above).
VI. Describe any deposits of money, securities or other property held by or for the debtor from or for the claimant, and indicate if any of this property was included in your answer to III.c above.
VII. Of the money, securities, or other property described in VI above, identify any which consists of the following:
a. With respect to property received, acquired, or held by or for the account of the debtor from or for the account of the claimant to margin, guarantee or secure an open commodity contract, the following:
   1. Any security which as of the filing date is:
      A. Held for the claimant’s account;
      B. Registered in the claimant’s name;
      C. Not transferable by delivery; and
      D. Not a short term obligation; or
   2. Any warehouse receipt, bill of lading or other document of title which as of the filing date:
      A. Can be identified on the books and records of the debtor as held for the account of the claimant; and
      B. Is not in bearer form and is not otherwise transferable by delivery.
b. With respect to open commodity contracts, and except as otherwise provided below in item g of this VII, any such contract which:
   1. As of the date the petition in bankruptcy was filed, is identified on the books and records of the debtor as held for the account of the claimant;
   2. Is a bona fide hedging position or transaction as defined in Rule 1.3 of the Commodity Futures Trading Commission ("CFTC") or is a commodity option transaction which has been determined by a registered entity to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been approved by the CFTC pursuant to section 5c(c) of the Commodity Exchange Act;
   3. Is in an account designated in the accounting records of the debtor as a hedging account.
c. With respect to warehouse receipts, bills of lading or other documents of title, or
physical commodities received, acquired, or held by or for the account of the debtor for the purpose of making or taking delivery or exercise from or for the claimant’s account, any original document of title or commodity which as of the filing date can be identified on the books and records of the debtor as received from or for the account of the claimant specifically for the purpose of delivery or exercise.

d. Any cash or other property deposited prior to bankruptcy to pay for the taking of physical delivery on a long commodity contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date which cash or other property is identified on the books and records of the debtor as received from or for the account of the claimant within three or less days of the notice date or exercise date or of the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the strike price upon exercise.

e. The cash price tendered for any property deposited prior to bankruptcy to make physical delivery on a short commodity contract or for exercise of a long put or a short call option contract on a physical commodity, which cannot be settled in cash, to the extent it exceeds the amount necessary to margin such contract prior to the notice exercise date which property is identified on the books and records of the debtor as received from or for the account of the claimant within three or less days of the notice date or exercise date or of the exercise date specifically for the purpose of a delivery or exercise.

f. Fully paid, non-exempt securities identified on the books and records of the debtor as held by the debtor for or on behalf of the commodity contract account of the claimant for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity.

g. Open commodity contracts transferred to another future commission merchant by the trustee.

VIII. Specify whether the claimant wishes to receive payment in kind, to the extent possible, for any claim for securities.

IX. Attach copies of any documents which support the information provided in this proof of claim, including but not limited to: customer confirmations, account statements, and statements of purchase or sale.

This proof of claim must be filed with the trustee no later than ___ or your claim will be barred unless an extension has been granted, available only for good cause.

Return this form to:

(Trustee’s name (or designee’s) and address)

Dated:

(Signed)

Violation of fraud or false pretense constitutes a misdemeanor punishable by:

Penalty for Presenting Fraudulent Claim.

Fines of not more than $5,000 or imprisonment for not more than five years or both—Title 18, U.S.C. 152.

(Approved by the Office of Management and Budget under control number 3038–0021)

(77 FR 6382, Feb. 7, 2012)

APPENDIX B TO PART 190—SPECIAL BANKRUPTCY DISTRIBUTIONS

FRAMEWORK I—SPECIAL DISTRIBUTION OF CUSTOMER FUNDS FOR FUTURES CONTRACTS WHEN FCM PARTICIPATED IN CROSS-MARGINING

The Commission has established the following distributional convention with respect to “customer funds” (as § 1.3 of this chapter defines such term) for futures contracts held by a futures commission merchant (FCM) that participated in a cross-margining (XM) program which shall apply if participating market professionals sign an agreement that makes reference to this distributional rule and the form of such agreement has been approved by the Commission by rule, regulation or order:

All customer funds for futures contracts held in respect of XM accounts, regardless of the product that customers holding such accounts are trading, are required by Commission order to be segregated separately from all other customer segregated funds. For purposes of this distributional rule, XM accounts will be deemed to be commodity interest accounts and securities held in XM accounts will be deemed to be received by the FCM to margin, guarantee, or secure commodity interest contracts. The maintenance of property in an XM account will result in subordination of the claim for such property to certain non-XM customer claims and thereby will operate to cause such XM claim not to be treated as a customer claim for purposes of the Securities Investors Protection Act and the XM securities to be excluded from the securities estate. This creates subclasses of futures customer accounts, an XM account and a non-XM account (a person could hold each type of account), and results in two pools of segregated funds belonging to futures customers: An XM pool and a non-XM pool. In the event that there is a shortfall in the non-XM pool of customer class segregated funds and there is no shortfall in the XM pool of customer segregated funds, all futures customer net equity claims, whether or not they arise out of the XM subclass of accounts, will be combined and will be paid pro rata out of the total pool of available XM and non-XM customer funds for futures contracts. In the event that there
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is a shortfall in the XM pool of customer segregated funds and there is no shortfall in the non-XM pool of customer segregated funds, then futures customer net equity claims arising from the XM subclass of accounts shall be satisfied first from the XM pool of customer segregated funds, and futures customer net equity claims arising from the non-XM subclass of accounts shall be satisfied first from the non-XM customer segregated funds. Furthermore, in the event that there is a shortfall in both the non-XM and XM pools of customer segregated funds: (1) If the non-XM shortfall as a percentage of the segregation requirement in the non-XM pool is greater than or equal to the XM shortfall as a percentage of the segregation requirement in the XM pool, all futures customer net equity claims will be paid pro rata; and (2) if the XM shortfall as a percentage of the segregation requirement in the XM pool is greater than the non-XM shortfall as a percentage of the segregation requirement of the non-XM pool, non-XM futures customer net equity claims will be paid pro rata out of the available non-XM segregated funds, and XM futures customer net equity claims will be paid pro rata out of the available XM segregated funds. In this way, non-XM customers will never be adversely affected by an XM shortfall.

The following examples illustrate the operation of this convention. The examples assume that the FCM has two customers, one with exclusively XM accounts and one with exclusively non-XM accounts. However, the examples would apply equally if there were only one customer, with both an XM account and a non-XM account.
## 1. Sufficient Funds to Meet Non-XM and XM Customer Claims:

<table>
<thead>
<tr>
<th></th>
<th>Non-XM</th>
<th>XM</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funds in 4d(a) segregation</td>
<td>150</td>
<td>150</td>
<td>300</td>
</tr>
<tr>
<td>4d(a) Segregation requirement</td>
<td>150</td>
<td>150</td>
<td>300</td>
</tr>
<tr>
<td>Shortfall (dollars)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Shortfall (percent)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Distribution</td>
<td>150</td>
<td>150</td>
<td>300</td>
</tr>
</tbody>
</table>

There are adequate funds available and both the non-XM and the XM customer claims will be paid in full.

## 2. Shortfall in Non-XM Only:

<table>
<thead>
<tr>
<th></th>
<th>Non-XM</th>
<th>XM</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funds in 4d(a) segregation</td>
<td>100</td>
<td>150</td>
<td>250</td>
</tr>
<tr>
<td>4d(a) Segregation requirement</td>
<td>150</td>
<td>150</td>
<td>300</td>
</tr>
<tr>
<td>Shortfall (dollars)</td>
<td>50</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Shortfall (percent)</td>
<td>50/150≈33.3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Pro rata (percent)</td>
<td>150/300≈50</td>
<td>150/300≈50</td>
<td>50/150≈33.3</td>
</tr>
<tr>
<td>Pro rata (dollars)</td>
<td>125</td>
<td>125</td>
<td>250</td>
</tr>
<tr>
<td>Distribution</td>
<td>125</td>
<td>125</td>
<td>250</td>
</tr>
</tbody>
</table>

Due to the non-XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Each customer will receive his pro rata share of the funds available, or 50% of the $250 available, or $125.

## 3. Shortfall in XM Only:

<table>
<thead>
<tr>
<th></th>
<th>Non-XM</th>
<th>XM</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funds in 4d(a) segregation</td>
<td>150</td>
<td>100</td>
<td>250</td>
</tr>
<tr>
<td>4d(a) Segregation requirement</td>
<td>150</td>
<td>150</td>
<td>300</td>
</tr>
<tr>
<td>Shortfall (dollars)</td>
<td>0</td>
<td>50</td>
<td>50/150≈33.3</td>
</tr>
<tr>
<td>Shortfall (percent)</td>
<td>0</td>
<td>50/150≈33.3</td>
<td>0</td>
</tr>
<tr>
<td>Pro rata (percent)</td>
<td>150/300≈50</td>
<td>150/300≈50</td>
<td>150/300≈50</td>
</tr>
<tr>
<td>Pro rata (dollars)</td>
<td>125</td>
<td>125</td>
<td>250</td>
</tr>
<tr>
<td>Distribution</td>
<td>150</td>
<td>100</td>
<td>250</td>
</tr>
</tbody>
</table>

Due to the XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Accordingly, the XM funds and non-XM funds are treated as separate pools, and the non-XM customer will be paid in full, receiving $150 while the XM customer will receive the remaining $100.

## 4. Shortfall in Both, With XM Shortfall Exceeding Non-XM Shortfall:

<table>
<thead>
<tr>
<th></th>
<th>Non-XM</th>
<th>XM</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funds in 4d(a) segregation</td>
<td>125</td>
<td>100</td>
<td>225</td>
</tr>
<tr>
<td>4d(a) Segregation requirement</td>
<td>150</td>
<td>150</td>
<td>300</td>
</tr>
<tr>
<td>Shortfall (dollars)</td>
<td>25</td>
<td>50</td>
<td>50/150≈33.3</td>
</tr>
<tr>
<td>Shortfall (percent)</td>
<td>25/150≈16.7</td>
<td>50/150≈33.3</td>
<td>0</td>
</tr>
<tr>
<td>Pro rata (percent)</td>
<td>150/300≈50</td>
<td>150/300≈50</td>
<td>150/300≈50</td>
</tr>
<tr>
<td>Pro rata (dollars)</td>
<td>112.50</td>
<td>112.50</td>
<td>225</td>
</tr>
<tr>
<td>Distribution</td>
<td>125</td>
<td>100</td>
<td>225</td>
</tr>
</tbody>
</table>

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the XM shortfall exceeds the non-XM shortfall. The non-XM...
customer will receive the $125 available with respect to non-XM claims while the XM customer will receive the $100 available with respect to XM claims.

5. Shortfall in Both, With Non-XM Shortfall Exceeding XM Shortfall:

<table>
<thead>
<tr>
<th></th>
<th>Non-XM</th>
<th>XM</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funds in 4d(a) segregation</td>
<td>100</td>
<td>125</td>
<td>225</td>
</tr>
<tr>
<td>4d(a) Segregation requirement</td>
<td>150</td>
<td>150</td>
<td>300</td>
</tr>
<tr>
<td>Shortfall (dollars)</td>
<td>50</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Shortfall (percent)</td>
<td>50/150=33.3</td>
<td>25/150=16.7</td>
<td></td>
</tr>
<tr>
<td>Pro rata (percent)</td>
<td>150/300=50</td>
<td>150/300=50</td>
<td></td>
</tr>
<tr>
<td>Pro rata (dollars)</td>
<td>112.50</td>
<td>112.50</td>
<td></td>
</tr>
<tr>
<td>Distribution</td>
<td>112.50</td>
<td>112.50</td>
<td>225</td>
</tr>
</tbody>
</table>

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall exceeds the XM shortfall. Each customer will receive 50% of the $225 available, or $112.50.

6. Shortfall in Both, Non-XM Shortfall = XM Shortfall:

<table>
<thead>
<tr>
<th></th>
<th>Non-XM</th>
<th>XM</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funds in 4d(a) segregation</td>
<td>100</td>
<td>100</td>
<td>200</td>
</tr>
<tr>
<td>4d(a) Segregation requirement</td>
<td>150</td>
<td>150</td>
<td>300</td>
</tr>
<tr>
<td>Shortfall (dollars)</td>
<td>50</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>Shortfall (percent)</td>
<td>50/150=33.3</td>
<td>50/150=33.3</td>
<td></td>
</tr>
<tr>
<td>Pro rata (percent)</td>
<td>150/300=50</td>
<td>150/300=50</td>
<td></td>
</tr>
<tr>
<td>Pro rata (dollars)</td>
<td>100</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>Distribution</td>
<td>100</td>
<td>100</td>
<td>200</td>
</tr>
</tbody>
</table>

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall equals the XM shortfall. Each customer will receive 50% of the $200 available, or $100.

These examples illustrate the principle that pro rata distribution across both accounts is the preferable approach except when a shortfall in the XM account could harm non-XM customers. Thus, pro rata distribution occurs in Examples 1, 2, 5 and 6. Separate treatment of the XM and non-XM accounts occurs in Examples 3 and 4.

FRAMEWORK 2 — SPECIAL ALLOCATION OF SHORTFALL TO CUSTOMER CLAIMS WHEN CUSTOMER FUNDS FOR FUTURES CONTRACTS AND CLEARED SWAPS CUSTOMER COLLATERAL ARE HELD IN A DEPOSITORY OUTSIDE OF THE UNITED STATES OR IN A FOREIGN CURRENCY

The Commission has established the following allocation convention with respect to customer funds (as §1.3 of this chapter defines such term) for futures contracts and Cleared Swaps Customer Collateral (as §22.1 of this chapter defines such term) segregated pursuant to the Act and Commission rules thereunder held by a futures commission merchant (“FCM”) or derivatives clearing organization (“DCO”) in a depository outside the United States (“U.S.”) or in a foreign currency. The maintenance of customer funds for futures contracts or Cleared Swaps Customer Collateral in a depository outside the U.S. or denominated in a foreign currency will result, in certain circumstances, in the reduction of customer claims for such funds. For purposes of this proposed bankruptcy convention, sovereign action of a foreign government or court would include, but not be limited to, the application or enforcement of statutes, rules,
regulations, interpretations, advisories, decisions, or orders, formal or informal, by a federal, state, or provincial executive, legislature, judiciary, or government agency. If an FCM enters into bankruptcy and maintains customer funds for futures contracts or Cleared Swaps Customer Collateral in a depository located in the U.S. in a currency other than U.S. dollars or in a depository outside the U.S., the following allocation procedures shall be used to calculate the claim of each futures customer or Cleared Swaps Customer (as §22.1 of this chapter defines such term). The allocation procedures should be performed separately with respect to each futures customer or Cleared Swaps Customer.

I. REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

A. Determination of losses not attributable to sovereign action

1. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars at the exchange rate in effect on the Final Net Equity Determination Date, as defined in §190.01(s) (the “Exchange Rate”).

2. Determine the amount of assets available for distribution to futures customers or Cleared Swaps Customers. In making this calculation, include customer funds for futures contracts and Cleared Swaps Customer Collateral that would be available for distribution but for the sovereign action.

3. Convert the amount of customer funds for futures contracts and Cleared Swaps Customer Collateral available for distribution to U.S. Dollars at the Exchange Rate.

4. Determine the Shortfall Percentage that is not attributable to sovereign action, as follows:

\[
	ext{Shortfall Percentage} = 1 - \left( \frac{\text{Total Customer Assets}}{\text{Total Customer Claims}} \right)
\]

B. Allocation of Losses Not Attributable to Sovereign Action

1. Reduce the claim of each futures customer or Cleared Swaps Customer by the Shortfall Percentage.

II. REDUCTION IN CLAIMS FOR SOVEREIGN LOSS

A. Determination of Losses Attributable to Sovereign Action (“Sovereign Loss”)

1. If any portion of the claim of a futures customer or Cleared Swaps Customer is required to be kept in U.S. dollars in the U.S., that portion of the claim is not exposed to Sovereign Loss.

2. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one location and that location is:
   a. The U.S. or a location in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.
   b. A location in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.
3. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one currency and that currency is:
   a. U.S. dollars or a currency in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.
   b. A currency in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.
4. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one location and:
   a. There is no Sovereign Loss in any of those locations, then that portion of the claim is not exposed to Sovereign Loss.
   b. There is Sovereign Loss in one of those locations, then that entire portion of the claim is exposed to Sovereign Loss.
   c. There is Sovereign Loss in more than one of those locations, then an equal share of that portion of the claim will be exposed to Sovereign Loss in each such location.
5. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one currency and:
   a. There is no Sovereign Loss in any of those currencies, then that portion of the claim is not exposed to Sovereign Loss.
   b. There is Sovereign Loss in one of those currencies, then that entire portion of the claim is exposed to Sovereign Loss.
   c. There is Sovereign Loss in more than one of those currencies, then an equal share of that portion of the claim will be exposed to Sovereign Loss.

B. Calculation of Sovereign Loss
1. The total Sovereign Loss for each location is the difference between:
   a. The total customer funds for futures contracts or Cleared Swaps Customer Collateral deposited in depositories in that location and
   b. The amount of customer funds for futures contracts or Cleared Swaps Customer Collateral in that location that is available to be distributed to futures customers or Cleared Swaps Customers, after taking into account any sovereign action.
2. The total Sovereign Loss for each currency is the difference between:
   a. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the day before the sovereign action took place and
   b. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the Final Net Equity Determination Date.

C. Allocation of Sovereign Loss
1. Each portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location will be reduced by:

   \[
   \frac{\text{Total Sovereign Loss for the location}}{\text{All portions of customer claims exposed to loss in that location}} = \frac{\text{Portion of the customer's claim exposed to loss in that location}}{\text{All portions of customer claims exposed to loss in that location}}
   \]
2. Each portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a currency will be reduced by:

\[
\frac{\text{Total Sovereign Loss} \times \text{Portion of the customer's claim exposed to loss in that currency}}{\text{All portions of customer claims exposed to loss in that currency}}
\]

3. A portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location or currency will not be reduced below zero. (The above calculations might yield a result below zero where the FCM kept more customer funds for futures contracts or Cleared Swaps Customer Funds in a location or currency than it was authorized to keep.)

4. Any amount of Sovereign Loss from a location or currency in excess of the total amount of customer funds for futures contracts or Cleared Swaps Customer Funds authorized to be kept in that location or currency (calculated in accord with section II.1 above) (“Total Excess Sovereign Loss”) will be divided among all futures customers or Cleared Swaps Customer who have authorized funds to be kept outside the U.S., or in currencies other than U.S. dollars, with each such futures customer or Cleared Swaps Customer claim reduced by the following amount:

\[
\left(\frac{\text{Total Excess Sovereign Loss} \times \left(\frac{\text{This customer's total claim} - \text{The portion of this Customer's claim required to be kept in U.S. dollars, in the U.S.}}{\text{Total customer claims - Total of all customer claims required to be kept in U.S. dollars, in the U.S.}}\right)}{\text{Customer's total claim}}\right)
\]

The following examples illustrate the operation of this convention.

**Example 1.** No shortfall in any location.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Location(s) customer has consented to having funds held</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>U.S.</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>U.K.</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>Germany</td>
</tr>
<tr>
<td>D</td>
<td>£300</td>
<td>U.K.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Location</th>
<th>Actual asset balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$50</td>
</tr>
<tr>
<td>U.K.</td>
<td>£300</td>
</tr>
<tr>
<td>U.K.</td>
<td>€50</td>
</tr>
<tr>
<td>Germany</td>
<td>€50</td>
</tr>
</tbody>
</table>

Note: Conversion Rates: £1 = $1; £1 = $1.5.
Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Conversion rate</th>
<th>Claim in U.S. dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>1.0</td>
<td>$50</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>D</td>
<td>£300</td>
<td>1.5</td>
<td>450</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>$600.00</td>
</tr>
</tbody>
</table>

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

<table>
<thead>
<tr>
<th>Location</th>
<th>Assets</th>
<th>Conversion rate</th>
<th>Assets in U.S. dollars</th>
<th>Shortfall due to sovereign action percentage</th>
<th>Actual shortfall due to sovereign action</th>
<th>Amount actually available</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$50</td>
<td>1.0</td>
<td>$50</td>
<td></td>
<td></td>
<td>$50</td>
</tr>
<tr>
<td>U.K.</td>
<td>£300</td>
<td>1.5</td>
<td>450</td>
<td></td>
<td></td>
<td>450</td>
</tr>
<tr>
<td>U.K.</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
<td></td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>Germany</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
<td></td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>Total</td>
<td>$600.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$600.00</td>
</tr>
</tbody>
</table>

There are no shortfalls in funds held in any location. Accordingly, there will be no reduction of futures customer or Cleared Swaps Customer claims.

Claims:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in U.S. dollars after allocated non-sovereign shortfall</th>
<th>Allocation of shortfall due to sovereign action</th>
<th>Claim after all reductions</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>$0</td>
<td>$50</td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td>0</td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>50</td>
<td>0</td>
<td>50</td>
</tr>
<tr>
<td>D</td>
<td>450</td>
<td>0</td>
<td>450</td>
</tr>
<tr>
<td>Total</td>
<td>600.00</td>
<td>0.0</td>
<td>600.00</td>
</tr>
</tbody>
</table>
Example 2. Shortfall in funds held in the U.S.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Location(s) customer has consented to having funds held</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$100</td>
<td>U.S.</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>U.K.</td>
</tr>
<tr>
<td>C</td>
<td>€100</td>
<td>U.K., Germany, or Japan</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Location</th>
<th>Actual asset balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$50</td>
</tr>
<tr>
<td>U.K.</td>
<td>€100</td>
</tr>
<tr>
<td>Germany</td>
<td>€50</td>
</tr>
</tbody>
</table>

Note: Conversion Rates: €1=$1.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

There is a shortfall in the funds held in the U.S. such that only 1/2 of the funds are available. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Convert each customer's claim in each currency to U.S. Dollars:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Conversion rate</th>
<th>Claim in US$</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$100</td>
<td>1.0</td>
<td>$100</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>250.00</td>
</tr>
</tbody>
</table>

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

<table>
<thead>
<tr>
<th>Location</th>
<th>Assets</th>
<th>Conversion rate</th>
<th>Assets in U.S. dollars</th>
<th>Shortfall due to sovereign action percentage</th>
<th>Actual shortfall due to sovereign action</th>
<th>Amount actually available</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$50</td>
<td>1.0</td>
<td>$50.00</td>
<td></td>
<td></td>
<td>$50</td>
</tr>
<tr>
<td>U.K.</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
<td></td>
<td></td>
<td>100</td>
</tr>
<tr>
<td>Germany</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
<td></td>
<td></td>
<td>$50</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>200.00</td>
<td></td>
<td></td>
<td>200.00</td>
</tr>
</tbody>
</table>

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1−(200/250)) = (1−80%) = 20%. 
Reduce each futures customer or Cleared Swaps Customer claim by the Shortfall Percentage:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in U.S.$</th>
<th>Allocated shortfall (non-sovereign)</th>
<th>Claim in U.S. dollars after allocated shortfall</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$100</td>
<td>$20.00</td>
<td>$80.00</td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td>10.00</td>
<td>40.00</td>
</tr>
<tr>
<td>C</td>
<td>100</td>
<td>20.00</td>
<td>80.00</td>
</tr>
<tr>
<td>Total</td>
<td>250.00</td>
<td>50.00</td>
<td>200.00</td>
</tr>
</tbody>
</table>

**REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION**

There is no shortfall due to sovereign action. Accordingly, the futures customer or Cleared Swaps Customer claims will not be further reduced.

**CLAIMS AFTER REDUCTIONS**

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in U.S. dollars after allocated non-sovereign shortfall</th>
<th>Allocation of shortfall due to sovereign action</th>
<th>Claim after all reductions</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$80</td>
<td></td>
<td>$80.00</td>
</tr>
<tr>
<td>B</td>
<td>40</td>
<td></td>
<td>40.00</td>
</tr>
<tr>
<td>C</td>
<td>80</td>
<td></td>
<td>80.00</td>
</tr>
<tr>
<td>Total</td>
<td>200.00</td>
<td>0</td>
<td>200.00</td>
</tr>
</tbody>
</table>

**Example 3.** Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Location(s) customer has consented to having funds held</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$150</td>
<td>U.S.</td>
</tr>
<tr>
<td>B</td>
<td>€100</td>
<td>U.K.</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>Germany</td>
</tr>
<tr>
<td>D</td>
<td>$100</td>
<td>U.S.</td>
</tr>
<tr>
<td>D</td>
<td>€100</td>
<td>U.K. or Germany</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Location</th>
<th>Actual asset balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$250</td>
</tr>
<tr>
<td>U.K.</td>
<td>€50</td>
</tr>
<tr>
<td>Germany</td>
<td>€100</td>
</tr>
</tbody>
</table>

Note: Conversion Rates: €1=$1.
REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Conversion rate</th>
<th>Claim in US$</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$150</td>
<td>1.0</td>
<td>$150</td>
</tr>
<tr>
<td>B</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>D</td>
<td>$100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>D</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>500.00</td>
</tr>
</tbody>
</table>

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

<table>
<thead>
<tr>
<th>Location</th>
<th>Assets</th>
<th>Conversion rate</th>
<th>Assets in U.S. dollars</th>
<th>Shortfall due to sovereign action percentage</th>
<th>Actual shortfall due to sovereign action</th>
<th>Amount actually available</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$250</td>
<td>1.0</td>
<td>$250</td>
<td></td>
<td></td>
<td>$250</td>
</tr>
<tr>
<td>U.K.</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
<td></td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>Germany</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
<td></td>
<td></td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>400.00</td>
<td></td>
<td></td>
<td>400.00</td>
</tr>
</tbody>
</table>

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1 – 400/500) = (1 – 80%) = 20%.

Reduce each futures customer or Cleared Swaps Customer by the shortfall percentage:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in US$</th>
<th>Allocated shortfall (non-sovereign)</th>
<th>Claim in U.S. dollars after allocated shortfall</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$150</td>
<td>$30.00</td>
<td>120.00</td>
</tr>
<tr>
<td>B</td>
<td>100</td>
<td>20.00</td>
<td>80.00</td>
</tr>
<tr>
<td>C</td>
<td>50</td>
<td>10.00</td>
<td>40.00</td>
</tr>
<tr>
<td>D</td>
<td>200</td>
<td>40.00</td>
<td>160.00</td>
</tr>
<tr>
<td>Total</td>
<td>500.00</td>
<td>100.00</td>
<td>400.00</td>
</tr>
</tbody>
</table>

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, the claims will not be further reduced.
### Claims After Reductions

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in U.S. dollars after allocated non-sovereign shortfall</th>
<th>Allocation of shortfall due to sovereign action</th>
<th>Claim after all reductions</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$120.00</td>
<td></td>
<td>$120</td>
</tr>
<tr>
<td>B</td>
<td>80.00</td>
<td></td>
<td>80</td>
</tr>
<tr>
<td>C</td>
<td>40.00</td>
<td></td>
<td>40</td>
</tr>
<tr>
<td>D</td>
<td>160.00</td>
<td>0</td>
<td>160</td>
</tr>
<tr>
<td>Total</td>
<td>400.00</td>
<td>0</td>
<td>400</td>
</tr>
</tbody>
</table>

Example 4. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Location(s) where customer has consented to have funds held</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>U.S.</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>U.K.</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>Germany</td>
</tr>
<tr>
<td>D</td>
<td>$100</td>
<td>U.S.</td>
</tr>
<tr>
<td>D</td>
<td>€100</td>
<td>U.K. or Germany</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Location</th>
<th>Actual asset balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$150</td>
</tr>
<tr>
<td>U.K.</td>
<td>100</td>
</tr>
<tr>
<td>Germany</td>
<td>100</td>
</tr>
</tbody>
</table>

Notice: Conversion Rates: €1 = $1; ¥1 = $0.01, £1 = $1.5.

### Reduction in Claims for General Shortfall

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Conversion rate</th>
<th>Claim in US$</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>1.0</td>
<td>$50</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>D</td>
<td>$100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>D</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>350.00</td>
</tr>
</tbody>
</table>
Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

<table>
<thead>
<tr>
<th>Location</th>
<th>Assets</th>
<th>Conversion rate</th>
<th>Assets in U.S. dollars</th>
<th>Shortfall due to sovereign action percentage</th>
<th>Actual shortfall due to sovereign action</th>
<th>Amount actually available</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$150</td>
<td>1.0</td>
<td>$150</td>
<td></td>
<td></td>
<td>$150</td>
</tr>
<tr>
<td>U.K.</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
<td></td>
<td></td>
<td>100</td>
</tr>
<tr>
<td>Germany</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
<td>50%</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>Total</td>
<td>350.00</td>
<td>50.00</td>
<td>300.00</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1−350/350) = (1−100%) = 0%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in US$</th>
<th>Allocated shortfall (non-sovereign)</th>
<th>Claim in U.S. dollars after allocated shortfall</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>0</td>
<td>$50.00</td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td>0</td>
<td>50.00</td>
</tr>
<tr>
<td>C</td>
<td>50</td>
<td>0</td>
<td>50.00</td>
</tr>
<tr>
<td>D</td>
<td>200</td>
<td>0</td>
<td>200.00</td>
</tr>
<tr>
<td>Total</td>
<td>350.00</td>
<td>0.00</td>
<td>350.00</td>
</tr>
</tbody>
</table>

**Reduction in Claims for Shortfall Due to Sovereign Action**

Due to sovereign action, only 1/2 of the funds in Germany are available.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Presumed location of funds</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>U.S.</td>
</tr>
<tr>
<td>A</td>
<td>$50</td>
</tr>
<tr>
<td>B</td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td>150.00</td>
</tr>
</tbody>
</table>
Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

<table>
<thead>
<tr>
<th>Customer</th>
<th>Allocation share</th>
<th>Allocation share of actual shortfall</th>
<th>Actual shortfall allocated</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>$50/$150</td>
<td>33.3% of $50</td>
<td>$16.67</td>
</tr>
<tr>
<td>D</td>
<td>$100/$150</td>
<td>66.7% of $50</td>
<td>33.33</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>50.00</td>
</tr>
</tbody>
</table>

**CLAIMS AFTER REDUCTIONS:**

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in U.S. dollars after allocated non-sovereign shortfall</th>
<th>Allocation of shortfall due to sovereign action from Germany</th>
<th>Claim after all reductions</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td></td>
<td>$50</td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>50</td>
<td>$16.67</td>
<td>33.33</td>
</tr>
<tr>
<td>D</td>
<td>200</td>
<td>33.33</td>
<td>166.67</td>
</tr>
<tr>
<td>Total</td>
<td>350.00</td>
<td></td>
<td>50.00</td>
</tr>
</tbody>
</table>

**Example 5.** Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action and a shortfall in funds held in the U.S.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Location(s) customer has consented to having funds held</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$100</td>
<td>U.S.</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>U.K.</td>
</tr>
<tr>
<td>C</td>
<td>€150</td>
<td>Germany</td>
</tr>
<tr>
<td>D</td>
<td>$100</td>
<td>U.S.</td>
</tr>
<tr>
<td>D</td>
<td>£300</td>
<td>U.K.</td>
</tr>
<tr>
<td>D</td>
<td>€150</td>
<td>U.K. or Germany</td>
</tr>
</tbody>
</table>

**Location**

| U.S.      | $100       |
| U.K.      | £300       |
| U.K.      | €200       |
| Germany   | €150       |

Conversion Rates: €1=$1; £1=$1.5.

**REDUCTION IN CLAIMS FOR GENERAL SHORTFALL**
Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Conversion rate</th>
<th>Claim in US$</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$100</td>
<td>1.0</td>
<td>$100</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>€150</td>
<td>1.0</td>
<td>150</td>
</tr>
<tr>
<td>D</td>
<td>$100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>D</td>
<td>£300</td>
<td>1.5</td>
<td>450</td>
</tr>
<tr>
<td>D</td>
<td>€150</td>
<td>1.0</td>
<td>150</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>1000.00</td>
</tr>
</tbody>
</table>

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

<table>
<thead>
<tr>
<th>Location</th>
<th>Assets</th>
<th>Conversion rate</th>
<th>Assets in U.S. dollars</th>
<th>Shortfall due to sovereign action percentage</th>
<th>Actual shortfall due to sovereign action</th>
<th>Amount actually available</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$100</td>
<td>1.0</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
</tr>
<tr>
<td>U.K.</td>
<td>£300</td>
<td>1.5</td>
<td>450</td>
<td>$450</td>
<td></td>
<td>450</td>
</tr>
<tr>
<td>U.K.</td>
<td>€200</td>
<td>1.0</td>
<td>200</td>
<td></td>
<td></td>
<td>200</td>
</tr>
<tr>
<td>Germany</td>
<td>€150</td>
<td>1.0</td>
<td>150</td>
<td>100%</td>
<td>$150</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>900.00</td>
<td></td>
<td>150.00</td>
<td>750.00</td>
<td></td>
<td>750.00</td>
</tr>
</tbody>
</table>

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = \((1 - 900/1000) = (1 - 90\%) = 10\%\).

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in US$</th>
<th>Allocated shortfall (non-sovereign)</th>
<th>Claim in U.S. dollars after allocated shortfall</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$100</td>
<td>$10.00</td>
<td>$90.00</td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td>5.00</td>
<td>45.00</td>
</tr>
<tr>
<td>C</td>
<td>150</td>
<td>15.00</td>
<td>135.00</td>
</tr>
<tr>
<td>D</td>
<td>700</td>
<td>70.00</td>
<td>63.00</td>
</tr>
<tr>
<td>Total</td>
<td>1000.00</td>
<td>100.00</td>
<td>900.00</td>
</tr>
</tbody>
</table>
REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Presumed location of funds</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>U.S.</td>
<td>U.K.</td>
</tr>
<tr>
<td>A</td>
<td>$100</td>
<td></td>
</tr>
<tr>
<td>B</td>
<td></td>
<td>$50</td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>100</td>
<td>450</td>
</tr>
<tr>
<td>Total</td>
<td>200</td>
<td>500</td>
</tr>
</tbody>
</table>

Calculation of the allocation of the shortfall due to sovereign action Germany ($150 shortfall to be allocated):

<table>
<thead>
<tr>
<th>Customer</th>
<th>Allocation share</th>
<th>Allocation Share of actual shortfall</th>
<th>Actual shortfall allocated</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>$150/$300</td>
<td>50% of $150</td>
<td>$75</td>
</tr>
<tr>
<td>D</td>
<td>150/$300</td>
<td>50% of $150</td>
<td>75</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>150.00</td>
</tr>
</tbody>
</table>

CLAIMS AFTER REDUCTIONS

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in U.S. dollars after allocated non-sovereign shortfall</th>
<th>Allocation of shortfall due to sovereign action from Germany</th>
<th>Claim after all reductions</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$90</td>
<td></td>
<td>$90</td>
</tr>
<tr>
<td>B</td>
<td>45</td>
<td></td>
<td>45</td>
</tr>
<tr>
<td>C</td>
<td>135</td>
<td>$75</td>
<td>60</td>
</tr>
<tr>
<td>D</td>
<td>630</td>
<td>75</td>
<td>555</td>
</tr>
<tr>
<td>Total</td>
<td>900.00</td>
<td>150.00</td>
<td>750.00</td>
</tr>
</tbody>
</table>

Example 6. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action, and a shortfall in funds held in the U.S.
Customer | Claim | Location(s) customer has consented to having funds held
---|---|---
A | $50 | U.S.
B | €50 | U.K.
C | $20 | U.S.
C | €50 | Germany
D | $100 | U.S.
D | £300 | U.K.
D | €100 | U.K., Germany, or Japan
E | $80 | U.S.
E | ¥10,000 | Japan

<table>
<thead>
<tr>
<th>Location</th>
<th>Actual asset balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$200</td>
</tr>
<tr>
<td>U.K.</td>
<td>£200</td>
</tr>
<tr>
<td>U.K.</td>
<td>€100</td>
</tr>
<tr>
<td>Germany</td>
<td>€50</td>
</tr>
<tr>
<td>Japan</td>
<td>¥10,000</td>
</tr>
</tbody>
</table>

Conversion Rates: £1 = $1; ¥1=$0.01, £1=$1.5.

**Reduction in Claims for General Shortfall**

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Conversion rate</th>
<th>Claim in US$</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>1.0</td>
<td>$50</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>$20</td>
<td>1.0</td>
<td>20</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>D</td>
<td>$100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>D</td>
<td>€300</td>
<td>1.5</td>
<td>450</td>
</tr>
<tr>
<td>D</td>
<td>£100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>E</td>
<td>$80</td>
<td>1.0</td>
<td>80</td>
</tr>
<tr>
<td>E</td>
<td>¥10,000</td>
<td>0.01</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>1000.00</td>
</tr>
</tbody>
</table>
Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

<table>
<thead>
<tr>
<th>Location</th>
<th>Assets</th>
<th>Conversion rate</th>
<th>Assets in U.S. dollars</th>
<th>Shortfall due to sovereign action percentage</th>
<th>Actual shortfall due to sovereign action</th>
<th>Amount actually available</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$200</td>
<td>1.0</td>
<td>$200</td>
<td></td>
<td>$200</td>
<td>$200</td>
</tr>
<tr>
<td>U.K.</td>
<td>£200</td>
<td>1.5</td>
<td>300</td>
<td></td>
<td></td>
<td>300</td>
</tr>
<tr>
<td>U.K.</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
<td></td>
<td></td>
<td>100</td>
</tr>
<tr>
<td>Germany</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
<td>100%</td>
<td>$50</td>
<td>0</td>
</tr>
<tr>
<td>Japan</td>
<td>¥10,000</td>
<td>0.01</td>
<td>100</td>
<td>50%</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>750</td>
<td>100%</td>
<td>650.00</td>
<td></td>
</tr>
</tbody>
</table>

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1-750/1100) = (1-75%) = 25%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in U.S.</th>
<th>Allocated shortfall (non-sovereign)</th>
<th>Claim in U.S. dollars after allocated shortfall</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>$12.50</td>
<td>$37.50</td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td>12.50</td>
<td>37.50</td>
</tr>
<tr>
<td>C</td>
<td>70</td>
<td>17.50</td>
<td>52.50</td>
</tr>
<tr>
<td>D</td>
<td>650</td>
<td>162.50</td>
<td>487.50</td>
</tr>
<tr>
<td>E</td>
<td>180</td>
<td>45.00</td>
<td>135.00</td>
</tr>
<tr>
<td>Total</td>
<td>1000.00</td>
<td>250.00</td>
<td>750.00</td>
</tr>
</tbody>
</table>

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany and only 1/2 of the funds in Japan are available:

<table>
<thead>
<tr>
<th>Presumed location of funds</th>
<th>U.S.</th>
<th>U.K.</th>
<th>Germany</th>
<th>Japan</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td></td>
<td>$50</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td>20</td>
<td></td>
<td>$50</td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>100</td>
<td>450</td>
<td>50</td>
<td>$50</td>
</tr>
<tr>
<td>E</td>
<td>80</td>
<td></td>
<td></td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td>250.00</td>
<td>500.00</td>
<td>100.00</td>
<td>150.00</td>
</tr>
</tbody>
</table>
Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

<table>
<thead>
<tr>
<th>Customer allocation</th>
<th>Allocation share</th>
<th>Allocation share of actual shortfall</th>
<th>Actual shortfall allocated</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>$50/$100</td>
<td>50% of $50</td>
<td>$25</td>
</tr>
<tr>
<td>D</td>
<td>50/100</td>
<td>50% of 50</td>
<td>25</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>50</td>
</tr>
</tbody>
</table>

Japan ($50 shortfall to be allocated):

<table>
<thead>
<tr>
<th>Customer</th>
<th>Allocation share</th>
<th>Allocation share of actual shortfall</th>
<th>Actual shortfall allocated</th>
</tr>
</thead>
<tbody>
<tr>
<td>D</td>
<td>$50/$150</td>
<td>33.3% of $50</td>
<td>$16.67</td>
</tr>
<tr>
<td>E</td>
<td>100/150</td>
<td>66.6% of 50</td>
<td>33.33</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>50.00</td>
</tr>
</tbody>
</table>

**Claims After Reductions**

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in US dollars after allocated non-sovereign shortfall</th>
<th>Allocation of shortfall due to sovereign action from Germany</th>
<th>Allocation of shortfall due to sovereign action from Japan</th>
<th>Claim after all reductions</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$37.50</td>
<td></td>
<td></td>
<td>37.50</td>
</tr>
<tr>
<td>B</td>
<td>37.50</td>
<td></td>
<td></td>
<td>37.50</td>
</tr>
<tr>
<td>C</td>
<td>52.50</td>
<td>$25</td>
<td></td>
<td>27.50</td>
</tr>
<tr>
<td>D</td>
<td>487.50</td>
<td>25</td>
<td>16.67</td>
<td>445.83</td>
</tr>
<tr>
<td>E</td>
<td>135.00</td>
<td></td>
<td>33.33</td>
<td>101.67</td>
</tr>
<tr>
<td>Total</td>
<td>750.00</td>
<td>50.00</td>
<td>50.00</td>
<td>650.00</td>
</tr>
</tbody>
</table>

**Example 7.** Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, where the FCM kept more funds than permitted in such location or currency:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Location(s) customer has consented to having funds held</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>U.S.</td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td>U.S.</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>U.K.</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>Germany.</td>
</tr>
<tr>
<td>D</td>
<td>100</td>
<td>U.S.</td>
</tr>
<tr>
<td>D</td>
<td>€100</td>
<td>U.K. or Germany.</td>
</tr>
<tr>
<td>E</td>
<td>50</td>
<td>U.S.</td>
</tr>
<tr>
<td>E</td>
<td>€50</td>
<td>U.K.</td>
</tr>
</tbody>
</table>
REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim</th>
<th>Conversion rate</th>
<th>Claim in US$</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>1.0</td>
<td>$50</td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>B</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>D</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>D</td>
<td>€100</td>
<td>1.0</td>
<td>100</td>
</tr>
<tr>
<td>E</td>
<td>50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>E</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>500.00</td>
</tr>
</tbody>
</table>

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

<table>
<thead>
<tr>
<th>Location</th>
<th>Assets</th>
<th>Conversion rate</th>
<th>Assets in U.S. dollars</th>
<th>Shortfall due to sovereign action percentage</th>
<th>Actual shortfall due to sovereign action</th>
<th>Amount actually available</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>$250</td>
<td>1.0</td>
<td>$250</td>
<td></td>
<td></td>
<td>$250</td>
</tr>
<tr>
<td>U.K.</td>
<td>€50</td>
<td>1.0</td>
<td>50</td>
<td></td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>Germany</td>
<td>€200</td>
<td>1.0</td>
<td>200</td>
<td>100%</td>
<td>200</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>500.00</td>
<td>200</td>
<td>300.00</td>
<td></td>
</tr>
</tbody>
</table>

Determine the percentage of shortfall that is not attributable to sovereign

Shortfall Percentage = (1–500/500) = (1–100%) = 0%.
Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

<table>
<thead>
<tr>
<th>Customer</th>
<th>Claim in US$</th>
<th>Allocated shortfall (non-sovereign)</th>
<th>Claim in U.S. dollars after allocated shortfall</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$50</td>
<td>0</td>
<td>$50.00</td>
</tr>
<tr>
<td>B</td>
<td>100</td>
<td>0</td>
<td>100.00</td>
</tr>
<tr>
<td>C</td>
<td>50</td>
<td>0</td>
<td>50.00</td>
</tr>
<tr>
<td>D</td>
<td>200</td>
<td>0</td>
<td>200.00</td>
</tr>
<tr>
<td>E</td>
<td>100</td>
<td>0</td>
<td>100.00</td>
</tr>
<tr>
<td>Total</td>
<td>500.00</td>
<td>0.00</td>
<td>500.00</td>
</tr>
</tbody>
</table>

**REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION**

Due to sovereign action, none of the money in Germany is available.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Presumed location of funds</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>U.S.</td>
<td>U.K.</td>
</tr>
<tr>
<td>A</td>
<td>$50</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>50</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>100</td>
<td></td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>50</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>250.00</td>
<td>100.00</td>
<td></td>
</tr>
</tbody>
</table>

Calculation of the allocation of the shortfall due to sovereign action—Germany ($200 shortfall to be allocated):

<table>
<thead>
<tr>
<th>Customer</th>
<th>Allocation share</th>
<th>Allocation share of actual shortfall</th>
<th>Actual shortfall allocated</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>$50/$150</td>
<td>33.3% of $200</td>
<td>$66.67</td>
</tr>
<tr>
<td>D</td>
<td>$100/$150</td>
<td>66.7% of $200</td>
<td>$133.33</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>$200,000</td>
</tr>
</tbody>
</table>

This would result in the claims of customers C and D being reduced below zero.
Accordingly, the claims of customer C and D will only be reduced to zero, or $50 for C and $100 for D. This results in a Total Excess Shortfall of $50.

<table>
<thead>
<tr>
<th>Actual shortfall</th>
<th>Allocation of shortfall for customer C</th>
<th>Allocation of shortfall for customer D</th>
<th>Total excess shortfall</th>
</tr>
</thead>
<tbody>
<tr>
<td>$200</td>
<td>$50</td>
<td>$100</td>
<td>$50</td>
</tr>
</tbody>
</table>

This shortfall will be divided among the remaining futures customers or Cleared Swaps Customers who have authorized funds to be held outside the U.S. or in a currency other than U.S. dollars.

<table>
<thead>
<tr>
<th>Customer</th>
<th>Total claims of customers permitting funds to be held outside the U.S.</th>
<th>Portion of claim required to be in the U.S.</th>
<th>Allocation share (column B- C/column B)</th>
<th>Allocation share of actual total excess shortfall</th>
<th>Actual total excess shortfall allocated</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td>$100</td>
<td>$50</td>
<td>$50/$200</td>
<td>25% of $50</td>
<td>$12.50</td>
</tr>
<tr>
<td>C</td>
<td>50</td>
<td>0</td>
<td>(1)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
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1Claim already reduced to $0.

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All changes in this volume of the Code of Federal Regulations (CFR) that were made by documents published in the Federal Register since January 1, 2008 are enumerated in the following list. Entries indicate the nature of the changes effected. Page numbers refer to Federal Register pages. The user should consult the entries for chapters, parts and subparts as well as sections for revisions.


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140.735–2 (b)(1)(i), (ii) and (iii) redesignated as (b)(1)(ii), (iv) and (v); new (b)(1)(i) and (iii) added; (b)(2) and (c) revised

140.735–3 Revised

143.8 (a) revised

145.5 (d)(1)(vii) and (h) revised; eff. 4-24-12

145.9 (c)(1), (d)(1) introductory text and (vi) revised

145 Appendix A amended

147.3 (b)(4)(i)(H) and (b)(8) revised; eff. 4-24-12

155.2 Introductory text revised

155.3 (a)(1), (b)(2)(ii) and (c)(1) revised

155.4 (a)(1), (b)(2)(ii) and (c)(2) revised

155.6 Removed

160 Appendices A and B correctly reinstated

166.2 (a) introductory text and (b) revised

166.5 (a)(2) revised

170.16 Added

190.01 (w), (y) and (kk)(6) amended; (e) through (oo) redesignated as (f) through (pp); new (e) added; (a) and new (f), (cc, (hh), (ll)(2)(ii), (4), (5) and (pp) revised; eff. 4-9-12

190.02 (d)(1), (3), (6) and (7) amended; eff. 4-9-12

190.03 (a)(2) amended; eff. 4-9-12

190.04 (d)(1) revised; eff. 4-9-12

190.05 (a)(1) and (b)(1) amended; eff. 4-9-12

190.06 (g)(g)(1)(i), (ii), (3) amended; eff. 4-9-12

190.07 (e)(1) and (2)(ii)(B) amended; eff. 4-9-12

190.08 (b)(2)(viii), (ix), (3)(v), (c)(1)(i), (e) introductory text, (1) and (4) revised; (b)(2)(xii) redesignated as (b)(2)(xiv); new (b)(2)(xii) added; eff. 4-9-12

190.09 (b) revised; eff. 4-9-12

190.10 (d)(1) and (h) amended; eff. 4-9-12

190 Appendix A revised; eff. 4-9-12

Appendix B revised; eff. 4-9-12

2013

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Order

9.9 (b)(1) introductory text, (3) and (4) revised

10.4 Revised

10.8 Introductory text revised

10.12 (a)(1), (2)(d), (ii), (iv), (3) and (b) through (f) revised; (a)(4), (5) and (6) added; (g) removed

10.121 (a), (b) and (c) revised

12.201 (b)(3)(ii) compliance date extended

23.201 (b)(3)(ii) compliance date extended

23.301 Compliance date extended

23.401 (c) compliance date extended

23.430 Compliance date extended

23.431 (a), (b) and (c) compliance date extended

23.432 Compliance date extended

23.440 Compliance date extended

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