AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Title 17—Commodity and Securities Exchanges

(This book contains parts 41 to 199)

Part

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AUTHORITY: Sections 206, 251 and 252, Pub. L. 106–554, 114 Stat. 2763, 7 U.S.C. 1a, 2, 6f, 6j, 7a–2, 12a; 15 U.S.C. 78g(c)(2).

SOURCE: 66 FR 44511, Aug. 23, 2001, unless otherwise noted.

Subpart A—General Provisions

§ 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.

[66 FR 44511, Aug. 23, 2001, as amended at 66 FR 44965, Aug. 27, 2001; 67 FR 36761, May 24, 2002; 77 FR 66344, Nov. 2, 2012]

§ 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 4f(a)(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 Swap Dealer 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.

[66 FR 43086, Aug. 17, 2001. Redesignated at 67 FR 53171, Aug. 14, 2002, as amended at 67 FR 62352, Oct. 7, 2002; 78 FR 22419, Apr. 16, 2013]

§§ 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.

(2) For purposes of section 1a(35)(B)(III)(cc) of the Act (7 U.S.C. 1a(35)(B)(III)(cc)):

(i) On a particular day, a security shall be 1 of 675 securities with the largest dollar value of ADTV 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.

(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. 78*l*) shall be satisfied with respect to any security that is a depositary share if the deposited securities underlying the depositary share are registered pursuant to section 12 of 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 (7 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, 249.310b,

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)(ii) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(51)(A)(ii)); 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.

[66 FR 44511, Aug. 23, 2001, as amended at 70 FR 43750, July 29, 2005; 77 FR 66344, Nov. 2, 2012]

§41.12 Indexes underlying futures contracts trading for fewer than 30 days.

(a) An index on which a contract of sale for future delivery is trading on a designated contract market or foreign board of trade is not a narrow-based security index under section 1a(35) of the Act (7 U.S.C. 1a(35)) for the first 30 days of trading, if:

(1) Such index would not have been a narrow-based security index on each trading day of the preceding 6 full calendar months with respect to a date no earlier than 30 days prior to the commencement of trading of such contract;

(2) On each trading day of the preceding 6 full calendar months with respect to a date no earlier than 30 days prior to the commencement of trading such contract:

(i) Such index had more than 9 component securities;

(ii) No component security in such index comprised more than 30 percent of the index's weighting;

(iii) The 5 highest weighted component securities in such index did not comprise, in the aggregate, more than 60 percent of the index's weighting; and

(iv) The dollar value of the trading volume of the lowest weighted 25% of such index was not less than $50 million (or in the case of an index with 15 or more component securities, $30 million); or

(3) On each trading day of the 6 full calendar months preceding a date no earlier than 30 days prior to the commencement of trading such contract:

(i) Such index had at least 9 component securities;

(ii) No component security in such index comprised more than 30 percent of the index's weighting; and

(iii) Each component security in such index was:

(A) Registered pursuant to Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78) or was a depositary share representing a security registered pursuant to Section 12 of the Securities Exchange Act of 1934;

(B) 1 of 750 securities with the largest market capitalization that day; and

(C) 1 of 675 securities with the largest dollar value of trading volume that day.

(b) An index that is not a narrow-based security index for the first 30 days of trading pursuant to paragraph (a) of this section, shall become a narrow-based security index if such index has been a narrow-based security index for more than 45 business days over 3 consecutive calendar months.

(c) An index that becomes a narrow-based security index solely because it was a narrow-based security index for

more than 45 business days over 3 consecutive calendar months pursuant to paragraph (b) of this section shall not be a narrow-based security index for the following 3 calendar months.

(d) *Definitions.* For purposes of this section:

(1) *Market capitalization* 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.

[66 FR 44511, Aug. 23, 2001, as amended at 77 FR 66344, Nov. 2, 2012]

§ 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 no more than 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:

(1)(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)(viii) 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 nonaffiliates 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)(viii) 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.

[71 FR 39541, July 13, 2006]

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.

[66 FR 55083, Nov. 1, 2001, as amended at 71 FR 39542, July 13, 2006; 77 FR 66344, Nov. 2, 2012]

§ 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 to those 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 these 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;

(i) Procedures are in place to coordinate regulatory trading halts between the board of trade and markets on which any security underlying the security futures product is traded and other 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; and

(j) The margin requirements for the security futures product will comply with the provisions specified in §41.43 through §41.48.

[66 FR 44511, Aug. 23, 2001, as amended at 77 FR 66344, Nov. 2, 2012]

§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;

(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 a certification that the security futures product complies with the Act and rules thereunder; and

(6) Includes a copy of the submission cover sheet in accordance with the instructions in appendix D of part 40.

(7) Includes a request for confidential treatment as permitted under the procedures of §40.8.

(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.

[66 FR 55083, Nov. 1, 2001, as amended at 69 FR 67507, Nov. 18, 2004; 74 FR 17394, Apr. 15, 2009; 77 FR 66344, Nov. 2, 2012]

§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 or is a registered derivatives clearing organization pursuant to section 5b 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

(5) Includes a copy of the submission cover sheet in accordance with the instructions in appendix D of part 40.

(6) Includes a request for confidential treatment as permitted under the procedures of § 40.8.

(b) *Voluntary submission of rules for Commission review and approval.* A designated contract market or a registered derivatives clearing organization clearing security futures products may request that the Commission approve any rule or proposed rule or rule amendment relating to a security futures product under the procedures of § 40.5 of this chapter, *provided however,* that the registered entity shall include the certifications required by § 41.22 with its submission under § 40.5 of this chapter. Notice designated contract markets may not request Commission approval of rules.

[66 FR 55083, Nov. 1, 2001, as amended at 69 FR 67507, Nov. 18, 2004; 74 FR 17394, Apr. 15, 2009; 77 FR 66344, Nov. 2, 2012]

§ 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

(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 of the underlying security outstanding, the designated contract market may adopt a position accountability rule. Upon request by the designated contract market, traders who hold net positions greater than 22,500 (100-share) contracts, or such lower level specified by exchange rules, must provide information to the exchange and consent to halt increasing their positions when so ordered by the exchange.

(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.

[66 FR 55083, Nov. 1, 2001, as amended at 67 FR 36761, May 24, 2002; 77 FR 66345, Nov. 2, 2012]

§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 override a predetermined algorithm must submit an appropriate rule proposal to the Commission consistent with the procedures set forth in § 40.5. The proposed rule must prohibit electronic market participants with a time or place advantage or the ability to override a predetermined algorithm from trading a security futures product for accounts in which these same participants have any interest during the same trading session that they also trade the same security futures product for other accounts. This paragraph, however, is not applicable with respect to execution priorities or quantity guarantees granted to market makers who perform that function, or to market participants who receive execution priorities based on price improvement activity, in accordance with the rules governing the designated contract market.

(c) *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) [Reserved]

(d) *Specific Permitted Exceptions.* Notwithstanding the applicability of a dual trading prohibition under paragraph (b) of this section, dual trading may be permitted on a designated contract market pursuant to one or more of the following specific exceptions:

(1) *Correction of errors.* To offset trading errors resulting from the execution of customer orders, *provided,* that the floor broker must liquidate the position in his or her personal error account resulting from that error through open outcry or through a trading system that electronically matches bids and offers as soon as practicable, but, except as provided herein, not later than the close of business on the business day following the discovery of error. In the event that a floor broker is unable to offset the error trade because the daily price fluctuation limit is reached, a trading halt is imposed by the designated contract market, or an emergency is declared pursuant to the

rules of the designated contract market, the floor broker must liquidate the position in his or her personal error account resulting from that error as soon as practicable thereafter.

(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.

(2) [Reserved]

(f) *Unique or Special Characteristics of Agreements, Contracts or Transactions, or of Designated Contract Markets*. Notwithstanding the applicability of a dual trading prohibition under paragraph (b) of this section, dual trading may be permitted on a designated contract market to address unique or special characteristics of agreements, contracts, or transactions, or of the designated contract market as provided herein. Any rule of a designated contract market that would permit dual trading when it would otherwise be prohibited, based on a unique or special characteristic of agreements, contracts, or transactions, or of the designated contract market must be submitted to the Commission for prior approval under the procedures set forth in §40.5. The rule submission must include a detailed demonstration of why an exception is warranted.

[67 FR 11227, Mar. 13, 2002, as amended at 77 FR 66345, Nov. 2, 2012]

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 exchange, 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.

(2) The Commission may request additional information from the applicant at any time prior to the end of the review period.

(3) The Commission may stay the review period if it determines that an application is materially incomplete; *provided, however*, that this paragraph (d) does not limit the Commission's authority, under paragraph (b) of this section, to decline to entertain an application.

(e) Upon conclusion of the review period, the Commission shall issue an order granting or denying relief, or granting relief subject to conditions; *provided, however*, that the Commission's obligations under this paragraph shall not limit its authority, under paragraph (b) of this section, to decline to entertain an application. The Commission shall notify the board of trade in writing of its decision to grant or deny relief under this paragraph.

(f) An application for an exemptive order may be withdrawn by the applicant at any time, without explanation, by filing with the Secretary of the Commission a written request for withdrawal, signed by an authorized representative of the board of trade.

(g) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Division of Market Oversight, with the concurrence of the General Counsel, authority to make determinations on applications for exemptive orders pursuant to this section; *provided, however*, that:

(1) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated pursuant to paragraph (g) of this section; and

(2) Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Market Oversight under paragraph (g) of this section.

[66 FR 44511, Aug. 23, 2001, as amended at 67 FR 62352, Oct. 7, 2002]

§ 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 5f(b)(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 5f(b)(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.

[67 FR 11229, Mar. 13, 2002]

Subpart E—Customer Accounts and Margin Requirements

SOURCE: 67 FR 53171, Aug. 14, 2002, unless otherwise noted.

§ 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 4f(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 4f(a)(2) of the CEA (a notice-registered FCM) 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 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)(iii) 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 or section 19(b)(7) of the Exchange Act and, as applicable, section 5c(c) of the Commodity Exchange Act (''Act''), or a security futures intermediary from imposing additional margin requirements on security futures, including higher initial or maintenance margin levels, consistent with this Regulation (Subpart E, §§41.42 through 41.49), or from taking appropriate action to preserve its financial integrity.

(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 4f(a)(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.

[67 FR 53171, Aug. 14, 2002, as amended at 77 FR 66346, Nov. 2, 2012]

§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, and shall be for the

amount of the margin deficiency so created or increased (a ''special margin requirement''); and

(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 subpart, cash, securities, or other assets deposited as margin for positions in an account may be withdrawn, provided that the equity in the account after such withdrawal is sufficient to satisfy the required margin for the security futures and related positions in the account under this Regulation (Subpart E, §§ 41.42 through 41.49).

(b) *By the security futures intermediary.* Notwithstanding paragraph (a) of this section, the security futures intermediary, in its usual practice, may deduct the following items from an account in which security futures or related positions are held if they are considered in computing the balance of such account:

(1) Variation settlement payable, directly or indirectly, to a clearing agency that is registered under section 17A of the Exchange Act or a derivatives clearing organization that is registered under section 5b of the Act;

(2) Interest charged on credit maintained in the account;

(3) Communication or shipping charges with respect to transactions in the account;

(4) Payment of commissions, brokerage, taxes, storage and other charges lawfully accruing in connection with the positions and transactions in the account;

(5) Any service charges that the security futures intermediary may impose; or

(6) Any other withdrawals that are permitted from a securities margin account under Regulation T, to the extent permitted under applicable margin rules.

§ 41.48 Undermargined accounts.

(a) *Failure to satisfy margin call.* If any margin call required by this Regulation (Subpart E, §§ 41.42 through 41.49) is not met in full, the security futures intermediary shall take the deduction required with respect to an undermargined account in computing its net

capital under SEC or Commission rules.

(b) *Accounts that liquidate to a deficit.* If at any time there is a liquidating deficit in an account in which security futures are held, the security futures intermediary shall take steps to liquidate positions in the account promptly and in an orderly manner.

(c) *Liquidation of undermargined accounts not required.* Notwithstanding §41.44(a)(1) of this subpart, §220.4(d) of Regulation T (12 CFR 220.4(d)) respecting liquidation of positions in lieu of deposit shall not apply with respect to security futures carried in a securities account.

§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.

[67 FR 53171, Aug. 14, 2002, as amended at 77 FR 66346, Nov. 2, 2012]

PART 42—ANTI-MONEY LAUNDERING, TERRORIST FINANCING

Subpart A—General Provisions

Sec.
42.1 [Reserved]
42.2 Compliance with Bank Secrecy Act

AUTHORITY: 7 U.S.C. 1a, 2, 5, 6, 6b, 6d, 6f, 6g, 7, 7a, 7a–1, 7a–2, 7b, 7b–1, 7b–2, 9, 12, 12a, 12c, 13a, 13a–1, 13c, 16 and 21; 12 U.S.C. 1786(q), 1818, 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, secs. 312–314, 319, 321, 326, 352, Pub. L. 107–56, 115 Stat. 307.

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 chapter X, 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 1026.220, which require that a customer identification program be adopted as part of the firm's Bank Secrecy Act compliance program.

[79 FR 2371, Jan. 14, 2014]

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 Block trades and large notional off-facility swaps.
43.7 Delegation of authority.
APPENDIX A TO PART 43—DATA FIELDS FOR PUBLIC DISSEMINATION
APPENDIX B TO PART 43—ENUMERATED PHYSICAL COMMODITY CONTRACTS AND OTHER CONTRACTS
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APPENDIX D TO PART 43—OTHER COMMODITY SWAP CATEGORIES
APPENDIX E TO PART 43—OTHER COMMODITY GEOGRAPHIC IDENTIFICATION FOR PUBLIC DISSEMINATION PURSUANT TO § 43.4(d)(4)(iii)
APPENDIX F TO PART 43—INITIAL APPROPRIATE MINIMUM BLOCK SIZES BY ASSET CLASS FOR BLOCK TRADES AND LARGE NOTIONAL OFF-FACILITY SWAPS

AUTHORITY: 7 U.S.C. 2(a), 12a(5) and 24a, as amended by Pub. L. 111–203, 124 Stat. 1376 (2010).

SOURCE: 76 FR 1243, 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.

Cap size means, for each swap category, the maximum notional or principal amount of a publicly reportable swap transaction that is publicly disseminated.

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.

Economically related means a direct or indirect reference to the same commodity at the same delivery location or locations, or with the same or a substantially similar cash market price series.

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 parties to such swap terms under applicable law. Execution occurs simultaneous with or immediately following the affirmation of the swap.

Futures-related swap means a swap (as defined in section 1a(47) of the Act and as further defined by the Commission in implementing regulations) that is economically related to a futures contract.

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.

Major currencies means the currencies, and the cross-rates between the currencies, of Australia, Canada, Denmark, New Zealand, Norway, South Africa, South Korea, Sweden, and Switzerland.

Non-major currencies means all other currencies that are not super-major currencies or major currencies.

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.

Physical commodity swap means a swap in the other commodity asset class that is based on a tangible commodity.

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:

(1) Unless otherwise provided in this part—

(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.

Reference price means a floating price series (including derivatives contract prices 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 a swap contract.

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.

Super-major currencies means the currencies of the European Monetary Union, Japan, the United Kingdom, and United States.

Swaps with composite reference prices means swaps based on reference prices that are composed of more than one reference price from more than one swap category.

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.

Trimmed data set means a data set that has had extraordinarily large notional transactions removed by transforming the data into a logarithm with a base of 10, computing the mean, and excluding transactions that are beyond four standard deviations above the mean.

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.

[76 FR 1243, Jan. 9, 2012, as amended at 78 FR 32937, May 31, 2013]

§43.3 Method and timing for real-time public reporting.

(a) *Responsibilities of parties to a swap to report swap transaction and pricing 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 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 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 a cancellation of the incorrect swap transaction and pricing data and then publicly disseminating the correct data, as soon as technologically practicable, in the manner described in appendix A to this part.

(f) *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 and pricing data relating to a publicly reportable swap transaction with the date and time, to the nearest second 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.

§ 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 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 paragraphs (d)(4)(ii) and (d)(4)(iii) of this section.

(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 of this part; or

(C) Any publicly reportable swap transaction executed on or pursuant to the rules of a registered swap execution facility or designated contract market.

(iii) The underlying assets of swaps in the other commodity asset class that are not described in paragraph (d)(4)(ii) of this section shall be publicly disseminated by limiting the geographic detail of the underlying assets. The identification of any specific delivery point or pricing point associated with the underlying asset of such other commodity swap shall be publicly disseminated pursuant to appendix E of this part.

(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.* (i) 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 500 million, round to the nearest 50 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.

(h) *Cap sizes.*

(1) *Initial cap sizes.* Prior to the effective date of a Commission determination to establish an applicable post-initial cap size for a swap category as determined pursuant to paragraph (h)(2) of this section, the initial cap sizes for each swap category shall be equal to the greater of the initial appropriate minimum block size for the respective swap category in Appendix F of this part or the respective cap sizes in paragraphs (h)(1)(i) through (h)(1)(v) of this section. If Appendix F of this part does not provide an initial appropriate minimum block size for a particular swap category, the initial cap size for such swap category shall be equal to the appropriate cap size as set forth in paragraphs (h)(1)(i) through (h)(1)(v) of this section.

(i) For swaps in the interest rate asset class, the publicly disseminated notional or principal amount for a swap subject to the rules in this part shall be:

(A) USD 250 million for swaps with a tenor greater than zero up to and including two years;

(B) USD 100 million for swaps with a tenor greater than two years up to and including ten years; and

(C) USD 75 million for swaps with a tenor greater than ten years.

(ii) For swaps in the credit asset class, the publicly disseminated notional or principal amount for a swap subject to the rules in this part shall be USD 100 million.

(iii) For swaps in the equity asset class, the publicly disseminated notional or principal amount for a swap subject to the rules in this part shall be USD 250 million.

(iv) For swaps in the foreign exchange asset class, the publicly disseminated notional or principal amount for a swap subject to the rules in this part shall be USD 250 million.

(v) For swaps in the other commodity asset class, the publicly disseminated notional or principal amount for a swap subject to the rules in this part shall be USD 25 million.

(2) *Post-initial cap sizes.* Pursuant to the process described in § 43.6(f)(1), the Commission shall establish post-initial cap sizes using reliable data collected by registered swap data repositories, as determined by the Commission, based on the following:

(i) A one-year window of swap transaction and pricing data corresponding to each relevant swap category recalculated no less than once each calendar year; and

(ii) The 75-percent notional amount calculation described in § 43.6(c)(3) applied to the swap transaction and pricing data described in paragraph (h)(2)(i) of this section.

(3) *Commission publication of post-initial cap sizes.* The Commission shall publish post-initial cap sizes on its Web site at *http://www.cftc.gov*.

(4) *Effective date of post-initial cap sizes.* Unless otherwise indicated on the Commission's Web site, the post-initial cap sizes shall be effective on the first day of the second month following the date of publication.

[76 FR 1243, Jan. 9, 2012, as amended at 78 FR 32937, May 31, 2013]

§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 that is 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.

(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 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; 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.

(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 30 minutes immediately after execution of such swap.

(g) *Time delay for large notional 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 large notional 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 exempt 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(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 of such swap, 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(g) 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(g) shall be two hours after the execution of such swap.

(h) *Time delay for large notional off-facility swaps in all asset classes not subject to the mandatory clearing requirement in which neither counterparty is a swap dealer or a major swap participant.* Any large notional off-facility swap in which neither party is a swap dealer or a major swap participant, which is not subject to the mandatory clearing requirement or is exempt 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(h) shall be 48 business hours immediately after execution of such swap.

(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 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 Block trades and large notional off-facility swaps.

(a) *Commission determination.* The Commission shall establish the appropriate minimum block size for publicly reportable swap transactions based on the swap categories set forth in paragraph (b) of this section in accordance with the provisions set forth in paragraphs (c), (d), (e), (f) or (h) of this section, as applicable.

(b) *Swap categories.* Swap categories shall be established for all swaps, by asset class, in the following manner:

(1) *Interest rates asset class.* Interest rate asset class swap categories shall be based on unique combinations of the following:

(i) Currency by:

(A) Super-major currency;

(B) Major currency; or

(C) Non-major currency; and

(ii) Tenor of swap as follows:

(A) Zero to 46 days;

(B) Greater than 46 days to three months (47 to 107 days);

(C) Greater than three months to six months (108 to 198 days);

(D) Greater than six months to one year (199 to 381 days);

(E) Greater than one to two years (382 to 746 days);

(F) Greater than two to five years (747 to 1,842 days);

(G) Greater than five to ten years (1,843 to 3,668 days);

(H) Greater than ten to 30 years (3,669 to 10,973 days); or

(I) Greater than 30 years (10,974 days and above).

(2) *Credit asset class.* Credit asset class swap categories shall be based on unique combinations of the following:

(i) Traded Spread rounded to the nearest basis point (0.01) as follows:

(A) 0 to 175 points;

(B) 176 to 350 points; or

(C) 351 points and above;

(ii) Tenor of swap as follows:

(A) Zero to two years (0–746 days);

(B) Greater than two to four years (747–1,476 days);

(C) Greater than four to six years (1,477–2,207 days);

(D) Greater than six to eight-and-a-half years (2,208–3,120 days);

(E) Greater than eight-and-a-half to 12.5 years (3,121–4,581 days); and

(F) Greater than 12.5 years (4,582 days and above).

(3) *Equity asset class*. There shall be one swap category consisting of all swaps in the equity asset class.

(4) *Foreign exchange asset class*. Swap categories in the foreign exchange asset class shall be grouped as follows:

(i) By the unique currency combinations of one super-major currency paired with one of the following:

(A) Another super major currency;

(B) A major currency; or

(C) A currency of Brazil, China, Czech Republic, Hungary, Israel, Mexico, Poland, Russia, and Turkey; or

(ii) By unique currency combinations not included in paragraph (b)(4)(i) of this section.

(5) *Other commodity asset class*. Swap contracts in the other commodity asset class shall be grouped into swap categories as follows:

(i) For swaps that are economically related to contracts in Appendix B of this part, by the relevant contract as referenced in Appendix B of this part; or

(ii) For swaps that are not economically related to contracts in Appendix B of this part, by the following futures-related swaps—

(A) CME Cheese;

(B) CBOT Distillers' Dried Grain;

(C) CBOT Dow Jones-UBS Commodity Index;

(D) CBOT Ethanol;

(E) CME Frost Index;

(F) CME Goldman Sachs Commodity Index (GSCI), (GSCI Excess Return Index);

(G) NYMEX Gulf Coast Sour Crude Oil;

(H) CME Hurricane Index;

(I) CME Rainfall Index;

(J) CME Snowfall Index;

(K) CME Temperature Index;

(L) CME U.S. Dollar Cash Settled Crude Palm Oil; or

(iii) For swaps that are not covered in paragraphs (b)(5)(i) and (b)(5)(ii) of this section, the relevant product type as referenced in Appendix D of this part.

(c) *Methodologies to determine appropriate minimum block sizes and cap sizes*. In determining appropriate minimum block sizes and cap sizes for publicly reportable swap transactions, the Commission shall utilize the following statistical calculations—

(1) *50-percent notional amount calculation*. The Commission shall use the following procedure in determining the 50-percent notional amount calculation:

(i) Select all of the publicly reportable swap transactions within a specific swap category using a one-year window of data beginning with a minimum of one year's worth of data;

(ii) Convert to the same currency or units and use a trimmed data set;

(iii) Determine the sum of the notional amounts of swaps in the trimmed data set;

(iv) Multiply the sum of the notional amount by 50 percent;

(v) Rank order the observations by notional amount from least to greatest;

(vi) Calculate the cumulative sum of the observations until the cumulative sum is equal to or greater than the 50-percent notional amount calculated in paragraph (c)(1)(iv) of this section;

(vii) Select the notional amount associated with that observation;

(viii) Round the notional amount of that observation to two significant digits, or if the notional amount associated with that observation is already significant to two digits, increase that notional amount to the next highest rounding point of two significant digits; and

(ix) Set the appropriate minimum block size at the amount calculated in paragraph (c)(1)(viii) of this section.

(2) *67-percent notional amount calculation*. The Commission shall use the following procedure in determining the 67-percent notional amount calculation:

(i) Select all of the publicly reportable swap transactions within a specific swap category using a one-year

window of data beginning with a minimum of one year's worth of data;

(ii) Convert to the same currency or units and use a trimmed data set;

(iii) Determine the sum of the notional amounts of swaps in the trimmed data set;

(iv) Multiply the sum of the notional amount by 67 percent;

(v) Rank order the observations by notional amount from least to greatest;

(vi) Calculate the cumulative sum of the observations until the cumulative sum is equal to or greater than the 67-percent notional amount calculated in paragraph (c)(2)(iv) of this section;

(vii) Select the notional amount associated with that observation;

(viii) Round the notional amount of that observation to two significant digits, or if the notional amount associated with that observation is already significant to two digits, increase that notional amount to the next highest rounding point of two significant digits; and

(ix) Set the appropriate minimum block size at the amount calculated in paragraph (c)(2)(viii) of this section.

(3) *75-percent notional amount calculation.* The Commission shall use the following procedure in determining the 75-percent notional amount calculation:

(i) Select all of the publicly reportable swap transactions within a specific swap category using a one-year window of data beginning with a minimum of one year's worth of data;

(ii) Convert to the same currency or units and use a trimmed data set;

(iii) Determine the sum of the notional amounts of swaps in the trimmed data set;

(iv) Multiply the sum of the notional amount by 75 percent;

(v) Rank order the observations by notional amount from least to greatest;

(vi) Calculate the cumulative sum of the observations until the cumulative sum is equal to or greater than the 75-percent notional amount calculated in paragraph (c)(3)(iv) of this section;

(vii) Select the notional amount associated with that observation;

(viii) Round the notional amount of that observation to two significant digits, or if the notional amount associated with that observation is already significant to two digits, increase that notional amount to the next highest rounding point of two significant digits; and

(ix) Set the appropriate minimum block size at the amount calculated in paragraph (c)(3)(viii) of this section.

(d) *No appropriate minimum block sizes for swaps in the equity asset class.* Publicly reportable swap transactions in the equity asset class shall not be treated as block trades or large notional off-facility swaps.

(e) *Initial appropriate minimum block sizes.* Prior to the Commission making a determination as described in paragraph (f)(1) of this section, the following initial appropriate minimum block sizes shall apply:

(1) *Prescribed appropriate minimum block sizes.* Except as otherwise provided in paragraph (e)(1) of this section, for any publicly reportable swap transaction that falls within the swap categories described in paragraphs (b)(1), (b)(2), (b)(4)(i), (b)(5)(i) or (b)(5)(ii) of this section, the initial appropriate minimum block size for such publicly reportable swap transaction shall be the appropriate minimum block size that is in Appendix F of this part.

(2) *Certain swaps in the foreign exchange and other commodity asset classes.* All swaps or instruments in the swap categories described in paragraphs (b)(4)(ii) and (b)(5)(iii) of this section shall be eligible to be treated as a block trade or large notional off-facility swap, as applicable.

(3) *Exception.* Publicly reportable swap transactions described in paragraph (b)(5)(i) of this section that are economically related to a futures contract in Appendix B of this part shall not qualify to be treated as block trades or large notional off-facility swaps (as applicable), if such futures contract is not subject to a designated contract market's block trading rules.

(f) *Post-initial process to determine appropriate minimum block sizes.*

(1) *Post-initial period.* After a registered swap data repository has collected at least one year of reliable data

for a particular asset class, the Commission shall establish, by swap categories, the post-initial appropriate minimum block sizes as described in paragraphs (f)(2) through (f)(5) of this section. No less than once each calendar year thereafter, the Commission shall update the post-initial appropriate minimum block sizes.

(2) *Post-initial appropriate minimum block sizes for certain swaps.* The Commission shall determine post-initial appropriate minimum block sizes for the swap categories described in paragraphs (b)(1), (b)(2), (b)(4)(i) and (b)(5) of this section by utilizing a one-year window of swap transaction and pricing data corresponding to each relevant swap category reviewed no less than once each calendar year, and by applying the 67-percent notional amount calculation to such data.

(3) *Certain swaps in the foreign exchange asset class.* All swaps or instruments in the swap category described in paragraph (b)(4)(ii) of this section shall be eligible to be treated as a block trade or large notional off-facility swap, as applicable.

(4) *Commission publication of post-initial appropriate minimum block sizes.* The Commission shall publish the appropriate minimum block sizes determined pursuant to paragraph (f)(1) of this section on its Web site at *http://www.cftc.gov.*

(5) *Effective date of post-initial appropriate minimum block sizes.* Unless otherwise indicated on the Commission's Web site, the post-initial appropriate minimum block sizes described in paragraph (f)(1) of this section shall be effective on the first day of the second month following the date of publication.

(g) *Required notification.*

(1) *Block trade election.*

(i) The parties to a publicly reportable swap transaction that has a notional amount at or above the appropriate minimum block size shall notify the registered swap execution facility or designated contract market, as applicable, pursuant to the rules of such registered swap execution facility or designated contract market, of its election to have the publicly reportable swap transaction treated as a block trade.

(ii) The registered swap execution facility or designated contract market, as applicable, pursuant to the rules of which a block trade is executed shall notify the registered swap data repository of such a block trade election when transmitting swap transaction and pricing data to such swap data repository in accordance with §43.3(b)(1).

(2) *Large notional off-facility swap election.* A reporting party who executes an off-facility swap that has a notional amount at or above the appropriate minimum block size shall notify the applicable registered swap data repository that such swap transaction qualifies as a large notional off-facility swap concurrent with the transmission of swap transaction and pricing data in accordance with this part.

(h) *Special provisions relating to appropriate minimum block sizes and cap sizes.* The following special rules shall apply to the determination of appropriate minimum block sizes and cap sizes—

(1) *Swaps with optionality.* The notional amount of a swap with optionality shall equal the notional amount of the component of the swap that does not include the option component.

(2) *Swaps with composite reference prices.* The parties to a swap transaction with composite reference prices may elect to apply the lowest appropriate minimum block size or cap size applicable to one component reference price's swap category of such publicly reportable swap transaction.

(3) *Notional amounts for physical commodity swaps.* Unless otherwise specified in this part, the notional amount for a physical commodity swap shall be based on the notional unit measure utilized in the related futures contract market or the predominant notional unit measure used to determine notional quantities in the cash market for the relevant, underlying physical commodity.

(4) *Currency conversion.* Unless otherwise specified in this part, when the appropriate minimum block size or cap size for a publicly reportable swap transaction is denominated in a currency other than U.S. dollars, parties to a swap and registered entities may use a currency exchange rate that is widely published within the preceding

two business days from the date of execution of the swap transaction in order to determine such qualification.

(5) *Successor currencies.* For currencies that succeed a super-major currency, the appropriate currency classification for such currency shall be based on the corresponding nominal gross domestic product classification (in U.S. dollars) as determined in the most recent World Bank, World Development Indicator at the time of succession. If the gross domestic product of the country or nation utilizing the successor currency is:

(i) Greater than $2 trillion, then the successor currency shall be included among the super-major currencies;

(ii) Greater than $500 billion but less than $2 trillion, then the successor currency shall be included among the major currencies; or

(iii) Less than $500 billion, then the successor currency shall be included among the non-major currencies.

(6) *Aggregation.* Except as otherwise stated in this paragraph, the aggregation of orders for different accounts in order to satisfy the minimum block trade size or the cap size requirement is prohibited. Aggregation is permissible on a designated contract market or swap execution facility if done by a person who:

(i) (A) Is a commodity trading advisor registered pursuant to Section 4n of the Act, or exempt from registration under the Act, or a principal thereof, who has discretionary trading authority or directs client accounts,

(B) Is an investment adviser who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(2)(v) of this chapter, or

(C) Is a foreign person who performs a similar role or function as the persons described in paragraphs (h)(6)(i)(A) or (h)(6)(i)(B) of this section and is subject as such to foreign regulation; and,

(ii) Has more than $25,000,000 in total assets under management.

(i) *Eligible Block Trade Parties.*

(1) Parties to a block trade must be ''eligible contract participants,'' as defined in Section 1a(18) of the Act and the Commission's regulations. However, a designated contract market may allow:

(i) A commodity trading advisor registered pursuant to Section 4n of the Act, or exempt from registration under the Act, or a principal thereof, who has discretionary trading authority or directs client accounts,

(ii) An investment adviser who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(2)(v) of this chapter, or

(iii) a foreign person who performs a similar role or function as the persons described in paragraphs (i)(1)(i) or (ii) of this section and is subject as such to foreign regulation, to transact block trades for customers who are not eligible contract participants if such commodity trading advisor, investment adviser or foreign person has more than $25,000,000 in total assets under management.

(2) A person transacting a block trade on behalf of a customer must receive prior written instruction or consent from the customer to do so. Such instruction or consent may be provided in the power of attorney or similar document by which the customer provides the person with discretionary trading authority or the authority to direct the trading in its account.

[78 FR 32938, May 31, 2013]

§ 43.7 Delegation of authority.

(a) *Authority.* 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) To determine whether swaps fall within specific swap categories as described in § 43.6(b);

(2) To determine and publish post-initial, appropriate minimum block sizes as described in § 43.6(f); and

(3) To determine post-initial cap sizes as described in § 43.4(h).

(b) *Submission for Commission consideration.* 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.

(c) *Commission reserves authority.* Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

[78 FR 32940, May 31, 2013]

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.

Field	Description	Example	Data application
Cancellation	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(e). If a publicly reportable swap transaction is canceled, it may be corrected by reporting the "Correction" data field and the correct information.	CANCEL…… (e.g., the information is being cancelled in accordance with § 43.3(e))	Information is needed to inform market participants and the public that swap transaction and pricing data was erroneously disseminated to the public.
Correction	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	CORRECT …… (e.g., the information is a correction to a previously reported swap)	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

	disseminates swap transaction and pricing data shall first cancel the incorrectly reported swap transaction and pricing data and the follow such cancellation with the correction. There shall be a clear indication to the public that the swap transaction and pricing data that is being reported is a correction (e.g., "CORRECT"). Any corrections should be made in accordance with § 43.3(e).		repository.
Execution timestamp	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.	13-10-2007; 15:25:47 (e.g., the date (October 13, 2007) and time in UTC (15:25:47))	Information needed to indicate the time and date of execution of the publicly reportable swap transaction.
Cleared or uncleared	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.	C……. (e.g., cleared)	Information needed to indicate whether or not a publicly reportable swap transaction is cleared through a derivatives clearing organization.
Indication of Collateralization	If a swap is not cleared, an indication of whether a swap is (A) Uncollateralized –	PC …… (e.g., partially collateralized)	Information needed to provide information regarding differences

	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.		in prices in uncleared swaps.
Indication of end-user exception	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.	EU …… (e.g., swap is not required to be cleared under CEA Section 2(h)(7) and Commission regulations)	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.
Indication of other price affecting term (indication for	An indication that the publicly reportable swap transaction has	B*……..... (e.g., bespoke swap that has a material	Information needed to indicate whether a publicly reportable

non-standardized (bespoke) swaps)	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.	price affecting term that is not otherwise publicly disseminated)	swap transaction is non-standardized (bespoke) and to inform the public that there are one or more additional term(s) or provision(s) that materially affect the price of the publicly reportable swap transaction.
Block trades and large notional off-facility swaps	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 a 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.	BLK…… (e.g., swap is block trade or large notional off-facility swap)	Information needed to indicate whether a publicly reportable swap transaction is a block trade or a large notional off-facility swap. This information is important since it will alert market participants and the public to the differences in notional or principal amount and the time delay in the public dissemination of the swap transaction and pricing data.
Execution venue	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	OFF…… (e.g., off-facility swap)	Information needed to indicate whether a publicly reportable swap transaction is executed on a swap market, as an off-facility swap, or as a block trade or large notional off-facility swap.

	indication of whether the publicly reportable swap transaction is executed on or pursuant to the rules of a registered swap execution facility or designated contract market or is executed as an off-facility swap.		
Effective or Start date	The date that the publicly reportable swap transaction becomes effective or starts.	20-02-2009…… (e.g., February 20, 2009)	Information needed to indicate when the terms of the publicly reportable swap transaction become effective or start.
End Date	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.	04-02-2014 …… (e.g., February 4, 2014)	Information needed to determine the end month and year of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the reportable swap transaction.
Day count convention	The determination of how interest accrues over time for the swap.	Actual/360 …...…… (e.g., day count convention uses Actual/360 day count fraction)	Information needed to better inform market participants and the public about the price of the swap.
Settlement currency (i.e., value date)	The settlement currency type for publicly reportable swap transactions in the foreign exchange asset class.	Settle JPY …… (e.g., the foreign exchange swap is settled in Japanese Yen)	Information needed to inform market participants and the public about how to price the publicly reportable swap transaction.
Asset class	An indication of one of the broad categories as described in § 43.2(e).	IR……... (e.g., interest rate asset class)	Information needed to broadly describe the underlying asset to facilitate comparison with other similar publicly reportable swap transactions.
Sub-asset class for other commodity	An indication of a more specific description of	AG……. (e.g., agriculture)	Information needed to define with greater

	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.		specificity, the type of other commodity that is being publicly disseminated and to facilitate comparison with other similar publicly reportable swap transactions.
Contract type	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 stand-alone options.	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.
Contract sub-type	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.	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.
Price-forming continuation data	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	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.

	extinguishing of rights that change the price of the swap.		
Underlying asset 1	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.	TX……. (e.g., TX may represent "Treasury 10 year")	Information needed to describe the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Underlying asset 2	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.	IIIL……. (e.g., IIIL may represent 3-month LIBOR)	Information needed to describe the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Price notation	The price, yield, spread, coupon, etc., depending on the type of swap, which is calculated at affirmation. The pricing characteristic shall not include any	162……. (e.g., 162 may indicate the spread for a credit default swap index)	Information needed to describe the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly

	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.		reportable swap transaction.
Additional price notation	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.	+0.25…….. (e.g., +0.25 would indicate the net present value of the premiums separated from the price notation)	Additional information needed to describe the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Unique product identifier	Certain fields may be replaced with a unique	12345 ……. (e.g., 12345 may	Information needed to describe the

	product identifier, if such unique identifier exists, to the extent that such unique product identifier adequately describes such fields.	represent a 10 year interest rate swap based on 3 month LIBOR)	publicly reportable swap transaction and enable market participants and the public to compare such publicly reportable swap transaction to other similar publicly reportable swap transactions. Such information would substitute the information described in one or more reportable fields in accordance with §43.4(e).
Notional currency 1 (i.e., base currency)	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).	EUR…… (e.g., Euro)	Information needed to describe the type of currency of the notional or principal amount.
Rounded notional or principal amount 1	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.	200……. (e.g., 200 may represent 200 million of the notional currency 1)	Information needed to identify the size of the publicly reportable swap transaction and to help evaluate the price of the publicly reportable swap transaction.
Notional currency 2 (i.e., counter currency)	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	USD…….. (e.g., U.S. Dollar)	Information needed to describe the type of currency of the notional or principal amount.

	three character alphabetic ISO 4217 currency code).		
Rounded notional or principal amount 2	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.	45…… (e.g., 45 may represent 45 million of the notional currency 2)	Information needed to identify the size of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
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

	transaction. Such payment frequency may be described as one letter preceded by an integer.		transaction.
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.

	described as one letter preceded by an integer.		
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.

Field	Description	Example	Data application
Embedded Option on Swap	An indication of whether or not the option fields are for an embedded option. This indication may be displayed as "EMBED1," "EMBED2," etc.	EMBED1…….. (e.g., the option is embedded in the terms of the swap)	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.
Option Strike Price	The level or price at which an option may be exercised.	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)	Information needed to indicate the level or price at which the option may be exercised to market participants and the public.
Option Type	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.	P-…… (e.g., put)	Information needed to adequately describe the option to market participants and the public.
Option Family	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.	EU……..... (e.g., European option)	Information needed to adequately describe the option to market participants and the public.

Option currency	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).	USD……. (e.g., U.S. Dollar)	Information needed to identify the type of currency of the option premium to market participants and the public.
Option premium	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.	50000…… (e.g., the cost would be 50,000 to purchase the option)	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.
Option lockout period	An indication of the first allowable exercise date of the option.	20-08-2010…… (e.g., August 20, 2010)	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.
Option expiration date	An indication of the date that the option is no longer available for exercise.	20-08-2012……... (e.g., August 20, 2012)	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.

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

Metals

Commodity Exchange, Inc. Copper
New York Mercantile Exchange Palladium
New York Mercantile Exchange Platinum
Commodity Exchange, Inc. Gold
Commodity Exchange, Inc. Silver

Energy

New York Mercantile Exchange Light Sweet Crude Oil
New York Mercantile Exchange New York Harbor Gasoline Blendstock
New York Mercantile Exchange Henry Hub Natural Gas
New York Mercantile Exchange New York Harbor Heating Oil
ICE Futures SP–15 Day-Ahead Peak Fixed Price
ICE Futures SP–15 Day-Ahead Off-Peak Fixed Price
ICE Futures PJM Western Hub Real Time Peak Fixed Price
ICE Futures PJM Western Hub Real Time Off-Peak Fixed Price
ICE Futures Mid-Columbia Day-Ahead Peak Fixed Price
ICE Futures Mid-Columbia Day-Ahead Off-Peak Fixed Price
Chicago Basis
HSC Basis
Socal Border Basis
Waha Basis
ICE Futures AB NIT Basis
NWP Rockies Basis
PG&E Citygate Basis

OTHER CONTRACTS

Brent Crude Oil (ICE)

[76 FR 1243, Jan. 9, 2012, as amended at 78 FR 32940, May 31, 2013]

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 C1 also designates the interim time delays for swaps described in § 43.5(c)(2).

ALL ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	30 minutes.
After Year 1	15 minutes.

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 C2 also designates the interim time delays for swaps described in § 43.5(c)(3).

ALL ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	30 minutes.
After Year 1	15 minutes.

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 C3 also designates the interim time delays for swaps described in § 43.5(c)(3).

ALL ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	4 hours.
Year 2	2 hours.
After Year 2	1 hour.

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

Yearly phase-in	Time delay for public dissemination
Year 1	1 hour. 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.
Year 2	30 minutes. 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.
After Year 2	30 minutes.

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

Yearly phase-in	Time delay for public dissemination
Year 1	4 hours. 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.

OTHER COMMODITY ASSET CLASS—Continued

Yearly phase-in	Time delay for public dissemination
Year 2	2 hours. 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.
After Year 2	2 hours.

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).

ALL ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	48 business hours.
Year 2	36 business hours.
After Year 2	24 business hours.

APPENDIX D TO PART 43—OTHER COMMODITY SWAP CATEGORIES

Other Commodity Group

Individual Other Commodity

Grains
- Oats
- Wheat
- Corn
- Rice
- Grains—Other

Livestock/Meat Products
- Live Cattle
- Pork Bellies
- Feeder Cattle
- Lean Hogs
- Livestock/Meat Products—Other

Dairy Products
- Milk
- Butter
- Cheese
- Dairy Products—Other

Oilseed and Products
- Soybean Oil
- Soybean Meal
- Soybeans
- Oilseed and Products—Other

Fiber
- Cotton
- Fiber—Other

Foodstuffs/Softs
- Coffee
- Frozen Concentrated Orange Juice
- Sugar
- Cocoa
- Foodstuffs/Softs—Other

Petroleum and Products
- Jet Fuel
- Ethanol
- Biodiesel
- Fuel Oil
- Heating Oil
- Gasoline
- Naphtha
- Crude Oil
- Diesel
- Petroleum and Products—Other

Natural Gas and Related Products
- Natural Gas Liquids
- Natural Gas
- Natural Gas and Related Products—Other

Electricity and Sources
- Coal
- Electricity
- Uranium
- Electricity and Sources—Other

Precious Metals
- Palladium
- Platinum
- Silver
- Gold
- Precious Metals—Other

Base Metals
- Steel
- Copper
- Base Metals—Other

Wood Products
- Lumber
- Pulp

Wood Products—Other
Real Estate
Real Estate
Chemicals
Chemicals
Plastics
Plastics
Emissions
Emissions
Weather
Weather
Multiple Commodity Index
Multiple Commodity Index
Other Agricultural
Other Agricultural
Other Non-Agricultural
Other Non-Agricultural

[78 FR 32941, May 31, 2013]

APPENDIX E TO PART 43—OTHER COMMODITY GEOGRAPHIC IDENTIFICATION FOR PUBLIC DISSEMINATION PURSUANT TO §43.4(d)(4)(iii)

Registered swap data repositories are required by §43.4(d)(4)(iii) to publicly disseminate any specific delivery point or pricing point associated with publicly reportable swap transactions in the ''other commodity'' asset class pursuant to Tables E1 and E2 in this appendix. If the underlying asset of a publicly reportable swap transaction described in §43.4(d)(4)(iii) has a delivery or pricing point that is located in the United States, such information shall be publicly disseminated pursuant to the regions described in Table E1 in this appendix. If the underlying asset of a publicly reportable swap transaction described in §43.4(d)(4)(iii) has a delivery or pricing point that is not located in the United States, such information shall be publicly disseminated pursuant to the countries or sub-regions, or if no country or sub-region, by the other commodity region, described in Table E2 in this appendix.

Table E1. U.S. Delivery or Pricing Points

Other Commodity Group
Region
Natural Gas and Related Products
Midwest
Northeast
Gulf
Southeast
Western
Other—U.S.
Petroleum and Products
New England (PADD 1A)
Central Atlantic (PADD 1B)
Lower Atlantic (PADD 1C)
Midwest (PADD 2)
Gulf Coast (PADD 3)
Rocky Mountains (PADD 4)
West Coast (PADD 5)
Other—U.S.
Electricity and Sources
Florida Reliability Coordinating Council (FRCC)
Midwest Reliability Organization (MRO)
Northeast Power Coordinating Council (NPCC)
Reliability First Corporation (RFC)
SERC Reliability Corporation (SERC)
Southwest Power Pool, RE (SPP)
Texas Regional Entity (TRE)
Western Electricity Coordinating Council (WECC)
Other—U.S.
All Remaining Other Commodities (Publicly disseminate the region. If pricing or delivery point is not region-specific, indicate ''U.S.'')
Region 1—(Includes Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont)
Region 2—(Includes New Jersey, New York)
Region 3—(Includes Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia)
Region 4—(Includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee)
Region 5—(Includes Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin)
Region 6—(Includes Arkansas, Louisiana, New Mexico, Oklahoma, Texas)
Region 7—(Includes Iowa, Kansas, Missouri, Nebraska)
Region 8—(Includes Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming)
Region 9—(Includes Arizona, California, Hawaii, Nevada)
Region 10—(Includes Alaska, Idaho, Oregon, Washington)

Table E2. Non-U.S. Delivery or Pricing Points

Other Commodity Regions
Country or Sub-Region
North America (Other than U.S.)
Canada
Mexico
Central America
South America
Brazil
Other South America
Europe
Western Europe
Northern Europe
Southern Europe
Eastern Europe (excluding Russia)
Russia
Africa
Northern Africa
Western Africa
Eastern Africa
Central Africa
Southern Africa
Asia-Pacific
Northern Asia (excluding Russia)
Central Asia
Eastern Asia
Western Asia
Southeast Asia

Australia/New Zealand/Pacific Islands

[78 FR 32941, May 31, 2013]

Appendix F to Part 43—Initial Appropriate Minimum Block Sizes by Asset Class for Block Trades and Large Notional Off-Facility Swaps

Currency group	Currencies
Super-Major Currencies	United States dollar (USD), European Union Euro Area euro (EUR), United Kingdom pound sterling (GBP), and Japan yen (JPY).
Major Currencies	Australia dollar (AUD), Switzerland franc (CHF), Canada dollar (CAD), Republic of South Africa rand (ZAR), Republic of Korea won (KRW), Kingdom of Sweden krona (SEK), New Zealand dollar (NZD), Kingdom of Norway krone (NOK), and Denmark krone (DKK).
Non-Major Currencies	All other currencies.

Interest Rate Swaps

Currency group	Tenor greater than	Tenor less than or equal to	50% Notional (in millions)
Super-Major		46 days	6,400
Super-Major	46 days	Three months (107 days)	2,100
Super-Major	Three months (107 days)	Six months (198 days)	1,200
Super-Major	Six months (198 days)	One year (381 days)	1,100
Super-Major	One year (381 days)	Two years (746 days)	460
Super-Major	Two years (746 days)	Five years (1,842 days)	240
Super-Major	Five years (1,842 days)	Ten years (3,668 days)	170
Super-Major	Ten years (3,668 days)	30 years (10,973 days)	120
Super-Major	30 years (10,973 days)		67
Major		46 days	2,200
Major	46 days	Three months (107 days)	580
Major	Three months (107 days)	Six months (198 days)	440
Major	Six months (198 days)	One year (381 days)	220
Major	One year (381 days)	Two years (746 days)	130
Major	Two years (746 days)	Five years (1,842 days)	88
Major	Five years (1,842 days)	Ten years (3,668 days)	49
Major	Ten years (3,668 days)	30 years (10,973 days)	37
Major	30 years (10,973 days)		15
Non-Major		46 days	230
Non-Major	46 days	Three months (107 days)	230
Non-Major	Three months (107 days)	Six months (198 days)	150
Non-Major	Six months (198 days)	One year (381 days)	110
Non-Major	One year (381 days)	Two years (746 days)	54
Non-Major	Two years (746 days)	Five years (1,842 days)	27
Non-Major	Five years (1,842 days)	Ten years (3,668 days)	15
Non-Major	Ten years (3,668 days)	30 years (10,973 days)	16
Non-Major	30 years (10,973 days)		15

Credit Swaps

Spread group (basis points)	Traded tenor greater than	Traded tenor less than or equal to	50% Notional (in millions)
Less than or equal to 175		Two years (746 days)	320
Less than or equal to 175	Two years (746 days)	Four years (1,477 days)	200
Less than or equal to 175	Four years (1,477 days)	Six years (2,207 days)	110
Less than or equal to 175	Six years (2,207 days)	Eight years and six months (3,120 days).	110
Less than or equal to 175	Eight years and six months (3,120 days).	Twelve years and six months (4,581 days).	130
Less than or equal to 175	Twelve years and six months (4,581 days).		46
Greater than 175 and less than or equal to 350.		Two years (746 days)	140
Greater than 175 and less than or equal to 350.	Two years (746 days)	Four years (1,477 days)	82
Greater than 175 and less than or equal to 350.	Four years (1,477 days)	Six years (2,207 days)	32
Greater than 175 and less than or equal to 350.	Six years (2,207 days)	Eight years and six months (3,120 days).	20
Greater than 175 and less than or equal to 350.	Eight years and six months (3,120 days).	Twelve years and six months (4,581 days).	26

CREDIT SWAPS—Continued

Spread group (basis points)	Traded tenor greater than	Traded tenor less than or equal to	50% Notional (in millions)
Greater than 175 and less than or equal to 350.	Twelve years and six months (4,581 days).	.....	63
Greater than 350	.....	Two years (746 days)	66
Greater than 350	Two years (746 days)	Four years (1,477 days)	41
Greater than 350	Four years (1,477 days)	Six years (2,207 days)	26
Greater than 350	Six years (2,207 days)	Eight years and six months (3,120 days).	13
Greater than 350	Eight years and six months (3,120 days.	Twelve years and six months (4,581 days).	13
Greater than 350	Twelve years and six months (4,581 days).	.....	41

FOREIGN EXCHANGE SWAPS

		Super-major currencies			
		EUR (Euro)	GBP (British pound)	JPY (Japanese yen)	USD (U.S. dollar)
Super-major currencies	EUR	.....	6,250,000	6,250,000	18,750,000
	GBP	*6,250,000	.....	6,250,000	6,250,000
	JPY	*6,250,000	*6,250,000	.....	1,875,000,000
	USD	*18,750,000	*6,250,000	*1,875,000,000	.....
Major currencies	AUD	*6,250,000	0	10,000,000	10,000,000
	CAD	*6,250,000	0	10,000,000	10,000,000
	CHF	*6,250,000	*6,250,000	12,500,000	12,500,000
	DKK	0	0	0	0
	KRW	0	0	0	6,250,000,000
	SEK	*6,250,000	0	0	100,000,000
	NOK	*6,250,000	0	0	100,000,000
	NZD	0	0	0	5,000,000
	ZAR	0	0	0	25,000,000
Non-major currencies	BRL	0	0	0	5,000,000
	CZK	200,000,000	0	0	200,000,000
	HUF	1,500,000,000	0	0	1,500,000,000
	ILS	0	0	0	50,000,000
	MXN	0	0	0	50,000,000
	PLN	25,000,000	0	0	25,000,000
	RMB	50,000,000	0	50,000,000	50,000,000
	RUB	0	0	0	125,000,000
	TRY	*6,250,000	0	0	*10,000,000

All values that do not have an asterisk are denominated in the currency of the left hand side.
All values that have an asterisk (*) are denominated in the currency indicated on the top of the table.

OTHER COMMODITY SWAPS

Related futures contract	Initial appropriate minimum block size	Units
AB NIT Basis (ICE)	62,500	MMBtu.
Brent Crude (ICE and NYMEX)	25,000	bbl.
Cheese (CME)	400,000	lbs.
Class III Milk (CME)	NO BLOCKS.	
Cocoa (ICE and NYSE LIFFE and NYMEX)	1,000	metric tons.
Coffee (ICE and NYMEX)	3,750,000	lbs.
Copper (COMEX)	625,000	lbs.
Corn (CBOT)	NO BLOCKS.	bushels.
Cotton No. 2 (ICE and NYMEX)	5,000,000	lbs.
Distillers' Dried Grain (CBOT)	1,000	short tons.
Dow Jones-UBS Commodity Index (CBOT)	30,000 times index	dollars.
Ethanol (CBOT)	290,000	gallons.
Feeder Cattle (CME)	NO BLOCKS.	
Frost Index (CME)	200,000 times index	euros.
Frozen Concentrated Orange Juice (ICE)	NO BLOCKS.	
Gold (COMEX and NYSE Liffe)	2,500	troy oz.
Goldman Sachs Commodity Index (GSCI), GSCI Excess Return Index (CME).	5,000 times index	dollars.

OTHER COMMODITY SWAPS—Continued

Related futures contract	Initial appropriate minimum block size	Units
Gulf Coast Sour Crude Oil (NYMEX)	5,000	bbl.
Hard Red Spring Wheat (MGEX)	NO BLOCKS.	
Hard Winter Wheat (KCBT)	NO BLOCKS.	
Henry Hub Natural Gas (NYMEX)	500,000	MMBtu.
HSC Basis (ICE and NYMEX)	62,500	MMBtu.
Hurricane Index (CME)	20,000 times index	dollars.
Chicago Basis (ICE and NYMEX)	62,500	MMBtu.
Lean Hogs (CME)	NO BLOCKS.	
Light Sweet Crude Oil (NYMEX)	50,000	bbl.
Live Cattle (CME)	NO BLOCKS.	
Mid-Columbia Day-Ahead Off-Peak Fixed Price (ICE)	625	Mwh.
Mid-Columbia Day-Ahead Peak Fixed Price (ICE)	4,000	Mwh.
New York Harbor RBOB (Blendstock) Gasoline (NYMEX).	1,050,000	gallons.
New York Harbor No. 2 Heating Oil (NYMEX)	1,050,000	gallons.
NWP Rockies Basis (ICE and NYMEX)	62,500	MMBtu.
Oats (CBOT)	NO BLOCKS.	
Palladium (NYMEX)	1,000	troy oz.
PG&E Citygate Basis (ICE and NYMEX)	62,500	MMBtu.
PJM Western Hub Real Time Off-Peak Fixed Price (ICE).	3,900	Mwh.
PJM Western Hub Real Time Peak Fixed Price (ICE)	8,000	Mwh.
Platinum (NYMEX)	500	troy oz.
Rainfall Index (CME)	10,000 times index	dollars.
Rough Rice (CBOT)	NO BLOCKS.	
Silver (COMEX and NYSE Liffe)	125,000	troy oz.
Snowfall Index (CME)	10,000 times index	dollars.
Socal Border Basis (ICE and NYMEX)	62,500	MMBtu.
Soybean (CBOT)	NO BLOCKS.	
Soybean Meal (CBOT)	NO BLOCKS.	
Soybean Oil (CBOT)	NO BLOCKS.	
SP–15 Day-Ahead Peak Fixed Price (ICE)	4,000	Mwh.
SP–15 Day-Ahead Off-Peak Fixed Price (ICE)	625	Mwh.
Sugar #11 (ICE and NYMEX)	5,000	metric tons.
Sugar #16 (ICE)	NO BLOCKS.	
Temperature Index (CME)	400 times index	currency units.
U.S. Dollar Cash Settled Crude Palm Oil (CME)	250	metric tons.
Waha Basis (ICE and NYMEX)	62,500	MMBtu.
Wheat (CBOT)	NO BLOCKS.	

[78 FR 32942, May 31, 2013; 78 FR 42436, July 16, 2013]

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.

AUTHORITY: 7 U.S.C. 2(h)(5), 4r, and 12a(5), as amended by Title VII of the Wall Street Reform and Consumer Protection Act (Dodd-Frank Act of 2010), Pub. L. 111–203, 124 Stat. 1376 (2010).

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 prior to 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;

[75 FR 63084, Oct. 14, 2010, as amended at 75 FR 78896, Dec. 17, 2010]

§ 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 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 PARAGRAPH (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]

PART 45—SWAP DATA RECORDKEEPING AND REPORTING REQUIREMENTS

Sec.

45.1 Definitions.
45.2 Swap recordkeeping.
45.3 Swap data reporting: Creation data.
45.4 Swap data reporting: Continuation data.
45.5 Unique swap identifiers.
45.6 Legal entity identifiers.
48.7 Unique product identifiers.
45.8 Determination of which counterparty must report.
45.9 Third-party facilitation of data reporting.
45.10 Reporting to a single swap data repository.
45.11 Data reporting for swaps in a swap asset class not accepted by any swap data repository.
45.12 Voluntary supplemental reporting.
45.13 Required data standards.
45.14 Reporting of errors and omissions in previously reported data.

APPENDIX 1 TO PART 45—TABLES OF MINIMUM PRIMARY ECONOMIC TERMS DATA.

AUTHORITY: 7 U.S.C. 6r, 7, 7a–1, 7b–3, 12a and 24, as amended by Title VII of the Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376 (2010), unless otherwise noted.

SOURCE: 77 FR 2197, Jan. 13, 2012, unless otherwise noted.

§ 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 to 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(49), 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)(iii), 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 records required to be kept by any non-SD/MSP counterparty subject to the jurisdiction of the Commission that is not a Commission registrant shall be provided in the form, whether electronic or paper, in which the records are kept.

§ 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 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 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, 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.

(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 §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.

(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 second year following the compliance date; and 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 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.

(2) The registered entity or reporting counterparty making the first report of required swap creation data pursuant to this section shall ensure that the same unique swap identifier is recorded for the swap in both the swap data repository and the security-based swap data repository.

(h) *International swaps.* For each international swap, the reporting counterparty shall report as soon as practicable to the swap data repository the identity of the non-U.S. trade repository not registered with the Commission to which the swap is also reported and the swap identifier used by the non-U.S. trade repository to identify the swap. If necessary, the reporting counterparty shall obtain this information from the non-reporting counterparty.

§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.

(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 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 designated contract market, 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

(ii) 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 agent.

(2) *Post-allocation swaps.* The reporting counterparty must create a unique

swap identifier for each of the individual swaps resulting from allocation, as soon as technologically practicable after it is informed by the agent of the identities of its actual counterparties, and must transmit each such unique swap identifier to:

(i) The non-reporting counterparty for the swap in question.

(ii) 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 recordkeeping 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 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.

Self-registration means submission by a legal entity of its own level one or level two reference data, as applicable.

Third-party registration means submission of level one or level two reference data, as applicable, for a legal entity that is or may become a swap counterparty, made by an entity or organization other than the legal entity identified by the submitted reference data. Examples of third-party registration include, without limitation, submission by a swap dealer or major swap participant of level one or level two reference data for its swap counterparties, and submission by a national numbering agency, national registration agency, or data service provider of level one or level two reference data concerning legal entities with respect to which the agency or service provider maintains information.

Ultimate 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.

(ii) With respect to adherence to ISO Standard 17442, by the International Organisation for Standardisation.

(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 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 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.

(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 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.

(2) Before a legal entity identifier system has been designated by the Commission, each registered entity and swap counterparty shall use a substitute counterparty identifier created and assigned by a swap data repository in all recordkeeping and swap data reporting pursuant to this part, as follows:

(i) When a swap involving one or more counterparties for which no substitute counterparty identifier has yet been created and assigned is reported to a swap data repository, the swap data repository shall create a substitute counterparty identifier for each such counterparty as provided in paragraph (f)(2)(ii) of this section, and assign the substitute counterparty identifier to that counterparty, as soon as technologically practicable after that swap is first reported to the swap data repository. In lieu of creating a substitute identifier as provided in paragraph (f)(2)(ii), the swap data repository may assign a unique substitute identifier provided by a third party service provider, if such identifier complies with all of the principles for LEIs set forth in this part.

(ii) Each such substitute counterparty identifier created by a swap data repository shall consist of a single data field that contains two components, including:

(A) The unique alphanumeric code assigned to the swap data repository by the Commission for the purpose of identifying the swap data repository; and

(B) An alphanumeric code generated and assigned to that counterparty by the automated systems of the swap data repository, which shall be unique with respect to all such substitute counterparty identifier codes generated and assigned by that swap data repository.

(iii) The swap data repository shall transmit each substitute counterparty identifier thus created to each counterparty to the swap, to each other registered entity associated with the swap, to each registered entity or swap counterparty who has made any report of any swap data to the swap data repository, and to each swap data repository registered with the Commission, as soon as technologically practicable after creation and assignment of the substitute counterparty identifier.

(iv) Once any swap data repository has created and assigned such a substitute counterparty identifier to a swap counterparty and has transmitted it as required by paragraph (f)(2)(iii) of this section, all registered entities and swap counterparties shall use that substitute counterparty identifier to identify that counterparty in all swap data recordkeeping and reporting, until such time as the Commission designates a legal entity identifier system pursuant to paragraph (e) of this section.

(3) For swaps reported pursuant to this part prior to Commission designation of a legal entity identifier system, after such designation each swap data repository shall map the legal entity identifiers for the counterparties to the substitute counterparty identifiers in the record for each such swap.

(4) Prior to October 15, 2012, if a legal entity identifier system has been designated by the Commission as provided in this section, but a reporting counterparty's automated systems are not yet prepared to include legal entity identifiers in recordkeeping and swap data reporting pursuant to this part, the counterparty shall be excused from complying with paragraph (f)(1) of this section, and shall instead comply with paragraph (f)(2) of this section, until its automated systems are prepared with respect to legal entity identifiers, at which time it must commence compliance with paragraph (f)(1) of this section. This paragraph shall have no effect on or after October 15, 2012.

§ 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.

(a) *Requirements for the unique product identifier and product classification system.* The unique product identifier and product classification system shall identify and describe the swap asset class and the sub-type within that asset class to which the swap belongs, and the underlying product for the swap, with sufficient distinctiveness and specificity to enable the Commission and other financial regulators to fulfill their regulatory responsibilities and to assist in real time reporting of swaps as provided in the Act and part 43 of this chapter. The level of distinctiveness and specificity which the unique product identifier will provide shall be determined separately for each swap asset class.

(b) *Designation of the unique product identifier and product classification system.* (1) The Commission shall determine when a unique product identifier and product classification system that is acceptable to the Commission and satisfies the requirements set forth in this section is available for use in compliance with this section.

(2) When the Commission determines that such a unique product identifier and product classification system is available, the Commission shall designate the unique product identifier and product classification system 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 issuer of such unique product identifiers, and information concerning the procedure and requirements for obtaining unique product identifiers and using the product classification system.

(c) *Use of the unique product identifier and product classification system by registered entities and swap counterparties.* (1) When a unique product identifier and product classification system has been designated by the Commission pursuant to paragraph (b) of this section, each registered entity and swap counterparty shall use the unique product identifier and product classification system in all recordkeeping and swap data reporting pursuant to this part.

(2) Before a unique product identifier and product classification system has been designated by the Commission, each registered entity and swap counterparty shall use the internal product identifier or product description used by the swap data repository to which a swap is reported in all recordkeeping and swap data reporting pursuant to this part.

§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 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):

(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 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.

(vi) If applicable, an indication that the market participant will elect the clearing requirement exception in CEA section (2)(h)(7) for any swap resulting from the order.

(vii) If the swap will be allocated:

(A) An indication that the swap will be allocated.

(B) The legal entity identifier of the agent.

(C) An indication of whether the swap is a post-allocation swap.

(D) If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent.

(2) To achieve this, the swap execution facility or designated contract market must use the information obtained pursuant to paragraph (h)(1) of this section to identify the counterparty that 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:

(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, and, if applicable, that neither counterparty is a U.S. person; and

(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 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 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, and shall transmit to the non-reporting counterparty the unique swap identifier for the swap.

(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.

(4) The legal entity identifier (or substitute identifier) required by §45.6 for 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.

(e) If a counterparty that has made a voluntary, supplemental report discovers any errors in the swap data included in the voluntary, supplemental report, the counterparty must report a correction of each such error to the swap data repository to which the voluntary, supplemental report was made, as soon as technologically practicable after discovery of any such error.

§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 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.

APPENDIX 1 TO PART 45—TABLES OF MINIMUM PRIMARY ECONOMIC TERMS DATA

EXHIBIT A
Minimum Primary Economic Terms Data
CREDIT SWAPS AND EQUITY SWAPS
(Enter N/A for fields that are not applicable)

Data categories and fields	**Comment**
The Unique Swap Identifier for the swap	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)
The Legal Entity Identifier of the reporting counterparty*	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
An indication of whether the reporting counterparty* is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty* is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the reporting counterparty* is a U.S. person.	Yes/No
An indication that the swap will be allocated	Yes/No
If the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent	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
An indication that the swap is a post-allocation swap	Yes/No
If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent	As provided in § 45.5
The Legal Entity Identifier of the non-reporting party**	As provided in § 45.6
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	If no repository identifier yet exists, the repository fills in this field after creating its identifier

An indication of whether the non-reporting counterparty** is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty** is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the non-reporting counterparty** is a U.S. person.	Yes/No
The Unique Product Identifier assigned to the swap	As provided in § 45.7
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	
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	
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
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	
An indication of the counterparty purchasing protection	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
An indication of the counterparty selling protection	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Information identifying the reference entity	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
Contract type	E.g., swap, swaption, forward, option, basis swap, index swap, basket swap
Block trade indicator	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
Execution timestamp	The date and time of the trade, expressed using Coordinated Universal Time ("UCT")

Execution venue	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
Start date	The date on which the swap starts or goes into effect
Maturity, termination or end date	The date on which the swap expires
The price	E.g., strike price, initial price, spread
The notional amount, and the currency in which the notional amount is expressed	
The amount and currency (or currencies) of any up-front payment	
Payment frequency of the reporting counterparty	A description of the payment stream of the reporting counterparty, e.g., coupon
Payment frequency of the non-reporting counterparty	A description of the payment stream of the non-reporting counterparty, e.g., coupon
Timestamp for submission to swap data repository	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
Clearing indicator	Yes/No indication of whether the swap will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization
If the swap will not be cleared, an indication of whether the clearing requirement exception in CEA section (2)(h)(7) was elected	Yes/No
The identity of the counterparty electing the clearing requirement exception in CEA section (2)(h)(7)	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Indication of collateralization	Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized
Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap	Use as many fields as required to report each such term

* 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** **(OTHER THAN CROSS-CURRENCY SWAPS)** (Enter N/A for fields that are not applicable)	
Data fields	**Comments**
The Unique Swap Identifier for the swap	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)
The Legal Entity Identifier of the reporting counterparty*	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
An indication of whether the reporting counterparty* is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty* is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the reporting counterparty* is a U.S. person	Yes/No
An indication that the swap will be allocated	Yes/No
If the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent	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
An indication that the swap is a post-allocation swap	Yes/No
If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent	As provided in § 45.5
The Legal Entity Identifier of the non-reporting party**	As provided in § 45.6

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	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty** is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty** is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the non-reporting counterparty** is a U.S. person.	Yes/No
The Unique Product Identifier assigned to the swap	As provided in § 45.7
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	
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	
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
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	
Contract type	E.g., forward, non-deliverable forward (NDF), non-deliverable option (NDO), vanilla option, simple exotic option, complex exotic option
Block trade indicator	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
Execution timestamp	The date and time of the trade, expressed using Coordinated Universal Time ("UCT")

Execution venue	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
Currency 1	ISO code
Currency 2	ISO code
Notional amount 1	For currency 1
Notional amount 2	For currency 2
Exchange rate	Contractual rate of exchange of the currencies
Delivery type	Physical (deliverable) or cash (non-deliverable)
Settlement or expiration date	Settlement date, or for an option the contract expiration date
Timestamp for submission to swap data repository	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
Clearing indicator	Yes/No indication of whether the swap will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization
If the swap will not be cleared, an indication of whether the clearing requirement exception in CEA section (2)(h)(7) was elected	Yes/No
The identity of the counterparty electing the clearing requirement exception in CEA section (2)(h)(7)	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Indication of collateralization	Is the trade collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized
Any other term(s) of the trade matched or affirmed by the counterparties in verifying the trade	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

* 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)

Data field	**Comment**
The Unique Swap Identifier for the swap	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)
The Legal Entity Identifier of the reporting counterparty*	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
An indication of whether the reporting counterparty* is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty* is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the reporting counterparty* is a U.S. person.	Yes/No
An indication that the swap will be allocated	Yes/No
If the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent	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
An indication that the swap is a post-allocation swap	Yes/No
If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent	As provided in § 45.5
The Legal Entity Identifier of the non-reporting counterparty**	As provided in § 45.6

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	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty** is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty** is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the non-reporting counterparty** is a U.S. person.	Yes/No
The Unique Product Identifier assigned to the swap	As provided in § 45.7
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	
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	
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
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	
Contract type	E.g., swap, swaption, option, basis swap, index swap
Block trade indicator	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
Execution timestamp	The date and time of the trade, expressed using Coordinated Universal Time ("UCT")

Execution venue	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
Start date	The date on which the swap starts or goes into effect
Maturity, termination or end date	The date on which the swap expires or ends
Day count convention	
Notional amount (leg 1)	The current active notional amount
Notional currency (leg 1)	ISO code
Notional amount (leg 2)	The current active notional amount
Notional currency (leg 2)	ISO code
Payer (fixed rate)	Is the reporting party a fixed rate payer? Yes/No/Not applicable
Payer (floating rate leg 1)	If two floating legs, the payer for leg 1
Payer (floating rate leg 2)	If two floating legs, the payer for leg 2
Direction	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.
Option type	E.g., put, call, straddle
Fixed rate	
Fixed rate day count fraction	E.g., actual 360
Floating rate payment frequency	
Floating rate reset frequency	
Floating rate index name/rate period	E.g., USD-Libor-BBA
Timestamp for submission to swap data repository	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
Clearing indicator	Yes/No indication of whether the swap will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization
If the swap will not be cleared, an indication of whether the clearing requirement exception in CEA section (2)(h)(7) was elected	Yes/No
The identity of the counterparty electing the clearing requirement exception in CEA section (2)(h)(7)	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Indication of collateralization	Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized
Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap	E.g., early termination option clause. Use as many fields as required to report each such term

* 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 D **Minimum Primary Economic Terms Data** **OTHER COMMODITY SWAPS** (Enter N/A for fields that are not applicable)	
Data field	**Comment**
The Unique Swap Identifier for the swap	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)
The Legal Entity Identifier of the reporting counterparty*	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
An indication of whether the reporting counterparty* is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty* is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the reporting counterparty* is a U.S. person.	Yes/No
An indication that the swap will be allocated	Yes/No
If the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent	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
An indication that the swap is a post-allocation swap	Yes/No
If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent	As provided in § 45.5
The Legal Entity Identifier of the non-reporting party**	As provided in § 45.6

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	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty** is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty** is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the non-reporting counterparty** is a U.S. person.	Yes/No
The Unique Product Identifier assigned to the swap	As provided in § 45.7
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	
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	
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
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	
Contract type	E.g., swap, swaption, option, basis swap, index swap
Block trade indicator	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

Execution timestamp	The date and time of the trade, 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
Execution venue	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
Timestamp for submission to swap data repository	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
Start date	The date on which the swap commences or goes into effect (e.g., in physical oil, the pricing start date)
Maturity, termination, or end date	The date on which the swap expires or ends (e.g., in physical oil, the pricing end date)
Buyer	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
Seller	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
Quantity unit	The unit of measure applicable for the quantity on the swap. E.g., barrels, bushels, gallons, pounds, tons
Quantity	The amount of the commodity (the number of quantity units) quoted on the swap
Quantity frequency	The rate at which the quantity is quoted on the swap. E.g., hourly, daily, weekly, monthly
Total quantity	The quantity of the commodity for the entire term of the swap
Settlement method	Physical delivery or cash
Price	The price of the swap. For options, the strike price
Price unit	The unit of measure applicable for the price of the swap
Price currency	ISO code

Buyer pay index	The published price as paid by the buyer (if applicable). For swaptions, applies to the underlying swap
Buyer pay averaging method	The averaging method used to calculate the index of the buyer pay index. For swaptions, applies to the underlying swap
Seller pay index	The published price as paid by the seller (if applicable). For swaptions, applies to the underlying swap
Seller pay averaging method	The averaging method used to calculate the index of the seller pay index. For swaptions, applies to the underlying swap
Grade	If applicable, the grade of the commodity to be delivered, e.g., the grade of oil or refined product
Option type	Descriptor for the type of option transaction. E.g., put, call, straddle
Option style	E.g., American, European, European Daily, European Monthly, Asian
Option premium	The total amount paid by the option buyer
Hours from through	For electric power, the hours of the day for which the swap is effective
Hours from through time zone	For electric power, the time zone prevailing for the hours during which electricity is transmitted
Days of week	For electric power, the profile applicable for the delivery of power
Load type	For electric power, the load profile for the delivery of power
Clearing indicator	Yes/No indication of whether the swap will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization
If the swap will not be cleared, an indication of whether the clearing requirement exception in CEA section (2)(h)(7) was elected	Yes/No
The identity of the counterparty electing the clearing requirement exception in CEA section (2)(h)(7)	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Indication of collateralization	Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized
Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap	Use as many fields as required to report each such term

* 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

PART 46—SWAP DATA RECORDKEEPING AND REPORTING REQUIREMENTS: PRE–ENACTMENT AND TRANSITION SWAPS

Sec.
46.1 Definitions.
46.2 Recordkeeping for pre-enactment swaps and transition swaps.
46.3 Swap data reporting for pre-enactment swaps and transition swaps.
46.4 Unique identifiers.
46.5 Determination of which counterparty must report.
46.6 Third-party facilitation of data reporting.
46.7 Reporting to a single swap data repository.
46.8 Data reporting for swaps in a swap asset class not accepted by any swap data repository.
46.9 Voluntary supplemental reporting
46.10 Required data standards.
46.11 Reporting of errors and omissions in previously reported data.

APPENDIX 1 TO PART 46—TABLES OF MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION SWAPS

AUTHORITY: Title VII, sections 723 and 729, Pub. L. 111–203, 124 Stat. 1738.

SOURCE: 77 FR 35226, June 12, 2012, unless otherwise noted.

§ 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.

(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.

(3) *Data reporting for multi-asset swaps and mixed swaps.* (i) 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 (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, such information relating to the terms of the transaction as was in the reporting counterparty's possession on or after October 14, 2010 (17 CFR 44.00 through 44.02). This information may be reported via any method selected by the reporting counterparty.

(2) *Transition swaps expired or terminated prior to April 25, 2011.* For each transition swap which expired or was terminated prior to April 25, 2011, the reporting counterparty shall report 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, such information relating to the terms of the transaction as was in the reporting counterparty's possession on or after December 17, 2010 (17 CFR 44.03). This information may be reported via any method selected by the reporting counterparty.

(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 an 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

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 authority delegated to the Chief Information Officer by paragraph (c) of this section shall include:

(1) With respect to all pre-enactment and transition swaps required to be reported by this part, the authority to determine the dates and times at which data concerning such swaps shall be reported pursuant to this part.

(2) With respect to all pre-enactment swaps or transition swaps in existence on or after April 25, 2011:

(i) 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; and

(ii) The authority to determine whether the Commission may permit or require use by reporting entities or counterparties in reporting pre-enactment or transition swaps in existence on or after April 25, 2011, 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.

(d) The Chief Information Officer shall publish from time to time in the FEDERAL REGISTER and on the Web site of the Commission the dates and times, format, data schema, and electronic data transmission methods and procedures for reporting acceptable to the Commission with respect to swap data reporting pursuant to this section.

§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

report, the counterparty must report a correction of each such error to the swap data repository to which the voluntary, supplemental report was made, as soon as technologically practicable after discovery of any such error.

§ 46.10 Required data standards.

In reporting swap data to a swap data repository as required by this part 46, each reporting counterparty shall use the facilities, methods, or data standards provided or required by the swap data repository to which counterparty reports the data.

§ 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.

APPENDIX 1 TO PART 46—TABLES OF MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION SWAPS

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)	
Data categories and fields	**Comment**
The Legal Entity Identifier of the reporting counterparty	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
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
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	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
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)	Yes/No

An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
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	
An indication of the counterparty purchasing protection	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
An indication of the counterparty selling protection	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Information identifying the reference entity	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
Contract type	E.g., swap, swaption, forward, option, basis swap, index swap, basket swap
Execution timestamp	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
Execution venue	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
Start date	The date on which the swap starts or goes into effect
Maturity, termination or end date	The date on which the swap expires
The price	E.g., strike price, initial price, spread
The notional amount, and the currency in which the notional amount is expressed	
The amount and currency (or currencies) of any up-front payment	
Payment frequency of the reporting counterparty	A description of the payment stream of the reporting counterparty, e.g., coupon
Payment frequency of the non-reporting counterparty	A description of the payment stream of the non-reporting counterparty, e.g., coupon
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	If the swap was or will be cleared, the identifier (if available) or name of the derivatives clearing organization

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)

Data fields	**Comments**
The Legal Entity Identifier of the reporting counterparty	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
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the reporting counterparty is a U.S. person	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
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	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity

For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
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	
Contract type	E.g., forward, non-deliverable forward (NDF), non-deliverable option (NDO), vanilla option, simple exotic option, complex exotic option
Execution timestamp	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
Execution venue	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
Currency 1	ISO code
Currency 2	ISO code
Notional amount 1	For currency 1
Notional amount 2	For currency 2
Exchange rate	Contractual rate of exchange of the currencies
Delivery type	Physical (deliverable) or cash (non-deliverable)
Settlement or expiration date	Settlement date, or for an option the contract expiration date
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	If the swap was or will be cleared, the identifier (if available) or name of the derivatives clearing organization

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)	
Data field	**Comment**
The Legal Entity Identifier of the reporting counterparty	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
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting counterparty	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
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	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity

An indication that the swap is a mixed swap	Field values: Yes, Not applicable
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	
Contract type	E.g., swap, swaption, option, basis swap, index swap
Execution timestamp	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
Execution venue	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
Start date	The date on which the swap starts or goes into effect
Maturity, termination or end date	The date on which the swap expires or ends
Day count convention	
Notional amount (leg 1)	The current active notional amount
Notional currency (leg 1)	ISO code
Notional amount (leg 2)	The current active notional amount
Notional currency (leg 2)	ISO code
Payer (fixed rate)	Is the reporting party a fixed rate payer? Yes/No/Not applicable
Payer (floating rate leg 1)	If two floating legs, the payer for leg 1
Payer (floating rate leg 2)	If two floating legs, the payer for leg 2
Direction	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.
Option type	E.g., put, call, straddle
Fixed rate	
Fixed rate day count fraction	E.g., actual 360
Floating rate payment frequency	
Floating rate reset frequency	
Floating rate index name/rate period	E.g., USD-Libor-BBA
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization

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)	
Data field	**Comment**
The Legal Entity Identifier of the reporting counterparty	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
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
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	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
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)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity

An indication that the swap is a mixed swap	Field values: Yes, Not applicable
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	
Contract type	E.g., swap, swaption, option, basis swap, index swap
Execution timestamp	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
Execution venue	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
Start date	The date on which the swap commences or goes into effect (e.g., in physical oil, the pricing start date)
Maturity, termination, or end date	The date on which the swap expires or ends (e.g., in physical oil, the pricing end date)
Buyer	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
Seller	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
Quantity unit	The unit of measure applicable for the quantity on the swap. E.g., barrels, bushels, gallons, pounds, tons
Quantity	The amount of the commodity (the number of quantity units) quoted on the swap
Quantity frequency	The rate at which the quantity is quoted on the swap. E.g., hourly, daily, weekly, monthly
Total quantity	The quantity of the commodity for the entire term of the swap
Settlement method	Physical delivery or cash
Price	The price of the swap. For options, the strike price
Price unit	The unit of measure applicable for the price of the swap
Price currency	ISO code

Buyer pay index	The published price as paid by the buyer (if applicable). For swaptions, applies to the underlying swap
Buyer pay averaging method	The averaging method used to calculate the index of the buyer pay index. For swaptions, applies to the underlying swap
Seller pay index	The published price as paid by the seller (if applicable). For swaptions, applies to the underlying swap
Seller pay averaging method	The averaging method used to calculate the index of the seller pay index. For swaptions, applies to the underlying swap
Grade	If applicable, the grade of the commodity to be delivered, e.g., the grade of oil or refined product
Option type	Descriptor for the type of option transaction. E.g., put, call, straddle
Option style	E.g., American, European, European Daily, European Monthly, Asian
Option premium	The total amount paid by the option buyer
Hours from through	For electric power, the hours of the day for which the swap is effective
Hours from through time zone	For electric power, the time zone prevailing for the hours during which electricity is transmitted
Days of week	For electric power, the profile applicable for the delivery of power
Load type	For electric power, the load profile for the delivery of power
Clearing indicator	Yes/No indication of whether the swap will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization

PART 48—REGISTRATION OF FOREIGN BOARDS OF TRADE

Sec.
48.1 Scope.
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APPENDIX TO PART 48—FORM FBOT

AUTHORITY: 7 U.S.C. 5, 6 and 12a, unless otherwise noted.

SOURCE: 76 FR 80698, 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,

(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.

(k) *Affiliate.* An affiliate of a registered foreign board of trade member or other participant means any person, as that term is defined in section 1a(38) of the Act, that:

(1) Owns 50% or more of the member or other participant;

(2) Is owned 50% or more by the member or other participant; or

(3) Is owned 50% or more by a third person that also owns 50% or more of the member or other participant.

(l) *Member or other participant.* Member or other participant means a member or other participant of a foreign board of trade that is registered under this part and any affiliate thereof that has been granted direct access by the foreign board of trade.

§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

support for any request for confidential treatment pursuant to the procedures set forth in § 145.9 of this chapter.

(d) If, upon review, the Commission finds the application for registration to be complete, the Commission may approve or deny the application. In reviewing the application, the Commission will consider, among other things:

(1) Whether the foreign board of trade is eligible to be registered as defined in § 48.2(b) and;

(2) Whether the foreign board of trade and its clearing organization are subject to comprehensive supervision and regulation by the appropriate governmental authorities in their home country or countries that is comparable to the comprehensive supervision and regulation to which designated contract markets and derivatives clearing organizations are respectively subject under the Act, Commission regulations, and other applicable United States laws and regulations, if any, and;

(3) Any previous Commission findings that the foreign board of trade and its clearing organization are subject to comprehensive supervision and regulation by the appropriate government authorities in their home country or countries that is comparable to the comprehensive supervision and regulation to which designated contract markets and derivatives clearing organizations are subject under the Act, Commission regulations, and other applicable United States laws and regulations, if any; and

(4) Whether the foreign board of trade and its clearing organization have adequately demonstrated that they meet the requirements for registration specified in § 48.7.

(5) The Commission's determination that the foreign board of trade and its clearing organization are subject to comprehensive supervision and regulation by the appropriate government authorities in their home country or countries that is comparable to the comprehensive supervision and regulation to which designated contract markets and derivatives clearing organizations are subject will be based upon a principles-based review conducted in a manner consistent with this part 48 pursuant to which the Commission will 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.

(e) If the Commission approves the application, the Commission will issue an Order of Registration. If the Commission does not approve the application, the Commission will, after appropriate notice and an opportunity to respond, issue a Notice of Action specifying that the application was not approved and setting forth the reasons therefor. The Commission, in its discretion, may impose conditions in the Order of Registration and may, after appropriate notice and an opportunity to respond, amend, suspend, or otherwise restrict the terms of an issued Order of Registration or issue an Order revoking registration.

(f) A foreign board of trade whose application is not approved may reapply for registration 360 days after the issuance of the Notice of Action if the foreign board of trade has addressed any deficiencies in its original application or facts and circumstances relevant to the Commission's review of the application have changed.

§ 48.6 Foreign boards of trade providing direct access pursuant to existing no-action relief.

(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

demonstrate that it satisfies the registration requirements set forth in §48.7, (limited application) the foreign board of trade must:

(i) Specifically identify the information or documentation previously submitted;

(ii) Identify the specific registration requirements set forth in §48.7 that are satisfied by such information or documentation; and

(iii) Certify that the information remains accurate and current.

(2) If the foreign board of trade wishes to rely on information and documentation previously submitted in hard copy in connection with its application for no-action relief, the foreign board of trade must also resubmit the identified information or documentation. A foreign board of trade that has submitted a complete application for no-action relief that is pending as of February 21, 2012 may also apply for registration pursuant to these limited application procedures.

(c) A foreign board of trade operating pursuant to existing no-action relief must submit a limited application for registration, determined in good faith by the applicant to be complete, within 180 days of February 21, 2012. If, at any time after August 20, 2012 but before a limited application is approved or disapproved, the Commission determines that the application is materially incomplete, the Commission may, after providing the foreign board of trade with notice and an opportunity to respond to the determination of incompleteness, withdraw the existing no-action relief if the Commission determines that the application cannot be made complete in a timely manner. The foreign board of trade may continue to operate pursuant to the existing no-action relief, subject to the terms and conditions contained therein, August 20, 2012, while the Commission is reviewing its application, and until the Commission approves or disapproves the application or otherwise withdraws the existing no-action relief. The no-action relief is automatically withdrawn upon issuance of an Order of Registration or upon disapproval.

§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; and

(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 laws 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;

(*1*) The total trade volume originating from electronic trading devices providing direct access;

(*2*) The total trade volume for such contracts traded through the trading system worldwide;

(*3*) The total trade volume for such contracts traded on 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,

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 the foreign board of trade's contract 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—

(*1*) The information that the foreign board of trade will make publicly available,

(*2*) The position limits that foreign board of trade or its regulatory authority will adopt and enforce,

(*3*) The position reductions required to prevent manipulation, excessive speculation as described in section 4a of the Act, price distortion, or disruption of delivery or the cash settlement process, and

(*4*) Any other area of interest expressed by the Commission to the foreign board of trade or its regulatory authority;

(D) Provide information to the Commission regarding large trader positions in the linked contract that is comparable to the large trader position information collected by the Commission for the contract to which it is linked; and

(E) Provide the Commission such information as is necessary to publish reports on aggregate trader positions for the linked contract that are comparable to such reports on aggregate trader positions for the contract to which it is linked.

(2) Other Conditions on Linked Contracts.

(i) The foreign board of trade will inform the Commission in a quarterly report of any member that had positions in a linked contract above the applicable foreign board of trade position limit, whether a hedge exemption was granted, and if not, whether a disciplinary action was taken.

(ii) The foreign board of trade will provide the Commission, either directly or through its agent, with trade execution and audit trail data for the Commission's Trade Surveillance System on a trade-date plus one basis and in a form, content and manner acceptable to the Commission for all linked contracts.

(iii) The foreign board of trade will provide to the Commission, at least one day prior to the effective date thereof, except in the event of an emergency market situation, copies of, or hyperlinks to, all rules, rule amendments, circulars and other notices published by the foreign board of trade with respect to all 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 its 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 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 appropriate notice and an opportunity to respond, by issuing an Order Revoking Registration which sets forth the reasons therefor.

(3) A foreign board of trade whose registration has been revoked for failure to satisfy a registration requirement or condition of registration may

apply for re-registration 360 days after the issuance of the Order Revoking Registration if the deficiency causing the revocation has been cured or relevant 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 warrant.

(1) 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 the foreign board of trade's application for registration is found to be untrue or materially misleading or if the foreign board of trade failed to include information in the application that would have been material to the Commission'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 opportunity to respond, if there is a material change in the regulatory regime applicable to the foreign board of trade or clearing organization such that the regulatory regime no longer satisfies any registration requirement or condition 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 circumstance where the Commission determines that revocation would be necessary or appropriate in the public interest. Following revocation, the Commission will provide notice and an opportunity 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 respond.

(c) Upon request by the Commission, a registered foreign board of trade must file with the Commission a written demonstration, containing such supporting data, information, and documents, in such form and manner and within such timeframe as the Commission may specify, that the foreign board of trade or clearing organization is in compliance with the registration requirements and/or conditions for registration.

§48.10 Additional contracts.

(a) *Generally*. A registered foreign board of trade that wishes to make an additional futures, option or swap contract 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 written request prior to offering the contracts from within the United States. Such a written request must include the terms and conditions of the additional futures, option or swap contracts and a certification that the additional 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 requirements and conditions of registration. 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 request, unless the Commission notifies the foreign board of trade that additional time is needed to complete its review of policy or other issues pertinent to the additional contracts. A registered foreign board of trade may list for trading by direct access an additional futures or option contract on a non-narrow-based security index pursuant to the Commission certification procedures set forth in §30.13(d) and appendix D to part 30 of this chapter.

(b) *Option contracts on previously approved 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 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, including the conditions specifically applicable to linked contracts set forth in § 48.8(c).

(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.

[1] 7 U.S.C. 1 *et seq.*

[2] 17 CFR chapter I.

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 and

[3] 17 CFR 145.9.

will be available for inspection and comment by any interested person.

8. A Form FBOT that is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing.[4] Acceptance of a Form FBOT by the Commission, however, shall not constitute a finding that the Form FBOT has 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 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.

[4] 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.

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].

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

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

CEA section 4(b) and part 48 of the Commission's regulations. The information and documentation requested relates to the activities of the foreign board of trade, unless otherwise stated.

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:

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:

Articles of association, constitution, or other similar organizational documents.

Attach, as EXHIBIT A–3, the following:

(1) Membership and trading participant agreements.

(2) Clearing agreements.

Attach, as EXHIBIT A–4, the following:

Terms and conditions of contracts to be available through direct access (as specified in Exhibit E).

Attach, as EXHIBIT A–5, the following:

The national statutes, laws and regulations governing the activities of the foreign board of trade and its respective participants.

Attach, as EXHIBIT A–6, the following:

The current rules, regulations, guidelines and bylaws of the foreign board of trade.

Attach, as EXHIBIT A–7, the following:

Evidence of the authorization, licensure or registration of the foreign board of trade pursuant to the regulatory regime in its home country jurisdiction 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–8, the following document:

A summary of any disciplinary or enforcement actions or proceedings that have been brought against the foreign board of trade, or any of the senior officers thereof, in the past five years and the resolution of those actions or proceedings.

Attach, as EXHIBIT A–9, the following document:

An undertaking by the chief executive officer(s) (or functional equivalent[s]) of the foreign board of trade to notify Commission staff promptly if any of the representations made in connection with or related to the foreign board of trade's application for registration 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:

(1) A description of the categories of membership and participation in the foreign board of trade and the access and trading privileges provided by the foreign board of trade. The description should include any restrictions applicable to members and other participants to which the foreign board of trade intends to grant direct access to its trading system.

(2) A description of all requirements for each category of membership and participation on the trading system 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:

(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 such requirements.

(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 (or where appropriate, documentation addressing) the following, 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/execution 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.

(5) 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 regulated 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[5] 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 future, 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:[6]

(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.

[5] 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.

[6] 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 recent 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 visit subsequent to submission of the application on an ''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.

(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–3, 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–4, 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

COMMODITY 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),[7] and in the regulations of the Commodity Futures Trading Commission (Commission or CFTC).[8]

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.[9] 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

[7] 7 U.S.C. 1 *et seq.*

[8] 17 CFR chapter I.

[9] 17 CFR 145.9.

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.[10] 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.

[10] 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, Supplement S–1, or exhibits 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 and Supplement S–1 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.

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: _____

Website Address: _____

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: _____

_____

_____

Phone Number: _____

Fax Number: _____

BUSINESS 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.

_____ [Name of the Clearing Organization] has duly caused this Supplement S-1 to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ [Number] day of _____ [Month], _____ [Year].

_____ [Name of the Clearing Organization] and the undersigned represent that all information and representations contained in this Supplement S-1 (and exhibits) are true, current, and complete. It is understood that all information, documentation, and exhibits are considered integral parts of this Supplement S-1. The submission of any amendment to a Supplement S-1 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 Clearing Organization

_____

Title

_____

Name of Clearing Organization

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.

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:

(1) Membership and participation agreements.

(2) Clearing agreements.

Attach, as EXHIBIT A–4, the following:

The national statutes, laws and regulations governing the activities of the clearing organization and its members.

Attach, as EXHIBIT A–5, the following:

The current rules, regulations, guidelines and bylaws of the clearing organization.

Attach, as EXHIBIT A–6, 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–7, 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–8, 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:

(1) A description of the categories of membership and participation in the clearing organization and the access and clearing privileges provided to each by the clearing organization.

(2) 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:

(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 any regulatory or self-regulatory authorization, licensure or registration requirements that the clearing organization 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 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 and 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, and

(*2*) Risk management mechanisms.

(iv) Fit and Proper Standards. A description of any other ways in which the clearing

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 how the clearing organization ensures that potential governing board and committee members meet these standards.

(3) 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 rules with respect to the disclosure of material non-public information obtained as a result of a member's performance on the governing board or on a significant committee.

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 offer (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:[11]

(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:

[11] 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.

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 F–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 F–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 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 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.

(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.

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APPENDIX A TO PART 49—FORM SDR

AUTHORITY: 7 U.S.C. 12a and 24a, as amended by Title VII of the Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010), unless otherwise noted.

SOURCE: 76 FR 54575, Sept. 1, 2011, unless otherwise noted.

§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 8 Material*. The term ''*Section 8 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 of ten percent or more was acquired. Such 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.

§49.6 Registration of successor entities.

(a) In the event of a corporate transaction, such as a re-organization, merger, acquisition, bankruptcy or other similar corporate event, that creates a new entity, in which the swap data repository continues to operate, the swap data repository shall request a transfer of the registration, rules, and other matters, no later than 30 days after the succession. The registration of the predecessor shall be deemed to remain effective as the registration of the successor if the successor, within 30 days after such succession, files an application for registration on Form SDR, and the predecessor files a request for vacation of registration on Form SDR *provided, however,* that the registration of the predecessor swap data repository shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor swap data repository.

(b) If the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor swap data repository on Form SDR to reflect these changes. This amendment shall be an application for registration filed by the predecessor and adopted by the successor.

§49.7 Swap data repositories located in foreign jurisdictions.

Any swap data repository located outside of the United States applying for registration pursuant to §49.3 of this part shall certify on Form SDR and provide 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.

§49.8 Procedures for implementing registered swap data repository rules.

(a) *Request for Commission approval of rules.* An applicant for registration as a swap data repository may request that

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;

(6) Establish automated systems for monitoring, screening, and analyzing swap data as prescribed in § 49.13;

(7) Establish automated systems for monitoring, screening and analyzing end-user clearing exemption claims as prescribed in § 49.14;

(8) Maintain the privacy of any and all swap data and any other related information that the swap data repository receives from a reporting entity as prescribed in § 49.16;

(9) Upon request of certain appropriate domestic and foreign regulators, provide access to swap data and information held and maintained by the swap data repository as prescribed in § 49.17;

(10) Adopt and establish appropriate emergency policies and procedures, including business continuity and disaster recovery plans, as prescribed in § 49.23 and § 49.24.

(11) Designate an individual to serve as a chief compliance officer who shall comply with § 49.22; and

(12) Subject itself to inspection and examination by the Commission.

(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

designated contract markets, derivatives clearing organizations, swaps execution facilities, swap dealers, major swap participants and/or certain other non-swap dealer/non-major swap participant counterparties who report such data. The technological protocols established by a swap data repository shall provide for the receipt of swap creation data, swap continuation data, real-time public reporting data, and all other data and information required to be reported to such swap data repository. The swap data repository shall ensure that its mechanisms for swap data acceptance are reliable and secure.

(b) A registered swap data repository shall set forth in its application for registration as described in §49.3 the specific asset class or classes for which it will accept swaps data. If a swap data repository accepts swap data of a particular asset class, then it shall accept data from all swaps of that asset class, unless otherwise prescribed by the Commission.

(c) A registered swap data repository shall establish policies and procedures reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the confirmation or recording process of the swap data repository. The policies and procedures must ensure that the swap data repository's user agreements are designed to prevent any such invalidation or modification.

(d) A registered swap data repository shall establish procedures and provide facilities for effectively resolving disputes over the accuracy of the swap data and positions that are recorded in the registered swap data repository.

§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 recordkeeping 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.

(b) *Systems to accept and disseminate swap data in connection with real-time public reporting.* A registered swap data repository shall establish such electronic systems as are necessary to accept and publicly disseminate real-time swap data submitted to meet the real-time public reporting obligations of part 43 of this chapter. Any electronic systems established for this purpose must be capable of accepting and ensuring the public dissemination of all data fields required by part 43 of this chapter.

(c) *Duty to notify the commission of untimely data.* A registered swap data repository must notify the Commission of any swap transaction for which the real-time swap data was not received by the swap data repository in accordance with 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. However, the data and information maintained by the registered swap data repository that may be accessed by either counterparty to a particular swap shall not include the identity or the legal entity identifier (as such term is used in part 45 of this chapter) of the other counterparty to the swap, or the other counterparty's clearing member for the swap, if the swap is executed anonymously on a swap execution facility or designated contract market, and cleared in accordance with Commission regulations in §§1.74, 23.610, and 37.12(b)(7) of this chapter.

(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.

[76 FR 54575, Sept. 1, 2011, as amended at 79 FR 16675, Mar. 26, 2014]

§ 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:

(*1*) Authority to act on behalf of its board of directors or

(*2*) Authority to amend or constrain actions of its board of directors, adequately considers an Independent Perspective in its decision-making process;

(B) To ensure that the nominations process for such board of directors, as well as the process for assigning members of the board of directors or other persons to such committees, adequately incorporates an Independent Perspective; and

(C) To clearly articulate the roles and responsibilities of such board of directors, as well as such committees, especially with respect to the manner in which they ensure that a registered swap data repository complies with all statutory and regulatory responsibilities under the Act and the regulations promulgated thereunder.

(ii) Each registered swap data repository shall submit to the Commission, within thirty days after each election of its board of directors:

(A) For the board of directors, as well as each committee referenced in paragraph (c)(1)(i)(A) of this section, a list of all members;

(B) A description of the relationship, if any, between such members and the registered swap data repository or any reporting entity thereof (or, in each case, affiliates thereof, as § 49.2(a)(1) of this part defines such term); and

(C) Any amendments to the written policies and procedures referenced in paragraph (c)(1)(i) of this section.

(2) *Compensation.* The compensation of non-executive members of the board of directors of a registered swap data repository shall not be linked to the business performance of such swap data repository.

(3) *Annual self-review.* The board of directors of a registered swap data repository shall review its performance and that of its individual members annually. It should consider periodically using external facilitators for such reviews.

(4) *Board member removal.* A registered swap data repository shall have procedures to remove a member from 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.

(5) *Expertise.* Each registered swap data repository shall ensure that members of its board of directors, members of any committee referenced in paragraph (c)(1)(i)(A) of this Regulation, and its senior management, in each case, are of sufficiently good repute and possess the requisite skills and expertise to fulfill their responsibilities in the management and governance of the swap data repository, to have a clear understanding of such responsibilities, and to exercise sound judgment about the affairs of the swap data repository.

(d) *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.

§ 49.21 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.

(c) *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 submitted to the Commission pursuant to §49.3(a)(5) of this part.

(3) Promptly upon discovery of any material error or omission made in a previously filed compliance report, the chief compliance officer shall file an amendment with the Commission to correct any material error or omission. An amendment shall contain the oath or certification required under paragraph (e)(67) of this section.

(4) A registered swap data repository may request the Commission for an extension of time to file its compliance report based on substantial, undue hardship. Extensions for the filing deadline may be granted at the discretion of the Commission.

(g) *Recordkeeping.* (1) The registered swap data repository shall maintain:

(i) A copy of the written policies and procedures, including the code of ethics and conflicts of interest policies adopted in furtherance of compliance with the Act and Commission regulations;

(ii) Copies of all materials, including written reports provided to the board of directors or senior officer in connection with the review of the annual compliance report under paragraph (f)(1) of this section and the board minutes or similar written record of such review, that record the submission of the annual compliance report to the board of directors or senior officer; and

(iii) Any records relevant to the registered swap data repository's annual compliance 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:

(A) Created, sent or received in connection with the annual compliance report and

(B) Contain conclusions, opinions, analyses, or financial data related to the annual compliance report.

(2) The registered swap data repository shall maintain records in accordance with §1.31 of this chapter.

§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 soon as reasonably practicable regarding any invocation of emergency authority. When notifying the Commission of any exercise of emergency authority, a swap data repository shall explain the reasons for taking such emergency action, explain how conflicts of interest were minimized, and document the decision-making process. Underlying documentation shall be made available to the Commission upon request.

§ 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:

(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, duties and obligations as a registered swap data repository following any disruption of its operations; or

(2) Contractual arrangements with other registered swap data repositories or disaster recovery service providers, as appropriate, that are sufficient to ensure continued fulfillment of all of the swap data repository's duties and obligations following any disruption 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 resource 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.

(4) The financial resources described in this paragraph (a) must be independent and separately dedicated to ensure that assets and capital are not used for multiple purposes.

(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 accordance with the requirements of paragraph (d); and provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows of the swap data repository or of its parent company. Financial statements shall be prepared in conformity with generally accepted accounting principles (GAAP) applied on a basis consistent with that of the preceding financial statement.

(2) The calculations required by this paragraph shall be made as of the last business day of the swap data repository's fiscal quarter.

(3) The report shall be filed not later than 17 business days after the end of the swap data repository's fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the swap data repository.

§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 its safeguarding of swap data and operational reliability to protect the confidentiality and security of such data, as described in §49.24;

(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; and

(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 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 REGISTRATION 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 registration.

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 managing agent, 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.

COMMODITY FUTURES TRADING COMMISSION

FORM SDR

SWAP DATA REPOSITORY
APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

_____

Exact name of Applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for registration, complete in full and check here.

☐ If this is an **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:

_____

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 swap data repositories activities are conducted

Office	**Address**

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

_____
Name

_____
Number and Street

_____
City State Country Zip Code

_____ _____ _____
Phone Number Fax Number E-mail Address

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

☐ 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

_____
City State Zip Code

_____ _____ _____
Phone Number Fax Number E-mail Address

SIGNATURES

13. 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 21 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 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.
    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.

47. Attach as **Exhibit GG** policies and procedures implemented by the Applicant protect the privacy of any and all swap information that the swap data repository receives from reporting entities.

48. Attach as **Exhibit HH** a description of safeguards, policies, and procedures implemented by the Applicant to prevent the misappropriation or misuse of (a) any confidential information received by the Applicant, including, but not limited to "Section 8 Material" and "SDR Information," as those terms are defined in Commission Regulation §49.2, about a market participant or any of its customers; and/or (c) intellectual property by Applicant or any person associated with the Applicant for their personal benefit or the benefit of others.

49. Attach **Exhibit II** policies and procedures implemented by the Applicant regarding its use of the SDR information that it receives from a market participant, any registered entity, or any person for non-commercial and/or commercial purposes.

50. Attach as **Exhibit JJ** procedures and a description of facilities of the Applicant for effectively resolving disputes over the accuracy of the transaction data and positions that are recorded in the swap data repository.

51. Attach as **Exhibit KK** policies and procedures relating to the Applicant's calculation of positions.

52. Attach as **Exhibit LL** policies and procedures that are reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the procedures or operations of the Applicant.

53. Attach as **Exhibit MM** a plan to ensure that the transaction data and position data that are recorded in the Applicant continue to be maintained after the Applicant withdraws from registration as a swap data repository, which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered swap data repository).

PART 50—CLEARING REQUIREMENT AND RELATED RULES

Subpart A—Definitions and Clearing Requirement

Sec.
50.1 Definitions.
50.2 Treatment of swaps subject to a clearing requirement.
50.3 Notice to the public.
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Subpart B—Compliance Schedule

50.25 Clearing requirement compliance schedule.
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Subpart C—Exceptions and Exemptions to Clearing Requirement

50.50 Exceptions to the clearing requirement.
50.51 Exemption for cooperatives.
50.52 Exemption for swaps between affiliates.

AUTHORITY: 7 U.S.C. 2(h) and 7a–1 as amended by Pub. L. 111–203, 124 Stat. 1376.

SOURCE: 77 FR 44455, July 30, 2012, unless otherwise noted.

Subpart A—Definitions and Clearing Requirement

SOURCE: 77 FR 74335, Dec. 13, 2012, unless otherwise noted.

§ 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.

§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 technologically 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.

Specification	Fixed-to-floating swap class			
Currency	U.S. dollar (USD).	Euro (EUR)	Sterling (GBP)	Yen (JPY).
Floating Rate Indexes	LIBOR	EURIBOR	LIBOR	LIBOR.
Stated Termination Date Range	28 days to 50 years.	28 days to 50 years.	28 days to 50 years.	28 days to 30 years.
Optionality	No	No	No	No.
Dual Currencies	No	No	No	No.
Conditional Notional Amounts	No	No	No	No.

Specification	Basis swap class			
Currency	U.S. dollar (USD).	Euro (EUR)	Sterling (GBP)	Yen (JPY).
Floating Rate Indexes	LIBOR	EURIBOR	LIBOR	LIBOR.
Stated Termination Date Range	28 days to 50 years.	28 days to 50 years.	28 days to 50 years.	28 days to 30 years.
Optionality	No	No	No	No.
Dual Currencies	No	No	No	No.
Conditional Notional Amounts	No	No	No	No.

Specification	Forward rate agreement class			
Currency	U.S. dollar (USD).	Euro (EUR)	Sterling (GBP)	Yen (JPY).
Floating Rate Indexes	LIBOR	EURIBOR	LIBOR	LIBOR.
Stated Termination Date Range	3 days to 3 years.	3 days to 3 years.	3 days to 3 years.	3 days to 3 years.
Optionality	No	No	No	No.
Dual Currencies	No	No	No	No.

6. Conditional Notional Amounts ..	No	No	No	No.
Specification	Overnight index swap class			
Currency	U.S. dollar (USD).	Euro (EUR)	Sterling (GBP).	
Floating Rate Indexes	FedFunds	EONIA	SONIA.	
Stated Termination Date Range ...	7 days to 2 years.	7 days to 2 years.	7 days to 2 years.	
Optionality	No	No	No.	
Dual Currencies	No	No	No.	
Conditional Notional Amounts	No	No	No.	

(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.

Specification	North American untranched CDS indices class
Reference Entities	Corporate.
Region	North America.
Indices	CDX.NA.IG; CDX.NA.HY.
Tenor	CDX.NA.IG: 3Y, 5Y, 7Y, 10Y; CDX.NA.HY: 5Y.
Applicable Series	CDX.NA.IG 3Y: 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. CDX.NA.HY 5Y: Series 11 and all subsequent Series, up to and including the current Series.
Tranched	No.
Specification	**European untranched CDS indices class**
Reference Entities	Corporate.
Region	Europe.
Indices	iTraxx Europe. iTraxx Europe Crossover. iTraxx Europe HiVol.
Tenor	iTraxx Europe: 5Y, 10Y. iTraxx Europe Crossover: 5Y. iTraxx Europe HiVol: 5Y.
Applicable Series	iTraxx Europe 5Y: Series 10 and all subsequent Series, up to and including the current Series. iTraxx Europe 10Y: Series 7 and all subsequent Series, up to and including the current Series. iTraxx Europe Crossover 5Y: Series 10 and all subsequent Series, up to and including the current Series. iTraxx Europe HiVol 5Y: Series 10 and all subsequent Series, up to and including the current Series.
Tranched	No.

§ 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)(5)(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, at its election, from exercising the authority delegated in this section.

§ 50.7–50.9 [Reserved]

§ 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]

Subpart B—Compliance Schedule

§ 50.25 Clearing requirement compliance schedule.

(a) *Definitions.* For the purposes of this paragraph:

Active fund means any private fund as defined in section 202(a) of the Investment Advisers Act of 1940, that is not a third-party subaccount and that executes 200 or more swaps per month based on a monthly average over the 12 months preceding the Commission issuing a clearing requirement determination under section 2(h)(2) of the Act.

Category 1 Entity means a swap dealer, a security-based swap dealer; a major swap participant; a major security-based swap participant; or an active fund.

Category 2 Entity means a commodity pool; a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 other than an active fund; or 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, provided that, in each case, the entity is not a third-party subaccount.

Third-party Subaccount means an account that is managed by an investment manager that is independent of and unaffiliated with the account's beneficial owner or sponsor, and is responsible for the documentation necessary for the account's beneficial owner to clear swaps.

(b) Upon issuing a clearing requirement determination under section 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) 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:

(*1*) A written credit support agreement;

(*2*) Pledged or segregated assets (including posting or receiving margin pursuant to a credit support agreement or otherwise);

(*3*) A written third-party guarantee;

(*4*) The electing counterparty's available financial resources; or

(*5*) 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:

(*1*) The relevant SEC Central Index Key number for that counterparty; and

(*2*) 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:

(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.

§ 50.51 Exemption for cooperatives.

Exemption for cooperatives. Exempt cooperatives may elect not to clear certain swaps identified in paragraph (b) of this section that are otherwise subject to the clearing requirement of section 2(h)(1)(A) of the Act if the following requirements are satisfied.

(a) For the purposes of this paragraph, an *exempt cooperative* means a cooperative:

(1) Formed and existing pursuant to Federal or state law as a cooperative;

(2) That is a ''financial entity,'' as defined in section 2(h)(7)(C)(i) of the Act, solely because of section 2(h)(7)(C)(i)(VIII) of the Act; and

(3) Each member of which is not a ''financial entity,'' as defined in section 2(h)(7)(C)(i) of the Act, or if any member is a financial entity solely because of section 2(h)(7)(C)(i)(VIII) of the Act, such member is:

(i) Exempt from the definition of ''financial entity'' pursuant to § 50.50(d); or

(ii) A cooperative formed under Federal or state law as a cooperative and each member thereof is either not a ''financial entity,'' as defined in section 2(h)(7)(C)(i) of the Act, or is exempt from the definition of ''financial entity'' pursuant to § 50.50(d).

(b) An exempt cooperative may elect not to clear a swap that is subject to the clearing requirement of section 2(h)(1)(A) of the Act if the swap:

(1) Is entered into with a member of the exempt cooperative in connection with originating a loan or loans for the member, which means the requirements of § 1.3(ggg)(5)(i), (ii), and (iii) are satisfied; *provided that,* for this purpose, the term ''insured depository institution'' as used in those sections is replaced with the term ''exempt cooperative'' and the word ''customer'' is replaced with the word ''member;'' or

(2) Hedges or mitigates commercial risk, in accordance with § 50.50(c), related to loans to members or arising from a swap or swaps that meet the requirements of paragraph (b)(1) of this section.

(c) An exempt cooperative that elects the exemption provided in this section shall comply with the requirements of § 50.50(b). For this purpose, the exempt cooperative shall be the ''electing counterparty,'' as such term is used in § 50.50(b), and for purposes of § 50.50(b)(1)(iii)(A), the reporting counterparty, as determined pursuant to § 45.8, shall report that an exemption is being elected in accordance with this section.

[78 FR 52307, Aug. 22, 2013]

§ 50.52 Exemption for swaps between affiliates.

(a) *Eligible affiliate counterparty status.* Subject to the conditions in paragraph (b) of this section:

(1) Counterparties to a swap may elect not to clear a swap subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(i) One counterparty, directly or indirectly, holds a majority ownership interest in the other counterparty, and the counterparty that holds the majority interest in the other counterparty reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the majority-owned counterparty; or

(ii) A third party, directly or indirectly, holds a majority ownership interest in both counterparties, and the third party reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of both of the swap counterparties.

(2) For purposes of this section:

(i) A counterparty or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership; and

(ii) The term ''eligible affiliate counterparty'' means an entity that meets the requirements of this paragraph.

(b) *Additional conditions.* Eligible affiliate counterparties to a swap may elect the exemption described in paragraph (a) of this section if:

(1) Both counterparties elect not to clear the swap;

(2)(i) A swap dealer or major swap participant that is an eligible affiliate counterparty to the swap satisfies the requirements of § 23.504 of this chapter; or

(ii) If neither eligible affiliate counterparty is a swap dealer or major swap participant, the terms of the swap are documented in a swap trading relationship document that shall be in writing and shall include all terms governing the trading relationship between the eligible affiliate counterparties;

(3) The swap is subject to a centralized risk management program that is reasonably designed to monitor and manage the risks associated with the swap. If at least one of the eligible affiliate counterparties is a swap dealer or major swap participant, this centralized risk management requirement shall be satisfied by complying with the requirements of § 23.600 of this chapter; and

(4)(i) Each eligible affiliate counterparty that enters into a swap, which is included in a class of swaps identified in § 50.4, with an unaffiliated counterparty shall:

(A) Comply with the requirements for clearing the swap in section 2(h) of the Act and this part;

(B) Comply with the requirements for clearing the swap under a foreign jurisdiction's clearing mandate that is comparable, and comprehensive but not necessarily identical, to the clearing requirement of section 2(h) of the Act and this part, as determined by the Commission;

(C) Comply with an exception or exemption under section 2(h)(7) of the Act or this part;

(D) Comply with an exception or exemption under a foreign jurisdiction's clearing mandate, provided that:

(*1*) The foreign jurisdiction's clearing mandate is comparable, and comprehensive but not necessarily identical, to the clearing requirement of section 2(h) of the Act and this part, as determined by the Commission; and

(*2*) The foreign jurisdiction's exception or exemption is comparable to an exception or exemption under section 2(h)(7) of the Act or this part, as determined by the Commission; or

(E) Clear such swap through a registered derivatives clearing organization or a clearing organization that is subject to supervision by appropriate government authorities in the home country of the clearing organization and has been assessed to be in compliance with the Principles for Financial Market Infrastructures.

(ii)(A) Except as provided in paragraph (b)(4)(ii)(B) of this section, if one of the eligible affiliate counterparties is located in the European Union, Japan, or Singapore, the following may satisfy the requirements of paragraph (b)(4)(i) of this section until March 11, 2014:

(*1*) Each eligible affiliate counterparty, or a third party that directly or indirectly holds a majority interest in both eligible affiliate counterparties, pays and collects full variation margin daily on all swaps entered into between the eligible affiliate counterparty located in the European Union, Japan, or Singapore and an unaffiliated counterparty; or

(*2*) Each eligible affiliate counterparty, or a third party that directly or indirectly holds a majority interest in both eligible affiliate counterparties, pays and collects full variation margin daily on all of the eligible affiliate counterparties' swaps with other eligible affiliate counterparties.

(B) If one of the eligible affiliate counterparties is located in the European Union, Japan, or Singapore, the requirements of paragraph (b)(4)(i) of this section shall not apply to the eligible affiliate counterparty located in the European Union, Japan, or Singapore until March 11, 2014, provided that:

(*1*) The one counterparty that directly or indirectly holds a majority ownership interest in the other counterparty or the third party that directly or indirectly holds a majority ownership interest in both counterparties is not a ''financial entity'' as defined in section 2(h)(7)(C)(i) of the Act; and

(*2*) Neither eligible affiliate counterparty is affiliated with an entity that is a swap dealer or major swap participant, as defined in § 1.3.

(iii) If an eligible affiliate counterparty located in the United States enters into swaps, which are included in a class of swaps identified in § 50.4, with eligible affiliate counterparties located in jurisdictions other than the United States, the European Union, Japan, and Singapore, and the aggregate notional value of such swaps, which are included in a class of swaps identified in § 50.4, does not exceed five percent of the aggregate notional value of all swaps, which are included in a class of swaps identified in § 50.4, in each instance the notional value as measured in U.S. dollar equivalents and calculated for each calendar quarter, entered into by the eligible affiliate counterparty located in the United States, then such swaps shall be deemed to satisfy the requirements of paragraph (b)(4)(i) of this section until March 11, 2014, provided that:

(A) Each eligible affiliate counterparty, or a third party that directly or indirectly holds a majority interest in both eligible affiliate counterparties, pays and collects full variation margin daily on all swaps entered into between the eligible affiliate counterparties located in jurisdictions other than the United States, the European Union, Japan, and Singapore and an unaffiliated counterparty; or

(B) Each eligible affiliate counterparty, or a third party that directly or indirectly holds a majority interest in both eligible affiliate counterparties, pays and collects full variation margin daily on all of the eligible affiliate counterparties' swaps with other eligible affiliate counterparties.

(c) *Reporting requirements.* When the exemption described in paragraph (a) of this section is elected, the reporting counterparty, as determined in accordance with § 45.8 of this chapter, 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:

(1) Confirmation that both eligible affiliate counterparties to the swap are electing not to clear the swap and that each of the electing eligible affiliate counterparties satisfies the requirements in paragraph (b) of this section applicable to it;

(2) For each electing eligible affiliate counterparty, how the 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 guarantee from another party;

(iv) The electing counterparty's available financial resources; or

(v) Means other than those described in paragraphs (c)(2)(i), (ii), (iii) or (iv) of this section; and

(3) If an electing eligible affiliate 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:

(i) The relevant SEC Central Index Key number for that counterparty; and

(ii) Acknowledgment that an appropriate committee of the board of directors (or equivalent body) of the eligible affiliate counterparty has reviewed and approved the decision to enter into swaps that are exempt from the requirements of section 2(h)(1) and 2(h)(8) of the Act.

(d) *Annual reporting.* An eligible affiliate counterparty that qualifies for the exemption described in paragraph (a) of this section may report the information listed in paragraphs (c)(2) and (3) of this section annually in anticipation of electing the exemption for one or more swaps. Any such reporting by a reporting counterparty under this paragraph will be effective for purposes of paragraphs (c)(2) and (3) of this section for 365 days following the date of such reporting. During the 365-day period, the reporting counterparty shall amend the report as necessary to reflect any material changes to the information reported. Each reporting counterparty shall have a reasonable basis to believe that the eligible affiliate counterparties meet the requirements for the exemption under this section.

[78 FR 21783, Apr. 11, 2013]

PART 75—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

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AUTHORITY: 12 U.S.C. 1851.

SOURCE: 79 FR 6048, Jan. 31, 2014, unless otherwise noted.

Subpart A—Authority and Definitions

§ 75.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part is issued by the Commission under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading by, and investments in or relationships with covered funds by, certain banking entities. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and further explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to banking entities for which the CFTC is the primary financial regulatory agency, as defined in section 2(12) of the Dodd-Frank Act.

(d) *Relationship to other authorities.* Except as otherwise provided under section 13 of the BHC Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of the BHC Act shall apply to the activities of an applicable banking entity, even if such activities are authorized for the applicable banking entity under other applicable provisions of law.

§ 75.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any portfolio concern, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* or *Commission* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have

further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include an insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)).

(s) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(t) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(u) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(v) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(w) *SEC* means the Securities and Exchange Commission.

(x) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(y) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(z) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(aa) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(bb) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, 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.

(cc) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(dd) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(ee) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ff) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

§ 75.3 Prohibition on proprietary trading.

(a) *Prohibition*. Except as otherwise provided in this subpart, a banking entity may not engage in proprietary trading. *Proprietary trading* means engaging as principal for the trading account of the banking entity in any purchase or sale of one or more financial instruments.

(b) *Definition of trading account*. (1) Trading account means any account that is used by a banking entity to:

(i) Purchase or sell one or more financial instruments principally for the purpose of:

(A) Short-term resale;

(B) Benefitting from actual or expected short-term price movements;

(C) Realizing short-term arbitrage profits; or

(D) Hedging one or more positions resulting from the purchases or sales of financial instruments described in paragraphs (b)(1)(i)(A), (B), or (C) of this section;

(ii) Purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate of the banking entity, is an insured depository institution, bank holding company, or savings and loan holding company, and calculates risk-based capital ratios under the market risk capital rule; or

(iii) Purchase or sell one or more financial instruments for any purpose, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Rebuttable presumption for certain purchases and sales*. The purchase (or sale) of a financial instrument by a banking entity shall be presumed to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for fewer than sixty days or substantially transfers the risk of the financial instrument within sixty days of the purchase (or sale), unless the banking entity can demonstrate, based on all relevant facts and circumstances, that the banking entity did not purchase (or sell) the financial instrument principally for any of the purposes described in paragraph (b)(1)(i) of this section.

(c) *Financial instrument*—(1) *Financial instrument* means:

(i) A security, including an option on a security;

(ii) A derivative, including an option on a derivative; or

(iii) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(2) A financial instrument does not include:

(i) A loan;

(ii) A commodity that is not:

(A) An excluded commodity (other than foreign exchange or currency);

(B) A derivative;

(C) A contract of sale of a commodity for future delivery; or

(D) An option on a contract of sale of a commodity for future delivery; or

(iii) Foreign exchange or currency.

(d) *Proprietary trading does not include:*—(1) Any purchase or sale of one or more financial instruments by a banking entity that arises under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(2) Any purchase or sale of one or more financial instruments by a banking entity that arises under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(3) Any purchase or sale of a security by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular securities to be used for liquidity management purposes, the amount, types, and risks of these securities that are consistent with liquidity management, and the liquidity circumstances in which the particular securities may or must be used;

(ii) Requires that any purchase or sale of securities contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any securities purchased or sold for liquidity management purposes be highly liquid and limited to securities the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any securities purchased or sold for liquidity management purposes, together with any other instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of securities that are not permitted under §75.6(a) or (b) are for the purpose of liquidity management and in accordance with the liquidity management plan described in paragraph (d)(3) of this section; and

(vi) Is consistent with the Commission's supervisory requirements, guidance, and expectations regarding liquidity management;

(4) Any purchase or sale of one or more financial instruments by a banking entity that is a derivatives clearing organization or a clearing agency in connection with clearing financial instruments;

(5) Any excluded clearing activities by a banking entity that is a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(6) Any purchase or sale of one or more financial instruments by a banking entity, so long as:

(i) The purchase (or sale) satisfies an existing delivery obligation of the banking entity or its customers, including to prevent or close out a failure to deliver, in connection with delivery, clearing, or settlement activity; or

(ii) The purchase (or sale) satisfies an obligation of the banking entity in connection with a judicial, administrative, self-regulatory organization, or arbitration proceeding;

(7) Any purchase or sale of one or more financial instruments by a banking entity that is acting solely as agent, broker, or custodian;

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity; or

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the Commission.

(e) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Anonymous* means that each party to a purchase or sale is unaware of the identity of the other party(ies) to the purchase or sale.

(2) *Clearing agency* has the same meaning as in section 3(a)(23) of the Exchange Act (15 U.S.C. 78c(a)(23)).

(3) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(4) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27))).

(5) *Derivatives clearing organization* means:

(i) A derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1);

(ii) A derivatives clearing organization that, pursuant to CFTC regulation, is exempt from the registration requirements under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1); or

(iii) A foreign derivatives clearing organization that, pursuant to CFTC regulation, is permitted to clear for a foreign board of trade that is registered with the CFTC.

(6) *Exchange,* unless the context otherwise requires, means any designated contract market, swap execution facility, or foreign board of trade registered with the CFTC, or, for purposes of securities or security-based swaps, an exchange, as defined under section 3(a)(1) of the Exchange Act (15 U.S.C. 78c(a)(1)), or security-based swap execution facility, as defined under section 3(a)(77) of the Exchange Act (15 U.S.C. 78c(a)(77)).

(7) *Excluded clearing activities* means:

(i) With respect to customer transactions cleared on a derivatives clearing organization, a clearing agency, or a designated financial market utility, any purchase or sale necessary to correct trading errors made by or on behalf of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(ii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a customer provided

that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(iii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(iv) Any purchase or sale in connection with and related to the management of the default or threatened default of a clearing agency, a derivatives clearing organization, or a designated financial market utility; and

(v) Any purchase or sale that is required by the rules or procedures of a clearing agency, a derivatives clearing organization, or a designated financial market utility to mitigate the risk to the clearing agency, derivatives clearing organization, or designated financial market utility that would result from the clearing by a member of security-based swaps that reference the member or an affiliate of the member.

(8) *Designated financial market utility* has the same meaning as in section 803(4) of the Dodd-Frank Act (12 U.S.C. 5462(4)).

(9) *Issuer* has the same meaning as in section 2(a)(4) of the Securities Act of 1933 (15 U.S.C. 77b(a)(4)).

(10) *Market risk capital rule covered position and trading position* means a financial instrument that is both a covered position and a trading position, as those terms are respectively defined:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(11) *Market risk capital rule* means the market risk capital rule that is contained in subpart F of 12 CFR part 3, 12 CFR parts 208 and 225, or 12 CFR part 324, as applicable.

(12) *Municipal security* means a security that is a direct obligation of or issued by, or an obligation guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States or political subdivisions thereof.

(13) *Trading desk* means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

§ 75.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 75.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with paragraph (a) of this section.

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, and reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, based on the nature and amount of the trading desk's underwriting activities, including the reasonably expected near term demands of clients, customers, or counterparties, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held;

(C) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(D) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval;

(iv) The compensation arrangements of persons performing the activities described in paragraph (a) of this section are designed not to reward or incentivize prohibited proprietary trading; and

(v) The banking entity is licensed or registered to engage in the activity described in paragraph (a) of this section in accordance with applicable law.

(3) *Definition of distribution.* For purposes of paragraph (a) of this section, a *distribution* of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of paragraph (a) of this section, *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of paragraph (a) of this section, *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of paragraph (a) of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of paragraph (a) of this section, the terms *client, customer,* and *counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 75.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with paragraph (b) of this section.

(2) *Requirements.* The market making-related activities of a banking entity

are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The amount, types, and risks of the financial instruments in the trading desk's market-maker inventory are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, based on:

(A) The liquidity, maturity, and depth of the market for the relevant types of financial instrument(s); and

(B) Demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors regarding the amount, types, and risks, of or associated with financial instruments in which the trading desk makes a market, including through block trades;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and inventory; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, based on the nature and amount of the trading desk's market making-related activities, that address the factors prescribed by paragraph (b)(2)(ii) of this section, on:

(*1*) The amount, types, and risks of its market-maker inventory;

(*2*) The amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) The level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) The period of time a financial instrument may be held;

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(E) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis that the basis for any temporary or permanent increase to a trading desk's limit(s) is consistent with the requirements of paragraph (b) of this section, and independent review of such demonstrable analysis and approval;

(iv) To the extent that any limit identified pursuant to paragraph (b)(2)(iii)(C) of this section is exceeded, the trading desk takes action to bring the trading desk into compliance with the limits as promptly as possible after the limit is exceeded;

(v) The compensation arrangements of persons performing the activities described in paragraph (b) of this section are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in paragraph (b) of this section in accordance with applicable law.

(3) *Definition of client, customer, and counterparty*. For purposes of paragraph (b) of this section, the terms *client, customer*, and *counterparty*, on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 75.20(d)(1), unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure*. For purposes of paragraph (b) of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker inventory*. For the purposes of paragraph (b) of this section, *market-maker inventory* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

§ 75.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities*. The prohibition contained in § 75.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements*. The risk-mitigating hedging activities of a banking entity are permitted under paragraph (a) of this section only if:

(1) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(i) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(ii) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(iii) The conduct of analysis, including correlation analysis, and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged, and such correlation analysis demonstrates that the hedging activity demonstrably reduces or otherwise significantly mitigates the specific, identifiable risk(s) being hedged;

(2) The risk-mitigating hedging activity:

(i) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(ii) At the inception of the hedging activity, including, without limitation,

any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(iii) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(iv) Is subject to continuing review, monitoring and management by the banking entity that:

(A) Is consistent with the written hedging policies and procedures required under paragraph (b)(1) of this section;

(B) Is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(C) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading; and

(3) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(c) *Documentation requirement.* (1) A banking entity must comply with the requirements of paragraphs (c)(2) and (c)(3) of this section with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

(i) Not established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the hedging activity is designed to reduce;

(ii) Established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the purchases or sales are designed to reduce, but that is effected through a financial instrument, exposure, technique, or strategy that is not specifically identified in the trading desk's written policies and procedures established under paragraph (b)(1) of this section or under § 75.4(b)(2)(iii)(B) as a product, instrument, exposure, technique, or strategy such trading desk may use for hedging; or

(iii) Established to hedge aggregated positions across two or more trading desks.

(2) In connection with any purchase or sale identified in paragraph (c)(1) of this section, a banking entity must, at a minimum, and contemporaneously with the purchase or sale, document:

(i) The specific, identifiable risk(s) of the identified positions, contracts, or other holdings of the banking entity that the purchase or sale is designed to reduce;

(ii) The specific risk-mitigating strategy that the purchase or sale is designed to fulfill; and

(iii) The trading desk or other business unit that is establishing and responsible for the hedge.

(3) A banking entity must create and retain records sufficient to demonstrate compliance with the requirements of paragraph (c) of this section for a period that is no less than five years in a form that allows the banking entity to promptly produce such records to the Commission on request, or such longer period as required under other law or this part.

§ 75.6 Other permitted proprietary trading activities.

(a) *Permitted trading in domestic government obligations.* The prohibition

contained in § 75.3(a) does not apply to the purchase or sale by a banking entity of a financial instrument that is:

(1) An obligation of, or issued or guaranteed by, the United States;

(2) An obligation, participation, or other instrument of, or issued or guaranteed by, an agency of the United States, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(3) An obligation of any State or any political subdivision thereof, including any municipal security; or

(4) An obligation of the FDIC, or any entity formed by or on behalf of the FDIC for purpose of facilitating the disposal of assets acquired or held by the FDIC in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(b) *Permitted trading in foreign government obligations*—(1) *Affiliates of foreign banking entities in the United States.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of such foreign sovereign, by a banking entity, so long as:

(i) The banking entity is organized under or is directly or indirectly controlled by a banking entity that is organized under the laws of a foreign sovereign and is not directly or indirectly controlled by a top-tier banking entity that is organized under the laws of the United States;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign banking entity referred to in paragraph (b)(1)(i) of this section is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The purchase or sale as principal is not made by an insured depository institution.

(2) *Foreign affiliates of a U.S. banking entity.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign, by a foreign entity that is owned or controlled by a banking entity organized or established under the laws of the United States or any State, so long as:

(i) The foreign entity is a foreign bank, as defined in § 211.2(j) of the Board's Regulation K (12 CFR 211.2(j)), or is regulated by the foreign sovereign as a securities dealer;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign entity is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The financial instrument is owned by the foreign entity and is not financed by an affiliate that is located in the United States or organized under the laws of the United States or of any State.

(c) *Permitted trading on behalf of customers*—(1) *Fiduciary transactions.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as trustee or in a similar fiduciary capacity, so long as:

(i) The transaction is conducted for the account of, or on behalf of, a customer; and

(ii) The banking entity does not have or retain beneficial ownership of the financial instruments.

(2) *Riskless principal transactions.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as riskless principal in a transaction in which the banking entity, after receiving an order to purchase

(or sell) a financial instrument from a customer, purchases (or sells) the financial instrument for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(d) *Permitted trading by a regulated insurance company*. The prohibition contained in §75.3(a) does not apply to the purchase or sale of financial instruments by a banking entity that is an insurance company or an affiliate of an insurance company if:

(1) The insurance company or its affiliate purchases or sells the financial instruments solely for:

(i) The general account of the insurance company; or

(ii) A separate account established by the insurance company;

(2) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (d)(2) of this section is insufficient to protect the safety and soundness of the covered banking entity, or the financial stability of the United States.

(e) *Permitted trading activities of foreign banking entities*. (1) The prohibition contained in §75.3(a) does not apply to the purchase or sale of financial instruments by a banking entity if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of any State;

(ii) The purchase or sale by the banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale meets the requirements of paragraph (e)(3) of this section.

(2) A purchase or sale of financial instruments by a banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (e)(1)(ii) of this section only if:

(i) The purchase or sale is conducted in accordance with the requirements of paragraph (e) of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of §211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of any State and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) A purchase or sale by a banking entity is permitted for purposes of paragraph (e) of this section only if:

(i) The banking entity engaging as principal in the purchase or sale (including any personnel of the banking entity or its affiliate that arrange, negotiate or execute such purchase or sale) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State;

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or

affiliate that is located in the United States or organized under the laws of the United States or of any State;

(iv) No financing for the banking entity's purchases or sales is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(v) The purchase or sale is not conducted with or through any U.S. entity, other than:

(A) A purchase or sale with the foreign operations of a U.S. entity if no personnel of such U.S. entity that are located in the United States are involved in the arrangement, negotiation, or execution of such purchase or sale;

(B) A purchase or sale with an unaffiliated market intermediary acting as principal, provided the purchase or sale is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty; or

(C) A purchase or sale through an unaffiliated market intermediary acting as agent, provided the purchase or sale is conducted anonymously on an exchange or similar trading facility and is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty,

(4) For purposes of paragraph (e) of this section, a U.S. entity is any entity that is, or is controlled by, or is acting on behalf of, or at the direction of, any other entity that is, located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of paragraph (e) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is considered to be located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(6) For purposes of paragraph (e) of this section, *unaffiliated market intermediary* means an unaffiliated entity, acting as an intermediary, that is:

(i) A broker or dealer registered with the SEC under section 15 of the Exchange Act or exempt from registration or excluded from regulation as such;

(ii) A swap dealer registered with the CFTC under section 4s of the Commodity Exchange Act or exempt from registration or excluded from regulation as such;

(iii) A security-based swap dealer registered with the SEC under section 15F of the Exchange Act or exempt from registration or excluded from regulation as such; or

(iv) A futures commission merchant registered with the CFTC under section 4f of the Commodity Exchange Act or exempt from registration or excluded from regulation as such.

§ 75.7 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 75.4 through 75.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§§ 75.8–75.9 [Reserved]

Subpart C—Covered Fund Activities and Investments

§ 75.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, if the ownership interest is held or controlled directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity (or an affiliate thereof);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the Commission; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under § 4.7 of this chapter; or

(B) (*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(*2*) Substantially all participation units of the commodity pool are owned by qualified eligible persons under § 4.7(a)(2) and (3) of this chapter; and

(*3*) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under § 4.7(a)(2) and (3) of this chapter; or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities; and

(C) (*1*) Has as its sponsor that banking entity (or an affiliate thereof); or

(*2*) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds.* (i) Subject to paragraphs (c)(1)(ii) and (iii) of this section, an issuer that:

(A) Is organized or established outside of the United States;

(B) Is authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction; and

(C) Sells ownership interests predominantly through one or more public offerings outside of the United States.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless ownership interests in the issuer are sold predominantly to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and employees of such entities.

(iii) For purposes of paragraph (c)(1)(i)(C) of this section, the term *public offering* means a distribution (as defined in § 75.4(a)(3)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(B) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(C) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, *provided that* the joint venture:

(i) Is comprised of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles.* An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable supervisory guidance regarding bank owned life insurance.

(8) *Loan securitizations*—(i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of paragraph (c)(8) of this section and the assets or holdings of which are comprised solely of:

(A) Loans as defined in § 75.2(s);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements

of paragraph (c)(8)(iv) of this section; and

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section.

(ii) *Impermissible assets*. For purposes of paragraph (c)(8) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraph (c)(8)(iii) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities*. Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities if those securities are:

(A) Cash equivalents for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives*. The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivative directly relate to the loans, the asset-backed securities, or the contractual rights of other assets described in paragraph (c)(8)(i)(B) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, or the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section.

(v) *Special units of beneficial interest and collateral certificates*. The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in paragraph (c)(8) of this section;

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under paragraph (c)(8) of this section and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits*. (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset-backed securities issued by the asset-backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9) of this section, a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in §211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on Banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are comprised solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of paragraph (c)(10) of this section, a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked; or

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

(12) *Registered investment companies and excluded entities.* An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in §75.20(e)(3) and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15 U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in §75.20(e)(3) and that

complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.* (i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(d) *Definition of other terms related to covered funds.* For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the Commission determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).

(3) *Director* has the same meaning as provided in § 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (d)(6)(i)(F) of this section.

(ii) *Ownership interest* does not include *restricted profit interest,* which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider so long as:

(A) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the

investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(B) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(C) Any amounts invested in the covered fund, including any amounts paid by the entity (or employee or former employee thereof) in connection with obtaining the restricted profit interest, are within the limits of § 75.12; and

(D) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a ''U.S. person'' as defined in rule 902(k) of the SEC's Regulation S (17 CFR 230.902(k)).

(9) *Sponsor* means, with respect to a covered fund:

(i) To serve as a general partner, managing member, or trustee of a covered fund, or to serve as a commodity pool operator with respect to a covered fund as defined in (b)(1)(ii) of this section;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name.

(10) *Trustee*. (i) For purposes of paragraph (d)(9) of this section and § 75.11, a trustee does *not* include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

§ 75.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general*. Notwithstanding § 75.10(a), a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered

fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 75.12;

(4) The banking entity and its affiliates comply with the requirements of § 75.14;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof); and

(ii) Does not use the word ''bank'' in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(A) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate'';

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding § 75.10(a), a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraphs (a)(3) through (a)(8) of this section.

(2) For purposes of paragraph (b) of this section, organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section

15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 75.10(a) does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 75.4(a) or (b), respectively;

(2) With respect to any banking entity (or any affiliate thereof) that acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78o–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section; or, directly or indirectly, guarantees, assumes, or otherwise insures the obligations or performance of the covered fund or of any covered fund in which such fund invests, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 75.12(a)(2)(ii) and (d); and

(3) With respect to any banking entity, the aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired and retained under § 75.11, including all covered funds in which the banking entity holds an ownership interest in connection with underwriting and market making related activities permitted under paragraph (c) of this section, are included in the calculation of all ownership interests under § 75.12(a)(2)(iii) and (d).

§ 75.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) Notwithstanding the prohibition contained in § 75.10(a), a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to § 75.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (a)(2)(iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of

the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—(1) *Attribution of ownership interests to a covered banking entity.* (i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 75.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies or foreign public fund as described in § 75.10(c)(1) will not be considered to be an affiliate of the banking entity so long as the banking entity:

(A) Does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) Provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraphs (b)(3) or (4) of this section, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by

the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset-backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—(i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest of the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 75.11 for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that

other fund, as well as the banking entity's pro-rata share of any ownership interest of the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(c) *Aggregate permitted investments in all covered funds.* (1) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under §75.10(d)(6)(ii)), on a historical cost basis.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under §75.10(d)(6)(ii)), on a historical cost basis, plus any earnings received; and

(2) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (3) of this section (together with any amounts paid by the entity (or employee thereof) in

connection with obtaining a restricted profit interest under § 75.10(d)(6)(ii)), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(e) *Extension of time to divest an ownership interest.* (1) Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(2) *Factors governing Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(3) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(4) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

§ 75.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 75.10(a) does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with a compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund.

(2) *Requirements*. The risk-mitigating hedging activities of a banking entity are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks arising in connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) The compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to this paragraph and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States*. (1) The prohibition contained in § 75.10(a) does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for

purposes of paragraph (b)(1)(iii) of this section only if it is sold or has been sold pursuant to an offering that does not target residents of the United States.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State;

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(iv) No financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company*. The prohibition contained in § 75.10(a) does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

§ 75.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund*. (1) Except as provided for in paragraph (a)(2) of this section, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, that organizes and offers a covered fund pursuant to § 75.11, or that continues to hold an ownership interest in accordance with § 75.11(b), and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of §§ 75.11, 75.12, or 75.13; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 75.11 with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually to the Commission (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 75.11, or that continues to hold an ownership interest in accordance with § 75.11(b), shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on prime brokerage transactions.* A prime brokerage transaction permitted under paragraph (a)(2)(ii) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity.

§ 75.15 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 75.11 through 75.13 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest

from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 75.16 Ownership of interests in and sponsorship of issuers of certain collateralized debt obligations backed by trust-preferred securities.

(a) The prohibition contained in § 75.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 75.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 75.4 and 75.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

[79 FR 5228, Jan. 31, 2014]

§§ 75.17–75.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ 75.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope and detail of the compliance program shall be appropriate for the types, size, scope and complexity of activities and business structure of the banking entity.

(b) *Contents of compliance program.* Except as provided in paragraph (f) of this section, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B of this part (including those permitted under

§§ 75.3 to 75.6), including setting, monitoring and managing required limits set out in §§ 75.4 and 75.5, and activities and investments with respect to a covered fund subject to subpart C of this part (including those permitted under §§ 75.11 through 75.14) conducted by the banking entity to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act and this part comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention;

(4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the Commission upon request and retain for a period of no less than 5 years or such longer period as required by the Commission.

(c) *Additional standards.* In addition to the requirements in paragraph (b) of this section, the compliance program of a banking entity must satisfy the requirements and other standards contained in Appendix B of this part, if:

(1) The banking entity engages in proprietary trading permitted under subpart B of this part and is required to comply with the reporting requirements of paragraph (d) of this section;

(2) The banking entity has reported total consolidated assets as of the previous calendar year end of $50 billion or more or, in the case of a foreign banking entity, has total U.S. assets as of the previous calendar year end of $50 billion or more (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States); or

(3) The Commission notifies the banking entity in writing that it must satisfy the requirements and other standards contained in Appendix B of this part.

(d) *Reporting requirements under Appendix A of this Part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B of this part shall comply with the reporting requirements described in Appendix A of this part, if:

(i) The banking entity (other than a foreign banking entity as provided in paragraph (d)(1)(ii) of this section) has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which (on a worldwide consolidated basis) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section;

(ii) In the case of a foreign banking entity, the average gross sum of the trading assets and liabilities of the combined U.S. operations of the foreign banking entity (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States and excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; or

(iii) The Commission notifies the banking entity in writing that it must

satisfy the reporting requirements contained in Appendix A of this part.

(2) The threshold for reporting under paragraph (d)(1) of this section shall be $50 billion beginning on June 30, 2014; $25 billion beginning on April 30, 2016; and $10 billion beginning on December 31, 2016.

(3) *Frequency of reporting*. Unless the Commission notifies the banking entity in writing that it must report on a different basis, a banking entity with $50 billion or more in trading assets and liabilities (as calculated in accordance with paragraph (d)(1) of this section) shall report the information required by Appendix A of this part for each calendar month within 30 days of the end of the relevant calendar month; beginning with information for the month of January 2015, such information shall be reported within 10 days of the end of each calendar month. Any other banking entity subject to Appendix A of this part shall report the information required by Appendix A of this part for each calendar quarter within 30 days of the end of that calendar quarter unless the Commission notifies the banking entity in writing that it must report on a different basis.

(e) *Additional documentation for covered funds*. Any banking entity that has more than $10 billion in total consolidated assets as reported on December 31 of the previous two calendar years shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by § 75.10(c)(1), (5), (8), (9), or (10), documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 75.10(c)(12)(i) or (iii) that will become a registered investment company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified in § 75.12(a)(2)(i)(B);

(4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 75.10(c)(1) owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(f) *Simplified programs for less active banking entities*—(1) *Banking entities with no covered activities*. A banking entity that does not engage in activities or investments pursuant to subpart B

or subpart C of this part (other than trading activities permitted pursuant to § 75.6(a)) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 75.6(a)).

(2) *Banking entities with modest activities.* A banking entity with total consolidated assets of $10 billion or less as reported on December 31 of the previous two calendar years that engages in activities or investments pursuant to subpart B or subpart C of this part (other than trading activities permitted under § 75.6(a)) may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope and complexity of the banking entity.

§ 75.21 Termination of activities or investments; penalties for violations.

(a) Any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part, or acts in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C of this part, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall, upon discovery, promptly terminate the activity and, as relevant, dispose of the investment.

(b) Whenever the Commission finds reasonable cause to believe any banking entity has engaged in an activity or made an investment in violation of section 13 of the BHC Act or this part, or engaged in any activity or made any investment that functions as an evasion of the requirements of section 13 of the BHC Act or this part, the Commission may take any action permitted by law to enforce compliance with section 13 of the BHC Act and this part, including directing the banking entity to restrict, limit, or terminate any or all activities under this part and dispose of any investment.

APPENDIX A TO PART 75—REPORTING AND RECORDKEEPING REQUIREMENTS FOR COVERED TRADING ACTIVITIES

I. PURPOSE

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B of this part (''proprietary trading restrictions''). Pursuant to § 75.20(d), this appendix generally applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the Commission regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 75.20 and Appendix B of this part.

b. The purpose of this appendix is to assist banking entities and the Commission in:

(i) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(ii) Monitoring the banking entity's covered trading activities;

(iii) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(iv) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 75.4(b) are consistent with the requirements governing permitted market making-related activities;

(v) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to § 75.4, 75.5, or 75.6(a) and (b) (i.e., underwriting and market making-related related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(vi) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the Commission of such activities; and

(vii) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. The quantitative measurements that must be furnished pursuant to this appendix are *not* intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In order to allow banking entities and the Agencies to evaluate the effectiveness of these metrics, banking entities must collect and report these metrics for all trading desks beginning on the dates established in §75.20. The Agencies will review the data collected and revise this collection requirement as appropriate based on a review of the data collected prior to September 30, 2015.

e. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by §75.20 and Appendix B of this part. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (e.g., whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

f. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§75.4 through 75.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the Commission, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§75.2 and 75.3. In addition, for purposes of this appendix, the following definitions apply:

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under §75.4, 75.5, or 75.6(a) or (b). A banking entity may include trading under §75.3(d) or 75.6(c), (d) or (e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading desk means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

III. Reporting and Recordkeeping of Quantitative Measurements

a. Scope of Required Reporting

General scope. Each banking entity made subject to this part by §75.20 must furnish the following quantitative measurements for each trading desk of the banking entity, calculated in accordance with this appendix:

- Risk and Position Limits and Usage;
- Risk Factor Sensitivities;
- Value-at-Risk and Stress VaR;
- Comprehensive Profit and Loss Attribution;
- Inventory Turnover;
- Inventory Aging; and
- Customer Facing Trade Ratio

b. Frequency of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report each applicable quantitative measurement to the Commission on the reporting schedule established in §75.20 unless otherwise requested by the Commission. All quantitative measurements for any calendar month must be reported within the time period required by §75.20.

c. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the Commission pursuant to this appendix and §75.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the Commission to verify the accuracy of such reports, for a period of 5 years from the end of the calendar year for which the measurement was taken.

IV. QUANTITATIVE MEASUREMENTS

a. Risk-Management Measurements

1. Risk and Position Limits and Usage

i. *Description:* For purposes of this appendix, Risk and Position Limits are the constraints that define the amount of risk that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the portion of the trading desk's limits that are accounted for by the current activity of the desk. Risk and position limits and their usage are key risk management tools used to control and monitor risk taking and include, but are not limited, to the limits set out in §§75.4 and 75.5. A number of the metrics that are described below, including ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk,'' relate to a trading desk's risk and position limits and are useful in evaluating and setting these limits in the broader context of the trading desk's overall activities, particularly for the market making activities under §75.4(b) and hedging activity under §75.5. Accordingly, the limits required under §§75.4(b)(2)(iii) and 75.5(b)(1)(i) must meet the applicable requirements under §§75.4(b)(2)(iii) and 75.5(b)(1)(i) and also must include appropriate metrics for the trading desk limits including, at a minimum, the ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk'' metrics except to the extent any of the ''Risk Factor Sensitivities'' or ''Value-at-Risk and Stress Value-at-Risk'' metrics are demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

ii. *General Calculation Guidance:* Risk and Position Limits must be reported in the format used by the banking entity for the purposes of risk management of each trading desk. Risk and Position Limits are often expressed in terms of risk measures, such as VaR and Risk Factor Sensitivities, but may also be expressed in terms of other observable criteria, such as net open positions. When criteria other than VaR or Risk Factor Sensitivities are used to define the Risk and Position Limits, both the value of the Risk and Position Limits and the value of the variables used to assess whether these limits have been reached must be reported.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

2. Risk Factor Sensitivities

i. *Description:* For purposes of this appendix, Risk Factor Sensitivities are changes in a trading desk's Comprehensive Profit and Loss that are expected to occur in the event of a change in one or more underlying variables that are significant sources of the trading desk's profitability and risk.

ii. *General Calculation Guidance:* A banking entity must report the Risk Factor Sensitivities that are monitored and managed as part of the trading desk's overall risk management policy. The underlying data and methods used to compute a trading desk's Risk Factor Sensitivities will depend on the specific function of the trading desk and the internal risk management models employed. The number and type of Risk Factor Sensitivities that are monitored and managed by a trading desk, and furnished to the Commission, will depend on the explicit risks assumed by the trading desk. In general, however, reported Risk Factor Sensitivities must be sufficiently granular to account for a preponderance of the expected price variation in the trading desk's holdings.

A. Trading desks must take into account any relevant factors in calculating Risk Factor Sensitivities, including, for example, the following with respect to particular asset classes:

• *Commodity derivative positions:* risk factors with respect to the related commodities set out in §20.2 of this chapter, the maturity of the positions, volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;

• *Credit positions:* risk factors with respect to credit spreads that are sufficiently granular to account for specific credit sectors and market segments, the maturity profile of the positions, and risk factors with respect to interest rates of all relevant maturities;

• *Credit-related derivative positions:* risk factor sensitivities, for example credit spreads, shifts (parallel and non-parallel) in credit spreads—volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;

• *Equity derivative positions:* risk factor sensitivities such as equity positions, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;

• *Equity positions:* risk factors for equity prices and risk factors that differentiate between important equity market sectors and segments, such as a small capitalization equities and international equities;

• *Foreign exchange derivative positions:* risk factors with respect to major currency pairs and maturities, exposure to interest rates at relevant maturities, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions; and

• *Interest rate positions, including interest rate derivative positions:* risk factors with respect to major interest rate categories and maturities and volatility and/or correlation

sensitivities (expressed in a manner that demonstrates any significant non-linearities), and shifts (parallel and non-parallel) in the interest rate curve, as well as the maturity profile of the positions.

B. The methods used by a banking entity to calculate sensitivities to a common factor shared by multiple trading desks, such as an equity price factor, must be applied consistently across its trading desks so that the sensitivities can be compared from one trading desk to another.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Value-at-Risk and Stress Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the commonly used percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on current market conditions. For purposes of this appendix, Stress Value-at-Risk (''Stress VaR'') is the percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on market conditions during a period of significant financial stress.

ii. *General Calculation Guidance:* Banking entities must compute and report VaR and Stress VaR by employing generally accepted standards and methods of calculation. VaR should reflect a loss in a trading desk that is expected to be exceeded less than one percent of the time over a one-day period. For those banking entities that are subject to regulatory capital requirements imposed by a Federal banking agency, VaR and Stress VaR must be computed and reported in a manner that is consistent with such regulatory capital requirements. In cases where a trading desk does not have a standalone VaR or Stress VaR calculation but is part of a larger aggregation of positions for which a VaR or Stress VaR calculation is performed, a VaR or Stress VaR calculation that includes only the trading desk's holdings must be performed consistent with the VaR or Stress VaR model and methodology used for the larger aggregation of positions.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into three categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions''); and (iii) residual profit and loss that cannot be specifically attributed to existing positions or new positions. The sum of (i), (ii), and (iii) must equal the trading desk's comprehensive profit and loss at each point in time. In addition, profit and loss measurements must calculate volatility of comprehensive profit and loss (i.e., the standard deviation of the trading desk's one-day profit and loss, in dollar terms) for the reporting period for at least a 30-, 60- and 90-day lag period, from the end of the reporting period, and any other period that the banking entity deems necessary to meet the requirements of the rule.

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to changes in (i) the specific Risk Factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

C. The portion of comprehensive profit and loss that cannot be specifically attributed to known sources must be allocated to a residual category identified as an unexplained portion of the comprehensive profit and loss. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *General Calculation Guidance:* The specific categories used by a trading desk in the attribution analysis and amount of detail for the analysis should be tailored to the type and amount of trading activities undertaken by the trading desk. The new position attribution must be computed by calculating the difference between the prices at which instruments were bought and/or sold and the prices at which those instruments are marked to market at the close of business on that day multiplied by the notional or principal amount of each purchase or sale. Any

fees, commissions, or other payments received (paid) that are associated with transactions executed on that day must be added (subtracted) from such difference. These factors must be measured consistently over time to facilitate historical comparisons.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

c. Customer-Facing Activity Measurements

1. Inventory Turnover

i. *Description:* For purposes of this appendix, Inventory Turnover is a ratio that measures the turnover of a trading desk's inventory. The numerator of the ratio is the absolute value of all transactions over the reporting period. The denominator of the ratio is the value of the trading desk's inventory at the beginning of the reporting period.

ii. *General Calculation Guidance:* For purposes of this appendix, for derivatives, other than options and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

2. Inventory Aging

i. *Description:* For purposes of this appendix, Inventory Aging generally describes a schedule of the trading desk's aggregate assets and liabilities and the amount of time that those assets and liabilities have been held. Inventory Aging should measure the age profile of the trading desk's assets and liabilities.

ii. *General Calculation Guidance:* In general, Inventory Aging must be computed using a trading desk's trading activity data and must identify the value of a trading desk's aggregate assets and liabilities. Inventory Aging must include two schedules, an asset-aging schedule and a liability-aging schedule. Each schedule must record the value of assets or liabilities held over all holding periods. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value and, for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Customer-Facing Trade Ratio—Trade Count Based and Value Based

i. *Description:* For purposes of this appendix, the Customer-Facing Trade Ratio is a ratio comparing (i) the transactions involving a counterparty that is a customer of the trading desk to (ii) the transactions involving a counterparty that is not a customer of the trading desk. A trade count based ratio must be computed that records the number of transactions involving a counterparty that is a customer of the trading desk and the number of transactions involving a counterparty that is not a customer of the trading desk. A value based ratio must be computed that records the value of transactions involving a counterparty that is a customer of the trading desk and the value of transactions involving a counterparty that is not a customer of the trading desk.

ii. *General Calculation Guidance:* For purposes of calculating the Customer-Facing Trade Ratio, a counterparty is considered to be a customer of the trading desk if the counterparty is a market participant that makes use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services. However, a trading desk or other organizational unit of another banking entity would not be a client, customer, or counterparty of the trading desk if the other entity has trading assets and liabilities of $50 billion or more as measured in accordance with §75.20(d)(1) unless the trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk. Transactions conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants would be considered transactions with customers of the trading desk. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

APPENDIX B TO PART 75—ENHANCED MINIMUM STANDARDS FOR COMPLIANCE PROGRAMS

I. OVERVIEW

Section 75.20(c) requires certain banking entities to establish, maintain, and enforce an enhanced compliance program that includes the requirements and standards in this Appendix as well as the minimum written policies and procedures, internal controls, management framework, independent testing, training, and recordkeeping provisions outlined in §75.20. This Appendix sets forth additional minimum standards with respect to the establishment, oversight, maintenance, and enforcement by these banking entities of an enhanced internal compliance

program for ensuring and monitoring compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part.

a. This compliance program must:

1. Be reasonably designed to identify, document, monitor, and report the permitted trading and covered fund activities and investments of the banking entity; identify, monitor and promptly address the risks of these covered activities and investments and potential areas of noncompliance; and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and this part;

2. Establish and enforce appropriate limits on the covered activities and investments of the banking entity, including limits on the size, scope, complexity, and risks of the individual activities or investments consistent with the requirements of section 13 of the BHC Act and this part;

3. Subject the effectiveness of the compliance program to periodic independent review and testing, and ensure that the entity's internal audit, corporate compliance and internal control functions involved in review and testing are effective and independent;

4. Make senior management, and others as appropriate, accountable for the effective implementation of the compliance program, and ensure that the board of directors and chief executive officer (or equivalent) of the banking entity review the effectiveness of the compliance program; and

5. Facilitate supervision and examination by the Agencies of the banking entity's permitted trading and covered fund activities and investments.

II. Enhanced Compliance Program

a. Proprietary Trading Activities

A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, and complexity of, and risks associated with, its permitted trading activities. The compliance program may be tailored to the types of trading activities conducted by the banking entity, and must include a detailed description of controls established by the banking entity to reasonably ensure that its trading activities are conducted in accordance with the requirements and limitations applicable to those trading activities under section 13 of the BHC Act and this part, and provide for appropriate revision of the compliance program before expansion of the trading activities of the banking entity. A banking entity must devote adequate resources and use knowledgeable personnel in conducting, supervising and managing its trading activities, and promote consistency, independence and rigor in implementing its risk controls and compliance efforts. The compliance program must be updated with a frequency sufficient to account for changes in the activities of the banking entity, results of independent testing of the program, identification of weaknesses in the program, and changes in legal, regulatory or other requirements.

1. *Trading Desks:* The banking entity must have written policies and procedures governing each trading desk that include a description of:

i. The process for identifying, authorizing and documenting financial instruments each trading desk may purchase or sell, with separate documentation for market making-related activities conducted in reliance on §75.4(b) and for hedging activity conducted in reliance on §75.5;

ii. A mapping for each trading desk to the division, business line, or other organizational structure that is responsible for managing and overseeing the trading desk's activities;

iii. The mission (*i.e.*, the type of trading activity, such as market-making, trading in sovereign debt, etc.) and strategy (*i.e.*, methods for conducting authorized trading activities) of each trading desk;

iv. The activities that the trading desk is authorized to conduct, including (i) authorized instruments and products, and (ii) authorized hedging strategies, techniques and instruments;

v. The types and amount of risks allocated by the banking entity to each trading desk to implement the mission and strategy of the trading desk, including an enumeration of material risks resulting from the activities in which the trading desk is authorized to engage (including but not limited to price risks, such as basis, volatility and correlation risks, as well as counterparty credit risk). Risk assessments must take into account both the risks inherent in the trading activity and the strength and effectiveness of controls designed to mitigate those risks;

vi. How the risks allocated to each trading desk will be measured;

vii. Why the allocated risks levels are appropriate to the activities authorized for the trading desk;

viii. The limits on the holding period of, and the risk associated with, financial instruments under the responsibility of the trading desk;

ix. The process for setting new or revised limits, as well as escalation procedures for granting exceptions to any limits or to any policies or procedures governing the desk, the analysis that will be required to support revising limits or granting exceptions, and the process for independently reviewing and documenting those exceptions and the underlying analysis;

x. The process for identifying, documenting and approving new products, trading strategies, and hedging strategies;

xi. The types of clients, customers, and counterparties with whom the trading desk may trade; and

xii. The compensation arrangements, including incentive arrangements, for employees associated with the trading desk, which may not be designed to reward or incentivize prohibited proprietary trading or excessive or imprudent risk-taking.

2. *Description of risks and risk management processes:* The compliance program for the banking entity must include a comprehensive description of the risk management program for the trading activity of the banking entity. The compliance program must also include a description of the governance, approval, reporting, escalation, review and other processes the banking entity will use to reasonably ensure that trading activity is conducted in compliance with section 13 of the BHC Act and this part. Trading activity in similar financial instruments should be subject to similar governance, limits, testing, controls, and review, unless the banking entity specifically determines to establish different limits or processes and documents those differences. Descriptions must include, at a minimum, the following elements:

i. A description of the supervisory and risk management structure governing all trading activity, including a description of processes for initial and senior-level review of new products and new strategies;

ii. A description of the process for developing, documenting, testing, approving and reviewing all models used for valuing, identifying and monitoring the risks of trading activity and related positions, including the process for periodic independent testing of the reliability and accuracy of those models;

iii. A description of the process for developing, documenting, testing, approving and reviewing the limits established for each trading desk;

iv. A description of the process by which a security may be purchased or sold pursuant to the liquidity management plan, including the process for authorizing and monitoring such activity to ensure compliance with the banking entity's liquidity management plan and the restrictions on liquidity management activities in this part;

v. A description of the management review process, including escalation procedures, for approving any temporary exceptions or permanent adjustments to limits on the activities, positions, strategies, or risks associated with each trading desk; and

vi. The role of the audit, compliance, risk management and other relevant units for conducting independent testing of trading and hedging activities, techniques and strategies.

3. *Authorized risks, instruments, and products.* The banking entity must implement and enforce limits and internal controls for each trading desk that are reasonably designed to ensure that trading activity is conducted in conformance with section 13 of the BHC Act and this part and with the banking entity's written policies and procedures. The banking entity must establish and enforce risk limits appropriate for the activity of each trading desk. These limits should be based on probabilistic and non-probabilistic measures of potential loss (*e.g.*, Value-at-Risk and notional exposure, respectively), and measured under normal and stress market conditions. At a minimum, these internal controls must monitor, establish and enforce limits on:

i. The financial instruments (including, at a minimum, by type and exposure) that the trading desk may trade;

ii. The types and levels of risks that may be taken by each trading desk; and

iii. The types of hedging instruments used, hedging strategies employed, and the amount of risk effectively hedged.

4. *Hedging policies and procedures.* The banking entity must establish, maintain, and enforce written policies and procedures regarding the use of risk-mitigating hedging instruments and strategies that, at a minimum, describe:

i. The positions, techniques and strategies that each trading desk may use to hedge the risk of its positions;

ii. The manner in which the banking entity will identify the risks arising in connection with and related to the individual or aggregated positions, contracts or other holdings of the banking entity that are to be hedged and determine that those risks have been properly and effectively hedged;

iii. The level of the organization at which hedging activity and management will occur;

iv. The manner in which hedging strategies will be monitored and the personnel responsible for such monitoring;

v. The risk management processes used to control unhedged or residual risks; and

vi. The process for developing, documenting, testing, approving and reviewing all hedging positions, techniques and strategies permitted for each trading desk and for the banking entity in reliance on §75.5.

5. *Analysis and quantitative measurements.* The banking entity must perform robust analysis and quantitative measurement of its trading activities that is reasonably designed to ensure that the trading activity of each trading desk is consistent with the banking entity's compliance program; monitor and assist in the identification of potential and actual prohibited proprietary trading activity; and prevent the occurrence of prohibited proprietary trading. Analysis and models used to determine, measure and limit

risk must be rigorously tested and be reviewed by management responsible for trading activity to ensure that trading activities, limits, strategies, and hedging activities do not understate the risk and exposure to the banking entity or allow prohibited proprietary trading. This review should include periodic and independent back-testing and revision of activities, limits, strategies and hedging as appropriate to contain risk and ensure compliance. In addition to the quantitative measurements reported by any banking entity subject to Appendix A of this part, each banking entity must develop and implement, to the extent appropriate to facilitate compliance with this part, additional quantitative measurements specifically tailored to the particular risks, practices, and strategies of its trading desks. The banking entity's analysis and quantitative measurements must incorporate the quantitative measurements reported by the banking entity pursuant to Appendix A of this part (if applicable) and include, at a minimum, the following:

i. Internal controls and written policies and procedures reasonably designed to ensure the accuracy and integrity of quantitative measurements;

ii. Ongoing, timely monitoring and review of calculated quantitative measurements;

iii. The establishment of numerical thresholds and appropriate trading measures for each trading desk and heightened review of trading activity not consistent with those thresholds to ensure compliance with section 13 of the BHC Act and this part, including analysis of the measurement results or other information, appropriate escalation procedures, and documentation related to the review; and

iv. Immediate review and compliance investigation of the trading desk's activities, escalation to senior management with oversight responsibilities for the applicable trading desk, timely notification to the Commission, appropriate remedial action (*e.g.*, divesting of impermissible positions, cessation of impermissible activity, disciplinary actions), and documentation of the investigation findings and remedial action taken when quantitative measurements or other information, considered together with the facts and circumstances, or findings of internal audit, independent testing or other review suggest a reasonable likelihood that the trading desk has violated any part of section 13 of the BHC Act or this part.

6. *Other Compliance Matters.* In addition to the requirements specified above, the banking entity's compliance program must:

i. Identify activities of each trading desk that will be conducted in reliance on exemptions contained in §§75.4 through 75.6, including an explanation of:

A. How and where in the organization the activity occurs; and

B. Which exemption is being relied on and how the activity meets the specific requirements for reliance on the applicable exemption;

ii. Include an explanation of the process for documenting, approving and reviewing actions taken pursuant to the liquidity management plan, where in the organization this activity occurs, the securities permissible for liquidity management, the process for ensuring that liquidity management activities are not conducted for the purpose of prohibited proprietary trading, and the process for ensuring that securities purchased as part of the liquidity management plan are highly liquid and conform to the requirements of this part;

iii. Describe how the banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each trading desk that relies on the exemptions contained in §§75.3(d)(3) and 75.4 through 75.6, which must take into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in value cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that result in large and significant concentrations to sectors, risk factors, or counterparties;

iv. Establish responsibility for compliance with the reporting and recordkeeping requirements of subpart B of this part and §75.20; and

v. Establish policies for monitoring and prohibiting potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties.

7. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any trading activity that may indicate potential violations of section 13 of the BHC Act and this part and to prevent actual violations of section 13 of the BHC Act and this part. The compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the

BHC Act or this part, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

b. Covered Fund Activities or Investments

A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, complexity and risks of the covered fund and related activities conducted and investments made, by the banking entity.

1. *Identification of covered funds*. The banking entity's compliance program must provide a process, which must include appropriate management review and independent testing, for identifying and documenting covered funds that each unit within the banking entity's organization sponsors or organizes and offers, and covered funds in which each such unit invests. In addition to the documentation requirements for covered funds, as specified under §75.20(e), the documentation must include information that identifies all pools that the banking entity sponsors or has an interest in and the type of exemption from the Commodity Exchange Act (whether or not the pool relies on §4.7 of the regulations under the Commodity Exchange Act (§4.7 of this chapter)), and the amount of ownership interest the banking entity has in those pools.

2. *Identification of covered fund activities and investments*. The banking entity's compliance program must identify, document and map each unit within the organization that is permitted to acquire or hold an interest in any covered fund or sponsor any covered fund and map each unit to the division, business line, or other organizational structure that will be responsible for managing and overseeing that unit's activities and investments.

3. *Explanation of compliance*. The banking entity's compliance program must explain how:

i. The banking entity monitors for and prohibits potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties related to its covered fund activities and investments;

ii. The banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the banking entity related to its covered fund activities and investments; and

iii. The banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by its covered fund activities and investments, taking into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in values cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that expose the banking entity to large and significant concentrations with respect to sectors, risk factors, or counterparties;

4. *Description and documentation of covered fund activities and investments*. For each organizational unit engaged in covered fund activities and investments, the banking entity's compliance program must document:

i. The covered fund activities and investments that the unit is authorized to conduct;

ii. The banking entity's plan for actively seeking unaffiliated investors to ensure that any investment by the banking entity conforms to the limits contained in §75.12 or registered in compliance with the securities laws and thereby exempt from those limits within the time periods allotted in §75.12; and

iii. How it complies with the requirements of subpart C of this part.

5. *Internal Controls*. A banking entity must establish, maintain, and enforce internal controls that are reasonably designed to ensure that its covered fund activities or investments comply with the requirements of section 13 of the BHC Act and this part and are appropriate given the limits on risk established by the banking entity. These written internal controls must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part. The internal controls must, at a minimum require:

i. Monitoring and limiting the banking entity's individual and aggregate investments in covered funds;

ii. Monitoring the amount and timing of seed capital investments for compliance with the limitations under subpart C of this part (including but not limited to the redemption, sale or disposition requirements of §75.12), and the effectiveness of efforts to seek unaffiliated investors to ensure compliance with those limits;

iii. Calculating the individual and aggregate levels of ownership interests in one or more covered fund required by §75.12;

iv. Attributing the appropriate instruments to the individual and aggregate ownership interest calculations above;

v. Making disclosures to prospective and actual investors in any covered fund organized and offered or sponsored by the banking entity, as provided under §75.11(a)(8);

vi. Monitoring for and preventing any relationship or transaction between the banking entity and a covered fund that is prohibited under §75.14, including where the banking entity has been designated as the sponsor, investment manager, investment adviser, or commodity trading advisor to a covered fund by another banking entity; and

vii. Appropriate management review and supervision across legal entities of the banking entity to ensure that services and products provided by all affiliated entities comply with the limitation on services and products contained in §75.14.

6. *Remediation of violations*. The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part and to prevent actual violations of section 13 of the BHC Act and this part. The banking entity's compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, including §75.21, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity or investment indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

III. RESPONSIBILITY AND ACCOUNTABILITY FOR THE COMPLIANCE PROGRAM

a. A banking entity must establish, maintain, and enforce a governance and management framework to manage its business and employees with a view to preventing violations of section 13 of the BHC Act and this part. A banking entity must have an appropriate management framework reasonably designed to ensure that: Appropriate personnel are responsible and accountable for the effective implementation and enforcement of the compliance program; a clear reporting line with a chain of responsibility is delineated; and the compliance program is reviewed periodically by senior management. The board of directors (or equivalent governance body) and senior management should have the appropriate authority and access to personnel and information within the organizations as well as appropriate resources to conduct their oversight activities effectively.

1. *Corporate governance*. The banking entity must adopt a written compliance program approved by the board of directors, an appropriate committee of the board, or equivalent governance body, and senior management.

2. *Management procedures*. The banking entity must establish, maintain, and enforce a governance framework that is reasonably designed to achieve compliance with section 13 of the BHC Act and this part, which, at a minimum, provides for:

i. The designation of appropriate senior management or committee of senior management with authority to carry out the management responsibilities of the banking entity for each trading desk and for each organizational unit engaged in covered fund activities;

ii. Written procedures addressing the management of the activities of the banking entity that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, including:

A. A description of the management system, including the titles, qualifications, and locations of managers and the specific responsibilities of each person with respect to the banking entity's activities governed by section 13 of the BHC Act and this part; and

B. Procedures for determining compensation arrangements for traders engaged in underwriting or market making-related activities under §75.4 or risk-mitigating hedging activities under §75.5 so that such compensation arrangements are designed not to reward or incentivize prohibited proprietary trading and appropriately balance risk and financial results in a manner that does not encourage employees to expose the banking entity to excessive or imprudent risk.

3. *Business line managers*. Managers with responsibility for one or more trading desks of the banking entity are accountable for the

effective implementation and enforcement of the compliance program with respect to the applicable trading desk(s).

4. *Board of directors, or similar corporate body, and senior management.* The board of directors, or similar corporate body, and senior management are responsible for setting and communicating an appropriate culture of compliance with section 13 of the BHC Act and this part and ensuring that appropriate policies regarding the management of trading activities and covered fund activities or investments are adopted to comply with section 13 of the BHC Act and this part. The board of directors or similar corporate body (such as a designated committee of the board or an equivalent governance body) must ensure that senior management is fully capable, qualified, and properly motivated to manage compliance with this part in light of the organization's business activities and the expectations of the board of directors. The board of directors or similar corporate body must also ensure that senior management has established appropriate incentives and adequate resources to support compliance with this part, including the implementation of a compliance program meeting the requirements of this appendix into management goals and compensation structures across the banking entity.

5. *Senior management.* Senior management is responsible for implementing and enforcing the approved compliance program. Senior management must also ensure that effective corrective action is taken when failures in compliance with section 13 of the BHC Act and this part are identified. Senior management and control personnel charged with overseeing compliance with section 13 of the BHC Act and this part should review the compliance program for the banking entity periodically and report to the board, or an appropriate committee thereof, on the effectiveness of the compliance program and compliance matters with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading activities and covered fund activities or investments, which shall be at least annually.

6. *CEO attestation.* Based on a review by the CEO of the banking entity, the CEO of the banking entity must, annually, attest in writing to the Commission that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under this appendix and §75.20 in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the United States operations of the foreign banking entity who is located in the United States.

IV. INDEPENDENT TESTING

a. Independent testing must occur with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading and covered fund activities or investments, which shall be at least annually. This independent testing must include an evaluation of:

1. The overall adequacy and effectiveness of the banking entity's compliance program, including an analysis of the extent to which the program contains all the required elements of this appendix;

2. The effectiveness of the banking entity's internal controls, including an analysis and documentation of instances in which such internal controls have been breached, and how such breaches were addressed and resolved; and

3. The effectiveness of the banking entity's management procedures.

b. A banking entity must ensure that independent testing regarding the effectiveness of the banking entity's compliance program is conducted by a qualified independent party, such as the banking entity's internal audit department, compliance personnel or risk managers independent of the organizational unit being tested, outside auditors, consultants, or other qualified independent parties. A banking entity must promptly take appropriate action to remedy any significant deficiencies or material weaknesses in its compliance program and to terminate any violations of section 13 of the BHC Act or this part.

V. TRAINING

Banking entities must provide adequate training to personnel and managers of the banking entity engaged in activities or investments governed by section 13 of the BHC Act or this part, as well as other appropriate supervisory, risk, independent testing, and audit personnel, in order to effectively implement and enforce the compliance program. This training should occur with a frequency appropriate to the size and the risk profile of the banking entity's trading activities and covered fund activities or investments.

VI. RECORDKEEPING

Banking entities must create and retain records sufficient to demonstrate compliance and support the operations and effectiveness of the compliance program. A banking entity must retain these records for a period that is no less than 5 years or such longer period as required by the Commission in a form that allows it to promptly produce such records to the Commission on request.

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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AUTHORITY: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

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 (1) without consultation with such other member of the Commission as

may at the time be present at the Commission's offices in Washington, DC, and without a reasonable attempt to consult, by telephone, with other members of the Commission; and (2) unless, in the opinion of the Senior Commissioner (after consulting with the General Counsel or his deputy or associate, and such other members of the Commission staff as the Senior Commissioner deems appropriate) the public interest requires that action be taken prior to the next scheduled meeting of the Commission.

(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 seriatim 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.

(b) *Compromise.* The disclosure of classified information to persons not authorized access thereto.

(c) *Custodians.* An individual who has possession of or is otherwise charged with the responsibility for safeguarding or accounting for classified information.

(d) *Classification levels.* Refers to Top Secret ''(TS)'', Secret ''(S)'', and Confidential ''(C)'' levels used to identify national security information. Markings ''For Official Use Only,'' and ''Limited Official Use'' shall not be used to identify national security information.

[48 FR 15464, Apr. 11, 1983]

§ 140.22 Procedures.

(a) *Original classification.* The Commodity Futures Trading Commission has no original classification authority.

(b) *Derivative classification.* Personnel of the Commission shall respect the original classification markings assigned to information they receive from other agencies.

(c) *Declassification and downgrading.* Since the Commission does no original classification of material, declassification and downgrading of sensitive material is not applicable.

(d) *Dissemination.* All classified national security information which the Commission receives from any agency will be cared for and returned in accordance with the particular agency's policy guidelines and may not be disseminated to any other agency without the consent of the originating agency.

[48 FR 15464, Apr. 11, 1983]

§ 140.23 General access requirements.

(a) *Determination of trustworthiness.* No person shall be given access to classified information unless a favorable determination has been made as to the person's trustworthiness. The determination of eligibility, referred to as a security clearance, shall be based on such investigations as the Commission may require in accordance with the applicable Office of Personnel Management standards and criteria.

(b) *Determination of need-to-know.* A person is not entitled to receive classified information solely by virtue of 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]

§ 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 report the circumstances either to the Security Officer or to the Executive Director or his delegee. The Executive Director or his delegee 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.

[48 FR 15464, Apr. 11, 1983, as amended at 61 FR 21955, May 13, 1996]

§ 140.61 [Reserved]

§ 140.72 Delegation of authority to disclose confidential information to a registered entity, 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, Director of the Division of Swap Dealer and Intermediary Oversight, the Chief Counsel of the Division of Swap Dealer and Intermediary Oversight, each Deputy Director of the Division of Swap Dealer and Intermediary Oversight, the Director of the Division of Clearing and Risk, the Chief Counsel of the Division of Clearing and Risk, each Deputy Director of the Division of Clearing and Risk, 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 registered entity, swap execution facility, swap data repository, registered futures association, or self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934, any information necessary or appropriate to effectuate the purposes of the Act, including, but not limited to, the full facts concerning any transaction or market operation, including the names of the parties thereto. This authority to disclose shall be based on a determination that the transaction or market operation disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors or that disclosure is necessary or appropriate to effectuate the purposes of the Act. The authority to make such a determination is also delegated by the Commission to the Commission employees identified in this section. A Commission employee delegated authority under this section may exercise that authority on his or her own initiative or in response to a request by an official of a registered entity, swap execution facility, swap data repository, registered futures association or self-regulatory organization.

(b) Disclosure under this section shall only be made to a registered entity, swap execution facility, swap data repository, registered futures association or self-regulatory organization official who is named in a list filed with the Commission by the chief executive officer of the registered entity, 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 registered entity, 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 registered entity, 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 registered entity, 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.

[48 FR 22134, May 17, 1983, as amended at 57 FR 20638, May 14, 1992; 61 FR 1709, Jan. 23, 1996; 66 FR 1576, Jan. 9, 2001; 67 FR 62352, Oct. 7, 2002; 73 FR 79609, Dec. 30, 2008; 77 FR 66346, Nov. 2, 2012; 78 FR 21523, Apr. 11, 2013; 78 FR 22419, Apr. 16, 2013]

§ 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 Market Surveillance Section, Director of the Division of Swap Dealer and Intermediary Oversight or, in his or her absence, the Chief Counsel of the Division of Swap Dealer and Intermediary Oversight, each Deputy Director of the Division of Swap Dealer and Intermediary Oversight, the Director of the Division of Clearing and Risk or, in his or her absence, the Chief Counsel of the Division of Clearing and Risk, each Deputy Director of the Division of Clearing and Risk, 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, the Deputy Director of the Office of International Affairs, the authority to furnish information in the possession of the Commission obtained 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.

[48 FR 22135, May 17, 1983, as amended at 57 FR 20638, May 14, 1992; 61 FR 1709, Jan. 23, 1996; 66 FR 1576, Jan. 9, 2001; 67 FR 62352, Oct. 7, 2002; 73 FR 79609, Dec. 30, 2008; 78 FR 22419, Apr. 16, 2013]

§ 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.

[50 FR 47530, Nov. 19, 1985, as amended at 67 FR 62352, Oct. 7, 2002]

§ 140.75 Delegation of authority to the Director of the Division of Clearing and Risk and Division of Swap Dealer 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 Risk and Division of Swap Dealer and Intermediary Oversight and to such members of the Commission's staff acting under his or her direction as the Director may designate from time to time, the authority to disclose any registration information contained in the registration applications filed by Commission registrants or any compilation of such information maintained by the Commission to any department or agency of any State or any political subdivision thereof. Disclosure under this section may be made upon reasonable request made to the Commission or without request whenever the Director of Trading and Markets or any Commission employee designated by the Director to make disclosures under this section determines that such information may be appropriate for use by any department or agency of a State or political subdivision thereof. Notwithstanding the provisions of this section, in any case

in which the Director of Division of Clearing and Risk and Division of Swap Dealer and Intermediary Oversight deems it appropriate, or in any case in which the Commission so requests, the Director may submit matter to the Commission for its consideration.

[48 FR 22136, May 17, 1983, as amended at 67 FR 62352, Oct. 7, 2002; 78 FR 22420, Apr. 16, 2013]

§ 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 Risk and Division of Swap Dealer 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.

(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 Risk and Division of Swap Dealer 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.

[49 FR 4464, Feb. 7, 1984, as amended at 67 FR 62352, Oct. 7, 2002; 78 FR 22420, Apr. 16, 2013]

§ 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.

[48 FR 34946, Aug. 2, 1983, as amended at 57 FR 20638, May 14, 1992; 67 FR 62353, Oct. 7, 2002; 77 FR 66347, Nov. 2, 2012]

§ 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 Commission. Notice ordinarily will be provided by mailing a copy of the summons or subpoena to the last known home or business address of the person who submitted the information. However, under circumstances which would make notice by mail unduly burdensome or costly, notice of the existence of the summons or subpoena may be affected by alternative means such as publication in the FEDERAL REGISTER. The Commission will not disclose such information until the expiration of at least fourteen days from the date of mailing, or such other notice as is given. This section shall not apply to

(a) Congressional subpoenas or Congressional requests for information, (b) information which is considered by the Commission to be public information, or (c) information as to which the submitter has waived the notice provision of this section.

[49 FR 4464, Feb. 7, 1984]

§ 140.81 [Reserved]

§ 140.91 Delegation of authority to the Director of the Division of Swap Dealer 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 Swap Dealer 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 § 1.20 of this chapter.

(8) All functions reserved to the Commission in § 1.25 of this chapter.

(9) All functions reserved to the Commission in § 1.26 of this chapter.

(10) All functions reserved to the Commission in § 1.52 of this chapter.

(11) All functions reserved to the Commission in § 30.7 of this chapter.

(12) 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 Risk and the Director of the Division of Swap Dealer and Intermediary Oversight may submit any matter which has been delegated to him or her under paragraph (a) of this section to the Commission for its consideration.

[44 FR 13460, Mar. 12, 1979, as amended at 60 FR 8195, Feb. 13, 1995; 66 FR 43087, Aug. 17, 2001; 66 FR 53523, Oct. 23, 2001; 67 FR 62353, Oct. 7, 2002; 78 FR 22420, Apr. 16, 2013; 78 FR 68655, Nov. 14, 2013]

§ 140.92 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 Risk and Division of Swap Dealer 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 Risk and Division of Swap Dealer 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 Risk and Division of Swap Dealer and Intermediary Oversight under paragraph (a) of this section.

[45 FR 20785, Mar. 31, 1980, as amended at 67 FR 62353, Oct. 7, 2002; 78 FR 22420, Apr. 16, 2013]

§ 140.93 Delegation of authority to the Director of the Division of Swap Dealer 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 Swap Dealer 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 § 4.12(a) of this chapter.

(2) All functions reserved to the Commission in § 4.22(g)(3) of this chapter.

(3) All functions reserved to the Commission in § 4.20(a) of this chapter.

(4) All functions reserved to the Commission in § 4.5(c)(2)(ii) of this chapter.

(5) All functions reserved to the Commission in § 4.6(b) of this chapter.

(b) The Director of the Division of Swap Dealer 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 Swap Dealer and Intermediary Oversight under paragraph (a) of this section.

[46 FR 26023, May 8, 1981, as amended at 46 FR 34311, July 1, 1981; 50 FR 15884, Apr. 23, 1985; 52 FR 41986, Nov. 2, 1987; 67 FR 62353, Oct. 7, 2002; 70 FR 2566, Jan. 14, 2005; 78 FR 22420, Apr. 16, 2013]

§ 140.94 Delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight and the Director of the Division of Clearing and Risk.

(a) The Commission hereby delegates, until such time as the Commission orders otherwise, the following functions to the Director of the Division of Swap Dealer and Intermediary Oversight and to such members of the Commission's staff acting under his or her direction as he or she may designate from time to time:

(1) All functions reserved to the Commission in § 5.7 of this chapter;

(2) All function reserved to the Commission in § 5.10 of this chapter;

(3) All functions reserved to the Commission in § 5.11 of this chapter;

(4) All functions reserved to the Commission in § 5.12 of this chapter, except for those relating to nonpublic treatment of reports set forth in § 5.12(i) of this chapter; and

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

(b) The Director of the Division of Swap Dealer and Intermediary Oversight may submit any matter which has been delegated to him or her under paragraph (a) of this section to the Commission for its consideration.

(c) The Commission hereby delegates, until such time as the Commission orders otherwise, the following function to the Director of the Division of Clearing and Risk and to such members of the Commission's staff acting under his or her direction as he or she may designate from time to time:

(1) All functions reserved to the Commission in §§ 39.3(a)(1), (a)(2), (a)(3), 39.3(b)(1), and 39.3(f)(4) of this chapter;

(2) All functions reserved to the Commission in § 39.4(a) of this chapter;

(3) All functions reserved to the Commission in § 39.5(b)(2), (b)(3)(ix), (c)(1), and (d)(3) of this chapter;

(4) All functions reserved to the Commission in § 39.10(c)(4)(iv) of this chapter;

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

(6) All functions reserved to the Commission in § 39.12(a)(5)(i)(B) of this chapter;

(7) All functions reserved to the Commission in § 39.13(g)(8)(ii), (h)(1)(i)(C), (h)(1)(ii), (h)(3)(i), (h)(3)(ii), and (h)(5)(i)(A) of this chapter;

(8) The authority to request additional information in support of a rule submission under § 39.15(b)(2)(iii)(A) of this chapter and in support of a petition pursuant to section 4d of the Act under § 39.15(b)(2)(iii)(B) of this chapter;

(9) All functions reserved to the Commission in § 39.19(c)(3)(iv), (c)(5)(i), (c)(5)(ii), and (c)(5)(iii) of this chapter;

(10) All functions reserved to the Commission in § 39.20(a)(5); and

(11) All functions reserved to the Commission in § 39.21(d) of this chapter.

(12) All functions reserved to the Commission in § 39.31 of this chapter; and

(13) The authority to approve the requests described in §§ 39.34(d) and 39.39(f) of this chapter.

(d) The Director of Clearing and Risk may submit any matter which has been delegated to him or her under paragraph (c) of this section to the Commission for its consideration.

(e) Nothing in this section may prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of

Swap Dealers and Intermediary Oversight under paragraph (a) or to the Director of the Division of Clearing and Risk under paragraph (c) of this section.

[78 FR 22421, Apr. 16, 2013, as amended at 78 FR 72524, Dec. 2, 2013]

§ 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 Risk and Division of Swap Dealer 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 Risk and Division of Swap Dealer 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 shall prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Clearing and Risk and Division of Swap Dealer and Intermediary Oversight. under paragraph (a) of this section.

[46 FR 48918, Oct. 5, 1981, as amended at 67 FR 62353, Oct. 7, 2002; 78 FR 22420, Apr. 16, 2013]

§ 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 Swap Dealer and Intermediary Oversight or the Director's designee, and 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 determine to publish, and to publish, in the FEDERAL REGISTER, requests for public comment on proposed exchange and self-regulatory organization rule amendments when publication of the proposed rule amendment is in the public interest and will assist the Commission in considering the views of interested persons.

(c) The Director of the Division of Market Oversight or the Director of the Division of Swap Dealer and Intermediary Oversight or the Director of the Division of Clearing and Risk 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 Swap Dealer and Intermediary Oversight or the Director of the Division of Clearing and Risk under paragraphs (a) and (b) of this section.

[50 FR 47532, Nov. 19, 1985, as amended at 55 FR 35897, Sept. 4, 1990; 57 FR 20638, May 14, 1992; 67 FR 62353, Oct. 7, 2002; 7 FR 66347, Nov. 2, 2012; 78 FR 22420, Apr. 16, 2013]

§ 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.

[57 FR 12874, Apr. 14, 1992, as amended at 67 FR 62353, Oct. 7, 2002]

§ 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:

(1) Interpretative legal advice with respect to the Commodity Exchange Act or any rule, regulation or order issued or adopted by the Commission thereunder;

(2) A statement that, on the basis of the facts stated in such letter or other communication, the staff would not recommend that the Commission take any enforcement action; or

(3) An exemption, on the basis of the facts stated in such letter or other communication, from the provisions of the Commodity Exchange Act or any rules, or regulations or orders issued or adopted by the Commission thereunder; shall be made available, together with the letter or other written communication making the request, for inspection and copying by any person as soon as practicable after the response has been sent or given to the person requesting it.

(b) Any person submitting a letter or other written communication making such a request may also submit therewith a request that the letter or other written communication, as well as any Commission or staff response thereto, be accorded confidential treatment for a specified period of time, not exceeding 120 days from the date of the response thereto, together with a statement setting forth the considerations upon which the request for such treatment is based. If the staff determines that the request is reasonable and appropriate it will be granted and the letter or other written communication as well as the response thereto will not be made available for public inspection or copying until the expiration of the specified period. If it appears to the staff that the request for confidential treatment should be denied, the staff shall so advise the person making the request and such person may withdraw the letter or other written communication within 30 days thereafter. In such case, no response will be sent or given and the letter or other written communication shall remain in the Commission's files but will not be made public pursuant to this section. If such letter or other written communication is not so withdrawn, it shall be deemed to be available for public inspection and copying together with any written response thereto.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, no portion of a letter or other written communication received by the Commission or its staff of the type described in paragraph (a) of this section, or any written response thereto, shall be made available for inspection and copying or otherwise published which would separately disclose the business transactions or market positions of any person and trade secrets or names of customers, except in accordance with the provisions of section 8 of the Commodity Exchange Act.

[57 FR 61291, Dec. 24, 1992]

§ 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

issued thereunder by the Commission. 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 represents the position only of the Division that issued it, or the Office of the General Counsel if issued thereby. 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 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 Swap Dealer and Intermediary Oversight, the Division of Clearing and Risk 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:

(1)(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)(i) 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, registered foreign boards of trade, 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, made available for trading determinations, position limits, hedging exemptions, position aggregation treatment or 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.

(ii) A request for a Letter relating to the provisions of the Act or the Commission's rules, regulations or orders governing or related to derivatives clearing organizations and other central counterparties, the clearing process, the clearing requirement determination, Commission regulation 1.25 jointly with the Director of the Division of Swap Dealer and Intermediary

Oversight, risk assessment, financial surveillance, the end user exemption, and bankruptcy shall be filed with the Director, Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

(iii) A request for a Letter relating to all other provisions of the Act or Commission rules, including Commission regulation 1.25 jointly with the Director of the Division of Clearing and Risk, shall be filed with the Director, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

(iv) The requests described in paragraphs (d)(2)(i) through (iii) of this section must be submitted electronically using the email address *dmoletters@cftc.gov* (for a request filed with the Division of Market Oversight), *dcrletters@cftc.gov* (for a request filed with the Division of Clearing and Risk), or *dsioletters@cftc.gov* (for a request filed with the Division of Swap Dealer and Intermediary Oversight), as appropriate, and a properly signed paper copy of the request must be provided to the Division of Market Oversight, the Division of Clearing and Risk, or the Division of Swap Dealer 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.

(2) Where a request has been submitted by an authorized representative of the person on whose behalf a Letter is sought, the authorized representative may withdraw from representation at any time without explanation, *Provided*, That Commission staff is promptly so notified.

(g) *Failure to pursue a request.* In the event that Commission staff requests additional information or analysis from a requester and the requester does not provide that information or analysis within thirty calendar days, Commission staff generally will issue a denial of the request; *Provided, however*, that Commission staff in its discretion may issue an extension of time to provide the information and or analysis.

(h) *Confidential treatment.* Confidential treatment of a request for a Letter must be requested separately in accordance with § 140.98 or § 145.9 of this chapter, as applicable.

(i) *Applicability to other sections.* The provisions of this section shall not affect the requirements of, or otherwise be applicable to:

(1) Notice filings required to be made to claim relief from the Act or from a Commission rule, regulation, or order including, without limitations, §§ 4.5, 4.7(a), 4.7(b), 4.12(b), 4.13(b) and 4.14(a)(8) of this chapter;

(2) Requests for exemption pursuant to section 4(c) of the Act; or

(3) Requests for exemption pursuant to § 41.33 of this chapter.

[63 FR 68181, Dec. 10, 1998, as amended at 65 FR 47859, Aug. 4, 2000; 66 FR 44967, Aug. 27, 2001; 67 FR 62353, Oct. 7, 2002; 69 FR 41426, July 9, 2004; 77 FR 66347, Nov. 2, 2012; 78 FR 22420, 22421, Apr. 16, 2013]

Subpart C—Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission

AUTHORITY: 7 U.S.C. 4a(f) and (j), 12a(5), and 13, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

SOURCE: 41 FR 27511, July 2, 1976, unless otherwise noted.

§ 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;

(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

[1] These 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.

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[2] in writing of the nature of the operation, the extent of the member's or employee's interest, the types of transactions in which the operation may engage, and the identity of the person or persons who will make trading decisions for the operation;[3] 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 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

[2] As used in this subpart, ''General Counsel'' refers to the General Counsel in his or her capacity as counselor for the Commission and designated agency ethics official for the Commission, and includes his or her designee and the alternate designated agency ethics official appointed by the agency head pursuant to 5 CFR 2638.202.

[3] Although not required, if they choose to do so, members or employees may use powers of attorney or other arrangements in order to meet the notice requirements of, and to assure that they have no control or knowledge of, futures, 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.

[4] Section 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.

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 participation in a periodic investment plan when the original purchase was otherwise consistent with this rule; or

(6) Investment in any fund established pursuant to the Federal Employees Retirement System.

(e) *No prohibition on stocks or funds.* Nothing in paragraph (b)(1) or (2) of this section shall prohibit a member or employee from purchasing, selling, or retaining any share that represents ownership of a publicly-owned corporation or interest in a publicly-available pooled investment vehicle containing any such shares (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 pooled investment vehicle, regardless of whether any security futures product may at any time be or have been based upon shares of such corporation or pooled investment vehicle, and regardless of whether such pooled investment vehicle may, by design or effect, track or follow any group of securities that also underlies a futures contract.

(f) *Exception applicable to legally separated employees.* This section shall not apply to transactions of a legally separated spouse of a 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 transactions of a legally separated spouse or for the benefit of a minor child, the disqualification provisions of § 140.735–2a(d)(2)(i)–(iii) and 18 U.S.C. 208 are applicable.

[67 FR 5939, Feb. 8, 2002, as amended at 77 FR 66347, Nov. 2, 2012]

§ 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 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[5] 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;[6]

(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

[5] As defined in section 1a(38) of the Commodity Exchange Act and 17 CFR 1.3(u) thereunder, a ''person'' includes an individual, association, partnership, corporation and a trust.

[6] Attention is directed to 18 U.S.C. 208.

[7] [Reserved]

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;[8]

(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:

(i) Makes full disclosure of any such interest on his or her annual financial disclosure (Standard Form 278 or Standard Form 450);

(ii) Makes full written disclosure to the General Counsel within 30 days of commencing employment or, for incumbents, within twenty days of his or her receipt of actual or constructive notice that the interest has been acquired;[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

[8] 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.

[9] 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, 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.

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]

[67 FR 5940, Feb. 8, 2002, as amended at 67 FR 62353, Oct. 7, 2002; 77 FR 66348, Nov. 2, 2012]

§ 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]

[77 FR 66348, Nov. 2, 2012]

§ 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 redefined 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:

[10] Any 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.

[11] Attention is directed to section 2(a)(8) of the Commodity Exchange Act, which provides, among other things, that no Commission member or employee shall accept employment or compensation from any person, exchange or derivatives clearing organization (''clearinghouse'') subject to regulation by the Commission, or participate, directly or indirectly, in any contract market operations or transactions of a character subject to regulation by the Commission.

(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, the 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 for disposal 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 or a spouse or dependent 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 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) A violation of the requirements set forth in this section by a Commission employee may be cause for appropriate disciplinary action which may be in addition to any penalty prescribed by law.

(j)(1) 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.

(2) When requested by the Administrator of Government Services, the Executive Director shall arrange for an appraisal of a gift or decoration.

(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.

[47 FR 24115, June 3, 1982. Redesignated at 58 FR 52658, Oct. 12, 1993; 63 FR 32733, June 16, 1998]

§ 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.[9] 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.[10] Any employee or former employee who is served with a subpoena calling for information regarding the Commission's business shall promptly advise the General Counsel of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability of making such information or document available in the public interest.[11] In any proceeding in which the Commission is not a party, no employee of the Commission shall testify concerning matters related to the business of the Commission unless authorized to do so by the Commission.

[58 FR 52658, Oct. 12, 1993]

§ 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[12] in which such person, or one participating with him or her in the particular matter, participated personally and substantially, or gained

[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.

[11] 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.

[12] The phrase "particular matter involving a specific party or parties" does not apply to general rulemaking, general policy and standards formulation or other similar matters. *See* § 2637.201(c)(1) of the regulations of the Office of Government Ethics, 5 CFR 2637.201(c)(1); *cf.*, memorandum of the Attorney General dealing with the conflict-of-interest provisions prior to amendment by the Ethics in Government Act (reproduced following 18 U.S.C. 201).

nonpublic knowledge of facts thereof, while with the Commission.[13]

(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]

(c) *Restrictions on former members and senior employees*. A former member or employee of the Commission who occupied a ''senior'' position specified in 18 U.S.C. 207(c)(2), as amended, shall not within one year after such ''senior'' employment has ceased, knowingly make, with the intent to influence, any 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]

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[13] Attention is directed to 18 U.S.C. 207(a)(1), as amended, which generally prohibits former Federal officers and employees permanently 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.

[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 which was actually pending under the official responsibility of the former officer or employee within one year prior to the termination of government service.

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.''

[15] Attention 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.

[16] Attention is directed to 18 U.S.C. 207(j), as amended (listing other exceptions). Self-representation is not prohibited under section 207.

(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 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 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]

[17] This section does not apply to employees who leave service after December 31, 1990.

§ 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. 208 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.[18]

(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.

[18] No attorney-client privilege, however, attaches to such communications since the Counselors are counsel to the Commission, not to the employee. Thus, any evidence of criminal law violations divulged by an employee to the Counselor must be reported by the latter 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.

(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.

[58 FR 52660, Oct. 12, 1993, as amended at 61 FR 21955, May 13, 1996; 62 FR 13302, Mar. 20, 1997; 67 FR 5941, Feb. 8, 2002]

PART 141—SALARY OFFSET

Sec.
141.1 Purpose and scope.
141.2 Definitions.
141.3 Applicability.
141.4 Notice requirements.
141.5 Hearing.
141.6 Written decision.
141.7 Coordinating offset with another Federal agency.
141.8 Procedures for salary offset.
141.9 Refunds.
141.10 Statute of limitations.
141.11 Non-waiver of rights.
141.12 Interest, penalties, and administrative costs.

AUTHORITY: 5 U.S.C. 5514, E.O. 11609 (redesignated E.O. 12197), 5 CFR part 550, subpart K, and 7 U.S.C. 4a(j), unless otherwise noted.

SOURCE: 55 FR 5207, Feb. 14, 1990, unless otherwise noted.

§ 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 a change in coverage under a federal benefits program requiring periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

(d) This regulation does not preclude the compromise, suspension, or termination of collection action where appropriate under the standards implementing the Federal Claims Collection Act, 31 U.S.C. 3711 *et seq.*, 4 CFR parts 101 through 105, 45 CFR part 1177.

(e) This regulation does not preclude an employee from requesting waiver of an overpayment under 5 U.S.C. 5584, 10 U.S.C. 2774 or 32 U.S.C. 716 or in any way questioning the amount or validity of the debt by submitting a subsequent claim to the General Accounting Office in accordance with General Accounting Office procedures. This regulation does not preclude an employee from requesting a waiver pursuant to other statutory provisions applicable to the particular debt being collected. Neither the requesting of a waiver nor the filing of a claim with the General Accounting Office will affect the amount or validity of the debt being collected until a waiver has been granted or the debt has been determined to be for an incorrect amount or invalid.

(f) Matters not addressed in these regulations should be reviewed in accordance with the Federal Claims Collection Standards at 4 CFR 101.1 *et seq.*

§ 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 entities 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;

(2) The agency's intention to collect the debt by deducting from the employee's current disposable pay account;

(3) The amount, frequency, proposed beginning date, and duration of the intended deduction(s);

(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.

§ 141.5 Hearing.

(a) *Request for hearing*. (1) An employee must file a petition for a hearing in accordance with the instructions outlined in the Commission's notice to offset.

(2) A hearing may be requested by filing a written petition addressed to the Executive Director stating why the employee disputes the existence or amount of the debt. The petition for a hearing must be received by the Executive Director no later than fifteen (15) calendar days after the date of the notice to offset unless the employee can show good cause for failing to meet the deadline date.

(b) *Hearing procedures*. (1) The hearing will be presided over by an impartial hearing official.

(2) The hearing shall conform to procedures contained in the Federal Claims Collection Standards 4 CFR 102.3(c). The burden shall be on the employee to demonstrate that the existence or the amount of the debt is in error.

§ 141.6 Written decision.

(a) The hearing official shall issue a written opinion no later than 60 days after the hearing.

(b) The written opinion will include a statement of the facts presented to demonstrate the nature and origin of the alleged debt; the hearing official's analysis, findings and conclusions; the amount and validity of the debt, and the repayment schedule.

§ 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) If collection must be made in installments, the Commission must advise the paying agency of the amount or percentage of disposable pay to be collected in each installment;

(4) Advise the paying agency of the actions taken under 5 U.S.C. 5514(b) and provide the dates on which action was taken unless the employee has consented to salary offset in writing or signed a statement acknowledging that the Commission has complied with the procedures required by law. The written consent or acknowledgment must be sent to the paying agency;

(5) If the employee is in the process of separating, the Commission must submit its debt claim to the paying agency as provided in this part. The paying agency must certify any amounts already collected, notify the employee, and send a copy of the certification and notice of the employee's separation to the Commission. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund or similar payments, it must certify to the agency responsible for making such payments the amount of the debt and that the provisions of 5 CFR 550.1108 have been followed; and

(6) If the employee has already separated and all payments due from the paying agency have been paid, the Commission may request, unless otherwise prohibited, that money payable to the employee from the Civil Service Retirement and Disability Fund or other similar funds be collected by administrative offset.

(b) *The Commission as the paying agency*. (1) Upon receipt of a properly certified debt claim from another agency, deductions will be scheduled to begin at the next established pay interval. The employee must receive written notice from the Commission that the

Commission has received a certified debt claim from the creditor agency, the amount of the debt, the date salary offset will begin, and the amount of the deduction(s). The Commission shall not review the merits of the creditor agency's determination of the validity or the amount of the certified claim.

(2) If the employee transfers to another agency after the creditor agency has submitted its debt claim to the Commission and before the debt is collected completely, the Commission must certify the total amount collected. One copy of the certification must be furnished to the employee. A copy must be furnished the creditor agency with notice of the employee's transfer.

§ 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.

SOURCE: 50 FR 5384, Feb. 8, 1985, unless otherwise noted.

§ 143.1 Purpose.

This part provides procedures that the Commission will use to collect debts owed the United States arising from activities under the Commission's jurisdiction. As applicable, these procedures are based upon, and conform to, the Federal Claims Collection Act, as amended, 31 U.S.C. 3701–3720E; the Federal Claims Collection Standards, 31 CFR Parts 900–905, issued by the Department of the Treasury and the Department of Justice; administrative wage garnishment regulations issued by the Department of the Treasury, 31 CFR 285.11; and other laws applicable to the collection of non-tax debts owed to the United States arising from activities under the Commission's jurisdiction. Subpart A describes procedures for collection by offset against obligations of the United States to the debtor, by compromise, and by referral to the Department of Justice for litigation. It also sets forth the Commission's policy on collecting interest on unpaid claims, the method used in calculating such interest, and the maximum inflation-adjusted civil monetary penalties that may be assessed and enforced for each violation of the Commodity Exchange Act or regulations or orders of the Commission promulgated thereunder. Subpart B describes procedures for collection by administrative garnishment of the debtor's wages.

[69 FR 52997, Aug. 31, 2004]

Subpart A—General Provisions

§ 143.2 Notice of claim.

(a) The Commission will send a written notice to any person who owes payment to the United States under this part, stating the basis for the claim, the interest, penalties, and administrative costs that may be imposed for non-payment, and the date full payment is due.

(b) If the claim is disputed, the debtor shall respond to the notice in writing and state the reasons for non-payment. If the claim is not disputed but full payment is not made by the date indicated in the notice, the debtor shall state the reasons for the failure to make full payment.

(c) If no response or an unsatisfactory response is received by the date indicated in the notice, the Commission may take further action as appropriate under the Commodity Exchange Act or regulations thereunder, or under 31 CFR parts 900–905 or the Federal Claims Collection Act as amended, 31 U.S.C. 3701–3720E.

[50 FR 5384, Feb. 8, 1985, as amended at 69 FR 52997, Aug. 31, 2004]

§ 143.3 Interest, penalty charges, and administrative costs.

(a) The Commission will assess interest on unpaid claims. The rate of interest assessed shall be the rate of the current value of funds to the U.S. Treasury (*i.e.*, the Treasury tax and loan account rate) as prescribed and published by the Secretary of the Treasury. The Commission will charge penalty fees of not more than 6 percent per year on any portion of a claim that is delinquent for more than 90 days. The Commission will also impose actual administrative costs to cover the processing and handling of delinquent claims.

(b) Interest on claims will be charged and will run from the date the notice of claim is mailed if the amount of the claim is not paid within 30 days from that date. Interest will be calculated only on the principal of the claim. The rate of interest charged is the rate in effect on the date from which interest begins to run. The rate will remain fixed for the duration of the indebtedness.

(c) The Commission may waive in whole or in part interest, penalty charges or administrative costs if it finds that:

(1) The debtor is unable to pay any significant sum within a reasonable period of time;

(2) Collection of interest or penalty charges jeopardizes collection of the principal of the claim; or

(3) It is in the best interests of the United States.

§ 143.4 Collection by offset.

(a) Whenever feasible, the Commission will collect claims under this part by means of administrative offset against obligations of the United States to the debtor.

(b) The Commission will notify the debtor in writing of its intent to use offset procedures to collect the debt unless the debtor agrees to repayment. The notice to the debtor shall include the type and amount of the claim and an explanation of the debtor's rights for records and review under 31 U.S.C. 3716(a).

(c) The Commission will seek to coordinate administrative offset with other federal agencies in accordance with 4 CFR part 102.

§ 143.5 Collection by compromise.

The Commission may settle claims not exceeding $100,000 (excluding interest) by compromise at less than the principal amount of the claim if—

(a) The debtor shows an inability to pay the full amount within a reasonable period of time;

(b) The Government would be unable to enforce collection in full through litigation or administrative means within a reasonable period of time;

(c) The cost of collecting the claim in full is not justified by the amount of the claim; or

(d) The Commission's enforcement policy would be served by settlement of the claim for less than the full amount.

[50 FR 5384, Feb. 8, 1985, as amended at 57 FR 61292, Dec. 24, 1992]

§ 143.6 Referral for litigation.

Claims that cannot be collected by the Commission under this part or for which collection action cannot be ended or suspended under 4 CFR part 104 will be referred to the Department of Justice for litigation.

§ 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.

(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

(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:

(i) 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) For all other violations:

(A) Committed between November 27, 1996 and October 22, 2000, not more than $550,000 for each such violation;

(B) Committed between October 23, 2000 and October 22, 2004, not more than $575,000 for each such violation;

(C) Committed between October 23, 2004 and October 22, 2008, not more than $625,000 for each such violation;

(D) Committed between October 23, 2008 and October 22, 2012, not more than the greater of $675,000 or triple the monetary gain to such person for each such violation; and

(E) Committed on or after October 23, 2012, not more than the greater of $700,000 or triple the monetary gain to such person for each such violation; and

(4) 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:

(i) 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.

[61 FR 55566, Oct. 28, 1996, as amended at 65 FR 45711, July 25, 2000; 69 FR 52995, Aug. 31, 2004; 73 FR 57514, Oct. 3, 2008; 77 FR 65102, Oct. 25, 2012]

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 285.11. 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 285.11(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 written decision within 60 days of the Commission's receipt of the request, unless otherwise approved, in writing, by the Executive Director.

PART 144—PROCEDURES REGARDING THE DISCLOSURE OF INFORMATION AND THE TESTIMONY OF PRESENT OR FORMER OFFICERS AND EMPLOYEES IN RESPONSE TO SUBPOENAS OR OTHER DEMANDS OF A COURT

Sec.
144.0 Purpose and scope.
144.1 Service upon the Commission.
144.2 Service upon an employee or former employee of the Commission.
144.3 Testimony by present or former Commission employees.
144.4 Production or disclosure of records by present or former employees.
144.5 Procedures when production or disclosure of Commission records or information relating to Commission business is sought.
144.6 Fees.

AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 4a(j) and 12a(5); 31 U.S.C. 9701, unless otherwise noted.

SOURCE: 50 FR 11149, Mar. 20, 1985, unless otherwise noted.

§ 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]

§ 144.2 Service upon an employee or former employee of the Commission.

(a) Any employee of the Commission who is served or is attempted to be served with a demand of a court or other authority seeking information or documents relating to the business of the Commission shall promptly advise the General Counsel of the service or attempted service of such demand, the nature of the information or documents sought by the demand and any circumstances that may bear upon the desirability in the public interest of disclosure of the information or the production of documents.

(b) Any former employee of the Commission who is served or is attempted to be served with a demand of a court or other authority seeking information or documents relating to the business of the Commission shall promptly advise the General Counsel of the service or the attempted service of such demand, the nature of the information or documents sought by the demand and any circumstances that might bear upon the desirability in the public interest of the disclosure of the information or the production of documents.

(c) After such further inquiry as appropriate, the General Counsel shall advise the Commission concerning the matter.

§ 144.3 Testimony by present or former Commission employees.

(a) In any proceeding to which the Commission is not a party, an employee of the Commission shall not testify concerning matters related to the business of the Commission unless authorized to do so by the Commission upon the advice of the General Counsel.

(b) In any proceeding, an employee or former employee of the Commission shall not testify concerning non-public matters related to the business of the Commission unless authorized to do so by the Commission upon the advice of the General Counsel. See § 140.735–9 of these regulations.

§ 144.4 Production or disclosure of records by present or former employees.

(a) No employee of the Commission shall, in response to a demand by a court or other authority or otherwise in any proceeding in which the Commission is not a party, produce any material contained in the files of the Commission or disclose any information relating to material contained in the files of the Commission or disclose

any information or produce any material acquired as part of the performance of the employee's official duties or by virtue of the employee's official status unless authorized to do so by the Commission, provided that Commission authorization shall not be required to comply with a demand solely for Commission documents generally available to the public. In litigation in which the Commission is a party no employee may produce any confidential Commission material without Commission authorization.

(b) No former employee of the Commission shall, in response to a demand by a court or other authority or otherwise in any proceeding in which the Commission is not a party, produce without Commission authorization any material contained in or from the files of the Commission acquired as part of the performance of the former employee's official duties while employed by the Commission. No former employee may in any litigation produce confidential material acquired as part of the performance of the former employee's official duties while employed by the Commission unless authorized to do so by the 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.
145.2 Records available for public inspection and copying; documents published and indexed.
145.3 [Reserved]
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]

AUTHORITY: Pub. L. 99–570, 100 Stat. 3207; Pub. L. 89–554, 80 Stat. 383; Pub. L. 90–23, 81 Stat. 54; Pub. L. 98–502, 88 Stat. 1561–1564 (5 U.S.C. 552); Sec. 101(a), Pub. L. 93–463, 88 Stat. 1389 (5 U.S.C. 4a(j)); unless otherwise noted.

§ 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) are 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 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:

(1)(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 17.01;

(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; 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

(A)(*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 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 trail 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), 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); 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)

[41 FR 16290, Apr. 16, 1976]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 145.5, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 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, Privacy and Sunshine Acts Compliance, the request shall be made in writing and shall be addressed or otherwise directed to the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Requests for public records directed to a regional office of the Commission pursuant to § 145.2 should be sent to:

Commodity Futures Trading Commission, 140 Broadway, New York, New York 10005, Telephone: (646) 746–9700.

Commodity Futures Trading Commission, 525 West Monroe Street, Suite 1100 North, Chicago, Illinois 60661, Telephone: (312) 596–0700.

Commodity Futures Trading Commission, Two Emanuel Cleaver II Blvd., Suite 300, Kansas City, Missouri 64112, Telephone: (816) 960–7700.

(b)(1) The publicly available portions of Form 7–R (application for registration as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator or leverage transaction merchant), Form 8–R (application for registration as an associated person, floor broker, floor trader and biographical supplement to application on Form 7–

R), Form 3–R (changes and corrections; multiple associations) Form 8–S (certificate of special registration), Form 8–T (notice of termination), Form 7–W (withdrawal from firm registration) and Form 8–W (withdrawal from floor broker or floor trader registration) will be available for public inspection and copying. Such registration forms will be available in the offices of the National Futures Association, 200 West Madison Street, Chicago, Illinois 60606. Telephone: (312) 781–1300.

(2) The fingerprint card and any supplementary attachments filed in response to:

(i) Items 6–9, 14–21, the ''Personal Information,'' or the ''Disciplinary Information'' sections on Form 8–R;

(ii) Item 3 on Form 8–S;

(iii) Items 3–5, 9–11, the ''Withdrawal Reasons,'' the ''Disciplinary Information,'' or the ''Matter Information'' sections on Form 8–T;

(iv) Items 9–10 on Form 7–R;

(v) Item 7 and the ''Additional Customer Information'' section on Form 7–W; and

(vi) Item 7 on Form 8–W generally will not be available for public inspection and copying unless such disclosure is required under the Freedom of Information Act. Changes or corrections to those items reported on Form 3–R will be treated similarly. When such fingerprint cards or supplementary attachments are on file, the FOI, Privacy and Sunshine Acts compliance staff will decide any request for access in accordance with the procedures set forth in §§ 145.7 and 145.9.

(7 U.S.C. 2, 4, 6, and 12; secs. 2(a)(1), 4c, 4d, 4e, 4f, 4k, 4m, 4n, 4p, 8, 8a and 19 of the Commodity Exchange Act (7 U.S.C. 2 and 4, 6c, 6d, 6e, 6f, 6k, 6m, 6n, 6p, 12, 12a and 23 (1982)); 5 U.S.C. 552 and 552b)

[49 FR 39534, Oct. 9, 1984, and 51 FR 26870, July 28, 1986, as amended at 53 FR 8435, Mar. 15, 1988; 54 FR 19886, May 9, 1989; 57 FR 29203, July 1, 1992; 58 FR 19597, Apr. 15, 1993; 60 FR 49335, Sept. 25, 1995; 64 FR 26, Jan. 4, 1999; 67 FR 62353, Oct. 7, 2002; 67 FR 63539, Oct. 15, 2002; 69 FR 41426, July 9, 2004; 72 FR 16269, Apr. 4, 2007]

§ 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 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.

(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 nonpublic records before considering the remainder of the request.

(2) Where it is determined to deny, in whole or in part, a request for nonpublic 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.

(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.

(j) *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.

[51 FR 26870, July 28, 1986, as amended at 52 FR 19307, May 22, 1987; 62 FR 17069, Apr. 9, 1997; 69 FR 67507, Nov. 18, 2004]

§ 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 not affect the Commission's right, authority, or obligation to disclose information in any other context.

(b) *Scope*. The provisions of this section shall apply only where the Commission has not specified that an alternative procedure be utilized in connection with a particular study, report, investigation, or other matter. See 40.8 for procedures to be utilized in connection with filing information required to be filed pursuant to 17 CFR parts 40 and 41.

(c) *Definitions*. The following definitions 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)(ii) of this section only, ''submitter'' includes any person whose information has been submitted to a designated contract market, derivatives clearing organization, swap execution facility, swap data repository or registered futures association that in turn has submitted the information to the Commission.

(2) *FOIA requester*. A ''FOIA requester'' is any person who files with the Commission a request to inspect or copy Commission records or documents pursuant to the Freedom of Information Act, 5 U.S.C. 552.

(d) *Written request for confidential treatment.* (1) Any submitter may request in writing that the Commission afford confidential treatment under the Freedom of Information Act to any information that he or she submits to the Commission. Except as provided in paragraph (d)(4) of this section, no oral requests for confidential treatment will be accepted by the Commission. The submitter shall specify the grounds on which confidential treatment is being requested but need not provide a detailed written justification of the request unless required to do so under paragraph (e) of this section. Confidential treatment may be requested only on the grounds that disclosure:

(i) Is specifically exempted by a statute that either requires that the matters 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 withheld.

(ii) Would reveal the submitter's trade secrets or confidential commercial or financial information.

(iii) Would constitute a clearly unwarranted invasion of the submitter's personal privacy.

(iv) Would reveal investigatory records compiled for law enforcement purposes whose disclosure would deprive 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 constitute an unwarranted invasion of the personal privacy of the submitter.

(vi) Would reveal investigatory records compiled for law enforcement purposes when disclosure would interfere with enforcement proceedings or disclose investigative techniques and procedures, *provided,* that the claim may be made only by a designated contract market, derivatives clearing organization, swap execution facility, swap data repository or registered futures association with regard to its own investigatory records.

(2) The original of any written request 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 division or office receiving the original of any material for which confidential treatment is being sought.

(3) A request for confidential treatment 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 informing the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance of any changes in his or her name, address, and telephone number.

(4) A request for confidential treatment should accompany the material for which confidential treatment is being sought. If a request for confidential 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) 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 here 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 a 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.

(h) *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.

[51 FR 26871, July 28, 1986, as amended at 64 FR 26, Jan. 4, 1999; 69 FR 67507, Nov. 18, 2004; 74 FR 17395, Apr. 15, 2009; 77 FR 66348, Nov. 2, 2012]

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.

(2) Weekly Advisory (solely available on the Commission's Web site at *http://www.cftc.gov/cftc/cftcpressoffice.htm)*.

(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.

(11) Statistical data concerning specific contracts and markets.

(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.

(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 Reparation 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 Swap Dealer 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.

[51 FR 26874, July 28, 1986, as amended at 57 FR 29203, July 1, 1992; 59 FR 5528, Feb. 7, 1994; 60 FR 49335, Sept. 25, 1995; 64 FR 27, Jan. 4, 1999; 67 FR 62353, Oct. 7, 2002; 67 FR 63539, Oct. 15, 2002; 69 FR 67507, Nov. 18, 2004; 77 FR 66348, Nov. 2, 2012; 78 FR 22420, Apr. 16, 2013]

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.

(3) 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.

(8) Upon request, records will be mailed by means of overnight or express mail at the fee of $10.00 per package mailed.

(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 31th 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.

[52 FR 19308, May 22, 1987, as amended at 64 FR 27, Jan. 4, 1999; 69 FR 67507, Nov. 18, 2004]

APPENDIX C TO PART 145 [RESERVED]

PART 146—RECORDS MAINTAINED ON INDIVIDUALS

Sec.
146.1 Purpose and scope.
146.2 Definitions.
146.3 Requests by an individual for information or access.
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146.5 Disclosure of requested information to individuals; fees for copies of records.
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146.9 Appeals to the Commission.
146.10 Information supplied by the Commission when collecting information from an individual.
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APPENDIX A TO PART 146—FEES FOR COPIES OF RECORDS REQUESTED UNDER THE PRIVACY ACT OF 1974

AUTHORITY: 88 Stat. 1896 (5 U.S.C. 552a), as amended; 88 Stat. 1389 (7 U.S.C. 4a(j)).

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 inaccurate 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;

(j) The term *Freedom of Information Act* encompasses both the Freedom of Information Act, as amended, 5 U.S.C. 552, and the Commission's rules contained in part 145 of this title.

(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 obtain copies of the Commission's system notices appear in § 146.11(b).

(d) The Commission will respond in writing to a request made under this section within ten days (excluding Saturdays, Sundays and legal public holidays) after receipt of the request. If a definitive reply cannot be given within ten days, the request will be acknowledged and an explanation will be given of the status of the request.

(e) When an individual has requested access to records, available to him under these rules, he will either be notified in writing of where and when he may obtain access to the records requested or be given the name, address and telephone number of the member of the Commission staff with whom he should communicate to make further arrangements for access.

[41 FR 3212, Jan. 21, 1976, as amended at 41 FR 28260, July 9, 1976; 60 FR 49335, Sept. 25, 1995]

§ 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 insure 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 accompany 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, or to the member of the Commission's staff through whom arrangements for access were made.

(f) Fees for copies of records shall be charged as set forth in the schedule of fees contained in appendix A to this part. Copies of the schedule may be obtained 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. 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 investigative 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 transferred in a form that is not individually 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 instrumentality has made a written request 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 disclosure notification is transmitted to the last known address of such individual;

(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 committee;

(10) The disclosure is made to the Comptroller General, or any of his authorized 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 jurisdiction.

(12) The disclosure is made, upon request, 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 limitations of further dissemination as contained in section 8(e). Information disclosed pursuant to this paragraph may also include registration information maintained by the Commission on any registrant as authorized to be disclosed by section 8(g) of the Act. Registration information may be furnished to a department or agency of any state or political subdivision thereof upon reasonable request made by the department or agency or without request whenever the Commission or an employee designated by § 140.75 of this chapter determines that such information may be appropriate for use by the department or agency.

(13) The disclosure is made, upon request, to a department or agency of any foreign government or any political subdivision thereof, acting within the scope of its jurisdiction, provided that, prior to disclosure, the Commission or an employee delegated authority by § 140.73 of this chapter to disclose information pursuant to section 8(e) of the Act is satisfied that the information will not be disclosed by such department or agency 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 is a party.

(b) The Commission will make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public 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 Exchange Act, and § 140.80 of this chapter, at least fourteen days prior to disclosure. Notice will not, however, be given with regard to any information as to which the submitter has waived the notice requirements of § 140.80.

(c) The Commission, with respect to each system of records under its control, shall keep an accurate accounting of certain disclosures.

(1) A record shall be kept of all disclosures 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 section) and disclosures required under the Freedom of Information Act (paragraph (a)(3) of this section).

(2) The record shall include:

(i) The date, nature, and purpose of each disclosure of a record made to any person or to another agency;

(ii) The name and address of the person or agency to whom the disclosure was made.

(3) The accounting will be retained for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made.

(d) The accounting described in paragraph (c) of this section will be made available to the individual named in the record upon his written request, 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, except that the accounting will not be revealed with respect to disclosures made under paragraph (a)(7) of this section pertaining to law enforcement activity, and to disclosures involving systems of investigative records exempted under § 146.12 of these rules.

(e) Whenever an amendment or correction of a record or a notation of dispute concerning the accuracy of records is made by the Commission in accordance with §§ 146.8 and 146.9 of these rules, the Commission will inform any person or other agency to

whom the record was previously disclosed, if an accounting of the disclosure was made pursuant to the requirements of paragraph (c) of this section.

(Secs. 2(a)(11), 8 and 8a of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12 and 12a, as amended by Pub. L. 97–444)

[41 FR 3212, Jan. 21, 1976, as amended at 41 FR 28261, July 9, 1976; 48 FR 22136, May 17, 1983; 49 FR 4465, Feb. 7, 1984; 60 FR 49335, Sept. 25, 1995]

§ 146.7 Content of systems of records.

(a) The Commission will maintain in its records only such information about an individual as is relevant and necessary to accomplish the purposes of the Commodity Exchange Act and other purposes required to be accomplished by statute or by executive order of the President.

(b) The Commission will maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

(c) The Commission will collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

(d) The Commission will maintain all records which are used by the Commission in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

§ 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, Sundays, and legal public holidays) except that, if the individual is given notice within the ten day period that his request will or will not be complied with, no acknowledgement is required.

(d) Assistance in preparing a request to amend a record may be obtained 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.

(e) Upon receipt of a request for amendment the Executive Director of the Commission or a person designated by the Executive Director shall promptly determine whether the record is materially inaccurate, incomplete, misleading, or is irrelevant or not timely, as claimed by the individual, and, if so, shall cause the record to be amended in accordance with the individual's request.

(f) If the Executive Director or designee grants the request to amend the record, the individual shall promptly be advised of the decision and of the action taken, and notice shall be given of the correction and its substance to each person or agency to whom the record had previously been disclosed, as shown on the record of disclosures maintained in accordance with §146.6(c).

(g) If the Executive Director or designee disagrees in whole or in part with a request for amendment of a record, the individual shall promptly be notified of the complete or partial denial of his request and the reasons for the refusal. The individual shall also be notified of the procedures for administrative review by the Commission of any complete or partial denial of a request for amendment, which are set forth in § 146.9.

(h) If a request is received for amendment of a record prepared by another agency which is in the possession or control of the Commission, the request for amendment will be forwarded to that agency. If that agency determines that the correction should be made, the Commission will amend its records accordingly and notify the individual making the request for amendment of the change. If the other agency declines to make the amendment, the Executive Director or designee will independently determine whether the amendment will be made to the record in the Commission's possession or control, considering any explanation given by the other agency for its decision.

[41 FR 3211, Jan. 21, 1976, as amended at 41 FR 28261, July 9, 1976; 60 FR 49335, Sept. 25, 1995]

§ 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 the 30-day period. If a petition is denied, the Commission will notify the petitioner in writing and state the reasons therefor.

(e) Where the petition is made for review of a denial of a request for amendment made pursuant to § 146.8, the following additional procedures shall apply:

(1) If upon review the Commission grants the petition to amend the record, notice of the correction and its substance shall be given to each person or agency to whom the record had previously been disclosed, as shown on the record of disclosures maintained in accordance with § 146.6(c) of these rules.

(2) If upon review the initial denial of the request for amendment is upheld in whole or in part, the individual shall be notified of the provisions for judicial review of that determination which are set forth in section 552a(g)(1)(A) and (2)(A), of title 5 of the U.S. Code and the provisions for disputed records set forth in paragraph (e)(3) of this section.

(3) If after review the Commission has declined to amend the records as the individual has requested, the individual may file with the FOI, Privacy and Sunshine Acts compliance staff, Office of the Secretariat a concise statement setting forth why he disagrees with the Commission's denial of his request. Any subsequent disclosure containing information about which a

statement of disagreement has been filed shall clearly note the portion which is disputed, and include a copy of the individual's statement. The Commission may also include a copy of a concise statement explaining its reasons for not making the amendments requested.

(f) The General Counsel or his or her designee is hereby delegated the authority to act for the Commission in deciding appeals under this section. The General Counsel may, in his or her sole and unfettered discretion, refer such appeals to the Commission for decision.

[41 FR 3211, Jan. 21, 1976, as amended at 41 FR 28261, July 9, 1976; 45 FR 26954, Apr. 22, 1980; 51 FR 26874, July 28, 1986; 60 FR 49336, Sept. 25, 1995]

§ 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 of:

(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 pertaining to him contained in the system of records, and how he can contest its contents; and

(9) The categories of sources of records in the system.

(b) Copies of the notices as printed in the FEDERAL REGISTER will be available in each office of the Commission. Locations of Commission offices are listed in § 145.6. Mail 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. The first copy will be furnished free of charge. A charge will be made for each additional copy.

[41 FR 3212, Jan. 21, 1976, as amended at 41 FR 28261, July 9, 1976; 45 FR 26955, Apr. 22, 1980; 60 FR 49336, Sept. 25, 1995; 65 FR 53560, Sept. 5, 2000]

§ 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.''

Notwithstanding the foregoing, however, no record which has served as a basis for denying an individual a right, privilege, or benefit to which he would otherwise be eligible, shall be maintained in this system, unless the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence. For records of this type, if practicable, material identifying the 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.

(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 non-exempt system containing the same category of record. Materials exempted under this paragraph are included in the system of records entitled ''Exempted Employee Background Investigation Material'' and/or in the system of records entitled ''Exempted Closed Commission Meetings.''

(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).

[41 FR 3212, Jan. 21, 1976, as amended at 53 FR 35198, Sept. 12, 1988]

§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 the provisions of 5 U.S.C. 552a (except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i)) and from 17 CFR 146.3, 146.4, 146.5, 146.6 (b), (d) and (e), 146.7 (a), (c) and (d), 146.8, 146.9, 146.10, 146.11(a) (7), (8) and (9), insofar as the system contains information pertaining to criminal law enforcement investigations.

(2) [Reserved]

(b) Pursuant to section (k) 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. 552(k)(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 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f) and from 17 CFR 146.3, 146.4, 146.5, 146.6(d), 146.7(a), 146.8, 146.9, 146.11(a) (7), (8) and (9), insofar as it contains investigatory materials compiled for law enforcement purposes.

(2) [Reserved]

[57 FR 4364, Feb. 5, 1992]

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 wavier or reduction of fee is in the public interest.

b. 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.

(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. 662a and 552b)

[41 FR 3212, Jan. 21, 1976, as amended at 45 FR 26955, Apr. 22, 1980; 48 FR 46011, Oct. 11, 1983; 48 FR 55280, Dec. 12, 1983; 49 FR 12684, Mar. 30, 1984; 60 FR 49336, Sept. 25, 1995]

PART 147—OPEN COMMISSION MEETINGS

Sec.

147.1 General policy considerations, purpose and scope of rules relating to open Commission meetings.
147.2 Definitions.
147.3 General requirement of open meetings; grounds upon which meetings may be closed.
147.4 Procedure for announcing meetings.
147.5 General procedure for closing meetings.
147.6 Special procedure for closing certain meetings.
147.7 Maintenance of transcripts, recordings and minutes of closed meetings.
147.8 Public availability of transcripts, recordings and minutes of closed meetings.
147.9 Requests for copies of transcripts, recordings or minutes of closed meetings.
147.10 Interpretation of this part with other provisions.

AUTHORITY: Sec. 3(a), Pub. L. 94–409, 90 Stat. 1241 (5 U.S.C. 552b); sec. 101(a)(11), Pub. L. 93–463, 88 Stat. 1391 (7 U.S.C. 4a(j) (Supp. V, 1975)), unless otherwise noted.

SOURCE: 42 FR 13704, Mar. 11, 1977, unless otherwise noted.

§ 147.1 General policy considerations, purpose and scope of rules relating to open Commission meetings.

(a) This part contains the rules of the Commodity Futures Trading Commission implementing the open meeting requirements of the Government in the Sunshine Act (Pub. L. 94–409, 90 Stat. 1241, 5 U.S.C. 552b). These rules apply to all deliberations of a quorum of the Commission which determine or result in the conduct or disposition of official Commission business, with the exception of deliberations required or permitted by § 147.4, § 147.5 or § 147.6.

(b) Among the primary purposes of these rules is the Commission's desire to inform the public to the fullest extent possible of its activities as an aid to its properly carrying out its responsibility for administrating and enforcing the Commodity Exchange Act, as amended, 7 U.S.C. 1 *et seq.*, and the Commission's belief that, in order to guarantee public confidence in the integrity of its decision-making, it must, to the fullest possible extent, conduct its business in an open manner.

§ 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.

[42 FR 13704, Mar. 11, 1977, as amended at 45 FR 26955, Apr. 22, 1980]

§ 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;

(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 subpena, 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 ajudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

(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), 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); secs. 2(a)(11) and 8, 7 U.S.C. 4a(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)

[42 FR 13704, Mar. 11, 1977, as amended at 42 FR 42851, Aug. 25, 1977; 44 FR 13458, Mar. 12, 1979; 45 FR 2023, Jan. 10, 1980; 46 FR 24943, May 4, 1981; 46 FR 54534, Nov. 3, 1981; 48 FR 35303, Aug. 3, 1983; 49 FR 4465, Feb. 7, 1984; 49 FR 5541, Feb. 13, 1984; 53 FR 4613, Feb. 17, 1988; 54 FR 41084, Oct. 5, 1989; 62 FR 4642, Jan. 31, 1997; 64 FR 27, Jan. 4, 1999; 71 FR 5595, Feb. 2, 2006; 75 FR 55450, Sept. 10, 2010; 77 FR 11342, Feb. 24, 2012]

§ 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.

(b) When a majority of Commissioners determines by a recorded vote that Commission business requires a meeting be held upon public notice of less than one week as required by paragraph (a) of this section, 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 the earliest practicable time, 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 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 charge 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.

(2) Interested persons may contact the Commission's Office of the Secretariat during normal business hours to obtain information concerning future meetings.

(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 time, place, and subject matter of a meeting, which portions of the meeting shall be open or closed to the public, any change in one of the preceding, and the name and telephone number of an official of the Commission who may be contacted for information about the meeting.

[42 FR 13704, Mar. 11, 1977, as amended at 60 FR 49336, Sept. 25, 1995]

§ 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 Commission close such portion 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 Centre, 1155 21st Street, NW., Washington, DC 20581.

[42 FR 13704, Mar. 11, 1977, as amended at 45 FR 26955, Apr. 22, 1980; 60 FR 49336, Sept. 25, 1995]

§ 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).

[42 FR 13704, Mar. 11, 1977, as amended at 45 FR 26955, Apr. 22, 1980; 60 FR 49336, Sept. 25, 1995]

§ 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 (b)(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.

[42 FR 13704, Mar. 11, 1977, as amended at 45 FR 26955, Apr. 22, 1980; 60 FR 49336, Sept. 25, 1995]

§ 147.9 Requests for copies of transcripts, recordings or minutes of closed meetings.

(a) Copies of a transcript transcription of an electronic recording or set of minutes disclosing the identity of each speaker, which are publicly available pursuant to § 147.8(a), shall be furnished to any person at the actual cost of duplication or transcription pursuant to the schedule of fees set forth in 17 CFR part 145, appendix B (a)(4), (a)(5), (a)(7), (a)(8), (a)(9), (d) and (e).

(b) Requests for copies of transcripts, transcriptions of electronic recordings or sets of minutes as described in paragraph (a) of this section shall be made either in person, by telephone, or by mail addressed 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.

(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)

[42 FR 13704, Mar. 11, 1977, as amended at 45 FR 26955, Apr. 22, 1980; 48 FR 46012, Oct. 11, 1983; 49 FR 12684, Mar. 30, 1984; 60 FR 49336, Sept. 25, 1995]

§ 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.
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148.6 Allowable fees and expenses.
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Subpart B—Information Required from Applicants

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Subpart C—Procedures for Considering Applications

148.21 Filing and service of documents.
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148.26 Further proceedings.
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148.28 Appeal to the Commission.
148.29 Judicial review.
148.30 Payment of award.

AUTHORITY: Equal Access to Justice Act, 5 U.S.C. 504(c)(1) and secs. 2(a)(11) and 8a(5) of the Commodity Exchange Act, 7 U.S.C. 4a(j) and 12a(5), unless otherwise noted.

SOURCE: 46 FR 57671, Nov. 25, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 148.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called ''the Act'' in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are prevailing private parties in adjudicatory proceedings before the Commission. An eligible party may receive an award when it prevails over the Commission, unless the Commission's position was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Commission will use to make them.

[51 FR 18880, May 23, 1986]

§ 148.2 When the Act applies.

The Act applies to any covered adjudicatory proceeding pending before the Commission on or after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date. Awards may be sought for fees and other expenses incurred before October 1, 1981, in any such covered proceeding.

[51 FR 18880, May 23, 1986]

§ 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.

[46 FR 57671, Nov. 25, 1981, as amended at 51 FR 18880, May 23, 1986; 59 FR 5528, Feb. 7, 1994]

§ 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 entitles that would be ineligible is not itself eligible for an award.

[46 FR 57671, Nov. 25, 1981, as amended at 51 FR 18880, May 23, 1986]

§ 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 proceeding or if special circumstances make the award sought unjust.

[46 FR 57671, Nov. 25, 1981, as amended at 51 FR 18880, May 23, 1986]

§ 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 postion 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.

[46 FR 57671, Nov. 25, 1981, as amended at 51 FR 18880, May 23, 1986]

§ 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.

[46 FR 57671, Nov. 25, 1981, as amended at 51 FR 18881, May 23, 1986]

§ 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

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AUTHORITY: 29 U.S.C 794, unless otherwise noted.

SOURCE: 51 FR 22889, 22896, June 23, 1986, unless otherwise noted.

§ 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 alocoholism.

(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.

Qualified handicapped person means—

(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 acheive 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.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 149.104–149.110 [Reserved]

§ 149.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the

provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 149.112–149.129 [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.

(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 arrangments, 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.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program

limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited 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 adminstrative 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.

[51 FR 22889, 22896, June 23, 1986, as amended at 51 FR 22889, June 23, 1986; 60 FR 49336, Sept. 25, 1995]

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.

AUTHORITY: 7 U.S.C. 6a, 6c, and 12a(5), as amended by the Commodity Futures Modernization Act of 2000, appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

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:

Commodity	Beginning delivery month
corn	December.
cotton	October.
oats	July.
soybeans	September.
soybean meal	October.
soybean oil	October.
wheat (spring)	September.
wheat (winter)	July.

[52 FR 38923, Oct. 20, 1987, as amended at 53 FR 41571, Oct. 24, 1988; 56 FR 14315, Apr. 9, 1991; 57 FR 44492, Sept. 28, 1992; 58 FR 17981, Apr. 7, 1993; 64 FR 24046, May 5, 1999]

§ 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:

SPECULATIVE POSITION LIMITS

Contract	Limits by number of contracts		
	Spot month	Single month	All months
Chicago Board of Trade			
Corn and Mini-Corn [1]	600	33,000	33,000
Oats	600	2,000	2,000
Soybeans and Mini-Soybeans [1]	600	15,000	15,000
Wheat and Mini-Wheat [1]	600	12,000	12,000
Soybean Oil	540	8,000	8,000
Soybean Meal	720	6,500	6,500
Minneapolis Grain Exchange			
Hard Red Spring Wheat	600	12,000	12,000
ICE Futures U.S.			
Cotton No. 2	300	5,000	5,000
Kansas City Board of Trade			
Hard Winter Wheat	600	12,000	12,000

[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]

§ 150.3 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 delegee, 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 the relevant business relationships supporting a claim of exemption.

[53 FR 41571, Oct. 24, 1988, as amended at 56 FR 14315, Apr. 9, 1991; 57 FR 44492, Sept. 28, 1992; 58 FR 17982, Apr. 7, 1993; 60 FR 38193, July 25, 1995; 67 FR 62353, Oct. 7, 2002]

§ 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 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 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 affilate 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.

[64 FR 24047, May 5, 1999, as amended at 67 FR 62353, Oct. 7, 2002]

§ 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 and to consent to halt increasing further a trader's positions if so ordered 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 month-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.

(f) *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.

[52 FR 38923, Oct. 20, 1987, as amended at 59 FR 5528, Feb. 7, 1993]

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 visibility.
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

(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.

§ 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);

(v) *Chicago Board of Trade Soybean Oil* (BO);

(vi) *Chicago Board of Trade Wheat* (W);

(vii) *ICE Futures U.S. Cotton No. 2* (CT);

(viii) *Kansas City Board of Trade Hard Winter Wheat (KW);* and

(ix) *Minneapolis Grain Exchange Hard Red Spring Wheat* (MWE).

(2) Core Referenced Futures Contracts in non-legacy agricultural commodities:

(i) *Chicago Mercantile Exchange Class III Milk (DA);*

(ii) *Chicago Mercantile Exchange Feeder Cattle* (FC);

(iii) *Chicago Mercantile Exchange Lean Hog* (LH);

(iv) *Chicago Mercantile Exchange Live Cattle* (LC);

(v) *Chicago Board of Trade Rough Rice* (RR);

(vi) *ICE Futures U.S. Cocoa (CC);*

(vii) *ICE Futures U.S. Coffee C (KC);*

(viii) *ICE Futures U.S. FCOJ–A(OJ);*

(ix) *ICE Futures U.S. Sugar No. 11* (SB); and

(x) *ICE Futures U.S. Sugar No. 16* (SF).

(b) *Metal commodities*. Core Referenced Futures Contracts in metal commodities include the following futures contracts and options thereon:

(1) *Commodity Exchange, Inc. Copper* (HG);

(2) *Commodity Exchange, Inc. Gold* (GC);

(3) *Commodity Exchange, Inc. Silver* (SI);

(4) *New York Mercantile Exchange Palladium* (PA); and

(5) *New York Mercantile Exchange Platinum* (PL).

(c) *Energy commodities*. The Core Referenced Futures Contracts in energy commodities include the following futures contracts and options thereon:

(1) *New York Mercantile Exchange Henry Hub Natural Gas* (NG);

(2) New York Mercantile Exchange Light Sweet Crude Oil (CL);

(3) *New York Mercantile Exchange New York Harbor Gasoline Blendstock* (RB); and

(4) *New York Mercantile Exchange New York Harbor Heating Oil* (HO).

§ 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) *Minneapolis Grain Exchange Hard Red Spring Wheat* (MW) contract; and

(xiii) *Kansas City Board of Trade Hard Winter Wheat* (KW) contract;

(2) At the close of business of the first business day after the fifteenth calendar day of the calendar month preceding the delivery month if the fifteenth calendar day is a business day, or at the close of business of the second business day after the fifteenth day if the fifteenth day is a non-business day and terminating at the end of the delivery period in the underlying Core Referenced Futures Contract for the *ICE Futures U.S. Sugar No. 11* (SB) Referenced Contract;

(3) 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 the *ICE Futures U.S. Sugar No. 16* (SF) Referenced 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

(5) *New York Mercantile Exchange Platinum* (PL) contract.

(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.

§ 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:

(i) 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. *Provided, however,*

(ii) For New York Mercantile Exchange Henry Hub Natural Gas 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 Contracts 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).

(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 when such positions, in all months combined (including the spot month) or in a single month, are in excess of:

(1) *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) *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) *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:

Referenced contract	Position limits
(i) Chicago Board of Trade Corn (C) contract	33,000
(ii) Chicago Board of Trade Oats (O) contract	2,000
(iii) Chicago Board of Trade Soybeans (S) contract	15,000
(iv) Chicago Board of Trade Wheat (W) contract	12,000
(v) Chicago Board of Trade Soybean Oil (BO) contract	8,000
(vi) Chicago Board of Trade Soybean Meal (SM) contract	6,500
(vii) Minneapolis Grain Exchange Hard Red Spring Wheat (MW) contract	12,000
(viii) ICE Futures U.S. Cotton No. 2 (CT) contract	5,000
(ix) Kansas City Board of Trade Hard Winter Wheat (KW) contract	12,000

(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 spot-month position limits for Referenced Contracts referred to in appendix A shall apply to all the provisions of this part.

(2) *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)(iii) 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 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)(iii)(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)(iii)(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)(iii)(C) of this section and annually 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)(iii)(D) of this section and annually 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; and

(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.

(f) *Rounding*. In determining or calculating all levels and limits under this section, a resulting number shall be rounded up to the nearest hundred contracts.

§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.

(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; 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.

(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 offset 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)(ii)(A), (a)(2)(ii)(B), (a)(2)(iii), or (a)(2)(iv) 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;

(viii) 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)(ii)(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	
(i) New York Mercantile Exchange Light Sweet Crude Oil (CL)	50,000
(ii) New York Mercantile Exchange Henry Hub Natural Gas (NG)	50,000
(iii) New York Mercantile Exchange New York Harbor Gasoline Blendstock (RB)	10,000
(iv) New York Mercantile Exchange New York Harbor No. 2 Heating Oil (HO)	16,000

(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 (on an all months combined basis) 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 (h) 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 designees, 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 after a position 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.

(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 for the greater of the most recent one or two calendar years up to 25,000 contracts with a marginal increase of 2.5 percent thereafter.

(3) *Levels at designation or initial listing.* Other than in Referenced Contracts, at the time of its initial designation or upon offering a new contract, agreement, or transaction to be executed pursuant to its rules, it shall be an acceptable practice for a designated contract market or swap execution facility that is a trading facility to provide for speculative limits for an individual single-month or in all-months-combined at no greater than 1,000 contracts for physical commodities other than energy commodities and 5,000 contracts for other commodities, *provided that* the notional quantity for such contracts, agreements, or transactions, corresponds to a notional quantity per contract that is no larger than a typical cash market transaction in the underlying commodity.

(4) For purposes of this paragraph, it shall be an acceptable practice for open interest to be calculated by combining the all months month-end 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

(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.

(2) *Procedure*. Persons seeking to establish eligibility for an exemption must comply with the procedures of the designated contract market or swap execution facility that is a trading facility for granting exemptions from its speculative position limit rules. In considering whether to permit or grant an exemption, a designated contract market or swap execution facility that is a trading facility must take into account sound commercial practices and paragraph (d)(1) of this section and apply principles consistent with § 151.5.

(g) *Other exemptions*. Speculative position limits adopted pursuant to this section shall not apply to:

(1) Any position acquired in good faith prior to the effective date of any bylaw, rule, regulation, or resolution which specifies such limit;

(2) Spread or arbitrage positions either in positions in related Referenced Contracts or, for contracts that are not Referenced Contracts, economically equivalent contracts *provided that* such positions are outside of the spot month for physical-delivery contracts; or

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

(h) *Ongoing responsibilities*. Nothing in this part shall be construed to affect any provisions of the Act relating to manipulation or corners or to relieve any designated contract market, swap execution facility that is a trading facility, or governing board of a designated contract market or swap execution facility that is a trading facility from its responsibility under other provisions of the Act and regulations.

(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 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 position limits or accountability levels pursuant to the acceptable practice described in §151.11(b)(2) and (c)(1) based on 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.

§ 151.12 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 §151.4(b) for determining levels of open interest, in §151.4(d)(2)(ii) to estimate deliverable supply, in §151.4(d)(3)(ii) to fix non-spot-month limits, and in §151.4(e) to publish position limit levels.

(2) In §151.5 requesting additional information or determining whether a filing should not be considered as bona fide hedging;

(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

Contract	Referenced contract spot-month limit
Agricultural Referenced Contracts	
ICE Futures U.S. Cocoa	1,000
ICE Futures U.S. Coffee C	500
Chicago Board of Trade Corn	600
ICE Futures U.S. Cotton No. 2	300
ICE Futures U.S. FCOJ–A	300
Chicago Mercantile Exchange Class III Milk	1,500
Chicago Mercantile Exchange Feeder Cattle	300
Chicago Mercantile Exchange Lean Hog	950
Chicago Mercantile Exchange Live Cattle	450
Chicago Board of Trade Oats	600
Chicago Board of Trade Rough Rice	600
Chicago Board of Trade Soybeans	600
Chicago Board of Trade Soybean Meal	720
Chicago Board of Trade Soybean Oil	540
ICE Futures U.S. Sugar No. 11	5,000
ICE Futures U.S. Sugar No. 16	1,000
Chicago Board of Trade Wheat	600
Minneapolis Grain Exchange Hard Red Spring Wheat	600
Kansas City Board of Trade Hard Winter Wheat	600
Metal Referenced Contracts	
Commodity Exchange, Inc. Copper	1,200
New York Mercantile Exchange Palladium	650
New York Mercantile Exchange Platinum	500
Commodity Exchange, Inc. Gold	3,000
Commodity Exchange, Inc. Silver	1,500
Energy Referenced Contracts	
New York Mercantile Exchange Light Sweet Crude Oil	3,000
New York Mercantile Exchange New York Harbor Gasoline Blendstock	1,000
New York Mercantile Exchange Henry Hub Natural Gas	1,000
New York Mercantile Exchange New York Harbor Heating Oil	1,000

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 bona fide hedging transactions (§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 production. The Sovereign faces commodity price risk as it stands ready to pay the farmer the difference between the market price and the price of the fixed-price contract. To reduce that risk, the Sovereign purchases 100,000 bushels of Chicago Board of Trade (''CBOT'') Corn Referenced Contract call options.

Analysis: Because the Sovereign and the farmer are acting together pursuant to an express agreement, the aggregation provisions of §151.7 and §151.5(b) apply and they are treated as a single person. Taking the positions of the Sovereign and farmer jointly, the risk profile of the combination of the forward sale and the long call is approximately equivalent to the risk profile of a synthetic long put.[521] A synthetic long put may be a bona fide hedge for anticipated production. Thus, that single person satisfies the general requirements for bona fide hedging transactions (§151.5(a)(1)(i)–(iii)) and specific requirements for anticipated agricultural production (§151.5(a)(2)(i)(B)). The synthetic long put is a substitute for transactions that the farmer will make at a later time in the physical marketing channel after the crop is harvested. The synthetic long put reduces the price risk associated with anticipated agricultural production. The size of the hedge is equivalent to the size of the Sovereign's risk exposure. As provided under §151.5(a)(2)(i)(B), the Sovereign's risk-reducing position will not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the last five trading days.

3. SERVICES

a. *Fact Pattern:* Company A enters into a risk service agreement to drill an oil well with Company B. The risk service agreement provides that a portion of the revenue receipts to Company A depends on the value of the oil produced. Company A is concerned that the price of oil may fall resulting in lower anticipated revenues from the risk service agreement. To reduce that risk, Company A sells 5,000 NYMEX Light Sweet Crude Oil Referenced Contracts, which is equivalent to the firm's anticipated share of the oil produced.

Analysis: Company A's hedge of a portion of its revenue stream from the risk service agreement meets the general requirements for bona fide hedging (§151.5(a)(1)(i)–(iii)) and the specific provisions for services (§151.5(a)(2)(vii)). Selling NYMEX Light Sweet Crude Oil Referenced Contracts is a substitute for transactions to be taken at a later time in the physical marketing channel once the oil is produced. The Referenced Contracts sold by Company A are economically appropriate to the reduction of risk because the total notional quantity of the Referenced Contracts sold by Company A equals its share of the expected quantity of future production under the risk service agreement. Because the price of oil may fall, the transactions in Referenced Contracts arise from a potential reduction in the value of the service that Company A is providing to Company B. The contract for services involves the production of a commodity underlying the NYMEX Exchange Light Sweet Crude Oil Referenced Contract. As provided under §151.5(a)(2)(vii), the risk reducing position will not qualify as a bona fide hedge during

[521] Put-call parity describes the mathematical relationship between price of a put and call with identical strike prices and expiry.

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 rise. To mitigate this risk, the City establishes a long position in NYMEX Natural Gas Referenced Contracts that is equivalent to the expected use of natural gas over the life of the service contract.

Analysis: This transaction meets the general requirements for bona fide hedging transaction (§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 Contract 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 services (§151.5(a)(2)(vii)).[522] 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 §151.5(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.

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 (*i.e.*, 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 owing 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

[522] Note that in addition to the use of Referenced Contracts, Producer A could have hedged this risk by using a basis contract, which is excluded from the definition of Referenced Contracts.

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 the Bank at the current COMEX Silver settlement price plus an interest payment based on a differential to LIBOR (*i.e.*, 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 and sells CBOT Soybean Meal and Soybean Oil Referenced Contracts, such that the total notional quantity of soybean meal and oil Referenced Contracts equals the expected production from crushing soybeans into soybean meal and oil respectively.

Analysis: These hedging transactions meet the general requirements for bona fide hedging transactions (§§151.5(a)(1)(i)–(iii)) and the specific provisions for unfilled anticipated requirements and unsold anticipated agricultural production (§§151.5(a)(2)(i)–(ii)). Purchases of soybean Referenced Contracts qualify as bona fide hedging transaction provided they do not exceed the unfilled anticipated requirements of the cash commodity for one year (in this case 80 million tons). Such transactions are a substitute for purchases to be made at a later time in the physical marketing channel and are economically appropriate to the reduction of risk. The transactions in Referenced Contracts arise from a potential change in the value of soybeans that the processor anticipates owning. The size of the permissible hedge position in soybeans must be reduced by any inventories and fixed-price purchases because they are no longer unfilled requirements. As provided under §151.5(a)(2)(ii)(C), the risk reduction position that is not in excess of the anticipated requirements for soybeans for that month and the next succeeding month qualifies as a bona fide hedge during the last five trading days provided it is not in a physical-delivery Referenced Contract.

Given that Soybean Processor A has purchased 80 million tons worth of CBOT Soybean Referenced Contracts, it can reduce its processing risk by selling soybean meal and oil Referenced Contracts equivalent to the expected production. The sale of CBOT Soybean, Soybean Meal, and Soybean Oil contracts represents a substitute for transactions to be taken at a later time in the physical marketing channel by the soybean processor. Because the amount of soybean meal and oil Referenced Contracts sold forward by the soybean processor corresponds to expected production from 80 million tons of soybeans, the hedging transactions are economically appropriate to the reduction of risk in the conduct and management of the commercial enterprise. These transactions arise from a potential change in the value of soybean meal and oil that is expected to be produced. The size of the permissible hedge position in the products must be reduced by any fixed-price sales because they are no longer *unsold* production. As provided under §151.5(a)(2)(i)(B), the risk reducing position does not qualify as a bona fide hedge in a physical-delivery Referenced Contract during the last five trading days in the event the anticipated crushed products have not been produced.

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 merchandisers 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)(1)(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 to 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 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 offsetting 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 buys and sells a variety of agricultural products, such as wheat and cotton. 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(b), 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

[523] Participant 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.

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.

10. INVENTORY

a. *Fact Pattern:* Copper Wire Fabricator A is concerned about possible reductions in the price of copper. Currently it is November and it owns inventory of 100,000 pounds of copper and 50,000 pounds of finished copper wire. Currently, deferred futures prices are lower than the nearby futures price. Copper Wire Fabricator A expects to sell 150,000 pounds of finished copper wire in February. To reduce its price risk, Copper Wire Fabricator A sells 150,000 pounds of February COMEX Copper Referenced Contracts.

Analysis: The Copper Wire Fabricator A's hedging transaction meets the general requirements for bona fide hedging transactions (§§ 151.5(a)(1)(i)–(iii)) and the provisions for owning a commodity (§ 151.5(a)(2)(i)(A)). The sale of Referenced Contracts represents a substitute for transactions to be taken at a later time. The transactions are economically appropriate to the reduction of risk in the conduct and management of the commercial enterprise because the price of copper could drop further. The transactions in Referenced Contracts arise from a possible reduction in the value of the inventory that it owns.

PART 155—TRADING STANDARDS

Sec.
155.1 Definitions.
155.2 Trading standards for floor brokers.
155.3 Trading standards for futures commission merchants.
155.4 Trading standards for introducing brokers.
155.5–155.6 [Reserved]
155.10 Exemptions.

AUTHORITY: 7 U.S.C. 6b, 6c, 6g, 6j and 12a, unless otherwise noted.

§ 155.1 Definitions.

For purposes of this part, the term *affiliated person* of a futures commission merchant or of an introducing broker means any general partner, officer, director, owner of more than ten percent of the equity interest, associated person or employee of the futures commission merchant or of the introducing broker, 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.

(Approved by the Office of Management and Budget under control numbers 3038–0007 and 3038–0022)

[46 FR 63036, Dec. 30, 1981, and 48 FR 35304, Aug. 3, 1983]

§ 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 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 prearranged.

(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.

(Approved by the Office of Management and Budget under control numbers 3038–0007 and 3038–0022)

(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))

[41 FR 56142, Dec. 23, 1976, as amended at 46 FR 54534, Nov. 3, 1981; 46 FR 63036, Dec. 30, 1981; 47 FR 57020, Dec. 22, 1982; 59 FR 5528, Feb. 7, 1994; 77 FR 66348, Nov. 2, 2012]

§ 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 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 timestamp 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 and of all written records prepared upon the receipt of orders 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)

(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))

[41 FR 56142, Dec. 23, 1976, as amended at 44 FR 71821, Dec. 12, 1979; 46 FR 54535, Nov. 3, 1981; 46 FR 63036, Dec. 30, 1981; 47 FR 57020, Dec. 22, 1982; 48 FR 35304, Aug. 3, 1983; 66 FR 53523, Oct. 23, 2001; 70 FR 5924, Feb. 4, 2005; 77 FR 66349, Nov. 2, 2012]

§ 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.

[48 FR 35304, Aug. 3, 1983, as amended at 66 FR 53523, Oct. 23, 2001; 70 FR 5924, Feb. 4, 2005; 77 FR 66349, Nov. 2, 2012]

§§ 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)

[41 FR 56142, Dec. 23, 1976, as amended at 46 FR 63036, Dec. 30, 1981]

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]

PART 160—PRIVACY OF CONSUMER FINANCIAL INFORMATION UNDER TITLE V OF THE GRAMM–LEACH–BLILEY ACT

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AUTHORITY: 7 U.S.C. 7b–2 and 12a(5); 15 U.S.C 6801, *et seq.*, and sec. 1093, Pub. L. 111–203, 124 Stat. 1376.

SOURCE: 66 FR 21252, Apr. 27, 2001, unless otherwise noted.

§ 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 hereinafter 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.

[66 FR 21252, Apr. 27, 2001, as amended at 75 FR 55450, Sept. 10, 2010; 76 FR 43878, July 22, 2011]

§ 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.

(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) Use a typeface and type size that are easy to read;

(C) Provide wide margins and ample line spacing;

(D) Use boldface or italics for key words; and

(E) Use distinctive type size, style and graphic devices, such as shading or sidebars when you combine your notice with other information.

(iii) *Notices on web sites.* If you provide notice on a web page, you design your notice to call attention to the nature and significance of the information in it if you use text or visual cues to encourage scrolling down the page, if necessary to view the entire notice, and ensure that other elements on the web site, such as text, graphics, hyperlinks or sound, do not distract from the notice, and you either:

(A) Place the notice on a screen that consumers frequently access, such as a page on which transactions are conducted; or

(B) Place a link on a screen that consumers frequently access, such as a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature and relevance of the notice.

(c) *Collect* means to obtain information that you organize or can retrieve by the name of an individual or by identifying number, symbol or other identifying particular assigned to the individual, irrespective of the source of the underlying information.

(d) *Commission* means the Commodity Futures Trading Commission.

(e) *Commodity pool operator* has the same meaning as in section 1a(5) of the Commodity Exchange Act, as amended, and includes anyone registered as such under the Act.

(f) *Commodity trading advisor* has the same meaning as in section 1a(6) of the Commodity Exchange Act, as amended, and includes anyone registered as such under the Act.

(g) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association or similar organization.

(h)(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 nonpublic 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

(2) *Financial institution* does not include:

(i) Any person or entity, other than a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer that, with respect to any financial activity, is subject to the jurisdiction of the Commission under the Act.

(ii) The Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); or

(iii) Institutions chartered by Congress specifically to engage in securitizations, secondary market sales (including sales of servicing rights) or similar transactions related to a transaction of a consumer, as long as such

institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.

(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 subject to the Commission's jurisdiction; and

(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).

(2) *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.

(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 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.

(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 nonpublic, 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.

(z) *Retail foreign exchange dealer* has the same meaning as in § 5.3(i)(1) of this chapter.

[66 FR 21252, Apr. 27, 2001, as amended at 75 FR 55450, Sept. 10, 2010; 76 FR 43878, July 22, 2011]

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).

[66 FR 21252, Apr. 27, 2001, as amended at 75 FR 55451, Sept. 10, 2010]

§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 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.

§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:

(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.

(2) 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.

[66 FR 21252, Apr. 27, 2001, as amended at 74 FR 62974, December 1, 2009]

§ 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.

(e) *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]

§ 160.8 Revised privacy notices.

(a) *General rule.* Except as otherwise authorized in this part, you must not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party other than as described in the initial notice that you provided to that consumer under § 160.4, unless:

(1) You have provided to the consumer a clear and conspicuous revised notice that accurately describes your policies and practices;

(2) You have provided to the consumer a new opt out notice;

(3) 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

(4) The consumer does not opt out.

(b) *Examples.* (1) Except as otherwise permitted by §§ 160.13, 160.14, and 160.15, you must provide a revised notice before you:

(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 § 160.8, 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 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, other than as permitted by §§ 160.13, 160.14 and 160.15.

(3) *Examples of reasonable opportunity to opt out*. You provide a consumer with a reasonable opportunity to opt out if:

(i) *By mail*. You mail the notices required in paragraph (a)(1) of this section to the consumer and allow the consumer to opt out by mailing a form, calling a toll-free telephone number, or any other reasonable means within 30 days after the date you mailed the notices.

(ii) *By electronic means*. A customer opens an on-line account with you and agrees to receive the notices required in paragraph (a)(1) of this section electronically, and you allow the customer to opt out by any reasonable means within 30 days after the date that the customer acknowledges receipt of the notices in conjunction with opening the account.

(iii) *Isolated transaction with consumer. For an isolated transaction with a consumer*, you provide the consumer with a reasonable opportunity to opt out if you provide the notices required in paragraph (a)(1) of this section at the time of the transaction and request that the consumer decide, as a necessary part of the transaction, whether to opt out before completing the transaction.

(b) *Application of opt out to all consumers and all nonpublic personal information.* (1) You must comply with this section, regardless of whether you and the consumer have established a customer relationship.

(2) 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 §§ 160.14 or 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.

(2) *Example.* If you receive a customer list from a nonaffiliated financial institution in order to provide account-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.

(d) *Information you disclose outside of an exception.* If you disclose nonpublic personal information to a nonaffiliated third party other than under an exception in §§ 160.14 or 160.15, the third party may disclose the information only:

(1) To your affiliates;

(2) To its affiliates, but its affiliates, in turn, may disclose the information only to the extent the third party can disclose the information; and

(3) To any other person, if the disclosure would be lawful if you made it directly to that person.

§ 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 not authorized to directly initiate charges to the account; or

(2) To a participant in a private-label credit card program or an affinity or similar program where the participants in the program are identified to the customer when the customer enters into the program.

(c) *Example.* An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, as long as you do not provide the recipient with a means to decode the number or code.

Subpart C—Exceptions

§ 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 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)(i) To protect the confidentiality or security or your records pertaining to the consumer, service, product or transaction;

(ii) To protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability;

(iii) For required institutional risk control or for resolving consumer disputes or inquiries;

(iv) To persons holding a legal or beneficial interest relating to the consumer; or

(v) 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 nonpublic personal information as permitted under § 160.7(f).

[66 FR 21252, Apr. 27, 2001, as amended at 76 FR 43879, July 22, 2011]

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 is not inconsistent with the provisions of this part if the protection such statute, regulation, order or interpretation affords any person is 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.

[66 FR 21252, Apr. 27, 2001, as amended at 76 FR 43879, July 22, 2011]

§ 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.

[66 FR 21252, Apr. 27, 2001, as amended at 66 FR 24061, 24183, May 11, 2001; 67 FR 6790, Feb. 13, 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

Version 1: Model Form With No Opt-Out.

Rev. [insert date]

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] 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.

Reasons we can share your personal information	Does [name of financial institution] share?	Can you limit this sharing?
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		
For our marketing purposes— to offer our products and services to you		
For joint marketing with other financial companies		
For our affiliates' everyday business purposes— information about your transactions and experiences		
For our affiliates' everyday business purposes— information about your creditworthiness		
For our affiliates to market to you		
For nonaffiliates to market to you		

Questions?	Call [phone number] or go to [website]

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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]	

Version 2: Model Form with Opt-Out by Telephone and/or Online.

Rev. [insert date]

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	Does [name of financial institution] share?	Can you limit this sharing?
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		
For our marketing purposes— to offer our products and services to you		
For joint marketing with other financial companies		
For our affiliates' everyday business purposes— information about your transactions and experiences		
For our affiliates' everyday business purposes— information about your creditworthiness		
For our affiliates to market to you		
For nonaffiliates to market to you		

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]

Page 2

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.]
What happens when I limit sharing for an account I hold jointly with someone else?	[Your choices will apply to everyone on your account.] **OR** [Your choices will apply to everyone on your account—unless you tell us otherwise.]

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]

Version 3: Model Form with Mail-In Opt-Out Form.

Rev. [insert date]

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	Does [name of financial institution] share?	Can you limit this sharing?
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		
For our marketing purposes— to offer our products and services to you		
For joint marketing with other financial companies		
For our affiliates' everyday business purposes— information about your transactions and experiences		
For our affiliates' everyday business purposes— information about your creditworthiness		
For our affiliates to market to you		
For nonaffiliates to market to you		

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 **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]

✂

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	
[Account #]	

Mail to:
[Name of Financial Institution]
[Address1]
[Address2]
[City], [ST] [ZIP]

Page 2

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.]
What happens when I limit sharing for an account I hold jointly with someone else?	[Your choices will apply to everyone on your account.] **OR** [Your choices will apply to everyone on your account—unless you tell us otherwise.]

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]

Version 4. Optional Mail-in Form.

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
	[Account #]

Mail To: [Name of Financial Institution], [Address1] [Address2], [City], [ST] [ZIP]

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?).

(4) Disclosure table (''Reasons we can share your personal information'').

(5) ''To limit our sharing'' box, as needed, for the financial institution's opt-out information.

(6) ''Questions'' box, for customer service contact information.

(7) Mail-in opt-out form, as needed.

(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 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 words ''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 directly to the 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.

(f) *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 must 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 accountholder.* Only institutions that provide their joint accountholders the choice to opt out for only one accountholder, 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)(iii) opt-out.* If the institution shares personal information pursuant to section 603(d)(2)(A)(iii) 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 624 opt-out.* If the institution incorporates section 624 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 §160.10(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 §160.9(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; direct us to sell your 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 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)(3) of this part, where [*affiliate 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*''; or

(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]; nonfinancial companies, 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 [*nonaffiliate 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 [*joint marketing*] 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 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 requirement of §160.6(a)(2) to describe the categories of nonpublic personal information you disclose. You may use these clauses if you disclose nonpublic personal information other than as permitted by the exceptions in §§160.13, 160.14 and 160.15.

Sample Clause A–2, Alternative 1

We may disclose the following kinds of nonpublic personal information about you:

- 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–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 meet the requirement of §160.6(a)(3) to describe the categories of affiliates and nonaffiliated third parties to whom you disclose

nonpublic personal information. You may use this clause if you disclose nonpublic personal information other than as permitted by the exceptions in §§160.13, 160.14 and 160.15, as well as when permitted by the exceptions in §§160.14 and 160.15.

Sample Clause A–4

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''].

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–6—EXPLANATION OF OPT OUT RIGHT (INSTITUTIONS THAT DISCLOSE OUTSIDE OF THE EXCEPTIONS)

You may use this clause, as applicable, to meet the requirement of §160.6(a)(6) to provide an explanation of the consumer's right 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. You may use this clause if you disclose nonpublic personal information other than as permitted by the exceptions in §§160.13, 160.14 and 160.15.

Sample Clause A–6

If you prefer that we not disclose nonpublic personal information about you to nonaffiliated third parties you may opt out of those disclosures; that is, you may direct us not to make those disclosures (other than disclosures permitted or required by law). If you wish to opt out of disclosures to nonaffiliated third parties, you may [describe a reasonable means of opting out, such as ''call the following toll-free number: (insert number)'']].

A–7—CONFIDENTIALITY AND SECURITY (ALL INSTITUTIONS)

You may use this clause, as applicable, to meet the requirement of §160.6(a)(8) 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.

[66 FR 21252, Apr. 27, 2001, as amended at 74 FR 62984, Dec. 1, 2009]

PART 162—PROTECTION OF CONSUMER INFORMATION UNDER THE FAIR CREDIT REPORTING ACT

Sec.
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APPENDIX A TO PART 162—SAMPLE CLAUSES
APPENDIX B TO PART 162—INTERAGENCY GUIDELINES ON IDENTITY THEFT DETECTION, PREVENTION, AND MITIGATION

AUTHORITY: Sec. 1088, Pub. L. 111–203; 124 Stat. 1376 (2010).

SOURCE: 76 FR 43884, July 22, 2011, unless otherwise noted.

§ 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.

(j) *Dodd-Frank Act*. The term ''Dodd-Frank Act'' means the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)).

(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.

(n) *GLB Act*. The term ''GLB Act'' means the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338 (1999)).

(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, 7 U.S.C. 1 *et seq.*, as may be further defined by this title, and includes any person registered as such thereunder.

Subpart A—Business Affiliate Marketing Rules

§ 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;

(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

(iii) 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)(5) 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 and 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 obtain 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 with paragraph b of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

(b) *Duration of opt-out election.* An opt-out election must be effective for a period of at least five years beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out election in writing or, if the consumer agrees, electronically. An opt-out election may be established for a period of more than five years or for an indefinite period unless revoked.

(c) *Time period in which a consumer can opt out.* A consumer may opt out at any time.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt out.

§ 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) (A) The name of the affiliate that has or previously had a pre-existing business relationship with a consumer, which is providing the notice; or

(B) If jointly provided jointly by multiple affiliates and each affiliate shares a common name, then the notice may indicate that it is being provided by multiple companies with the same name or multiple companies in the same group or family of companies. If the affiliates providing the notice do not share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates;

(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.

§ 162.6 Reasonable opportunity to opt out.

(a) *In general.* A covered affiliate must not use eligibility information about a consumer that the covered affiliate receives from an affiliate to make a solicitation to such consumer about the covered affiliate's financial products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by this subpart.

(b) *Examples.* A reasonable opportunity to opt out under this subpart is:

(1) If the opt-out notice is mailed to the consumer, the consumer has 30 days from the date the notice is mailed to opt out.

(2) If the opt-out notice is sent *via* electronic means to the consumer, the consumer has 30 days from the date the consumer acknowledges receipt to elect to opt out by any reasonable method.

(3) If the opt-out notice is sent *via* e-mail (where the consumer has agreed to receive disclosures by e-mail), the consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable method.

(4) If the opt-out notice provided to the consumer at the time of an electronic transaction, the consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction.

(5) If the opt-out notice is provided during an in-person transaction, the consumer is required to decide, as a necessary part of completing the transaction, whether to opt out through a simple process.

(6) If the opt-out notice is provided in conjunction with other privacy notices required by law, the consumer is allowed to exercise the opt-out election within a reasonable period of time and in the same manner as the opt out under that privacy notice.

§ 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.

(c) *Specific opt-out method.* Each consumer may be required to opt out through a specific method, as long as that method is acceptable under this subpart.

§ 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 must adopt reasonable, 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.

(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 practicably 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 to maintain or destroy such a record.

Subpart C—Identity Theft Red Flags

SOURCE: 78 FR 23660, Apr. 19, 2013, unless otherwise noted.

§ 162.30 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope of this subpart*. This section applies to financial institutions or creditors that are subject to administrative enforcement of the FCRA by the Commission pursuant to Sec. 621(b)(1) of the FCRA, 15 U.S.C. 1681s(b)(1).

(b) *Special definitions for this subpart*. For purposes of this section, and Appendix B to this part, the following definitions apply:

(1) Account means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes an extension of credit, such as the purchase of property or services involving a deferred payment.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and

(ii) In the case of any other creditor that does not have a board of directors, a designated senior management employee.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a margin account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning in Sec. 603(r)(5) of the FCRA, 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681m(e)(4), and includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that regularly extends, renews, or continues credit; regularly arranges for the extension, renewal, or continuation of credit; or in acting as an assignee of an original creditor, participates in the decision to extend, renew, or continue credit.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t) and includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that directly or indirectly holds a transaction account belonging to a consumer.

(8) *Identifying information* means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any—

(i) Name, Social Security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(ii) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(iii) Unique electronic identification number, address, or routing code; or

(iv) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

(9) *Identity theft* means a fraud committed or attempted using the identifying information of another person without authority.

(10) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(11) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(c) *Periodic identification of covered accounts.* Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor shall conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program*–(1) Program requirement. Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Identity Theft Prevention Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Identity Theft Prevention Program.* The Identity Theft Prevention Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Identity Theft Prevention Program;

(ii) Detect Red Flags that have been incorporated into the Identity Theft

Prevention Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Identity Theft Prevention Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Identity Theft Prevention Program.* Each financial institution or creditor that is required to implement an Identity Theft Prevention Program must provide for the continued administration of the Identity Theft Prevention Program and must:

(1) Obtain approval of the initial written Identity Theft Prevention Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Identity Theft Prevention Program;

(3) Train staff, as necessary, to effectively implement the Identity Theft Prevention Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement an Identity Theft Prevention Program must consider the guidelines in appendix B of this part and include in its Identity Theft Prevention Program those guidelines that are appropriate.

§ 162.31 [Reserved]

§ 162.32 Duties of card issuers regarding changes of address.

(a) *Scope.* This section applies to a person described in § 162.30(a) that issues a debit or credit card (card issuer).

(b) *Definition of cardholder.* For purposes of this section, a cardholder means a consumer who has been issued a credit or debit card.

(c) *Address validation requirements.* A card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1)(i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to § 162.30.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and provided separately from its regular correspondence with the cardholder.

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]

—[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 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 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 they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

—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].

– [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 the [ABC] companies, 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 any company [in the ABC group of companies] to use my personal information to market to me.

A–3 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]

____Renew my choice to limit marketing for [x] more years.

A–4 MODEL FORM FOR RENEWAL NOTICE (JOINT NOTICE)

[RENEWING YOUR CHOICE TO LIMIT MARKETING]/[RENEWING YOUR 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 previously chose to 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 they receive from other [ABC] companies. This information includes your [income], your [account history], 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]

____ Renew my choice to limit marketing for [x] more years.

A–5 MODEL FORM FOR VOLUNTARY ''NO MARKETING'' NOTICE

[YOUR CHOICE TO STOP MARKETING]

– [Name of Affiliate] is providing this notice.

You may choose to stop all marketing from us and our affiliates.

To stop all 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 market to me.

APPENDIX B TO PART 162—INTERAGENCY GUIDELINES ON IDENTITY THEFT DETECTION, PREVENTION, AND MITIGATION

Section 162.30 requires each financial institution or creditor that offers or maintains one or more covered accounts, as defined in §162.30(b)(3), to develop and provide for the continued administration of a written Identity Theft Prevention Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of an Identity Theft Prevention Program that satisfies the requirements of §162.30.

I. THE IDENTITY THEFT PREVENTION PROGRAM

In designing its Identity Theft Prevention Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. IDENTIFYING RELEVANT RED FLAGS

(a) *Risk factors.* A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;

(2) The methods it provides to open its covered accounts;

(3) The methods it provides to access its covered accounts; and

(4) Its previous experiences with identity theft.

(b) *Sources of Red Flags.* Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has experienced;

(2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and

(3) Applicable supervisory guidance.

(c) *Categories of Red Flags.* The Identity Theft Prevention Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix B.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

(2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. DETECTING RED FLAGS

The Identity Theft Prevention Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account; and

(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. PREVENTING AND MITIGATING IDENTITY THEFT

The Identity Theft Prevention Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution or creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Internet Web site. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;

(b) Contacting the customer;

(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;

(d) Reopening a covered account with a new account number;

(e) Not opening a new covered account;

(f) Closing an existing covered account;

(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;

(h) Notifying law enforcement; or

(i) Determining that no response is warranted under the particular circumstances.

V. UPDATING THE IDENTITY THEFT PREVENTION PROGRAM

Financial institutions and creditors should update the Identity Theft Prevention Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

(a) The experiences of the financial institution or creditor with identity theft;

(b) Changes in methods of identity theft;

(c) Changes in methods to detect, prevent, and mitigate identity theft;

(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and

(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

VI. METHODS FOR ADMINISTERING THE IDENTITY THEFT PREVENTION PROGRAM

(a) *Oversight of Identity Theft Prevention Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated senior management employee should include:

(1) Assigning specific responsibility for the Identity Theft Prevention Program's implementation;

(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with §162.30; and

(3) Approving material changes to the Identity Theft Prevention Program as necessary to address changing identity theft risks.

(b) *Reports.* (1) *In general.* Staff of the financial institution or creditor responsible for development, implementation, and administration of its Identity Theft Prevention Program should report to the board of directors, an appropriate committee of the board, or a designated senior management employee, at least annually, on compliance by the financial institution or creditor with §162.30.

(2) *Contents of report.* The report should address material matters related to the Identity Theft Prevention Program and evaluate issues such as: The effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Identity Theft Prevention Program.

(c) *Oversight of service provider arrangements.* Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. OTHER APPLICABLE LEGAL REQUIREMENTS

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;

(b) Implementing any requirements under 15 U.S.C. 1681c-1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;

(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s-2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and

(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix B

In addition to incorporating Red Flags from the sources recommended in section II(b) of the Guidelines in Appendix B of this part, each financial institution or creditor may consider incorporating into its Identity Theft Prevention Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings From a Consumer Reporting Agency

1. A fraud or active duty alert is included with a consumer report.

2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.

3. A consumer reporting agency provides a notice of address discrepancy, as defined in Sec. 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

a. A recent and significant increase in the volume of inquiries;

b. An unusual number of recently established credit relationships;

c. A material change in the use of credit, especially with respect to recently established credit relationships; or

d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions or creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement means of accessing the account or for the addition of an authorized user on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud. For example:

a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (*e.g.*, electronics equipment or jewelry); or

b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

a. Nonpayment when there is no history of late or missed payments;

b. A material increase in the use of available credit;

c. A material change in purchasing or spending patterns;

d. A material change in electronic fund transfer patterns in connection with a deposit account; or

e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of

account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice From Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

[78 FR 23661, Apr. 19, 2013]

PART 165—WHISTLEBLOWER RULES

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165.1 General.
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APPENDIX A TO PART 165—GUIDANCE WITH RESPECT TO THE PROTECTION OF WHISTLEBLOWERS AGAINST RETALIATION

AUTHORITY: 7 U.S.C. 2, 5, 12a(5) and 26, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (July 16, 2010).

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.

(f) *Fund.* The term ''Fund'' means the Commodity Futures Trading Commission Customer Protection Fund.

(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 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) of this section), and the whistleblower's submission significantly contributed to the success of the action.

(3) The whistleblower reported original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time the whistleblower reported them to the Commission; the entity later provided the whistleblower's information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information the whistleblower reported to the entity; and the information the entity provided to the Commission satisfies either paragraph (i)(1) or (i)(2) of this section. Under this paragraph (i)(3), the whistleblower must also submit the same information to the Commission in accordance with the procedures set forth in § 165.3 within 120 days of providing it to the entity.

(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 one of the other entities or authorities described above.

(ii) In the event that the whistleblower claims to be the original source of information that an authority or another 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 authority 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 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 pursuant to paragraph (a)(1) or (2) of this section that the whistleblower's information is true and correct to the best of the whistleblower's knowledge and belief.

(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 acceptable to the Commission consistent with the procedure set forth in §165.7(c) prior to Commission's payment of any award.

(d) If the whistleblower submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Wall Street Transparency and Accountability Act of 2010) but before the effective date of these rules, the whistleblower will be eligible for an award only in the event that the whistleblower provided the original information to the Commission in a format or manner other than that described in paragraph (a) of this

section, the whistleblower submits a completed Form TCR within 120 days of the effective date of these rules and otherwise follows the procedures set forth above in paragraphs (a) and (b) of this section.

§ 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

(3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(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 Commission; 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, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Fax (202) 418–5975. The Form WB–APP, including any attachments, must be received by the Commission within 90 calendar days of the date of the Notice of Covered Action or 90 calendar days following the date of a final judgment in a related action in order to be considered for an award.

(c) If the whistleblower provided the whistleblower's original information to the Commission anonymously pursuant to §§ 165.3 and 165.4 and:

(1) The whistleblower is making the whistleblower's claim for a whistleblower award on a disclosed basis, the whistleblower must disclose the whistleblower's identity on the Form WB–APP. The whistleblower's identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award; or

(2) The whistleblower is making the whistleblower's claim for a whistleblower award on an anonymous basis, the whistleblower must be represented by counsel. The whistleblower must provide the whistleblower's counsel with a completed Form WB–APP that is signed by the whistleblower by no later than the date upon which the whistleblower's counsel submits to the Commission a copy of the Form WB–APP that does not disclose the whistleblower's identity and is signed solely by the whistleblower's counsel. In addition, the whistleblower's counsel must retain the signed original of the whistleblower's Form WB–APP in counsel's records. Upon request of the Commission staff, whistleblower's counsel must produce to the Commission the whistleblower's signed original WB–APP and the whistleblower's identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action and all related actions has expired, or, where an appeal has been filed, after all appeals in the judicial, administrative and related actions have concluded, the Commission will evaluate all timely whistleblower award claims submitted on Form WB–APP in accordance with the criteria set forth in this part 165. In connection with this process, the Commission may require that the whistleblower provide additional information relating to the whistleblower's eligibility for an award or satisfaction of any of the conditions for an award, as set forth in §165.5(b). Following that evaluation, the Commission will send the whistleblower a Final Order setting forth whether the claim is allowed or denied and, if allowed, setting forth the award percentage amount.

(e) The Commission's Office of the Secretariat will provide the whistleblower with the Final Order of the 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 the procedure set forth in §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.

§ 165.10 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.

(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.

§ 165.11 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 ''related action'' is based on the same original information that the whistleblower voluntarily submitted to the Commission and led to a successful resolution of the Commission judicial or administrative action.

§ 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 an action is determined to be appropriate, however, the Commission's Division of Enforcement will take the whistleblower's cooperation into consideration in accordance with its sanction recommendations to the Commission.

§ 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—

(1) 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.

UNITED STATES
COMMODITY FUTURES TRADING COMMISSION
Washington, DC 20581

FORM TCR
TIP, COMPLAINT OR REFERRAL

A. INFORMATION ABOUT YOU			
COMPLAINANT 1:			
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	Preferred Method of Communication
4. Occupation			
COMPLAINANT 2: 1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
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			

2. Firm Name			
3. Street Address			
City	State/ Province	ZIP/ Postal Code	Country
4. Telephone	Fax	E-mail Address	
C. TELL US ABOUT THE INDIVIDUAL AND/OR ENTITY THE WHISTLEBLOWER HAS A COMPLAINT AGAINST			
INDIVIDUAL/ENTITY 1: 1. Type: ☐ Individual ☐ Entity	If An Individual, Specify Profession: If An Entity, Specify Type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Phone	E-mail Address	Internet Address	
INDIVIDUAL/ENTITY 2: 1. Type: ☐ Individual ☐ Entity	If an individual, specify profession: If an entity, specify type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country

4. Phone	E-mail Address	Internet Address

D. TELL US ABOUT THE WHISTLEBLOWER'S COMPLAINT

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 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.

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 (analyst 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: Provide the name and contact information of the point of contact at the other agency or organization, if known.

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

whether the whistleblower complained to the Commission, another regulator, a law enforcement agency, or any other agency or organization; initiated legal action, mediation or arbitration, or initiated any other action.

Question 6b: If the whistleblower answered yes to question 6a, provide details, including the date on which the whistleblower took the action(s) described, the name of the person or entity to whom the whistleblower directed any report or complaint and contact information for the person or entity, if known, and the complete case name, case number, and forum of any legal action the whistleblower has taken. Use additional sheets, if necessary.

Question 7a: Choose from the following the option that the whistleblower believes best describes the type of financial product or investment at issue, if applicable:

- Commodity futures;
- Options on commodity futures;
- Commodity options;
- Foreign currency transactions;
- Swaps; or
- Other (specify).

Question 7b: Provide the name of the financial product or investment, if applicable.

Question 8: State in detail all the facts pertinent to the alleged violation. Explain why the whistleblower believes the facts described constitute a violation of the Commodity Exchange Act. Use additional sheets, if necessary.

Question 9: Describe all supporting materials in the whistleblower's possession, custody or control, and the availability and location of additional supporting materials not in the whistleblower's possession, custody or control. Use additional sheets, if necessary.

Question 10: Describe how the whistleblower obtained the information that supports the whistleblower's allegation. 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.

Question 11: The whistleblower may use this space to identify any documents or other information in the whistleblower's submission on this Form TCR that the whistleblower believes could reasonably be expected to reveal the whistleblower's identity. 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.

Question 12: Provide any additional information the whistleblower thinks may be relevant.

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 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.

UNITED STATES
COMMODITY FUTURES TRADING COMMISSION
Washington, DC 20581

FORM WB-APP

APPLICATION FOR AWARD FOR ORIGINAL INFORMATION SUBMITTED PURSUANT TO SECTION 23 OF THE COMMODITY EXCHANGE ACT

A. APPLICANT'S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)			
1. Last Name	First	M.I.	Social Security No.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	
B. ATTORNEY'S INFORMATION (IF APPLICABLE – SEE INSTRUCTIONS)			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ 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			

1. Date of Notice of Covered Action to Which Claim Relates ___/___/____	2. Notice Number:
3a. Case Name	3b. Case Number

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 Commodities 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.

Print Name	Print Name
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. The information provided will enable the Commission to determine the whistleblower's eligibility for payment of an award pursuant to Section 23 of the Commodity Exchange Act. 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 in 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.

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 Commodity Futures Trading Commission as follows:

• If a final order imposing monetary sanctions has been entered in a related action at the time the whistleblower submits the whistleblower's claim for an award in connection with a Commission action, the whistleblower must submit the whistleblower's claim for an award in that related action on the same Form WB–APP that the whistleblower uses for the Commission action.

• If a final order imposing monetary sanctions in a related action has not been entered at the time the whistleblower submits the whistleblower's claim for an award in connection with a Commission action, the whistleblower must submit the whistleblower's claim on Form WB–APP within ninety (90) days of the issuance of a final order imposing sanctions in the related action.

• The whistleblower must submit the whistleblower's Form WB–APP to us in one of the following two ways:

○ By mailing or delivering the signed form to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; or

○ By faxing the signed form to (202) XXX–XXXX.

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.

Question 1: Provide the date of the Notice of Covered Action to which this claim relates.

Question 2: Provide the notice number of the Notice of Covered Action.

Question 3a: Provide the case name referenced in Notice of Covered Action.

Question 3b: Provide the case number referenced in Notice of Covered Action.

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 that the whistleblower provided the whistleblower's information to the agency or organization referenced in question E1.

Question 3b: Provide the date on which the agency or organization referenced in question E1 filed the related action that was based upon the information the whistleblower provided.

Question 4a: Provide the case name of the related action.

Question 4b: Provide the case number of the related action.

Section F: Eligibility Requirements and Other Information

Question 1: State whether the whistleblower is currently, or was at the time the whistleblower acquired the original information that 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.

Question 2: State whether the whistleblower provided the information submitted to the CFTC pursuant to a cooperation agreement with the CFTC or with any other agency or organization.

Question 3: State whether the whistleblower acquired the information the whistleblower provided to the CFTC from any individual described in Question 1 through 2 of this Section.

Question 5: If the whistleblower answered ''yes'' to questions 1 though 3 of this Section, please provide details.

Question 5a: 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, 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 5b: If the whistleblower answered ''yes'' to questions 5a, please provide details. Use additional sheets if necessary.

Question 6a: 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 6b: If the whistleblower answered ''yes'' to question 6a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of the whistleblower's point of contact at the agency or organization, if available, and the investigation/case name and number, if applicable. 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

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, 6c, 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.

[43 FR 31886, July 24, 1978, as amended at 46 FR 54535, Nov. 3, 1981; 52 FR 29003, Aug. 5, 1987; 72 FR 63979, Nov. 14, 2007]

§ 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.

[75 FR 55451, Sept. 10, 2010, as amended at 77 FR 66349, Nov. 2, 2012]

§ 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

its business as a Commission registrant.

[48 FR 35304, Aug. 3, 1983]

§ 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, floor 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

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; and

(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 customer and the registrant have agreed in advance to require that all such submissions be included in the proceeding, and if the aggregate monetary value of the counterclaims is capable of calculation.

(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.

[66 FR 42287, Aug. 10, 2001, as amended at 75 FR 55451, Sept. 10, 2010; 77 FR 66349, Nov. 2, 2012]

PART 170—REGISTERED FUTURES ASSOCIATIONS

Subpart A—Standards Governing Commission Review of Applications for Registration as a Futures Association Under Section 17 of the Act

Sec.
170.1 Demonstration of purposes (section 17(b)(1) of the Act).
170.2 Membership restrictions (section 17(b)(2) of the Act).
170.3 Fair and equitable representation of members (section 17(b)(5) of the Act).
170.4 Allocation of dues (section 17(b)(6) of the Act).
170.5 Prevention of fraudulent and manipulative practices (section 17(b)(7) of the Act).
170.6 Disciplinary proceedings (sections 17(b)(8) and (b)(9) of the Act).
170.7 Membership denial (section 17(b)(9) of the Act).
170.8 Settlement of customer disputes (section 17(b)(10) of the Act).
170.9 General standard.
170.10 Proficiency examinations (sections 4p and 17(p) of the Act).

Subpart B—Registration Statement of Futures Associations to be Submitted to the Commission

170.11 Form of registration statement; review of registration statement.
170.12 Delegation of Authority to Director of the Division of Swap Dealer and Intermediary Oversight.

Subpart C—Membership in a Registered Futures Association

170.15 Futures commission merchants.
170.16 Swap dealers and major swap participants.

AUTHORITY: 7 U.S.C. 6p, 12a, and 21, as amended by the Commodity Futures Modernization Act of 2000, appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

SOURCE: 44 FR 20651, Apr. 6, 1979, unless otherwise noted.

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 and rules.

(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:

(a) Take vigorous action against those who engage in activities in violation of association rules;

(b) Conduct proceedings in a manner consistent with the fundamental elements of due process; and

(c) Impose discipline which is fair and has a reasonable basis in fact.

(Approved by the Office of Management and Budget under control number 3038–0022)

[44 FR 20651, Apr. 6, 1979, as amended at 46 FR 63036, Dec. 30, 1981]

§ 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)

[44 FR 20651, Apr. 6, 1979, as amended at 46 FR 63036, Dec. 30, 1981]

§ 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 46 FR 63036, Dec. 30, 1981; 60 FR 49336, Sept. 25, 1995]

§ 170.12 Delegation of Authority to Director of the Division of Swap Dealer and Intermediary Oversight.

The Commission hereby delegates, until the Commission orders otherwise, to the Director of the Division of Swap Dealer 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; 78 FR 22420, Apr. 16, 2013]

Subpart C—Membership in a Registered Futures Association

§ 170.15 Futures commission merchants.

(a) Except as provided in paragraph (b) of this section, each person registered as a futures commission merchant must become and remain a member of at least one futures association that is registered under section 17 of the Act and that provides for the membership therein of such futures commission merchant, unless no such futures association is so registered.

(b) The requirements of paragraph (a) of this section shall not apply to a futures commission merchant registered in accordance with § 3.10(a)(3) of this chapter.

[66 FR 43083, Aug. 17, 2001, as amended at 72 FR 2615, Jan. 22, 2007]

§ 170.16 Swap dealers and major swap participants.

Each person registered as a swap dealer or major swap participant must become and remain a member of at least one futures association that is registered under section 17 of the Act and that provides for the membership therein of such swap dealer or major swap participant, as the case may be, unless no such futures association is so registered.

[77 FR 2629, Jan. 19, 2012]

PART 171—RULES RELATING TO REVIEW OF NATIONAL FUTURES ASSOCIATION DECISIONS IN DISCIPLINARY, MEMBERSHIP DENIAL, REGISTRATION AND MEMBER RESPONSIBILITY ACTIONS

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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

§ 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 Assocaition has acted arbitrarily.

(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.

[55 FR 41068, Oct. 9, 1990, as amended at 70 FR 2352, Jan. 13, 2005; 78 FR 1145, Jan. 8, 2013]

§ 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

that files a Notice of Appearance pursuant to § 171.28 of these rules.

(j) *Person associated with a member* includes any person permitted to register as an associate of a member by the National Futures Association.

(k) *Record of the proceeding* shall include the order appealed from, the findings or report on which the order is based, the pleadings, evidence and proceedings before the National Futures Association decisonmaker and a copy of any rule of the National Futures Association that is material to the order.

(l) *Registration action* includes any proceeding brought by the National Futures Association, pursuant to authority delegated by the Commission, to grant, condition, deny, suspend, restrict, or revoke the registration of any person.

(m) *Rule of the National Futures Association* includes any article of incorporation, bylaw, rule, regulation, resolution or written interpretation of stated policy of the National Futures Association.

§ 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.

[55 FR 41068, Oct. 9, 1990, as amended at 60 FR 49336, Sept. 25, 1995]

§ 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, 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;

(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 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 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)(i) The prohibitions of this section shall begin to apply at the time that a copy of a notice of appeal has been filed with the Proceedings Clerk in accordance with § 171.23 or § 171.44 of this part; or a petition for stay or for an emergency effective date 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 conformed 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.

[55 FR 41068, Oct. 9, 1990, as amended at 60 FR 49336, Sept. 25, 1995; 78 FR 12937, Feb. 26, 2013]

§ 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.

[55 FR 41068, Oct. 9, 1990, as amended at 72 FR 42277, Aug. 2, 2007]

§ 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 contemptuous 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

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.

Subpart B—Notice and Effective Date of Final Decisions in Disciplinary, Membership Denial and Registration Actions

§ 171.20 [Reserved]

§ 171.21 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 struck, 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 seciton, 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 Asssociation. 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 perfect the appeal by filing an appeal brief with the Proceedings Clerk within thirty 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 submitted to the Commission pursuant to this section shall include, in the order indicated:

(1) A statement of the issues presented for review;

(2) A statement of the case. The statement shall indicate briefly the nature of the case and include a full description of the action being challenged. 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 appellant with respect to the issues presented and the reasons supporting those contentions. It shall cite specifically 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 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, rules, regulations or similar materials.

§ 171.26 Answering brief.

(a) *Time for filing answering brief*. Within thirty days after service of the appeal brief, the National Futures Association shall file with the Proceedings Clerk an answering brief.

(b) *Contents of answering brief*. The contents of the answering brief generally shall be consistent with those set forth in § 171.25(b) but may omit a statement of the issues and a statement of the case if the National Futures Association does not dispute the issues or the statement of the case contained in the appeal brief.

(c) *Length of the 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.

§ 171.27 Limited participation by interested persons.

(a) Upon motion of any interested person or, on its own motion, the Commission 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 interest of that person and shall show why participation in the proceeding by that person would serve the public interest. If the Commission determines that participation would serve the public 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, 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.

§ 171.28 Participation by Commission staff.

The Division of Enforcement, the Division of Swap Dealer and Intermediary Oversight and the Division of Clearing and Risk or the Division of Market Oversight may participate in any proceeding by filing a notice of appearance. 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 establish a supplementary briefing schedule for the Commission staff and other parties to the proceeding. If it concludes that participation of the Commission staff will not serve the public interest, the Commission shall prohibit further participation.

[55 FR 41068, Oct. 9, 1990, as amended at 67 FR 62353, Oct. 7, 2002; 78 FR 22420, Apr. 16, 2013]

Subpart C—Commission Review of Final Decisions in Disciplinary, Membership Denial and Registration Actions

§ 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 Swap Dealer and Intermediary Oversight and the Division of Clearing and Risk 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 apropriate, 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.

[55 FR 41068, Oct. 9, 1990, as amended at 67 FR 62353, Oct. 7, 2002; 78 FR 22420, Apr. 16, 2013]

§ 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

the parties. In the event the Commission is equally divided as to its decision, the decision of the National Futures Association shall be affirmed without a Commission opinion.

(b) *Order of summary affirmance.* If the Commission finds that the result reached in the decision of the National Futures Association 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 without opinion. The decision of the National Futures Association 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 not reflect a Commission determination to adopt the rationale of the National Futures Association, and neither the order of summary affirmance nor the underlying order shall serve as Commission precedent in other proceedings.

§ 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

Association on the factual issues relevant to the suspension, restriction or remedial action ordered.

§ 171.41 Petition for a stay of effective date of a member responsibility action pending a hearing by the National Futures Association.

(a) *Time to file.* Within ten days after the National Futures Association serves the notice required by § 171.40, any party aggrieved by the National Futures Association's determination that the member responsibility action should be effective prior to the opportunity for a hearing on the factual issues relevant to the suspension, restriction or remedial action imposed may petition the Commission to stay its effectiveness pending completion of further proceedings by the National Futures Association. The burden of persuasion shall rest with the party seeking the stay.

(b) *Content.* A petition for stay shall meet the content requirements set forth in § 171.22(b)(3).

(c) *Response.* A response may be filed by the National Futures Association in accordance with § 171.22(b)(4).

(d) *Standards for granting petition for stay.* In reviewing petitions to stay the effectiveness of the member responsibility action pending completion of further proceedings, the Commission shall consider:

(1) Whether, in the circumstances presented, the notice and opportunity for a hearing provided by the National Futures Association are consistent with principles of fundamental fairness; and

(2) The likelihood that the denial of the petition would result in irreparable harm to petitioner; and

(3) The effect a grant of the petition would have on the interests of the National Futures Association; and

(4) The effect a grant or denial of the petition would have on the public interest.

(e) If the suspension, restriction or remedial action imposed by the National Futures Assocation 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 action 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.

(f) *Proceedings following Commission disposition.* If the petition for a stay is denied, the National Futures Association shall continue its action in accordance with the applicable rules of the association. If the petition for a stay is granted, the action shall be remanded to the National Futures Association for further proceedings as provided in the Commission's decision. Unless otherwise ordered by the Commission, a stay issued pursuant to this section shall not deprive the National Futures Association of the authority, after conducting a hearing under the appropriate rules of the association, to make the suspension, restriction or remedial action ordered in the member responsibility action immediately effective at the time a final decision is issued.

§ 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.

(b) *Contents of the written notice.* At a minimum, the notice shall provide the following information:

(1) The name 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 § 171.44 as well as their right to seek a stay of the decision pending Commission consideration of their appeal pursuant to § 171.43;

(4) A description of the action taken and the reasons for the action;

(5) Findings of fact and conclusions of law on all issues relevant to its decision;

(6) A determination of the appropriate relief based on the findings and conclusions.

§ 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 aggrived 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.

(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.

§ 171.45 General procedures.

The following procedural rules applicable to review of decisions of the National Futures Association in disciplinary, membership denial and registration actions shall also apply to the review of decisions of the National Futures Association in member responsibility actions:

(a) Section 171.24 Submission of the Record.

(b) Section 171.25 Appeal Brief.

(c) Section 171.26 Answering Brief.

(d) Section 171.27 Limited Participation By Interested Persons.

(e) Section 171.28 Participation By Commission Staff.

(f) Section 171.30 Scope of Review.

(g) Section 171.31 Commission Review In the Absence of An Appeal.

(h) Section 171.32 Oral Argument.

(i) Section 171.33 Final Decision By the Commission.

§ 171.46 Standards of review.

In reviewing the decision of the National Futures Association in a member responsibility action, the Commission shall consider whether:

(a) The proceedings were conducted in a manner consistent with fundamental fairness;

(b) The proceedings were conducted in a manner consistent with the rules of the National Futures Association;

(c) The weight of the evidence supports the findings of the National Futures Association concerning the reasons for the action;

(d) The determination that summary action is necessary to protect the commodity futures markets, customers, or members of the National Futures Association rests on a reasonable interpretation of the NFA rules at issue;

(e) The National Futures Association's application of its rules is consistent with the purposes of the Act;

(f) In light of the findings of the National Futures Association concerning the reasons for the action and the public interest, the suspension, restriction or remedial action imposed by the National Futures Association is not excessive, oppressive or an abuse of discretion.

Subpart E—Delegation of Functions

§ 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.

[55 FR 41068, Oct. 9, 1990, as amended at 64 FR 46271, Aug. 25, 1999; 78 FR 1145, Jan. 8, 2013]

PART 180—PROHIBITION AGAINST MANIPULATION

Sec.

180.1 Prohibition on the employment, or attempted employment, of manipulative and deceptive devices.
180.2 Prohibition on price manipulation.

AUTHORITY: 7 U.S.C. 6c(a), 9, 12(a)(5) and 15, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010); 5 U.S.C. 552 and 552(b), unless otherwise noted.

SOURCE: 76 FR 41410, July 14, 2011, unless otherwise noted.

§ 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.

190.01 Definitions.
190.02 Operation of the debtor's estate subsequent to the filing date and prior to the primary liquidation date.
190.03 Operation of the debtor's estate subsequent to the primary liquidation date.
190.04 Operation of the debtor's estate—general.
190.05 Making and taking delivery on commodity contracts.
190.06 Transfers.
190.07 Calculation of allowed net equity.

190.08 Allocation of property and allowance of claims.
190.09 Member property.
190.10 General.
APPENDIX A TO PART 190—BANKRUPTCY FORMS
APPENDIX B TO PART 190—SPECIAL BANKRUPTCY DISTRIBUTIONS

AUTHORITY: 7 U.S.C. 1a, 2, 4a, 6c, 6d, 6g, 7a, 12, 19, and 24, and 11 U.S.C. 362, 546, 548, 556, and 761–766, unless otherwise noted.

SOURCE: 48 FR 8739, Mar. 1, 1983, unless otherwise noted.

§ 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.

(2)(i) 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 4f(a)(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.

(l) *Customer* shall have the same meaning as that set forth in section 761(9) of the Bankruptcy Code. To the extent not otherwise included, customer shall include the owner of a portfolio margining account carried as a futures account or cleared swaps customer account.

(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 strike price upon exercise, respectively, and such customer takes delivery or exercises the option in accordance with the applicable designated contract market rules.

(5) The cash price tendered for any property deposited prior to the entry of the order for relief 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 date or exercise date, which 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 a delivery or exercise, respectively, and such customer makes delivery or exercises the option in accordance with the applicable contract market rules.

(6) Notwithstanding paragraph (kk)(1) of this section, fully paid, nonexempt 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 a particular customer for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity.

(7) Open commodity contracts transferred in accordance with the provisions of § 190.06.

(8) Except as is otherwise specified in this paragraph (kk), no customer property may be treated as specifically identifiable property.

(9) Notwithstanding any other provision of this paragraph (kk), security futures products, and any money, securities or property held to margin, guarantee or secure such products, or accruing as a result of such products, shall not be considered specifically identifiable property for the purposes of Subchapter IV of the Bankruptcy Code or this part 190, if held in a securities account.

(mm) *Strike price* means the price per unit multiplied by the total number of units at which a person may purchase or sell the physical commodity or the contract of sale of a commodity for future delivery which is the subject of a commodity option.

(nn) *Trustee* means, as appropriate, the trustee in bankruptcy apointed to administer the debtor's estate and any interim or successor trustee.

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

(pp) *Cleared Swap*. This term shall have the same meaning as set forth in § 22.1 of this chapter.

(Secs. 2(a), 4c, 4d, 4g, 5, 5a, 8a, 15, 19 and 20 of the Commodity Exchange Act, as amended by the Futures Trading Act of 1982, Pub. L. 97–444, 96 Stat. 2294 (1983), 7 U.S.C. 2 and 4a, 6c, 6d, 6g, 7, 7a, 12a, 19, 23 and 24 (1976 & Supp. V. 1981 and Pub. L. 97–444); secs. 761–766 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Act Amendments, Pub. L. 97–222, 96 Stat. 235 (1982), 11 U.S.C. 761–766 (Supp. V. 1981 as amended by Pub. L. 97–222))

[48 FR 8739, Mar. 1, 1983; 48 FR 15122 and 15123, Apr. 7, 1983, as amended at 48 FR 28980, June 24, 1983; 49 FR 5541, Feb. 13, 1984, 50 FR 34617, Sept. 6, 1985; 59 FR 5704, Feb. 8, 1994; 66 FR 20745, Apr. 25, 2001; 67 FR 58298, Sept. 13, 2002; 75 FR 17302, Apr. 6, 2010; 77 FR 6378, Feb. 7, 2012; 78 FR 66637, Nov. 6, 2013]

§ 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 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 §1.3 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 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 contact market or swap 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 § 190.04(e)(4): *Provided*, That the trustee must immediately liquidate any account which is in deficit.

(3) *Margin payments by the customer*. The full amount of any margin payment by a customer in response to a margin call under paragraph (g)(2) of this section must be credited to the funded balance of the particular account for which it was made.

[48 FR 8739, Mar. 1, 1983, as amended at 67 FR 58298, Sept. 13, 2002; 77 FR 6378, 6379, Feb. 7, 2012]

§ 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 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 contact 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 contracts are credited. Any customer for which 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 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.

[48 FR 8739, Mar. 1, 1983, as amended at 77 FR 6378, 6380, Feb. 7, 2012]

§ 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 § 1.31 of this chapter by the trustee for the greater of the period required by § 1.31 of this chapter or for a period of one year after the close of the bankruptcy proceeding for which they were compiled.

(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 the 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 § 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

long option contract with value does not expire worthless.

(Secs. 2(a), 4c, 4d, 4g, 5, 5a, 8a, 15, 19 and 20 of the Commodity Exchange Act, as amended by the Futures Trading Act of 1982, Pub. L. 97–444, 96 Stat. 2294 (1983), 7 U.S.C. 2 and 4a, 6c, 6d, 6g, 7, 7a, 12a, 19, 23 and 24 (1976 & Supp. V. 1981 and Pub. L. 97–444); secs. 761–766 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Act Amendments, Pub. L. 97–222, 96 Stat. 235 (1982), 11 U.S.C. 761–766 (Supp. V. 1981 as amended by Pub. L. 97–222))

[48 FR 8739, Mar. 1, 1983, as amended at 48 FR 28980, June 24, 1983; 75 FR 44893, July 30, 2010; 77 FR 6380, Feb. 7, 2012]

§ 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 under § 190.01(kk) (4) and (5) must be distributed pro rata under section 766(h) of the Code.

(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.

(c) *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)(ii).

(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.

(3) If delivery is to be made or taken on behalf of a house account the trustee must either make or take delivery, as the case may be, on behalf of the debtor's estate: *Provided*, That if the trustee, at any time, takes delivery of a physical commodity, the trustee must convert that physical commodity to cash as promptly as possible.

(Secs. 2(a), 4c, 4d, 4g, 5, 5a, 8a, 15, 19 and 20 of the Commodity Exchange Act, as amended by the Futures Trading Act of 1982, Pub. L. 97–444, 96 Stat. 2294 (1983), 7 U.S.C. 2 and 4a, 6c, 6d, 6g, 7, 7a, 12a, 19, 23 and 24 (1976 & Supp. V. 1981 and Pub. L. 97–444); secs. 761–766 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Act Amendments, Pub. L. 97–222, 96 Stat. 235 (1982), 11 U.S.C. 761–766 (Supp. V. 1981 as amended by Pub. L. 97–222))

[48 FR 8739, Mar. 1, 1983, as amended at 48 FR 28980, June 24, 1983; 59 FR 5704, Feb. 8, 1994; 77 FR 6381, Feb. 7, 2012]

§ 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 com-mission 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

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. If any commodity contracts to be transferred in a partial

transfer are part of a spread or straddle, both sides of such spread or straddle must be transferred or neither side may be transferred.

(g) *Prohibition on avoidance of transfers under section 764(b) of the Bankruptcy Code*—(1) *Pre-relief transfers*. Notwithstanding the provisions of paragraph (e) of this section, the following transfers may not be avoided by a trustee:

(i) The transfer of commodity contract accounts prior to the entry of the order for relief in compliance with §1.17(a)(4) of this chapter unless such transfer is disapproved by the Commission; or

(ii) The transfer prior to the order for relief by a public customer, including a transfer by a public customer which is a commodity broker, of commodity contract accounts held from or for the account of such customer by or on behalf of the debtor unless:

(A) The customer acted in collusion with the debtor or its principals to obtain a greater share of the bankrupt estate than that to which it would be entitled in a bankruptcy distribution; or

(B) The transfer is disapproved by the Commission.

(iii) The transfer prior to the order for relief by a clearing organization of one or more accounts held for or on behalf of customers of the debtor, provided that (I) the money, securities, or other property accompanying such transfer did not exceed the funded balance of each account based on available information as of the close of business on the business day immediately preceding such transfer less the value on the date of return or transfer of any property previously returned or transferred thereto, and (II) the transfer is not disapproved by the Commission.

(2) *Post-relief transfers*. On or after the entry of the order for relief, the following transfers to one or more transferees may not be avoided by the trustee:

(i) The transfer of a customer account eligible to be transferred under paragraph (e) or (f) of this section made by the trustee of the commodity broker or by any self-regulatory organization of the commodity broker:

(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.

[48 FR 8739, Mar. 1, 1983; 48 FR 15122 and 15123, Apr. 7, 1983; 58 FR 17505, Apr. 5, 1993; 77 FR 6378, 6381, Feb. 7, 2012]

§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

or on behalf of such customer less any indebtedness of the customer to the debtor. Net equity shall be calculated as follows:

(1) *Step 1—Equity determination.* Determine the equity balance of each customer 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, margin, guarantee, secure, or settle a commodity contract;

(*2*) Except as is otherwise provided in this chapter, the cash proceeds of such cash, or of securities or other property referred to in paragraph (b)(1) of this section held from or for the customer by or for the account of the commodity broker; and

(*3*) Gains realized on trades, and

(B) Subtracting from the result:

(*1*) Losses realized on trades;

(*2*) Disbursements to or on behalf of the customer; and

(*3*) The normal costs attributable to the payment of commissions, brokerage, interest, taxes, storage, transaction fees, insurance and other costs and charges lawfully incurred in connection 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 from the unrealized gain in value of the open commodity contracts held by or for such account. In calculating the ledger balance or open trade balance of any customer, exclude any security futures products, any gains or losses realized on trades in such products, any property received to margin, guarantee or secure such products (including interest thereon or the proceeds thereof), to the extent any of the foregoing are held in a securities account, 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 (aggregation).* 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 prescribe 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 this 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 capacity 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 capacity from accounts held by such guardian, custodian or conservator in its individual 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 capacity from accounts held by such executor 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 decedent, in the name of the decedent's estate, or in the name of the executor or administrator of such estate shall be deemed to be accounts 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 instrument for a purpose other than avoidance of an offset under the regulations 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

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 held in a separate capacity from each other such individual customer account; subject to the provisions of paragraphs (b)(2)(i) through (xii) of this paragraph (b)(2).

(xiv) Accounts held by a customer in separate capacities 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.

(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

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.

[48 FR 8739, Mar. 1, 1983; 48 FR 15122 and 15123, Apr. 7, 1983, as amended at 67 FR 58298, Sept. 13, 2002; 69 FR 41427, July 9, 2004; 75 FR 17303, Apr. 6, 2010; 77 FR 6378, 6381, Feb. 7, 2012]

§ 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

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) To the extent not otherwise included, securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account;

(G) 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)(ii)(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 the net equity claims which are funded for each class remains equal until the percentage of each public customer net equity claim which is funded equals the percentage of each public customer net equity claim which is funded for the account class with the next lowest percentage of funded claims, and so forth, until the percentage of each public customer net equity claim which is funded is equal for all classes of accounts; 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, together with any other disbursements made, or to be made, to such customer, 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 deposit cash with the trustee in an amount equal to the amount by which the equity to be transferred to margin such contract together with any other transfers or returns of specifically identifiable property or disbursements made, or to be made, to such customer, 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 the respect to the customer's net equity claim for such account: and, *Provided further*, That adequate security for the nonrecovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(3) *Distribution in kind of specifically identifiable securities.* If any securities of a customer would have been specifically identifiable under §190.01(kk)(6) if that customer had had no open commodity contracts, the customer may request that the trustee purchase or otherwise obtain the largest whole number of like-kind securities, with a fair market value (inclusive of transaction costs) which does not exceed that portion of such customer's allowed net equity claim that constitutes a claim for securities, if like-kind securities can be purchased in a fair and orderly manner.

(4) *Proof of customer claim.* No distribution shall be made pursuant to paragraphs (d)(1) and (d)(3) of this section prior to receipt of a completed proof of customer claim as described in §190.02(d).

(5) *No differential distributions.* No further disbursements may be made to customers for whom transfers have been made pursuant to §190.06 and paragraph (d)(2) of this section, until a percentage of each net equity claim equivalent to the percentage distributed to such customers is distributed to all public customers. Partial distributions, other than the transfers referred to in §190.06 and paragraph (d)(2) of this section, made prior to the final net equity determination date must be made pursuant to a preliminary plan of distribution approved by the court, upon notice to the parties and to all customers, which plan requires adequate security to the debtor's estate for the nonrecovery of any overpayments by the trustee and distributes an equal percentage of net equity to all public customers.

(6) *Margin payments.* The trustee may make margin payments on behalf of any account which do not exceed the funded balance of that account.

[48 FR 8739, Mar. 1, 1983; 48 FR 15122, Apr. 1, 1983, as amended at 59 FR 17471, Apr. 13, 1994; 67 FR 58298, Sept. 13, 2002; 78 FR 66637, Nov. 6, 2013]

§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) of this chapter, and any Cleared Swaps Proprietary Account, as defined in §22.1 of this chapter: *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, in each case in accordance with the by-laws or rules of the clearing organization, of that portion of:

(1) The net equity claim of the member based on its customer account; and

(2) Any obligations due to the clearing organization which may be paid therefrom, including any obligations

due from the clearing organization to the customers of other members.

[48 FR 8739, Mar. 1, 1983, as amended at 77 FR 6382, Feb. 7, 2012; 78 FR 72524, Dec. 2, 2013]

§ 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 paragarph (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 Risk, 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, after consultation with the Director of the Division of Swap Dealer and Intermediary Oversight, or such member of the Commission's staff under his direction as he may designate, unless exigent circumstances require immediate action precluding such prior consultation, 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 Risk.* (1) Until such time as the Commission orders otherwise, the Commission hereby delegates to the Director of the Division of Clearing and Risk, and to such members of the Commission's staff acting under his direction as he may designate, after consultation with the Director of the Division of Swap Dealer and Intermediary Oversight, or such member of the Commission's staff under his direction as he may designate, unless exigent circumstances require immediate action, 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 Risk 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 Risk 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.

(h) *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.

(Secs. 2(a), 4c, 4d, 4g, 5, 5a, 8a, 15, 19 and 20 of the Commodity Exchange Act, as amended by the Futures Trading Act of 1982, Pub. L. 97–444, 96 Stat. 2294 (1983), 7 U.S.C. 2 and 4a, 6c, 6d, 6g, 7, 7a, 12a, 19, 23 and 24 (1976 & Supp. V. 1981 and Pub. L. 97–444); secs. 761–766 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Act Amendments, Pub. L. 97–222, 96 Stat. 235 (1982), 11 U.S.C. 761–766 (Supp. V. 1981 as amended by Pub. L. 97–222))

[48 FR 8739, Mar. 1, 1983, as amended at 48 FR 28980, June 24, 1983; 58 FR 17505, Apr. 5, 1993; 59 FR 34382, July 5, 1994; 60 FR 49336, Sept. 25, 1995; 63 FR 8571, Feb. 20, 1998; 67 FR 58298, Sept. 13, 2002; 67 FR 62353, Oct. 7, 2002; 77 FR 6378, 6382, Feb. 7, 2012; 78 FR 22420, Apr. 16, 2013]

APPENDIX A TO PART 190—BANKRUPTCY FORMS

BANKRUPTCY APPENDIX FORM 1—OPERATION OF THE DEBTOR'S ESTATE—SCHEDULE OF TRUSTEE'S DUTIES

For the convenience of a prospective trustee, the Commission has constructed an approximate schedule of important duties which the trustee should perform during the early stages of a commodity broker bankruptcy proceeding. The schedule includes duties required by this part, subchapter IV of chapter 7 of the Bankruptcy Code as well as certain practical suggestions, but it is only intended to highlight the more significant duties and is not an exhaustive description of all the trustee's responsibilities. It also

assumes that the commodity broker being liquidated is an FCM. Moreover, it is important to note that the operating facts in a particular bankruptcy proceeding may vary the schedule or obviate the need for any of the particular activities.

ALL CASES

Date of Order for Relief

1. Assure that the commodity broker has notified the Commission, its designated self-regulatory organization (''DSRO'') (if any), and all applicable clearing organizations of which it is a member that a petition or order for relief has been filed (§ 190.02(a)(1)).

2. Attempt to effectuate the transfer of entire customer accounts wherein the commodity contracts are transferred together with the money, securities, or other property margining, guaranteeing, or securing the commodity contracts (hereinafter the ''transfer'').

3. Attempt to estimate shortfall of customer funds segregated pursuant to sections 4d(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 § 190.01(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 (§ 190.04(d)(1)(ii)).

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(f)(1)).

6. Compute estimated funded balance for each customer commodity contract account containing open commodity contracts (§ 190.04(b)) (daily thereafter).

7. Make margin calls if necessary (§ 190.02(g)(1)) (daily thereafter).

8. Liquidate or offset any open commodity contact 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 (§ 190.05).

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 (§ 190.01(ff)).

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 directly 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)(i)(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 (§ 190.03(a)(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 information 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, or 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).

NOTE: The trustee is required to liquidate your property despite the timely receipt of your instructions, money, and proof of claim if, for any reason, your property cannot be returned by (close of business on the 7th calendar day after 2d publication date).

BANKRUPTCY APPENDIX FORM 3—REQUEST FOR INSTRUCTIONS CONCERNING TRANSFER OF YOUR HEDGE CONTRACTS HELD BY (COMMODITY BROKER)

United States Bankruptcy Court ____District of ____In re ____, Debtor, No. ____.

Please take notice: On (date), a petition in bankruptcy was filed by [against] (commodity broker).

You indicated when your hedge account was opened that the commodity contracts in your hedge account should not be liquidated automatically in the event of the bankruptcy of (commodity broker), and that you wished to provide instructions at this time concerning their disposition.

Instructions to transfer your commodity contracts and a cash deposit (as described below) must be received by the trustee by (the 6th calendar day after entry of order for relief) or your commodity contracts will be liquidated.

If you request the transfer of your commodity contracts, prior to their transfer, you must pay the trustee in cash an amount determined by the trustee which will approximate the difference between the value of the equity margining your commodity contracts and your *pro rata* share of the estate plus an amount constituting security for the nonrecovery of any overpayments. In your instructions, you should specify the broker to which you wish your commodity contracts transferred.

Be further advised that prior to receipt of your instructions, circumstances may, in any event, require the trustee to liquidate or transfer your commodity contracts. If your commodity contracts are so transferred and your instructions are received, your instructions will be forwarded to the new broker.

Note also that the trustee is required to liquidate your positions despite the timely receipt of your instructions and money 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 ____, of ____, 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 though 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 (and not described above in items 1–8 of this II, b)].

10. [The account is held in any other capacity not described above in items 1–9 of this II, b. Specify the capacity].

c. The equity, as of the date the petition in bankruptcy was filed, based on the commodity contracts in the account.

d. Whether the person[s] (including a general partnership, limited partnership, corporation, or other type of association) on whose behalf the account is held is one of the following persons OR whether one of the following persons, alone or jointly, owns 10% or more of the account:

1. [If the debtor is an individual—

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; or

E. Corporation of which the debtor is a director, officer, or person in control];

2. [If the debtor is a partnership—

A. Such partnership;

B. General partner in the debtor;

C. Relative (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; or

F. Person in control of the debtor];

3. [If the debtor is a limited partnership—

A. Such limited partnership;

B. A 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; or

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—

Shareholder or member of the debtor which is an officer, director or manager];

6. [An employee of such individual, partnership, limited partnership, corporation or association whose duties include:

A. The management of the business of such individual, partnership, limited partnership, corporation or association or any part thereof;

B. The handling of the trades or customer funds of customers of such individual, partnership, limited partnership, corporation or association;

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 or co-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 out-standing 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 of 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 such 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 three or less days 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 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 futures 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) _____

Penalty for Presenting Fraudulent Claim. Fine 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 1—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 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:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	150	300
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	0	
Shortfall (percent)	0	0	
Distribution	150	150	300

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:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	150	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	0	
Shortfall (percent)	50/150=33.3	0	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	125	125	
Distribution	125	125	250

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:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	100	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	50	
Shortfall (percent)	0	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	125	125	
Distribution	150	100	250

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:

	Non-XM	XM	Total
Funds in 4d(a) segregation	125	100	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	25	50	
Shortfall (percent)	25/150=16.7	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	112.50	112.50	
Distribution	125	100	225

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:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	125	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	25	
Shortfall (percent)	50/150=33.3	25/150=16.7	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	112.50	112.50	
Distribution	112.50	112.50	225

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:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	100	200
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	50	
Shortfall (percent)	50/150=33.3	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	100	100	
Distribution	100	100	200

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:

$$\textit{Shortfall}\ \text{Percentage} = \left(1 - \left[\frac{\textit{Total}\ \text{Customer Assets}}{\textit{Total}\ \text{Customer Claims}}\right]\right)$$

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:

$$\textit{Total}\ \text{Sovereign Loss} \times \frac{\text{Portion of the customer's claim exposed to loss in that location}}{\textit{All}\ \text{portions of customer claims exposed to loss in that location}}$$

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:

$$\textit{Total}\ \text{Sovereign Loss} \times \frac{\text{Portion of the customer's claim exposed to loss in that currency}}{\textit{All}\ \text{portions of customer claims exposed to loss in that currency}}$$

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:

$$\textit{Total}\ \text{Excess Sovereign Loss} \times \left[\frac{\left(\begin{array}{c}\text{This customer's total claim} - \text{The portion of this Customer's claim}\\ \text{required to be kept in U.S. dollars, in the U.S.}\end{array}\right)}{\begin{array}{c}\textit{Total}\ \text{customer claims} - \text{Total of all customer claims}\\ \text{required to be kept in U.S. dollars, in the U.S.}\end{array}}\right]$$

The following examples illustrate the operation of this convention.

Example 1. No shortfall in any location.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	€50	U.K.
C	€50	Germany
D	£300	U.K.

Location	Actual asset balance
U.S.	$50
U.K.	£300
U.K.	€50
Germany	€50

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:

Customer	Claim	Conversion rate	Claim in U.S. dollars
A	$50	1.0	$50
B	€50	1.0	50
C	€50	1.0	50
D	£300	1.5	450
Total			$600.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$50	1.0	$50			$50
U.K.	£300	1.5	450			450
U.K.	€50	1.0	50			50
Germany	€50	1.0	50			50
Total			$600.00		0	$600.00

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:

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action	Claim after all reductions
A	$50	$0	$50
B	50	0	50
C	50	0	50
D	450	0	450
Total	600.00	0.00	600.00

Example 2. Shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	$100	U.S.
B	€50	U.K.
C	€100	U.K., Germany, or Japan

Location	Actual asset balance
U.S.	$50
U.K.	€100
Germany	€50

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 only1/2 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:

Customer	Claim	Conversion rate	Claim in US$
A	$100	1.0	$100
B	€50	1.0	50
C	€100	1.0	100
Total			250.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$50	1.0	$50.00			$50
U.K.	€100	1.0	100			100
Germany	€50	1.0	50			$50
Total			200.00			200.00

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:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$100	$20.00	$80.00
B	50	10.00	40.00
C	100	20.00	80.00
Total	250.00	50.00	200.00

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

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action	Claim after all reductions
A	$80		$80.00
B	40		40.00
C	80		80.00
Total	200.00	0	200.00

Example 3. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action.

Customer	Claim	Location(s) customer has consented to having funds held
A	$150	U.S.
B	€100	U.K.
C	€50	Germany
D	$100	U.S.
D	€100	U.K. or Germany

Location	Actual asset balance
U.S.	$250
U.K.	€50
Germany	€100

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:

Customer	Claim	Conversion rate	Claim in US$
A	$150	1.0	$150
B	€100	1.0	100
C	€50	1.0	50
D	$100	1.0	100
D	€100	1.0	100
Total			500.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$250	1.0	$250			$250
U.K.	€50	1.0	50			50
Germany	€100	1.0	100			100
Total			400.00		0	400.00

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:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$150	$30.00	120.00
B	100	20.00	80.00
C	50	10.00	40.00
D	200	40.00	160.00
Total	500.00	100.00	400.00

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

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action	Claim after all reductions
A	$120.00		$120
B	80.00		80
C	40.00		40
D	160.00	0	160
Total	400.00	0	400

Example 4. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action.

Customer	Claim	Location(s) where customer has consented to have funds held
A	$50	U.S.
B	€50	U.K.
C	€50	Germany
D	$100.	U.S.
D	€100	U.K. or Germany

Location	Actual asset balance
U.S.	$150
U.K.	100
Germany	100

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:

Customer	Claim	Conversion rate	Claim in US$
A	$50	1.0	$50
B	€50	1.0	50
C	€50	1.0	50
D	$100	1.0	100
D	€100	1.0	100
Total			350.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$150	1.0	$150			$150
U.K.	€100	1.0	100			100
Germany	€100	1.0	100	50%	50	50
Total			350.00		50.00	300.00

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:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$50	0	$50.00
B	50	0	50.00
C	50	0	50.00
D	200	0	200.00
Total	350.00	0.00	350.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, only1/2of the funds in Germany are available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$50		
B		$50	
C			$50
D	100		100
Total	150.00	50.00	150.00

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

Customer	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
C	$50/$150	33.3% of $50	$16.67
D	$100/$150	66.7% of $50	33.33
Total			50.00

CLAIMS AFTER REDUCTIONS:

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Claim after all reductions
A	$50		$50
B	50		50
C	50	$16.67	33.33
D	200	33.33	166.67
Total	350.00	50.00	300.00

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.

Customer	Claim	Location(s) customer has consented to having funds held
A	$100	U.S.
B	€50	U.K.
C	€150	Germany
D	$100	U.S.
D	£300	U.K.
D	€150	U.K. or Germany

Location	Actual asset balance
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:

Customer	Claim	Conversion rate	Claim in US$
A	$100	1.0	$100
B	€50	1.0	50
C	€150	1.0	150
D	$100	1.0	100
D	£300	1.5	450
D	€150	1.0	150
Total			1000.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$100	1.0	$100			$100
U.K.	£300	1.5	450			450
U.K.	€200	1.0	200			200
Germany	€150	1.0	150	100%	$150	0
Total			900.00		150.00	750.00

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:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$100	$10.00	$90.00
B	50	5.00	45.00
C	150	15.00	135.00
D	700	70.00	63.00
Total	1000.00	100.00	900.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$100		
B		$50	
C			$150
D	100	450	150
Total	200.00	500.00	300.00

Calculation of the allocation of the shortfall due to sovereign action Germany ($150 shortfall to be allocated):

Customer	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
C	$150/$300	50% of $150	$75
D	150/$300	50% of $150	75
Total			150.00

CLAIMS AFTER REDUCTIONS

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Claim after all reductions
A	$90		$90
B	45		45
C	135	$75	60
D	630	75	555
Total	900.00	150.00	750.00

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

Location	Actual asset balance
U.S.	$200
U.K.	£200
U.K.	€100
Germany	€50
Japan	¥10,000

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:

Customer	Claim	Conversion rate	Claim in US$
A	$50	1.0	$50
B	€50	1.0	50
C	$20	1.0	20
C	€50	1.0	50
D	$100.	1.0	100
D	€300	1.5	450
D	£100	1.0	100
E	$80	1.0	80
E	¥10,000	0.01	100
Total			1000.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$200	1.0	$200			$200
U.K.	£200	1.5	300			300
U.K.	€100	1.0	100			100
Germany	€50	1.0	50	100%	$50	0
Japan	¥10,000	0.01	100	50%	50	50
Total			750		100.00	650.00

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1–750/1000) = (1–75%) = 25%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

Customer	Claim in U.S.$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$50	$12.50	$37.50
B	50	12.50	37.50
C	70	17.50	52.50
D	650	162.50	487.50
E	180	45.00	135.00
Total	1000.00	250.00	750.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany and only1/2of the funds in Japan are available.

Customer	Presumed location of funds			
	U.S.	U.K.	Germany	Japan
A	$50			
B		$50		
C	20		$50	
D	100	450	50	$50
E	80			100
Total	250.00	500.00	100.00	150.00

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

Customer allocation	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
C	$50/$100	50% of $50	$25
D	50/100	50% of 50	25
Total			50

Japan ($50 shortfall to be allocated):

Customer	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
D	$50/$150	33.3% of $50	$16.67
E	100/150	66.6% of 50	33.33
Total			50.00

CLAIMS AFTER REDUCTIONS

Customer	Claim in US dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Allocation of shortfall due to sovereign action from Japan	Claim after all reductions
A	$37.50			37.50
B	37.50			37.50
C	52.50	$25		27.50
D	487.50	25	16.67	445.83
E	135.00		33.33	101.67
Total	750.00	50.00	50.00	650.00

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.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	50	U.S.
B	€50	U.K.
C	€50	Germany.
D	100.	U.S.
D	€100	U.K. or Germany.
E	50	U.S.
E	€50	U.K.

Location	Actual asset balance
U.S.	$250
U.K.	€50
Germany	€200

Conversion Rates: 1 = $1.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$50	1.0	$50
B	50	1.0	50
B	€50	1.0	50
C	€50	1.0	50
D	€100.	1.0	100
D	€100	1.0	100
E	50	1.0	50
E	€50	1.0	50
Total			500.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$250	1.0	$250			$250
U.K.	€50	1.0	50			50
Germany	€200	1.0	200	100%	200	0
Total			500.00		200	300.00

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:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$50	$0	$50.00
B	100	0	100.00
C	50	0	50.00
D	200	0	200.00
E	100	0	100.00
Total	500.00	0.00	500.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$50		
B	50	50	
C			50
D	100		100
E	50	50	
Total	250.00	100.00	150.00

Calculation of the allocation of the shortfall due to sovereign action—Germany ($200 shortfall to be allocated):

Customer	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
C	$50/$150	33.3% of $200	$66.67
D	$100/$150	66.7% of $200	$133.33
Total			$200.000

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.

Actual shortfall	Allocation of shortfall for customer C	Allocation of shortfall for customer D	Total excess shortfall
$200	$50	$100	$50

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.

Customer	Total claims of customers permitting funds to be held outside the U.S.	Portion of claim required to be in the U.S.	Allocation share (column B-C/column B Total—all customer claims in U.S.)	Allocation share of actual total excess shortfall	Actual total excess shortfall allocated
B	$100	$50	$50/$200	25% of $50	$12.50
C	50	0	(1)		0
D	200	100	$100/200	50% of $50	25
E	100	50	50/100	25% of $50	12.50
Total	450.00				50.00

[1]Claim already reduced to $0.

CLAIMS AFTER REDUCTIONS

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action Germany	Allocation of total excess shortfall	Claim after all reductions
A	$50			$50.00
B	100		12.50	87.50
C	50	50		0
D	200	100	25	75.00
E	100		12.50	87.50
Total	500.00	150.00	50.00	300.00

[77 FR 6386, Feb. 7, 2012]

PARTS 191–199 [RESERVED]