COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 37, 38, and 40

RIN 3038–AF28

Provisions Common to Registered Entities

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''Commission'') is proposing to amend the Commission's regulations under the Commodity Exchange Act (''CEA'' or ''Act'') that govern how registered entities submit self-certifications, and requests for approval, of their rules, rule amendments, and new products for trading and clearing, as well as the Commission's review and processing of such submissions. The proposed amendments are intended to clarify, simplify and enhance the utility of those regulations for market participants and the Commission.

DATES: Comments must be received on or before November 6, 2023.

ADDRESSES: You may submit comments, identified by RIN 3038–AF28, by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above. Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act (''FOIA''),[1] a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[2]

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

FOR FURTHER INFORMATION CONTACT: Rachel Kaplan Reicher, Senior Special Counsel, *rreicher@cftc.gov,* 202–418–6233, Steven Benton, Industry Economist, *sbenton@cftc.gov,* 202–418–5617, and Nancy Markowitz, Deputy Director, *nmarkowitz@cftc.gov,* 202–418–5453, Division of Market Oversight, and Eileen Chotiner, *echotiner@cftc.gov,* 202–418–5467, Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

Part 40 of the Commission's regulations implements section 5c(c) of the CEA and sets forth provisions that are common to registered entities, including designated contract markets (''DCMs''), derivatives clearing organizations (''DCOs''), swap execution facilities (''SEFs'') and swap data repositories (''SDRs'').[3] Part 40 establishes requirements and procedures for registered entities to submit their rules and products to the Commission prior to implementing rules, listing products for trading, or accepting products for clearing. Part 40 generally provides two means for registered entities to submit rules and products to the Commission. Typically, a registered entity elects to certify that their product or rule complies with the CEA and the Commission regulations.[4] This process is known as self-certification. Alternatively, a registered entity may seek Commission approval of the product or rule.[5]

The part 40 regulations also provide the Commission's procedures for review (including approval or non-approval) of such product and rule submissions. The part 40 regulations prescribe certain information that must be made publicly available in connection with an application to become a DCM, SEF, DCO or SDR and when registered entities file new products, new rules and rule amendments.[6] Additionally, the regulations include special certification provisions for certain rules submitted by systemically important DCOs (''SIDCOs'').[7]

With two exceptions, the Commission last amended the part 40 regulations in 2011,[8] in connection with implementing various amendments the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') made to the CEA. Based on the Commission's experience applying the part 40 regulations over the ensuing years, the Commission is proposing amendments that are intended to clarify, simplify and enhance the utility of the part 40 regulations for registered entities and the Commission.[9]

[1] 5 U.S.C. 552.

[2] Regulation 145.9. Commission regulations referred to in this release are found at 17 CFR chapter I (2021), and are accessible on the Commission's website at *https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm.*

[3] Section 1a(40) of the CEA defines the term registered entity to include DCMs, DCOs, SEFs and SDRs.

[4] *See* CEA section 5c(c)(1); 17 CFR 40.2 and 40.6. *But see* § 40.4 (requiring that a DCM submit for Commission approval any rule that would materially change a term or condition of a contract for future delivery in an agricultural commodity enumerated in CEA section 1a(9) or of an option on such contract or commodity).

[5] *See* CEA section 5c(c)(1); 17 CFR 40.3 and 40.5.

[6] *See* § 40.8. Regulation § 40.8 is not the subject of this rulemaking.

[7] *See* § 40.10.

[8] Provisions Common to Registered Entities, 76 FR 44776 (July 27, 2011) (the ''2011 Final Rule''). In 2021, the Commission made targeted, conforming amendments to § 40.1(j)(1)(vii) and (j)(2)(vii) (the portion of the definition of ''terms and conditions'' that relates to position limits) to conform this text to reflect the position limits amendments adopted by the Commission at that time. *See* Position Limits for Derivatives, 86 FR 3236 (January 14, 2021). Additionally, in 2015, the Commission removed from § 40.8 and appendix D to part 40 all references to electronic trading facilities on which significant price discovery contracts are traded or executed to reflect the fact that the Dodd-Frank Act eliminated these facilities from the CEA. *See* Repeal of the Exempt Commercial Market and Exempt Board of Trade Exemptions, 80 FR 59575 (October 2, 2015).

[9] As discussed below in note 10, the Commission also proposes to make two conforming, non-substantive changes to update the citations referencing the definition of emergency located in the guidance section regarding Emergency Authority of appendix B for each of parts 37 and 38. Regulation § 40.11 relates to the Commission's review of certain event contracts and is not the subject of this rulemaking.

II. Proposed Amendments

A. Section 40.1—Definitions

1. Formatting Change to § 40.1

Currently, the defined terms in § 40.1 are arranged in alphabetical order, with lettered headers. The Commission proposes to remove the lettered headers and instead arrange the defined terms in § 40.1 solely in alphabetical order,[10] requiring the Commission to make fewer conforming changes to § 40.1 and other regulations when adding or removing defined terms in the future.[11]

2. Non-Substantive Amendments to the Definition of ''Business Day''

The Commission proposes non-substantive changes to the definition of the term ''Business day'' in § 40.1(a). Currently, the definition of the term ''Business day'' in § 40.1(a) uses the term ''business hour'' and defines the term ''business hour'' to mean ''any hour between 8:15 a.m. and 4:45 p.m.'' With the exception of § 40.1(a), the term ''business hour'' is not used in part 40. To enhance the readability of the definition of ''Business day,'' the Commission proposes to delete the definition of the term ''business hour'' and all references to the term ''business hour'' that currently appear in the definition of ''Business day'' in § 40.1(a). As amended, the term ''Business day'' would mean the intraday period of time starting at 8:15 a.m. and ending at 4:45 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect in Washington, DC, on all days except Saturdays, Sundays, and Federal holidays in Washington, DC.[12]

3. Amendments to the Definitions of Dormant Entities

The Commission proposes to amend the definitions of the terms ''Dormant designated contract market,'' ''Dormant derivatives clearing organization,'' ''Dormant swap data repository,'' and ''Dormant swap execution facility'' in current § 40.1(c) through (f). These amendments relate to the duration of inactivity of a registered entity that will result in the registered entity being deemed dormant, and are intended to enhance the clarity and consistency of the relevant regulatory text.

The current definitions in § 40.1(c) and (f) generally provide that a DCM and a SEF, respectively, will become dormant if there is no trading on the entity for a period of approximately 12 months, provided that the entity will not become dormant during the 36-month period following the entity's initial and original designation or registration, respectively. Similarly, the definition in current § 40.1(d) generally provides that a DCO will become dormant if the entity has not accepted an agreement, contract or transaction for clearing for a period of 12 months, provided that the entity will not become dormant during the 36-month period following the entity's initial and original registration. The definition in current § 40.1(e) generally provides that an SDR will become dormant if no data has resided on the entity for a period of approximately 12 months.[13]

The definitions are inconsistent and, in some cases, unclear as to how the applicable 12-month and 36-month periods are determined. In particular, the definitions vary in their use of the terms ''consecutive'' vs ''complete'' calendar months. Additionally, staff have observed that the phrases ''preceding the first day of the most recent calendar month'' and ''preceding the most recent calendar month'' have been a source of uncertainty when calculating whether an entity has become dormant. The Commission has observed that the definitions have been interpreted differently sometimes by registered entities than was intended by the Commission and believes the proposed changes will provide consistency.

To simplify the calculation of how long a registered entity has been inactive and to reduce the potential that market participants may interpret the regulatory language differently, the Commission proposes to amend the regulations to consistently state the time periods in days—*i.e.,* 365 days instead of 12 months, and 1,095 days rather than 36 months.

4. Removal of the Terms ''Dormant Contract or Dormant Product'' and ''Dormant Rule,'' and Related Requirements

Regulation § 40.1(b) defines the term ''Dormant contract or dormant product,'' and § 40.1(g) defines the term ''Dormant rule.'' If a contract or product of a DCM or SEF is dormant pursuant to § 40.1(b), § 40.2(a) prohibits the DCM or SEF from listing the contract or product until the DCM or SEF either self certifies that the contract or product to be listed complies with the CEA and Commission regulations pursuant to § 40.2(a) or obtains Commission approval of the contract or product pursuant to § 40.3. Likewise, under § 40.6(a), a registered entity may not implement a rule that has become dormant unless the registered entity either certifies that the rule complies with the CEA and Commission regulations in accordance with § 40.6(a) or obtains Commission approval of the rule pursuant to § 40.5.

The Commission proposes to remove the terms ''Dormant contract or dormant product'' and ''Dormant rule'' from § 40.1, and the requirements relating to dormant products and dormant rules from §§ 40.2 and 40.6. At the time the Commission adopted the dormant contract definition and the applicable requirements, contract markets were generally required to obtain Commission approval of any new products prior to listing the products. The CEA no longer requires approval of each contract or product listed by an exchange.[14] Rather, an exchange may list a product after self-certifying that the product to be listed complies with the CEA and Commission regulations in accordance with § 40.2. Given this flexibility, exchanges now typically delist a contract that has no open interest before the contract can be considered dormant through self-certification pursuant to § 40.6(a).

In the Commission's experience, registrants have effectively managed the removal of dormant products or rules as appropriate, particularly since the adoption of the self-certification process. Furthermore, while the removal of the term ''dormant product'' would enable a contract that has not been traded for an extended period of time to remain listed, the Commission believes any new trading may not pose concerns regarding market integrity or safety given that a DCM or SEF listing a contract has a continuing obligation to ensure that the contract complies with

[10] The Commission also proposes to make two conforming changes that are necessitated by this proposed change to § 40.1. Specifically, the Commission proposes to update the references to the definition of emergency located in the guidance section regarding Emergency Authority of appendix B for each of parts 37 and 38 such that they reference § 40.1 rather than § 40.1(h). No substance is intended to be changed by these amendments.

[11] The Office of the Federal Register prefers the solely alphabetical approach to definitions sections. *See Document Drafting Handbook, Office of the Federal Register at* 2–27 (Revision 1.4, January 7, 2022).

[12] The Commission is not proposing any substantive changes to the definition of ''Business day.''

[13] Unlike the definitions for a dormant DCM, dormant DCO and dormant SEF in § 40.1(c), (d), and (f), respectively, the dormant SDR definition in § 40.1(e) does not provide a 36-month grace period after the entity's initial and original registration before an SDR may become dormant.

[14] Section 113 of the Commodity Futures Modernization Act of 2000, Appendix E of Public Law 106–554, 114 Stat. 2763 added section 5c(c) to the CEA.

the CEA and Commission's regulations thereunder. In addition, the Commission is unaware of any instances in which the dormancy of a product or rule for an extended period has caused any market or market participant material harm. The Commission preliminarily believes that deleting the definitions would result in little, if any, reduction in market integrity or safety while potentially reducing compliance costs for market participants and oversight costs for the Commission.

Accordingly, the Commission proposes to remove the definitions of ''dormant contract or dormant product'' and ''dormant rule,'' and all references to ''dormant contract or dormant product'' and ''dormant rule'' in the regulations. As discussed above, the Commission will retain its definitions of dormant registered entities, and the rules of a dormant DCM, dormant SEF, dormant DCO, or dormant SDR would need to be approved in connection with the entity being reinstated as a DCM, SEF, DCO or SDR, respectively.[15] Also, products would need to be approved or self-certified in order to be listed for trading by the DCM or SEF offered for clearing by the DCO.[16]

5. Amendment to the Definitions of ''Rule'' and ''Terms and Conditions''

The Commission proposes to add ''margin methodology'' to the definition of ''Rule'' in § 40.1. Prior to 2011, the definition included a restriction on Commission review of rules relating to margin levels, based on section 8a(7) of the Act.[17] After section 736 of the Dodd-Frank Act amended section 8a(7) of the Act to remove the restriction on Commission review of rules relating to margin levels,[18] the Commission removed the restriction from the definition of ''Rule.'' Although DCOs have been submitting margin-related rule changes to the Commission since 2011, in order to provide clarity regarding the requirement to submit changes to margin methodologies, the Commission is proposing to revise the definition of ''Rule'' to include an explicit reference to margin methodology.

The Commission proposes to amend the definition ''Terms and conditions'' by removing the following items from the scope of the definition such that the items to be removed will no longer be treated as terms and conditions. With respect to a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap), the Commission proposes to remove ''Payment or collection of commodity option premiums or margins'' from § 40.1(j)(1)(xi). With respect to a swap, the Commission proposes to remove ''Payment or collection of option premiums or margins'' from § 40.1(j)(2)(xi). Further, the Commission is proposing to add these items to the categories of rules that may be implemented without certification pursuant to § 40.6(d)(2). The Commission preliminarily believes that registered entities should be able to submit rules or rule amendments governing the payment or collection of these premiums or margins through weekly notices to the Commission pursuant to § 40.6(d)(2) as this will lower the burden for registered entities and still provide sufficient notice to the Commission given the fact that these rules and rule amendments governing the payment or collection of these premiums or margins are general in substance.[19]

The Commission requests comment on all aspects of its proposed amendments to § 40.1.

B. Section 40.2—Listing Products for Trading by Certification

1. Proposed Amendments to § 40.2(a)(3)(i) and Appendix D

Regulation § 40.2(a)(3)(i) requires a product certification submission to include a copy of the submission cover sheet in accordance with the instructions in appendix D to part 40. The same requirement is in the part 40 regulations governing the submission of rule certifications and product and rule approval requests. With the development and evolution of the Commission's online portal for the filing of rule and product submissions, the cover sheet information required by appendix D is currently entered by registered entities via the portal and processed and stored in the Commission's online systems, making the cover sheet itself unnecessary.

Accordingly, the Commission proposes to revise § 40.2(a)(3)(i), the analogous provisions in §§ 40.3, 40.5 and 40.6,[20] and appendix D to remove the cover sheet requirement and related references. As proposed, appendix D will continue to specify the information that must be entered by a registered entity as part of the filing process, and the Commission will continue to use such information as part of its processing and review of submissions.

Additionally, the Commission proposes to amend appendix D to require a SEF or DCM when submitting a new product to indicate whether the product is a ''referenced contract'' as such term is defined in § 150.1 and as is described in appendix C to part 150. By way of background, the Commission's amendments to position limits that became effective on March 15, 2021 introduced the term ''referenced contract'' and incorporated the term ''referenced contract'' into the regulatory text that defines the term ''terms and conditions'' in part 40.[21] As

[15] *See, e.g.,* §§ 38.4(a)(2), 37.4(d), and 49.8(b). Similarly, in adopting changes to § 39.4(a) in 2020, the Commission stated that its issuance of an order of registration as a DCO constitutes an approval of the applicant's rules that were submitted as part of the application. 85 FR 4852, Jan. 27, 2020.

[16] *See, e.g.,* §§ 38.4(b), 37.4(d), 40.2, and 40.3.

[17] Prior to the enactment of the CFMA in 2000, section 5a(a)(12)(A) of the Act required that all changes to contract terms and conditions be submitted to the Commission for approval ''except those rules relating to the setting of levels of margin.'' In section 113 of the CFMA, Congress removed section 5a(a)(12)(A) and adopted new section 5c(c), allowing registered entities to amend their rules by self-certification. The new provision did not retain any reference to the exclusion of margin rules. However, section 8a(7) of the Act was not amended by the CFMA except to replace ''contract market'' with ''registered entity'', and retained the provision that allowed the Commission to alter or supplement the rules of a DCO, except for rules related to ''the setting of levels of margin,'' thereby creating uncertainty as to whether registered entities could adopt or change margin rules without certifying those rules to the Commission. Because there was no indication that Congress intended to alter the special status of rules relating to the setting of margin levels, the Commission had resolved this ambiguity by excluding the setting of margin levels, with limited exceptions, from the definition of ''rule'' in Regulation § 40.1(h), as in effect prior to the July 2011 amendments to part 40. Section 8a(7)(D), as amended by the Dodd-Frank Act, now permits the Commission to alter the rules of a DCO with respect to margin requirements, provided, however, that the Commission may not set specific margin amounts. The Commission eliminated the exclusion of the setting of margin levels from the definition of ''rule'' in its 2011 Final Rule.

[18] Specifically, section 8a(7) of the Act provides that the Commission is authorized to alter or supplement rules of a DCO including rules with respect to margin requirements, provided that the rules shall be limited to protecting the financial integrity of the DCO, be designed for risk management purposes to protect the financial integrity of transactions, and not set specific margin amounts.

[19] The Commission notes for clarity that these rules and rule amendments do not include details regarding the models used to calculate the premiums or margins.

[20] Specifically, the analogous provisions are §§ 40.3(a)(2), 40.5(a)(2) and 40.6(a)(7)(i).

[21] *See* 86 FR 3236, 3307 (January 14, 2021) Position Limits for Derivatives (adding the definition of ''referenced contract'' to § 150.1 and incorporating the term referenced contract into § 40.1(j)(1)(vii) and (j)(2)(vii). *See also* Appendix C to Part 150-Guidance Regarding the Definition of Referenced Contract. Generally, the term ''referenced contract'' as used for purposes of Federal position limits in part 150 and as defined in § 150.1 means either a futures contract or an option on a futures contract whose settlement price is determined by reference, directly or indirectly, to the price of one of 25 physically-settled core referenced futures contracts enumerated in § 150.2, or a swap that qualifies as an ''economically

a result, before listing a new contract for trading, a DCM or SEF must determine whether a new contract to be listed is a referenced contract.[22] To facilitate market participants' compliance with position limits, Commission staff maintain a workbook of all the referenced contracts that are listed on DCMs and SEFs. To better enable Commission staff to consider whether new contracts to be listed should be added to the workbook in a timely, efficient manner and to review such submissions, the Commission is proposing to amend appendix D to require a DCM or SEF to indicate as part of the filing process if a contract to be listed is a referenced contract. The identification of new products as referenced contracts as part of the filing process will enable the Commission to more efficiently process and review such submissions.

Finally, as a related matter, the Commission is amending the filing format and manner requirement in §§ 40.2(a)(1), 40.3(a)(1), 40.5(a)(1) and 40.6(a)(1) to remove the reference to the ''Secretary of'' the Commission. The Commission is also proposing to delegate the Commission's authority to specify the format and manner of filing under these regulations to the Directors of the Division of Market Oversight and the Division of Clearing and Risk by adding proposed § 40.7(e).

2. Proposed Amendments to § 40.2(a)(3)(ii)

Currently, the text of §§ 40.2(a)(3)(ii) and 40.3(a)(3) both describe a requirement to submit as part of a self-certification or a voluntary submission for Commission approval, respectively, the rules that set forth a contract's terms and conditions. The two provisions use similar, but slightly different, language.[23] Given that the two provisions use slightly different words, but are both intended to require that the DCM or SEF include a copy of the rules that set forth the contract's terms and conditions, the Commission proposes to amend the text of § 40.2(a)(3)(ii) to mirror the text used in § 40.3(a)(3) so that both provisions use the same language for consistency and avoid any potential misreading that the differences in language between the two provisions are intended to signify a difference in substance.

3. Proposed Amendments to § 40.2(a)(3)(v)

Regulation § 40.2(a)(3)(v) requires a DCM or SEF that self-certifies a product to submit a concise explanation and analysis of the product and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder. Staff primarily bases its analysis of the product on the explanation and analysis the DCM or SEF must provide regarding the product's compliance with the Act and Commission regulations, including analysis of the commodity underlying the product. Staff has observed a trend that new product certifications tend not to include sufficient information on the underlying commodity to enable the Commission to complete its analysis, particularly for contracts on new commodities (*e.g.,* rare earth metals) for which staff may have less prior experience. The Commission notes that a DCM or SEF that provides the information described in appendix C to part 38 that applies to a contract would be sufficient for the Commission to determine the compliance of the contract's terms and conditions with the applicable core principles.[24]

To ensure staff receive adequate information regarding the product and the commodity underlying the product in order to analyze the compliance of self-certified products with the applicable core principles, the Commission proposes the following changes to § 40.2(a)(3)(v). The Commission proposes to amend the text to include references to the ''terms and conditions'' of the product and to ''the underlying commodity'' to clarify the Commission's intent that § 40.2(a)(3)(v) requires an explanation and analysis of the product's underlying commodity, as well as both the product's terms and conditions, and the product's compliance with the applicable provisions of the Act, including core principles, and the Commission's regulations thereunder. The Commission also proposes to add the words ''that is complete with respect to'' the product's terms and conditions, the underlying commodity, and the product's compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder to ensure that, although the explanation be concise, it nevertheless has to include an explanation of how and why the contract's terms and conditions comply with the applicable core principles and relate to the cash market of the underlying commodity.[25]

As noted above, the information described in appendix C to part 38 that applies to a contract would be sufficient for the Commission to determine the compliance of a contract's terms and conditions with the applicable core principles.[26] Appendix C to part 38 provides guidance on the quality standards that should be defined for the underlying commodity in the contract's terms and conditions for a futures contract.[27] The quality standards used should reflect those used in transactions in the commodity in normal cash marketing channels and comply with those industry established standards.[28] Accordingly, to be complete, submissions pursuant to § 40.2(a)(3)(v) should be guided by portions of appendix C to part 38 that apply to the contract being listed.[29]

To improve the understanding of the level of detail expected by the Commission, the discussion below addresses two common categories of contracts and provides two specific product examples that illustrate the level of detail that would meet the ''concise'' and ''complete'' standard to enable the Commission to analyze the compliance of the contract with the applicable core principles.

Generally, when listing a cash settled or physically settled contract on a

equivalent swap'' (as such term is defined in § 150.1) to any of the 25 physically-settled core referenced futures contracts enumerated in § 150.2.

[22] *See* § 40.1(j)(1)(vii) and (j)(2)(vii), and §§ 40.2 and 40.3.

[23] Regulation § 40.2(a)(3)(ii) requires the self-certification to include ''a copy of the product's rules including all rules related to its terms and conditions.'' Regulation 40.3(a)(3) says substantively the same thing, but using different words (requiring the voluntary submission for Commission approval of a product to include ''a copy of the rules that set forth the contract's terms and conditions'').

[24] Appendix C to part 38. Specifically, for the listing of futures contracts, *see* paragraph (a) of appendix C to part 38. For the listing of futures contracts settled by physical delivery, *see* paragraph (b) of appendix C to part 38. For the listing of futures contracts settled by cash delivery, *see* paragraph (c) of appendix C to part 38. For the listing of options on futures contracts, *see* paragraph (d) of appendix C to part 38. For the listing of security futures products, *see* paragraph (e) of appendix C to part 38. For the listing of non-price-based contracts, *see* paragraph (f) of appendix C to part 38. For the listing of swap contracts, *see* paragraph (g) of appendix C to part 38. *See also* Appendix B to part 37 (pointing SEFs to appendix C of part 38 for guidance on how to demonstrate compliance with SEF Core Principle 3 for swaps that are settled by physical delivery or cash settlement).

[25] *See* § 38.252 which provides, among other things, that the DCM must demonstrate for physical delivery contracts that it monitors a contract's terms and conditions as they relate to the underlying commodity market and to the convergence between the contract price and the price of the underlying commodity and show a good-faith effort to resolve conditions that are interfering with convergence.

[26] *See* note 24.

[27] *See* Appendix C to part 38, paragraph (b)(2)(i)(A) for physically-settled contracts and paragraph (c)(4)(i)(A) for cash-settled contracts.

[28] *See id.*

[29] *See* note 24.

commodity, the explanation and analysis the DCM or SEF submits describing the characteristics of the contract's underlying commodity pursuant to § 40.2(a)(3)(v) should include characteristics such as the deliverable commodity's grade, quality and deliverable supply, as applicable, as well as the other applicable requirements described in appendix C to part 38. Appendix C to part 38 provides guidance on the quality standards that should be defined for the underlying commodity in the contract's terms and conditions for a physically-settled futures contract.[30] The quality standards used should reflect those used in transactions in the commodity in normal cash marketing channels and comply with those industry established standards.[31]

As a specific example for a physically settled futures contract, when listing a physically settled futures contract on copper, the DCM should specify the acceptable standard of copper that is eligible for delivery on the physically-settled futures contract.[32] Today, an acceptable quality standard for copper in the cash market is Grade 1 Electrolytic Copper Cathodes (full plate or cut) that conforms to the latest chemical and physical specifications adopted by the American Society for Testing and Materials for Grade 1 Electrolytic Copper Cathode (B115–00 or its latest revision). If a DCM lists a physically settled futures contract on Grade 1 Electrolytic Copper Cathodes, the only quality of copper allowed for delivery at the settlement of the futures contract would be copper of the quality that meets this industry-set standard, and as a result, the price of the futures contract would reflect the price of only this kind of copper.

Throughout the life of the futures contract up until the time of expiration, copper located in a DCM-approved warehouse of the quality specified in the contract would be eligible to be warranted by the warehouse for delivery on the contract. The price of the physical copper (Grade 1 Electrolytic Copper Cathode) to which the futures contract settles and the price of the physically settled futures contract on Grade 1 Electrolytic Copper Cathode should match—or converge—at the expiration date. The convergence demonstrates that the futures contract accurately reflects the cash price of the underlying commodity and compliance with DCM Core Principle 3 (that the contract is not readily susceptible to manipulation).

Similarly, when listing a cash-settled contract based on an excluded commodity, the explanation and analysis the DCM or SEF submits describing the characteristics of the contract's underlying commodity should include characteristics such as the rate, index methodology, and pricing source, as applicable, as well as other applicable characteristics described in appendix C to part 38.[33] Appendix C to part 38 provides guidance on the cash settlement price calculation for a cash-settled futures contract.[34] Appendix C provides that the cash-settlement price series used by a DCM or SEF to settle a cash settled contract should be reflective of the underlying cash-market of the commodity, publicly available, timely and reliable.[35] The DCM or SEF should include this information in its explanation of how the product complies with the applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.

As a specific product example for a cash-settled excluded commodity, when listing a cash-settled futures contract on a stock index price series, such as the S&P 500 (a stock index of large capitalization stocks listed on U.S. stock exchanges), the DCM should specify how the cash settlement price based on the S&P 500 Index is reflective of the underlying cash-market, reliable, publicly available and timely.[36] The DCM should describe how the S&P 500 Index price series is reflective of the underlying cash market of domestic large capitalization stocks by describing the methodology for constructing and maintaining the S&P 500 Index. The DCM should describe how the S&P 500 Index is considered by industry as an accurate and reliable index of large capitalization stocks by describing how the index is used as a benchmark for measuring the movements of the U.S. stock exchanges. The DCM should describe how frequently the index is calculated and where it is disseminated to the market place to describe how the index is publicly available and timely.

The Commission requests comment on all aspects of its proposed amendments to § 40.2.

C. Section 40.3—Voluntary Submission of New Products for Commission Review and Approval

1. Proposed Amendments to § 40.3(a)(4)

Regulation § 40.3(a)(4) requires that when a DCM, SEF or DCO voluntarily submits a new product for Commission review and approval prior to its listing for trading or accepting the product for clearing, the DCM, SEF or DCO must send the Commission an explanation and analysis of the product and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder. Currently, staff relies primarily on the explanation and analysis provided pursuant to this requirement to analyze the compliance of a product submitted for review and approval by the Commission, including the explanation and analysis of the commodity underlying the product. The Commission proposes to amend § 40.3(a)(4) to clarify that by ''product'', the regulation requires an explanation and analysis ''that is complete with respect to'' the product's terms and conditions, the underlying commodity and the product's compliance with the applicable provisions of the Act and Commission regulations thereunder.[37] This amendment is intended to ensure the Commission receives adequate information regarding the product and the commodity underlying the product to analyze the compliance of the product submitted for voluntary Commission review and approval.

2. Proposed Amendments to § 40.3(a)(10)

Currently, § 40.3(a)(10) provides that when a registered entity voluntarily submits a contract for Commission approval, Commission staff may request additional evidence, information or data to demonstrate that the contract meets, initially or on a continuing basis, the

[30] Appendix C to part 38, paragraph (b)(2)(i)(A).

[31] *See id.* Appendix C also provides that regardless of the type of commodity underlying the contract, the DCM or SEF's explanation and analysis should describe the cash market for the underlying commodity and how the contract's terms and conditions: reflect the cash market transactions in the underlying commodity; meet the risk management needs of prospective users; and promote price discovery of the underlying commodity. Appendix C to part 38, paragraph (a).

[32] *See* Appendix C to part 38, paragraph (b)(2)(i)(A). When listing a cash settled futures contract on copper, the DCM should specify the acceptable standard of copper that underlies the cash price series or the physically-settled futures referenced price used for cash settlement purposes. *See* Appendix C to part 38, paragraph (c)(4)(i)(A).

[33] *See* Appendix C to part 38, paragraphs (a) and (c).

[34] For example, when listing a cash settled futures contract on the S&P 500 Index, the DCM's contract specifications should describe the index and its methodology.

[35] *See* Appendix C to part 38, paragraphs (a) and (c).

[36] Appendix C to part 38, paragraphs (c)(3)(iv) and (v).

[37] While the Commission proposes to include the word ''complete,'' the Commission notes that the ''explanation and analysis'' requirement in proposed § 40.3(a)(4) does not include the qualifier that the submission be ''concise'' for the same reasons discussed below in note 47.

requirements of the Act, or other requirement for designation or registration under the Act, or the Commission's regulations or policies thereunder. Upon such request, the registered entity must provide the requested additional evidence, information or data by the open of business two business days after the date staff made such request, or at the conclusion of such extended period agreed to by Commission staff after timely receipt of a written request from the registered entity.

The Commission proposes to remove the two business day deadline from § 40.3(a)(10) and replace it with ''the time specified by the Commission staff'' to reflect the fact that the two business day deadline is often not practical and that the amount of time the registered entity needs to respond depends on the nature and scope of the requested information.

3. Proposed Amendments to § 40.3(c), (d) and (f)

The Commission proposes to reorganize paragraphs (c) and (d) of § 40.3, which address the Commission's review and determination (*i.e.,* approval or non-approval) of products submitted for Commission approval. More specifically, to enhance the readability of § 40.3(c), the Commission proposes to reorganize § 40.3 so that all of the provisions that may affect the length of the review period of a product submitted for Commission approval pursuant to § 40.3 appear together in § 40.3(c).[38] The Commission proposes to reorganize § 40.3(d) to address the Commission's determination, including: approval through the passage of the applicable review period; and non-approval.

Currently, § 40.3(c) provides that all products submitted for Commission approval under § 40.3(c) shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of an extended period as provided under § 40.3(d), ''unless notified otherwise within the applicable period;'' provided that the conditions set forth in § 40.3(c)(1) and (2) are satisfied. The Commission proposes to amend the text of the introductory paragraph in § 40.3(c) (which the Commission proposes to move to § 40.3(d)(1)) to clarify that the phrase ''unless notified otherwise within the applicable period'' (which provides a vague reference to the notification involved) means unless the Commission issues a notice of non-approval to the registered entity under paragraph (d)(2) of § 40.3 within the applicable review period.

In addition, the Commission is proposing to amend the condition in § 40.3(c)(2) (which the Commission proposes to move to § 40.3(c)(4)) that must be met for the deemed approval to be effective. Regulation § 40.3(c)(2) currently requires that the submitting entity does not amend the terms or conditions of the product or supplement the request for approval, except as requested by the Commission or for correction of typographical errors, renumbering or other non-substantive revisions, during that period. Any voluntary, substantive amendment by the submitting entity will be treated as a new submission under § 40.3(c)(2). The Commission proposes to amend this condition by removing the phrase, except as requested by the Commission, and the reference to voluntary in the next sentence and by adding text that states that an amendment or supplementation requested by the Commission will be treated as a new submission under § 40.3 and will restart the review period of the submission. As amended, any substantive amendment to the terms or conditions of the product or supplementation to the request for product approval, including any substantive amendment requested by the Commission or any other substantive amendment made voluntarily by the submitting entity, will be treated as a new submission under § 40.3 and will restart the review period of the submission.[39] The Commission believes these proposed amendments are necessary to better ensure the Commission has sufficient time to review substantive changes to requests for product approval.

The Commission also proposes to amend § 40.3(d)(1) (which the Commission proposes to move to § 40.3(c)(2)) to provide that the Commission may extend the request for a product approval if the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner. The Commission has the authority to extend their review of a rule approval request submission under current § 40.5(d)(1) if the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner[40] and the Commission believes the same ability for reviews of product approval request submissions under § 40.3 would better enable the Commission to review products when requested by registered entities.

The Commission proposes to add § 40.3(c)(5) to extend the review period under proposed § 40.3(c)(1) when the review period would end on a day that is not a business day to instead end on the next business day,[41] and to revise current § 40.3(d)(1), proposed to be redesignated as § 40.3(c)(2), to permit an additional extension of *up to* 45 days. By way of background, § 40.3(d)(1) (which the Commission proposes moving to § 40.3(c)(2)) provides that the Commission may extend the review period for an additional 45 days if the product raises novel or complex issues that require additional time for analysis. Under current § 40.3(c) and (d)(1), the initial 45-day review period and the 45-day extended review period do not exceed the 90 days permitted by section 5c(c)(4)(C) of the CEA,[42] absent agreement by the requestor to a further extension.[43] To ensure that the total review period will not extend beyond 90 days after the request is submitted, the Commission proposes to change the extended review period under § 40.3(d)(1) from ''an additional 45 days'' to ''up to an additional 45 days'' in proposed § 40.3(c)(2). For example, if the end of the initial 45-day review period would fall on a Saturday, and is

[38] The Commission proposes these changes to enhance readability and address some confusion regarding the § 40.3 process. The Commission also proposes changes to reorganize § 40.5 to enhance readability and, in general, is proposing parallel structural changes to §§ 40.3 and 40.5 for consistency.

[39] One example of a substantive amendment would be changes in the delivery grade or characteristics of the underlying commodity for a physically settled contract that may affect estimated deliverable supply and thus position limits for the contract. Another example would be a change in the price reference series of a new cash-settled contract that settles to a Price Reporting Agency source (''PRA''). Most PRAs have various series on the same commodity that differ from each other depending on characteristics such as geographical location of commodity transaction or commodity quality characteristics. PRA methodologies for the same commodity can differ between PRAs. If an amendment changes a PRA as the source, the underlying methodology for the price series would need to be examined to determine if it is not readily susceptible to manipulation.

[40] Under current § 40.5(d)(1), the timely manner standard is dependent upon the facts and circumstances. The Commission proposes the same timely manner standard for § 40.3(d)(1).

[41] The Commission proposes to revise the heading of § 40.3(c) from ''Forty-five day review'' to ''Commission review'' to reflect the fact that the review period may be extended beyond forty-five days due to adjustments so that the review period ends on a business day.

[42] The relevant portions of section 5c(c)(4)(C) of the Act provide that the Commission shall take final action on the request not later than 90 days after submission of the request, unless the person submitting the request agrees to an extension of the time limitation established under paragraph (c)(4)(C).

[43] Because an extension to which a registered entity may agree under proposed § 40.3(c)(3) is not required to be a specified number of days, Commission staff can ensure that the extended period ends on a business day.

extended by proposed § 40.3(c)(5) to Monday, the next business day, for a total of 47 days, any additional extension under proposed § 40.3(c)(2) could not exceed 43 days (47 + 43 = 90).

The Commission also proposes to make explicit in proposed § 40.3(c)(3) that the Commission may at any time extend its review period for any period of time, provided that it does so with the written agreement of the registered entity.[44]

Additionally, the Commission is proposing to amend § 40.3(f)(1) (which the Commission proposes to move to § 40.3(e)(1)). Current § 40.3(f)(1) provides that notification to a registered entity under paragraph (e) of § 40.3 of the Commission's determination not to approve a product does not prejudice the entity from subsequently submitting a revised version of the product for Commission approval or from submitting the product as initially proposed pursuant to a supplemented submission. The Commission believes that amending the text by replacing the word ''prejudice'' with ''prevent'', replacing the words ''pursuant to'' with ''in'', adding the phrase ''the revised or supplemented submission will be reviewed without prejudice'' at the end, and inserting two commas will help avoid any confusion as to the effect of the non-approval. Also, the changes to the paragraph would improve consistency with §§ 40.5(e)(1) and 40.6(c)(5)(i).

Finally, the Commission proposes to amend § 40.3(f)(2) (which the Commission proposes to move to § 40.3(e)(2)). Currently, the section provides that notification to a registered entity under paragraph (e) of § 40.3 of the Commission's refusal to approve a product shall be presumptive evidence that the entity may not truthfully certify under § 40.2 that the same, or substantially the same, product does not violate the Act or the Commission's regulations thereunder. The Commission believes that amending the text by replacing the words ''refusal'' with ''determination not''—as well as replacing the words ''does not violate the Act'' with ''complies with the Act''—will have the effect of increasing clarity and provide consistency with §§ 40.2(a)(3)(iv) and 40.5(f)(2) (which the Commission proposes to be redesignated as § 40.5(e)(2)).

The Commission requests comment on all aspects of its proposed amendments to § 40.3.

D. Section 40.4—Amendments to Terms or Conditions of Enumerated Agricultural Products

1. Clarification Regarding Scope of § 40.4(a) and Materiality Under § 40.4

Regulation § 40.4(a) requires a DCM to submit rule changes that would materially change a term or condition of a contract on an agricultural product enumerated in section 1a(9) of the CEA with open interest for Commission approval under the procedures of § 40.5. The Commission notes that § 40.4(a) applies strictly to rules that materially change a product's economic terms and conditions, and does not apply to other rules. To ensure this is clear, the Commission proposes to add the word ''product's'' to the text of § 40.4(a) to modify ''term or condition'' as used therein and to replace the words ''should not be submitted under this section'' with the words ''are not required by this section to be submitted for Commission approval under the procedures of § 40.5.''

By way of background, when a registered entity submits a change to any terms or conditions of a contract on an agricultural product enumerated in section 1a(9) of the CEA with open interest, the DCM's assessment of materiality affects whether the registered entity submits the change for Commission approval under § 40.5 (as is required for material changes). A DCM may file a change that falls within any of the four types of discrete changes that the Commission enumerates in § 40.4(b)(1) through (4) through self-certification or notice filing, as applicable.[45] For any other rule that the DCM believes to be non-material, § 40.4(b)(5) sets forth a process for the DCM to implement the change through self-certification pursuant to § 40.6(a). In order for a DCM to self-certify the change, § 40.4(b)(5) requires the DCM to make a non-materiality filing and explain why it considers the rule change to be ''non-material.''

To assist a DCM in assessing and explaining whether a change to the terms and conditions of a contract on an agricultural product enumerated in section 1a(9) of the CEA that has open interest is a material change (and thus should be filed under § 40.5 pursuant to § 40.4(a)) or is non-material (and thus can be implemented through the § 40.6(a) self-certification process in accordance with § 40.4(b)(5)), the Commission proposes to add an appendix E to part 40 and to include therein the criteria that the Commission generally considers as evidence that an enumerated agricultural product rule change is non-material under § 40.4(b)(5). Specifically, proposed appendix E to part 40 provides that a non-material change: should not affect a reasonable trader's decision to enter into, or maintain, a position; should not affect a reasonable trader's decision to make or take delivery on the contract or to exercise an option on the contract; and should not have an effect on the value of existing positions, including, but not limited to, a change affecting the price of the contract due to a change in the commodity quality characteristics of the existing contract, a change to the size of the existing contract, or a change to a cost of effecting delivery for the existing contract.

2. Proposed Amendments to § 40.4(b)

The Commission proposes amendments to § 40.4(b)(1) through (5) to enhance the readability, consistency and clarity of this regulatory text. Specifically, the Commission proposes to clarify that the intent of § 40.4(b) is that the rules and rule amendments identified as non-material need not be submitted for Commission approval under the procedures of § 40.5 by replacing the text stating that the rules and rule amendments enumerated in § 40.4(b) as not material ''should not be submitted under this section'' with text stating that such rules and rule amendments ''are not required by this section to be submitted for Commission approval under the procedures of § 40.5.'' The Commission also proposes to replace the word ''changes'' in each of § 40.4(b)(1) through (4) with ''rules or rule amendments'' so that the text of paragraphs (b)(1) through (4) use the same language as the text used in the introductory paragraph of § 40.4(b). Additionally, the Commission proposes to replace the word ''if'' in each of § 40.4(b)(1), (3) and (4) with the words ''provided that they are'' to clarify (and address confusion) that the implementation specified in the applicable paragraph (§ 40.4(b)(1), (3) and (4)) is a condition that must be satisfied in order to rely upon § 40.4(b)(1), (3) or (4), as applicable. None of these amendments are intended to alter the substance of § 40.4.

The Commission proposes to remove the reference to ''changes in no cancellation ranges'' in § 40.4(b)(3). As discussed below in section II.E.4, the

[44] Current § 40.3(d)(2) provides the Commission with authority to extend the review period with the written agreement of the registered entity. The proposed amendment in § 40.3(c)(3) would ensure it is clear that the authority also applies during any extended review period.

[45] Given that the Commission states specifically in § 40.4(b)(1) through (4) that the changes covered therein are not material, a DCM filing a change under § 40.4(b)(1) through (4) does not need to file a non-materiality explanation.

Commission proposes to amend § 40.6(d) to allow a registered entity to file rules and rule amendments governing changes in no cancellation ranges pursuant to the notification procedures of § 40.6(d). By filing rules and rule amendments governing no cancellation ranges pursuant to the notification procedures of § 40.6(d), such rules and rule amendments would be non-material pursuant to § 40.4(b)(1), making the current reference to ''changes in no cancellation ranges'' in § 40.4(b)(3) redundant and unnecessary.

Additionally, to enhance readability of § 40.4(b)(5), the Commission proposes to move from § 40.4(b)(5)(iii) to § 40.4(b)(5)(i) the text requiring that a rule or rule amendment filed under § 40.4(b)(5) be submitted pursuant to the procedures of § 40.6(a), and to delete redundant text in § 40.4(b)(5)(iii). The Commission proposes to add text to § 40.4(b)(5)(ii) to provide that when a DCM provides an explanation as to why it considers the rule ''non-material,'' the DCM shall, if applicable, include a previously approved rule or rule amendment that is, in substance, the same as the current non-material rule or rule amendment. The Commission believes the copy of the previously approved rule or rule amendment would provide market participants with context and background that would be helpful information in understanding the current rule or rule amendment and why it is non-material.

The Commission requests comment on all aspects of its proposed amendments to § 40.4.

E. Section 40.5—Voluntary Submission of Rules for Commission Review and Approval

1. Reorganization and Clarification of § 40.5

The Commission proposes to reorganize and clarify § 40.5, which addresses the submission by registered entities of requests for Commission approval of new rules and rule amendments and the Commission's review of such rules and rule amendments. Under the proposed amendments, paragraphs (a) and (b) of § 40.5 would remain largely unchanged, with the exception of conforming amendments previously discussed,[46] as well as the following two changes.

The Commission proposes to clarify that § 40.5(a)(5) requires an explanation and analysis ''that is complete with respect to'' the proposed rule changes for the same reasons the language regarding completeness is being proposed in §§ 40.2(a)(3)(v), 40.3(a)(4), and 40.6(a)(7)(v).[47]

Currently, § 40.5(a)(6) provides that the registered entity shall certify that it posted a notice of the ''pending rule with the Commission.'' To clarify that the ''pending rule'' is intended to mean the registered entity's request for approval, the Commission proposes to amend the text of § 40.5(a)(6) to replace the words ''pending rule with the Commission'' with the words ''a notice of its request for Commission approval of the new rule or rule amendment''. The proposed language would also use language that is consistent with § 40.3(a)(9).[48]

The Commission proposes to reorganize paragraphs (c) and (d) of § 40.5, which address the Commission's review and determination (*i.e.,* approval or non-approval) of new rules and rule amendments. More specifically, to enhance the readability of § 40.5(c), the Commission proposes to reorganize § 40.5 so that all of the provisions that may affect the length of the review period of a rule submitted for Commission approval pursuant to § 40.5 appear together in § 40.5(c)—with the exception of expedited approval (which the Commission proposes to move to § 40.5(d)(2)).[49] The Commission proposes to add § 40.5(c)(6) to extend the review period under proposed § 40.5(c)(1)[50] when the review period would end on a day that is not a business day to instead end on the next business day,[51] and to revise current § 40.5(d)(1), proposed to be redesignated as § 40.5(c)(2), to permit an additional extension of *up to* 45 days.

By way of background, § 40.5(d)(1) (which the Commission proposes moving to § 40.5(c)(2)) provides that the Commission may extend the review period for an additional 45 days if the proposed rule raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner. Under current § 40.5(c) and (d)(1), the initial 45-day review period and the 45-day extended review period do not exceed the 90 days permitted by section 5c(c)(4)(C) of the CEA, absent agreement by the requestor to a further extension. To ensure that the total review period will not extend beyond 90 days after the request is submitted, the Commission proposes to change the extended review period under § 40.5(c)(2) from ''an additional 45 days'' to ''up to an additional 45 days.'' For example, if the end of the initial 45-day review period would fall on a Saturday, and is extended by proposed § 40.5(c)(6) to Monday, the next business day, for a total of 47 days, any additional extension under proposed § 40.5(c)(2) could not exceed 43 days (47 + 43 = 90).

The other changes to the regulatory text in proposed § 40.5(c) are non-substantive and are not intended to alter the length of time the Commission will review a rule submitted for Commission approval under § 40.5(a).[52] As part of these non-substantive amendments, the Commission proposes to make explicit in proposed § 40.5(c)(3) that the Commission may at any time extend its review period for any period of time, provided that it does so with the written agreement of the registered entity.[53]

The Commission proposes to reorganize § 40.5(d) to address the Commission's determination, including: approval through the passage of the applicable review period; expedited approval; and non-approval. Current § 40.5(g), which addresses expedited approval of a proposed rule or rule amendment, would be redesignated as

[46] The amendments include the removal of references to a cover sheet, dormant rules, and submission to the Secretary of the Commission.

[47] While the Commission proposes to include the word ''complete,'' the Commission notes that the ''explanation and analysis'' requirement in proposed § 40.5(a)(5) does not include the qualifier that the submission be ''concise.'' *See* the 2011 Final Rule at 44782 (explaining that the ''explanation and analysis'' requirement in final § 40.5(a)(5) does not include the qualifier that the submission be ''concise.'' The Commission requires registered entities to provide a more detailed explanation and analysis of rules voluntarily submitted for Commission approval under the provisions of § 40.5.).

[48] The Commission also proposes to eliminate the word ''which'' from the second sentence of § 40.5(a)(6) to improve clarity and readability.

[49] The Commission proposes these changes to enhance readability and address some confusion regarding the § 40.5 process. Changes to proposed § 40.5(d)(2) are discussed below.

[50] Because an extension to which a registered entity may agree under § 40.5(c)(3) is not required to be a specified number of days, Commission staff can ensure that the extended period ends on a business day.

[51] The Commission proposes to revise the heading of § 40.5(c) from ''Forty-five- day review'' to ''Commission review'' to reflect the fact that the review period may be extended beyond forty-five days due to adjustments so that the review period ends on a business day.

[52] The Commission proposes to add descriptive language into § 40.5(c)(5) to provide the reader with context to better understand the interaction of the provisions in proposed §§ 40.4(b)(5) and 40.5(c)(5). The descriptive language added to § 40.5(c)(5) is consistent with current § 40.5(c)(2). For a discussion of the materiality determination under § 40.4(b)(5), see section II.D above.

[53] Current § 40.5(d)(2) provides the Commission authority to extend the review period with the written agreement of the registered entity. The proposed amendment in § 40.5(c)(3) would ensure it is clear that the authority also applies during any extended review period.

§ 40.5(d)(2) and amended to remove the limitations that: expedited approval may be used only for ''changes to'' a proposed rule or a rule amendment; and the changes to the proposed rule or rule amendment may only be approved through expedited approval if they are consistent with ''standards approved or established by the Commission.'' The Commission believes that the quoted text that these amendments will remove is not necessary or could be misconstrued in connection with the ability of the Commission to approve proposed rules and rule amendments that are consistent with the CEA and Commission regulations on an expedited basis.[54] Current § 40.5(f), which addresses the impact of non-approval, would be redesignated as § 40.5(e).

The current text of § 40.5(f)(1) (proposed to be redesignated as § 40.5(e)(1)) provides that notification to a registered entity under paragraph (d)(3) of § 40.5 does not prevent the registered entity from subsequently submitting a revised version of a proposed rule or rule amendment for Commission review and approval, or from submitting the new rule or rule amendment as initially proposed in a supplemented submission, and that the revised submission will be reviewed without prejudice. To clarify that notification to a registered entity under paragraph (d)(3) means a notification of non-approval by the Commission, the Commission proposes to amend the text of § 40.5(f)(1) to include ''of the Commission's determination not to approve a new rule or rule amendment''. The Commission also proposes to add the words ''or supplemented'' to the text to clarify that supplemented submissions are reviewed without prejudice.[55] The Commission believes this will help avoid any potential confusion and make the section more consistent with § 40.5(f)(2) (proposed to be redesignated as § 40.5(e)(2)).

Current § 40.5(f)(2) (proposed to be redesignated as § 40.5(e)(2)) provides that notification to a registered entity under paragraph (d)(3) of § 40.5 of the Commission's determination not to approve a proposed rule or rule amendment is presumptive evidence that the entity may not truthfully certify the same, or substantially the same, proposed rule or rule amendment under § 40.6(a). To clarify that certification under § 40.6(a) is referring to the certification that the rule or rule amendment complies with the CEA and the Commission's regulations, the Commission proposes to amend the text of § 40.5(f)(2) to add ''complies with the Act and the Commission's regulations thereunder'' and move the reference to § 40.6(a) to earlier in the text. The Commission believes these changes will enhance clarity and improve context.[56]

The Commission requests comment on all aspects of its proposed amendments to § 40.5.

F. Section 40.6—Self-Certification of Rules

1. Proposed Amendments to 40.6(a)

Regulation § 40.6(a) sets forth the submission requirements for rule certifications under CEA section 5c(c)(1). The Commission proposes various non-substantive amendments to § 40.6(a) to enhance its clarity. The proposed non-substantive amendments include: revising the introductory text of § 40.6(a), including the heading, to better reflect the content of the regulation; moving the requirements for delisting of products with no open interest from the introductory text to a new § 40.6(a)(9); and revising the heading and ordering of § 40.6(a)(6) to better reflect its purposes.[57] The Commission also proposes to remove references to dormant rules, the submission cover sheet, and the Secretary of the Commission, as previously discussed, and to correct the reference to the statutory definition of the term commodity in § 40.6(a)(5) from ''section 1a(4) of the Act'' to ''section 1a(9) of the Act.''

The Commission proposes to replace the word ''of'' in current § 40.6(a)(7)(v) with the words ''that is complete with respect to.'' This condition would then read as shown in the proposed revised text of § 40.6(a)(7)(v) presented in this Notice of Proposed Rulemaking. The Commission has previously explained that like the explanation and analysis required for new product submissions, the explanation and analysis of certified rules or rule amendments should be a clear and informative—but not necessarily lengthy—discussion of the submission, the factors leading to the adoption of the rule or rule amendment, and the expected impact of the rule or rule amendment on the public and market participants.[58] Similar to the discussion above in section II.B.3 regarding the level of detail in the explanation and analysis provided in new contract submissions, the Commission has found that some new rule submissions, while being concise, have not provided sufficient detail for staff to evaluate compliance of the proposed rule. Adding the words ''that is complete with respect to'' to current § 40.6(a)(7)(v) is intended to add more direction to submitters that, while the required explanation be concise, it must also be sufficiently comprehensive to address the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations.

As set forth in the current introductory text to § 40.6(a), the delisting or withdrawal of the certification of a product with no open interest must comply with the submission and certification requirements in § 40.6(a)(1) and (2) and § 40.6(a)(7). The Commission proposes to move this provision from the introductory paragraph of § 40.6(a) to new § 40.6(a)(9) to enhance the readability of § 40.6(a) and clarify the provision. Specifically, proposed new § 40.6(a)(9)would explicitly state that a new rule or a rule amendment that delists, or withdraws the certification of, a product with no open interest may become effective immediately upon the filing of the submission, provided that the submission is made in compliance with § 40.6(a)(1) and (2) and § 40.6(a)(7). The Commission notes that while the current introductory text to § 40.6(a) is intended to enable a registered entity to delist, or withdraw a certification of, a product with no open interest immediately upon a submission,[59] the current provision has not been well understood and it would be useful to

[54] The Commission also proposes to replace the word ''under'' with ''in compliance with'' in § 40.5(d)(1) to clarify that consideration for approval is contingent upon complying with the requirements of § 40.5(a).

[55] The Commission additionally proposes to non-substantively revise § 40.5(f)(1) to include two new commas. The Commission believes this will improve readability and reduce the risk of confusion.

[56] These changes also make this language consistent with the corresponding language in §§ 40.3 and 40.5.

[57] The Commission also proposes to amend § 40.6(a)(6)(ii) by adding the words ''or may be submitted pursuant to § 40.5'' to clarify that new rules or rule amendments that establish standards for responding to an emergency may be either certified pursuant to § 40.6(a) or submitted for Commission approval pursuant to § 40.5.

[58] 2011 Final Rule at 44782–44783.

[59] *Id.* at 44783 (explaining that the Commission, in consideration of comments from both CME and OCX, determined to amend § 40.6(a) to make rules delisting or withdrawing the certification of products effective upon submission to the Commission. The Commission agreed that such submissions should be exempt from the 10-business-day review period in order to avoid complicating the delisting of the product by providing market participants an opportunity to enter into contracts between the time period of submission and the effective date of the rule.).

clarify by adding an explicit statement into the regulatory text.

2. Proposed Amendments to § 40.6(b)

Regulation § 40.6(b) sets forth the Commission's review period for a rule certification under § 40.6(a). The regulation provides the Commission with a 10-business day review period after which the rule is deemed certified, unless the rule is stayed by the Commission during the review period. The Commission proposes to amend § 40.6(b) to provide that any substantive amendment or supplementation of the rule submission will be deemed a new submission and restart the 10-business day review period, unless the amendment or supplementation is made for correction of typographical errors, renumbering or other non-substantive revisions. The proposed amendments are intended to preserve the Commission's 10-business day review period where a registered entity makes a substantive change to a rule certification.

3. Proposed Amendments to § 40.6(c)

Regulation § 40.6(c) sets forth the Commission's authority and procedures for staying a submission pursuant to § 40.6(a). The Commission proposes to add the phrase ''and can be implemented'' in § 40.6(c)(3) in order to make clear that upon the expiration of a stay (without Commission objection), the registered entity may opt to implement the rule at a later time.[60]

The Commission proposes to amend § 40.6 by adding a new § 40.6(c)(5) to address the effect of a Commission objection to a rule submitted pursuant to § 40.6(a). The proposed provision is based on the similar provision in current § 40.5(f) (Effect of non-approval). Proposed § 40.6(c)(5)(ii) would provide that a Commission objection to a rule certification pursuant to § 40.6(c)(3) is presumptive evidence that the entity may not truthfully certify that the same, or substantially the same, rule complies with the Act and the Commission's regulations. Proposed § 40.6(c)(5)(i) would provide that a Commission objection does not, however, prevent the registered entity from subsequently submitting a revised or supplemented version of the proposed rule or rule amendment for review and approval or for certification. As discussed above with respect to current § 40.5(f), the revisions must provide a substantive basis to treat the revised rule differently from the previously submitted rule.

4. Proposed Amendments to § 40.6(d)

Regulation § 40.6(d)(2) sets forth various categories of rules that may be implemented by a registered entity without certification, provided that the registered entity complies with the weekly notification requirements in § 40.6(d)(1). The Commission proposes to add the following new categories of rules to § 40.6(d)(2): updates to email addresses or other contact information that market participants use to submit block trades; amendments to existing trading months; with respect to a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap), payment or collection of commodity options premiums or margins and changes to no cancellation ranges; and with respect to a swap, payment or collection of option premiums or margins. The Commission believes updates to contact information for the submission of block trades are not substantive for compliance purposes and need not be subject to self-certification and Commission review requirements of § 40.6(a). As discussed above in section II.A.5, the Commission preliminarily believes that registered entities should be able to submit rules or rule amendments governing the payment or collection of these premiums or margins (which are currently within the definition of terms and conditions in § 40.1) through weekly notices to the Commission pursuant to § 40.6(d)(2) as this will lower the burden for registered entities and still provide sufficient notice to the Commission. The Commission also preliminarily believes that registered entities should be able to submit rules or rule amendments that change no cancellation ranges or amend existing trading months through weekly notices to the Commission pursuant to § 40.6(d)(2) as this will lower the burden for registered entities to implement such changes and still provide sufficient notice to the Commission.

Regulation § 40.6(d)(3) currently sets forth various categories of rules that may be implemented without certification or notice to the Commission. The Commission proposes to amend current § 40.6(d)(3)(ii)(E)(*1*) (which would become § 40.6(e)(2)(v)(A)) to add the words ''per contract'' to be consistent with the corresponding provision in § 40.6(d)(2)(v)(A). The Commission also proposes to make a non-substantive amendment to redesignate § 40.6(d)(3) as § 40.6(e) and make corresponding designation changes to the other paragraphs of the section.[61]

The Commission requests comment on all aspects of its proposed amendments to § 40.6. In particular, the Commission requests comment on its proposed new categories of rules that may be filed pursuant to § 40.6(d)(2). The Commission further requests comments on the following questions: Are there other categories of rules, including rules specific to DCOs, DCMs, SEFs, or SDRs, that should be added to § 40.6(d)(2)? If so, what is the rationale for the addition? Are there categories of rules that should be added to current § 40.6(d)(3) (which is proposed to be moved to § 40.6(e))? If so, what is the rationale for the addition?

In addition, the Commission requests comment on whether the per-contract fee change parameters in § 40.6(d)(2)(v)(A) and 40.6(d)(3)(ii)(E)(1) (the latter of which would become § 40.6(e)(2)(v)(A)) (*i.e.,* above or below one dollar per contract) should be increased given the passage of time since the adoption of the current regulation.

G. Section 40.7—Delegations

1. Proposed Amendments to § 40.7

Regulation § 40.7 sets forth delegations of the Commission's authority to take various actions under the provisions of part 40. The Commission proposes to amend § 40.7 to enhance the regulation's utility and clarity and to add three new delegations.

The Commission proposes to amend § 40.7(b)(3) by adding the words ''or relate to'' to clarify that this delegation includes authority to approve rules or rule amendments of a registered entity that relate to, but do not establish or amend, speculative limits or position accountability provisions.[62]

The Commission proposes to delegate under proposed § 40.7(a)(1)(iv) and (v) the authority in proposed §§ 40.3(c)(3) and 40.5(c)(3) to extend the applicable review period set forth in §§ 40.3(c) and 40.5(c), respectively, for the period of time agreed to in writing by the registered entity. The Commission believes these two delegations are appropriate given the agreement by the registered entity to the extension.

[60] The Commission also proposes to change the reference in § 40.6(c)(3) from ''proposed certification'' to ''certification.''

[61] The Commission believes the current designations are inconsistent with the introductory text of § 40.6(d).

[62] The delegation is not intended to and does not affect any substantive authority including, for example, the Commission's authority to bring an enforcement action based on a person's violation of a registered entity's position limit rules pursuant to CEA Section 4a(e).

With respect to proposed § 40.7(a)(1)(iv) and (v), should the Commission impose a maximum period of time that the staff, under delegated authority, may extend the period agreed to in writing by the registered entity? Why or why not? The Commission would still have the authority to extend the time for review for the period agreed to in writing by the registered entity, pursuant to proposed §§ 40.3(c)(3) and 40.5(c)(3).

Also, the Commission proposes to amend the text of § 40.7(a)(5), which delegates the Commission's authority to determine if a proposed rule is material under § 40.4(b)(5). The proposed amendments streamline and simplify the text of the regulation by eliminating text that is not relevant to the delegation as well as an inconsistent reference to § 40.6(d).[63]

Finally, as discussed above, the Commission is also proposing to add § 40.7(e) to delegate the Commission's authority to specify the format and manner of filing under these regulations to the Directors of the Division of Market Oversight and the Division of Clearing and Risk. Given that technology is used for the Commission to receive submissions from the registered entities under these regulations and the speed at which technology evolves, the Commission believes it is useful for staff to be able to specify the format and manner of filing under these regulations to facilitate the regulations remaining current with technological advances that registered entities and the Commission may use in the future.

The Commission requests comment on all aspect of its proposed amendments to § 40.7.

H. Section 40.10—Special Certification Procedures for Submission of Rules by SIDCOs

1. Definition of ''Materiality'' in § 40.10

Regulation § 40.10(a), which implements section 806(e) of the Dodd-Frank Act, requires a SIDCO to provide notice to the Commission not less than 60 days in advance of any proposed change to its rules, procedures, or operations that could materially affect the nature or level of risks presented by the SIDCO. When the Commission first adopted this requirement in 2011, it further defined ''materially affect the nature or level of risks presented'' in § 40.10(b) as matters as to which there is a reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the SIDCO, and notes that such changes may include changes that materially affect financial resources, participant and product eligibility, risk management (including matters relating to margin and stress testing), daily or intraday settlement procedures, default procedures, system safeguards (business continuity and disaster recovery), and governance. The Commission is proposing to revise this definition.

In the more than a decade since its adoption, the Commission has found that the definition in § 40.10(b) is so broad and vague that it does not provide meaningful guidance to SIDCOs. Rather, the determination as to whether a proposed change is subject to advance notice under § 40.10(a) is usually made through discussions between the SIDCOs and Commission staff.

The Commission is therefore proposing to revise the definition in § 40.10(b) to specify that proposed changes that require advance notice under § 40.10 may include, but are not limited to, material changes to the SIDCO's default management plan or default rules or procedures under § 39.16 or § 39.35, program of risk analysis and oversight required under § 39.18, or recovery and wind down plans required under § 39.39; the adoption of a new or materially revised margin methodology; the establishment of a cross-margining program or similar arrangement with another clearing organization; and material changes to its approach to the stress testing required under § 39.13(h)(3), § 39.36(a), or § 39.36(c).

The Commission notes that the ''may include, but are not limited to'' language means that the examples listed in the definition are not exhaustive and a proposed change that is not specifically mentioned nevertheless may be subject to advance notice if it meets the standard in § 40.10(a), including proposed changes that may fall under the broad categories listed in the current definition in § 40.10(b). The Commission requests comment on whether there are other examples of changes that should be listed in the definition in § 40.10(b), or whether there are other ways the definition could be revised to provide better guidance to SIDCOs as to when advance notice of a proposed change is required under § 40.10.

2. SIDCO Sbmission Under § 40.10 of Rules Otherwise Required To Be Submitted Under § 40.5

The Commission is proposing to add new § 40.10(i) to require that where any provision of the Commission's regulations requires a DCO to file rules for approval under § 40.5, a SIDCO would be required instead to file those rules under § 40.10, if the rules could materially affect the nature or level of risks presented by the SIDCO. Without this change, a requirement for DCOs to file rules pursuant to § 40.5 could be misinterpreted as relieving a SIDCO from having to file those same rules pursuant to § 40.10, or as creating a duplicative requirement for SIDCOs to submit rules under both § 40.5 and § 40.10. Current regulations that require a DCO to file rules for approval include requests for transfer of open positions in § 39.3(g); holding securities in a futures account pursuant to a portfolio margining program in § 39.4(f); cross-margining programs in § 39.13(i); and commingling of customer positions and associated funds in either a futures or cleared swaps customer account in § 39.15(b).

3. Technical Corrections to § 40.10

The Commission is proposing to revise the first sentence of § 40.10(a), which references a registered DCO that has been designated by the Financial Stability Oversight Council as a systemically important DCO. After § 40.10(a) was adopted, the Commission adopted a definition of ''systemically important derivatives clearing organization'' in § 39.2. The Commission proposes to change the reference to a systemically important DCO, ''as defined in § 39.2 of this chapter.''

The Commission is also proposing to revise § 40.10 to remove references to ''the purposes of the Dodd-Frank Act.'' At the time § 40.10 was adopted, the Commission was still in the process of incorporating in its regulations changes necessary to reflect the purposes of the Dodd-Frank Act. The Commission subsequently adopted revisions to its DCO regulations that address the Dodd-Frank Act requirements. Accordingly, the references in § 40.10(d) and (h)(3) to the purposes of the Dodd-Frank Act are no longer necessary.

The Commission requests comment on all aspects of its proposed amendments to § 40.10.

I. Technical Correction to Authority Section of Part 40

The Commission is proposing to remove the reference to section 7a of the

[63] Current § 40.7(a)(5) provides that if the Commission determines that a rule submitted by a DCM pursuant to § 40.4(b)(5) is not material, the rule may be reported pursuant to the provisions of § 40.6(d). However, § 40.4(b)(5) itself provides that if a rule is deemed not material pursuant to the regulation, it may be filed pursuant to § 40.6(a).

CEA, which was repealed by the Dodd-Frank Act,[64] from the authority section for part 40.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis with respect to such impact.[65] The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[66] The proposed amendments to part 40 set forth herein would impact DCMs, DCOs, SEFs and SDRs. The Commission has previously determined that DCMs,[67] DCOs,[68] SEFs,[69] and SDRs [70] are not small entities for purposes of the RFA. Therefore, the Chairman, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), hereby certifies that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [71] provides that Federal agencies, including the Commission, may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number from the Office of Management and Budget (''OMB''). This proposed rulemaking contains reporting and recordkeeping requirements that are collections of information within the meaning of the PRA. This section addresses the impact of the proposal on existing information collection requirements associated with part 40 of the Commission's regulations. Changes to the existing information requirements as a result of this proposal are set forth below. OMB has assigned Control No 3038–0093, ''Part 40, Provisions Common to Registered Entities,'' to the information collections associated with these regulations.[72] The Commission is revising its total burden estimates for this clearance to reflect the proposed amendments.

The proposed amendments will modify the existing information collection entitled Part 40, Provisions Common to Registered Entities, (''Part 40 Information Collection''), which is one of two Information Collections under OMB control number 3038–0093.[73] The Part 40 Information Collection encompasses the reporting burdens associated with §§ 40.2 and 40.3 (product submissions); §§ 40.5 and 40.6 (rule submissions); and § 40.10 (SIDCO submissions).

1. Burden Estimates

The proposed amendments to §§ 40.2(a)(3)(v), 40.3(a)(4), and 40.6(a)(7)(v) would clarify that these regulations require registered entities to provide sufficient detail for staff to evaluate compliance of the products and rules registered entities are proposing in their submissions. This additional detail (*e.g.,* about the underlying commodity in a derivatives contract) is necessary to allow Commission staff to assess whether new products and amendments to existing products terms and conditions comply with the CEA and Commission regulations. The Commission anticipates that, if adopted, these amendments are likely to increase reporting burden for registered entities, although some registered entities are already providing this information.[74] Specifically, for rule submissions under § 40.6, these new requirements would add an additional average of 30 minutes (for a new total of 2.5 hours). For product submissions under §§ 40.2 and 40.3, the proposed amendments would add an additional average 1 hour of burden (for a new total of 22 hours).

The aggregate burden for the Part 40 Information Collection, including the burden from the proposed amendments and the updates to number of responses based on current Commission data, is estimated as follows:

Product Submissions (§§ 40.2 and 40.3)

For product submissions (§§ 40.2 and 40.3), the number of respondents remains 70. The Commission estimates that for product submissions under §§ 40.2 and 40.3, the proposed amendments to §§ 40.2(a)(3)(v) and 40.3(a)(4) would add an additional average 1 hour of burden (for a new total of 22 hours). Based on an updated review of its annual reporting data for the past three years (2020–2022), the Commission estimates that reporting entities are likely to submit on average an aggregate of 848 reports annually.

Accordingly, the aggregate annual estimate for the reporting burden associated with product submissions (§§ 40.2 and 40.3), as amended by the proposal, is as follows:

Estimated number of respondents: 70.

Estimated number of reports per respondent: 12.[75]

Average number of hours per report: 22.[76]

Estimated gross annual reporting burden (hours): 18,480.[77]

Rule Submissions (§§ 40.5 and 40.6)

For rule submissions (§§ 40.5 and 40.6), the number of respondents remains 70. Although the proposed amendments only increase reporting burden for § 40.6 submissions, the Commission averages §§ 40.5 and 40.6 for PRA purposes. Based on an updated review of recent submission data from 2020–2022, the Commission estimates that respondents submit on average 1,412 reports per year. Further, the Commission estimates that, if the proposed amendments to § 40.6(a)(7)(v) are adopted, each respondent would spend approximately 2.5 hours to prepare and submit the required reports. Accordingly, the aggregate annual estimate for the reporting burden, as amended by the proposal, is as follows:

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[64] Public Law 111–203, title VII, sec. 734(a), July 21, 2010, 124 Stat. 1718 (2010).

[65] 5 U.S.C. 601 *et seq.*

[66] *See* Policy Statement and Establishment of ''Small Entities'' for purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982).

[67] 47 FR 18618, 18619 (April 30, 1982).

[68] New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609 (Aug. 29, 2001).

[69] Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548 (June 4, 2013).

[70] Swap Data Repositories, 75 FR 80898, 80926 (Dec. 23, 2010).

[71] 44 U.S.C. 3501 *et seq.*

[72] For the previously approved estimates, see ICR Reference No. 202102–3038–001 (conclusion date Feb. 24, 2021), available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202102-3038-001.*

[73] OMB Control Number 3038–0093 has two Information Collections: Part 40, Provisions Common to Registered Entities; and Part 150, Position Limits. *See https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202102-3038-001.*

[74] As discussed above in sections II.B.3, II.C.1, and II.F.1, the proposed amendments clarify the Commission's expectations for the content of submissions, which some registered entities had not been meeting in their recent filings. Although the Commission views the proposed amendments as clarifying filing requirements rather than new requirements, they will increase the reporting burden compared to some registered entities' current filing practices.

[75] The 3-year average of total responses for §§ 40.2 and 40.3 submissions combined was 848 responses, calculated by taking the annual total submissions received under §§ 40.2 and 40.3 combined from all entities and averaging them for the years of 2020, 2021 and 2022. The estimated number of reports per respondent is calculated as 848 responses divided by 70 respondents (848 responses/70 respondents = 12 responses per respondent).

[76] The aggregate number of hours per report for §§ 40.2 and 40.3 adds 1 hour to the existing burden estimate of 21 hours, for a total of 22.

[77] The estimated gross annual reporting burden (hours) is calculated by multiplying the estimated number of respondents times the estimated number of reports per respondent times the average number of hours per report (70 respondents × 12 reports per respondent × 22 hours per report = 18,480 hours).

Estimated number of respondents: 70.[78]

Estimated number of reports per respondent: 20.[79]

Average number of hours per report: 2.5.[80]

Estimated gross annual reporting burden (hours): 3,500.[81]

SIDCO Submissions (§ 40.10)

The burden for SIDCO submissions under § 40.10 is unaffected by the proposed amendments, but has been updated based on review of existing data. Based on an updated review of recent submission data from 2020–2022, the number of SIDCO respondents remains 2 and each respondent typically submits 1 report annually. The Commission estimates that each registered entity will continue to spend on average 50 hours to prepare and submit its report. The aggregate annual estimate burden for § 40.10 submissions is as follows:

Estimated number of respondents: 2.

Estimated number of reports per respondent: 1.[82]

Average number of hours per report: 50.

Estimated gross annual reporting burden (hours): 100.[83]

The Commission believes that the other proposed changes to reporting proposed in this NPRM will not increase the burden on the registered entities, and in some cases, may reduce reporting burden. The Commission anticipates that the following proposed changes will not result in any increase in reporting burden:

Dormancy (§ 40.1(b) and (g)). If the proposed removal of the definitions of ''dormant contract or dormant product'' and ''dormant rule'' is adopted, registered entities would no longer be required to make submissions to revive dormant rules or products under §§ 40.2, 40.3, 40.5, or 40.6, other than when required to do so in connection with reinstating a registered entity's registration or designation from dormancy. Accordingly, the proposed changes would not add any burden on registered entities but may reduce burdens.

Margin methodology rules (§§ 40.1, 40.5, 40.6, 40.10). This provision would add ''margin methodology'' to the definition of ''rule'' and thus require the corresponding rule submissions. However, registered entities already have been submitting margin-related rule changes under the current requirements. The proposed change only clarifies existing filing requirements and would not add new reporting burdens.

Terms and conditions; weekly notification (§§ 40.1(j), 40.2, and 40.6(d)(2)). The proposed changes to the definition of ''terms and conditions'' remove certain categories of information, such as payments and collections of certain margins and premiums that registered entities must submit to the Commission as part of their rule submissions under § 40.6(a). Instead, the information would be filed as rules under the less burdensome weekly notification requirements of § 40.6(d)(2). Contact information for block trades and amendments to ''no cancellation ranges'' would also be added to the less-burdensome weekly notification category under § 40.6(d)(2).

Cover sheet (§§ 40.2, 40.3, 40.5, 40.6 and Appendix D). The proposal would remove the requirement for filers to submit a cover sheet. The Commission's electronic portal now collects the required information and generates a cover sheet automatically, allowing the cover-sheet requirement to be removed and reducing burden to the registered entities.

Time period for submitting additional materials for product approvals (§ 40.3(a)(10)). The proposed rule would provide Commission staff greater flexibility to set deadlines for submission of any additional information requested by the Commission for voluntary product approval by registered entities. Currently, the regulation requires an initial two-business-day limit after the Commission requests the information. The greater staff discretion to set more flexible deadlines would reduce the need for registered entities to submit extension requests, thereby reducing their burden.

Non-materiality criteria (§ 40.4(b)(5)). This provision would provide guidance to registered entities about the non-materiality determination required for certain products. It would not change the submission requirements, but rather help registered entities understand Commission requirements for their submissions. The Commission anticipates that these clarifications are likely to reduce burden for reporting entities by providing more specificity about submission requirements.

Materiality; submission of related rules (§ 40.4(b)(5)(ii)). If adopted, the proposed rules would require that non-materiality submissions include any relevant previous rules or rule amendments that support non-materiality. This could impose additional research, information collection, and filing burdens. However, according to Commission data, fewer than one non-materiality submission is made annually. Accordingly, the Commission anticipates that this requirement is unlikely to impose any material increase in reporting burden for covered entities.

Resubmission (§ 40.6(c)(5)(ii)). This proposed provision describes how an objection by the Commission to a registered entity's certification of a proposed rule or rule amendment would affect any future filings by the registered entity of the proposed rule or rule amendment to which the Commission objected. Because objections are infrequent, the Commission anticipates that the burden of this provision is unlikely to result in increased burden for reporting entities.

Materiality standard (§ 40.10(b)). Under the proposed amendments, the definition ''materially affect the nature or level of risks presented'' for SIDCO rule submissions would be revised to provide more useful guidance to registered entities. This change would not affect the reporting burden.

SIDCO submission under § 40.10 of rules otherwise required to be submitted under § 40.5. This proposed amendment would clarify filing requirements, but would not result in a substantive change to filing obligations. The Commission also anticipates that this clarification may reduce burden by eliminating mistaken duplicate filings.

''*Referenced contract*'' *data element (Appendix D).* Submissions for new products would include a new structured data element in the online

[78] The estimated number of 70 respondents includes 16 active DCMs, 23 registered SEFs, 15 registered DCOs, 5 provisionally registered SDRs, plus pending applications for those entities.

[79] As noted above, the proposed amendment increases the burden only for § 40.6 filings (and not for § 40.5 filings). However, the Commission aggregates §§ 40.5 and 40.6 for PRA purposes. The 3-year average of total responses for §§ 40.5 and 40.6 submissions combined was 1,412 responses, calculated by taking the annual total submissions received under §§ 40.5 and 40.6 combined from all entities and averaging them for the years of 2020, 2021 and 2022. The estimated number of reports per respondent is calculated as 1,412 responses divided by 70 respondents (1,412 responses/70 respondents = 20 responses per respondent).

[80] The aggregate number of hours per report for §§ 40.5 and 40.6 adds 0.5 hours to the existing burden of 2 hours per report, for a total of 2.5.

[81] The estimated gross annual reporting burden (hours) is calculated by multiplying the estimated number of respondents times the estimated number of reports per respondent times the average number of hours per report (70 respondents × 20 reports per respondent × 2.5 hours per report = 3,500 hours).

[82] The 3-year average of total responses for § 40.10 submissions was 2, calculated by taking the annual total submissions received under § 40.10 from all entities and averaging them for the years of 2020, 2021 and 2022.

[83] The estimated gross annual reporting burden (hours) is calculated by multiplying the estimated number of respondents times the estimated number of reports per respondent times the average number of hours per report (2 respondents × 1 reports per respondent × 50 hours per report = 100 hours).

portal indicating whether the product is a ''referenced contract.'' This information would be the same as the ''reference contract'' determination set out in § 150.1 and appendix C to part 150. Accordingly, this is a non-substantive revision that will have de minimis impact on reporting burden.

2. Request for Comment

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission will consider public comments on this proposed collection of information in:

(a) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

(b) Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

(c) Enhancing the quality, utility, and clarity of the information proposed to be collected; and

(d) Minimizing the burden of the proposed information collection requirements on registered entities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.,* permitting electronic submission of responses.

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, (202) 418–5160 or from *https://RegInfo.gov.* Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- (202) 395–6566 (fax); or
- *OIRAsubmissions@omb.eop.gov* (email).

Please provide the Commission with a copy of submitted comments so that comments can be summarized and addressed in the final rulemaking, and please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this release in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this release. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

C. Cost Benefit Considerations

1. CEA Section 15(a)

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before issuing new regulations under the CEA.[84] By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a new rule or to determine whether the benefits of the adopted rule outweigh its costs. Rather, section 15(a) requires the Commission to ''consider the costs and benefits'' of a subject rule.

Section 15(a) further specifies that the costs and benefits of the proposed regulations shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Collectively, these five factors are referred to herein as section 15(a) factors and they are addressed below. In conducting its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission recognizes that the proposed amendments may impose costs. Some of the proposed amendments, however, are format, organizational, and non-substantive changes, which will have no costs. The Commission has endeavored to assess the expected costs and benefits of the proposed amendments in quantitative terms, including PRA related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable proposed amendments in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the proposed amendments. Additionally, any initial and recurring compliance costs for any particular DCM, DCO, SDR, or SEF will depend on the size, existing infrastructure, practices, and cost structure of the entity.

The Commission generally requests comment on all aspects of its cost benefit considerations, including the identification and assessment of any costs and benefits not discussed herein; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed amendments; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. The Commission welcomes comment on such costs.

2. Statutory and Regulatory Background

Part 40 of the Commission's regulations implements section 5c(c) of the CEA and requirements and procedures for registered entities, including DCMs, DCOs, SEFs, SDRs, and SIDCOs, to submit their rules and products to the Commission prior to implementing rules, listing products for trading, or accepting products for clearing. Part 40 generally provides two means for registered entities to submit rules and products to the Commission. There is a self-certification process and a Commission-approval process.[85]

With two exceptions, the Commission last amended the part 40 regulations in 2011.[86] After years of experience with registered entities following the processes set forth in the part 40 regulations, the Commission is proposing amendments to clarify, simplify, and enhance the utility of, the part 40 regulations for registered entities and the Commission. Changes proposed include amendments to: § 40.1 to simplify the determination of whether a registered entity is deemed dormant and to remove the terms ''dormant rule'' and ''dormant contract or dormant product''; §§ 40.2, 40.3, 40.4, 40.5 and 40.6 and appendix D to part 40 to reflect the development, evolution and use of the Commission's online portal for the filing of rule and product submissions; and §§ 40.5, 40.6 and 40.7 to reorganize and enhance the regulations' utility. The Commission also proposes to amend

[84] 7 U.S.C. 19(a).

[85] *See* §§ 40.2, 40.3, 40.4, 40.5 and 40.6.

[86] *See* 2011 Final Rule; Repeal of the Exempt Commercial Market and Exempt Board of Trade Exemptions, 80 FR 59575 (October 2, 2015); and Position Limits for Derivatives, 86 FR 3236 (January 14, 2021).

§ 40.10 to provide meaningful guidance to SIDCOs regarding filing instructions for rules that could materially affect the nature or level of risks presented by the SIDCO.

3. Baseline

The baseline for the Commission's consideration of the costs and benefits of this proposed rulemaking is the existing statutory and regulatory framework applicable to DCMs, DCOs, SDRs, and SEFs, in 17 CFR part 40. Current part 40 provides substantive and procedural regulatory requirements for the submission of registered entities' self-certifications, and requests for approval, of new products for trading and clearing and new rules and rule amendments. Current part 40 also establishes guidelines for the Commission's review and processing of registered entities' submissions. Current part 40 regulations explain what information must be made publicly available in relation to the application to become a DCM, DCO, SDR, or SEF, and when registered entities file submissions for new products, new rules and rule amendments. There are also special requirements for certain rules submitted by SIDCOs.

The Commission notes that this cost-benefit consideration is based on its understanding that the derivatives market regulated by the Commission functions internationally with: (1) transactions that involve U.S. entities occurring across different international jurisdictions; (2) some entities organized outside of the United States that are registered with the Commission; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the proposed regulations on all relevant derivatives activity, whether based on their actual occurrence in the United States or on their connection with, or effect on U.S. commerce.[87]

4. Proposed Amendments

a. Proposed Amendments to § 40.1 Regarding Dormant Registered Entities, Products, Contracts, and Rules

The Commission proposes to amend its regulations to simplify the calculation of how long a registered entity is inactive and when a registered DCM, DCO, SDR or SEF is deemed dormant. The proposed amendments to § 40.1(c) through (f) would conform the wording of these sections across the different types of registered entity such that any registered entity would be considered dormant if it is inactive for a period of 365 days, provided that a DCM, DCO or SEF will not become dormant during the 1,095 days following the entity's initial and original order of designation or registration, as applicable. The proposed amendments replace the current regulatory text that measures time periods in months with language that measures the equivalent time in days and the proposed amendments provide for consistent, clear start and end dates for measuring inactivity in connection with dormancy status.

In addition, the Commission proposes removing from § 40.1(b) and (g) the definitions and related requirements for the following terms: ''dormant contract or dormant product,'' and ''dormant rule'', respectively. As amended, the rules of a dormant DCM, dormant SEF, dormant DCO, or dormant SDR would still need to be approved and the products would still need to be self-certified or approved in connection with the entity being reinstated as a DCM, SEF, DCO or SDR, respectively, but a DCM, SEF, DCO or SDR that is not dormant would no longer need to certify, or seek approval, of a particular rule or product that was already approved or certified solely due to a lack of implementation of the rule or inactivity of the particular product.

i. Benefits

The Commission believes that the proposed changes to the part 40 dormancy regulations will benefit registered entities by helping registrants interpret dormancy period requirements consistently across the relevant registration types and more readily identify when dormancy applies. Additionally, the removal of the terms ''dormant contract or dormant product,'' and ''dormant rule'' and the associated requirements will remove the administrative and compliance burdens of tracking whether a product or rule has become dormant and the potential costs of recertifying (or obtaining approval of) a dormant contract, product, or rule.

ii. Costs

The Commission expects that registered entities will not incur any increased costs related to the proposed amendments to the current dormancy regulations in part 40. The proposed amendments would eliminate ambiguity regarding how registered entities calculate entity dormancy periods and remove requirements for determining when a product or rule is considered dormant and related submission requirements for dormant products and rules. Furthermore, by removing the dormant rule regulations in their entirety, the Commission believes that it has generated a cost-savings because entities no longer need to monitor whether rules are dormant. Regarding the potential for a cost in the reduction of market oversight, based on experience with dormant products and rules to date, the Commission preliminarily believes that deleting the definitions would result in little, if any, cost to regulatory oversight because the Commission has observed that registrants typically manage products with no trading activity or inactive rules and the Commission is not aware of any market disruptions resulting from the inactivity of products or rules.

b. Proposed Amendments to § 40.1(i) and (j) Regarding Definitions of Rule and Terms and Conditions

The Commission proposes to amend § 40.1(i)—the definition of the term ''rule''—by including ''margin methodology'' in the list of specific items that are considered a ''rule,'' thereby making explicit what is already understood by current DCOs as implicitly included and codifying the current practice of DCOs submitting margin methodologies as rules to the Commission. The Commission also proposes to amend § 40.1(j)—the definition of the term ''terms and conditions''—by removing from the list of terms that are considered ''terms and conditions'' payments or collections of certain premiums or margins from § 40.1(j)(1)(xi) and (j)(2)(xi). The Commission proposes to add the payments or collections of such premiums or margins, as well as changes to the no cancellation ranges, to the categories of rules that may be submitted without certification pursuant to § 40.6(d)(2).

i. Benefits

The proposed amendments to the definition of ''terms and conditions'' will reduce compliance burdens for registered entities for rule amendments that address payments or collections of certain premiums or margins and changes to the no cancellation ranges as these could be filed through a weekly notification pursuant to § 40.6(d)(2), which is a less burdensome, less costly process than through the current process under § 40.6(a). The § 40.6(d) process permits a registered entity to implement a rule immediately and without self-certification provided that the entity files a summary notification

[87] *See, e.g.,* 7 U.S.C. 2(i).

within a week of the rule amendment. The Commission believes that by adding margin-related rule changes to the list of items considered a rule, the Commission is making it clear what type of information is considered a rule and codifying a current practice.

ii. Costs

The Commission believes that the proposed amendment to the definition of ''rule'' to state explicitly that ''margin methodology'' is included in the definition will make the term consistent with the current DCO practice and understanding of implicit requirements and therefore will not place any additional cost or burden on registered entities that submit rules to the Commission under part 40.

The Commission does not expect registered entities to incur any additional costs or burdens related to the proposed changes to the definition of ''terms and conditions'' because the proposed amendments reduce the number of items of information registered entities must submit to the Commission under § 40.6(a). The proposed amendments also allow rules relating to the new categories of information to be implemented more quickly and efficiently by filing such rules in accordance with the requirements of § 40.6(d) (a process which allows a registered entity to implement rules enumerated in § 40.6(d) immediately and without self-certification, provided that the registered entity provides the Commission with a required summary notification of such actions within a week of making the rule amendments).

c. Proposed Amendments to §§ 40.2 and 40.3 Regarding Instructions for Self-Certification and Approval of Products

The Commission is proposing changes to current §§ 40.2 and 40.3 to update Commission processes and clarify filing instructions for registered entities' submission of products to the Commission. Proposed amendments to §§ 40.2(a)(1) and 40.3(a)(1) remove references to the Commission Secretary. To reflect the fact that registered entities now file submissions through the Commission's portal and a cover sheet is no longer necessary, proposed changes to §§ 40.2(a)(3) and 40.3(a)(2) remove the references to a cover sheet and replace them with a requirement directing registered entities to provide the information required by appendix D to part 40.

Proposed changes to § 40.2(a)(3) clarify that a registered entity's concise explanation of a product must also be complete and that the explanation include the product's terms and conditions, the underlying commodity, and the product's compliance with the CEA and associated regulations. Proposed changes to § 40.3(a)(4) clarify that a registered entity's explanation of a product must be complete and that the explanation include the product's terms and conditions, the underlying commodity, and the product's compliance with the CEA and associated regulations.

The proposed amendments to § 40.3(a)(10) eliminate the two-business day deadline for registered entities to respond to Commission staff requests for additional information with respect to product approval requests under § 40.3 and grant Commission staff authority to set response deadlines.

Proposed amendments to § 40.3(c) concern the length of the review period. Proposed amendment to § 40.3(c) make it clear that there is a 45-day review period that the Commission may extend for an additional 45-days, but not to exceed 90 days, if the product raises novel or complex issues that require additional time for analysis. The proposed amendments to § 40.3(c) would also permit the Commission to extend for an additional 45-days if the submission is ''incomplete'' or the entity doesn't respond completely to ''Commission questions in a timely manner.'' The proposed amendments to § 40.3(c) also state that the Commission may extend the review period for any period of time, provided there is written agreement by the registered entity, and that any subsequent, substantive submission of information for a product under a § 40.3 review, whether requested by the Commission or voluntarily provided by the submitting entity, restarts the 45-day review period. The Commission also proposes an amendment to § 40.3(c)(5) providing that if a review period ends on a non-business day, such review is extended to the next business day.

i. Benefits

The Commission believes the removal of the reference to the Secretary in the regulations is beneficial because the deletion modernizes the regulation and makes it consistent with current practices and technologies. For example, submitting entities no longer send submissions to the Commission's Secretary because they upload documents to the Commission's portal. The Commission believes that the elimination of the cover sheet requirement under §§ 40.2 and 40.3 removes redundancy because the online portal requires registered entities to input the same information that is required on the coversheet. The Commission believes that the proposed amendments will benefit registered entities by clarifying the Commission's intent as to the scope of the explanation and analysis required for the submission of self-certified products pursuant to § 40.2 or for requests for a product approval pursuant to § 40.3. In addition, the proposed amendments will help achieve improved regulatory effectiveness of the product self-certification and approval processes by clarifying the level of detail in the information provided thereby enabling the Commission to more effectively complete its analysis.

The Commission believes that amending § 40.3(a)(10) to eliminate the two business day deadline for responding to Commission request for additional information and granting Commission staff the authority to set a deadline based on the nature of the requested information will provide more flexibility to registered entities and better enable the Commission to manage its resources and conduct more effective oversight over registered entities. The proposed changes to § 40.3(c)(4) also provide that any substantive amendment of a § 40.3 submission would restart the 45-day review period provided in § 40.3(c) to ensure that the Commission has sufficient time to analyze and consider the substantive changes. The restarting of the 45-day review period provided in § 40.3(c) upon a registered entity making any substantive changes to their § 40.3(c) filing would also encourage registered entities to be precise and consult with Commission staff regarding any questions when preparing § 40.3 submissions.

ii. Costs

The Commission believes that there will not be new costs associated with the proposed amendments §§ 40.2 and 40.3 requiring registered entities to provide complete explanations of their products as this information is already required under the current regulations. The current regulations instruct registered entities to submit explanations and analyses about products (which are to be ''concise'' when self-certifying under § 40.2). The amendment is intended to clarify the Commission's original intent that the explanation and analysis contain sufficient detail for the Commission to evaluate the submissions for the purpose intended—to assess whether the new products would comply with the CEA and associated regulations. In general, the proposed amendments to §§ 40.2 and 40.3 will provide greater

specificity, leaving less room for regulatory ambiguity, improve the quality of submissions, and reduce any administrative costs registered entities might incur when determining what information must be submitted to the Commission for a product self-certification or product approval request. The proposed amendments eliminating the two-business day deadline and regarding extending the 45-day review period as a result of any substantive amendments to a § 40.3 submission, the submission being ''incomplete'' or the entity not responding completely to ''Commission questions in a timely manner'' may cause registered entities to incur costs related to the offering of products or contracts, if the timelines affect product-launch dates.

d. Proposed Amendments to § 40.4 and Appendix E Regarding Terms or Conditions for Enumerated Agricultural Products

Current § 40.4 applies to DCMs and identifies the rules or rule amendments for enumerated agricultural products that are not material and required to be submitted for approval by the Commission when the products being changed have open interest. The Commission proposes to add appendix E to part 40 to provide guidance to DCMs regarding criteria that the Commission considers as evidence that an enumerated agricultural product rule change is non-material. The Commission proposes to add text to current § 40.4(b)(5)(ii) to provide that when a DCM explains why it considers a rule ''non-material'' pursuant to § 40.4(b)(5), the DCM will, if applicable, include a copy of a previously approved rule or rule amendment that is, in substance, the same as the non-material rule or rule amendment.

i. Benefits

The Commission believes that appendix E to part 40 will aid DCMs in determining whether a proposed change to terms and conditions is material. Specifically, the guidance offered in appendix E should reduce uncertainties and enable DCMs to more efficiently determine whether a proposed change would be material. Additionally, by directing DCMs to include a copy of a previously approved rule or rule amendment with submissions to the Commission pursuant to § 40.4(b)(5)(ii), the Commission believes this effort will provide market participants with context and background that would help them understand the current rule or rule amendment and why it is non-material. In other words, the proposed amendments will improve transparency for market participants.

ii. Costs

The Commission anticipates appendix E to part 40 might cause DCMs to incur a one-time compliance cost related to understanding appendix E's guidance to assessing whether a rule is material. The Commission believes that DCMs will incur costs related to researching and collecting previously approved rules or rule amendments for submissions to the Commission.

e. Proposed Amendments to §§ 40.5, 40.6, and 40.10 Regarding Filing Instructions for Rules

The Commission is proposing changes to update Commission processes and clarify submission procedures for a registered entity to voluntarily submit its rules for Commission approval and for a registered entity to self-certify that its rules comply with the Act and Commission regulations. Proposed amendments to §§ 40.5(a)(1) and 40.6(a)(1) remove references to the Commission Secretary. Proposed amendments to §§ 40.5(a)(2) and 40.6(a)(7)(i) remove the references to the cover sheet and replace these with references to the ''information required by Appendix D'' to part 40.

The proposed amendments to the self-certification submission requirements in § 40.6(a)(7) clarify the Commission's intent as to the scope of the explanation and analysis that registered entities must submit by adding that the explanation and analysis needs to also be ''complete'' to ensure enough information is provided so that Commission staff can effectively evaluate the rule submissions. The Commission proposes to move certain language from the introductory paragraph of § 40.6(a) to become § 40.6(a)(9) and to state more clearly therein that a new rule or a rule amendment that delists, or withdraws the certification of, a product with no open interest may become effective immediately upon the filing of the submission, provided that the submission is made in compliance with § 40.6(a)(1) and (2) and (7). In addition, the proposed amendments in § 40.6(b)(2) provide that if a registered entity amends or supplements its initial rule submission under § 40.6(a), the Commission will treat the amendment as a new submission and restart the Commission's 10-day review period, unless the amendments or supplementation is requested by the Commission or is for non-substantive revisions.

The proposed amendments in § 40.6(c)(5) make it clear that if the Commission stays and ultimately objects to a rule certification, the registered entity may re-submit a revised version with a substantive basis for treating the revised rule differently. Specifically, under the proposed amendment, a Commission objection to a certification of a rule or rule amendment that is inconsistent with the Act or the Commission's regulations does not prevent a registered entity from submitting a revised proposed rule or rule amendment, or from submitting the new rule or rule amendment as initially proposed, in a supplemental submission, for certification or Commission review and approval. In addition, the objection by the Commission will be treated as presumptive evidence that the entity may not truthfully certify that the same proposed rule or substantially the same rule complies with CEA or the Commission's regulations.

The proposed amendments to § 40.6(d)(2) expand the categories of rules that may be implemented without a certification to include a number of new categories of rules. The new categories include rule amendments updating email addresses or contact information that market participants use to submit block trades; rules amending existing trading months; rules changing the price ranges within which a trade will not be cancelled; and rules governing the payment or collection of option premiums or margins.[88] Registered entities may implement rules within these categories by notifying the Commission of the rule changes on a weekly basis pursuant to § 40.6(d)(2). The proposed amendments to § 40.6(d)(2) align with the Commission's proposal to remove a subset of the same categories of rules from the definition of ''terms and conditions'' in § 40.1.

For SIDCOs certifying rules that could materially affect the nature or level of risks presented by the SIDCO, the

[88] Proposed § 40.6(d)(2)(xi) will allow registered entities to submit rules to allow updates of email addresses and contact information that market participants use to submit block trades. Proposed § 40.6(d)(2)(xii) will allow registered entities to submit rules that make changes to no cancellation ranges on contracts for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap). Proposed § 40.6(d)(2)(xiii) will allow registered entities to submit rules that set or amend the payment or collection of commodity options premiums or margins for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap). Proposed § 40.6(d)(2)(xiii) will allow registered entities to submit rules that set or amend the payments or collections of option premiums or margins for a swap.

Commission proposes amendments to § 40.10(b) to revise the definition in § 40.10(b) to specify that proposed changes that require advance notice under § 40.10 may include, but are not limited to, material changes to the SIDCO's default management plan or default rules or procedures under § 39.16 or § 39.35, program of risk analysis and oversight required under § 39.18, or recovery and wind down plans required under § 39.39; the adoption of a new or materially revised margin methodology; the establishment of a cross-margining program or similar arrangement with another clearing organization; and material changes to its approach to the stress testing required under §§ 39.13(h)(3), 39.36(a), or 39.36(c). Finally, the Commission proposes an amendment to § 40.10 that expressly states that where any provision of the Commission's regulations requires a DCO to file rules for approval under § 40.5, a SIDCO would be required instead to file those rules under § 40.10, if the rules could materially affect the nature or level of risks presented by the SIDCO.

i. Benefits

The Commission believes the removal of the reference to the Secretary modernizes the regulation and makes it consistent with current practices and technologies. Submitting entities no longer send submissions to the Secretary with a cover sheet because they instead file submissions through uploading documents to, and entering information into, the Commission's portal. The Commission also believes that the elimination of the cover sheet requirement in the text of §§ 40.5 and 40.6 removes redundancy because the online portal requires registered entities to input into the online portal the same information that is required on the cover sheet.

The Commission believes the proposed amendments to § 40.6(a)(7) stating that registered entities must provide complete explanations and analysis to the Commission for self-certifying rules clarifies the Commission's intent as to the scope of the explanation and analysis required by establishing the information and detail to be addressed. This amendment will assist registrants with better understanding what to include in the submissions and the information provided will enable Commission staff to better assess whether the proposed rules comply with the CEA and Commission regulations. Proposed amendment § 40.6(a)(9) will benefit registered entities by providing certainty that a registered entity may immediately delist, or withdraw a certification of, a product with no open interest upon making a § 40.6(a) submission.

The proposed amendments to § 40.6(b)(2) that state that new information restarts the review period make it clear that the review period will be extended and should encourage registered entities to be thorough to ensure that their initial submissions are complete. The proposed amendments to § 40.6(c)(5) provide clarity regarding the impact of an objection by the Commission to a registered entity's certification of a proposed rule or rule amendment on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's regulations. Specifically, under the proposed amendment, if a registered entity wishes to resubmit through self-certification a rule or rule amendment that the Commission objected to on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's regulations, the registered entity must first substantively change or supplement the proposed rule or rule amendment to address the Commission's objection.

The proposed amendments to § 40.6(d)(2) to add new categories of rules that may be implemented through a weekly notification to the Commission will enable registered entities to more quickly implement rules that fall within these new categories as the registered entity may implement these rules immediately and file a weekly notification of any rule amendments within a week of making such amendments. The process of drafting a weekly notification is less involved than the process of submitting the rules pursuant to § 40.6(a), including self-certification that the rules comply with the Act and Commission regulations. Registered entities will be able to redirect their time to other compliance or operational activities. Proposed amendments to § 40.10(b) should aid SIDCOs in making determinations regarding the type of rules that must be submitted to the Commission under § 40.10. Proposed amendment § 40.10(i) also should eliminate potentially duplicative regulatory filings under current § 40.5, and, as a result, SIDCOs will benefit from the cost-savings of not having to dedicate administrative efforts two times for the similar submissions.

ii. Costs

The Commission believes that the proposed amendments to §§ 40.5(a) and 40.6(a), (b)(2), and (c)(5), regarding filing instructions for rules will not place any additional costs or burdens on registered entities because the proposed amendments clarify the Commission's expectations. The Commission does not believe that there are costs associated with proposed amendments to § 40.5(d). The proposed amendments to § 40.6(a)(7) inform registered entities of the quality of explanations and analysis needed for rule submissions and will lessen the likelihood that registered entities would need to amend or supplement submissions. If the Commission requests additional evidence, information or data pursuant to § 40.6(a)(8), proposed § 40.6(b) may result in an extended review period (as a result of the review period restarting) and the delay in implementation of a rule may impose a cost on a registered entity, depending on the nature of the rule. The Commission does not believe that there are costs associated with proposed amendments to § 40.6(c)(5). The Commission believes that the proposed changes to § 40.10 will not place additional costs or burdens on SIDCOs because they clarify the types of submissions that SIDCOs must file under § 40.10 and eliminate potential duplication in regulatory filings.

f. Proposed Amendments to § 40.7 Regarding Delegation of Authority

The Commission proposes to amend § 40.7 to enhance the utility and clarity of the regulation and add three new delegations. Proposed § 40.7(a)(1)(iv) and (v) delegates the authority in proposed §§ 40.3(c)(3) and 40.5(c)(3) to extend the applicable review period set forth in §§ 40.3(c) and 40.5(c), respectively, for the period of time agreed to in writing by the registered entity. Finally, as discussed above, the Commission is also proposing to add § 40.7(e) to delegate the Commission's authority to specify the format and manner of filing under these regulations to the Directors of the Division of Market Oversight and the Division of Clearing and Risk.

i. Benefits

The proposed amendments to § 40.7 will benefit regulated entities and the public by improving the readability of this regulation because the delegations are organized by the applicable section of part 40 from the which the delegated authorities originated. The Commission believes that delegating the authority in proposed §§ 40.3(c)(3) and 40.5(c)(3) to the Divisions to extend the applicable review period set forth in §§ 40.3(c) and 40.5(c), respectively, for the period of time agreed to in writing by the registered entity will enable the Commission to complete this process more efficiently. The Commission also

believes that delegating authority to the Divisions to specify format and manner of filing in proposed § 40.7(e) also enhances efficiency.

ii. Costs

The Commission expects that there will be no costs incurred by registered entities by the proposed amendments clarifying and amending the authorities delegated to Commission staff under part 40.

g. Proposed Amendments to Appendix D to Part 40

With the development and use of the Commission's online portal for the filing of rule and product submissions, the Commission is proposing amendments to appendix D to part 40 that reorganizes rule text and clarify instructions to registered entities on what information shall be uploaded to the portal. The Commission also is proposing a new requirement that DCMs and SEFs indicate when listing a new product whether the new product meets the definition of ''referenced contract'' as defined in § 150.1 and described in appendix C to part 150 that is titled ''Guidance Regarding the Definition of Reference Contract.'' Part 150 of the Commission's regulations outlines the requirements for Federal and exchange-set position limits.[89] Part 150, together with §§ 40.1(j)(1)(vii) and (j)(2)(vii), 40.2(a)(3)(ii) and 40.3(a)(3), require DCMs and SEFs to identify referenced contracts to assess whether a contract is subject to Federal position limits.

i. Benefits

The Commission believes that the proposed amendments to appendix D to part 40 will provide several benefits. First, the proposed changes clarify and modernize instructions. The current rule text is more applicable to paper submissions. The proposed text is consistent with the current technological practice where registered entities upload product and rule submissions using the Commission's online portal. Second, the proposed amendment to appendix D to part 40 would require DCMs and SEFs to indicate as part of filing the submission whether a new product to be listed meets the definition of a referenced contract, thereby alerting Commission staff when contracts that may need to be added to the Staff Workbook are being listed and enable the Commission to process and review the submission more efficiently.

[89] 17 CFR part 150. The Commission's latest amendments to part 150 became effective on March 15, 2021. 86 FR 3236 (Jan. 14, 2021).

ii. Costs

The Commission expects that there will be negligible, if any, costs incurred by registered entities with respect to the amendments proposed to modernize appendix D as registered entities are already submitting the covered rules and products using the portal. With regards to the amendment proposing that DCMs and SEFs indicate whether a new product to be listed meets the definition of referenced contract, the Commission notes that DCMs and SEFs will incur costs to make these indications. These costs, however, will be negligible because registered entities are already making the analytical determinations as to whether contracts are referenced contracts to meet their obligations under §§ 40.1(j)(1)(vii) and (j)(2)(vii), 40.2(a)(3)(ii), 40.3(a)(3) and part 150 of the Commission's regulations.

h. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to 17 CFR part 40 in light of the following five broad areas of market and public concern identified in section 15(a) of the CEA: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations.

Protection of market participants and the public: The Commission believes that the proposed changes to §§ 40.2, 40.3, 40.5 and 40.6, regarding the requirement for complete explanations and analysis for product and rule submissions will help protect market participants and the public by encouraging registered entities to submit comprehensive and informative filings for product and rule changes thereby providing the Commission with sufficient information to evaluate whether the new products or rules comply with the CEA and Commission rules. The Commission believes that the proposed changes to §§ 40.3 and 40.6, regarding restarting review periods under specific circumstances, provide the Commission with the necessary time to evaluate changes and consider risks, and ultimately protect the interests of market participants and the public.

Efficiency, competitiveness, and financial integrity of futures markets: The proposed improvements to the regulations providing for ''complete'' products and rules submissions sets forth in more detail the Commission's original intention regarding the level of detail thereby better ensuring that the Commission can provide adequate oversight with minimal disruption to market efficiency. The Commission has not identified any effect of the proposed regulations on innovation and competition.

Price discovery: The Commission has not identified any effect of the proposed regulations on price discovery.

Sound risk management practices: The Commission has not identified any other effect of the proposed regulations on sound risk management practices.

Other public interest considerations: The Commission has not identified any effect of the proposed regulations on other public interest considerations.

List of Subjects in Parts 37, 38, and 40

Commodity futures, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

PART 37—SWAP EXECUTION FACILIITES

■ 1. The authority citation for part 37 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3, and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

Appendix B to Part 37 [Amended]

■ 2. Amend appendix B to part 37, under the heading Core Principle 8 of Section 5h of the Act—Emergency Authority, in the first sentence of paragraph (a)(1), by removing the cross-reference ''§ 40.1(h)'' and adding in its place ''§ 40.1''.

PART 38—DESIGNATED CONTRACT MARKETS

■ 3. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a–2, 7b, 7b–1, 7b–3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

Appendix B to Part 38 [Amended]

■ 4. Amend appendix B to part 38, under the heading Core Principle 6 of section 5(d) of the Act: EMERGENCY AUTHORITY, in the third sentence of paragraph (a), by removing the cross-reference ''§ 40.1(h)'' and adding in its place ''§ 40.1''.

PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES

■ 5. The authority citation for part 40 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 7, 8 and 12, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 6. Revise § 40.1 to read as follows:

§ 40.1 Definitions.

As used in this part:

Business day means the intraday period of time starting at 8:15 a.m. and ending at 4:45 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect in Washington, DC, on all days except Saturdays, Sundays, and Federal holidays in Washington, DC.

Dormant derivatives clearing organization means any derivatives clearing organization registered pursuant to section 5b of the Act that has not accepted for clearing any agreement, contract or transaction that is required or permitted to be cleared by a derivatives clearing organization under sections 5b(a) and 5b(b) of the Act, respectively, for a period of 365 days; *provided, however,* no derivatives clearing organization shall be considered dormant if its initial and original Commission order of registration was issued within the preceding 1,095 days.

Dormant designated contract market means any designated contract market on which no trading has occurred for a period of 365 days; *provided, however,* no designated contract market shall be considered dormant if its initial and original Commission order of designation was issued within the preceding 1,095 days.

Dormant swap data repository means any registered swap data repository on which no data has resided for a period of 365 days.

Dormant swap execution facility means any swap execution facility on which no trading has occurred for a period of 365 days; *provided, however,* no swap execution facility shall be considered dormant if its initial and original Commission order of registration was issued within the preceding 1,095 days.

Emergency means any occurrence or circumstance that, in the opinion of the governing board of a registered entity, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of a registered entity under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any agreements, contracts, swaps or transactions or the timely collection and payment of funds in connection with clearing and settlement by a derivatives clearing organization, including:

(1) Any manipulative or attempted manipulative activity;

(2) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions;

(3) Any circumstances which may materially affect the performance of agreements, contracts, swaps or transactions, including failure of the payment system or the bankruptcy or insolvency of any participant;

(4) Any action taken by any governmental body, or any other registered entity, board of trade, market or facility which may have a direct impact on trading or clearing and settlement; and

(5) Any other circumstance which may have a severe, adverse effect upon the functioning of a registered entity.

Rule means any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, margin methodology, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted.

Terms and conditions means any definition of the trading unit or the specific commodity underlying a contract for the future delivery of a commodity or commodity option contract, description of the payments to be exchanged under a swap, specification of cash settlement or delivery standards and procedures, and establishment of buyers' and sellers' rights and obligations under the swap or contract. Terms and conditions include provisions relating to the following:

(1) For a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap):

(i) Quality and other standards that define the commodity or instrument underlying the contract;

(ii) Quantity standards or other provisions related to contract size;

(iii) Any applicable premiums or discounts for delivery of nonpar products;

(iv) Trading hours, trading months and the listing of contracts;

(v) The pricing basis, minimum price fluctuations, and maximum price fluctuations;

(vi) Any price limits, no cancellation ranges, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;

(vii) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the contract meets the definition of a referenced contract as defined in § 150.1 of this chapter, and if so, the name of either the core referenced futures contract or other referenced contract upon which the new referenced contract submitted under this part is based.

(viii) Delivery points and locational price differentials;

(ix) Delivery standards and procedures, including fees related to delivery or the delivery process; alternatives to delivery and applicable penalties or sanctions for failure to perform;

(x) If cash settled; the definition, composition, calculation and revision of the cash settlement price or index;

(xi) [Reserved];

(xii) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;

(xiii) Threshold prices for an option contract, the existence of which is contingent upon those prices; and

(xiv) Any restrictions or requirements for exercising an option; and

(2) For a swap:

(i) Identification of the major group, category, type or class in which the swap falls (such as an interest rate, commodity, credit or equity swap) and of any further sub-group, category, type or class that further describes the swap;

(ii) Notional amounts, quantity standards, or other unit size characteristics;

(iii) Any applicable premiums or discounts for delivery of nonpar products;

(iv) Trading hours and the listing of swaps;

(v) Pricing basis for establishing the payment obligations under, and mark-to-market value of, the swap including, as applicable, the accrual start dates, termination or maturity dates, and, for each leg of the swap, the initial cash flow components, spreads, and points, and the relevant indexes, prices, rates, coupons, or other price reference measures;

(vi) Any price limits, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;

(vii) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the contract meets the definition of economically equivalent swap as defined in § 150.1 of this chapter, and, if so, the name of either the core referenced futures contract or referenced contract, as applicable, to which the swap submitted under this part is economically equivalent.

(viii) Payment and reset frequency, day count conventions, business calendars, and accrual features;

(ix) If physical delivery applies, delivery standards and procedures, including fees related to delivery or the delivery process, alternatives to delivery and applicable penalties or sanctions for failure to perform;

(x) If cash settled, the definition, composition, calculation and revision of the cash settlement price, and the settlement currency;

(xi) [Reserved];

(xii) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;

(xiii) Threshold prices for an option, the existence of which is contingent upon those prices;

(xiv) Any restrictions or requirements for exercising an option; and

(xv) Life cycle events.

■ 7. Amend § 40.2 by revising the introductory text of paragraph (a) and paragraphs (a)(1), (a)(3)(i), (ii), (v), and (vi), and (d) to read as follows:

§ 40.2 Listing products for trading by certification.

(a) *Submission requirements.* A designated contract market or a swap execution facility must comply with the submission requirements of this section prior to listing a product for trading that has not been approved under § 40.3. A submission shall comply with the following conditions:

(1) The designated contract market or the swap execution facility has filed its submission electronically in a format and manner specified by the Commission;

* * * * *

(3) * * *

(i) The information required by appendix D of this part;

(ii) A copy of the rules that set forth the contract's terms and conditions;

* * * * *

(v) A concise explanation and analysis that is complete with respect to the product's terms and conditions, the underlying commodity, and the product's compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

(vi) A certification that the registered entity posted a notice of a pending product certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity's website. Information that the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity's website but must be republished consistent with any determination made pursuant to § 40.8(c)(4); and

* * * * *

(d) *Class certification of swaps.* (1) A designated contract market or swap execution facility may list or facilitate trading in any swap or number of swaps based upon an ''excluded commodity,'' as defined in section 1a(19)(i) of the Act, not including any security, security index, and currency other than the United States Dollar and a ''major foreign currency,'' as defined in § 15.03(a) of this chapter, or an ''excluded commodity,'' as defined in section 1a(19)(ii)–(iv) of the Act, provided the designated contract market or swap execution facility certifies, under § 40.2(a)(1) and (2) and (3)(i), (iv), and (vi), the following:

(i) Each particular swap within the certified class of swaps is based upon an excluded commodity specified in § 40.2(d)(1);

(ii) Each particular swap within the certified class of swaps is based upon an excluded commodity with an identical pricing source, formula, procedure, and methodology for calculating reference prices and payment obligations;

(iii) The pricing source, formula, procedure, and methodology for calculating reference prices and payment obligations in each particular swap within the certified class of swaps is identical to a pricing source, formula, procedure, and methodology for calculating reference prices and payment obligations in a product previously submitted to the Commission and certified or approved pursuant to § 40.2 or § 40.3; and

(iv) Each particular swap within the certified class of swaps is based upon an excluded commodity involving an identical currency or identical currencies.

(2) The Commission may in its discretion require a registered entity to withdraw its certification under § 40.2(d)(1) and to submit each individual swap or certain individual swaps within the submission for Commission review pursuant to § 40.2 or § 40.3.

■ 8. Amend § 40.3 as follows:

■ a. Revise the introductory text of paragraph (a) and paragraphs (a)(1) and (2), (4), (9) and (10), (c), and (d);

■ b. Remove paragraph (e); and

■ c. Redesignate paragraph (f) as paragraph (e) and revise newly redesignated paragraph (e).

The revisions read as follows:

§ 40.3 Voluntary submission of new products for Commission review and approval.

(a) *Request for approval.* Pursuant to section 5c(c) of the Act, a designated contract market, a swap execution facility, or a derivatives clearing organization may request that the Commission approve a new product prior to listing the product for trading or accepting the product for clearing, or if a product was initially submitted under § 40.2 or § 39.5 of this chapter, subsequent to listing the product for trading or accepting the product for clearing. A submission requesting approval shall:

(1) Be filed electronically in a format and manner specified by the Commission;

(2) Include the information required by appendix D of this part;

* * * * *

(4) Include an explanation and analysis that is complete with respect to the product's terms and conditions, the underlying commodity, and the product's compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with the applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

* * * * *

(9) Certify that the registered entity posted a notice of its request for Commission approval of the new product and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity's website. Information the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity's website but must be republished consistent with any determination made pursuant to § 40.8(c)(4); and

(10) Include, if requested by Commission staff, additional evidence, information or data demonstrating that the contract meets, initially or on a continuing basis, the requirements of the Act, or other requirement for designation or registration under the Act, or the Commission's regulations or policies thereunder. The registered entity shall submit the requested information by the time specified by Commission staff, or at the conclusion of any extended period agreed to by Commission staff after timely receipt of a written request from the registered entity.

* * * * *

(c) *Commission review.* (1) All products submitted for Commission approval pursuant to, and in compliance with the submission requirements of, paragraph (a) of this section shall be subject to review by the Commission for a period of 45 days after receipt by the Commission.

(2) The Commission may extend the initial 45-day review period for up to an additional 45 days if the product raises novel or complex issues that require additional time to analyze, the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner, in which case the Commission shall notify the submitting registered entity within the initial 45-day review period and shall briefly describe the nature of the specific issues for which additional time for review shall be required.

(3) At any time during its review of a proposed product under this section, the Commission may extend the review period for any period of time to which the registered entity agrees in writing.

(4) Any amendment or supplementation made by the registered entity to the submission will be treated as the filing of a new submission under this section and be subject to the initial 45-day review period in accordance with paragraph (c)(1) of this section, unless the amendment or supplementation is made for correction of typographical errors, renumbering or other non-substantive revisions. Any substantive amendment or supplementation by the submitting entity, including an amendment or supplementation requested by the Commission, will be treated as a new submission under this section.

(5) If the review period described in paragraph (c)(1) of this section would end on a day that is not a business day, such review period shall instead be extended to end on the next business day.

(d) *Commission determination*—(1) *Approval.* Any product submitted for Commission approval in compliance with paragraph (a) of this section shall be deemed approved by the Commission under section 5c(c) of the Act at the conclusion of the applicable review period under paragraph (c) of this section, unless the Commission issues a notice of non-approval to the registered entity under paragraph (d)(2) of this section within the applicable review period.

(2) *Notice of non-approval.* Any time during its review under this section, the Commission may notify the registered entity that it will not, or is unable to, approve the new product. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission's regulations, including the form or content requirements of this section, with which the new product is inconsistent or appears to be inconsistent with the Act or the Commission's regulations.

(e) *Effect of non-approval.* (1) Notification to a registered entity under paragraph (d)(2) of this section of the Commission's determination not to approve a product does not prevent the entity from subsequently submitting a revised version of the product for Commission approval, or from submitting the product as initially proposed, in a supplemented submission; the revised or supplemented submission will be reviewed without prejudice.

(2) Notification to a registered entity under paragraph (d)(2) of this section of the Commission's determination not to approve a product shall be presumptive evidence that the entity may not truthfully certify under § 40.2 that the same, or substantially the same, product complies with the Act and the Commission's regulations thereunder.

■ 9. Revise § 40.4 to read as follows:

§ 40.4 Amendments to terms or conditions of enumerated agricultural products.

(a) Notwithstanding the provisions of this part, a designated contract market must submit for Commission approval under the procedures of § 40.5, prior to its implementation, any rule that, for a delivery month having open interest, would materially change a product's term or condition, as defined in § 40.1, of a contract for future delivery in an agricultural commodity enumerated in section 1a(9) of the Act, or of an option on such a contract or commodity.

(b) The following rules or rule amendments are not material and are not required by this section to be submitted for Commission approval under the procedures of § 40.5:

(1) Rules or rule amendments that are enumerated in § 40.6(d)(2) may be implemented without prior approval or certification, provided that they are implemented pursuant to the notification procedures of § 40.6(d);

(2) Rules or rule amendments that are enumerated in § 40.6(e)(2) may be implemented without prior approval or certification or notification as permitted pursuant to § 40.6(e);

(3) Rules or rule amendments governing trading hours may be implemented without prior approval, provided that they are implemented pursuant to the procedures of § 40.6(a);

(4) Rules or rule amendments that are required to comply with a binding order of a court of competent jurisdiction, or a rule, regulation or order of the Commission or of another Federal regulatory authority, may be implemented without prior approval, provided that they are implemented pursuant to the procedures of § 40.6(a); or

(5) Any rule or rule amendment:

(i) The text of which has been submitted pursuant to the procedures of §§ 40.4(b)(5) and 40.6(a) at least ten business days prior to its implementation and that has been labeled ''Non-Material Agricultural Rule Change;''

(ii) For which the designated contract market has provided an explanation as to why it considers the rule ''non-material,'' and any other information that may be beneficial to the Commission in analyzing the merits of the entity's claim of non-materiality including, if applicable, a copy of a previously approved rule or rule amendment that is, in substance, the same as the non-material rule or rule amendment; and

(iii) With respect to which the Commission has not notified the contract market during the review period that the rule appears to require or does require prior approval under this section.

■ 10. Amend § 40.5 as follows:

■ a. Revise the introductory text of paragraph (a) and paragraphs (a)(1) and (2), (5) and (6), and (9), the paragraph heading of paragraph (c), and paragraph (c)(1);

■ b. Remove paragraph (c)(2);

■ c. Redesignate paragraph (d)(1) as paragraph (c)(2) and revise newly redesignated paragraph (c)(2);

■ d. Redesignate paragraph (d)(2) as paragraph (c)(3) and revise newly redesignated paragraph (c)(3);

■ e. Add paragraphs (c)(4) through (6);

■ f. Revise the paragraph heading of paragraph (d), remove paragraph (d) introductory text, and add a new paragraph (d)(1);
■ g. Redesignate paragraph (g) as paragraph (d)(2) and revise newly redesignated paragraph (d)(2);
■ h. Redesignate paragraph (e) as paragraph (d)(3) and revise newly redesignated paragraph (d)(3); and
■ i. Redesignate paragraph (f) as paragraph (e) and revise newly redesignated paragraph (e).

The revisions and additions read as follows:

§ 40.5 Voluntary submission of rules for Commission review and approval.

(a) *Request for approval of rules.* Pursuant to section 5c(c) of the Act, a registered entity may request that the Commission approve a new rule or rule amendment prior to implementation of the rule, or if the rule or rule amendment was initially submitted under § 40.2 or § 40.6, subsequent to implementation of the rule. A request for approval shall:

(1) Be filed electronically in a format and manner specified by the Commission;

(2) Include the information required by appendix D of this part;

* * * * *

(5) Provide an explanation and analysis that is complete with respect to the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder, including, as applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants or others, and how the rule fits into the registered entity's framework of self-regulation;

(6) Certify that the registered entity posted a notice of its request for Commission approval of the new rule or rule amendment and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity's website. Information the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity's website but must be republished consistent with any determination made pursuant to § 40.8(c)(4);

* * * * *

(9) Identify any Commission regulation that the Commission may need to amend, or sections of the Act or the Commission's regulations that the Commission may need to interpret, in order to approve the new rule or rule amendment. To the extent that such an amendment or interpretation is necessary to accommodate a new rule or rule amendment, the submission should include a reasoned analysis supporting the amendment to the Commission's regulation or the interpretation; and

* * * * *

(c) *Commission review.* (1) Any rule submitted for Commission approval pursuant to, and in compliance with the submission requirements of, paragraph (a) of this section shall be subject to review by the Commission for a period of 45 days after receipt by the Commission.

(2) The Commission may extend the initial 45-day review period for up to an additional 45 days if the proposed rule raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner, in which case the Commission shall notify the submitting registered entity within the initial 45-day review period and shall briefly describe the nature of the specific issues for which additional time for review shall be required.

(3) At any time during its review of a proposed rule under this section, the Commission may extend the review period for any period of time to which the registered entity agrees in writing.

(4) Any amendment or supplementation made by the registered entity to the submission will be treated as the filing of a new submission under this section and be subject to the initial 45-day review period in accordance with paragraph (c)(1) of this section, unless the amendment or supplementation is requested by the Commission or is made for correction of typographical errors, renumbering or other non-substantive revisions.

(5) If a rule or rule amendment that is submitted for Commission approval under paragraph (a) of this section is also submitted and labeled as a ''Non-Material Agricultural Rule Change'' in accordance with § 40.4(b)(5), the Commission shall commence the 45-day review period in paragraph (c)(1) of this section ten business days after receiving the submission.

(6) If the review period described in paragraph (c)(1) of this section would end on a day that is not a business day, such review period shall instead be extended to end on the next business day.

(d) *Commission determination*—(1) *Approval.* Any rule submitted for Commission approval in compliance with paragraph (a) of this section shall be deemed approved by the Commission under section 5c(c) of the Act at the conclusion of the applicable review period under paragraph (c) of this section, unless the Commission issues a notice of non-approval to the registered entity under paragraph (d)(3) of this section within the applicable review period.

(2) *Expedited approval.* Notwithstanding the provisions of paragraph (c) of this section, a proposed rule or rule amendment, including changes to terms and conditions of a product that are consistent with the Act and Commission regulations, may be approved by the Commission at such time and under such conditions as the Commission shall specify in a written notification.

(3) *Notice of non-approval.* Any time during its review under this section, the Commission may notify the registered entity that it will not, or is unable to, approve the new rule or rule amendment. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission's regulations, including the form or content requirements of this section, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the Act or the Commission's regulations.

(e) *Effect of non-approval.* (1) Notification to a registered entity under paragraph (d)(3) of this section of the Commission's determination not to approve a new rule or rule amendment does not prevent the registered entity from subsequently submitting a revised version of the proposed rule or rule amendment for Commission review and approval, or from submitting the new rule or rule amendment as initially proposed, in a supplemented submission; the revised or supplemented submission will be reviewed without prejudice.

(2) Notification to a registered entity under paragraph (d)(3) of this section of the Commission's determination not to approve a proposed rule or rule amendment of a registered entity shall be presumptive evidence that the entity may not truthfully certify under § 40.6 that the same, or substantially the same, proposed rule or rule amendment complies with the Act and the Commission's regulations thereunder.

■ 11. Amend § 40.6 as follows:
■ a. Revise the introductory text of paragraph (a) and paragraphs (a)(1) and (2) and (5) through (8);
■ b. Add paragraph (a)(9);

■ c. Revise paragraphs (b) and (c)(2) and (3);
■ d. Add paragraph (c)(5);
■ e. Revise paragraphs (d)(1) and (d)(2)(iii), (iv), and (ix);
■ f. Add paragraphs (d)(2)(xi) through (xiii); and
■ g. Redesignate paragraph (d)(3) as paragraph (e) and revise newly redesignated paragraph (e).

The revisions and additions read as follows:

§ 40.6 Self-certification of rules.

(a) *Submission requirements.* A registered entity shall comply with the certification and submission requirements of this section prior to implementing any rule that has not obtained Commission approval under § 40.5, or that is submitted under § 40.10, except as otherwise provided by § 40.10(a). A submission shall comply with the following conditions:

(1) The registered entity has filed its submission electronically in a format and manner specified by the Commission.

(2) The registered entity has provided a certification that the registered entity posted a notice of pending certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the registered entity's website. Information that the registered entity seeks to keep confidential may be redacted from the documents published on the registered entity's website but it must be republished consistent with any determination made pursuant to § 40.8(c)(4).

* * * * *

(5) The rule or rule amendment is not a rule or rule amendment of a designated contract market that materially changes a term or condition of a contract for future delivery of an agricultural commodity enumerated in section 1a(9) of the Act or an option on such a contract or commodity in a delivery month having open interest.

(6)(i) Rules or rule amendments implemented under procedures of the governing board to respond to an emergency as defined in § 40.1, shall, if practicable, be filed with the Commission prior to the implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than twenty-four hours after implementation. Such rules shall be subject to the review and stay provisions of paragraphs (b) and (c) of this section.

(ii) New rules or rule amendments that establish standards for responding to an emergency must be submitted pursuant to § 40.6(a) or may be submitted pursuant to § 40.5.

(7) The rule submission shall include:

(i) The information required by appendix D of this part (''Emergency Rule Certification'' should be noted in the Description section in the case of a rule or rule amendment that responds to an emergency);

(ii) The text of the rule (in the case of a rule amendment, deletions and additions must be indicated);

(iii) The date of intended implementation;

(iv) A certification by the registered entity that the rule complies with the Act and the Commission's regulations thereunder;

(v) A concise explanation and analysis that is complete with respect to the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder;

(vi) A brief explanation of any substantive opposing views expressed to the registered entity by governing board or committee members, members of the entity or market participants, that were not incorporated into the rule, or a statement that no such opposing views were expressed; and

(vii) As appropriate, a request for confidential treatment pursuant to the procedures provided in § 40.8;

(8) The registered entity shall provide, if requested by Commission staff, additional evidence, information or data that may be beneficial to the Commission in conducting a due diligence assessment of the filing and the registered entity's compliance with any of the requirements of the Act or the Commission's regulations or policies thereunder; and

(9) Notwithstanding the 10 business day filing requirement of paragraphs (a)(3) and (b)(1) of this section, a registered entity may file a submission and certification of a new rule or a rule amendment that delists, or withdraws the certification of, a product that has no open interest and may make the delisting or withdrawal of the product with no open interest effective immediately upon filing the submission, provided that the submission is made in compliance with paragraphs (a)(1) and (2) and (7) of this section.

(b) *Review by the Commission.* (1) The Commission shall have 10 business days to review the new rule or rule amendment before the new rule or rule amendment is deemed certified and can be made effective, unless the Commission notifies the registered entity during the 10-business day review period that it intends to issue a stay of the certification under paragraph (c) of this section.

(2) Any amendment or supplementation made by the registered entity to the submission will be treated as the filing of a new submission under this section and be subject to the initial 10-business day review period in accordance with paragraph (b)(1) of this section, unless the amendment or supplementation is made for correction of typographical errors, renumbering or other non-substantive revisions.

(c) * * *

(2) *Public comment.* The Commission shall provide a 30-day comment period within the 90-day period in which the stay is in effect as described in paragraph (c)(1) of this section. The Commission shall publish a notice of the 30-day comment period on the Commission website. Comments from the public shall be submitted as specified in that notice.

(3) *Expiration of a stay of certification of new rule or rule amendment.* A new rule or rule amendment subject to a stay pursuant to this paragraph shall become effective and can be implemented, pursuant to the certification, at the expiration of the 90-day review period described in paragraph (c)(1) of this section unless the Commission withdraws the stay prior to that time, or the Commission notifies the registered entity during the 90-day time period that it objects to the certification on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's regulations.

* * * * *

(5) *Effect of objection.* (i) Notification to a registered entity under paragraph (c) of this section of the Commission's objection to a certification by a registered entity on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's regulations does not prevent the registered entity from subsequently submitting a revised version of the proposed rule or rule amendment for certification or Commission review and approval, or from submitting the new rule or rule amendment as initially proposed, in a supplemented submission; the revised or supplemented submission will be reviewed without prejudice.

(ii) Notification to a registered entity under paragraph (c) of this section of the Commission's objection to a certification by a registered entity shall be presumptive evidence that the entity may not truthfully certify under this section that the same, or substantially the same, proposed rule or rule

amendment complies with the Act and the Commission's regulations thereunder.

(d) * * *

(1) The registered entity provides to the Commission at least weekly a summary notice of all rule amendments made effective pursuant to this paragraph (d) during the preceding week. Such notice must be labeled ''Weekly Notification of Rule Amendments'' and need not be filed for weeks during which no such actions have been taken. One copy of each such submission shall be furnished electronically in a format and manner specified by the Commission; and

(2) * * *

(iii) *Index products.* Routine changes in the composition, computation, or method of selection of component entities of an index (other than routine changes to securities indexes to the extent that such changes are not described in paragraph (e)(2)(vi) of this section) referenced and defined in the product's terms, that do not affect the pricing basis of the index, which are made by an independent third party whose business relates to the collection or dissemination of price information and which was not formed solely for the purpose of compiling an index for use in connection with a futures or option product;

(iv) *Option contract terms.* Changes to option contract rules, which may qualify for implementation without notice pursuant to paragraph (e)(2)(vii) of this section, relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis;

* * * * *

(ix) *Trading months.* The initial listing of trading months, or an amendment to existing trading months, which may qualify for implementation without notice pursuant to paragraph (e)(2)(viii) of this section, within the currently established cycle of trading months;

* * * * *

(xi) *Contact information.* Updates of email addresses or other contact information that market participants use to submit block trades;

(xii) *Changes to no cancellation ranges.* For a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap), changes to no cancellation ranges (which are the price ranges within which a trade will not be cancelled); or

(xiii) *Option premiums or margins.* For a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap), payment or collection of commodity options premiums or margins; or for a swap, payment or collection of option premiums or margins.

(e) *Notification of rule amendments not required.* Notwithstanding the rule certification requirements of section 5c(c)(1) of the Act and paragraph (a) of this section, a registered entity may place the following rules or rule amendments into effect without certification or notice to the Commission if the following conditions are met:

(1) The registered entity maintains documentation regarding all changes to rules; and

(2) The rule governs:

(i) *Transfer of membership or ownership.* Procedures and forms for the purchase, sale or transfer of membership or ownership, but not including qualifications for membership or ownership, any right or obligation of membership or ownership or dues or assessments;

(ii) *Administrative procedures.* The organization and administrative procedures of a registered entity governing bodies such as a Board of Directors, Officers and Committees, but not voting requirements, Board of Directors or Committee composition requirements or procedures, decision making procedures, use or disclosure of material non-public information gained through the performance of official duties, or requirements relating to conflicts of interest;

(iii) *Administration.* The routine, daily administration, direction and control of employees, requirements relating to gratuity and similar funds, but not guaranty, reserves, or similar funds; declaration of holidays, and changes to facilities housing the market, trading floor or trading area;

(iv) *Standards of decorum.* Standards of decorum or attire or similar provisions relating to admission to the floor, badges, or visitors, but not the establishment of penalties for violations of such rules; and

(v) *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(A) Are less than $1.00 per contract; or

(B) Relate to matters such as dues, badges, telecommunication services, booth space, real time quotations, historical information, publications, software licenses or other matters that are administrative in nature.

(vi) *Securities indexes.* Routine changes to the composition, computation or method of security selection of an index that is referenced and defined in the product's rules, and which is made by an independent third party.

(vii) *Option contract terms.* For registered entities that are in compliance with the daily reporting requirements of § 16.01 of this chapter, changes to option contract rules relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis.

(viii) *Trading months.* For registered entities that are in compliance with the daily reporting requirements of § 16.01 of this chapter, the initial listing of trading months which are within the currently established cycle of trading months.

■ 12. Amend § 40.7 by adding paragraphs (a)(1)(iv) and (v), revising paragraphs (a)(5) and (b)(3), and adding paragraph (e) to read as follows:

§ 40.7 Delegations.

(a) * * *

(1) * * *

(iv) To extend, pursuant to § 40.3(c)(3), the applicable review period set forth in § 40.3(c) for the period agreed to in writing by the registered entity;

(v) To extend, pursuant to § 40.5(c)(3), the applicable review period set forth in § 40.5(c) for the period agreed to in writing by the registered entity.

* * * * *

(5) The Commission hereby delegates to the Director of the Division of Market Oversight, to be exercised by the Director or by such employees of the Commission that the Director may designate from time to time, with the concurrence of the General Counsel or the General Counsel's delegate, the authority to determine whether a rule or rule amendment submitted by a designated contract market is material under § 40.4(b)(5), and to notify the designated contract market of such determination.

(b) * * *

(3) Establish or amend or relate to speculative limits or position accountability provisions that are in compliance with the requirements of the Act and the Commission's regulations;

* * * * *

(e) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Risk and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of

the Commission that either Director may designate from time to time, the authority to specify the format and manner to be used by a registered entity when filing a submission pursuant to this part.

■ 13. Amend § 40.10 by revising the introductory text of paragraph (a), paragraph (b), the introductory text of paragraph (d), and paragraph (h)(3), and adding paragraph (i) to read as follows:

§ 40.10 Special certification procedures for submission of rules by systemically important derivatives clearing organizations.

(a) *Advance notice.* A systemically important derivatives clearing organization, as defined in § 39.2 of this chapter, shall provide notice to the Commission not less than 60 days in advance of any proposed change to its rules, procedures, or operations that could materially affect the nature or level of risks presented by the systemically important derivatives clearing organization. A notice submitted under this section shall be subject to the filing requirements of § 40.6(a)(1) and the website publication requirements of § 40.6(a)(2).

* * * * *

(b) *Changes requiring advance notice.* Changes to a systemically important derivatives clearing organization's rules, procedures, or operations that could materially affect the nature or level of risks presented by the systemically important derivatives clearing organization may include, but are not limited to: material changes to its default management plan or default rules or procedures required under § 39.16 or § 39.35 of this chapter, program of risk analysis and oversight required under § 39.18 of this chapter, or recovery and wind down plans required under § 39.39 of this chapter; the adoption of a new or materially revised margin methodology; the establishment of a cross-margining program or similar arrangement with another clearing organization; and material changes to its approach to the stress testing required under § 39.13(h)(3), or § 39.36(a) or (c) of this chapter. If a systemically important derivatives clearing organization determines that a proposed change could not materially affect the nature or level of risks it presents and therefore does not file an advance notice, the Commission may determine otherwise and require the systemically important derivatives clearing organization to withdraw the proposed change and provide notice pursuant to this section.

* * * * *

(d) *Notice of objection.* A systemically important derivatives clearing organization shall not implement a change to which the Commission has an objection on the grounds that the proposed change is not consistent with the Act or the Commission's regulations, or any applicable rules, orders, or standards prescribed under section 805(a) of the Dodd-Frank Act. The Commission will notify the systemically important derivatives clearing organization in writing of any objection regarding the proposed change within 60 days from the later of:

* * * * *

(h) * * *

(3) The Commission may require modification or rescission of the emergency change if it finds that the change is not consistent with the Act or the Commission's regulations, or any applicable rules, orders, or standards prescribed under section 805(a) of the Dodd-Frank Act.

(i) Where in §§ 39.3(g), 39.4(f), 39.13(i), and 39.15(b)(2) of this chapter a derivatives clearing organization is required to submit rules for approval pursuant to § 40.5, a systemically important derivatives clearing organization instead shall submit such rules pursuant to § 40.10 if the rules could materially affect the nature or level of risks presented by the systemically important derivatives clearing organization.

■ 14. Revise appendix D to part 40 to read as follows:

Appendix D to Part 40—Submission Instructions for Rules and Products

(a) Rule and product submissions shall be submitted electronically to the Commission by a registered entity in a format and manner specified by the Commission, and shall include all of the following information:

1. *Date*—The date of the filing.

2. *Organization*—The name of the organization filing the submission (*e.g.,* CBOT).

3. *Type of Registered Entity*—An indication as to whether the rule or product is being submitted by a designated contract market (DCM), derivatives clearing organization (DCO), swap execution facility (SEF), or swap data repository (SDR).

4. *Type of Filing*—An indication as to whether the filing is a new rule, rule amendment or new product and the section of part 40 under which the filing is submitted. For a new product to be listed by a DCM or a SEF, an indication whether the new product meets the definition of referenced contract as such term is defined in § 150.1 of this chapter and is described in Appendix C to Part 150 of this chapter—Guidance Regarding the Definition of Referenced Contract.

5. *Rule Numbers*—For rule filings, the rule number(s) being adopted or modified in the case of rule amendment filings.

6. *Description*—For rule or rule amendment filings, a description of the new rule or rule amendment, including a discussion of its expected impact on the registered entity, market participants, and the overall market. The narrative should describe the substance of the submission with enough specificity to characterize all material aspects of the filing.

7. *Identifier Code (optional)*—A registered entity Identifier Code, if applicable. Such codes are commonly generated by registered entities to provide an identifier that is unique to each filing (*e.g.,* NYMEX Submission 03–116).

(b) *Other Requirements*—A submission shall comply with all applicable filing requirements for proposed rules, rule amendments, or products. The entry of the information required by paragraph (a) of this appendix does not obviate the registered entity's responsibility to comply with applicable filing requirements (*e.g.,* rules submitted for Commission approval under § 40.5 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views).

(c) An indication of ''confidential treatment requested'' does not obviate the submitter's responsibility to comply with all applicable requirements for requesting confidential treatment in § 40.8 and, where appropriate, § 145.9 of this chapter, and will not substitute for notice or full compliance with such requirements.

■ 15. Add appendix E to part 40 to read as follows:

Appendix E to Part 40—Guidance on Compliance With the Materiality Assessment in § 40.4

(a) This appendix provides guidance on complying with the requirement in § 40.4(a) that a DCM must submit rule changes that would materially change a term or condition of a contract on an agricultural product enumerated in section 1a(9) of the CEA with open interest for Commission approval under the procedures of § 40.5. Section 40.4(a) applies strictly to rules that materially change a product's economic terms and conditions, and does not apply to other rules. Guidance is set forth in this appendix to assist a DCM in assessing whether a change to the terms and conditions is material pursuant to § 40.4(a) and in explaining why it considers a rule to be non-material when § 40.4(b)(5) is applicable. The guidance in this appendix can be used to demonstrate to the Commission compliance with the requirement in § 40.4(b)(5)(ii) that the DCM explain why it considers a rule to be non-material when applicable.

Materiality of a Change of a Term or Condition

(b) Any change that is enumerated by the Commission in § 40.4(b)(1) through (4) is not material for purposes of § 40.4(a) and may be submitted under the applicable § 40.6 provision that is specified in the applicable section of § 40.4(b). For any other rule that the DCM believes to be non-material, § 40.4(b)(5) sets forth a process for the DCM

to implement the change through self-certification pursuant to § 40.6(a).

(c) In order for a DCM to self-certify a change to a term or condition of a contract on an agricultural product enumerated in CEA section 1a(9) with open interest that the DCM believes to be non-material, § 40.4(b)(5) requires the DCM to make a non-materiality filing and explain why it considers the rule change to be ''non-material.'' To assist an exchange in assessing and explaining whether a change to the terms and conditions is non-material pursuant to § 40.4(b)(5), the following paragraphs set forth the criteria that the Commission generally considers as evidence that an enumerated agricultural product rule change is non-material under § 40.4(a) pursuant to § 40.4(b)(5). A DCM may address these criteria in its assessment and explanation to demonstrate compliance with § 40.4(b)(5).

(d) The Commission considers a change to the terms and conditions of a contract on an agricultural product enumerated in CEA section 1a(9) that has open interest as a non-material change if:

(1) The change should not affect a reasonable trader's decision to enter into, or maintain, a position;

(2) The change should not affect a reasonable trader's decision to make or take delivery on the contract or to exercise an option on the contract; and

(3) The change should not have an effect on the value of existing positions, including, but not limited to, a change affecting the price of the contract due to a change in the commodity quality characteristics of the existing contract, a change to the size of the existing contract, or a change to a cost of effecting delivery for the existing contract.

Issued in Washington, DC, on August 24, 2023, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Provisions Common to Registered Entities—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Behnam and Commissioners Goldsmith Romero and Pham voted in the affirmative. Commissioners Johnson and Mersinger concurred. No Commissioner voted in the negative.

Appendix 2—Statement of Support of Chairman Rostin Behnam

The Commission votes today [at the Commission Open Meeting held on July 26, 2023] on a proposed rule to amend part 40 of the Commission regulations. Part 40 sets forth provisions common to registered entities, including designated contract markets (DCMs), derivatives clearing organizations (DCOs), swap execution facilities (SEFs), and swap data repositories (SDRs), and establishes requirements and procedures for submitting rules and products, listing products for trading, and accepting products for clearing. Part 40 has not been amended comprehensively since 2011; the proposal would amend part 40 based on the Commission's experience applying the part 40 regulations since 2011, and is intended to clarify and enhance the utility of part 40. I support this proposed rule.

At a high level, the proposed amendments would: (1) simplify the determination of whether a registered entity is deemed dormant; (2) edit language to reflect the development and use of the Commission's online portal for filing of rule and product submissions; (3) reorganize and enhance the utility of rules regarding rule submissions and delegations of authority; and (4) provide meaningful guidance to SIDCOs regarding filing instructions for rules that could materially affect the nature or level of risks presented by the SIDCO.

Appendix 3—Statement of Support of Commissioner Kristin N. Johnson

I support the Commission's issuance for notice and comment of proposed amendments to provisions common to registered entities as set forth in part 40 of the Commission's regulations.[1] These regulations implement section 5c(c) of the Commodity Exchange Act (CEA or Act),[2] which prescribes the procedures for listing by registered entities of new products, as well as for approval of new rules or rule amendments, and also standards for review for and approval of the same by the Commission.[3] These provisions apply to designated contract markets (DCMs), derivatives clearing organizations (DCOs), Swap Execution Facilities (SEFs), and swap data repositories (SDRs).

Part 40 has not been amended comprehensively for a decade. Over the course of that same decade, a number of other notable market events have transpired. For example, in 2008, an unidentified person—or group of people—using the pseudonym Satoshi Nakamoto published a white paper, innocently titled Bitcoin: A Peer-to-Peer Electronic Cash System, that outlined a decentralized peer-to-peer system for making and processing payments. In the decade since the white paper's release, we have witnessed exponential growth in the market for digital assets, including cryptocurrencies, as well as the explosion of the digital asset ecosystem.

In addition to the developments regarding the creation and proliferation of digital assets, we have witnessed remarkable growth in the market for carbon credits. There is an indisputable and urgent need for markets to focus on sustainability. This Commission's Second Voluntary Carbon Markets Convening held in this room last week highlighted this necessity. It also highlighted the need for careful consideration of important questions such as the potential for fraud or the veracity of claims regarding additionality and concerns regarding greenwashing.

I am enthusiastic to support the Director of the Division of Enforcement Ian McGinley as we stand up the Environmental Fraud Task Force and continue the work of the Digital Asset Task Force. Yet, I strongly believe that effectively addressing fraud and market manipulation requires not only vigorous enforcement, but also thoughtful and proactive regulation. The amendments proposed today [at the Commission Open Meeting held on July 26, 2023] are a significant step in empowering the Commission to better understand new products and new rules in our markets in support of our regulatory mission.

Turning to the rulemaking under consideration today [at the Commission Open Meeting held on July 26, 2023], registered entities generally have two options when submitting products and rules for approval: they may self-certify that the product or rule complies with the CEA and Commission regulations, or they may submit the product or rule for Commission approval.[4] The proposed amendments are intended to build on the Commission's experience over the past decade in applying the part 40 regulations to product and rule submissions to clarify, simplify, and enhance the utility of the part 40 regulations for both registered entities and the Commission. Many of these revisions are technical in nature, and I appreciate the wisdom of the staff in both the Division of Clearing and Risk and the Division of Market Oversight in proposing them. I note that there are additional revisions that update the regulations to reflect technological developments in the ways that registered entities communicate with the Commission—*i.e.,* by using the internet.

Consequently, the revisions to the requirements under regulations §§ 40.2(a)(3)(v) and 40.3(a)(4) merit additional focus. These amendments require a registered entity to provide an explanation of the nature of the new product self-certified or submitted to the Commission for approval, ''that is complete with respect to'' the product's terms and conditions as well as the product's compliance with the applicable provisions of the Act, including core principles, and the Commission's regulations.[5] Staff have noted that, in their experience, registered entities have not always included sufficient information about the underlying commodity to a new product to allow the Commission to complete the analysis of compliance required under the CEA and the part 40 regulations. The proposed amendments not only call for additional information about the product's underlying commodity, including characteristics such as the deliverable commodity's grade, quality and deliverable supply, as applicable, but also specifically reference the guidance provided in appendix C to part 38[6] as providing the requisite level

[1] 17 CFR part 40.

[2] 7 U.S.C. 7a–2(c).

[3] *Compare* 17 CFR 40.2, 40.6 (providing for self-certification of products or rules), *with* 17 CFR 40.3, 40.5 (setting forth procedures for seeking Commission review and approval of products or rules).

[4] *Id.*

[5] 17 CFR 40.2(a)(3)(v), 40.3(a)(4).

[6] 17 CFR part 38, appendix C.

of detail to comply with the newly proposed standard.

I support the proposed amendments to part 40 because I support making our rules clearer and easier to administer. I look forward to hearing from commenters as to whether these new requirements are fit for purpose and will enable the Commission to effectively address innovations regarding products, platforms, and technologies. I thank staff in the Division of Clearing and Risk and the Division of Market Oversight, including Rachel Kaplan Reicher, Steven Benton, Nancy Markowitz, and Eileen Chotiner, for their efforts, and look forward to receiving comments from registered entities and the public that will assist the Commission in achieving the best outcome with this rulemaking.

Appendix 4—Statement of Support of Commissioner Christy Goldsmith Romero

Over the last few years, derivatives markets have had to react quickly to new technologies, new government policies, and new economic realities. Exchanges have added many new products for futures in traditional commodity types. For example, in 2023, exchanges listed new metals contracts for lithium and molybdenum to meet growing demand in response to the historic investment in and demand for electric vehicles and batteries. And we have also seen entirely new product types proliferate. Exchanges have listed new contracts that reference novel commodities, such as digital assets and voluntary carbon market credits.

As sponsor of the CFTC's Technology Advisory Committee, I feel comfortable saying that there is no shortage of participants with new ideas seeking access to our regulated markets. Under the Commodity Exchange Act, the Commission's role includes promoting responsible innovation, while protecting customers and promoting the market integrity and transparency that makes American capital markets the deepest and most liquid in the world. New products may improve access to financial markets, reduce costs, and help manage novel risks. But novel derivative contracts and the commodity they are based on may lack a meaningful history that shows that the contract is not readily susceptible to manipulation. And for digital assets, showing that the contract is derivative of commodities rather than securities is important to prevent regulatory arbitrage.

Especially in novel cases, the Commission needs complete information so it can conduct oversight over new products on our markets. The Commission needs to be able to understand if an exchange is fulfilling its core principles that govern its conduct, to determine whether the new product complies with the law, and to understand any increased risk the contract may pose to customers and financial stability.

Under the Commodity Exchange Act, most exchanges are permitted to self-certify that new products comply with the core principles, including that they are not readily susceptible to manipulation. That means a potentially complex or novel product may enter the market even before the Commission's staff have been able to understand fully whether it complies with the law, and the risks that it could pose. To make this assessment quickly, our staff need complete information about both the characteristics of the product and of the market for the underlying commodity that determines its price.

I support this proposal because it recognizes and helps address a trend that Commission staff have experienced—submissions not including sufficient information for the staff to fulfill the Commission's regulatory responsibility. By requiring a ''complete'' explanation of a new product's terms and conditions and providing context on what it means for an explanation to be ''complete,'' this proposal would enable the Commission to fulfill its oversight responsibility, including to determine the lawfulness of the product and to assess risk.

Under the proposed changes, the Commission's ability to understand how the product's terms and conditions comply with the law is increased. This also allows the Commission to ensure that when exchanges do add new products, their decisions follow the core principles in the law, do not put market integrity at risk, and are supported by the twin pillars of customer protection and financial stability.

This proposal will help achieve the purposes of the Commission's existing heightened review standard for digital assets.[1] The heart of this heightened review is ''extensive visibility and monitoring of markets and for virtual currency derivatives and underlying settlement reference rates.'' [2] Complete information at the self-certification phase will help staff better understand the risks posed by products that may not have the extensive history that allows manipulative trading patterns to be identified and that may reference digital assets traded on unregulated or unregistered spot exchanges. ''Complete'' information will enable a more comprehensive Commission review of risks associated with these products and underlying commodities, and any changes necessary for market integrity or to protect customers and financial stability.

This proposal would also help the Commission extend heightened review to self-certified climate and environmental products listed on exchanges, a recommendation I first made in March at ISDA's ESG Conference.[3] The Commission has recognized the challenges that exist in the integrity of the spot market for carbon credits and launched an Environmental Fraud Task Force, which I advocated for, to combat fraud in this space that can impact derivatives carbon products. Adopting a heightened review framework will allow the Commission to work closely with exchanges to ensure that they are fulfilling interest in these products in a responsible fashion. That is aided by the Commission's access to complete information about their terms and conditions and the underlying commodity at the initial self-certification.

Even where contracts address more traditional markets, the economic circumstances and customer needs are changing and the Commission needs complete information to keep pace. Notably, the Commission needs complete information on new contracts on lithium, rare earth metals, and copper, products that are drawing increased interest due to growing investment in EV's and batteries encouraged by the ''triple whammy'' of new laws—the Inflation Reduction Act (IRA), the Bipartisan Infrastructure Law (BIL) and the CHIPS and Science Act. Users of these products may have sourcing and production location requirements for taking advantage of the IRA's tax credits. As I said before the Environmental and Energy Advisory Market Committee, the CFTC should work with exchanges on listing standards that address those needs.[4] Complete information will be an important tool in that effort.

The addition of requiring ''complete'' information would also apply to new rules that are self-certified by an exchange or clearinghouse. The emergence of novel products and technologies has also created interest in modifying long-standing rules about traditional market structure. When the CFTC released its request for comment on ''vertical integration,'' on novel market structures, I said that this is an area that needs to be studied to determine any increased risk or unintended consequences.[5] As I said in my statement, I am open to considering such changes to traditional market structures, but only if they do not result in increased risk to customers and financial stability.[6] This is just as true for an existing exchange or clearinghouse seeking to change its business model as it is for a novel registrant coming before the CFTC for the first time.

The Commission has a brief window to delay implementation of self-certified rule changes that it can use when they present novel or complex issues. Complete information will help us understand when to exercise that authority.

The power of markets is that, when they work well, they are an unmatched tool for innovation. It is our responsibility as a regulator to keep updating our rules in ways that both promote responsible innovation

[1] *See* CFTC, *CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets,* (Jan. 4, 2018), *https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf.*

[2] *Id.*

[3] Commissioner Christy Goldsmith Romero, *Remarks of Commissioner Christy Goldsmith Romero at ISDA's ESG Forum on Promoting Market Resilience: A Thoughtful Approach to the Daunting Challenge of Climate Financial Risk,* (Mar. 7, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/oparomero7.*

[4] Commissioner Christy Goldsmith Romero at the Energy and Environmental Markets Advisory Committee, Statement of Commissioner Christy Goldsmith Romero: *The Role of Copper and Other Metals in the Electrification of America,* (Jul. 26, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement062723.*

[5] Commissioner Christy Goldsmith Romero, *Statement of CFTC Commissioner Christy Goldsmith Romero on Request for Comment on the Impact of Affiliated Entities,* (Jun. 28, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement062823.*

[6] *See Id.*

and impose appropriate guardrails that promote market integrity and transparency. I am thankful to the staff for their hard work on making an update in that spirit, and the Commission for considering this requirement.

Finally, I support the proposal because it includes changes designed to decrease systemic risk. The Commission proposes to specify when systemically important clearing houses must notify the Commission when changing rules, procedures or operations. The Commission's experience has been that the current standard of notification, which is rules, procedures or operations ''that materially affect the nature or level of risks presented'' is too broad or vague to be meaningful. I support the proposed notification to the Commission on material changes such as to the default management rule, programs related to risk analysis, recovery and wind down plans, revised margin methodology, cross-margining programs, or stress testing. Each of these have the potential to be related to systemic risk. The proposed changes enable the Commission to manage systemic risk, which is one of our key roles as a financial regulator.

I appreciate all of the work of the staff, and I look forward to public comment on the rule.

Appendix 5—Statement of Support of Commissioner Caroline D. Pham

I support the Notice of Proposed Rulemaking regarding Amendments to Provisions Common to Registered Entities under part 40 of the CFTC's Regulations (Part 40 Proposal) because it is important to continuously improve our rules and do good housekeeping.[1] I appreciate that this Part 40 Proposal is ''intended to clarify, simplify and enhance the utility of the part 40 regulations for market participants and the Commission,'' as stated in the preamble. I would like to thank Rachel Kaplan Reicher, Steven Benton, and Nancy Markowitz of the Division of Market Oversight (DMO) and Eileen Chotiner of the Division of Clearing and Risk (DCR), as well as Jeannette Curtis and Phil Raimondi, for their work on the Part 40 Proposal. I appreciate the staff working with me to make revisions and address my concerns.

The Product Review Branch and Market Review Branch of DMO, and the Risk Surveillance Branch and Clearing Policy Branch of DCR, together with support from the Chief Counsel's office of each division, handle part 40[2] submissions. In fiscal year 2022, DMO reviewed 1,145 product filings and 1,054 rule filings. DCR reviewed 320 rule filings. These reviews are foundational to the oversight of our markets.

Accordingly, the Part 40 Proposal is intended to improve processes for review of product and rule submissions in order to use CFTC staff resources more effectively, particularly in light of increasing volumes of filings related to binary options. The sizeable increase in listing of new binary option contracts is unsustainable, and I encourage taking a serious look at how to address this problem. Efforts could include a staff roundtable or rulemaking on the listing and trading of binary options and appropriate customer protections.

Effective Self-Regulation

The Part 40 Proposal provides a good opportunity to examine the CFTC's regulatory framework and the role of self-regulation. Part 40 was established pursuant to the Commodity Futures Modernization Act of 2000 and has been in place since 2001.[3] Part 40 created a new framework for the certification and approval of new products, rules, and rule amendments that are submitted to the CFTC by registered entities[4] such as designated contract markets (DCMs), swap execution facilities (SEFs), derivatives clearing organizations (DCOs), and swap data repositories (SDRs). It was again amended in 2011 pursuant to the Dodd-Frank Act.[5] The Part 40 Proposal preamble states that part 40 ''govern[s] how registered entities submit self-certifications, and requests for approval, of their rules, rule amendments, and new products for trading and clearing, as well as the CFTC's review and processing of such submissions.''

As I have noted before, the Commodity Exchange Act[6] (CEA or Act) mandates that the Commission serve the public interest through our oversight of ''a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals.''[7] Part 40 is the cornerstone of effective self-regulation in our derivatives markets because it sets forth the standards for listing new contracts and issuing or amending rules for registered entities, including those that are self-regulatory organizations (SROs) and have rulebooks that are enforceable against SRO members. The penalties for violating SRO rules can be severe, including fines, suspension, or revocation of membership.

Our system of self-regulation works because our SROs take their role seriously in upholding the CFTC's regulatory framework and ensuring market integrity.[8] Self-regulation is effective when it is cooperative. I commend DCMs, SEFs, DCOs, and SDRs that recognize and support the efforts of our DMO and DCR staff, and I urge these registered entities to do their best to assist staff and make the review process as efficient as possible.

Existing Checks and Balances on Self-Regulation

Notwithstanding the important role of SROs in the CFTC's regulatory framework, the Commission must be able to exercise oversight of registered entities' new products and new rules or rule amendments. That is why our existing part 40 regulations include checks and balances on self-certification and Commission approval or non-approval for product and rule filings.

Stay of Self-Certification or Extension of Review Period

For example, regarding new products, under Rule 40.2 the Commission can stay the self-certification of a new product in circumstances involving a false certification, or a petition to alter or amend the contract terms and conditions pursuant to Section 8a(7)[9] of the CEA.[10] Under Rule 40.3, new products can be submitted to the Commission for review and approval, and the review period can be extended if the product raises novel or complex issues.[11]

Similarly, regarding new rules or rule amendments submitted under Rule 40.5 for Commission review and approval, the Commission can extend the review period for (1) novel or complex issues, (2) major economic significance, (3) incomplete submissions, and (4) not responding completely to CFTC questions in a timely manner.[12] And under Rule 40.6, the Commission can stay the self-certification of new rule or rule amendment filings involving (1) novel or complex issues, (2) inadequate explanation, or (3) potential inconsistency with the CEA or CFTC regulations.[13]

These checks and balances are integral to the Commission's oversight of SROs, and I support DMO and DCR staff's use of all these provisions to extend or stay the review period if any of these criteria have been met—especially if there are, as applicable, incomplete submissions, inadequate explanation, or for not responding completely to CFTC questions in a timely manner. Registered entities must ensure that they dot their *i*'s and cross their *t*'s, and show their work, when submitting product or rule filings.

Non-Approval of New Products or New Rule or Rule Amendments

I want to emphasize that the existing part 40 regulations provide for Commission non-approval of new products, or new rule or rule amendments, submitted for review under Rule 40.3 or 40.5, respectively.[14] Obviously,

[1] Statement of Commissioner Caroline D. Pham on Risk Management Program for Swap Dealers and Futures Commission Merchants Advance Notice of Proposed Rulemaking, U.S. Commodity Futures Trading Commission (June 1, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement060123.*

[2] 17 CFR part 40.

[3] A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, 66 FR 42255 (Aug. 10, 2001).

[4] 17 CFR 1.3.

[5] Provisions Common to Registered Entities, 76 FR 44776 (July 27, 2011).

[6] 7 U.S.C. 1 *et seq.*

[7] *See* Concurring Statement of Commissioner Caroline D. Pham Regarding the CFTC Request for Information on Climate-Related Financial Risk, U.S. Commodity Futures Trading Commission (June 2, 2022), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement060222.*

[8] *See* Statement of Commissioner Caroline D. Pham Regarding Request for Comment on the Impact of Affiliations Between Certain CFTC-Regulated Entities, U.S. Commodity Futures Trading Commission (June 28, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement062823.*

[9] 7 U.S.C. 12a(7). This section authorizes the Commission, in certain circumstances, ''to alter or supplement the rules of a registered entity insofar as necessary or appropriate by rule or regulation or by order.''

[10] 17 CFR 40.2(c).

[11] 17 CFR 40.3(d).

[12] 17 CFR 40.5(d).

[13] 17 CFR 40.6(c)(1).

[14] 17 CFR 40.3(e) and 40.5(e).

a product or rule will not be approved if it violates or is inconsistent, respectively, with the CEA or CFTC regulations.[15] The Commission can determine that ''it will not, or is unable to approve'' the product or rule, including for form and content requirements for submission, because the product ''violates, appears to violate or potentially violates but which cannot be ascertained from the submission,'' or the rule or rule amendment ''is inconsistent or appears to be inconsistent'' with the CEA and CFTC regulations.[16]

These standards and criteria grant the Commission and CFTC staff considerable discretion in conducting reviews of product and rule filings for approval or non-approval. Again, I support the Commission issuing a notice of *non-approval* if any of these criteria have been met.

Delegation of Authority

A hallmark of our American system of government is the constitutional law doctrine of separation of powers among the legislative, executive, and judicial branches of government.[17] This doctrine ensures that each branch of government will provide checks and balances upon another branch's exercise of power for encroachment or aggrandizement. I believe that this approach of checks and balances to defend against the over-concentration of power is especially prudent in regards to administrative agencies, who wield the authority to impose obligations on the public or withdraw previously-granted entitlements. These regulatory agencies must be fair and just in the exercise of the administrative power, which is derived from both the legislative branch and the executive branches of government.

The self-regulatory framework set forth in the CEA and CFTC regulations reflects the scales of justice in the balance between a free, and safe, society. I caution against any attempt to put a thumb on the scale which would upset this delicate balance, including further delegations of authority by the Commission to the staff.[18]

It is a truism that the heads of administrative agencies are a step removed from the will of the people,[19] because agency heads are not directly elected, but are instead appointed by the President with the advice and consent of the Senate. Therefore, this sentiment rings even more true with respect to the delegation of authority by the Commission to the staff, who though are dedicated public servants, are even more attenuated from the will of the people. Like liberty, both the public trust and delegations of authority by the Commission, ''once lost, is lost forever.'' [20]

Other Part 40 Issues

Finally, good process produces good outcomes, and there are other issues in part 40 that should be addressed.[21] I hope that the Commission does not wait another 12 years to fix them.

Derivatives Markets and the Real Economy

The CFTC is uniquely positioned at the intersection of the real economy and financial markets. Derivatives are inextricably linked to the underlying reference asset, and our derivatives markets span the breadth of agricultural products and other goods and articles, services, rights, and interests in the stream of commerce and financial markets.[22]

Because of the importance of derivatives markets to the real economy—in order to facilitate risk management and price discovery for farmers and ranchers, all the way to the largest Fortune 100 companies—the Commission is mandated to serve this ''national public interest'' through our oversight of a system of effective self-regulation.[23]

This statutory mandate is intentional, and coupled with the mandate to promote responsible innovation and fair competition,[24] the message is clear: Derivatives markets should enable growth and progress for commercial enterprise and free markets through providing a release valve for risk transfer as part of the engine of the real economy.

Growth and progress is how the United States and the American people have achieved the largest economy in the world, with the deepest and most liquid capital markets. This is why America is the land of opportunity—why I stand for growth, progress, and access to markets—and why the Commission must preserve the balance in our system of effective self-regulation in the derivatives markets.

I look forward to public comment on the Part 40 Proposal.

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[15] 17 CFR 40.3(b), (e) and 40.5(b), (e).

[16] *Id.*

[17] ''[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'' James Madison, The Federalist No. 48 (Feb. 1, 1788), *https://guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493415.*

[18] *See generally* James Madison, The Federalist No. 51 (Feb. 8, 1788) (''But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.''), *https://guides.loc.gov/federalist-papers/text-51-60.*

[19] *Cf.* The general will, or *volonté générale.* Jean-Jacques Rousseau, Article VI, Declaration of the Rights of Man and of the Citizen (1789).

[20] The full quotation is: ''But a Constitution of Government once changed from Freedom, can never be restored. Liberty once lost is lost forever.'' ''John Adams to Abigail Adams, 7 July 1775,'' *Founders Online,* National Archives, *https://founders.archives.gov/documents/Adams/04-01-02-0160.*

[21] *See* Walt Lukken, FIA CEO, Open letter to CFTC Chairman Giancarlo regarding the listing of cryptocurrency derivatives (Dec. 7, 2017), *https://www.fia.org/fia/articles/open-letter-cftc-chairman-giancarlo-regarding-listing-cryptocurrency-derivatives* and Dissenting Statement of Commissioner Caroline D. Pham Regarding the Review and Stay of KalshiEX LLC's Political Event Contracts, U.S. Commodity Futures Trading Commission (Aug. 26, 2022), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement082622.*

[22] 7 U.S.C. 2(1). There are some important exceptions and ongoing legal debate as to the outer limits of the definition of a ''commodity'' under the CEA. *See CFTC* v. *My Big Coin Pay, Inc.,* 334 F. Supp. 3d 492, 498 (D. Mass. 2018) (citing *CFTC* v. *McDonnell,* 287 F. Supp. 3d 213, 228 (E.D.N.Y. 2018)).

[23] 7 U.S.C. 5(a). *See* Concurring Statement of Commissioner Caroline D. Pham Regarding the CFTC Request for Information on Climate-Related Financial Risk, U.S. Commodity Futures Trading Commission (June 2, 2022), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement060222.*

[24] 7 U.S.C. 5(b). *See* Concurring Statement of Commissioner Caroline D. Pham Regarding the CFTC Request for Information on Climate-Related Financial Risk, U.S. Commodity Futures Trading Commission (June 2, 2022), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement060222.*