

even if the eligible affiliate counterparties clear the swap transaction.

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PART 37—SWAP EXECUTION FACILITIES

Subpart A—General Provisions

Sec.

- 37.1 Scope.
- 37.2 Applicable provisions.
- 37.3 Requirements and procedures for registration.
- 37.4 Procedures for listing products and implementing rules.
- 37.5 Information relating to swap execution facility compliance.
- 37.6 Enforceability.
- 37.7 Prohibited use of data collected for regulatory purposes.
- 37.8 Boards of trade operating both a designated contract market and a swap execution facility.
- 37.9 Methods of execution for required and permitted transactions.
- 37.10 Process for a swap execution facility to make a swap available to trade.
- 37.11 [Reserved]
- 37.12 Trade execution compliance schedule.

Subpart B—Compliance with Core Principles

- 37.100 Core Principle 1—Compliance with core principles.

Subpart C—Compliance with Rules

- 37.200 Core Principle 2—Compliance with rules.
- 37.201 Operation of swap execution facility and compliance with rules.
- 37.202 Access requirements.
- 37.203 Rule enforcement program.
- 37.204 Regulatory services provided by a third party.
- 37.205 Audit trail.
- 37.206 Disciplinary procedures and sanctions.

Subpart D—Swaps Not Readily Susceptible to Manipulation

- 37.300 Core Principle 3—Swaps not readily susceptible to manipulation.
- 37.301 General requirements.

Subpart E—Monitoring of Trading and Trade Processing

- 37.400 Core Principle 4—Monitoring of trading and trade processing.
- 37.401 General requirements.

- 37.402 Additional requirements for physical-delivery swaps.
- 37.403 Additional requirements for cash-settled swaps.
- 37.404 Ability to obtain information.
- 37.405 Risk controls for trading.
- 37.406 Trade reconstruction.
- 37.407 Regulatory service provider.
- 37.408 Additional sources for compliance.

Subpart F—Ability to Obtain Information

- 37.500 Core Principle 5—Ability to obtain information.
- 37.501 Establish and enforce rules.
- 37.502 Collection of information.
- 37.503 Provide information to the Commission.
- 37.504 Information-sharing agreements.

Subpart G—Position Limits or Accountability

- 37.600 Core Principle 6—Position limits or accountability.
- 37.601 Additional sources for compliance.

Subpart H—Financial Integrity of Transactions

- 37.700 Core Principle 7—Financial integrity of transactions.
- 37.701 Required clearing.
- 37.702 General financial integrity.
- 37.703 Monitoring for financial soundness.

Subpart I—Emergency Authority

- 37.800 Core Principle 8—Emergency authority.
- 37.801 Additional sources for compliance.

Subpart J—Timely Publication of Trading Information

- 37.900 Core Principle 9—Timely publication of trading information.
- 37.901 General requirements.

Subpart K—Recordkeeping and Reporting

- 37.1000 Core Principle 10—Recordkeeping and reporting.
- 37.1001 Recordkeeping.

Subpart L—Antitrust Considerations

- 37.1100 Core Principle 11—Antitrust considerations.
- 37.1101 Additional sources for compliance.

Subpart M—Conflicts of Interest

- 37.1200 Core Principle 12—Conflicts of interest.

§ 37.1

Subpart N—Financial Resources

- 37.1300 Core Principle 13—Financial resources.
- 37.1301 General requirements.
- 37.1302 Types of financial resources.
- 37.1303 Liquidity of financial resources.
- 37.1304 Computation of costs to meet financial resources requirement.
- 37.1305 Valuation of financial resources.
- 37.1306 Reporting to the Commission.
- 37.1307 Delegation of authority.

Subpart O—System Safeguards

- 37.1400 Core Principle 14—System safeguards.
- 37.1401 Requirements.

Subpart P—Designation of Chief Compliance Officer

- 37.1500 Core Principle 15—Designation of chief compliance officer.
- 37.1501 Chief compliance officer.

APPENDIX A TO PART 37—FORM SEF

APPENDIX B TO PART 37—GUIDANCE ON, AND ACCEPTABLE PRACTICES IN, COMPLIANCE WITH CORE PRINCIPLES

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Subpart A—General Provisions

§ 37.1 Scope.

The provisions of this part shall apply to every swap execution facility that is registered or is applying to become registered as a swap execution facility under section 5h of the Commodity Exchange Act (“the Act”); provided, however, nothing in this provision affects the eligibility of swap execution facilities to operate under the provisions of parts 38 or 49 of this chapter.

§ 37.2 Applicable provisions.

A swap execution facility shall comply with the requirements of this part and all other applicable Commission regulations, including § 1.60 and part 9 of this chapter, and including any related definitions and cross-referenced sections.

17 CFR Ch. I (4–1–24 Edition)

§ 37.3 Requirements and procedures for registration.

(a) *Requirements for registration.* (1) Any person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform shall register the facility as a swap execution facility under this part or as a designated contract market under part 38 of this chapter.

(2) *Minimum trading functionality.* A swap execution facility shall, at a minimum, offer an Order Book as defined in paragraph (a)(3) of this section.

(3) *Order book* means:

(i) An electronic trading facility, as that term is defined in section 1a(16) of the Act;

(ii) A trading facility, as that term is defined in section 1a(51) of the Act; or

(iii) A trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers.

(4) A swap execution facility is not required to provide an order book under this section for transactions defined in § 37.9(d)(2), (3), and (4), except that a swap execution facility must provide an order book under this section for Required Transactions that are components of transactions defined in § 37.9(d)(2), (3), and (4) of this part when such Required Transactions are not executed as components of transactions defined in § 37.9(d)(2), (3), and (4).

(b) *Procedures for full registration.* (1) An applicant requesting registration as a swap execution facility shall:

(i) File electronically a complete Form SEF as set forth in appendix A to this part, or any successor forms, and all information and documentation described in such forms with the Secretary of the Commission in the form and manner specified by the Commission;

(ii) Provide to the Commission, upon the Commission’s request, any additional information and documentation necessary to review an application; and

(iii) Request from the Commission a unique, extensible, alphanumeric code

for the purpose of identifying the swap execution facility pursuant to part 45 of this chapter.

(2) *Request for confidential treatment.*

(i) An applicant requesting registration as a swap execution facility shall identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to §145.9 of this chapter.

(ii) Section 40.8 of this chapter sets forth those sections of the application that will be made publicly available, notwithstanding a request for confidential treatment pursuant to §145.9 of this chapter.

(3) *Amendment of application prior or subsequent to full registration.* An applicant amending a pending application for registration as a swap execution facility or requesting an amendment to an order of registration shall file an amended application electronically with the Secretary of the Commission in the manner specified by the Commission. A swap execution facility shall file any amendment to an application subsequent to registration as a submission under part 40 of this chapter or as specified by the Commission.

(4) *Effect of incomplete application.* If an application is incomplete pursuant to paragraph (b)(1) of this section, the Commission shall notify the applicant that its application will not be deemed to have been submitted for purposes of the Commission's review.

(5) *Commission review period.* For an applicant who submits its application for registration as a swap execution facility on or after August 5, 2015 the Commission shall review such application pursuant to the 180-day timeframe and procedures specified in section 6(a) of the Act.

(6) *Commission determination.* (i) The Commission shall issue an order granting registration upon a Commission determination, in its own discretion, that the applicant has demonstrated compliance with the Act and the Commission's regulations applicable to swap execution facilities. If deemed appropriate, the Commission may issue an order granting registration subject to conditions.

(ii) The Commission may issue an order denying registration upon a Commission determination, in its own dis-

cretion, that the applicant has not demonstrated compliance with the Act and the Commission's regulations applicable to swap execution facilities.

(c) *Temporary registration.* An applicant seeking registration as a swap execution facility may request that the Commission grant the applicant temporary registration by complying with the requirements in paragraph (c)(1) of this section.

(1) *Requirements for temporary registration.* The Commission shall grant a request for temporary registration upon a Commission determination that the applicant has:

(i) Completed all of the requirements under paragraph (b)(1)(i) of this section; and

(ii) Submitted a notice to the Commission, concurrent with the filing of the application under paragraph (b)(1)(i) of this section, requesting that the Commission grant the applicant temporary registration. An applicant that is currently operating a swaps-trading platform in reliance upon either an exemption granted by the Commission or some form of no-action relief granted by the Commission staff shall include in such notice a certification that the applicant is operating pursuant to such exemption or no-action relief.

(iii) The Commission may deny a request for temporary registration upon a Commission determination that the applicant has not met the requirements under paragraphs (c)(1)(i) and (c)(1)(ii) of this section.

(2) *Operation pursuant to a grant of temporary registration.* An applicant may operate as a swap execution facility under temporary registration upon receipt of a notice from the Commission granting such temporary registration, but in no case may begin operating as a temporarily registered swap execution facility before August 5, 2013.

(3) *Expiration of temporary registration.* The temporary registration for a swap execution facility shall expire on the earlier of the date that:

(i) The Commission grants or denies registration of the swap execution facility as provided under paragraph (b) of this section;

(ii) The swap execution facility withdraws its application for registration

pursuant to paragraph (f) of this section; or

(iii) Temporary registration terminates pursuant to paragraph (c)(5) of this section.

(4) *Effect of temporary registration.* A grant of temporary registration by the Commission does not affect the right of the Commission to grant or deny registration as provided under paragraph (b) of this section.

(5) *Termination of temporary registration.* Paragraph (c) of this section shall terminate two years from the effective date of this regulation except as provided for under paragraph (c)(6) of this section and except for an applicant who requested that the Commission grant the applicant temporary registration by complying with the requirements in paragraph (c)(1) of this section before the termination of paragraph (c) of this section and has not been granted or denied registration under paragraph (b)(6) of this section by the time of the termination of paragraph (c) of this section. Such an applicant may operate as a swap execution facility under temporary registration upon receipt of a notice from the Commission granting such temporary registration until the Commission grants or denies registration pursuant to paragraph (b)(6) of this section. On the termination date of paragraph (c) of this section, the Commission shall review such applicant's application pursuant to the time period and procedures in paragraph (b)(5) of this section.

(6) *Temporary registration for applicants that are operational designated contract markets.* An applicant that is an operational designated contract market and is also seeking to register as a swap execution facility in order to transfer one or more of its contracts may request that the Commission grant the applicant temporary registration by complying with the requirements in paragraph (c)(1) of this section. The termination of temporary registration provision in paragraph (c)(5) of this section shall not apply to an applicant that is a non-dormant designated contract market as described in this paragraph.

(d) *Reinstatement of dormant registration.* A dormant swap execution facility as defined in section 40.1 of this chap-

ter may reinstate its registration under the procedures of paragraph (b) of this section. The applicant may rely upon previously submitted materials if such materials accurately describe the dormant swap execution facility's conditions at the time that it applies for reinstatement of its registration.

(e) *Request for transfer of registration.*

(1) A swap execution facility seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate change shall file a request for approval to transfer such registration with the Secretary of the Commission in the form and manner specified by the Commission.

(2) *Timeline for filing a request for transfer of registration.* A request for transfer of registration shall be filed no later than three months prior to the anticipated corporate change; or in the event that the swap execution facility could not have known of the anticipated change three months prior to the anticipated change, as soon as it knows of such change.

(3) *Required information.* The request for transfer of registration shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A description of the corporate change, including the reason for the change and its impact on the swap execution facility, including its governance and operations, and its impact on the rights and obligations of market participants;

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to swap execution facilities, and the Commission's regulations thereunder;

(iv) The governing documents of the transferee, including, but not limited to, articles of incorporation and by-laws;

(v) The transferee's rules marked to show changes from the current rules of the swap execution facility;

(vi) A representation by the transferee that it:

(A) Will be the surviving entity and successor-in-interest to the transferor swap execution facility and will retain and assume, without limitation, all of the assets and liabilities of the transferor;

Commodity Futures Trading Commission

§ 37.4

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission's regulations promulgated thereunder, including this part and appendices thereto;

(C) Will assume, maintain, and enforce all rules implementing and complying with the core principles applicable to swap execution facilities, including the adoption of the transferor's rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of this chapter;

(D) Will comply with all self-regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all self-regulatory programs; and

(E) Will notify market participants of all changes to the transferor's rulebook prior to the transfer and will further notify market participants of the concurrent transfer of the registration to the transferee upon Commission approval and issuance of an order permitting this transfer.

(vii) A representation by the transferee that upon the transfer:

(A) It will assume responsibility for and maintain compliance with core principles for all swaps previously made available for trading through the transferor, whether by certification or approval; and

(B) None of the proposed rule changes will affect the rights and obligations of any market participant.

(4) *Commission determination.* Upon review of a request for transfer of registration, the Commission, as soon as practicable, shall issue an order either approving or denying the request.

(f) *Request for withdrawal of application for registration.* An applicant for registration as a swap execution facility may withdraw its application submitted pursuant to paragraph (b) of this section by filing a withdrawal request electronically with the Secretary of the Commission. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application was pending with the Commission.

(g) *Request for vacation of registration.* A swap execution facility may request that its registration be vacated under section 7 of the Act by filing a vacation request electronically with the Secretary of the Commission. Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the swap execution facility was registered by the Commission.

(h) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, upon consultation with the General Counsel or the General Counsel's delegate, authority to notify an applicant seeking registration that its application is incomplete and that it will not be deemed to have been submitted for purposes of the Commission's review, to notify an applicant seeking registration under section 6(a) of the Act that its application is materially incomplete and the running of the 180-day period is stayed, and to notify an applicant seeking temporary registration that its request is granted or denied. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

[78 FR 33582, June 4, 2013, as amended at 85 FR 82329, Dec. 18, 2020]

§ 37.4 Procedures for listing products and implementing rules.

(a) An applicant for registration as a swap execution facility may submit a swap's terms and conditions prior to listing the product as part of its application for registration.

(b) Any swap terms and conditions or rules submitted as part of a swap execution facility's application for registration shall be considered for approval by the Commission at the time the Commission issues the swap execution facility's order of registration.

(c) After the Commission issues the order of registration, a swap execution facility shall submit a swap's terms

§ 37.5

and conditions, including amendments to such terms and conditions, new rules, or rule amendments pursuant to the procedures under part 40 of this chapter.

(d) Any swap terms and conditions or rules submitted as part of an application to reinstate the registration of a dormant swap execution facility, as defined in §40.1 of this chapter, shall be considered for approval by the Commission at the time the Commission approves the dormant swap execution facility's reinstatement of registration.

§37.5 Information relating to swap execution facility compliance.

(a) *Request for information.* Upon the Commission's request, a swap execution facility shall file with the Commission information related to its business as a swap execution facility in the form and manner and within the time period as the Commission specifies in its request.

(b) *Demonstration of compliance.* Upon the Commission's request, a swap execution facility shall file with the Commission a written demonstration, containing supporting data, information, and documents that it is in compliance with one or more core principles or with its other obligations under the Act or the Commission's regulations as the Commission specifies in its request. The swap execution facility shall file such written demonstration in the form and manner and within the time period as the Commission specifies in its request.

(c) *Equity interest transfer*—(1) *Equity interest transfer notification.* A swap execution facility shall file with the Commission a notification of each transaction that the swap execution facility enters into involving the transfer of fifty percent or more of the equity interest in the swap execution facility. The Commission may, upon receiving such notification, request supporting documentation of the transaction.

(2) *Timing of notification.* The equity interest transfer notice described in paragraph (c)(1) of this section shall be filed electronically with the Secretary of the Commission at its Washington, DC headquarters at submissions@cftc.gov and the Division of

17 CFR Ch. I (4–1–24 Edition)

Market Oversight at DMOSubmissions@cftc.gov, at the earliest possible time but in no event later than the open of business ten business days following the date upon which the swap execution facility enters into a firm obligation to transfer the equity interest.

(3) *Rule filing.* Notwithstanding the foregoing, if any aspect of an equity interest transfer described in paragraph (c)(1) of this section requires a swap execution facility to file a rule as defined in part 40 of this chapter, then the swap execution facility shall comply with the requirements of section 5c(c) of the Act and part 40 of this chapter, and all other applicable Commission regulations.

(4) *Certification.* Upon a transfer of an equity interest of fifty percent or more in a swap execution facility, the swap execution facility shall file electronically with the Secretary of the Commission at its Washington, DC headquarters at submissions@cftc.gov and the Division of Market Oversight at DMOSubmissions@cftc.gov, a certification that the swap execution facility meets all of the requirements of section 5h of the Act and the Commission regulations adopted thereunder, no later than two business days following the date on which the equity interest of fifty percent or more was acquired.

(d) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, the authority set forth in this section to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

§37.6 Enforceability.

(a) A transaction entered into on or pursuant to the rules of a swap execution facility shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of:

Commodity Futures Trading Commission

§ 37.9

(1) A violation by the swap execution facility of the provisions of section 5h of the Act or this part;

(2) Any Commission proceeding to alter or supplement a rule, term, or condition under section 8a(7) of the Act or to declare an emergency under section 8a(9) of the Act; or

(3) Any other proceeding the effect of which is to:

(i) Alter or supplement a specific term or condition or trading rule or procedure; or

(ii) Require a swap execution facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(b) A swap execution facility shall provide each counterparty to a transaction that is entered into on or pursuant to the rules of the swap execution facility with a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction. The confirmation of all terms of the transaction shall take place at the same time as execution; provided that specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a swap execution facility if the applicable requirements of §1.35(b)(5) of this chapter are met.

§37.7 Prohibited use of data collected for regulatory purposes.

A swap execution facility shall not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; *provided, however*, that a swap execution facility may use such data or information for business or marketing purposes if the person from whom it collects or receives such data or information clearly consents to the swap execution facility's use of such data or information in such manner. A swap execution facility shall not condition access to its market(s) or market services on a person's consent to the swap execution facility's use of proprietary data or personal information for business or marketing purposes. A swap execution facility, where necessary for

regulatory purposes, may share such data or information with one or more swap execution facilities or designated contract markets registered with the Commission.

§37.8 Boards of trade operating both a designated contract market and a swap execution facility.

(a) An entity that intends to operate both a designated contract market and a swap execution facility shall separately register the two entities pursuant to the designated contract market designation procedures set forth in part 38 of this chapter and the swap execution facility registration procedures set forth in this part. On an ongoing basis, the entity shall comply with the core principles for designated contract markets under section 5(d) of the Act and the regulations under part 38 of this chapter and the core principles for swap execution facilities under section 5h of the Act and the regulations under this part.

(b) A board of trade, as defined in section 1a(6) of the Act, that operates both a designated contract market and a swap execution facility and that uses the same electronic trade execution system for executing and trading swaps on the designated contract market and on the swap execution facility shall clearly identify to market participants for each swap whether the execution or trading of such swaps is taking place on the designated contract market or on the swap execution facility.

§37.9 Methods of execution for required and permitted transactions.

(a) *Execution methods for required transactions.* (1) *Required transaction* means any transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act.

(2) *Execution methods.* (i) Each Required Transaction that is not a block trade as defined in §43.2 of this chapter shall be executed on a swap execution facility in accordance with one of the following methods of execution except as provided in paragraph (d) or (e) of this section:

(A) An Order Book as defined in §37.3(a)(3); or

(B) A Request for Quote System, as defined in paragraph (a)(3) of this section, that operates in conjunction with an Order Book as defined in § 37.3(a)(3).

(ii) In providing either one of the execution methods set forth in paragraph (a)(2)(i)(A) or (B) of this section, a swap execution facility may for purposes of execution and communication use any means of interstate commerce, including, but not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements provided in § 37.3(a)(3) for Order Books or in paragraph (a)(3) of this section for Request for Quote Systems.

(3) *Request for quote system* means a trading system or platform in which a market participant transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all such market participants may respond. The three market participants shall not be affiliates of or controlled by the requester and shall not be affiliates of or controlled by each other. A swap execution facility that offers a request for quote system in connection with Required Transactions shall provide the following functionality:

(i) At the same time that the requester receives the first responsive bid or offer, the swap execution facility shall communicate to the requester any firm bid or offer pertaining to the same instrument resting on any of the swap execution facility's Order Books, as defined in § 37.3(a)(3);

(ii) The swap execution facility shall provide the requester with the ability to execute against such firm resting bids or offers along with any responsive orders; and

(iii) The swap execution facility shall ensure that its trading protocols provide each of its market participants with equal priority in receiving requests for quotes and in transmitting and displaying for execution responsive orders.

(b) *Time delay requirement for required transactions on an order book*—(1) *Time delay requirement*. A swap execution facility shall require that a broker or dealer who seeks to either execute against its customer's order or execute

two of its customers' orders against each other through the swap execution facility's Order Book, following some form of pre-arrangement or pre-negotiation of such orders, be subject to at least a 15 second time delay between the entry of those two orders into the Order Book, such that one side of the potential transaction is disclosed and made available to other market participants before the second side of the potential transaction, whether for the broker's or dealer's own account or for a second customer, is submitted for execution.

(2) *Adjustment of time delay requirement*. A swap execution facility may adjust the time period of the 15 second time delay requirement described in paragraph (b)(1) of this section, based upon a swap's liquidity or other product-specific considerations; however, the time delay shall be set for a sufficient period of time so that an order is exposed to the market and other market participants have a meaningful opportunity to execute against such order.

(c) *Execution methods for permitted transactions*. (1) *Permitted transaction* means any transaction not involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act.

(2) *Execution methods*. A swap execution facility may offer any method of execution for each Permitted Transaction.

(d) *Exceptions to required methods of execution for package transactions*. (1) For purposes of this paragraph, a package transaction consists of two or more component transactions executed between two or more counterparties where:

(i) At least one component transaction is a Required Transaction;

(ii) Execution of each component transaction is contingent upon the execution of all other component transactions; and

(iii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

(2) A Required Transaction that is executed as a component of a package transaction that includes a component

swap that is subject exclusively to the Commission's jurisdiction, but is not subject to the clearing requirement under section 2(h)(1)(A) of the Act, may be executed on a swap execution facility in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction;

(3) A Required Transaction that is executed as a component of a package transaction that includes a component that is not a swap, as defined under section 1a(47) of the Act, may be executed on a swap execution facility in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction. This provision shall not apply to:

(i) A Required Transaction that is executed as a component of a package transaction in which all other non-swap components are U.S. Treasury securities;

(ii) A Required Transaction that is executed as a component of a package transaction in which all other non-swap components are contracts for the purchase or sale of a commodity for future delivery;

(iii) A Required Transaction that is executed as a component of a package transaction in which all other non-swap components are agency mortgage-backed securities; and

(iv) A Required Transaction that is executed as a component of a package transaction that includes a component transaction that is the issuance of a bond in a primary market.

(4) A Required Transaction that is executed as a component of a package transaction that includes a component swap that is not exclusively subject to the Commission's jurisdiction may be executed on a swap execution facility in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction.

(e) *Resolution of operational and clerical error trades.* (1) As used in this paragraph:

(i) *Correcting trade* means a trade executed and submitted for clearing to a registered derivatives clearing organization, or a derivatives clearing organization that the Commission has determined is exempt from registration, with the same terms and conditions as an error trade other than any correc-

tions to any operational or clerical error and the time of execution.

(ii) *Error trade* means any trade executed on or subject to the rules of a swap execution facility that contains an operational or clerical error.

(iii) *Offsetting trade* means a trade executed and submitted for clearing to a registered derivatives clearing organization, or a derivatives clearing organization that the Commission has determined is exempt from registration, with terms and conditions that economically reverse an error trade that was accepted for clearing.

(2) *Execution of correcting trades and offsetting trades.* (i) A swap execution facility shall maintain rules and procedures that facilitate the resolution of error trades. Such rules shall be fair, transparent, and consistent; allow for timely resolution; require market participants to provide prompt notice of an error trade—and, as applicable, offsetting and correcting trades—to the swap execution facility; and permit market participants to:

(A) Execute a correcting trade, in accordance with paragraph (c)(2) of this section, regardless of whether it is a Required or Permitted Transaction, for an error trade that has been rejected from clearing as soon as technologically practicable, but no later than one hour after a registered derivatives clearing organization, or a derivatives clearing organization that the Commission has determined is exempt from registration, provides notice of the rejection; or

(B) Execute an offsetting trade and a correcting trade, in accordance with paragraph (c)(2) of this section, regardless of whether it is a Required or Permitted Transaction, for an error trade that was accepted for clearing as soon as technologically practicable, but no later than three days after the error trade was accepted for clearing at a derivatives clearing organization or a derivatives clearing organization that the Commission has determined is exempt from registration.

(ii) If a correcting trade is rejected from clearing, then a swap execution facility shall not allow the counterparties to execute another correcting trade.

§ 37.10

17 CFR Ch. I (4–1–24 Edition)

(f) *Counterparty anonymity.* (1) Except as otherwise required under the Act or the Commission’s regulations, a swap execution facility shall not directly or indirectly, including through a third-party service provider, disclose the identity of a counterparty to a swap that is executed anonymously and intended to be cleared.

(2) A swap execution facility shall establish and enforce rules that prohibit any person from directly or indirectly, including through a third-party service provider, disclosing the identity of a counterparty to a swap that is executed anonymously and intended to be cleared.

(3) For purposes of paragraphs (f)(1) and (2) of this section, “executed anonymously” shall include a swap that is pre-arranged or pre-negotiated anonymously, including by a participant of the swap execution facility.

(4) For a package transaction that includes a component transaction that is not a swap intended to be cleared, disclosing the identity of a counterparty shall not violate paragraph (f)(1) or (2) of this section. For purposes of this paragraph, a “package transaction” consists of two or more component transactions executed between two or more counterparties where:

(i) Execution of each component transaction is contingent upon the execution of all other component transactions; and

(ii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

[78 FR 33582, June 4, 2013, as amended at 85 FR 44707, July 24, 2020; 85 FR 82329, Dec. 18, 2020]

§ 37.10 Process for a swap execution facility to make a swap available to trade.

(a)(1) *Required submission.* A swap execution facility that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap as a rule, as that term is defined by § 40.1 of this chapter, pursuant to the procedures under part 40 of this chapter.

(2) *Listing requirement.* A swap execution facility that makes a swap available to trade must demonstrate that it lists or offers that swap for trading on its trading system or platform.

(b) *Factors to consider.* To make a swap available to trade, for purposes of section 2(h)(8) of the Act, a swap execution facility shall consider, as appropriate, the following factors with respect to such swap:

(1) Whether there are ready and willing buyers and sellers;

(2) The frequency or size of transactions;

(3) The trading volume;

(4) The number and types of market participants;

(5) The bid/ask spread; or

(6) The usual number of resting firm or indicative bids and offers.

(c) *Applicability.* Upon a determination that a swap is available to trade on any swap execution facility or designated contract market pursuant to part 40 of this chapter, all other swap execution facilities and designated contract markets shall comply with the requirements of section 2(h)(8)(A) of the Act in listing or offering such swap for trading.

(d) *Removal—(1) Determination.* The Commission may issue a determination that a swap is no longer available to trade upon determining that no swap execution facility or designated contract market lists such swap for trading.

(2) *Delegation of Authority.* (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to issue a determination that a swap is no longer available to trade.

(ii) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

[78 FR 33630, June 4, 2013]

§ 37.11 [Reserved]**§ 37.12 Trade execution compliance schedule.**

(a) A swap transaction shall be subject to the requirements of section 2(h)(8) of the Act upon the later of:

(1) The applicable deadline established under the compliance schedule provided under § 50.25(b) of this chapter; or

(2) Thirty days after the available-to-trade determination submission or certification for that swap is, respectively, deemed approved under § 40.5 of this chapter or deemed certified under § 40.6 of this chapter.

(b) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 2(h)(8) of the Act sooner than as provided in paragraph (a) of this section.

[78 FR 33630, June 4, 2013]

Subpart B—Compliance With Core Principles**§ 37.100 Core Principle 1—Compliance with core principles.**

(a) *In general.* To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—

(1) The core principles described in section 5h of the Act; and

(2) Any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act.

(b) *Reasonable discretion of a swap execution facility.* Unless otherwise determined by the Commission by rule or regulation, a swap execution facility described in paragraph (a) of this section shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in section 5h of the Act.

Subpart C—Compliance With Rules**§ 37.200 Core Principle 2—Compliance with rules.**

A swap execution facility shall:

(a) Establish and enforce compliance with any rule of the swap execution facility, including the terms and conditions of the swaps traded or processed on or through the swap execution facility and any limitation on access to the swap execution facility;

(b) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred;

(c) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

(d) Provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8) of the Act.

§ 37.201 Operation of swap execution facility and compliance with rules.

(a) A swap execution facility shall establish rules governing the operation of the swap execution facility, including, but not limited to, rules specifying trading procedures to be followed by members and market participants when entering and executing orders traded or posted on the swap execution facility, including block trades, as defined in part 43 of this chapter, if offered.

(b) A swap execution facility shall establish and impartially enforce compliance with the rules of the swap execution facility, including, but not limited to—

(1) The terms and conditions of any swaps traded or processed on or through the swap execution facility;

(2) Access to the swap execution facility;

(3) Trade practice rules;

(4) Audit trail requirements;

§ 37.202

17 CFR Ch. I (4-1-24 Edition)

- (5) Disciplinary rules; and
- (6) Mandatory trading requirements.

§ 37.202 Access requirements.

(a) *Impartial access to markets and market services.* A swap execution facility shall provide any eligible contract participant and any independent software vendor with impartial access to its market(s) and market services, including any indicative quote screens or any similar pricing data displays, provided that the facility has:

(1) Criteria governing such access that are impartial, transparent, and applied in a fair and nondiscriminatory manner;

(2) Procedures whereby eligible contract participants provide the swap execution facility with written or electronic confirmation of their status as eligible contract participants, as defined by the Act and Commission regulations, prior to obtaining access; and

(3) Comparable fee structures for eligible contract participants and independent software vendors receiving comparable access to, or services from, the swap execution facility.

(b) *Jurisdiction.* Prior to granting any eligible contract participant access to its facilities, a swap execution facility shall require that the eligible contract participant consent to its jurisdiction.

(c) *Limitations on access.* A swap execution facility shall establish and impartially enforce rules governing any decision to allow, deny, suspend, or permanently bar eligible contract participants' access to the swap execution facility, including when such decisions are made as part of a disciplinary or emergency action taken by the swap execution facility.

§ 37.203 Rule enforcement program.

A swap execution facility shall establish and enforce trading, trade processing, and participation rules that will deter abuses and it shall have the capacity to detect, investigate, and enforce those rules.

(a) *Abusive trading practices prohibited.* A swap execution facility shall prohibit abusive trading practices on its markets by members and market participants. Swap execution facilities that permit intermediation shall prohibit customer-related abuses including, but

not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that shall be prohibited include front-running, wash trading, pre-arranged trading (except for block trades permitted by part 43 of this chapter or other types of transactions certified to or approved by the Commission pursuant to the procedures under part 40 of this chapter), fraudulent trading, money passes, and any other trading practices that a swap execution facility deems to be abusive. A swap execution facility shall also prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.

(b) *Capacity to detect and investigate rule violations.* A swap execution facility shall have arrangements and resources for effective enforcement of its rules. Such arrangements shall include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the swap execution facility's members and by persons under investigation. A swap execution facility's arrangements and resources shall also facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation has occurred.

(c) *Compliance staff and resources.* A swap execution facility shall establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The swap execution facility's compliance staff shall also be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in § 37.203(f).

(d) *Automated trade surveillance system.* A swap execution facility shall maintain an automated trade surveillance system capable of detecting potential trade practice violations. The automated trade surveillance system shall load and process daily orders and trades no later than 24 hours after the

completion of the trading day. The automated trade surveillance system shall have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; compute trade gains, losses, and swap-equivalent positions; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.

(e) *Real-time market monitoring.* A swap execution facility shall conduct real-time market monitoring of all trading activity on its system(s) or platform(s) to identify disorderly trading and any market or system anomalies. A swap execution facility shall have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its system(s) or platform(s) or errors in orders submitted by members and market participants. Any trade price adjustments or trade cancellations shall be transparent to the market and subject to standards that are clear, fair, and publicly available.

(f) *Investigations and investigation reports—(1) Procedures.* A swap execution facility shall establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation shall be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the swap execution facility that indicates a reasonable basis for finding that a violation may have occurred or will occur.

(2) *Timeliness.* Each compliance staff investigation shall be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff.

(3) *Investigation reports when a reasonable basis exists for finding a violation.* Compliance staff shall submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report shall include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued.

(4) *Investigation reports when no reasonable basis exists for finding a violation.* If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a rule violation, it shall prepare a written report including the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff's analysis and conclusions.

(5) *Warning letters.* No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period.

(g) *Additional sources for compliance.* A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.203.

§ 37.204 Regulatory services provided by a third party.

(a) *Use of regulatory service provider permitted.* A swap execution facility may choose to contract with a registered futures association or another registered entity, as such terms are defined under the Act, or the Financial Industry Regulatory Authority (collectively, "regulatory service providers"), for the provision of services to assist in complying with the Act and Commission regulations thereunder, as approved by the Commission. Any swap execution facility that chooses to contract with a regulatory service provider shall ensure that such provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate

§ 37.205

17 CFR Ch. I (4–1–24 Edition)

staff and automated surveillance systems. A swap execution facility shall at all times remain responsible for the performance of any regulatory services received, for compliance with the swap execution facility's obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf.

(b) *Duty to supervise regulatory service provider.* A swap execution facility that elects to use the service of a regulatory service provider shall retain sufficient compliance staff to supervise the quality and effectiveness of the regulatory services provided on its behalf. Compliance staff of the swap execution facility shall hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern. A swap execution facility shall also conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. Such reviews shall be documented carefully and made available to the Commission upon request.

(c) *Regulatory decisions required from the swap execution facility.* A swap execution facility that elects to use the service of a regulatory service provider shall retain exclusive authority in all substantive decisions made by its regulatory service provider, including, but not limited to, decisions involving the cancellation of trades, the issuance of disciplinary charges against members or market participants, and denials of access to the trading platform for disciplinary reasons. A swap execution facility shall document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the swap execution facility chose a different course of action.

§ 37.205 Audit trail.

A swap execution facility shall establish procedures to capture and retain information that may be used in establishing whether rule violations have occurred.

(a) *Audit trail required.* A swap execution facility shall capture and retain all audit trail data necessary to detect,

investigate, and prevent customer and market abuses. Such data shall be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades within a reasonable period of time and to provide evidence of any violations of the rules of the swap execution facility. An acceptable audit trail shall also permit the swap execution facility to track a customer order from the time of receipt through execution on the swap execution facility.

(b) *Elements of an acceptable audit trail program—*(1) *Original source documents.* A swap execution facility's audit trail shall include original source documents. Original source documents include unalterable, sequentially-identified records on which trade execution information is originally recorded, whether recorded manually or electronically. Records for customer orders (whether filled, unfilled, or cancelled, each of which shall be retained or electronically captured) shall reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), the time of order entry, and the time of trade execution. Swap execution facilities shall require that all orders, indications of interest, and requests for quotes be immediately captured in the audit trail.

(2) *Transaction history database.* A swap execution facility's audit trail program shall include an electronic transaction history database. An adequate transaction history database includes a history of all indications of interest, requests for quotes, orders, and trades entered into a swap execution facility's trading system or platform, including all order modifications and cancellations. An adequate transaction history database also includes:

(i) All data that are input into the trade entry or matching system for the transaction to match and clear;

(ii) The customer type indicator code;

(iii) Timing and sequencing data adequate to reconstruct trading; and

(3) *Electronic analysis capability.* A swap execution facility's audit trail program shall include electronic analysis capability with respect to all audit trail data in the transaction history

database. Such electronic analysis capability shall ensure that the swap execution facility has the ability to reconstruct indications of interest, requests for quotes, orders, and trades, and identify possible trading violations with respect to both customer and market abuse.

(4) *Safe storage capability.* A swap execution facility's audit trail program shall include the capability to safely store all audit trail data retained in its transaction history database. Such safe storage capability shall include the capability to store all data in the database in a manner that protects it from unauthorized alteration, as well as from accidental erasure or other loss. Data shall be retained in accordance with the recordkeeping requirements of Core Principle 10 for swap execution facilities and the associated regulations in subpart K of this part.

(c) *Enforcement of audit trail requirements—(1) Annual audit trail and recordkeeping reviews.* A swap execution facility shall enforce its audit trail and recordkeeping requirements through at least annual reviews of all members and persons and firms subject to the swap execution facility's recordkeeping rules to verify their compliance with the swap execution facility's audit trail and recordkeeping requirements. Such reviews shall include, but are not limited to, reviews of randomly selected samples of front-end audit trail data for order routing systems; a review of the process by which user identifications are assigned and user identification records are maintained; a review of usage patterns associated with user identifications to monitor for violations of user identification rules; and reviews of account numbers and customer type indicator codes in trade records to test for accuracy and improper use.

(2) *Enforcement program required.* A swap execution facility shall establish a program for effective enforcement of its audit trail and recordkeeping requirements. An effective program shall identify members and persons and firms subject to the swap execution facility's recordkeeping rules that have failed to maintain high levels of compliance with such requirements, and impose meaningful sanctions when de-

ficiencies are found. Sanctions shall be sufficient to deter recidivist behavior. No more than one warning letter shall be issued to the same person or entity found to have committed the same violation of audit trail or recordkeeping requirements within a rolling twelve month period.

[78 FR 33582, June 4, 2013, as amended at 86 FR 9247, Feb. 11, 2021]

§ 37.206 Disciplinary procedures and sanctions.

A swap execution facility shall establish trading, trade processing, and participation rules that will deter abuses and have the capacity to enforce such rules through prompt and effective disciplinary action, including suspension or expulsion of members or market participants that violate the rules of the swap execution facility.

(a) *Enforcement staff.* A swap execution facility shall establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the swap execution facility.

(b) *Disciplinary panels.* A swap execution facility shall establish one or more disciplinary panels that are authorized to fulfill their obligations under the rules of this subpart. Disciplinary panels shall meet the composition requirements of part 40 of this chapter, and shall not include any members of the swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

(c) *Hearings.* A swap execution facility shall adopt rules that provide for the following minimum requirements for any hearing:

(1) The hearing shall be fair, shall be conducted before members of the disciplinary panel, and shall be promptly convened after reasonable notice to the respondent; and

(2) If the respondent has requested a hearing, a copy of the hearing shall be made and shall become a part of the record of the proceeding. The record shall not be required to be transcribed unless:

(i) The transcript is requested by Commission staff or the respondent;

§ 37.300

(ii) The decision is appealed pursuant to the rules of the swap execution facility; or

(iii) The decision is reviewed by the Commission pursuant to section 8c of the Act or part 9 of this chapter. In all other instances, a summary record of a hearing is permitted.

(d) *Decisions.* Promptly following a hearing conducted in accordance with the rules of the swap execution facility, the disciplinary panel shall render a written decision based upon the weight of the evidence contained in the record of the proceeding and shall provide a copy to the respondent. The decision shall include:

(1) The notice of charges or a summary of the charges;

(2) The answer, if any, or a summary of the answer;

(3) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(4) A statement of findings and conclusions with respect to each charge, and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(5) An indication of each specific rule that the respondent was found to have violated; and

(6) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

(e) *Disciplinary sanctions.* All disciplinary sanctions imposed by a swap execution facility or its disciplinary panels shall be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other market participants. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, shall take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction shall also include full customer restitution, except where the amount of restitution or to whom it should be provided cannot be reasonably determined.

(f) *Warning letters.* Where a rule violation is found to have occurred, no more than one warning letter may be issued

17 CFR Ch. I (4-1-24 Edition)

per rolling twelve month period for the same violation.

(g) *Additional sources for compliance.* A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.206.

Subpart D—Swaps Not Readily Susceptible to Manipulation

§ 37.300 Core Principle 3—Swaps not readily susceptible to manipulation.

The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

§ 37.301 General requirements.

To demonstrate to the Commission compliance with the requirements of § 37.300, a swap execution facility shall, at the time it submits a new swap contract in advance to the Commission pursuant to part 40 of this chapter, provide the applicable information as set forth in appendix C to part 38 of this chapter—Demonstration of Compliance That a Contract is not Readily Susceptible to Manipulation. A swap execution facility may also refer to the guidance and/or acceptable practices in appendix B of this part.

Subpart E—Monitoring of Trading and Trade Processing

§ 37.400 Core Principle 4—Monitoring of trading and trade processing.

The swap execution facility shall:

(a) Establish and enforce rules or terms and conditions defining, or specifications detailing:

(1) Trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(2) Procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(b) Monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including

Commodity Futures Trading Commission

§ 37.407

methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

§ 37.401 General requirements.

A swap execution facility shall:

(a) Collect and evaluate data on its market participants' market activity on an ongoing basis in order to detect and prevent manipulation, price distortions, and, where possible, disruptions of the physical-delivery or cash-settlement process;

(b) Monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand;

(c) Demonstrate an effective program for conducting real-time monitoring of trading for the purpose of detecting and resolving abnormalities; and

(d) Demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purpose of detecting instances or threats of manipulation, price distortion, and disruptions.

§ 37.402 Additional requirements for physical-delivery swaps.

For physical-delivery swaps, the swap execution facility shall demonstrate that it:

(a) Monitors a swap's terms and conditions as they relate to the underlying commodity market; and

(b) Monitors the availability of the supply of the commodity specified by the delivery requirements of the swap.

§ 37.403 Additional requirements for cash-settled swaps.

(a) For cash-settled swaps, the swap execution facility shall demonstrate that it monitors the pricing of the reference price used to determine cash flows or settlement;

(b) For cash-settled swaps listed on the swap execution facility where the reference price is formulated and computed by the swap execution facility, the swap execution facility shall demonstrate that it monitors the continued appropriateness of its methodology for deriving that price; and

(c) For cash-settled swaps listed on the swap execution facility where the

reference price relies on a third-party index or instrument, including an index or instrument traded on another venue, the swap execution facility shall demonstrate that it monitors the continued appropriateness of the index or instrument.

§ 37.404 Ability to obtain information.

(a) A swap execution facility shall demonstrate that it has access to sufficient information to assess whether trading in swaps listed on its market, in the index or instrument used as a reference price, or in the underlying commodity for its listed swaps is being used to affect prices on its market.

(b) A swap execution facility shall have rules that require its market participants to keep records of their trading, including records of their activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets, and make such records available, upon request, to the swap execution facility or, if applicable, to its regulatory service provider, and the Commission.

§ 37.405 Risk controls for trading.

The swap execution facility shall establish and maintain risk control mechanisms to prevent and reduce the potential risk of market disruptions, including, but not limited to, market restrictions that pause or halt trading under market conditions prescribed by the swap execution facility.

§ 37.406 Trade reconstruction.

The swap execution facility shall have the ability to comprehensively and accurately reconstruct all trading on its facility. All audit-trail data and reconstructions shall be made available to the Commission in a form, manner, and time that is acceptable to the Commission.

§ 37.407 Regulatory service provider.

A swap execution facility shall comply with the regulations in this subpart through a dedicated regulatory department or by contracting with a regulatory service provider pursuant to § 37.204.

§ 37.408 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.400.

Subpart F—Ability to Obtain Information

§ 37.500 Core Principle 5—Ability to obtain information.

The swap execution facility shall:

- (a) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 5h of the Act;
- (b) Provide the information to the Commission on request; and
- (c) Have the capacity to carry out such international information-sharing agreements as the Commission may require.

§ 37.501 Establish and enforce rules.

A swap execution facility shall establish and enforce rules that will allow the swap execution facility to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under this part, including the capacity to carry out international information-sharing agreements as the Commission may require.

§ 37.502 Collection of information.

A swap execution facility shall have rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its market participants, and allow for its examination of books and records kept by the market participants on its facility.

§ 37.503 Provide information to the Commission.

A swap execution facility shall provide information in its possession to the Commission upon request, in a form and manner that the Commission approves.

§ 37.504 Information-sharing agreements.

A swap execution facility shall share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the Commission or as otherwise necessary and appropriate to fulfill its self-regulatory and reporting responsibilities. Appropriate information-sharing agreements can be established with such entities or the Commission can act in conjunction with the swap execution facility to carry out such information sharing.

Subpart G—Position Limits or Accountability

§ 37.600 Core Principle 6—Position limits or accountability.

(a) *In general.* To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(b) *Position limits.* For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the Act, the swap execution facility shall:

- (1) Set its position limitation at a level no higher than the Commission limitation; and
- (2) Monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

§ 37.601 Additional sources for compliance.

Until such time that compliance is required under part 151 of this chapter, a swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.600.

Subpart H—Financial Integrity of Transactions**§ 37.700 Core Principle 7—Financial integrity of transactions.**

The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2(h)(1) of the Act.

§ 37.701 Required clearing.

Transactions executed on or through the swap execution facility that are required to be cleared under section 2(h)(1)(A) of the Act or are voluntarily cleared by the counterparties shall be cleared through a Commission-registered derivatives clearing organization, or a derivatives clearing organization that the Commission has determined is exempt from registration.

§ 37.702 General financial integrity.

A swap execution facility shall provide for the financial integrity of its transactions:

(a) By establishing minimum financial standards for its members, which shall, at a minimum, require that members qualify as an eligible contract participant as defined in section 1a(18) of the Act;

(b) For transactions cleared by a derivatives clearing organization:

(1) By ensuring that the swap execution facility has the capacity to route transactions to the derivatives clearing organization in a manner acceptable to the derivatives clearing organization for purposes of clearing; and

(2) By coordinating with each derivatives clearing organization to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing in accordance with the requirements of § 39.12(b)(7) of this chapter.

§ 37.703 Monitoring for financial soundness.

A swap execution facility shall monitor its members to ensure that they continue to qualify as eligible contract

participants as defined in section 1a(18) of the Act.

Subpart I—Emergency Authority**§ 37.800 Core Principle 8—Emergency authority.**

The swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

§ 37.801 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.800.

Subpart J—Timely Publication of Trading Information**§ 37.900 Core Principle 9—Timely publication of trading information.**

(a) *In general.* The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

(b) *Capacity of swap execution facility.* The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

§ 37.901 General requirements.

With respect to swaps traded on or through a swap execution facility, each swap execution facility shall:

(a) Report specified swap data as provided under part 43 and part 45 of this chapter; and

(b) Meet the requirements of part 16 of this chapter.

Subpart K—Recordkeeping and Reporting**§ 37.1000 Core Principle 10—Recordkeeping and reporting.**

(a) *In general.* A swap execution facility shall:

§ 37.1001

(1) Maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years;

(2) Report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act; and

(3) Keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

(b) *Requirements.* The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

§ 37.1001 Recordkeeping.

A swap execution facility shall maintain records of all activities relating to the business of the facility, in a form and manner acceptable to the Commission, for a period of at least five years. A swap execution facility shall maintain such records, including a complete audit trail for all swaps executed on or subject to the rules of the swap execution facility, investigatory files, and disciplinary files, in accordance with the requirements of § 1.31 and part 45 of this chapter.

Subpart L—Antitrust Considerations

§ 37.1100 Core Principle 11—Antitrust considerations.

Unless necessary or appropriate to achieve the purposes of the Act, the swap execution facility shall not:

(a) Adopt any rules or take any actions that result in any unreasonable restraint of trade; or

(b) Impose any material anticompetitive burden on trading or clearing.

§ 37.1101 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to dem-

17 CFR Ch. I (4–1–24 Edition)

onstrate to the Commission compliance with the requirements of § 37.1100.

Subpart M—Conflicts of Interest

§ 37.1200 Core Principle 12—Conflicts of interest.

The swap execution facility shall:

(a) Establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(b) Establish a process for resolving the conflicts of interest.

Subpart N—Financial Resources

SOURCE: 86 FR 9247, Feb. 11, 2021, unless otherwise noted.

§ 37.1300 Core Principle 13—Financial resources.

(a) *In general.* The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

(b) *Determination of resource adequacy.* The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the swap execution facility to cover the operating costs of the swap execution facility for a one-year period, as calculated on a rolling basis.

§ 37.1301 General requirements.

(a) A swap execution facility shall maintain financial resources on an ongoing basis that are adequate to enable it to comply with the core principles set forth in section 5h of the Act and any applicable Commission regulations. Financial resources shall be considered adequate if their value exceeds the total amount that would enable the swap execution facility to cover its projected operating costs necessary for the swap execution facility to comply with section 5h of the Act and applicable Commission regulations for a one-year period, as calculated on a rolling basis pursuant to § 37.1304.

(b) An entity that operates as both a swap execution facility and a derivatives clearing organization shall also comply with the financial resource requirements of § 39.11 of this chapter.

Commodity Futures Trading Commission

§ 37.1306

§ 37.1302 Types of financial resources.

Financial resources available to satisfy the requirements of § 37.1301 may include:

(a) The swap execution facility's own capital, meaning its assets minus its liabilities calculated in accordance with generally accepted accounting principles in the United States; and

(b) Any other financial resource deemed acceptable by the Commission.

§ 37.1303 Liquidity of financial resources.

The financial resources allocated by the swap execution facility to meet the ongoing requirements of § 37.1301 shall include unencumbered, liquid financial assets (*i.e.*, cash and/or highly liquid securities) equal to at least the greater of three months of projected operating costs, as calculated on a rolling basis, or the projected costs needed to wind down the swap execution facility's operations, in each case as determined under § 37.1304. If a swap execution facility lacks sufficient unencumbered, liquid financial assets to satisfy its obligations under this section, the swap execution facility may satisfy this requirement by obtaining a committed line of credit or similar facility in an amount at least equal to such deficiency.

§ 37.1304 Computation of costs to meet financial resources requirement.

A swap execution facility shall each fiscal quarter, make a reasonable calculation of its projected operating costs and wind-down costs in order to determine its applicable obligations under §§ 37.1301 and 37.1303. The swap execution facility shall have reasonable discretion in determining the methodologies used to compute such amounts. The Commission may review the methodologies and require changes as appropriate.

§ 37.1305 Valuation of financial resources.

No less than each fiscal quarter, a swap execution facility shall compute the current market value of each financial resource used to meet its obligations under §§ 37.1301 and 37.1303. Reductions in value to reflect market and

credit risk ("haircuts") shall be applied as appropriate.

§ 37.1306 Reporting to the Commission.

(a) Each fiscal quarter, or at any time upon Commission request, a swap execution facility shall provide a report to the Commission that includes:

(1) The amount of financial resources necessary to meet the requirements of §§ 37.1301 and 37.1303, computed in accordance with the requirements of § 37.1304, and the market value of each available financial resource, computed in accordance with the requirements of § 37.1305; and

(2) Financial statements, including the balance sheet, income statement, and statement of cash flows of the swap execution facility.

(i) The financial statements shall be prepared in accordance with generally accepted accounting principles in the United States, prepared in English, and denominated in U.S. dollars.

(ii) The financial statements of a swap execution facility that is not domiciled in the United States, and is not otherwise required to prepare financial statements in accordance with generally accepted accounting principles in the United States, may satisfy the requirement in paragraph (a)(2)(i) of this section if such financial statements are prepared in accordance with either International Financial Reporting Standards issued by the International Accounting Standards Board, or a comparable international standard as the Commission may otherwise accept in its discretion.

(b) The calculations required by paragraph (a) of this section shall be made as of the last business day of the swap execution facility's applicable fiscal quarter.

(c) With each report required under paragraph (a) of this section, the swap execution facility shall also provide the Commission with sufficient documentation explaining the methodology used to compute its financial requirements under §§ 37.1301 and 37.1303. Such documentation shall:

(1) Allow the Commission to reliably determine, without additional requests

§ 37.1307

for information, that the swap execution facility has made reasonable calculations pursuant to § 37.1304; and

(2) Include, at a minimum:

(i) A total list of all expenses, without any exclusion;

(ii) All expenses and the corresponding amounts, if any, that the swap execution facility excluded or prorated when determining its operating costs, calculated on a rolling basis, required under §§ 37.1301 and 37.1303, and the basis for any determination to exclude or prorate any such expenses;

(iii) Documentation demonstrating the existence of any committed line of credit or similar facility relied upon for the purpose of meeting the requirements of § 37.1303 (e.g., copies of agreements establishing or amending a credit facility or similar facility); and

(iv) All costs that a swap execution facility would incur to wind down the swap execution facility's operations, the projected amount of time for any such wind-down period, and the basis of its determination for the estimation of its costs and timing.

(d) The reports and supporting documentation required by this section shall be filed not later than 40 calendar days after the end of the swap execution facility's first three fiscal quarters, and not later than 90 calendar days after the end of the swap execution facility's fourth fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the swap execution facility.

(e) A swap execution facility shall provide notice to the Commission no later than 48 hours after it knows or reasonably should know that it no longer meets its obligations under § 37.1301 or 37.1303.

§ 37.1307 Delegation of authority.

(a) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, authority to:

(1) Determine whether a particular financial resource under § 37.1302 may be used to satisfy the requirements of § 37.1301;

17 CFR Ch. I (4–1–24 Edition)

(2) Review and make changes to the methodology used to compute projected operating costs and wind-down costs under § 37.1304 and the valuation of financial resources under § 37.1305;

(3) Request reports, in addition to those required in § 37.1306, or additional documentation or information under § 37.1306(a), (c), and (e); and

(4) Grant an extension of time to file fiscal quarter reports under § 37.1306(d).

(b) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

Subpart O—System Safeguards

§ 37.1400 Core Principle 14—System safeguards.

The swap execution facility shall:

(a) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that:

(1) Are reliable and secure; and

(2) Have adequate scalable capacity;

(b) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for:

(1) The timely recovery and resumption of operations; and

(2) The fulfillment of the responsibilities and obligations of the swap execution facility; and

(c) Periodically conduct tests to verify that the backup resources of the swap execution facility are sufficient to ensure continued:

(1) Order processing and trade matching;

(2) Price reporting;

(3) Market surveillance; and

(4) Maintenance of a comprehensive and accurate audit trail.

§ 37.1401 Requirements.

(a) A swap execution facility's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(1) *Enterprise risk management and governance.* This category includes, but is not limited to: Assessment, mitigation, and monitoring of security and technology risk; security and technology capital planning and investment; board of directors and management oversight of technology and security; information technology audit and controls assessments; remediation of deficiencies; and any other elements of enterprise risk management and governance included in generally accepted best practices.

(2) *Information security.* This category includes, but is not limited to, controls relating to: Access to systems and data (including least privilege, separation of duties, account monitoring and control); user and device identification and authentication; security awareness training; audit log maintenance, monitoring, and analysis; media protection; personnel security and screening; automated system and communications protection (including network port control, boundary defenses, encryption); system and information integrity (including malware defenses, software integrity monitoring); vulnerability management; penetration testing; security incident response and management; and any other elements of information security included in generally accepted best practices.

(3) *Business continuity-disaster recovery planning and resources.* This category includes, but is not limited to: Regular, periodic testing and review of business continuity-disaster recovery capabilities, the controls and capabilities described in paragraph (c), (d), (j), and (k) of this section; and any other elements of business continuity-disaster recovery planning and resources included in generally accepted best practices.

(4) *Capacity and performance planning.* This category includes, but is not limited to: Controls for monitoring the swap execution facility's systems to ensure adequate scalable capacity (including testing, monitoring, and analysis of current and projected future capacity and performance, and of possible capacity degradation due to planned automated system changes); and any other elements of capacity and per-

formance planning included in generally accepted best practices.

(5) *Systems operations.* This category includes, but is not limited to: System maintenance; configuration management (including baseline configuration, configuration change and patch management, least functionality, inventory of authorized and unauthorized devices and software); event and problem response and management; and any other elements of system operations included in generally accepted best practices.

(6) *Systems development and quality assurance.* This category includes, but is not limited to: Requirements development; pre-production and regression testing; change management procedures and approvals; outsourcing and vendor management; training in secure coding practices; and any other elements of systems development and quality assurance included in generally accepted best practices.

(7) *Physical security and environmental controls.* This category includes, but is not limited to: Physical access and monitoring; power, telecommunication, and environmental controls; fire protection; and any other elements of physical security and environmental controls included in generally accepted best practices.

(b) In addressing the categories of risk analysis and oversight required under paragraph (a) of this section, a swap execution facility shall follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(c) A swap execution facility shall maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a swap execution facility following any disruption of its operations. Such responsibilities and obligations include, without limitation: Order processing and trade matching; transmission of matched orders to a designated clearing organization for clearing, where appropriate; price reporting; market surveillance; and

§ 37.1401

17 CFR Ch. I (4–1–24 Edition)

maintenance of a comprehensive audit trail. A swap execution facility's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of swaps executed on or pursuant to the rules of the swap execution facility during the next business day following the disruption. Swap execution facilities determined by the Commission to be critical financial markets are subject to more stringent requirements in this regard, set forth in §40.9 of this chapter. A swap execution facility shall update its business continuity-disaster recovery plan and emergency procedures at a frequency determined by an appropriate risk analysis, but at a minimum no less frequently than annually.

(d) A swap execution facility that is not determined by the Commission to be a critical financial market satisfies the requirement to be able to resume its operations and resume its ongoing fulfillment of its responsibilities and obligations during the next business day following any disruption of its operations by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a swap execution facility following any disruption of its operations; or

(2) Contractual arrangements with other swap execution facilities or disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of swaps executed on the swap execution facility, and ongoing fulfillment of all of the swap execution facility's responsibilities and obligations with respect to such swaps, in the event that a disruption renders the swap execution facility temporarily or permanently unable to satisfy this requirement on its own behalf.

(e) A swap execution facility shall notify Commission staff promptly of all:

(1) Electronic trading halts and material system malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system op-

eration, reliability, security, or capacity; and

(3) Activations of the swap execution facility's business continuity-disaster recovery plan.

(f) A swap execution facility shall provide Commission staff timely advance notice of all material:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the swap execution facility's program of risk analysis and oversight.

(g) As part of a swap execution facility's obligation to produce books and records in accordance with §1.31 of this chapter, Core Principle 10 (Record-keeping and Reporting), and §§37.1000 and 37.1001, a swap execution facility shall provide to the Commission the following system safeguards-related books and records, promptly upon the request of any Commission representative:

(1) Current copies of its business continuity-disaster recovery plans and other emergency procedures;

(2) All assessments of its operational risks or system safeguards-related controls;

(3) All reports concerning system safeguards testing and assessment required by this chapter, whether performed by independent contractors or by employees of the swap execution facility; and

(4) All other books and records requested by Commission staff in connection with Commission oversight of system safeguards pursuant to the Act or Commission regulations, or in connection with Commission maintenance of a current profile of the swap execution facility's automated systems.

(5) Nothing in §37.1401(g) shall be interpreted as reducing or limiting in any way a swap execution facility's obligation to comply with Core Principle 10 (Recordkeeping and Reporting) or with §1.31 of this chapter or with §37.1000 or §37.1001.

(h) A swap execution facility shall conduct regular, periodic, objective testing and review of its automated

systems to ensure that they are reliable, secure, and have adequate scalable capacity. It shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Such testing and review shall include, without limitation, all of the types of testing set forth in paragraph (h) of this section.

(1) *Definitions.* As used in this paragraph (h):

Controls means the safeguards or countermeasures employed by the swap execution facility in order to protect the reliability, security, or capacity of its automated systems or the confidentiality, integrity, and availability of its data and information, and in order to enable the swap execution facility to fulfill its statutory and regulatory responsibilities.

Controls testing means assessment of the swap execution facility's controls to determine whether such controls are implemented correctly, are operating as intended, and are enabling the swap execution facility to meet the requirements established by this section.

Enterprise technology risk assessment means a written assessment that includes, but is not limited to, an analysis of threats and vulnerabilities in the context of mitigating controls. An enterprise technology risk assessment identifies, estimates, and prioritizes risks to swap execution facility operations or assets, or to market participants, individuals, or other entities, resulting from impairment of the confidentiality, integrity, and availability of data and information or the reliability, security, or capacity of automated systems.

External penetration testing means attempts to penetrate the swap execution facility's automated systems from outside the systems' boundaries to identify and exploit vulnerabilities. Methods of conducting external penetration testing include, but are not limited to, methods for circumventing the security features of an automated system.

Internal penetration testing means attempts to penetrate the swap execution facility's automated systems from inside the systems' boundaries, to identify and exploit vulnerabilities. Methods of conducting internal penetration testing include, but are not limited to,

methods for circumventing the security features of an automated system.

Key controls means those controls that an appropriate risk analysis determines are either critically important for effective system safeguards or intended to address risks that evolve or change more frequently and therefore require more frequent review to ensure their continuing effectiveness in addressing such risks.

Security incident means a cyber security or physical security event that actually jeopardizes or has a significant likelihood of jeopardizing automated system operation, reliability, security, or capacity, or the availability, confidentiality or integrity of data.

Security incident response plan means a written plan documenting the swap execution facility's policies, controls, procedures, and resources for identifying, responding to, mitigating, and recovering from security incidents, and the roles and responsibilities of its management, staff and independent contractors in responding to security incidents. A security incident response plan may be a separate document or a business continuity-disaster recovery plan section or appendix dedicated to security incident response.

Security incident response plan testing means testing of a swap execution facility's security incident response plan to determine the plan's effectiveness, identify its potential weaknesses or deficiencies, enable regular plan updating and improvement, and maintain organizational preparedness and resiliency with respect to security incidents. Methods of conducting security incident response plan testing may include, but are not limited to, checklist completion, walk-through or table-top exercises, simulations, and comprehensive exercises.

Vulnerability testing means testing of a swap execution facility's automated systems to determine what information may be discoverable through a reconnaissance analysis of those systems and what vulnerabilities may be present on those systems.

(2) *Vulnerability testing.* A swap execution facility shall conduct vulnerability testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct such vulnerability testing at a frequency determined by an appropriate risk analysis.

(ii) Such vulnerability testing shall include automated vulnerability scanning, which shall follow generally accepted best practices.

(iii) A swap execution facility shall conduct vulnerability testing by engaging independent contractors or by using employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(3) *External penetration testing.* A swap execution facility shall conduct external penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct such external penetration testing at a frequency determined by an appropriate risk analysis.

(ii) A swap execution facility shall conduct external penetration testing by engaging independent contractors or by using employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(4) *Internal penetration testing.* A swap execution facility shall conduct internal penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct such internal penetration testing at a frequency determined by an appropriate risk analysis.

(ii) A swap execution facility shall conduct internal penetration testing by engaging independent contractors, or by using employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(5) *Controls testing.* A swap execution facility shall conduct controls testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct controls testing, which includes testing of each control included in its program of risk analysis and oversight, at a frequency determined by an appropriate risk analysis. Such

testing may be conducted on a rolling basis.

(ii) A swap execution facility shall conduct controls testing by engaging independent contractors or by using employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(6) *Security incident response plan testing.* A swap execution facility shall conduct security incident response plan testing sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct such security incident response plan testing at a frequency determined by an appropriate risk analysis.

(ii) A swap execution facility's security incident response plan shall include, without limitation, the swap execution facility's definition and classification of security incidents, its policies and procedures for reporting security incidents and for internal and external communication and information sharing regarding security incidents, and the hand-off and escalation points in its security incident response process.

(iii) A swap execution facility may coordinate its security incident response plan testing with other testing required by this section or with testing of its other business continuity-disaster recovery and crisis management plans.

(iv) A swap execution facility may conduct security incident response plan testing by engaging independent contractors or by using employees of the swap execution facility.

(7) *Enterprise technology risk assessment.* A swap execution facility shall conduct enterprise technology risk assessment of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct enterprise technology risk assessment at a frequency determined by an appropriate risk analysis. A swap execution facility that has conducted an enterprise technology risk assessment that complies with this section may conduct subsequent assessments by updating the previous assessment.

(ii) A swap execution facility may conduct enterprise technology risk assessments by using independent contractors or employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being assessed.

(i) To the extent practicable, a swap execution facility shall:

(1) Coordinate its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the swap execution facility's business continuity-disaster recovery plan;

(2) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity; and

(3) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

(j) Part 40 of this chapter governs the obligations of those registered entities that the Commission has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Section 40.9 establishes the requirements for core principle compliance in that respect.

(k) *Scope of testing and assessment.* The scope for all system safeguards testing and assessment required by this part shall be broad enough to include the testing of automated systems and controls that the swap execution facility's required program of risk analysis and oversight and its current cybersecurity threat analysis indicate is necessary to identify risks and vulnerabilities that could enable an intruder or unauthorized user or insider to:

(1) Interfere with the swap execution facility's operations or with fulfillment of its statutory and regulatory responsibilities;

(2) Impair or degrade the reliability, security, or adequate scalable capacity

of the swap execution facility's automated systems;

(3) Add to, delete, modify, exfiltrate, or compromise the integrity of any data related to the swap execution facility's regulated activities; or

(4) Undertake any other unauthorized action affecting the swap execution facility's regulated activities or the hardware or software used in connection with those activities.

(1) *Internal reporting and review.* Both the senior management and the Board of Directors of a swap execution facility shall receive and review reports setting forth the results of the testing and assessment required by this section. A swap execution facility shall establish and follow appropriate procedures for the remediation of issues identified through such review, as provided in paragraph (m) of this section, and for evaluation of the effectiveness of testing and assessment protocols.

(m) *Remediation.* A swap execution facility shall identify and document the vulnerabilities and deficiencies in its systems revealed by the testing and assessment required by this section. The swap execution facility shall conduct and document an appropriate analysis of the risks presented by such vulnerabilities and deficiencies, to determine and document whether to remediate or accept the associated risk. When the swap execution facility determines to remediate a vulnerability or deficiency, it must remediate in a timely manner given the nature and magnitude of the associated risk.

[78 FR 33582, June 4, 2013, as amended at 81 FR 64310, Sept. 19, 2016]

Subpart P—Designation of Chief Compliance Officer

§ 37.1500 Core Principle 15—Designation of chief compliance officer.

(a) *In general.* Each swap execution facility shall designate an individual to serve as a chief compliance officer.

(b) *Duties.* The chief compliance officer shall:

(1) Report directly to the board or to the senior officer of the facility;

(2) Review compliance with the core principles in this subsection;

§ 37.1501

17 CFR Ch. I (4-1-24 Edition)

(3) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(4) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(5) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 5h of the Act; and

(6) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

(c) *Requirements for procedures.* In establishing procedures under paragraph (b)(6) of this section, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(d) *Annual reports*—(1) *In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(i) The compliance of the swap execution facility with the Act; and

(ii) The policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(2) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in paragraph (d)(1) of this section with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 5h of the Act; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

§ 37.1501 Chief compliance officer.

(a) *Definitions.* For purposes of this part, the term—

Board of directors means the board of directors of a swap execution facility, or for those swap execution facilities whose organizational structure does not include a board of directors, a body

performing a function similar to a board of directors.

Senior officer means the chief executive officer or other equivalent officer of the swap execution facility.

(b) *Chief compliance officer*—(1) *Authority of chief compliance officer.* (i) The position of chief compliance officer shall carry with it the authority and resources to develop, in consultation with the board of directors or senior officer, the policies and procedures of the swap execution facility and enforce such policies and procedures to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations.

(ii) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer.

(2) *Qualifications of chief compliance officer.* (i) The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position.

(ii) No individual disqualified from registration pursuant to sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(3) *Appointment and removal of chief compliance officer.* (i) Only the board of directors or the senior officer may appoint or remove the chief compliance officer.

(ii) The swap execution facility shall notify the Commission within two business days of the appointment or removal, whether interim or permanent, of a chief compliance officer.

(4) *Compensation of the chief compliance officer.* The board of directors or the senior officer shall approve the compensation of the chief compliance officer.

(5) *Annual meeting with the chief compliance officer.* The chief compliance officer shall meet with the board of directors or senior officer of the swap execution facility at least annually.

(6) *Information requested of the chief compliance officer.* The chief compliance officer shall provide any information regarding the self-regulatory program of the swap execution facility as requested by the board of directors or the senior officer.

Commodity Futures Trading Commission

§ 37.1501

(c) *Duties of chief compliance officer.* The duties of the chief compliance officer shall include, but are not limited to, the following:

(1) Overseeing and reviewing compliance of the swap execution facility with section 5h of the Act and any related rules adopted by the Commission;

(2) Taking reasonable steps, in consultation with the board of directors or the senior officer of the swap execution facility, to resolve any material conflicts of interest that may arise, including, but not limited to:

(i) Conflicts between business considerations and compliance requirements;

(ii) Conflicts between business considerations and the requirement that the swap execution facility provide fair, open, and impartial access as set forth in § 37.202; and;

(iii) Conflicts between a swap execution facility's management and members of the board of directors;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violations of the Act and the rules of the Commission;

(4) Taking reasonable steps to ensure compliance with the Act and the rules of the Commission;

(5) Establishing procedures reasonably designed to handle, respond, remediate, retest, and resolve noncompliance issues identified by the chief compliance officer through any means, including any compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and administering a compliance manual designed to promote compliance with the applicable laws, rules, and regulations and a written code of ethics for the swap execution facility designed to prevent ethical violations and to promote honesty and ethical conduct by personnel of the swap execution facility;

(7) Supervising the self-regulatory program of the swap execution facility with respect to trade practice surveillance; market surveillance; real time market monitoring; compliance with audit trail requirements; enforcement and disciplinary proceedings; audits, examinations, and other regulatory responsibilities (including taking reason-

able steps to ensure compliance with, if applicable, financial integrity, financial reporting, sales practice, record-keeping, and other requirements); and

(8) Supervising the effectiveness and sufficiency of any regulatory services provided to the swap execution facility by a regulatory service provider in accordance with § 37.204.

(d) *Preparation of annual compliance report.* The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report that covers the prior fiscal year. The report shall, at a minimum, contain:

(1) A description and self-assessment of the effectiveness of the written policies and procedures of the swap execution facility, including the code of ethics and conflict of interest policies, to reasonably ensure compliance with the Act and applicable Commission regulations;

(2) Any material changes made to compliance policies and procedures during the coverage period for the report and any areas of improvement or recommended changes to the compliance program;

(3) A description of the financial, managerial, and operational resources set aside for compliance with the Act and applicable Commission regulations;

(4) Any material non-compliance matters identified and an explanation of the corresponding action taken to resolve such non-compliance matters; and

(5) A certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete in all material respects.

(e) *Submission of annual compliance report and related matters—*(1) *Furnishing the annual compliance report prior to submission to the Commission.* Prior to submission to the Commission, the chief compliance officer shall provide the annual compliance report for review to the board of directors of the swap execution facility or, in the absence of a board of directors, to the senior officer of the swap execution facility. Members of the board of directors and the senior officer shall not require the

chief compliance officer to make any changes to the report.

(2) *Submission of annual compliance report to the Commission.* The annual compliance report shall be submitted electronically to the Commission not later than 90 calendar days after the end of the swap execution facility's fiscal year. The swap execution facility shall concurrently file the annual compliance report with the fourth-quarter financial report pursuant to §37.1306.

(3) *Amendments to annual compliance report.* (i) Promptly upon discovery of any material error or omission made in a previously filed annual compliance report, the chief compliance officer shall file an amendment with the Commission to correct the material error or omission. The chief compliance officer shall submit the amended annual compliance report to the board of directors, or in the absence of a board of directors, to the senior officer of the swap execution facility, pursuant to paragraph (e)(1) of this section.

(ii) An amendment shall contain the certification required under paragraph (d)(5) of this section.

(4) *Request for extension.* A swap execution facility may request an extension of time to file its annual compliance report from the Commission. Reasonable and valid requests for extensions of the filing deadline may be granted at the discretion of the Commission.

(f) *Recordkeeping.* The swap execution facility shall maintain all records demonstrating compliance with the duties of the chief compliance officer and the preparation and submission of annual compliance reports consistent with §§37.1000 and 37.1001.

(g) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to grant or deny a request for an extension of time for a swap execution facility to file its annual compliance report under paragraph (e)(4) of this section. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the

Commission, at its election, from exercising the authority delegated in this paragraph.

[86 FR 9248, Feb. 11, 2021]

APPENDIX A TO PART 37—FORM SEF

COMMODITY FUTURES TRADING COMMISSION

FORM SEF

SWAP EXECUTION FACILITY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

Registration Instructions

Intentional misstatements or omissions of material fact may constitute federal criminal violations (7 U.S.C. §13 and 18 U.S.C. §1001) or grounds for disqualification from registration.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form SEF have the same meaning as in the Commodity Exchange Act, as amended ("Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder.

For the purposes of this Form SEF, the term "Applicant" shall include any applicant for registration as a swap execution facility, any applicant amending a pending application, or any registered swap execution facility that is applying for an amendment to its order of registration.

GENERAL INSTRUCTIONS

1. This Form SEF, which includes instructions, a Cover Sheet, and required Exhibits (together, "Form SEF"), is to be filed with the Commission by all Applicants, pursuant to section 5h of the Act and the Commission's regulations thereunder. Applicants may prepare their own Form SEF but must follow the format prescribed herein. Upon the filing of an application for registration or a registration amendment in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. No application for registration or registration amendment shall be effective unless the Commission, by order, grants such registration or amended registration.

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. Signatures on all copies of the Form SEF filed with the Commission can be executed electronically. If this Form SEF is filed by a corporation, it shall be signed in

the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent, i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If this Form SEF is being filed as an application for registration, all applicable items must be answered in full. If any item is inapplicable, indicate by "none," "not applicable," or "N/A," as appropriate.

5. Under section 5h of the Act and the Commission's regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form SEF from any Applicant seeking registration as a swap execution facility and from any registered swap execution facility. Disclosure by the Applicant of the information specified on this Form SEF is mandatory prior to the start of the processing of an application for, or an amendment to, registration as a swap execution facility. The information provided in this Form SEF will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. A Form SEF which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SEF, however, shall not constitute a finding that the Form SEF has been filed as required or that the information submitted is true, current, or complete.

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this Form SEF will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. An Applicant amending a pending application for registration as a swap execution facility or requesting an amendment to an order of registration shall file an amended Form SEF electronically with the Secretary of the Commission in the manner specified by the Commission. Otherwise, a swap execution facility shall file any amendment to

this Form SEF as a submission under part 40 of the Commission's regulations or as specified by the Commission.

2. When filing this Form SEF for purposes of amending a pending application or requesting an amendment to an order of registration, Applicants must re-file the Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable. The submission of an amendment represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

WHERE TO FILE

This Form SEF must be filed electronically with the Secretary of the Commission in the manner specified by the Commission.

COMMODITY FUTURES TRADING COMMISSION

FORM SEF

SWAP EXECUTION FACILITY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

Cover Sheet

Exact name of Applicant as specified in charter

Address of principal executive offices

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

If this is an AMENDMENT to an application, or to an existing order of registration, list all items that are amended and check here.

GENERAL INFORMATION

1. Name under which the business of the swap execution facility is or will be conducted, if different than name specified above (include acronyms, if any):

2. If name of swap execution facility is being amended, state previous swap execution facility name:

3. Contact information, including mailing address if different than address specified above:

Number and Street			
City	State	Country	Zip Code
Main	Phone Number	Fax	

Pt. 37, App. A

17 CFR Ch. I (4-1-24 Edition)

Web site URL Email Address

4. List of principal office(s) and address(es) where swap execution facility activities are/will be conducted:

Office

Address

5. If the Applicant is a successor to a previously registered swap execution facility, please complete the following:

a. Date of succession

b. Full name and address of predecessor registrant

Name

Number and Street

City State Country Zip Code

Main Phone Number Web site URL

BUSINESS ORGANIZATION

6. Applicant is a:

- Corporation
- Partnership
- Limited Liability Company
- Other form of organization (specify)

7. Date of incorporation or formation:

8. State of incorporation or jurisdiction of organization:

9. The Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

Print Name and Title

Name of Applicant

Number and Street

City State Zip Code

SIGNATURES

10. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20___. The Applicant and the undersigned represent hereby that all information contained herein is true, current, and complete. It is understood that all required items and Exhibits are considered integral parts of this

Form SEF and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

Name of Applicant

Signature of Duly Authorized Person

Print Name and Title of Signatory

**COMMODITY FUTURES TRADING
COMMISSION**

FORM SEF

SWAP EXECUTION FACILITY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

Exhibits Instructions

The following Exhibits must be filed with the Commission by each Applicant applying for registration as a swap execution facility, or by a registered swap execution facility amending its registration, pursuant to section 5h of the Act and the Commission's regulations thereunder. The Exhibits must be labeled according to the items specified in this Form SEF.

The application must include a Table of Contents listing each Exhibit required by this Form SEF and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify "none," "not applicable," or "N/A," as appropriate.

If the Applicant is a newly formed enterprise and does not have the financial statements required pursuant to Items 9 and 10 (Exhibits I and J) of this Form SEF, the Applicant should provide *pro forma* financial statements for the most recent six months or since inception, whichever is less.

List of Exhibits

EXHIBITS—BUSINESS ORGANIZATION

1. Attach as Exhibit A, the name of any person who owns ten percent (10%) or more of the Applicant's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the Applicant.

Provide as part of Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as Exhibit B, a list of the present officers, directors, governors (and, in the

case of an Applicant that is not a corporation, the members of all standing committees, grouped by committee), or persons performing functions similar to any of the foregoing, of the swap execution facility or of any entity that performs the regulatory activities of the Applicant, indicating for each:

- a. Name
- b. Title
- c. Dates of commencement and termination of present term of office or position
- d. Length of time each present officer, director, or governor has held the same office or position
- e. Brief account of the business experience of each officer and director over the last five (5) years
- f. Any other business affiliations in the derivatives and securities industry
- g. For directors, list any committees on which they serve and any compensation received by virtue of their directorship
- h. A description of:

(1) Any order of the Commission with respect to such person pursuant to section 5e of the Act;

(2) Any conviction or injunction against such person within the past ten (10) years;

(3) Any disciplinary action with respect to such person within the last five (5) years;

(4) Any disqualification under sections 8b and 8d of the Act;

(5) Any disciplinary action under section 8c of the Act; and

(6) Any violation pursuant to section 9 of the Act.

3. Attach as Exhibit C, a narrative that sets forth the fitness standards for the Board of Directors and its composition including the number and percentage of public directors.

4. Attach as Exhibit D, a narrative or graphic description of the organizational structure of the Applicant. Include a list of all affiliates of the Applicant and indicate the general nature of the affiliation. Note: If the swap execution facility activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity within the Applicant, corporation, or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision, or separate entity, as applicable. Additionally, provide any relevant jurisdictional information, including any and all jurisdictions in which the Applicant or any affiliated entity are doing business, and registration status, including pending applications (e.g., country, regulator, registration category, date of registration). Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.

5. Attach as Exhibit E, a description of the personnel qualifications for each category of

professional employees employed by the Applicant or the division, subdivision, or other separate entity within the Applicant as described in Item 4.

6. Attach as Exhibit F, an analysis of staffing requirements necessary to carry out the operations of the Applicant as a swap execution facility and the name and qualifications of each key staff person.

7. Attach as Exhibit G, a copy of the constitution, articles of incorporation, formation, or association with all amendments thereto, partnership or limited liability agreements, and existing by-laws, operating agreement, rules or instruments corresponding thereto, of the Applicant. Include any additional governance fitness information not included in Exhibit C. Provide a certificate of good standing dated within one week of the date of this Form SEF.

8. Attach as Exhibit H, a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency where the proceeding(s) are pending, the date(s) instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS—FINANCIAL INFORMATION

9. Attach as Exhibit I:

a. (i) Balance sheet, (ii) Statement of income and expenses, (iii) Statement of cash flows, and (iv) Statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant, or of its parent company, if applicable. If a balance sheet and any statement(s) certified by an independent public accountant are available, that balance sheet and statement(s) should be submitted as Exhibit I.

b. Provide a narrative of how the value of the financial resources of the Applicant is at least equal to a total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis, and whether such financial resources include unencumbered, liquid financial assets (*i.e.*, cash and/or highly liquid securities) equal to at least six months' operating costs.

c. Attach copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the Applicant's conclusions regarding the liquidity of its financial assets.

d. Representations regarding sources and estimates for future ongoing operational resources.

10. Attach as Exhibit J, a balance sheet and an income and expense statement for each affiliate of the swap execution facility that also engages in swap execution facility activities or that engages in designated contract market activities as of the end of the most recent fiscal year of each such affiliate.

11. Attach as Exhibit K, the following:

a. A complete list of all dues, fees, and other charges imposed, or to be imposed, by or on behalf of the Applicant for its swap execution facility services that are provided on an exclusive basis and identify the service or services provided for each such due, fee, or other charge.

b. A description of the basis and methods used in determining the level and structure of the dues, fees, and other charges listed in paragraph (a) of this item.

c. If the Applicant differentiates, or proposes to differentiate, among its customers or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar exclusive services, describe and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services and any other factors that account for such differentiations.

EXHIBITS—COMPLIANCE

12. Attach as Exhibit L, a narrative and any other form of documentation that may be provided under other Exhibits herein, that describes the manner in which the Applicant is able to comply with each core principle. Such documentation must include a regulatory compliance chart setting forth each core principle and providing citations to the Applicant's relevant rules, policies, and procedures that address each core principle. To the extent that the application raises issues that are novel or for which compliance with a core principle is not self-evident, include an explanation of how that item and the application satisfy the core principles.

13. Attach as Exhibit M, a copy of the Applicant's rules (as defined in §40.1 of the Commission's regulations) and any technical manuals, other guides, or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Include rules citing applicable federal position limits and aggregation standards in part 151 of the Commission's regulations and any facility set position limit rules. Include rules on publication of daily trading information with regards to the requirements of part 16 of the Commission's regulations. The Applicant should include an explanation and any other form of documentation that the Applicant thinks will be helpful to its explanation, demonstrating how its rules, technical manuals, other guides, or instructions for users of, or participants in, the market, or minimum financial standards for members

or market participants as provided in this Exhibit M help support the swap execution facility's compliance with the core principles.

14. Attach as Exhibit N, executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third party regulatory service provider or member or user agreements that enable or empower the Applicant to comply with applicable core principles. Identify: (1) the services that will be provided; and (2) the core principles addressed by such agreement.

15. Attach as Exhibit O, a copy of any compliance manual and any other documents that describe with specificity the manner in which the Applicant will conduct trade practice, market, and financial surveillance.

16. Attach as Exhibit P, a description of the Applicant's disciplinary and enforcement protocols, tools, and procedures and, if applicable, the arrangements for alternative dispute resolution.

17. Attach as Exhibit Q, an explanation regarding the operation of the Applicant's trading system(s) or platform(s) and the manner in which the system(s) or platform(s) satisfy any Commission rules, interpretations, or guidelines regarding a swap execution facility's execution methods, including the minimum trading functionality requirement in §37.3(a)(2) of the Commission's regulations. This explanation should include, as applicable, the following:

a. For trading systems or platforms that enable market participants to engage in transactions through an order book:

(1) How the trading system or platform displays all orders and trades in an electronic or other form, and the timeliness in which the trading system or platform does so;

(2) How all market participants have the ability to see and have the ability to transact on all bids and offers; and

(3) An explanation of the trade matching algorithm, if applicable, and examples of how that algorithm works in various trading scenarios involving various types of orders.

b. For trading systems or platforms that enable market participants to engage in transactions through a request for quote system:

(1) How a market participant transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all such market participants may respond;

(2) How resting bids or offers from the Applicant's Order Book are communicated to the requester; and

(3) How a requester may transact on resting bids or offers along with the responsive orders.

c. How the timing delay described under §37.9 of the Commission's regulations is incorporated into the trading system or platform.

18. Attach as Exhibit R, a list of rules prohibiting specific trade practice violations.

19. Attach as Exhibit S, a discussion of how trading data will be maintained by the swap execution facility.

20. Attach as Exhibit T, a list of the name of the clearing organization(s) that will be clearing the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades.

21. Attach as Exhibit U, any information (described with particularity) included in the application that will be subject to a request for confidential treatment pursuant to §145.9 of the Commission's regulations.

EXHIBITS—OPERATIONAL CAPABILITY

22. Attach as Exhibit V, information responsive to the Technology Questionnaire. This questionnaire focuses on information pertaining to the Applicant's program of risk analysis and oversight. Main topic areas include: information security; business continuity-disaster recovery planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls. The questionnaire will be provided to Applicants on the Commission's Web site.

APPENDIX B TO PART 37—GUIDANCE ON, AND ACCEPTABLE PRACTICES IN, COMPLIANCE WITH CORE PRINCIPLES

1. This appendix provides guidance on complying with core principles, both initially and on an ongoing basis, to maintain registration under section 5h of the Act and this part 37. Where provided, guidance is set forth in paragraph (a) following the relevant heading and can be used to demonstrate to the Commission compliance with the selected requirements of a core principle of this part 37. The guidance for the core principle is illustrative only of the types of matters a swap execution facility may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues set forth in this appendix would help the Commission in its consideration of whether the swap execution facility is in compliance with the selected requirements of a core principle; provided however, that the guidance is not intended to diminish or replace, in any event, the obligations and requirements of applicants and swap execution facilities to comply with the regulations provided under this part 37.

2. Where provided, acceptable practices meeting selected requirements of core principles are set forth in paragraph (b) following

the guidance. Swap execution facilities that follow specific practices outlined in the acceptable practices for a core principle in this appendix will meet the selected requirements of the applicable core principle; provided however, that the acceptable practice is not intended to diminish or replace, in any event, the obligations and requirements of applicants and swap execution facilities to comply with the regulations provided under this part 37. The acceptable practices are for illustrative purposes only and do not state the exclusive means for satisfying a core principle.

CORE PRINCIPLE 1 OF SECTION 5H OF THE ACT—COMPLIANCE WITH CORE PRINCIPLES

(A) *In general.* To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—the core principles described in section 5h of the Act; and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act.

(B) *Reasonable discretion of swap execution facility.* Unless otherwise determined by the Commission by rule or regulation, a swap execution facility described in paragraph (A) shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in section 5h of the Act.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

CORE PRINCIPLE 2 OF SECTION 5H OF THE ACT—COMPLIANCE WITH RULES

A swap execution facility shall:

(A) Establish and enforce compliance with any rule of the swap execution facility, including the terms and conditions of the swaps traded or processed on or through the swap execution facility and any limitation on access to the swap execution facility;

(B) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred;

(C) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

(D) Provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8) of the Act.

(a) *Guidance.* (1) *Investigations and investigation reports—Warning letters.* The rules of a swap execution facility may authorize its compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action.

(2) *Additional rules required.* A swap execution facility should adopt and enforce any additional rules that it believes are necessary to comply with the requirements of §37.203.

(3) *Enforcement staff.* A swap execution facility's enforcement staff should not include either members of the swap execution facility or persons whose interests conflict with their enforcement duties. A member of the enforcement staff should not operate under the direction or control of any person or persons with trading privileges at the swap execution facility. A swap execution facility's enforcement staff may operate as part of the swap execution facility's compliance department.

(4) *Notice of charges.* If compliance staff authorized by a swap execution facility or a swap execution facility disciplinary panel determines, based upon reviewing an investigation report pursuant to §37.203(f)(3), that a reasonable basis exists for finding a violation and adjudication is warranted, it should direct that the person or entity alleged to have committed the violation be served with a notice of charges and should proceed in accordance with this guidance. A notice of charges should adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated (or about to be violated); advise the respondent that it is entitled, upon request, to a hearing on the charges; and prescribe the period within which a hearing on the charges may be requested. If the rules of the swap execution facility so provide, a notice may also advise:

(i) That failure to request a hearing within the period prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and

(ii) That failure to answer or to deny expressly a charge may be deemed to be an admission of such charge.

(5) *Right to representation.* Upon being served with a notice of charges, a respondent should have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except by any member of the swap execution facility's board of directors or disciplinary panel, any employee of the swap execution facility, or any person substantially related to the underlying investigations, such as a material witness or respondent.

(6) *Answer to charges.* A respondent should be given a reasonable period of time to file

an answer to a notice of charges. The rules of a swap execution facility governing the requirements and timeliness of a respondent's answer to a notice of charges should be fair, equitable, and publicly available.

(7) *Admission or failure to deny charges.* The rules of a swap execution facility may provide that if a respondent admits or fails to deny any of the charges, a disciplinary panel may find that the violations alleged in the notice of charges for which the respondent admitted or failed to deny any of the charges have been committed. If the swap execution facility's rules so provide, then:

(i) The disciplinary panel should impose a sanction for each violation found to have been committed;

(ii) The disciplinary panel should promptly notify the respondent in writing of any sanction to be imposed pursuant to paragraph (7)(i) of this guidance and shall advise the respondent that it may request a hearing on such sanction within the period of time, which shall be stated in the notice;

(iii) The rules of a swap execution facility may provide that if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

(8) *Denial of charges and right to hearing.* In every instance where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent should be given an opportunity for a hearing in accordance with the rules of the swap execution facility.

(9) *Settlement offers.* (i) The rules of a swap execution facility may permit a respondent to submit a written offer of settlement at any time after an investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of a settlement offer unless the respondent agrees.

(ii) The rules of a swap execution facility may provide that, in its discretion, a disciplinary panel may permit the respondent to accept a sanction without either admitting or denying the rule violations upon which the sanction is based.

(iii) If an offer of settlement is accepted, the panel accepting the offer should issue a written decision specifying the rule violations it has reason to believe were committed, including the basis or reasons for the panel's conclusions, and any sanction to be imposed, which should include full customer restitution where customer harm is demonstrated, except where the amount of restitution or to whom it should be provided cannot be reasonably determined. If an offer of settlement is accepted without the agreement of the enforcement staff, the decision should adequately support the disciplinary panel's acceptance of the settlement. Where applicable, the decision should also include a

statement that the respondent has accepted the sanctions imposed without either admitting or denying the rule violations.

(iv) The respondent may withdraw his or her offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent should not be deemed to have made any admissions by reason of the offer of settlement and should not be otherwise prejudiced by having submitted the offer of settlement.

(10) *Hearings.* (i) The swap execution facility need not apply the formal rules of evidence for a hearing; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing. No member of the disciplinary panel for the matter may have a financial, personal, or other direct interest in the matter under consideration.

(ii) In advance of the hearing, the respondent should be entitled to examine all books, documents, or other evidence in the possession or under the control of the swap execution facility. The swap execution facility may withhold documents that: Are privileged or constitute attorney work product; were prepared by an employee of the swap execution facility but will not be offered in evidence in the disciplinary proceedings; may disclose a technique or guideline used in examinations, investigations, or enforcement proceedings; or disclose the identity of a confidential source.

(iii) The swap execution facility's enforcement and compliance staffs should be parties to the hearing, and the enforcement staff should present their case on those charges and sanctions that are the subject of the hearing.

(iv) The respondent should be entitled to appear personally at the hearing, should be entitled to cross-examine any persons appearing as witnesses at the hearing, and should be entitled to call witnesses and to present such evidence as may be relevant to the charges.

(v) The swap execution facility should require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence. The swap execution facility should make reasonable efforts to secure the presence of all other persons called as witnesses whose testimony would be relevant.

(vi) The rules of a swap execution facility may provide that a sanction may be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

(11) *Right to appeal.* The rules of a swap execution facility may permit the parties to a proceeding to appeal promptly an adverse decision of a disciplinary panel in all or in certain classes of cases. Such rules may require a party's notice of appeal to be in writing and to specify the findings, conclusions,

or sanctions to which objection are taken. If the rules of a swap execution facility permit appeals, then both the respondent and the enforcement staff should have the opportunity to appeal and the swap execution facility should provide for the following:

(i) The swap execution facility should establish an appellate panel that should be authorized to hear appeals of respondents. In addition, the rules of a swap execution facility may provide that the appellate panel may, on its own initiative, order review of a decision by a disciplinary panel within a reasonable period of time after the decision has been rendered.

(ii) The composition of the appellate panel should be consistent with part 40 of this chapter, and should not include any members of the swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding. The rules of a swap execution facility should provide for the appeal proceeding to be conducted before all of the members of the appellate panel or a panel thereof.

(iii) Except for good cause shown, the appeal or review should be conducted solely on the record before the disciplinary panel, the written exceptions filed by the parties, and the oral or written arguments of the parties.

(iv) Promptly following the appeal or review proceeding, the appellate panel should issue a written decision and should provide a copy to the respondent. The decision issued by the appellate panel should adhere to all the requirements of §37.206(d) to the extent that a different conclusion is reached from that issued by the disciplinary panel.

(12) *Final decisions.* Each swap execution facility should establish rules setting forth when a decision rendered pursuant to its rules will become the final decision of such swap execution facility.

(13) *Summary fines for violations of rules regarding timely submission of records.* A swap execution facility may adopt a summary fine schedule for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each day's transactions. A swap execution facility may permit its compliance staff, or a designated panel of swap execution facility officials, to summarily impose minor sanctions against persons within the swap execution facility's jurisdiction for violating such rules. A swap execution facility's summary fine schedule may allow for warning letters to be issued for first-time violations or violators. If adopted, a summary fine schedule should provide for progressively larger fines for recurring violations.

(14) *Emergency disciplinary actions.* (i) A swap execution facility may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable

belief that such immediate action is necessary to protect the best interest of the marketplace.

(ii) Any emergency disciplinary action should be taken in accordance with a swap execution facility's procedures that provide for the following:

(A) If practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity. The notice should state the action, briefly state the reasons for the action, and state the effective time and date, and the duration of the action.

(B) The respondent should have the right to be represented by legal counsel or any other representative of its choosing in all proceedings subsequent to the emergency action taken. The respondent should be given the opportunity for a hearing as soon as reasonably practicable and the hearing should be conducted before the disciplinary panel pursuant to the rules of the swap execution facility.

(C) Promptly following the hearing provided for in paragraph (14)(ii)(B) of this guidance, the swap execution facility should render a written decision based upon the weight of the evidence contained in the record of the proceeding and should provide a copy to the respondent. The decision should include a description of the summary action taken; the reasons for the summary action; a summary of the evidence produced at the hearing; a statement of findings and conclusions; a determination that the summary action should be affirmed, modified, or reversed; and a declaration of any action to be taken pursuant to the determination, and the effective date and duration of such action.

(b) *Acceptable Practices.* [Reserved]

**CORE PRINCIPLE 3 OF SECTION 5H OF THE ACT—
SWAPS NOT READILY SUSCEPTIBLE TO MANIPULATION**

The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

(a) *Guidance.* (1) In general, a swap contract is an agreement to exchange a series of cash flows over a period of time based on some reference price, which could be a single price, such as an absolute level or a differential, or a price index calculated based on multiple observations. Moreover, such a reference price may be reported by the swap execution facility itself or by an independent third party. When listing a swap for trading, a swap execution facility shall ensure a swap's compliance with Core Principle 3, paying special attention to the reference price used to determine the cash flow exchanges. Specifically, Core Principle 3 requires that the reference price used by a swap not be readily susceptible to manipulation. As a result, when identifying a ref-

erence price, a swap execution facility should either: Calculate its own reference price using suitable and well-established acceptable methods or carefully select a reliable third-party index.

(2) The importance of the reference price's suitability for a given swap is similar to that of the final settlement price for a cash-settled futures contract. If the final settlement price is manipulated, then the futures contract does not serve its intended price discovery and risk management functions. Similarly, inappropriate reference prices cause the cash flows between the buyer and seller to differ from the proper amounts, thus benefitting one party and disadvantaging the other. Thus, careful consideration should be given to the potential for manipulation or distortion of the reference price.

(3) For swaps that are settled by physical delivery or by cash settlement refer to the guidance in appendix C to part 38 of this chapter—Demonstration of Compliance That a Contract is not Readily Susceptible to Manipulation, section b(2) and section c(4), respectively.

(b) *Acceptable Practices.* [Reserved]

**CORE PRINCIPLE 4 OF SECTION 5H OF THE ACT—
MONITORING OF TRADING AND TRADE PROCESSING**

The swap execution facility shall:

(A) Establish and enforce rules or terms and conditions defining, or specifications detailing:

(1) Trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(2) Procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(B) Monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(a) *Guidance.* The monitoring of trading activity in listed swaps should be designed to prevent manipulation, price distortion, and disruptions of the physical-delivery and cash settlement processes. The swap execution facility should have rules in place that allow it to intervene to prevent or reduce such market disruptions. Once a threatened or actual disruption is detected, the swap execution facility should take steps to prevent the market disruption or reduce its severity.

(1) *General requirements.* Real-time monitoring for market anomalies is the most effective, but the swap execution facility may also demonstrate that it has an acceptable

program if some of the monitoring is accomplished on a T+1 basis. The monitoring of trading should use automated alerts to detect abnormal price movements and unusual trading volumes in real-time and instances or threats of manipulation, price distortion, and disruptions on at least a T+1 basis. The T+1 detection and analysis should incorporate any additional data that becomes available on a T+1 basis, including the trade reconstruction data. In some cases, a swap execution facility may demonstrate that its manual processes are effective. The swap execution facility should continually monitor the appropriateness of its swaps' terms and conditions, including the physical-delivery requirements or reference prices used to determine cash flows or settlement. The swap execution facility should act promptly to address the conditions that are causing price distortions or market disruptions, including, when appropriate, changes to contract terms. The swap execution facility should be mindful that changes to contract terms may affect whether a product is subject to the trade execution and clearing requirements of the Act.

(2) *Physical-delivery swaps.* For physical-delivery swaps, the swap execution facility should monitor for conditions that may cause the swap to become susceptible to price manipulation or distortion, including: The general availability of the commodity specified by the swap, the commodity's characteristics, and the delivery locations; and if available, information related to the size and ownership of deliverable supplies.

(3) *Cash-settled swaps.* For cash-settled swaps, the swap execution facility should monitor for pricing abnormalities in the index or instrument used to calculate the reference price. If the swap execution facility computes its own reference price used for cash flows or settlement, it should promptly amend any methodologies that result, or are likely to result, in manipulation, price distortions, or market disruptions, or impose new methodologies to resolve the threat of disruptions or distortions. If the swap execution facility relies upon a third-party index or instrument, including an index or instrument traded on another venue for the swap reference price, it should conduct due diligence to ensure that the reference price is not susceptible to manipulation and that the terms and conditions of the swap continue to comply with § 37.300.

(4) *Ability to obtain information.* The swap execution facility shall demonstrate that it has access to sufficient information to assess whether trading in swaps listed on its market, in the index or instrument used as a reference price, or the underlying commodity for its listed swaps is being used to affect prices on its market. The swap execution facility should demonstrate that it can obtain position and trading information directly

from the market participants that conduct substantial trading on its facility or through an information sharing agreement with other venues or a third-party regulatory service provider. If the position and trading information is not available directly from the market participants in its markets, but is available through information sharing agreements with other trading venues or a third-party regulatory service provider, the swap execution facility should cooperate in such information sharing agreements. The swap execution facility may limit the application of the requirement for market participants to keep and provide records of their activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets, to only those market participants that conduct substantial trading on its facility.

(5) *Risk controls for trading.* An acceptable program for preventing market disruptions shall demonstrate appropriate trading risk controls, in addition to pauses and halts. Risk controls should be adapted to the unique characteristics of the trading platform and of the markets to which they apply and should be designed to avoid market disruptions without unduly interfering with that market's price discovery function. The swap execution facility may choose from among controls that include: pre-trade limits on order size, price collars or bands around the current price, message throttles, daily price limits, and intraday position limits related to financial risk to the clearing member, or design other types of controls, as well as clear error-trade and order-cancellation policies. Within the specific array of controls that are selected, the swap execution facility should set the parameters for those controls, so that the specific parameters are reasonably likely to serve the purpose of preventing market disruptions and price distortions. If a swap is fungible with, linked to, or a substitute for other swaps on the swap execution facility or on other trading venues, such risk controls should, to the extent practicable, be coordinated with any similar controls placed on those other swaps. If a swap is based on the level of an equity index, such risk controls should, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

(b) *Acceptable practices.* [Reserved]

CORE PRINCIPLE 5 OF SECTION 5H OF THE ACT—
ABILITY TO OBTAIN INFORMATION

The swap execution facility shall:

(A) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 5h of the Act;

(B) Provide the information to the Commission on request; and

(C) Have the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance*. [Reserved]

(b) *Acceptable Practices*. [Reserved]

CORE PRINCIPLE 6 OF SECTION 5H OF THE ACT—
POSITION LIMITS OR ACCOUNTABILITY

(A) *In general*. To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) *Position limits*. For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the Act, the swap execution facility shall:

(1) Set its position limitation at a level no higher than the Commission limitation; and

(2) Monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

(a) *Guidance*. Until such time that compliance is required under part 151 of this chapter, a swap execution facility should have reasonable discretion to comply with §37.600, including considering part 150 of this chapter. For Required Transactions as defined in §37.9, a swap execution facility may demonstrate compliance with §37.600 by setting and enforcing position limitations or position accountability levels only with respect to trading on the swap execution facility's own market. For Permitted Transactions as defined in §37.9, a swap execution facility may demonstrate compliance with §37.600 by setting and enforcing position accountability levels or sending the Commission a list of Permitted Transactions traded on the swap execution facility.

(b) *Acceptable Practices*. [Reserved]

CORE PRINCIPLE 7 OF SECTION 5H OF THE ACT—
FINANCIAL INTEGRITY OF TRANSACTIONS

The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2(h)(1) of the Act.

(a) *Guidance*. [Reserved]

(b) *Acceptable Practices*. [Reserved]

CORE PRINCIPLE 8 OF SECTION 5H OF THE ACT—
EMERGENCY AUTHORITY

The swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to

liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

(a) *Guidance*. (1) A swap execution facility should have rules that authorize it to take certain actions in the event of an emergency, as defined in §40.1(h) of this chapter. A swap execution facility should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the swap execution facility's market or as part of a coordinated, cross-market intervention. A swap execution facility should have the flexibility and independence to address market emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the swap execution facility are made in good faith to protect the integrity of the markets. However, the swap execution facility should also have rules that allow it to take market actions as may be directed by the Commission. Additionally, in situations where a swap is traded on more than one platform, emergency action to liquidate or transfer open interest shall be as directed, or agreed to, by the Commission or the Commission's staff. Swap execution facility rules should include procedures and guidelines for decision-making and implementation of emergency intervention that avoid conflicts of interest in accordance with the provisions of section 40.9 of this chapter, and include alternate lines of communication and approval procedures to address emergencies associated with real time events. To address perceived market threats, the swap execution facility should have rules that allow it to take emergency actions, including imposing or modifying position limits, imposing or modifying price limits, imposing or modifying intraday market restrictions, imposing special margin requirements, ordering the liquidation or transfer of open positions in any contract, ordering the fixing of a settlement price, extending or shortening the expiration date or the trading hours, suspending or curtailing trading in any contract, transferring customer contracts and the margin, or altering any contract's settlement terms or conditions, or, if applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services.

(2) A swap execution facility should promptly notify the Commission of its exercise of emergency action, explaining its decision-making process, the reasons for using its emergency authority, and how conflicts of interest were minimized, including the extent to which the swap execution facility considered the effect of its emergency action on the underlying markets and on markets

that are linked or referenced to the contracts traded on its facility, including similar markets on other trading venues. Information on all regulatory actions carried out pursuant to a swap execution facility's emergency authority should be included in a timely submission of a certified rule pursuant to part 40 of this chapter.

(b) *Acceptable Practices*. [Reserved]

CORE PRINCIPLE 9 OF SECTION 5H OF THE ACT—
TIMELY PUBLICATION OF TRADING INFORMATION

(A) *In general*. The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

(B) *Capacity of swap execution facility*. The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

(a) *Guidance*. [Reserved]

(b) *Acceptable Practices*. [Reserved]

CORE PRINCIPLE 10 OF SECTION 5H OF THE
ACT—RECORDKEEPING AND REPORTING

(A) *In general*. A swap execution facility shall:

(1) Maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years;

(2) Report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act; and

(3) Keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

(B) *Requirements*. The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

(a) *Guidance*. [Reserved]

(b) *Acceptable Practices*. [Reserved]

CORE PRINCIPLE 11 OF SECTION 5H OF THE
ACT—ANTITRUST CONSIDERATIONS

Unless necessary or appropriate to achieve the purposes of the Act, the swap execution facility shall not:

(A) Adopt any rules or take any actions that result in any unreasonable restraint of trade; or

(B) Impose any material anticompetitive burden on trading or clearing.

(a) *Guidance*. An entity seeking registration as a swap execution facility may re-

quest that the Commission consider under the provisions of section 15(b) of the Act, any of the entity's rules, including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading, at the time of registration or thereafter. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable Practices*. [Reserved]

CORE PRINCIPLE 12 OF SECTION 5H OF THE
ACT—CONFLICTS OF INTEREST:

The swap execution facility shall:

(A) Establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(B) Establish a process for resolving the conflicts of interest.

(a) *Guidance*. [Reserved]

(b) *Acceptable Practices*. [Reserved]

CORE PRINCIPLE 13 OF SECTION 5H OF THE
ACT—FINANCIAL RESOURCES

(A) *In general*. The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

(B) *Determination of resource adequacy*. The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the swap execution facility to cover the operating costs of the swap execution facility for a one-year period, as calculated on a rolling basis.

(a) *Guidance*. [Reserved]

(b) *Acceptable Practices*—(1) *Reasonable calculation of projected operating costs*. In connection with a swap execution facility calculating its projected operating costs, the Commission has determined that a reasonable calculation should include all expenses necessary for the swap execution facility to comply with the core principles set forth in section 5h of the Act and any applicable Commission regulations. This calculation should be based on the swap execution facility's current level of business and business model, and should take into account any projected modification to its business model (e.g., the addition or subtraction of business lines or operations or other changes), and any projected increase or decrease in its level of business over the next 12 months. The Commission believes, however, that it may be reasonable for a swap execution facility to exclude the following expenses ("excludable expenses") from its projected operating cost calculations:

(i) Costs attributable solely to sales, marketing, business development, product development, or recruitment and any related

travel, entertainment, event, or conference costs;

(ii) Compensation and related taxes and benefits for swap execution facility personnel who are not necessary to ensure that the swap execution facility is able to comply with the core principles set forth in section 5h of the Act and any applicable Commission regulations;

(iii) Costs for acquiring and defending patents and trademarks for swap execution facility products and related intellectual property;

(iv) Magazine, newspaper, and online periodical subscription fees;

(v) Tax preparation and audit fees;

(vi) To the extent not covered by paragraphs (b)(1)(ii) or (iii) of this Core Principle 13 of Section 5h of the Act—Financial Resources, the variable commissions that a voice-based swap execution facility may pay to its SEF trading specialists (as defined under §37.201(c)), calculated as a percentage of transaction revenue generated by the voice-based swap execution facility. Unlike fixed salaries or compensation, such variable commissions are not payable unless and until revenue is collected by the swap execution facility; and

(vii) Any non-cash costs, including depreciation and amortization.

(2) *Prorated expenses.* The Commission recognizes that, in the normal course of a swap execution facility's business, there may be an expense (e.g., typically related to overhead) that is only partially attributable to a swap execution facility's ability to comply with the core principles set forth in section 5h of the Act and any applicable Commission regulations; accordingly, such expense may need to be only partially attributed to the swap execution facility's projected operating costs. For example, if a swap execution facility's office rental space includes marketing personnel and compliance personnel, the swap execution facility may exclude the prorated office rental expense attributable to the marketing personnel. In order to prorate an expense, a swap execution facility should:

(i) Maintain sufficient documentation that reasonably shows the extent to which an expense is partially attributable to an excludable expense;

(ii) Identify any prorated expense in the financial reports that it submits to the Commission pursuant to §37.1306; and

(iii) Sufficiently explain why it prorated any expense. Common allocation methodologies that can be used include actual use, headcount, or square footage. A swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation methodologies to support its determination to prorate an expense.

(3) *Expenses allocated among affiliates.* The Commission recognizes that a swap execution facility may share certain expenses with affiliated entities, such as parent entities or other subsidiaries of the parent. For example, a swap execution facility may share employees (including employees on secondment from an affiliate) that perform similar tasks for the affiliated entities or may share office space with its affiliated entities. Accordingly, the Commission believes that it would be reasonable, for purposes of calculating its projected operating costs, for a swap execution facility to prorate any shared expense that the swap execution facility pays for, but only to the extent that such shared expense is actually attributable to the affiliate and for which the swap execution facility is reimbursed. Similarly, a reasonable calculation of a swap execution facility's projected operating costs must include the prorated amount of any expense paid for by an affiliated entity to the extent that the shared expense is attributable to the swap execution facility. In order to prorate a shared expense, the swap execution facility should:

(i) Maintain sufficient documentation that reasonably shows the extent to which the shared expense is attributable to and paid for by the swap execution facility and/or affiliated entity;

(ii) Identify any shared expense in the financial reports that it submits to the Commission; and

(iii) Sufficiently explain why it prorated any shared expense. A swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation methodologies, that reasonably shows how expenses are attributable to, and paid for by, the swap execution facility and/or its affiliated entities to support its determination to prorate an expense.

CORE PRINCIPLE 14 OF SECTION 5H OF THE ACT—SYSTEM SAFEGUARDS [RESERVED]

CORE PRINCIPLE 15 OF SECTION 5H OF THE ACT—DESIGNATION OF CHIEF COMPLIANCE OFFICER

(A) *In general.* Each swap execution facility shall designate an individual to serve as a chief compliance officer.

(B) *Duties.* The chief compliance officer shall:

(1) Report directly to the board or to the senior officer of the facility;

(2) Review compliance with the core principles in this subsection;

(3) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(4) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(5) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 5h of the Act; and

(6) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

(C) *Requirements for procedures.* In establishing procedures under paragraph (B)(6) of this section, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(D) *Annual reports—(1) In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(i) The compliance of the swap execution facility with the Act; and

(ii) The policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(2) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in clause (1) with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 5h of the Act; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices—(1) Qualifications of chief compliance officer.* In determining whether the background and skills of a potential chief compliance officer are appropriate for fulfilling the responsibilities of the role of the chief compliance officer, the swap execution facility has the discretion to base its determination on the totality of the qualifications of the potential chief compliance officer, including, but not limited to, compliance experience, related career experience, training, and any other relevant factors to the position. A swap execution facility should be especially vigilant regarding potential conflicts of interest when appointing a chief compliance officer.

(2) [Reserved]

[78 FR 33582, June 4, 2013, as amended at 78 FR 47154, Aug. 5, 2013; 81 FR 64312, Sept. 19, 2016; 86 FR 9249, Feb. 11, 2021]

PART 38—DESIGNATED CONTRACT MARKETS

Subpart A—General Provisions

Sec.

- 38.1 Scope.
- 38.2 Exemption.
- 38.3 Procedures for designation.
- 38.4 Procedures for listing products and implementing contract market rules.
- 38.5 Information relating to contract market compliance.
- 38.6 Enforceability.
- 38.7 Prohibited use of data collected for regulatory purposes.
- 38.8 Listing of swaps on a designated contract market.
- 38.9 Boards of trade operating both a designated contract market and a swap execution facility.
- 38.10 Reporting of swaps traded on a designated contract market.
- 38.11 Trade execution compliance schedule.
- 38.12 Process for a designated contract market to make a swap available to trade.

Subpart B—Designation as Contract Market

- 38.100 Core Principle 1.

Subpart C—Compliance With Rules

- 38.150 Core Principle 2.
- 38.151 Access requirements.
- 38.152 Abusive trading practices prohibited.
- 38.153 Capacity to detect and investigate rule violations.
- 38.154 Regulatory services provided by a third party.
- 38.155 Compliance staff and resources.
- 38.156 Automated trade surveillance system.
- 38.157 Real-time market monitoring.
- 38.158 Investigations and investigation reports.
- 38.159 Ability to obtain information.
- 38.160 Additional sources for compliance.

Subpart D—Contracts Not Readily Subject to Manipulation

- 38.200 Core Principle 3.
- 38.201 Additional sources for compliance.

Subpart E—Prevention of Market Disruption

- 38.250 Core Principle 4.
- 38.251 General requirements.
- 38.252 Additional requirements for physical-delivery contracts.
- 38.253 Additional requirements for cash-settled contracts.
- 38.254 Ability to obtain information.
- 38.255 Risk controls for trading.
- 38.256 Trade reconstruction.