

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 39 and 140

RIN 3038-AE87

Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission) is proposing amendments to its regulations that would permit derivatives clearing organizations (DCOs) organized outside of the United States (hereinafter referred to as “non-U.S. clearing organizations”) that do not pose substantial risk to the U.S. financial system to register with the Commission yet comply with the core principles applicable to DCOs set forth in the Commodity Exchange Act (CEA) through compliance with their home country regulatory regime, subject to certain conditions and limitations. The Commission is also proposing certain related amendments to the delegation provisions in its regulations.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by “Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations” and RIN 3038-AE87, by any of the following methods:

- *CFTC Comments Portal*: <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.

- *Mail*: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

- *Hand Delivery/Courier*: Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

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

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain

¹ 17 CFR 145.9. Commission regulations referred to in this release are found at 17 CFR chapter I (2018), and are accessible on the Commission’s website at <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm>.

comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

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I. Background

A. DCO Registration Framework

Section 5b(a) of the CEA provides that a clearing organization may not “perform the functions of a [DCO]”² with respect to futures or swaps unless the clearing organization is registered with the Commission.³ With respect to futures, section 4(a) of the CEA restricts the execution of a futures contract to a designated contract market (DCM), and § 38.601 of the Commission’s regulations requires any transaction executed on or through a DCM to be cleared at a DCO.⁴ This is distinguished from foreign futures which, if executed on or through a registered foreign board of trade, must be cleared through a DCO or a clearing organization that observes the CPMI-IOSCO Principles for Financial Market Infrastructures and is in good regulatory standing in its home country jurisdiction.⁵

With respect to swaps, the CEA permits the Commission to exempt from DCO registration a non-U.S. clearing organization that is “subject to comparable,

² The term “derivatives clearing organization” is statutorily defined to mean a clearing organization in general. However, for purposes of the discussion in this release, the term “DCO” refers to a Commission-registered DCO, the term “exempt DCO” refers to a derivatives clearing organization that is exempt from registration, and the term “clearing organization” refers to a clearing organization that: (a) is neither registered nor exempt from registration with the Commission as a DCO; and (b) falls within the definition of “derivatives clearing organization” under section 1a(15) of the CEA, 7 U.S.C. 1a(15), and “clearing organization or derivatives clearing organization” under § 1.3, 17 CFR 1.3.

³ 7 U.S.C. 7a-1(a). Under section 2(i) of the CEA, 7 U.S.C. 2(i), activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either “have a direct and significant connection with activities in, or effect on, commerce of the United States,” or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (Dodd-Frank Act). Therefore, pursuant to section 2(i), the DCO registration requirement extends to any clearing organization whose clearing activities outside of the United States have a “direct and significant connection with activities in, or effect on, commerce of the United States.”

⁴ See 7 U.S.C. 6; and 17 CFR 38.601.

⁵ See 17 CFR 48.7(d).

comprehensive supervision and regulation” by its home country regulator.⁶ The Commission has granted exemptions from DCO registration but so far has limited exempt DCOs to clearing only proprietary swaps for U.S. persons. As a result, a non-U.S. clearing organization currently must register as a DCO if it wants to clear swaps for customers of futures commission merchants (FCMs).

In order to register and maintain registration as a DCO, a clearing organization must comply with each of the core principles applicable to DCOs set forth in the CEA (DCO Core Principles) and any requirement that the Commission imposes by rule or regulation.⁷ Most of the requirements applicable to DCOs are set forth in part 39 of the Commission’s regulations (Part 39), which the Commission adopted to implement the DCO Core Principles.⁸

Of the 16 DCOs currently registered with the Commission, six are organized outside of the United States.⁹ These six DCOs are also registered (or have comparable status) in their respective home countries, which means they are subject to compliance with the CEA and Part 39 and their home country regulatory regimes, as well as oversight

⁶ Section 5b(h) of the CEA, 7 U.S.C. 7a-1(h). Section 5b(h) also permits the Commission to exempt from DCO registration a securities clearing agency registered with the Securities and Exchange Commission; however, the Commission has not granted, nor developed a framework for granting, such exemptions. In 2018, the Commission proposed regulations that would codify the policies and procedures that the Commission currently follows with respect to granting exemptions from DCO registration to non-U.S. clearing organizations. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018). On July 11, 2019, as a supplement to that proposal, the Commission approved a separate notice of proposed rulemaking, entitled “Exemption from Derivatives Clearing Organization Registration,” that will be published in the *Federal Register*. In that release, the Commission is further proposing to permit exempt DCOs to clear swaps for U.S. customers through foreign intermediaries. All references to exempt DCOs contained in this release are consistent with the existing exempt DCO regime and are not indicative of the Commission’s response to comments received on the initial proposal.

⁷ 7 U.S.C. 7a-1(c)(2)(A)(i).

⁸ Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334 (Nov. 8, 2011).

⁹ The six registered DCOs organized outside of the United States are Eurex Clearing AG, ICE Clear Europe Limited, ICE NGX Canada Inc., LCH Limited, LCH SA, and Singapore Exchange Derivatives Clearing Limited.

by the Commission and their home country regulators. There are, however, meaningful differences in the extent to which U.S. persons clear trades through these six non-U.S. DCOs. For example, nearly half of the swaps business at LCH Limited, if measured on the basis of required initial margin, is attributable to U.S. persons.¹⁰ In contrast, certain other non-U.S. DCOs, such as LCH SA and Eurex Clearing AG, for example, hold significantly less initial margin from U.S. persons, both in absolute terms and as a percentage of the total required initial margin at the DCO. The Commission, recognizing this regulatory overlap and considering the dynamics of the marketplace, is proposing a new DCO registration framework that would differentiate between clearing organizations organized in the United States (U.S. clearing organizations) and non-U.S. clearing organizations. The proposed framework would also distinguish non-U.S. clearing organizations that do not pose substantial risk to the U.S. financial system from those that do.

Under the new framework, the status of U.S. clearing organizations would not change. A U.S. clearing organization would still be required to register as a DCO and to comply with the CEA and all Commission regulations applicable to DCOs. In addition, any non-U.S. clearing organization that wants to clear futures listed for trading on a DCM would be subject to the current registration requirements. Finally, any non-U.S. clearing organization that wants to clear swaps, either proprietary or customer, for U.S. persons, and is determined by the Commission to pose substantial risk to the U.S. financial system (as discussed further below), would be subject to the current requirements as well.

¹⁰ Nearly half of the total required initial margin that U.S. persons post globally in connection with cleared swaps is held at LCH Limited.

However, a non-U.S. clearing organization that wants to clear swaps for U.S. persons (and not futures listed for trading on a DCM) and has not been determined by the Commission to pose substantial risk to the U.S. financial system would have two additional options. First, the non-U.S. clearing organization could still apply for an exemption from DCO registration. The Commission recognizes that this option may not appeal to some non-U.S. clearing organizations because, as previously noted, an exempt DCO is currently limited to clearing proprietary swaps for U.S. persons.¹¹ If the non-U.S. clearing organization wants to clear swaps for FCM customers, but does not want to be subject to full compliance with Commission regulations, it would have the option to register and maintain registration as a DCO by relying largely on its home country regulatory regime, as discussed below.

The Commission believes these proposed changes would allow the Commission to make more effective use of its resources by focusing its oversight almost exclusively on those DCOs that are either organized in the United States or pose substantial risk to the U.S. financial system. The Commission further believes this rulemaking would advance a territorial, risk-based approach to the regulation of clearing organizations that shows appropriate deference to non-U.S. regulation that achieves a similar result as the DCO Core Principles where the non-U.S. regulator itself has a substantial regulatory interest in the DCOs located in its jurisdiction. A deference-based cross-border policy recognizes that market participants and market facilities in a globalized swap market are subject to multiple regulators and potentially face duplicative regulations. Under the

¹¹ *But see* Exemption from Derivatives Clearing Organization Registration, approved on July 11, 2019 (proposing to permit exempt DCOs to clear swaps for U.S. customers through foreign intermediaries).

proposed framework, the Commission would allow a non-U.S. DCO to satisfy the DCO Core Principles by complying with the corresponding requirements in its home jurisdiction, except with respect to certain Commission regulations, including critical customer protection safeguards and swap data reporting requirements, as discussed below. In this way, the proposed framework would help preserve the benefits of an integrated, global swap market by reducing the degree to which a DCO would be subject to multiple sets of regulations, while ensuring protection for U.S. customers. Further, the proposed approach encourages collaboration and coordination among U.S. and foreign regulators in establishing comprehensive regulatory standards for swaps clearing.

B. Overview of Proposed Requirements

The CEA requires a DCO to comply with the DCO Core Principles and any requirement that the Commission imposes by rule or regulation. The CEA further provides that, subject to any rule or regulation prescribed by the Commission, a DCO has “reasonable discretion” in establishing the manner by which the DCO complies with each DCO Core Principle.¹² Currently, a DCO is required to comply with all Commission regulations that were adopted to implement the DCO Core Principles. The Commission is proposing regulations that would allow a non-U.S. clearing organization that seeks to clear swaps for U.S. persons,¹³ including FCM customers, to register as a DCO and, in most instances, comply with the applicable legal requirements in its home country as an alternative means of complying with the DCO Core Principles.

¹² 7 U.S.C. 7a-1(c)(2)(A)(ii).

¹³ The Commission proposes to use the interpretation of “U.S. person” as set forth in the Commission’s Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 FR 45292, 45316 – 45317 (July 26, 2013), as such definition may be amended or superseded by a definition of the term “U.S. person” that is adopted by the Commission and applicable to this proposed regulation.

A non-U.S. clearing organization would be eligible for this alternative compliance regime if: (1) the Commission determines that the clearing organization's compliance with its home country regulatory regime would satisfy the DCO Core Principles;¹⁴ (2) the clearing organization is in good regulatory standing in its home country; (3) the Commission determines that the clearing organization does not pose substantial risk to the U.S. financial system; and (4) a memorandum of understanding (MOU) or similar arrangement satisfactory to the Commission is in effect between the Commission and the clearing organization's home country regulator. Each of these requirements is described in greater detail below.

An applicant for alternative compliance would be required to file only certain exhibits of Form DCO,¹⁵ including a regulatory compliance chart in which the applicant would identify the applicable legal requirements¹⁶ in its home country that correspond with each DCO Core Principle and explain how the applicant satisfies those requirements. Under the current registration regime, an applicant must demonstrate compliance with the DCO Core Principles and Part 39. Under the alternative compliance regime, an applicant must demonstrate: (1) that compliance with its home country requirements would satisfy the DCO Core Principles, and (2) compliance with those requirements. If the application is approved by the Commission, the DCO would be permitted to comply with its home country regulatory regime rather than Part 39 (with the

¹⁴ The Commission notes that the home country regulatory regime would not need to satisfy the Commission's regulations under Part 39.

¹⁵ Whereas an applicant for DCO registration must file the numerous and extensive exhibits required by Form DCO, an applicant for alternative compliance would only be required to file certain exhibits. *See* Appendix A to Part 39, 17 CFR part 39, appendix A.

¹⁶ Home country "legal requirements" would include those standards or other requirements that are legally binding in the applicant's home country.

exception of § 39.15, which concerns treatment of funds). Because the DCO would clear swaps for customers¹⁷ through registered FCMs, the DCO would be required to fully comply with the Commission’s customer protection requirements,¹⁸ as well as the swap data reporting requirements in part 45 of the Commission’s regulations. The DCO would also be held to certain ongoing and event-specific reporting requirements that are more limited in scope than the reporting requirements for existing DCOs. The proposed eligibility criteria, conditions, and reporting requirements would be set forth in proposed subpart D of Part 39.

Assuming all other eligibility criteria continue to be met, the alternative compliance regime would be available to the non-U.S. DCO unless and until its U.S. clearing activity (as measured by initial margin requirements) grows to the point that the Commission determines the DCO poses substantial risk to the U.S. financial system, as described below. If this alternative compliance regime is adopted, any currently registered non-U.S. DCO that does not currently pose substantial risk to the U.S. financial system would be able to apply.

II. Proposed Amendments to Part 39

A. Regulation 39.2 – Definitions

1. Good regulatory standing

¹⁷ Section 2(e) of the CEA makes it unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a DCM. 7 U.S.C. 2(e). “Eligible contract participant” is defined in section 1a(18) of the CEA and § 1.3. 7 U.S.C. 1a(18); 17 CFR 1.3.

¹⁸ Section 4d(f)(1) of the CEA makes it unlawful for any person to accept money, securities, or property (i.e., funds) from a swaps customer to margin a swap cleared through a DCO unless the person is registered as an FCM. 7 U.S.C. 6(c). Any swaps customer funds held by a DCO are also subject to the segregation requirements of section 4d(f)(2) of the CEA and related regulations.

In a recent notice of proposed rulemaking regarding exempt DCOs, the Commission proposed a definition of “good regulatory standing” that is consistent with the definition that the Commission has been applying to exempt DCOs.¹⁹ The Commission is now proposing to add to the definition of “good regulatory standing” separate language that would cover DCOs subject to alternative compliance. The proposed definition of “good regulatory standing” as it relates to exempt DCOs remains unchanged. With the addition of the separate language, the Commission is proposing to define “good regulatory standing” to mean, with respect to a DCO subject to alternative compliance, either there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been such a finding by the home country regulator, but it has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the DCO. The Commission believes that the proposed definition, as it relates to DCOs subject to alternative compliance, establishes a basis for providing the Commission with a high degree of assurance as to the DCO’s compliance with the relevant legal requirements in its home country, while only seeking from the home country regulator a reasonable representation. Although the Commission proposes to limit this to instances of “material” non-observance of relevant home country legal requirements, the

¹⁹ See Exemption From Derivatives Clearing Organization Registration, 83 FR at 39924 – 39925 (proposing to define “good regulatory standing” to mean, with respect to a non-U.S. clearing organization that is authorized to act as a clearing organization in its home country, that either there has been no finding by the home country regulator of material non-observance of the Principles for Financial Market Infrastructures or other relevant home country legal requirements, or there has been such a finding by the home country regulator, but it has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the clearing organization).

Commission requests comment as to whether it should instead require all instances of non-observance.

2. Substantial risk to the U.S. financial system

For purposes of this rulemaking, the Commission is proposing to define “substantial risk to the U.S. financial system” to mean, with respect to a non-U.S. DCO, that (1) the DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (2) 20 percent or more of the initial margin requirements for swaps at that DCO is attributable to U.S. clearing members; provided, however, where one or both of these thresholds are close to 20 percent, the Commission may exercise discretion in determining whether the DCO poses substantial risk to the U.S. financial system. For purposes of this definition and proposed §§ 39.6 and 39.51, the Commission is proposing to clarify that “U.S. clearing member” means a clearing member organized in the United States or whose ultimate parent company is organized in the United States, or an FCM.²⁰

This definition sets forth the test the Commission would use to identify those non-U.S. DCOs that pose substantial risk to the U.S. financial system, as these DCOs would not be eligible for the alternative compliance proposed in this release. The proposed test consists of two prongs. The first prong, which is directly related to systemic risk, is whether the DCO holds 20 percent or more of the required initial margin²¹ of U.S.

²⁰ The Commission is proposing an identical definition of “substantial risk to the U.S. financial system” in a separate rulemaking regarding exemption from DCO registration. *See* Exemption from Derivatives Clearing Organization Registration, approved on July 11, 2019.

²¹ In general, initial margin requirements are risk-based and are meant to cover a DCO’s potential future exposure to clearing members based on price movements in the interval between the last collection of variation margin and the time within which the DCO estimates that it would be able to liquidate a defaulting clearing member’s portfolio. The Commission believes the relative risk that a DCO poses to the

clearing members for swaps across all registered and exempt DCOs. The Commission notes that its primary systemic risk-related concern is the potential for loss of clearing services for a significant part of the U.S. swaps market in the event of a catastrophic occurrence affecting the DCO. The second prong is whether U.S. clearing members account for 20 percent or more of the initial margin requirements for swaps at that DCO. This prong of the test, intended to respect international comity, would capture a non-U.S. DCO only if a large enough proportion of its clearing activity were attributable to U.S. clearing members such that the U.S. has a substantial interest warranting more active oversight by the Commission.²²

The Commission believes that, in the context of this test, the term “substantial” would reasonably apply to proportions of approximately 20 percent or greater. The Commission stresses that this is not a bright-line test; by offering this figure, the

financial system can be identified by the cumulative sum of initial margin collected by the DCO. Therefore, the Commission has found initial margin to be an appropriate measure of risk.

²² In developing this proposal, the Commission is guided by principles of international comity, which counsel due regard for the important interests of foreign sovereigns. *See* Restatement (Third) of Foreign Relations Law of the United States (the Restatement). The Restatement provides that even where a country has a basis for jurisdiction, it should not prescribe law with respect to a person or activity in another country when the exercise of such jurisdiction is unreasonable. *See* Restatement section 403(1). The reasonableness of such an exercise of jurisdiction, in turn, is to be determined by evaluating all relevant factors, including certain specifically enumerated factors where appropriate: (1) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (2) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (3) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation by another state. *See* Restatement section 403(2). Notably, the Restatement does not preclude concurrent regulation by multiple jurisdictions. However, where concurrent jurisdiction by two or more jurisdictions creates conflict, the Restatement recommends that each country evaluate its own interests in exercising jurisdiction and those of the other jurisdiction, and where possible, to consult with each other.

Commission does not intend to suggest that, for example, a DCO that holds 20.1 percent of the required initial margin of U.S. clearing members would potentially pose substantial risk to the U.S. financial system, while a DCO that holds 19.9 percent would not. The Commission is instead seeking to offer some indication of how it would assess the meaning of the term “substantial” in the test.

The Commission recognizes that a test based solely on initial margin requirements may not fully capture the risk of a given DCO. The Commission therefore proposes to retain discretion in determining whether a non-U.S. DCO poses substantial risk to the U.S. financial system, particularly where the DCO is close to 20 percent on both prongs of the test. In these cases, in making its determination, the Commission may look at other factors that may reduce or mitigate the DCO’s risk to the U.S. financial system or provide a better indication of the DCO’s risk to the U.S. financial system.

B. Regulation 39.3(a) – Application Procedures

The Commission is proposing to amend § 39.3(a) to establish in paragraph (a)(3) alternative application procedures for a non-U.S. clearing organization that is seeking to register as a DCO to clear swaps, does not pose substantial risk to the U.S. financial system, and wants to comply with its home country regulatory regime as a means of satisfying the DCO Core Principles.²³ Specifically, any such clearing organization may

²³ The proposed rule text includes changes to § 39.3(a) that were first proposed in a separate rulemaking. *See* Derivatives Clearing Organization General Provisions and Core Principles, 84 FR 22226 (May 16, 2019).

apply for registration in accordance with the terms of § 39.3(a)(3) in lieu of filing the application described in § 39.3(a)(2).²⁴

Proposed § 39.3(a)(3) would require an applicant to submit to the Commission the following sections of Form DCO: cover sheet, Exhibit A-1 (regulatory compliance chart), Exhibit A-2 (proposed rulebook), Exhibit A-3 (narrative summary of proposed clearing activities), Exhibit A-4 (detailed business plan), Exhibit A-7 (documents setting forth the applicant's corporate organizational structure), Exhibit A-8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), Exhibit A-9 (description of pending legal proceedings or governmental investigations), Exhibit A-10 (agreements with outside service providers with respect to the treatment of customer funds), Exhibits F-1 through F-3 (documents that demonstrate compliance with the treatment of funds requirements with respect to FCM customers), and Exhibit R (ring-fencing memorandum).

For purposes of § 39.3(a)(3), the applicant would be required to demonstrate to the Commission in Exhibit A-1 the extent to which compliance with the applicable legal requirements in its home country would constitute compliance with the DCO Core Principles.²⁵ To satisfy this requirement, the applicant would be required to provide in Exhibit A-1 the citation and full text of each applicable legal requirement in its home

²⁴ Regulation 39.3(a)(2) provides that any entity seeking to register as a DCO shall submit to the Commission a completed Form DCO, which shall include a cover sheet, all applicable exhibits, and any supplemental materials, as provided in Appendix A to Part 39.

²⁵ By way of comparison, the Commission has made this determination, in part, with regard to EU regulation. *See* Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016). The Commission notes, however, that this determination was made by comparing EU regulations with the Commission's regulations. Because the DCO Core Principles are broader than the Commission's regulations in most cases, the Commission expects it will be less burdensome for an applicant to demonstrate that compliance with its home country legal requirements would constitute compliance with the DCO Core Principles.

country that corresponds with each DCO Core Principle and an explanation of how the applicant satisfies those requirements. To the extent that the DCO's home country regulatory regime lacks legal requirements that correspond to those DCO Core Principles less related to risk, the Commission may, in its discretion, grant registration subject to conditions that would address the relevant DCO Core Principles.²⁶

C. Regulation 39.4 – Procedures for Implementing DCO Rules and Clearing New Products

Regulation 39.4(b) provides that proposed new or amended rules of a DCO not voluntarily submitted for Commission approval pursuant to § 40.5 must be submitted to the Commission pursuant to the self-certification procedures of § 40.6, as required by section 5c(c) of the CEA,²⁷ prior to their implementation.²⁸ Pursuant to the Commission's authority under section 4(c) of the CEA,²⁹ the Commission is proposing in § 39.4(c) to exempt DCOs that are subject to alternative compliance from submitting rules pursuant to section 5c(c) of the CEA and § 40.6, unless the rule relates to the

²⁶ For example, if the DCO's home country regulatory regime lacks legal requirements that would satisfy DCO Core Principle M (regarding information sharing), the Commission may grant registration subject to conditions that would address information sharing.

²⁷ 7 U.S.C. 7a-2(c).

²⁸ 17 CFR 40.6. A "rule," by definition, includes any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted. 17 CFR 40.1(i).

²⁹ 7 U.S.C. 6(c). Section 4(c) of the CEA provides that, in order to promote responsible economic or financial innovation and fair competition, the Commission, by rule, regulation, or order, may exempt any transaction or class of transactions (including any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to, the transaction) from any of the provisions of the CEA other than certain enumerated provisions, if the Commission determines that the exemption would be consistent with the public interest and the purposes of the CEA, that the transactions will be entered into solely between appropriate persons, and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.

DCO's compliance with the requirements of part 45 of the Commission's regulations,³⁰ or section 4d(f) of the CEA,³¹ parts 1 or 22 of the Commission's regulations,³² or § 39.15,³³ which set forth the Commission's customer protection requirements, as such DCOs would be subject to compliance with these requirements.

The Commission is proposing this limited exemption from the rule submission requirements for DCOs that are subject to alternative compliance as they would be subject to the applicable laws in their home country and oversight by their respective home country regulators. Accordingly, the Commission believes that the review of any new or amended rule unrelated to the Commission's customer protection regime would be more appropriately handled by the DCO's home country regulator. The Commission requests comment as to whether it should require, as part of the application process for alternative compliance, that there is a rule review or approval process under the home country regime.

The Commission believes the proposed exemption in § 39.4(c) is consistent with the public interest, as it would allow the Commission to focus on reviewing those critical rules that relate to areas where the Commission exercises direct oversight rather than review other rules for which duplication of review with the home country regulator is not necessary. The proposed exemption would reflect the protection of customers—and safeguarding of money, securities, or other property deposited by customers—as a fundamental component of the Commission's regulatory oversight of the derivatives

³⁰ 17 CFR part 45 (setting forth swap data reporting and recordkeeping requirements).

³¹ 7 U.S.C. 6d(f) (relating to segregation of customer funds).

³² 17 CFR parts 1 and 22 (setting forth general regulations under the CEA, including treatment of customer funds, and requirements for cleared swaps, respectively).

³³ 17 CFR 39.15 (setting forth requirements for the treatment of customer funds).

markets by requiring these DCOs to certify rules relating to the Commission's customer protection requirements. A DCO's new or amended customer protection-related rules would also continue to be made transparent to FCMs and their customers, as § 40.6(a)(2) requires a DCO to certify that it has posted on its website a copy of the rule submission.³⁴

At the same time, the proposed exemption in § 39.4(c) would reduce the time and resources necessary for DCOs to file rules unrelated to the Commission's customer protection or swap data reporting requirements. In light of the foregoing, the Commission believes the proposed exemption would be consistent with the public interest and the purposes of the CEA. The Commission also believes the proposed exemption would not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA, as the Commission would continue to receive submissions for new rules or rule changes concerning customer protection and swap data reporting, matters for which the DCO is subject to compliance with Commission regulation.³⁵

D. Regulation 39.9 – Scope

The Commission recently proposed to revise § 39.9 to make it clear that the provisions of subpart B apply to any DCO, as defined under section 1a(15) of the CEA and § 1.3, that is registered with the Commission as a DCO pursuant to section 5b of the CEA, but do not apply to any exempt DCO.³⁶ The Commission is proposing to further revise § 39.9 to provide that the provisions of subpart B apply to any DCO, except as

³⁴ The Commission also publicly posts on its website all § 40.6 rule certifications for which confidential treatment is not requested.

³⁵ The factor under section 4(c) of whether a transaction is entered into solely between appropriate persons does not apply here because there are no transactions implicated by this proposed exemption.

³⁶ See Exemption From Derivatives Clearing Organization Registration, 83 FR at 39929.

otherwise provided by Commission order. This change is intended to reflect the fact that a DCO registered through the alternative compliance procedures under proposed § 39.3(a)(3) would not be held to the requirements in subpart B, with the exception of § 39.15 and those requirements for which the Commission did not find there to be alternative compliance in the DCO's home country regulatory regime, as provided in the DCO's order. This provision also would allow the Commission to not apply to a particular DCO any subpart B requirement that the Commission deems irrelevant or otherwise inapplicable due to, for example, certain characteristics of the DCO's business model.

E. Subpart D – Provisions Applicable to DCOs Subject to Alternative Compliance

1. Regulation 39.50 – Scope

The Commission is proposing new § 39.50 to state that the provisions of subpart D of Part 39 apply to any DCO that is registered through the process described in § 39.3(a)(3) (i.e., DCOs subject to alternative compliance). Proposed § 39.51 would be contained in subpart D and would set forth the requirements for alternative compliance, as discussed below.

2. Regulation 39.51 – Alternative Compliance

a. Eligibility for Alternative Compliance

Proposed § 39.51(a) would provide that the Commission may register, subject to any terms and conditions as the Commission determines to be appropriate, a clearing organization for the clearing of swaps for U.S. persons if all of the eligibility requirements listed in proposed § 39.51(a)(1) and (a)(2) are met and the clearing

organization satisfies the conditions set forth in § 39.51(b).³⁷ Each of these requirements is described below.

Proposed § 39.51(a)(1)(i) would require that, in order to be eligible for alternative compliance as a DCO, the Commission must determine that compliance with the clearing organization's home country regulatory regime would satisfy the DCO Core Principles. Under proposed § 39.51(a)(1)(ii), a clearing organization would be required to be in good regulatory standing in its home country. Under proposed § 39.51(a)(1)(iii), the Commission must also determine that the clearing organization does not pose substantial risk to the U.S. financial system (as previously discussed).

Proposed § 39.51(a)(1)(iv) would provide that, in order for a clearing organization to be eligible for alternative compliance as a DCO, an MOU or similar arrangement satisfactory to the Commission must be in effect between the Commission and the clearing organization's home country regulator,³⁸ pursuant to which, among other things, the home country regulator agrees to provide to the Commission any information that the Commission deems appropriate to evaluate the clearing organization's initial and continued eligibility for registration or to review compliance with any conditions of such registration. The Commission has customarily entered into MOUs or similar arrangements in connection with the supervision of non-U.S. clearing organizations that are registered or exempt from DCO registration. In the context of DCOs subject to alternative compliance, satisfactory MOUs or similar arrangements with the home

³⁷ The eligibility requirements listed in proposed § 39.51(a)(1) and (a)(2) and the conditions set forth in proposed § 39.51(b) would be pre-conditions to the Commission's issuance of a registration order in this regard. Additional conditions that are unique to the facts and circumstances specific to a particular clearing organization could be imposed upon that clearing organization in the Commission's registration order.

³⁸ In foreign jurisdictions where more than one regulator supervises and regulates a clearing organization, the Commission would expect to enter into an MOU or similar arrangement with more than one regulator.

country regulator would include provisions for information sharing and cooperation, as well as for notification upon the occurrence of certain events.³⁹ Although the Commission would retain the right to conduct site visits, the Commission would not expect to conduct routine site visits to such DCOs.

Under proposed § 39.51(a)(2), if the DCO's home country regulatory regime lacks legal requirements that correspond to those DCO Core Principles less related to risk, the Commission may, in its discretion, grant registration subject to conditions that would address the relevant DCO Core Principles.

b. Conditions of Alternative Compliance

Proposed § 39.51(b) sets forth conditions of alternative compliance. These conditions are similar to the conditions that the Commission has imposed on exempt DCOs.⁴⁰

Under proposed § 39.51(b)(1), a DCO subject to alternative compliance would be required to comply with the DCO Core Principles through its compliance with applicable legal requirements in its home country, and any other requirements specified in its registration order including, but not limited to, section 4d(f) of the CEA, parts 1, 22, and 45 of the Commission's regulations, subpart A of Part 39, and § 39.15. Because the DCO would clear swaps for FCM customers, the DCO would be subject to the Commission's customer protection requirements set forth in section 4d(f) of the CEA, parts 1 and 22 of the Commission's regulations, and § 39.15. The DCO would also be subject to part 45 of

³⁹ For existing non-U.S. DCOs that wish to be subject to alternative compliance, the Commission believes the MOUs currently in place with their respective home country regulators would be sufficient to satisfy this requirement.

⁴⁰ See Exemption From Derivatives Clearing Organization Registration, 83 FR at 39926 – 39927.

the Commission's regulations, which sets forth swap data recordkeeping and reporting requirements, and subpart A of Part 39, which contains general provisions applicable to DCOs, including registration procedures.

Proposed § 39.51(b)(2) would codify the "open access" requirements of section 2(h)(1)(B) of the CEA with respect to swaps cleared by a DCO to which one or more of the counterparties is a U.S. person.⁴¹ Paragraph (b)(2)(i) would require a DCO to have rules providing that all such swaps with the same terms and conditions (as defined by product specifications established under the DCO's rules) submitted to the DCO for clearing are economically equivalent and may be offset with each other, to the extent that offsetting is permitted by the DCO's rules. Paragraph (b)(2)(ii) would require a DCO to have rules providing for non-discriminatory clearing of such a swap executed either bilaterally or on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility, e.g., a swap execution facility.

Proposed § 39.51(b)(3) would provide that a DCO must consent to jurisdiction in the United States and designate an agent in the United States, for notice or service of process, pleadings, or other documents issued by or on behalf of the Commission or the U.S. Department of Justice in connection with any actions or proceedings against, or any investigations relating to, the DCO or any of its U.S. clearing members. The name of the designated agent would be submitted as part of the clearing organization's application for registration. If a DCO appoints another agent to accept such notice or service of process, the DCO would be required to promptly inform the Commission of this change. This condition is also included in existing DCO registration orders.

⁴¹ 7 U.S.C. 2(h)(1)(B).

Proposed § 39.51(b)(4) is a general provision that would require a DCO to comply, and demonstrate compliance as requested by the Commission, with any condition of the DCO's registration order.

Proposed § 39.51(b)(5) would require a DCO to make all documents, books, records, reports, and other information related to its operation as a DCO (hereinafter, "books and records") open to inspection and copying by any Commission representative, and to promptly make its books and records available and provide them directly to Commission representatives, upon the request of a Commission representative. The Commission notes that it does not anticipate conducting routine site visits to DCOs subject to alternative compliance. However, the Commission may request a DCO to provide books and records related to its operation as a DCO subject to alternative compliance in order for the Commission to ensure that, among other things, the DCO continues to meet the eligibility requirements for alternative compliance as well as the conditions of its registration.⁴²

Proposed § 39.51(b)(6) would require that a DCO request and the Commission receive an annual written representation from a home country regulator that the DCO is in good regulatory standing, within 60 days following the end of the DCO's fiscal year. This requirement would help the Commission assess the DCO's compliance with its home country legal requirements, and thus, compliance with the DCO Core Principles, and continued eligibility for alternative compliance.

⁴² Although an MOU or similar arrangement would provide for information sharing whereby the home country regulator agrees to provide to the Commission any information that the Commission deems appropriate to evaluate the clearing organization's initial and continued eligibility for registration or to review compliance with any conditions of such registration, the Commission would retain the authority to access books and records directly from a DCO.

Under proposed § 39.51(b)(7), the Commission may condition alternative compliance on any other facts and circumstances it deems relevant. In doing so, the Commission would be mindful of principles of international comity. For example, the Commission could take into account the extent to which the relevant foreign regulatory authorities defer to the Commission with respect to oversight of DCOs organized in the United States. This approach would advance the goal of regulatory harmonization, consistent with the express directive of Congress that the Commission coordinate and cooperate with foreign regulatory authorities on matters related to the regulation of swaps.⁴³

c. General Reporting Requirements

Proposed § 39.51(c)(1) sets forth general reporting requirements pursuant to which a DCO subject to alternative compliance would have to provide certain information directly to the Commission: (1) on a periodic basis (daily or quarterly); and (2) after the occurrence of a specified event, each in accordance with the submission requirements of § 39.19(b).⁴⁴ Such information would be used by the Commission, among other things, to evaluate the continued eligibility of the DCO for alternative compliance, review the DCO's compliance with any conditions of its registration, or conduct oversight of U.S. clearing activity.

⁴³ In order to promote effective and consistent global regulation of swaps, section 752 of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of swaps, among other things. Section 752 of the Dodd-Frank Act, Public Law 111-203, 124 Stat. 1376 (2010), codified at 15 U.S.C. 8325.

⁴⁴ Regulation 39.19(b), 17 CFR 39.19(b), requires that a DCO submit reports electronically and in a format and manner specified by the Commission, defines the term "business day," and establishes the relevant time zone for any stated time, unless otherwise specified by the Commission. The Commission has specified that U.S. Central time will apply with respect to the daily reports that must be filed by exempt DCOs pursuant to proposed § 39.6(c)(2)(i).

Proposed § 39.51(c)(2)(i) would require a DCO to compile a report as of the end of each trading day, and submit the report to the Commission by 10:00 a.m. U.S. Central time on the following business day, containing the following information with respect to swaps: (A) total initial margin requirements for all clearing members; (B) initial margin requirements and initial margin on deposit for each U.S. clearing member, by house origin and by each customer origin, and by each individual customer account; and (C) daily variation margin, separately listing the mark-to-market amount collected from or paid to each clearing member, by house origin and by each customer origin, and by each individual customer account. These requirements are identical to reporting requirements in § 39.19(c)(1)(i)(A) and (B) that apply to registered DCOs and similar to reporting requirements in proposed § 39.6(c)(2)(i) that would apply to exempt DCOs.⁴⁵ These reports would provide the Commission with information regarding the cash flows associated with U.S. persons clearing swaps through DCOs subject to alternative compliance in order for the Commission to assess the risk exposure of U.S. persons and the extent of the DCO's U.S. clearing activity.⁴⁶

Proposed § 39.51(c)(2)(ii) would require a DCO to compile a report as of the last day of each fiscal quarter, and submit the report to the Commission no later than 17 business days after the end of the fiscal quarter, containing a list of U.S. clearing members, with respect to the clearing of swaps. This requirement is the same as the one

⁴⁵ See 17 CFR 39.19(c)(1)(i)(A) and (c)(1)(i)(B). See also Exemption From Derivatives Clearing Organization Registration, 83 FR at 39927 (discussing similar reporting requirements for exempt DCOs).

⁴⁶ The Commission notes that, given the time-sensitive nature of the data in these reports, the reports would need to be provided directly from the DCO, as is the case with existing registered and exempt DCOs.

that would apply to exempt DCOs in proposed § 39.6(c)(2)(ii)(C).⁴⁷ This report would help the Commission to better understand the extent of U.S. clearing activity at the DCO.

Paragraphs (c)(2)(iii) through (c)(2)(vii) of proposed § 39.51 each would require a DCO to provide information to the Commission upon the occurrence of certain specified events. These requirements are similar to reporting requirements in proposed § 39.6(c)(2)(iii) through (c)(2)(viii) that would apply to exempt DCOs.⁴⁸ Several of the proposed required notifications are intended to provide the Commission with information relevant to the DCO's continued eligibility for alternative compliance or its compliance with the conditions of its registration.

Proposed § 39.51(c)(2)(iii) would require a DCO to provide prompt notice to the Commission regarding any change in its home country regulatory regime. The Commission requests comment on whether the Commission should require a DCO subject to alternative compliance to provide prompt notice of any *material* change in its home country regulatory regime. If so, should the Commission attempt to define "material" (and, if so, how)?

Proposed § 39.51(c)(2)(iv) would require a DCO to provide to the Commission, to the extent that it is available to the DCO, any examination report or examination findings by a home country regulator, and notify the Commission within five business days after it becomes aware of the commencement of any enforcement or disciplinary action or investigation by a home country regulator. Proposed § 39.51(c)(2)(v) would require a DCO to provide immediate notice to the Commission of any change with respect to its

⁴⁷ See Exemption From Derivatives Clearing Organization Registration, 83 FR at 39927 – 39928.

⁴⁸ See *id.* at 39928.

licensure, registration, or other authorization to act as a clearing organization in its home country.

In addition, the Commission is proposing some required notifications that would assist the Commission in its oversight of U.S. clearing members and FCMs. Proposed § 39.51(c)(2)(vi) would require a DCO to provide immediate notice to the Commission in the event of a default (as defined by the DCO in its rules) by any clearing member, including the amount of the clearing member's financial obligation. If the defaulting clearing member is a U.S. clearing member, the notice must also include the name of the U.S. clearing member and a list of the positions it held. Proposed § 39.51(c)(2)(vii) would require a DCO to provide notice of any action that it has taken against a U.S. clearing member, no later than two business days after the DCO takes such action. Proposed paragraphs (c)(2)(vi) and (c)(2)(vii) of § 39.51 are similar to paragraphs (c)(4)(vii) and (c)(4)(xi) of § 39.19, which currently apply to registered DCOs.⁴⁹

d. Modification of Registration upon Commission Initiative

Proposed § 39.51(d) would permit the Commission to modify the terms and conditions of an order of registration, in its discretion and upon its own initiative, based on changes to or omissions in facts or circumstances pursuant to which the order was issued, or if any of the terms and conditions of the order have not been met.⁵⁰ For example, the Commission could modify the terms of a registration order upon a determination that compliance with the DCO's home country regulatory regime does not

⁴⁹ These provisions are also substantially similar to paragraphs (c)(2)(vii) and (c)(2)(viii) of proposed § 39.6, which would apply to exempt DCOs. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR at 39928.

⁵⁰ The Commission notes that it has authority to suspend or revoke a DCO's registration under the CEA. *See* 7 U.S.C. 7b.

satisfy the DCO Core Principles, the DCO is not in good regulatory standing in its home country, or the DCO poses substantial risk to the U.S. financial system.

Proposed §§ 39.51(d)(2), (d)(3), and (d)(4) would set forth the process for modification of registration upon the Commission's initiative. Proposed § 39.51(d)(2) would require the Commission to first provide written notification to a DCO that the Commission is considering modifying the DCO's registration order and the basis for that consideration.

Proposed § 39.51(d)(3) would provide up to 30 days for a DCO to respond to the Commission's notification in writing following receipt of the notification, or at such later time as the Commission may permit in writing. The Commission believes that a minimum 30-day timeframe would allow the Commission to take timely action to protect its regulatory interests while providing the DCO with sufficient time to develop its response. In its response, the DCO may provide potential mitigating factors for the Commission to consider where, for example, the DCO faces a potential finding of substantial risk to the U.S. financial system.

Proposed § 39.51(d)(4) would provide that, following receipt of a response from the DCO, or after expiration of the time permitted for a response, the Commission may either: (i) issue an order requiring the DCO to comply with all requirements applicable to DCOs registered through the process described in § 39.3(a)(2),⁵¹ effective as of a date to be specified in the order, which is intended to provide the DCO with a reasonable amount of time to come into compliance with the CEA and Commission regulations or request a

⁵¹ Regulation 39.3(a)(2) provides that any entity seeking to register as a DCO shall submit to the Commission a completed Form DCO, which shall include a cover sheet, all applicable exhibits, and any supplemental materials, as provided in Appendix A to Part 39.

vacation of registration in accordance with § 39.3(f); (ii) issue an amended order of registration that modifies the terms and conditions of the order; or (iii) provide written notification to the DCO that the registration order will remain in effect without modification to its terms and conditions.

III. Proposed Amendments to Part 140 – Organization, Functions, and Procedures of the Commission

The Commission is proposing amendments to § 140.94(c) in order to delegate authority to the Director of the Division of Clearing and Risk for all functions reserved to the Commission in proposed § 39.51, except for the authority to grant registration to a DCO, prescribe conditions to alternative compliance of a DCO, and modify a DCO's registration order. The Commission is proposing to adopt § 140.94(c)(15) to reflect this delegation. The Commission notes that the authority being delegated in this regard is ministerial in nature; significant functions are still being reserved to the Commission.

IV. Request for Comments

In addition to the specific requests for comment noted elsewhere, the Commission generally requests comments on all aspects of the proposed rules. The Commission also requests comments on the following specific issues:

1. Does the proposed alternative compliance regime, including both the application process and the ongoing requirements, strike the right balance between the Commission's regulatory interests and the regulatory interests of non-U.S. DCOs' home country regulators?

2. Are there additional regulatory requirements under the CEA or Commission regulations that should not apply to non-U.S. DCOs with alternative compliance in the

interest of deference and allowing such DCOs to satisfy the DCO Core Principles through compliance with their home country regulatory regimes while still protecting the Commission's regulatory interests?

3. Should the Commission take into account regulations in Part 39, in addition to the DCO Core Principles, in determining whether alternative compliance is appropriate for a non-U.S. clearing organization?

4. Should the Commission require additional, or less, information from an applicant for alternative compliance as part of its application under proposed § 39.3(a)(3)?

5. Is the proposed test for "substantial risk to the U.S. financial system" the best measure of such risk? If not, please explain why, and if there is a better measure/metric that the Commission should use, please provide a rationale and supporting data, if available.

6. What is the frequency with which the Commission should reassess a DCO's "risk to the U.S. financial system" for purposes of the test, and across what time period, after it is registered under the alternative compliance regime?

7. Does the proposed exemption from self-certification of rules in § 39.4(c) meet the standards for exemptive relief set out in section 4(c) of the CEA?

a. In addition to rules that relate to the DCO's compliance with the requirements of section 4d(f) of the CEA, parts 1, 22, or 45 of the Commission's regulations, or § 39.15, should the Commission require other rules to be filed pursuant to section 5c(c) of the CEA? If so, should the Commission retain discretion in determining which other rules must be filed based on, for example, the particular facts and circumstances? Or

should the Commission enumerate the types of rules that must be filed (e.g., rules related to certain products cleared by the DCO)?

8. Should non-U.S. DCOs with alternative compliance be excused from reporting any particular data streams in order to limit duplicative reporting obligations in the cross-border context without jeopardizing U.S. customer protections, particularly given the existence of an MOU between the Commission and the DCO's home country regulator as a requirement for eligibility for alternative compliance?

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.⁵² The regulations proposed by the Commission will affect only clearing organizations. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.⁵³ The Commission has previously determined that clearing organizations are not small entities for the purpose of the RFA.⁵⁴ Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

⁵² 5 U.S.C. 601 et seq.

⁵³ 47 FR 18618 (Apr. 30, 1982).

⁵⁴ See 66 FR 45604, 45609 (Aug. 29, 2001).

B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)⁵⁵ provides that Federal agencies, including the Commission, may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number from the Office of Management and Budget (OMB). This proposed rulemaking contains reporting requirements that are collections of information within the meaning of the PRA. The Commission is proposing to revise Information Collection 3038-0076, which contains the requirements for DCO registration and compliance, to include the collection of information in proposed §§ 39.3(a)(3) and 39.51, as well as changes to the existing information collection requirements for registered DCOs as a result of this proposal. The responses to the collection of information would be necessary to obtain DCO registration under the proposed alternative compliance process.

1. Alternative DCO Application Process under Proposed § 39.3(a)(3)

Regulation 39.3(a)(2) sets forth the requirements for filing an application for registration as a DCO. The Commission is proposing new § 39.3(a)(3), which would establish the application procedures for DCOs that wish to be subject to alternative compliance. Currently, Information Collection 3038-0076 reflects that each application for DCO registration takes 421 hours to complete, including all exhibits. Because the alternative application procedures would require substantially fewer documents and exhibits, the Commission is estimating that each such application would require 100 hours to complete.

⁵⁵ 44 U.S.C. 3501 et seq.

DCO application for alternative compliance, including all exhibits, supplements and amendments:

Estimated number of respondents: 1

Estimated number of reports per respondent: 1

Average number of hours per report: 100

Estimated gross annual reporting burden: 100

2. Ongoing Reporting Requirements for DCOs Subject to Alternative Compliance in Accordance With Proposed § 39.51

Proposed § 39.51 would include reporting requirements for DCOs subject to alternative compliance that are substantially similar to those proposed for exempt DCOs.⁵⁶ The estimated number of respondents is based on approximately three existing registered DCOs that may choose to convert to alternative compliance and one new registrant per year.

Daily reporting

Estimated number of respondents: 6

Estimated number of reports per respondent: 250

Average number of hours per report: 0.1

Estimated gross annual reporting burden: 150

Quarterly reporting

Estimated number of respondents: 6

Estimated number of reports per respondent: 4

Average number of hours per report: 1

⁵⁶ See Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018).

Estimated gross annual reporting burden: 24

Event-specific reporting

Estimated number of respondents: 6

Estimated number of reports per respondent: 1

Average number of hours per report: 0.5

Estimated gross annual reporting burden: 3

Annual certification of good regulatory standing

Estimated number of respondents: 6

Estimated number of reports per respondent: 1

Average number of hours per report: 1

Estimated gross annual reporting burden: 6

As proposed under § 39.4(c), DCOs subject to alternative compliance would not be required to comply with § 40.6 regarding certification of rules, other than rules relating to customer protection. Although this change could potentially reduce the burden related to rule submissions by registered entities, which is covered in Information Collection 3038-0093, the Commission is not proposing any changes to that information collection burden because its current estimate of 50 responses annually per respondent covers a broad range of the number of annual submissions by registered entities. Therefore, no adjustment to Information Collection 3038-0093 is necessary.

3. Adjustment to Part 39 Reporting and Recordkeeping Requirements

As noted above, the Commission anticipates that approximately three currently registered DCOs may seek registration under the alternative compliance process; accordingly, the information collection burden applicable to DCO applicants and

registered DCOs will be reduced. Currently, collection 3038-0076 reflects that there are 2 applicants for DCO registration annually and that it takes each applicant 421 hours to complete and submit the form, including all exhibits. The Commission is reducing the number of applicants for full DCO registration from two to one based on the expectation that one of the annual DCO applicants will seek registration subject to alternative compliance.

Form DCO - § 39.3(a)(2)

Estimated number of respondents: 1

Estimated number of reports per respondent: 1

Average number of hours per report: 421

Estimated gross annual reporting burden: 421

The information collection burden for registered DCOs, based on the Commission's proposed alternative compliance regime, is estimated to be reduced by three, from 16 to 13. The reduction in the number of respondents is the sole change in the burden estimates previously stated for registered DCOs. The revised burden estimates are as follows:

CCO annual report

Estimated number of respondents: 13

Estimated number of reports per respondent: 1

Average number of hours per report: 73

Estimated gross annual reporting burden: 949

Annual financial reports

Estimated number of respondents: 13

Estimated number of reports per respondent: 1

Average number of hours per report: 2640

Estimated gross annual reporting burden: 34,320

Quarterly financial reports

Estimated number of respondents: 13

Estimated number of reports per respondent: 4

Average number of hours per report: 8

Estimated gross annual reporting burden: 416

Daily reporting

Estimated number of respondents: 13

Estimated number of reports per respondent: 250

Average number of hours per report: 0.5

Estimated gross annual reporting burden: 1625

Event-specific reporting

Estimated number of respondents: 13

Estimated number of reports per respondent: 20

Average number of hours per report: 0.5

Estimated gross annual reporting burden: 130

Public information

Estimated number of respondents: 13

Estimated number of reports per respondent: 4

Average number of hours per report: 2

Estimated gross annual reporting burden: 104

Governance disclosures

Estimated number of respondents: 13

Estimated number of reports per respondent: 6

Average number of hours per report: 3

Estimated gross annual reporting burden: 234

Registered DCOs - Recordkeeping

Estimated number of respondents: 13

Estimated number of reports per respondent: 1

Average number of hours per report: 150

Estimated number of respondents-request to vacate: 1

Estimated number of reports per respondent-request to vacate: 0.33

Average number of hours per report-request to vacate: 1

Estimated gross annual recordkeeping burden: 1951⁵⁷

Proposed § 39.4(c) would exempt DCOs subject to alternative compliance from self-certifying rules unless the rule relates to the requirements under section 4d(f) of the CEA, parts 1, 22, or 45 of the Commission's regulations, or § 39.15. While this proposed change is likely to reduce the number of rule certification submissions that would otherwise be required for DCOs subject to alternative compliance, the Commission is not expecting that this will affect the overall burden for rule certification filings by all registered entities, covered in Information Collection 3038-0093. The number of rule submissions in that information collection is intended to represent an average number of

⁵⁷ The total annual recordkeeping burden estimate reflects the combined figures for 13 registered DCOs with an annual burden of one response and 150 hours per response (13 x 1 x 150=1950), and one vacated DCO registration every three years with an annual burden of one hour, which is not affected by this proposal.

submissions per registered entity. Because the average number of submissions covers a wide range of variability in the actual numbers of rule certification submissions by registered entities, the Commission believes that the small number of DCOs subject to alternative compliance which would not be required to certify all rules would be covered by the existing burden estimate in Information Collection 3038-0093.

4. Request for Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. The Commission will consider public comments on this proposed collection of information in:

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

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

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

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

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

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;

- (202) 395-6566 (fax); or
- OIRAsubmissions@omb.eop.gov (email).

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

C. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain

orders.⁵⁸ Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

The baseline for the Commission's consideration of the costs and benefits of this proposed rulemaking are: (1) the DCO Core Principles; (2) the general provisions applicable to DCOs under subparts A and B of Part 39; (3) Form DCO in Appendix A to Part 39; (4) Parts 1, 22, and 40 of the Commission's regulations; and (5) § 140.94.

The Commission notes that this consideration is based on its understanding that the swaps market functions internationally with (i) transactions that involve U.S. firms occurring across different international jurisdictions; (ii) some entities organized outside of the United States that are prospective Commission registrants; and (iii) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the proposed regulations on all relevant swaps activity, whether based on their actual occurrence in the United States or on their connection with, or effect on U.S. commerce pursuant to, section 2(i) of the CEA.⁵⁹

⁵⁸ 7 U.S.C. 19(a).

⁵⁹ Pursuant to section 2(i) of the CEA, activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either "have a direct and significant connection with activities in, or effect on, commerce of the

The Commission recognizes that the proposed rules may impose costs. The Commission has endeavored to assess the expected costs and benefits of the proposed rulemaking in quantitative terms, including PRA-related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable proposed rules in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the proposed rules. Additionally, the initial and recurring compliance costs for any particular DCO will depend on the size, existing infrastructure, level of clearing activity, practices, and cost structure of the DCO.

2. Proposed Amendments to Part 39

a. Summary

Section 5b(a) of the CEA requires a clearing organization that clears swaps to be registered with the Commission as a DCO. Once registered, a DCO is required to comply with the CEA and all Commission regulations applicable to DCOs, regardless of whether the DCO is subject to other regulation and oversight, as non-U.S. DCOs typically are. The proposed regulations would allow a non-U.S. DCO that the Commission determines does not pose substantial risk to the U.S. financial system to be subject to an alternative compliance regime that relies in part on the DCO's home country regulatory regime and would result in reduced regulatory obligations as compared to the existing registration requirements. Specifically, the DCO would comply with the DCO Core Principles in the CEA by complying with its home country's legal requirements

United States;" or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Act, Pub. L. 111-203, 124 Stat. 1376. 7 U.S.C. 2(i).

rather than the requirements of subpart B of Part 39 (with the exception of § 39.15). The DCO still would be subject to subpart A of Part 39 and the Commission's customer protection and swap data reporting requirements, as well as reporting and other conditions in its registration order. Lastly, the Commission is proposing in § 39.4(c) to exempt DCOs that are subject to alternative compliance from self-certifying rules pursuant to § 40.6, unless the rule relates to the Commission's customer protection or swap data reporting requirements.

b. Benefits

There are currently 16 DCOs registered with the Commission, six of which are organized outside of the United States and have comparable registration status in their respective home countries. These non-U.S. DCOs are regulated both by the Commission and their home country regulators.

The proposed regulations would allow the Commission to register a non-U.S. DCO through the alternative compliance procedures if the Commission has determined that, among other things, compliance with the DCO's home country regulatory regime satisfies the DCO Core Principles. Therefore, to the extent that the DCO's home country laws and regulations impose obligations similar to those imposed by the CEA, the proposal would significantly reduce duplicative regulatory requirements for the DCO.

The Commission is mindful that legal and regulatory compliance is not costless. Compliance with two different regulatory regimes, even if they are similar, requires legal and compliance staff capable of understanding, interpreting, and applying both regimes, which potentially requires hiring additional personnel or retaining additional outside advisors. Compliance with two regimes also requires a DCO to spend additional time

and resources. Moreover, the specific requirements of each regime may differ even if both regimes satisfy the DCO Core Principles. For example, different legal regimes may impose different requirements regarding acceptable accounting standards, the methods by which clearing members may be held accountable for violating a DCO's rules, the forms and locations in which records must be kept, and the type and manner of making information available to the public. Complying with both sets of requirements—that achieve effectively the same regulatory outcomes—may be costly, operationally difficult, or otherwise impractical. Because the proposal would substantially reduce an eligible DCO's expenditures for duplicative compliance activities, it would significantly decrease the overall ongoing legal and compliance costs incurred by DCOs subject to alternative compliance.

In addition, the proposed exemption in § 39.4(c) from self-certifying certain rules to the Commission would significantly reduce the ongoing compliance costs of DCOs subject to alternative compliance, as they would be required to self-certify only rules that relate to the Commission's customer protection or swap data reporting requirements. Because § 40.6 requires a DCO to include certain information in its rule submissions, the proposed exemption would save such DCOs the time and expense of preparing self-certifications for rules that pertain to other matters.

Moreover, the alternative application procedures included in proposed § 39.3(a)(3) are significantly simplified compared to the existing DCO application procedures under § 39.3(a)(2). The existing procedures require submission of a complete Form DCO, which includes over three dozen exhibits. Commission staff carefully reviews each such application and typically asks numerous questions and, when

necessary, requests amended exhibits and supplementary documents to evaluate and promote compliance with the CEA and Commission regulations. In contrast, the proposed alternative application procedures would require the submission of relatively few sections of Form DCO, mostly drawn from Exhibits A and F thereto. Preparing the sections of Form DCO that would be required under the proposed alternative application procedures should therefore be significantly less time-consuming and expensive than preparing the entire Form DCO under the existing application procedures. Moreover, with far fewer items for the Commission to review, the applicant is likely to receive significantly fewer questions from Commission staff and will require substantially less time and expense to respond to staff questions and prepare new or amended documents in response to staff requests. It is also likely that, as a result, the Commission may be able to make a final determination on an application under the proposed alternative application procedures in less time than is typically required under the existing procedures.

Given the lower initial application and ongoing compliance costs, the Commission anticipates that some non-U.S. clearing organizations that are not currently registered as DCOs, including, but not limited to, exempt DCOs, would pursue registration with alternative compliance. Because of the significantly reduced requirements under alternative compliance, the Commission believes it would be considerably easier for non-U.S. clearing organizations to comply with those requirements while still fully complying with their home country regime. As a result, the Commission believes that this proposal may increase the number of registered DCOs over time. Because exempt DCOs are currently not permitted to offer customer clearing, customers would have more clearing options if exempt DCOs were to become registered

DCOs. If clearing organizations that are neither registered nor exempt from registration were to register, both customers and clearing members would have more clearing options. Access to more clearing organizations may encourage more clearing of swaps, while reducing the concentration risk among DCOs.

Moreover, given the reduced costs expected to be borne by DCOs subject to alternative compliance and the greater competition resulting from the likely increase in the number of registered DCOs, it is possible that some registered DCOs may pass some of their cost savings to their clearing members and customers. In addition to their direct benefits, such cost reductions may have the indirect benefit of encouraging greater use of clearing, thereby increasing the safety and stability of the broader financial system.

Finally, the proposed regulations would promote and perhaps encourage international comity by showing deference to non-U.S. regulators in the oversight of non-U.S. DCOs that do not pose substantial risk to the U.S. financial system. If regulators in other countries deferred to U.S. oversight of U.S. DCOs active in overseas markets, the reduced registration and compliance burdens on such DCOs would be an additional benefit of the proposed regulation.

c. Costs

A non-U.S. clearing organization applying under the proposed alternative application procedures would incur costs in preparing the application. This would include preparing and submitting certain parts of the Form DCO, including the requirement to provide in Exhibit A-1 the citation and full text of each applicable legal requirement in its home country that corresponds with each core principle and an explanation of how the applicant satisfies those requirements. If a clearing organization

were required instead to apply under the existing application process, however, it would need to prepare and submit a complete Form DCO, which is a significantly more costly and burdensome process. Thus, although an applicant would incur costs in preparing the application under proposed § 39.3(a)(3), the proposed alternative application procedures would represent a substantial cost savings relative to the existing procedures.

DCOs registered under the existing procedures, including non-U.S. DCOs that are ineligible for alternative compliance, may face a competitive disadvantage as a result of this proposal. A DCO subject to full Commission regulation and oversight may have higher ongoing compliance costs than a DCO subject to alternative compliance. This competitive disadvantage is mitigated by the fact that DCOs subject to alternative compliance would, as a precondition of such registration, be required to be overseen by a home country regulator that is likely to impose costs similar to those associated with Commission regulation. Such non-U.S. DCOs, then, may have compliance costs in their home countries that a U.S.-based DCO might not.

The Commission does not anticipate that the proposal would impose costs on clearing members or customers. The proposal would likely increase the number of registered DCOs and permit some DCOs to register under a new procedure that may allow them to pass on cost savings to clearing members and customers. Therefore, the Commission believes that clearing members and customers may face reduced costs as a result of this proposal. To the extent that DCOs subject to alternative compliance do not save costs relative to traditionally registered DCOs, or do not pass cost savings to their clearing members or customers, the Commission notes that, to the extent products are available for clearing through more than one DCO, clearing members and customers may

be able to simply continue clearing through traditionally registered DCOs, likely without any change in costs.

Furthermore, the Commission does not believe that the proposal would materially increase the risk to the U.S. financial system. DCOs that pose substantial risk to the U.S. financial system would not be eligible to register under the proposed alternative process.⁶⁰ Furthermore, a DCO cannot avail itself of this process unless the Commission determines that a DCO's compliance with its home country regulatory regime would satisfy the DCO Core Principles, meaning that the DCO would be subject to regulation comparable to that imposed on DCOs registered under the existing procedure. An MOU or similar arrangement must be in effect between the Commission and the DCO's home country regulator, allowing the Commission to receive information from the home country regulator to help monitor the DCO's continuing compliance with its legal and regulatory obligations. In addition, DCOs that register under the proposed alternative process would remain subject to the Commission's customer protection requirements set forth in section 4d(f) of the CEA, parts 1 and 22 of the Commission's regulations, and § 39.15. The Commission also notes that foreign regulators have a strong incentive to ensure the safety and soundness of the clearing organizations that they regulate, and their oversight, combined with the alternative compliance regime, will enable the Commission to more efficiently allocate its own resources in the oversight of traditionally registered

⁶⁰ It may also be possible that the Commission's proposed test for "substantial risk to the U.S. financial system" may not be properly calibrated, allowing certain non-U.S. DCOs to register under the alternative registration regime when they may pose sufficient risk to the U.S. financial system to warrant greater oversight by the Commission. However, the Commission believes that even if these non-U.S. DCOs are permitted to register under the alternative registration regime, this risk will be mitigated by the Commission's determination that compliance with the foreign jurisdiction's legal regime would satisfy the DCO Core Principles, as discussed above, and the Commission's access to daily and periodic reports regarding the DCO and its risks.

DCOs. Finally, the proposal would not increase the risks posed by exempt DCOs or by clearing organizations that are neither registered nor exempt from registration.

Lastly, the Commission does not anticipate any costs to DCOs associated with the exemption in proposed § 39.4(c).

3. Section 15(a) Factors

a. Protection of Market Participants and the Public

The proposed regulations would not materially reduce the protections available to market participants and the public because they would require, among other things, that a DCO subject to alternative compliance: (i) must demonstrate to the Commission that compliance with the applicable legal requirements in its home country would constitute compliance with the DCO Core Principles; (ii) must be licensed, registered, or otherwise authorized to act as a clearing organization in its home country and be in good regulatory standing; and (iii) must not pose substantial risk to the U.S. financial system. The regulations would also protect market participants and the public by ensuring that FCM customers clearing through a DCO subject to alternative compliance would continue to receive the full benefits of the customer protection regime established in the CEA and Commission regulations. Although the Commission acknowledges the possibility that some foreign regulatory regimes may ultimately prove to be less effective than that of the United States, the Commission believes that this risk is mitigated for the reasons discussed above.

b. Efficiency, Competitiveness, and Financial Integrity

The proposed regulations would promote efficiency in the operations of DCOs subject to alternative compliance by reducing duplicative regulatory requirements. This

reduction in duplicative requirements would likely result in most DCOs being subject largely to only their home country regulatory regimes, which could promote competitiveness among DCOs. Furthermore, adopting the proposed regulations might prompt other regulators to adopt similar rules that would defer to the Commission in the regulation of U.S. DCOs operating outside the United States, which could increase competitiveness by reducing the regulatory burdens on such DCOs.

The proposed regulations would be expected to maintain the financial integrity of swap transactions cleared by DCOs because DCOs subject to alternative compliance would be required to comply with a home country regulatory regime that satisfies the DCO Core Principles and because they would be required to satisfy the Commission's regulations regarding customer protection. In addition, the proposed regulations may contribute to the financial integrity of the broader financial system by spreading the potential risk of particular swaps among a greater number of DCOs, thus reducing concentration risk.

c. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. The Commission has not identified any impact that the proposed regulations would have on price discovery. This is because price discovery occurs before a transaction is submitted for clearing through the interaction of bids and offers on a trading system or platform, or in the over-the-counter market. The proposed rule would not impact requirements under the CEA or Commission regulations regarding price discovery.

d. Sound Risk Management Practices

The proposed regulations would continue to encourage sound risk management practices because a DCO would be eligible for alternative compliance only if it is held to risk management requirements in its home country that satisfy the DCO Core Principles and are comparable to the Commission's risk management requirements.

e. Other Public Interest Considerations

The Commission notes the public interest in access to clearing organizations outside of the United States in light of the international nature of many swap transactions. The proposed regulations might encourage international comity by deferring, under certain conditions, to the regulators of other countries in the oversight of home country clearing organizations. The Commission expects that such regulators will defer to the Commission in the supervision and regulation of DCOs domiciled in the United States, thereby reducing the regulatory and compliance burdens to which such DCOs are subject.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.⁶¹

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission requests comment on whether the proposed rulemaking implicates any other specific public interest to be protected by the antitrust laws. The Commission has considered the proposed rulemaking to

⁶¹ 7 U.S.C. 19(b).

determine whether it is anticompetitive. The Commission believes that the proposed rulemaking may promote greater competition in swap clearing because it would reduce the regulatory burden for non-U.S. clearing organizations, which might encourage them to register to clear the same types of swaps for U.S. persons that are currently cleared by registered DCOs. Unlike non-U.S. DCOs subject to this alternative compliance, U.S. DCOs, and non-U.S. DCOs that pose substantial risk to the U.S. financial system, would be held to the requirements of the CEA and Commission regulations and subject to the direct oversight of the Commission. This may appear to create a competitive disadvantage for these DCOs; however, non-U.S. DCOs subject to alternative compliance would be meeting similar requirements through compliance with their home country regulatory regimes and would be subject to the direct oversight of their home country regulators. Further, to the extent that the U.S. clearing activity of a non-U.S. DCO subject to alternative compliance grows to the point that the DCO poses substantial risk to the U.S. financial system, and therefore, a threat to competition, it would be required to comply with all requirements applicable to DCOs and be subject to the Commission's direct oversight.

The Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed rules.

List of Subjects

17 CFR Part 39

Clearing, Customer protection, Derivatives clearing organization, Procedures, Registration, Swaps.

17 CFR Part 140

Authority delegations (Government agencies), Organization and functions (Government agencies).

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

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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

Authority: 7 U.S.C. 2, 7a-1, and 12a(5); 12 U.S.C. 5464; 15 U.S.C. 8325; Section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, title VII, sec. 752, July 21, 2010, 124 Stat. 1749.

2. In § 39.2, add the following definitions in alphabetical order to read as follows:

§ 39.2 Definitions.

* * * * *

Good regulatory standing means, with respect to a derivatives clearing organization that is organized outside of the United States, and is licensed, registered, or otherwise authorized to act as a clearing organization in its home country, that:

- (1) In the case of an exempt derivatives clearing organization, either there has been no finding by the home country regulator of material non-observance of the Principles for Financial Market Infrastructures or other relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the Principles for Financial Market Infrastructures or other relevant home country legal requirements but any such finding has been or is being resolved to the

satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization; or

(2) In the case of a derivatives clearing organization registered through the process described in § 39.3(a)(3), either there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization.

* * * * *

Substantial risk to the U.S. financial system means, with respect to a derivatives clearing organization organized outside of the United States, that—

(1) The derivatives clearing organization holds 20% or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt derivatives clearing organizations; and

(2) 20% or more of the initial margin requirements for swaps at that derivatives clearing organization is attributable to U.S. clearing members; *provided, however*, where one or both of these thresholds are close to 20%, the Commission may exercise discretion in determining whether the derivatives clearing organization poses substantial risk to the U.S. financial system. For purposes of this definition and §§ 39.6 and 39.51, *U.S.*

clearing member means a clearing member organized in the United States, a clearing member whose ultimate parent company is organized in the United States, or a futures commission merchant.

* * * * *

3. In § 39.3, revise paragraphs (a)(3), (4), and (5) and add paragraphs (a)(6) and (7) to read as follows:

§ 39.3 Procedures for registration.

(a) * * *

(3) *Alternative application procedures.* An entity that is organized outside of the United States, is seeking to register as a derivatives clearing organization for the clearing of swaps, and does not pose substantial risk to the U.S. financial system may apply for registration in accordance with the terms of this paragraph in lieu of filing the application described in paragraph (a)(2) of this section. If the application is approved by the Commission, the derivatives clearing organization's compliance with its home country's regulatory regime would satisfy the core principles set forth in section 5b(c)(2) of the Act, subject to the requirements of subpart D of this part. The applicant shall submit to the Commission the following sections of Form DCO, as provided in the appendix to this part: cover sheet, Exhibit A-1 (regulatory compliance chart), Exhibit A-2 (proposed rulebook), Exhibit A-3 (narrative summary of proposed clearing activities), Exhibit A-4 (detailed business plan), Exhibit A-7 (documents setting forth the applicant's corporate organizational structure), Exhibit A-8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), Exhibit A-9 (description of pending legal proceedings or governmental investigations), Exhibit A-10 (agreements with outside service providers with respect to the treatment of customer funds), Exhibits F-1 through F-3 (documents that demonstrate compliance with the treatment of funds requirements with respect to customers of futures commission merchants), and Exhibit R

(ring-fencing memorandum). For purposes of this paragraph, the applicant must demonstrate to the Commission, in Exhibit A-1, the extent to which compliance with the applicable legal requirements in its home country would constitute compliance with the core principles set forth in section 5b(c)(2) of the Act. To satisfy this requirement, the applicant shall provide in Exhibit A-1 the citation and full text of each applicable legal requirement in its home country that corresponds with each core principle and an explanation of how the applicant satisfies those requirements.

(4) *Submission of supplemental information.* The filing of a completed application is a minimum requirement and does not create a presumption that the application is materially complete or that supplemental information will not be required. At any time during the application review process, the Commission may request that the applicant provide supplemental information in order for the Commission to process the application. The applicant shall provide supplemental information in the format and manner specified by the Commission.

(5) *Application amendments.* An applicant shall promptly amend its application if it discovers a material omission or error, or if there is a material change in the information provided to the Commission in the application or other information provided in connection with the application. An applicant is only required to submit exhibits and other information that are relevant to the application amendment.

(6) *Public information.* The following sections of an application for registration as a derivatives clearing organization will be public: first page of the Form DCO cover sheet (up to and including the General Information section), Exhibit A-1 (regulatory compliance chart), Exhibit A-2 (proposed rulebook), Exhibit A-3 (narrative summary of

proposed clearing activities), Exhibit A-7 (documents setting forth the applicant's corporate organizational structure), Exhibit A-8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), and any other part of the application not covered by a request for confidential treatment, subject to § 145.9 of this chapter.

(7) *Extension of time for review.* The Commission may further extend the review period in paragraph (a)(1) of this section for any period of time to which the applicant agrees in writing.

* * * * *

4. In § 39.4, redesignate paragraphs (c) through (e) as paragraphs (d) through (f) and add new paragraph (c) to read as follows:

§ 39.4 Procedures for implementing derivatives clearing organization rules and clearing new products.

* * * * *

(c) *Exemption from self-certification of rules.* Notwithstanding the rule certification requirements of section 5c(c)(1) of the Act and § 40.6 of this chapter, a derivatives clearing organization that is registered through the process described in § 39.3(a)(3) is not required to certify a rule unless the rule relates to the requirements under section 4d(f) of the Act, parts 1, 22, or 45 of this chapter, or § 39.15.

* * * * *

5. Revise § 39.9 to read as follows:

§ 39.9 Scope.

Except as otherwise provided by Commission order, the provisions of this subpart B apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and § 1.3 of this chapter, that is registered with the Commission as a derivatives clearing organization pursuant to section 5b of the Act. The provisions of this subpart B do not apply to any exempt derivatives clearing organization, as defined under § 39.2.

6. Add and reserve §§ 39.43 through 39.49.

7. Add new subpart D, consisting of §§ 39.50 and 39.51, to read as follows:

Subpart D—Provisions Applicable to Derivatives Clearing Organizations Subject to Alternative Compliance

§ 39.50 Scope.

The provisions of this subpart D apply to any derivatives clearing organization that is registered through the process described in § 39.3(a)(3).

§ 39.51 Alternative compliance.

(a) *Eligibility for alternative compliance.* (1) The Commission may register, subject to any terms and conditions as the Commission determines to be appropriate, a derivatives clearing organization for the clearing of swaps for U.S. persons if:

(i) The Commission determines that compliance by the derivatives clearing organization with its home country regulatory regime constitutes compliance with the core principles set forth in section 5b(c)(2) of the Act;

(ii) The derivatives clearing organization is in good regulatory standing in its home country;

(iii) The Commission determines the derivatives clearing organization does not pose substantial risk to the U.S. financial system; and

(iv) A memorandum of understanding or similar arrangement satisfactory to the Commission is in effect between the Commission and the derivatives clearing organization's home country regulator, pursuant to which, among other things, the home country regulator agrees to provide to the Commission any information that the Commission deems appropriate to evaluate the initial and continued eligibility of the derivatives clearing organization for alternative registration or to review its compliance with any conditions of such registration.

(2) To the extent that the derivatives clearing organization's home country regulatory regime lacks legal requirements that correspond to those core principles less related to risk, the Commission may, in its discretion, grant registration subject to conditions that would address the relevant core principles.

(b) *Conditions of alternative compliance.* A derivatives clearing organization subject to alternative compliance shall be subject to any conditions the Commission may prescribe including, but not limited to:

(1) *Applicable requirements under the Act and Commission regulations.* The derivatives clearing organization shall comply with: the core principles set forth in section 5b(c)(2) of the Act through its compliance with applicable legal requirements in its home country; and other requirements applicable to derivatives clearing organizations as specified in the derivatives clearing organization's registration order including, but not limited to, section 4d(f) of the Act, parts 1, 22, and 45 of this chapter, and subpart A and § 39.15 of this part.

(2) *Open access.* The derivatives clearing organization shall have rules with respect to swaps to which one or more of the counterparties is a U.S. person that:

(i) Provide that all swaps with the same terms and conditions, as defined by product specifications established under the derivatives clearing organization's rules, submitted to the derivatives clearing organization for clearing are economically equivalent within the derivatives clearing organization and may be offset with each other within the derivatives clearing organization, to the extent offsetting is permitted by the derivatives clearing organization's rules; and

(ii) Provide that there shall be non-discriminatory clearing of a swap executed bilaterally or on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility.

(3) *Consent to jurisdiction; designation of agent for service of process.* The derivatives clearing organization shall:

(i) Consent to jurisdiction in the United States;

(ii) Designate, authorize, and identify to the Commission, an agent in the United States who shall accept any notice or service of process, pleadings, or other documents, including any summons, complaint, order, subpoena, request for information, or any other written or electronic documentation or correspondence issued by or on behalf of the Commission or the United States Department of Justice to the derivatives clearing organization, in connection with any actions or proceedings brought against, or investigations relating to, the derivatives clearing organization or any of its U.S. clearing members; and

(iii) Promptly inform the Commission of any change in its designated and authorized agent.

(4) *Compliance.* The derivatives clearing organization shall comply, and shall demonstrate compliance as requested by the Commission, with any condition of its registration.

(5) *Inspection of books and records.* The derivatives clearing organization shall make all documents, books, records, reports, and other information related to its operation as a derivatives clearing organization open to inspection and copying by any representative of the Commission; and in response to a request by any representative of the Commission, the derivatives clearing organization shall, promptly and in the form specified, make the requested books and records available and provide them directly to Commission representatives.

(6) *Representation of good regulatory standing.* On an annual basis, within 60 days following the end of its fiscal year, a derivatives clearing organization shall request and the Commission must receive from a home country regulator a written representation that the derivatives clearing organization is in good regulatory standing.

(7) *Other conditions.* The Commission may condition alternative compliance on any other facts and circumstances it deems relevant.

(c) *General reporting requirements.* (1) A derivatives clearing organization shall provide to the Commission the information specified in this paragraph and any other information that the Commission deems necessary, including, but not limited to, information for the purpose of the Commission evaluating the continued eligibility of the derivatives clearing organization for alternative compliance, reviewing compliance by the derivatives clearing organization with any conditions of its registration, or conducting oversight of U.S. clearing members, and the swaps that are cleared by such persons

through the derivatives clearing organization. Information provided to the Commission under this paragraph shall be submitted in accordance with § 39.19(b).

(2) Each derivatives clearing organization shall provide to the Commission the following information:

(i) A report compiled as of the end of each trading day and submitted to the Commission by 10:00 a.m. U.S. Central time on the following business day, containing with respect to swaps:

(A) Total initial margin requirements for all clearing members;

(B) Initial margin requirements and initial margin on deposit for each U.S. clearing member, by house origin and by each customer origin, and by each individual customer account; and

(C) Daily variation margin, separately listing the mark-to-market amount collected from or paid to each U.S. clearing member, by house origin and by each customer origin, and by each individual customer account.

(ii) A report compiled as of the last day of each fiscal quarter of the derivatives clearing organization and submitted to the Commission no later than 17 business days after the end of the derivatives clearing organization's fiscal quarter, containing a list of U.S. clearing members, with respect to the clearing of swaps, as of the last day of the fiscal quarter.

(iii) Prompt notice regarding any change in the home country regulatory regime;

(iv) As available to the derivatives clearing organization, any examination report or examination findings by a home country regulator, and notify the Commission within

five business days after it becomes aware of the commencement of any enforcement or disciplinary action or investigation by a home country regulator;

(v) Immediate notice of any change with respect to the derivatives clearing organization's licensure, registration, or other authorization to act as a derivatives clearing organization in its home country;

(vi) In the event of a default by a clearing member clearing swaps, with such event of default determined in accordance with the rules of the derivatives clearing organization, immediate notice of the default including the amount of the clearing member's financial obligation; *provided, however*, if the defaulting clearing member is a U.S. clearing member, the notice shall also include the name of the U.S. clearing member and a list of the positions held by the U.S. clearing member; and

(vii) Notice of action taken against a U.S. clearing member by a derivatives clearing organization, no later than two business days after the derivatives clearing organization takes such action against a U.S. clearing member.

(d) *Modification of registration upon Commission initiative.* (1) The Commission may, in its discretion and upon its own initiative, modify the terms and conditions of an order of registration granted through the process described in §39.3(a)(3) if the Commission determines that there are changes to or omissions in facts or circumstances pursuant to which the order was issued, or that any of the terms and conditions of its order have not been met, including, but not limited to, the requirement that:

(i) Compliance with the derivatives clearing organization's home country regulatory regime satisfies the core principles set forth in section 5b(c)(2) of the Act;

(ii) The derivatives clearing organization is in good regulatory standing in its home country; or

(iii) The derivatives clearing organization does not pose substantial risk to the U.S. financial system.

(2) The Commission shall provide written notification to a derivatives clearing organization that it is considering whether to modify an order of registration pursuant to this paragraph and the basis for that consideration.

(3) The derivatives clearing organization may respond to the notification in writing no later than 30 business days following receipt of the notification, or at such later time as the Commission permits in writing.

(4) Following receipt of a response from the derivatives clearing organization, or after expiration of the time permitted for a response, the Commission may:

(i) Issue an order requiring the derivatives clearing organization to comply with all requirements applicable to derivatives clearing organizations registered through the process described in §39.3(a)(2), effective as of a date to be specified therein. The specified date shall be intended to provide the derivatives clearing organization with a reasonable amount of time to come into compliance with the Act and Commission regulations or request a vacation of registration in accordance with § 39.3(f);

(ii) Issue an amended order of registration that modifies the terms and conditions of the order; or

(iii) Provide written notification to the derivatives clearing organization that the order of registration will remain in effect without modification to its terms and conditions.

PART 140 – ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

8. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

9. Amend § 140.94 as follows:

- a. Revise paragraph (c) introductory text and paragraph (c)(1); and
- b. Add paragraph (c)(15).

The revisions and addition read as follows:

§ 140.94 Delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight and the Director of the Division of Clearing and Risk.

* * * * *

(c) The Commission hereby delegates, until such time as the Commission orders otherwise, the following functions to the Director of the Division of Clearing and Risk and to such members of the Commission’s staff acting under his or her direction as he or she may designate from time to time:

(1) The authority to review applications for registration as a derivatives clearing organization filed with the Commission under § 39.3(a)(1) of this chapter, to determine that an application is materially complete pursuant to § 39.3(a)(2) of this chapter, to request additional information in support of an application pursuant to § 39.3(a)(4) of this chapter, to extend the review period for an application pursuant to § 39.3(a)(7) of this chapter, to stay the running of the 180-day review period if an application is incomplete pursuant to § 39.3(b)(1) of this chapter, to review requests for amendments to orders of registration filed with the Commission under § 39.3(d)(1) of this chapter, to request

additional information in support of a request for an amendment to an order of registration pursuant to § 39.3(d)(2) of this chapter, and to request additional information in support of a rule submission pursuant to § 39.3(g)(3) of this chapter;

* * * * *

(15) All functions reserved to the Commission in § 39.51 of this chapter, except for the authority to:

- (i) Grant registration under § 39.51(a) of this chapter;
- (ii) Prescribe conditions to registration under § 39.51(b) of this chapter; and
- (iii) Modify registration under § 39.51(d)(4) of this chapter.

* * * * *

Issued in Washington, DC, on July 12, 2019, by the Commission.

Christopher Kirkpatrick,
Secretary of the Commission.

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

Appendices to Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations – Commission Voting Summary, Chairman’s Statement, and Commissioners’ Statements

Appendix 1 – Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2 – Statement of Chairman J. Christopher Giancarlo

This proposal addresses the registration of non-U.S. DCOs that clear swaps for U.S. persons. The CFTC has almost two decades of experience overseeing non-U.S. DCOs engaging in activity in U.S. derivatives markets. LCH Ltd was the first non-U.S. DCO to register with the CFTC 18 years ago. Other CCPs became registered after the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).¹ Through its supervisory powers, the CFTC has informally calibrated its day-to-day oversight of these registered DCOs based on the principle of deference to the oversight of primary regulators, while taking into account the specific circumstances of a particular non-U.S. DCO.

The main purpose of this rulemaking is to address the current informality of the CFTC’s approach and, in doing so, introduce significant additional areas where the CFTC can defer, appropriately and consistent with its risk oversight responsibilities, to non-U.S. DCOs’ home country supervisors. Among other things, this proposal sets forth a framework under which non-U.S. DCOs that do not pose a substantial risk to the U.S. financial system would have the option of being fully registered with the CFTC as a DCO but meet their registration requirements through compliance with their home country requirements.

These DCOs that are “fully registered with alternative compliance” would still be able to offer customer clearing through futures commission merchants (FCMs), just like other fully registered DCOs. Consistent with the commitment to apply supervisory

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010), available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf.

deference under Title VII of the Dodd-Frank Act where appropriate, the home country regulator would have supervisory primacy over these DCOs with the CFTC much more narrowly focused than is currently the case, from both a legal and practical perspective, on U.S. customer funds protection at these DCOs. This narrow focus on customer funds protection is appropriate to help ensure the legal requirements relating to segregation at both the FCM and DCO level are met, and that, if necessary, the bankruptcy protections afforded to customers under the CFTC's FCM model work as intended.

In determining whether a non-U.S. CCP potentially poses "substantial risk to the U.S. financial system," the proposal would use objective criteria and provide transparency about such criteria. The proposed definition of substantial risk to the U.S. financial system consists of two 20 percent tests. The first focuses on the percentage of initial margin from a "U.S. origin" (i.e., initial margin posted by U.S.-domiciled clearing members and clearing members ultimately owned by U.S.-domiciled holding companies, regardless of the domicile of the clearing member) at a specific non-U.S. DCO. The second focuses on the "U.S. origin" business of the non-U.S. DCO as a percentage of the overall U.S. cleared swaps market. Where both of these "20/20" thresholds are close to 20 percent, the Commission would be able to exercise discretion in determining whether the DCO poses substantial risk to the U.S. financial system.

I believe that objective and transparent criteria, such as the ones set forth in the proposal, are what all regulators around the world should strive for to provide appropriate predictability and stability to the markets.

I thank CFTC staff for their fine work that resulted in today's proposal. I look forward to reviewing comments from the public.

Appendix 3 – Supporting Statement of Commissioner Brian Quintenz

This proposed rule would reduce the degree to which CFTC-registered foreign derivatives clearing organizations (DCO) are subject to duplicative regulation by the CFTC and their home country regulator. The proposal would permit a foreign DCO that does not pose “substantial risk to the U.S. financial system” to comply with its home country authorities’ regulations instead of most CFTC regulations. To satisfy CFTC regulations, the foreign DCO would only need to comply with certain of our customer protection and swap data reporting requirements.

The proposal recognizes that foreign regulators have a substantial interest and expertise in supervising DCOs located in their home jurisdictions. Deference to their oversight is appropriate when compliance with the home country regulatory regime would achieve compliance with DCO core principles. This proposal is consistent with, and in many ways an expansion of, the CFTC’s 2016 Equivalence Agreement with the European Commission, pursuant to which the CFTC granted substituted compliance to dually-registered DCOs based in the European Union.¹

I also strongly support the proposal’s transparent, fact-based procedure for determining when a foreign DCO poses “substantial risk to the U.S. financial system.” The proposal defines “substantial risk” to mean two simple criteria: (i) the foreign DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (ii) 20 percent or more of the initial margin requirements for swaps at that foreign DCO is attributable to U.S. clearing

¹ Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 Fed. Reg. 15260 (March 22, 2016).

members. I think this two-prong test correctly assesses the DCO's focus on U.S. firms and impact on the U.S. marketplace.

Today's proposal contrasts starkly with the European Securities and Markets Authority's (ESMA) recent proposal to determine the systemic importance of a foreign DCO to the European Union and thereby apply the European Market Infrastructure Regulation (EMIR) and ESMA oversight. Unlike today's CFTC proposal, ESMA has not proposed *any* quantitative thresholds for assessing systemic importance. Instead, ESMA proposed 14 "indicators" for determining systemic importance that would grant it considerable discretion and raise serious questions about the judgement and consistency of the indicators' application. I hope that, through its consultative process, ESMA decides to revise its criteria and ultimately adopts a predictable, transparent, and appropriately calibrated threshold regime for such an important and extraterritorial regulatory determination.

I welcome comments and suggestions from market participants and foreign jurisdictions about all aspects of the Commission's proposed alternative compliance regime for non-U.S. DCOs. It is also my hope that incoming Chairman Tarbert will prioritize finalizing a version of this proposal. Lastly, I look forward to discussing this proposal, and advocating for its deference-based approach, with our regulatory colleagues around the globe.

Appendix 4 – Statement of Commissioner Dawn D. Stump

Overview

In responding to the financial crisis, both the Group of 20 Nations (G-20) and the U.S. Congress recognized that the derivatives markets are global and in doing so

provided for international coordination and a practical application of regulatory deference. I want to commend the Chairman for his leadership in reminding us of the global commitments made in 2009 and the subsequent efforts Congress made to encourage global regulatory harmonization. Specifically, the G-20 leaders stated the clear responsibility we have “to take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage.”¹ More directly related to the subjects before us today, Congress, in the Dodd-Frank Act, amended the Commodity Exchange Act to provide: “The Commission may exempt, conditionally or unconditionally, a derivatives clearing organization from registration ... for the clearing of swaps if the Commission determines that the derivatives clearing organization is subject to comparable, comprehensive supervision and regulation by... the appropriate government authorities in the home country of the organization.”²

I believe deference to comparable regulatory regimes is essential. Historically, such deference has been the guiding principle of the CFTC’s approach to regulating cross-border derivatives. We cannot effectively supervise central counterparties (CCPs) in every corner of the world. We can, however, evaluate the regulatory requirements in a CCP’s home country to determine if they are sufficiently commensurate to our own. We will never have the exact same rules around the globe. We should rather strive to

¹ Leaders’ Statement from the 2009 G-20 Summit in Pittsburgh, Pa. 7 (Sept. 24-25, 2009), http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

² 7 U.S.C. 7a-1(h) (2012).

minimize the frequency and impact of duplicative regulatory oversight while also demanding high comparable standards, just as Congress intended.

Had we previously established a more comprehensive structure for those comparably-regulated, foreign CCPs seeking to offer swaps clearing to U.S. customers, then CCPs wishing to seek an exemption would have been able to do so under a regime that Congress provided for in the Dodd-Frank Act. Alternatively, those that wanted to register as a DCO would have done so voluntarily in response to a business rationale demanded by their clearing members and customers. However, by not having previously established an exemption process, the CFTC left only one path for customer clearing on non-U.S. DCOs, which resulted in compelling several non-U.S. CCPs to become dually registered with both their home country regulator and the CFTC.

As a result, relationships with our global regulatory counterparts became strained, and there have been many unfortunate consequences such that now we must provide new ground rules. So today, we are advancing an overdue conversation on applying international regulatory deference through the establishment of a test to identify non-U.S. CCPs that pose substantial risk to the U.S. financial system. To be clear, neither of the proposals we are considering today would be available to DCOs that pose such risk. I fear that this point may be lost or confused by the fact that we are presenting these as two separate rulemakings. While I would have preferred a single rulemaking to alleviate any confusion, I want to make clear that we are simply proposing two regulatory options, each of which is only available to those DCOs that do NOT pose substantial risk to the U.S. financial system under the proposed test. I encourage commenters to provide input on the proposals as if they are a single package, particularly where the request for

comments in one proposal may be relevant or more applicable to consideration of the other proposal.

These proposals are a step towards achieving the goals established in 2009 – an effort I wholeheartedly support. However, I have concerns that these proposals may be a bit too rigid to pragmatically facilitate increased swaps clearing by U.S. customers, as we are committed to do by the original G-20 and Congressional directives. Under the Alternative Compliance proposal, non-U.S. DCOs can permit customer access only if a futures commission merchant (FCM) is directly facilitating the clearing while the other available option -- provided for in the Exempt DCO proposal -- completely disallows the FCM from being involved in customer clearing. While I recognize that the blunt nature of these bright line distinctions makes it easier to regulate, I worry that it may not be workable in practice. I support putting these proposals out for public comment in hopes that those who participate in these markets and who are expected to apply the new swap clearing mandates will be able to lend their voices to the discussion. However, I anticipate that the elements left unaddressed in these proposals, which are detailed in the requests for comments, may require a re-proposal at some future date. Nonetheless, if that is to occur we will be well served to have that discussion with the benefit of public comments.

Registration with Alternative Compliance for Non-U.S. DCOs

This proposal is designed to more clearly spell out how we would provide regulatory oversight for those clearinghouses that do not pose substantial risk to the U.S. financial system and that may obtain Alternative Compliance by demonstrating fulfillment of statutorily-established core principles.

Unfortunately, the proposal fails to address, and in my opinion may even worsen, a challenge of great concern to this Commission – the increased strain on our registered FCMs. Under the Alternative Compliance proposal, any non-U.S. DCO seeking to apply the regime would be required to do so ONLY through clearing members that are FCMs, and may not do so through an affiliate of the FCM in the home country that is already acting as a clearing member of the DCO. This is the status quo, and frankly it often makes very little economic sense for both the FCM and its affiliate to be capitalizing a clearinghouse simultaneously. Consideration should be given to the efficiency of utilizing an affiliated entity, which would allow this to be a business decision between FCMs and their customers, rather than a regulatory impediment to sustaining FCMs that play a critical role in cleared derivatives markets.

It is costly for an FCM to join any clearinghouse and may be especially uneconomic if the FCM only has a few customers who wish to access a particular non-U.S. DCO. It may make more sense to structure the arrangement with the assistance of a non-U.S. affiliate, already actively participating as a member of the DCO. To do otherwise limits U.S. customer choice and access to clearing of the product in a foreign jurisdiction, which seems at odds with the reform agenda of encouraging clearing – mandated or not.

To be clear, two affiliated entities may each be subjected to risk mutualization obligations at the same CCP, and unfortunately, this proposal does not discuss how we might address this duplicative burden. Rather, we are requesting comment in the separate Exempt DCO proposal about how this problem might be addressed through an affiliate guarantee arrangement such that an FCM could potentially participate as a “special”

member whose obligations to the DCO could be guaranteed by its non-FCM affiliate acting as a “traditional” member of the DCO. I hope commenters will consider and discuss this concept in the context of the proposed Alternative Compliance regime where it is more applicable to CFTC-registered FCMs at non-U.S., CFTC-registered DCOs. I hope that commenters will also provide other potential solutions to help alleviate undue burdens on FCMs and their customers in the context of the Alternative Compliance proposal.

As a Commission, I believe we are all concerned about the consolidation these clearing service providers are already experiencing and the constraint on the availability of clearing services for market participants. I hope we will be able to avoid policies that unnecessarily challenge the economics of, or otherwise impede, operating as an FCM. Otherwise, we might find that our mandate to increase swaps clearing is futile: Simply put, the clearinghouses don’t work without clearing members and so we must seek to preserve both.

Closing

At the beginning of this year I penned an opinion piece in the Financial Times³ in which I attempted to appeal to our international regulatory partners to recommit to a coordinated approach, ensuring that our alliance remains strong rather than fractured. Regulatory conflicts are at odds with our shared mission and do a disservice to global market participants. I am committed to advancing a coordinated approach, and I believe the proposals we are putting forward today are a first step in that process. There is, however, more work to be done both in the way of the CFTC extending deference to

³ Dawn DeBerry Stump, Opinion, *We Must Rethink Our Clearinghouse Rules*, FIN. TIMES (Jan. 24, 2019).

other jurisdictions and vice versa. I hope our international regulatory partners will also take the opportunity to reset and recognize that our shared interest of advancing derivatives clearing is best achieved by respecting each jurisdiction’s successful implementation of the principles agreed to ten years ago. Otherwise, it might unfortunately become challenging to advance the concept of deference under consideration today to the next stage of the process.

Appendix 5 – Supporting Statement of Commissioner Dan M. Berkovitz

I support issuing for public comment the proposed rulemaking (“Proposal”) to permit registration with alternative compliance for non-U.S. derivatives clearing organizations (“non-U.S. DCOs”).

Under the Proposal, a non-U.S. DCO that does not pose “substantial risk to the U.S. financial system” would be permitted to elect to comply with certain Commodity Exchange Act (“CEA”) core principles for DCOs through compliance with its home country regulatory regime.¹ The non-U.S. DCO still would be required to comply with the CFTC’s customer protection and swap data reporting requirements. This registration alternative would permit U.S. persons to access foreign swap markets while benefitting from customer protections under the U.S. Bankruptcy Code and CFTC regulations without introducing significant new risks into the financial system.

The alternative compliance framework seeks to satisfy both the CFTC interest in protecting U.S. customers accessing a non-U.S. DCO and the interests of the home regulator in overseeing the activities of the non-U.S. DCO within its jurisdiction. It maintains key U.S. customer protection requirements and U.S. Bankruptcy Code

¹ Proposal, section I.A.

treatment for U.S. customer funds held by CFTC-registered futures commission merchants (“FCMs”).² At the same time, this framework recognizes the interests of the non-U.S. DCO’s home country regulator by relying on its oversight of other DCO activities. I look forward to comments on whether the Proposal maintains for the Commission an appropriate level of regulatory oversight for non-U.S. DCOs operating within this framework.

The effective regulation of central clearinghouses for derivatives is critical to managing risk throughout global financial markets. Under the CEA, the Commission may exempt a non-U.S. DCO from the registration requirement if the Commission determines that the non-U.S. DCO is subject to “comparable, comprehensive supervision and regulation” by its home regulator.³ The Exempt DCO Proposal, which the Commission also is considering today, would set forth, for the first time, objective standards for determining whether a particular non-U.S. DCO is eligible for such an exemption.⁴ The threshold for permitting non-U.S. DCOs under the Exempt DCO Proposal to be eligible to elect exemption from registration – that the DCO not pose a “substantial risk to the U.S. financial system” – is the same standard for permitting a non-U.S. DCO to be eligible to register with alternative compliance under this Proposal.

Thus, under the set of proposals the Commission is considering today, a non-U.S. DCO

² The Proposal would require each applicant for registration with alternative compliance to: (a) address compliance with certain Commission customer protection and reporting rules in its application; (b) submit DCO rules that relate to protection of customer funds and swap reporting to the Commission; and (c) comply with the Commission’s customer protection rules and reporting requirements largely through the required use of registered FCMs.

³ See Commodity Exchange Act sec. 5b(h), 7 U.S.C. 7a-1(h).

⁴ Although I support the development of objective standards for this purpose, I cannot support the Exempt DCO Proposal because, among other things, it fails to maintain appropriate protections for U.S. customers. Please see my dissenting statement for further detail on the failures of the Exempt DCO Proposal.

that does not pose substantial risk to the U.S. financial system could apply, at its election, either for an exemption from DCO registration, or for registration with alternative compliance. Of course, it could apply for full DCO registration as well.

I support the Commission's movement towards objective standards and defined processes for establishing registration alternatives for non-U.S. DCOs. Non-U.S. DCOs that conduct a substantial amount of U.S. customer-related activity will remain subject to full CFTC registration and regulation and U.S. customers on such DCOs are generally protected under the U.S. Bankruptcy Code and CFTC customer protection regulations.

For a non-U.S. DCO that is below that "substantial risk" threshold, this Proposal creates an "alternative compliance mechanism" that would permit the non-U.S. DCO to register with the Commission and provide clearing for U.S. customers, but also to comply with certain DCO core principles by complying with its home country requirements. Under this alternative, the non-U.S. DCO would still be subject to some CFTC customer protection regulations and U.S. customers would continue to receive protections under the U.S. Bankruptcy Code for funds held at the FCMs that must be used as intermediaries.⁵

"Substantial Risk" Threshold Issues

As noted above, only those non-U.S. DCOs that do not pose a "substantial risk to the U.S. financial system" would be permitted to register with alternative compliance. A non-U.S. DCO would be deemed to present a "substantial risk to the U.S. financial system" if: (1) it holds 20% or more of the required initial margin of U.S. members for

⁵ The ability of non-U.S. DCOs that are registered with alternative compliance to provide clearing services to U.S. customers with the customer protections provided under U.S. law obviates the need for the Commission's contortions found in the Exempt DCO Proposal to allow exempt DCOs to provide customer clearing but without any U.S. customer protections established by the CFTC.

swaps aggregated across all registered and exempt DCOs; and (2) 20% or more of the initial margin for swaps required at the DCO is attributable to U.S. members. The 20/20 criteria would not be a bright line test. If either of the conditions is present, or close to present, the Commission may nonetheless determine that the non-U.S. DCO presents substantial risk to the U.S. financial system and therefore must fully register.

Although I support issuance of this Proposal, I have significant concerns about adopting the 20/20 criteria as a “risk-based” standard. Although the 20/20 criteria are characterized as a risk-based standard (i.e., “substantial risk to the U.S. financial system”), the criteria would more accurately be described as establishing an activity-based test. The proposed 20/20 criteria directly measure the level of initial margin deposited at the non-U.S. DCO rather than risk presented to the U.S. financial system. The Proposal is devoid of reasoned analysis as to the basis for the 20/20 criteria in terms of actual risk presented to the U.S. financial system. It is not difficult to envision scenarios in which a lesser amount of initial margin at a non-U.S. DCO by U.S. participants may actually represent increased risk to the U.S. financial system, and a greater amount of margin may represent lesser risk. In the Proposal, the Commission concedes that “a test based solely on initial margin requirements may not fully capture the risk of a given DCO.”⁶

In my view, an activity-related test is, in fact, the more appropriate standard for determining registration requirements. In effect, the Proposal gets the result right, but for the wrong reasons. “Substantial risk to the U.S. financial system” is difficult—if not impossible—to measure in a straightforward, objective formula, especially as markets

⁶ Proposal, section II.A.2.

change over time. The activity-based thresholds in the Dodd-Frank Act for the regulation of swaps markets and entities were adopted largely due to the spectacular failure of the risk-based approach prior to the financial crisis. Other registration thresholds and registration exemptions in the CEA and the Commission's regulations, for example for swap dealers, FCMs, commodity pool operators, and commodity trading advisors, are based on activity rather than risk. Importantly, the standard in CEA Section 2(i) for the application of the swaps provisions to activities outside the U.S. ("direct and significant connection with activities in, or effect on, commerce of the United States") is activity-based and not risk-based. The threshold for exemption from registration for non-U.S. DCOs should be activity-based as well.

It is not apparent from the information provided in the Proposal why the 20/20 test should be the appropriate standard for determining whether a non-U.S. DCO need not fully register with the CFTC. Do the proposed criteria accurately measure the appropriate level of clearing activity? Are additional or different metrics more appropriate for measuring when clearing activity for U.S. customers becomes substantial and full registration becomes appropriate? I look forward to reviewing comments addressing these and the other issues regarding the 20/20 test.

No Substituted Compliance Review

I also am concerned that the Proposal may not establish sufficiently clear or adequate standards for the review of a non-U.S. DCO's application for alternative compliance. In contrast to the standard and proposed process for granting a request for exemption from DCO registration,⁷ the Proposal would not require the CFTC to make

⁷ See Commodity Exchange Act sec. 5b(h), 7 U.S.C. 7a-1(h).

any determination that the home jurisdiction’s requirements for the DCO are comparable to, and as comprehensive as, the core principles for which alternative compliance is being sought.⁸ It is not clear why a vaguer standard should apply to DCOs seeking registration with alternative compliance. The Proposal establishes what, in essence, appears to be a regime similar to substituted compliance for certain DCO core principles, yet it does not follow the process the CEA requires and the CFTC has implemented in other circumstances for establishing a substituted compliance regime.⁹ Further, the Proposal does not require that the non-U.S. DCO observe the Principles for Financial Market Infrastructure. I look forward to comments on, and further clarification of, these issues.

Reciprocity

In this rulemaking the Commission proposes to recognize the interests of other jurisdictions in the regulation of non-U.S. DCOs. To the extent that non-U.S. jurisdictions adopt similar approaches that recognize the interests of the U.S. in the regulation of DCOs located in the U.S., the global marketplace as a whole will benefit. However, to the extent that another jurisdiction does not appropriately recognize the interests of the U.S. in regulating U.S. DCOs, then U.S. DCOs could be fully regulated by both the U.S. and the other non-U.S. jurisdiction, subjecting the U.S. DCOs to unnecessary additional costs and potentially conflicting requirements.¹⁰ Prior to granting

⁸ See Exemption from Derivatives Clearing Organization Registration, section I (July 11, 2019).

⁹ See Commodity Exchange Act secs. 5b(h), 5h(g), 4(b)(1)(A) (7 U.S.C. 7a-1(h), 7b-3(g), 6(b)(1)(A)) (establishing a “comparable, comprehensive supervision and regulation” standard for exempt DCOs, exempt swap execution facilities, and foreign boards of trade, respectively); 78 Fed. Reg. 45,292, 45,342-45 (July 22, 2013) (establishing the “comparable and comprehensive” standard for substituted compliance determinations by the Commission for swap dealer regulations in foreign jurisdictions).

¹⁰ This situation presents a classic “prisoner’s dilemma,” in which the overall welfare of the two parties is maximized by the parties acting cooperatively (in this case, mutual recognition of regulatory interests), whereas individual welfare may be maximized by defection (no recognition of the other party’s interests)

any applications for alternative compliance for a non-U.S. DCO, the Commission should determine that the home jurisdiction of the non-U.S. DCO has adopted a comparable approach to the regulation (including exemption from regulation) of U.S. DCOs.¹¹ I invite comment on whether reciprocity or a similar mechanism should be incorporated into the regulation.

I thank the staff of the Division of Clearing and Risk for their work on this Proposal and appreciate their professional engagement with my office to address many of our comments.

when the other party cooperates (recognition of the other party's interests). The most rational and effective strategy for a party in a prisoner's dilemma where parties repeatedly interact with one another and one party seeks cooperation but the other party may defect is for the cooperating party to respond to any defection with tit-for-tat. *See* Robert Axelrod, *The Evolution of Cooperation* (Basic Books, 2006).

¹¹ The Restatement (Third) of Foreign Relations Law of the United States recognizes that, in the exercise of international comity, reciprocity is an appropriate consideration in determining whether to exercise jurisdiction extraterritorially. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 403 (AM. LAW INST. 2018).