

**Voting Copy – As approved by the Commission on 7/26/2023**  
(subject to pre-publication technical corrections)

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Parts 37, 38 and 40**

**RIN Number 3038-XXXX**

**Amendments to Provisions Common to Registered Entities**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission”) is proposing to amend part 40 of the Commission’s regulations. The regulations in part 40 implement Section 5c(c) of the Commodity Exchange Act (“CEA” or “Act”) and govern how registered entities submit self-certifications, and requests for approval, of their rules, rule amendments, and new products for trading and clearing, as well as the Commission’s review and processing of such submissions. The proposed amendments are intended to clarify, simplify and enhance the utility of the part 40 regulations for market participants and the Commission.

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

**ADDRESSES:** You may submit comments, identified by RIN number 3038-XXXX, by any of the following methods:

- Agency Web site, via its Comments Online process: [http:// comments.cftc.gov](http://comments.cftc.gov). Follow the instructions for submitting comments through the website.

- Mail: Christopher J. Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581.

- Hand Delivery/Courier: Same as mail above.

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

• Federal eRulemaking Portal: [http:// www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

Please submit your comments using only one of these methods.

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

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

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

---

<sup>1</sup> 5 U.S.C. 552.

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

**SUPPLEMENTARY INFORMATION:**

**TABLE OF CONTENTS**

- I. Background
- II. Proposed Regulations
- III. Related Matters
  - A. Regulatory Flexibility Act
  - B. Paperwork Reduction Act
  - C. Cost Benefit Considerations

**I. Background**

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

The part 40 regulations also provide the Commission’s procedures for review (including approval or non-approval) of such product and rule submissions. The part 40 regulations

---

<sup>3</sup> Section 1a(40) of the CEA defines the term registered entity to include DCMs, DCOs, SEFs and SDRs.

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

<sup>5</sup> See CEA section 5c(c)(1), § 40.3 and § 40.5.

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

prescribe certain information that must be made publicly available in connection with an application to become a DCM, SEF, DCO or SDR and when registered entities file new products, new rules and rule amendments.<sup>6</sup> Additionally, the regulations include special certification provisions for certain rules submitted by systemically important DCOs (“SIDCOs”).<sup>7</sup>

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

## **II. Proposed Amendments**

### *A. § 40.1—Definitions*

#### 1. Formatting Change to § 40.1

---

<sup>6</sup> See § 40.8. Regulation 40.8 is not the subject of this rulemaking.

<sup>7</sup> See § 40.10. Regulation 40.11 relates to the Commission’s review of certain event contracts and is not the subject of this rulemaking.

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

<sup>9</sup> As discussed below in note 10, the Commission also proposes to make two conforming, non-substantive changes to update the citations referencing the definition of emergency located in the guidance section regarding Emergency Authority of Appendix B for each of Parts 37 and 38.

## **Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

### **2. Non-substantive amendments to the definition of “Business day”**

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

### **3. Amendments to the definitions of dormant entities**

---

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

<sup>11</sup> The Office of the Federal Register prefers the solely alphabetical approach to definitions sections. *See Document Drafting Handbook, Office of the Federal Register at 2-27* (Revision 1.4, January 7, 2022).

<sup>12</sup> The Commission is not proposing any substantive changes to the definition of “Business day.”

**Voting Copy – As approved by the Commission on 7/26/2023**  
*(subject to pre-publication technical corrections)*

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

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

The definitions are inconsistent and, in some cases, unclear as to how the applicable 12-month and 36-month periods are determined. In particular, the definitions vary in their use of the terms “consecutive” vs “complete” calendar months. Additionally, staff have observed that the phrases “preceding the first day of the most recent calendar month” and “preceding the most

---

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

recent calendar month” have been a source of uncertainty when calculating whether an entity has become dormant. The Commission has observed that the definitions have been interpreted differently sometimes by registered entities than was intended by the Commission and believes the proposed changes will provide consistency.

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

4. Removal of the terms “Dormant contract or dormant product” and “dormant rule,” and related requirements

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

The Commission proposes to remove the terms “Dormant contract or dormant product” and “dormant rule” from § 40.1, and the requirements relating to dormant products and dormant rules from § 40.2 and § 40.6. At the time the Commission adopted the dormant contract

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

definition and the applicable requirements, contract markets were generally required to obtain Commission approval of any new products prior to listing the products. The CEA no longer requires approval of each contract or product listed by an exchange.<sup>14</sup> Rather, an exchange may list a product after self-certifying that the product to be listed complies with the CEA and Commission regulations in accordance with § 40.2. Given this flexibility, exchanges now typically delist a contract that has no open interest before the contract can be considered dormant through self-certification pursuant to § 40.6(a).

In the Commission’s experience, registrants have effectively managed the removal of dormant products or rules as appropriate, particularly since the adoption of the self-certification process. Furthermore, while the removal of the term “dormant product” would enable a contract that has not been traded for an extended period of time to remain listed, the Commission believes any new trading may not pose concerns regarding market integrity or safety given that a DCM or SEF listing a contract has a continuing obligation to ensure that the contract complies with the CEA and Commission’s regulations thereunder. In addition, the Commission is unaware of any instances in which the dormancy of a product or rule for an extended period has caused any market or market participant material harm. The Commission preliminarily believes that deleting the definitions would result in little, if any, reduction in market integrity or safety while potentially reducing compliance costs for market participants and oversight costs for the Commission.

Accordingly, the Commission proposes to remove the definitions of “dormant contract or dormant product” and “dormant rule”, and all references to “dormant contract or dormant

---

<sup>14</sup> Section 113 of the Commodity Futures Modernization Act of 2000 [Appendix E of Pub. L. 106-554, 114 Stat. 2763] added Section 5c(c) to the CEA.



## **Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

product” and “dormant rule” in the regulations. As discussed above, the Commission will retain its definitions of dormant registered entities, and the rules of a dormant DCM, dormant SEF, dormant DCO, or dormant SDR would need to be approved in connection with the entity being reinstated as a DCM, SEF, DCO or SDR, respectively.<sup>15</sup> Also, products would need to be approved or self-certified in order to be listed for trading by the DCM or SEF offered for clearing by the DCO.<sup>16</sup>

### **5. Amendment to the definitions of “Rule” and “Terms and conditions”**

The Commission proposes to add “margin methodology” to the definition of “Rule” in § 40.1. Prior to 2011, the definition included a restriction on Commission review of rules relating to margin levels, based on Section 8a(7) of the Act.<sup>17</sup> After Section 736 of the Dodd-Frank Act amended Section 8a(7) of the Act to remove the restriction on Commission review of rules relating to margin levels,<sup>18</sup> the Commission removed the restriction from the definition of

---

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

<sup>16</sup> See, e.g., §§ 38.4(b), 37.4(d), 40.2, and 40.3.

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

<sup>18</sup> Specifically, Section 8a(7) of the Act provides that the Commission is authorized to alter or supplement rules of a DCO including rules with respect to “(D) margin requirements, provided that the rules . . . shall— (i) be limited to

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

“Rule.” Although DCOs have been submitting margin-related rule changes to the Commission since 2011, in order to provide clarity regarding the requirement to submit changes to margin methodologies, the Commission is proposing to revise the definition of “Rule” to include an explicit reference to margin methodology.

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

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

---

protecting the financial integrity of the [DCO]; (ii) be designed for risk management purposes to protect the financial integrity of transactions; and (iii) not set specific margin amounts.”

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

**Voting Copy – As approved by the Commission on 7/26/2023**  
*(subject to pre-publication technical corrections)*

*B. § 40.2—Listing products for trading by certification*

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

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

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

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

---

<sup>20</sup> Specifically, the analogous provisions are §§ 40.3(a)(2), 40.5(a)(2) and 40.6(a)(7)(i).

<sup>21</sup> See 86 FR 3236, 3307 (January 14, 2021) Position Limits for Derivatives (adding the definition of “referenced contract” to §150.1 and incorporating the term referenced contract into §§40.1(j)(1)(vii) and 40.1(j)(2)(vii). See also

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

Currently, the text of § 40.2(a)(3)(ii) and § 40.3(a)(3) both describe a requirement to submit as part of a self-certification or a voluntary submission for Commission approval, respectively, the rules that set forth a contract's terms and conditions. The two provisions use

---

Appendix C to Part 150-Guidance Regarding the Definition of Referenced Contract. Generally, the term "referenced contract" as used for purposes of federal position limits in part 150 and as defined in § 150.1 means either a futures contract or an option on a futures contract whose settlement price is determined by reference, directly or indirectly, to the price of one of 25 physically-settled core referenced futures contracts enumerated in § 150.2, or a swap that qualifies as an "economically equivalent swap" (as such term is defined in § 150.1) to any of the 25 physically-settled core referenced futures contracts enumerated in § 150.2.

<sup>22</sup> See §§40.1(j)(1)(vii), 40.1(j)(2)(vii), 40.2 and 40.3.

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

similar, but slightly different, language.<sup>23</sup> Given that the two provisions use slightly different words, but are both intended to require that the DCM or SEF include a copy of the rules that set forth the contract’s terms and conditions, the Commission proposes to amend the text of § 40.2(a)(3)(ii) to mirror the text used in § 40.3(a)(3) so that both provisions use the same language for consistency and avoid any potential misreading that the differences in language between the two provisions are intended to signify a difference in substance.

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

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

---

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

contract would be sufficient for the Commission to determine the compliance of the contract's terms and conditions with the applicable core principles.<sup>24</sup>

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

---

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

Generally, when listing a cash settled or physically settled contract on a commodity, the explanation and analysis the DCM or SEF submits describing the characteristics of the contract's underlying commodity pursuant to § 40.2(a)(3)(v) should include characteristics such as the deliverable commodity's grade, quality and deliverable supply, as applicable, as well as the other applicable requirements described in Appendix C to Part 38. Appendix C to Part 38 provides

---

<sup>26</sup> See note [24].

<sup>27</sup> See Appendix C to Part 38, paragraph (b)(2)(i)(A) for physically-settled contracts and paragraph (c)(4)(i)(A) for cash-settled contracts.

<sup>28</sup> See *id.*

<sup>29</sup> See note [24].

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

guidance on the quality standards that should be defined for the underlying commodity in the contract's terms and conditions for a physically-settled futures contract.<sup>30</sup> The quality standards used should reflect those used in transactions in the commodity in normal cash marketing channels and comply with those industry established standards.<sup>31</sup>

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

Throughout the life of the futures contract up until the time of expiration, copper located in a DCM-approved warehouse of the quality specified in the contract would be eligible to be warranted by the warehouse for delivery on the contract. The price of the physical copper

---

<sup>30</sup>Appendix C to Part 38, paragraph (b)(2)(i)(A).

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

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



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

(Grade 1 Electrolytic Copper Cathode) to which the futures contract settles and the price of the physically settled futures contract on Grade 1 Electrolytic Copper Cathode should match—or converge—at the expiration date. The convergence demonstrates that the futures contract accurately reflects the cash price of the underlying commodity and compliance with DCM Core Principle 3 (that the contract is not readily susceptible to manipulation).

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

As a specific product example for a cash-settled excluded commodity, when listing a cash-settled futures contract on a stock index price series, such as the S&P 500 (a stock index of large capitalization stocks listed on US stock exchanges), the DCM should specify how the cash

---

<sup>33</sup> See Appendix C to Part 38, paragraph (a) and (c).

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

<sup>35</sup> See Appendix C to Part 38, paragraph (a) and (c).

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

settlement price based on the S&P 500 Index is reflective of the underlying cash-market, reliable, publicly available and timely.<sup>36</sup> The DCM should describe how the S&P 500 Index price series is reflective of the underlying cash market of domestic large capitalization stocks by describing the methodology for constructing and maintaining the S&P 500 Index. The DCM should describe how the S&P 500 Index is considered by industry as an accurate and reliable index of large capitalization stocks by describing how the index is used as a benchmark for measuring the movements of the US Stock Market. The DCM should describe how frequently the index is calculated and where it is disseminated to the market place to describe how the index is publicly available and timely.

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

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

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

Regulation 40.3(a)(4) requires that when a DCM, SEF or DCO voluntarily submits a new product for Commission review and approval prior to its listing for trading or accepting the product for clearing, the DCM, SEF or DCO must send the Commission “an explanation and analysis of the product and its compliance with applicable provisions of the Act, including core principles, and the Commission’s regulations thereunder.” Currently, staff relies primarily on the explanation and analysis provided pursuant to this requirement to analyze the compliance of a product submitted for review and approval by the Commission, including the explanation and analysis of the commodity underlying the product. The Commission proposes to amend § 40.3(a)(4) to clarify that by “product”, the regulation requires an explanation and analysis “that is

---

<sup>36</sup> Appendix C to Part 38, paragraph (c)(3)(iv)-(v).

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

complete with respect to” the product’s terms and conditions, the underlying commodity and the product’s compliance with the applicable provisions of the Act and Commission regulations thereunder.<sup>37</sup> This amendment is intended to ensure the Commission receives adequate information regarding the product and the commodity underlying the product to analyze the compliance of the product submitted for voluntary Commission review and approval.

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

Currently, § 40.3(a)(10) provides that when a registered entity voluntarily submits a contract for Commission approval, Commission staff may request additional evidence, information or data to demonstrate that the contract meets, initially or on a continuing basis, the requirements of the Act, or other requirement for designation or registration under the Act, or the Commission's regulations or policies thereunder. Upon such request, the registered entity must provide the requested additional evidence, information or data by the open of business two business days after the date staff made such request, or at the conclusion of such extended period agreed to by Commission staff after timely receipt of a written request from the registered entity.

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

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

---

<sup>37</sup> While the Commission proposes to include the word “complete”, the Commission notes that the ‘explanation and analysis’ requirement in proposed § 40.3(a)(4) does not include the qualifier that the submission be ‘concise’ for the same reasons discussed below in note 47.

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

In addition, the Commission is proposing to amend the condition in § 40.3(c)(2) (which the Commission proposes to move to § 40.3(c)(4)) that must be met for the deemed approval to

---

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

The Commission also proposes to amend § 40.3(d)(1) (which the Commission proposes to move to § 40.3(c)(2)) to provide that the Commission may extend the request for a product

---

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

approval if the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner. The Commission has the authority to extend their review of a rule approval request submission under current § 40.5(d)(1) if the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner<sup>40</sup> and the Commission believes the same ability for reviews of product approval request submissions under § 40.3 would better enable the Commission to review products when requested by registered entities.

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

---

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

<sup>41</sup> The Commission proposes to revise the header of § 40.3(c) from “Forty-five day review” to “Commission review” to reflect the fact that the review period may be extended beyond forty-five days due to adjustments so that the review period ends on a business day.

<sup>42</sup> Section 5c(c)(4)(C) of the Act reads in pertinent part that “the Commission shall take final action on the request not later than 90 days after submission of the request, unless the person submitting the request agrees to an extension of the time limitation established under this paragraph.”

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

40.3(d)(1) from “[a]n additional 45 days” to “up to an additional 45 days” in proposed § 40.3(c)(2). For example, if the end of the initial 45-day review period would fall on a Saturday, and is extended by proposed § 40.3(c)(5) to Monday, the next business day, for a total of 47 days, any additional extension under proposed § 40.3(c)(2) could not exceed 43 days (47+43=90).

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

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

---

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

1. Clarification regarding scope of § 40.4(a) and materiality under 40.4

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



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

---

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

change affecting the price of the contract due to a change in the commodity quality characteristics of the existing contract, a change to the size of the existing contract, or a change to a cost of effecting delivery for the existing contract.

2. Proposed Amendments to § 40.4(b)

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

The Commission proposes to remove the reference to “changes in no cancellation ranges” in § 40.4(b)(3). As discussed below in section II.E.4, the Commission proposes to amend § 40.6(d) to allow a registered entity to file rules and rule amendments governing changes in no

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

cancellation ranges pursuant to the notification procedures of § 40.6(d). By filing rules and rule amendments governing no cancellation ranges pursuant to the notification procedures of § 40.6(d), such rules and rule amendments would be non-material pursuant to § 40.4(b)(1), making the current reference to “changes in no cancellation ranges” in § 40.4(b)(3) redundant and unnecessary.

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

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

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

1. Reorganization and clarification of § 40.5

The Commission proposes to reorganize and clarify § 40.5, which addresses the submission by registered entities of requests for Commission approval of new rules and rule amendments and the Commission’s review of such rules and rule amendments. Under the proposed amendments, paragraphs (a) and (b) of § 40.5 would remain largely unchanged, with

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

the exception of conforming amendments previously discussed,<sup>46</sup> as well as the following two changes.

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

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

The Commission proposes to reorganize paragraphs (c) and (d) of § 40.5, which address the Commission’s review and determination (*i.e.*, approval or non-approval) of new rules and rule amendments. More specifically, to enhance the readability of § 40.5(c), the Commission proposes to reorganize § 40.5 so that all of the provisions that may affect the length of the review

---

<sup>46</sup> The amendments include the removal of references to a cover sheet, dormant rules, and submission to the Secretary of the Commission.

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

<sup>48</sup> The Commission also proposes to eliminate the word “which” from the second sentence of § 40.5(a)(6) to improve clarity and readability.

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

period of a rule submitted for Commission approval pursuant to § 40.5 appear together in § 40.5(c)—with the exception of expedited approval (which the Commission proposes to move to § 40.5(d)(2)).<sup>49</sup> The Commission proposes to add § 40.5(c)(6) to extend the review period under proposed § 40.5(c)(1)<sup>50</sup> when the review period would end on a day that is not a business day to instead end on the next business day<sup>51</sup>, and to revise current § 40.5(d)(1), proposed to be renumbered as § 40.5(c)(2), to permit an additional extension of *up to* 45 days.

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

---

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

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

<sup>51</sup> The Commission proposes to revise the header of § 40.5(c) from “Forty-five- day review” to “Commission review” to reflect the fact that the review period may be extended beyond forty-five days due to adjustments so that the review period ends on a business day.

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

40.5(c)(6) to Monday, the next business day, for a total of 47 days, any additional extension under proposed § 40.5(c)(2) could not exceed 43 days (47+43=90).

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

The Commission proposes to reorganize § 40.5(d) to address the Commission’s determination, including: approval through the passage of the applicable review period; expedited approval; and non-approval. Current § 40.5(g), which addresses expedited approval of a proposed rule or rule amendment, would be renumbered as § 40.5(d)(2) and amended to remove the limitations that: expedited approval may be used only for “changes to” a proposed rule or a rule amendment; and the changes to the proposed rule or rule amendment may only be approved through expedited approval if they are consistent with “standards approved or established by the Commission.” The Commission believes that the quoted text that these amendments will remove is not necessary or could be misconstrued in connection with the ability of the Commission to approve proposed rules and rule amendments that are consistent with the

---

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

CEA and Commission regulations on an expedited basis.<sup>54</sup> Current § 40.5(f), which addresses the impact of non-approval, would be renumbered as § 40.5(e).

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

Current § 40.5(f)(2) (proposed to be renumbered as § 40.5(e)(2)) provides that “[n]otification to a registered entity under paragraph (d)(3) of this section of the Commission’s determination not to approve a proposed rule or rule amendment” is “presumptive evidence that the entity may not truthfully certify the same, or substantially the same, proposed rule or rule amendment under § 40.6(a) of this section.” To clarify that certification under § 40.6(a) is referring to the certification that the rule or rule amendment complies with the CEA and the

---

<sup>54</sup> The Commission also proposes to replace the word “under” with “in compliance with” in § 40.5(d)(1) to clarify that consideration for approval is contingent upon complying with the requirements of § 40.5(a).

<sup>55</sup> The Commission additionally proposes to non-substantively amend § 40.5(f)(1) to include two new commas. The Commission believes this will improve readability and reduce the risk of confusion.

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

Commission’s regulations, the Commission proposes to amend the text of § 40.5(f)(2) to add “complies with the Act and the Commission’s regulations thereunder” and move “under § 40.6(a)” to earlier in the text. The Commission believes these changes will enhance clarity and improve context.<sup>56</sup>

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

*F. § 40.6—Self-certification of rules*

1. Proposed Amendments to 40.6(a)

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

The Commission proposes to replace the word “of” in current § 40.6(a)(7)(v) with the words “that is complete with respect to.” This condition would then read as follows: “A concise

---

<sup>56</sup> These changes also makes this language consistent with the corresponding language in §§ 40.3 and 40.5.

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



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

explanation and analysis that is complete with respect to the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.” The Commission has previously stated that “[l]ike the explanation and analysis required for new product submissions, the explanation and analysis of certified rules or rule amendments should be a clear and informative – but not necessarily lengthy – discussion of the submission, the factors leading to the adoption of the rule or rule amendment, and the expected impact of the rule or rule amendment on the public and market participants.”<sup>58</sup> Similar to the discussion above in section B.3 regarding the level of detail in the explanation and analysis provided in new contract submissions, the Commission has found that some new rule submissions, while being concise, have not provided sufficient detail for staff to evaluate compliance of the proposed rule. Adding the words “that is complete with respect to” to current § 40.6(a)(7)(v) is intended to add more direction to submitters that, while the required explanation be concise, it must also be sufficiently comprehensive to address the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations.

As set forth in the current introductory text to § 40.6(a), the delisting or withdrawal of the certification of a product with no open interest must comply with the submission and certification requirements in §§ 40.6(a)(1)-(2) and § 40.6(a)(7). The Commission proposes to move this provision from the introductory paragraph of § 40.6(a) to new § 40.6(a)(9) to enhance the readability of § 40.6(a) and clarify the provision. Specifically, proposed new § 40.6(a)(9)

---

<sup>58</sup> 2011 Final Rule at 44782-44783.

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

would explicitly state that a new rule or a rule amendment that delists, or withdraws the certification of, a product with no open interest may become effective immediately upon the filing of the submission, provided that the submission is made in compliance with §§ 40.6(a)(1)-(2) and § 40.6(a)(7). The Commission notes that while the current introductory text to § 40.6(a) is intended to enable a registered entity to delist, or withdraw a certification of, a product with no open interest immediately upon a submission,<sup>59</sup> the current provision has not been well understood and it would be useful to clarify by adding an explicit statement into the regulatory text.

2. Proposed Amendments to § 40.6(b)

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

---

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

3. Proposed Amendments to § 40.6(c)

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

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

4. Proposed Amendments to § 40.6(d)

Regulation 40.6(d)(2) sets forth various categories of rules that may be implemented by a registered entity without certification, provided that the registered entity complies with the weekly notification requirements in § 40.6(d)(1). The Commission proposes to add the

---

<sup>60</sup> The Commission also proposes to change the reference in § 40.6(c)(3) from “proposed certification” to “certification.”

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

following new categories of rules to § 40.6(d)(2): updates to e-mail addresses or other contact information that market participants use to submit block trades; amendments to existing trading months; with respect to a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap), payment or collection of commodity options premiums or margins and changes to no cancellation ranges; and with respect to a swap, payment or collection of option premiums or margins. The Commission believes updates to contact information for the submission of block trades are not substantive for compliance purposes and need not be subject to self-certification and Commission review requirements of § 40.6(a). As discussed above in section A.5, the Commission preliminarily believes that registered entities should be able to submit rules or rule amendments governing the payment or collection of these premiums or margins (which are currently within the definition of terms and conditions in § 40.1) through weekly notices to the Commission pursuant to § 40.6(d)(2) as this will lower the burden for registered entities and still provide sufficient notice to the Commission. The Commission also preliminarily believes that registered entities should be able to submit rules or rule amendments that change no cancellation ranges or amend existing trading months through weekly notices to the Commission pursuant to § 40.6(d)(2) as this will lower the burden for registered entities to implement such changes and still provide sufficient notice to the Commission.

Regulation 40.6(d)(3) currently sets forth various categories of rules that may be implemented without certification or notice to the Commission. The Commission proposes to amend current § 40.6(d)(3)(ii)(v)(E)(1) (which would become § 40.6(e)(2)(v)(A)) to read “Are less than \$1.00 per contract; or” to be consistent with the corresponding provision in § 40.6(d)(2)(v)(A). The Commission also proposes to make a non-substantive amendment to

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

renumber § 40.6(d)(2) as § 40.6(e) and make corresponding numbering changes to the subparagraphs of the regulation.<sup>61</sup>

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

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

*G. § 40.7 Delegations*

1. Proposed Amendments to § 40.7

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

---

<sup>61</sup> The Commission believes the current numbering is inconsistent with the introductory text of § 40.6(d).

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

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

---

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

*H. § 40.10—Special certification procedures for submission of rules by SIDCOs*

1. Definition of “materiality” in § 40.10

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

safeguards (business continuity and disaster recovery), and governance. The Commission is proposing to revise this definition.

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

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

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



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

other ways the definition could be revised to provide better guidance to SIDCOs as to when advance notice of a proposed change is required under § 40.10.

2. SIDCO submission under § 40.10 of rules otherwise required to be submitted under §40.5

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

3. Technical corrections to §40.10

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

*I. Technical correction to authority section of Part 40*

The Commission is proposing to remove the reference to Section 7a of the CEA, which was repealed by the Dodd-Frank Act,<sup>64</sup> from the authority section for Part 40.

**III. Related Matters**

*A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis with respect to such impact.<sup>65</sup> 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

---

<sup>64</sup> Pub. L. 111-203, title VII, §734(a), July 21, 2010, 124 Stat. 1718 (2010).

<sup>65</sup> 5 U.S.C. 601 *et seq.*

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

RFA.<sup>66</sup> The proposed amendments to part 40 set forth herein would impact DCMs, DCOs, SEFs and SDRs. The Commission has previously determined that DCMs,<sup>67</sup> DCOs<sup>68</sup> SEFs<sup>69</sup> and SDRs<sup>70</sup> are not small entities for purposes of the RFA. Therefore, the Chairman, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), hereby certifies that the proposed rules will not have a significant economic impact on a substantial number of small entities.

*B. Paperwork Reduction Act*

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

---

<sup>66</sup> See Policy Statement and Establishment of "Small Entities" for purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982).

<sup>67</sup> 47 FR 18618, 18619 (April 30, 1982).

<sup>68</sup> New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609 (Aug. 29, 2001).

<sup>69</sup> Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548 (June 4, 2013).

<sup>70</sup> Swap Data Repositories, 75 FR 80898, 80926 (Dec. 23, 2010).

<sup>71</sup> 44 U.S.C. 3501 *et seq.*

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

regulations.<sup>72</sup> The Commission is revising its total burden estimates for this clearance to reflect the proposed amendments.

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

*Burden Estimates*

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

---

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

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

product submissions under §§ 40.2 and 40.3, the proposed amendments would add an additional average 1 hour of burden (for a new total of 22 hours).

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

Product Submissions (§§ 40.2 and 40.3)

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

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

*Estimated number of respondents: 70*

*Estimated number of reports per respondent: 12<sup>75</sup>*

*Average number of hours per report: 22<sup>76</sup>*

*Estimated gross annual reporting burden (hours): 18,480<sup>77</sup>*

---

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

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

Rule Submissions (§§ 40.5 and 40.6)

For rule submissions (§§ 40.5 and 40.6), the number of respondents remains 70.

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

*Estimated number of respondents: 70<sup>78</sup>*

*Estimated number of reports per respondent: 20<sup>79</sup>*

*Average number of hours per report: 2.5<sup>80</sup>*

*Estimated gross annual reporting burden (hours): 3,500<sup>81</sup>*

SIDCO Submissions (§ 40.10)

---

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

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

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

*Estimated number of respondents: 2*

*Estimated number of reports per respondent: 1<sup>82</sup>*

*Average number of hours per report: 50*

*Estimated gross annual reporting burden (hours): 100<sup>83</sup>*

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

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

---

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

<sup>83</sup> The estimated gross annual reporting burden (hours) is calculated by multiplying the estimated number of respondents times the estimated number of reports per respondent times the average number of hours per report (2 respondents x 1 reports per respondent x 50 hours per report = 100 hours).

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

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



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

flexible deadlines would reduce the need for registered entities to submit extension requests, thereby reducing their burden.

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

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

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

*“Referenced contract” data element (Appendix D).* Submissions for new products would include a new structured data element in the online portal indicating whether the product is a “referenced contract.” This information would be the same as the “reference contract” determination set out in § 150.1 and Appendix C to part 150. Accordingly, this is a non-substantive revision that will have de minimis impact on reporting burden.

*Request for Comment.*

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

(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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

(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 <https://RegInfo.gov>. Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

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

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

*C. Cost Benefit Considerations*

1. CEA Section 15(a)

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

The Commission recognizes that the proposed amendments may impose costs. Some of the proposed amendments, however, are format, organizational, and non-substantive changes, which will have no costs. The Commission has endeavored to assess the expected costs and benefits of the proposed amendments in quantitative terms, including PRA related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable proposed amendments in qualitative terms. The lack of data and information to estimate those costs is

---

<sup>84</sup> 7 U.S.C. 19(a).

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

attributable in part to the nature of the proposed amendments. Additionally, any initial and recurring compliance costs for any particular DCM, DCO, SDR, or SEF will depend on the size, existing infrastructure, practices, and cost structure of the entity.

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

2. Statutory and Regulatory Background

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

With two exceptions, the Commission last amended the part 40 regulations in 2011.<sup>86</sup> After years of experience with registered entities following the processes set forth in the part 40 regulations, the Commission is proposing amendments to clarify, simplify, and enhance the

---

<sup>85</sup> See §§ 40.2, 40.3, 40.4, 40.5 and 40.6.

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

utility of, the part 40 regulations for registered entities and the Commission. Changes proposed include amendments to: § 40.1 to simplify the determination of whether a registered entity is deemed dormant and to remove the terms “dormant rule,” dormant contract” and “dormant product”; §§ 40.2, 40.3, 40.4, 40.5 and 40.6 and Appendix D to part 40 to reflect the development, evolution and use of the Commission’s online portal for the filing of rule and product submissions; and §§ 40.5, 40.6 and 40.7 to reorganize and enhance the regulations’ utility. The Commission also proposes to amend § 40.10 to provide meaningful guidance to SIDCOs regarding filing instructions for rules that could materially affect the nature or level of risks presented by the SIDCO.

3. Baseline

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

4. Proposed Amendments

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

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

---

<sup>87</sup> See, e.g. 7 U.S.C. § 2(i).

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

measures the equivalent time in days and the proposed amendments provide for consistent, clear start and end dates for measuring inactivity in connection with dormancy status.

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

i. Benefits

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

ii. Costs

The Commission expects that registered entities will not incur any increased costs related to the proposed amendments to the current dormancy regulations in Part 40. The proposed



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

i Benefits

The proposed amendments to the definition of “terms and conditions” will reduce compliance burdens for registered entities for rule amendments that address payments or collections of certain premiums or margins and changes to the no cancellation ranges as these could be filed through a weekly notification pursuant to § 40.6(d)(2), which is a less burdensome, less costly process than through the current process under § 40.6(a). The § 40.6(d) process permits a registered entity to implement a rule immediately and without self-certification provided that the entity files a summary notification within a week of the rule amendment. The Commission believes that by adding margin-related rule changes to the list of items considered a rule, the Commission is making it clear what type of information is considered a rule and codifying a current practice.

ii. Costs

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

The Commission does not expect registered entities to incur any additional costs or burdens related to the proposed changes to the definition of “terms and conditions” because the proposed amendments reduce the number of items of information registered entities must submit to the Commission under § 40.6(a). The proposed amendments also allow rules relating to the new categories of information to be implemented more quickly and efficiently by filing such

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

rules in accordance with the requirements of § 40.6(d) (a process which allows a registered entity to implement rules enumerated in § 40.6(d) immediately and without self-certification, provided that the registered entity provides the Commission with a required summary notification of such actions within a week of making the rule amendments).

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

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

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

i Benefits

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

and approval processes by clarifying the level of detail in the information provided thereby enabling the Commission to more effectively complete its analysis.

The Commission believes that amending § 40.3(a)(10) to eliminate the two business day deadline for responding to Commission request for additional information and granting Commission staff the authority to set a deadline based on the nature of the requested information will provide more flexibility to registered entities and better enable the Commission to manage its resources and conduct more effective oversight over registered entities. The proposed changes to § 40.3(c)(2) also provide that any substantive amendment of a § 40.3 submission would restart the 45-day review period provided in § 40.3(c) to ensure that the Commission has sufficient time to analyze and consider the substantive changes. The restarting of the 45-day review period provided in § 40.3(c) upon a registered entity making any substantive changes to their § 40.3(c) filing would also encourage registered entities to be precise and consult with Commission staff regarding any questions when preparing § 40.3 submissions.

ii. Costs

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

greater specificity, leaving less room for regulatory ambiguity, improve the quality of submissions, and reduce any administrative costs registered entities might incur when determining what information must be submitted to the Commission for a product self-certification or product approval request. The proposed amendments eliminating the two-business day deadline and regarding extending the 45-day review period as a result of any substantive amendments to a § 40.3 submission may cause registered entities to incur costs related to the offering of products or contracts, if the timelines affect product-launch dates.

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

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

i. Benefits

The Commission believes that Appendix E to part 40 will aid DCMs in determining whether a proposed change to terms and conditions is material. Specifically, the guidance offered in Appendix E should reduce uncertainties and enable DCMs to more efficiently

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

determine whether a proposed change would be material. Additionally, by directing DCMs to include a copy of a previously approved rule or rule amendment with submissions to the Commission pursuant to § 40.4(b)(5)(ii), the Commission believes this effort will provide market participants with context and background that would help them understand the current rule or rule amendment and why it is non-material. In other words, the proposed amendments will improve transparency for market participants.

ii. Costs

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

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

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

The proposed amendments to the self-certification submission requirements in § 40.6(a)(7) clarify the Commission's intent as to the scope of the explanation and analysis that

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

The proposed amendments to § 40.6(d)(2) expand the categories of rules that may be implemented without a certification to include a number of new categories of rules. The new



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

categories include rule amendments updating email addresses or contact information that market participants use to submit block trades; rules amending existing trading months; rules changing the price ranges within which a trade will not be cancelled; and rules governing the payment or collection of option premiums or margins.<sup>88</sup> Registered entities may implement rules within these categories by notifying the Commission of the rule changes on a weekly basis pursuant to § 40.6(d)(2). The proposed amendments to § 40.6(d)(2) align with the Commission’s proposal to remove a subset of the same categories of rules from the definition of “terms and conditions” in § 40.1.

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

---

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

provision of the Commission’s regulations requires a DCO to file rules for approval under § 40.5, a SIDCO would be required instead to file those rules under § 40.10, if the rules could materially affect the nature or level of risks presented by the SIDCO.

i. Benefits

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

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

The proposed amendments to § 40.6(b)(2) that state that new information restarts the review period make it clear that the review period will be extended and should encourage

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

registered entities to be thorough to ensure that their initial submissions are complete. The proposed amendments to § 40.6(c)(5) provide clarity regarding the impact of an objection by the Commission to a registered entity's certification of a proposed rule or rule amendment on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's regulations. Specifically, under the proposed amendment, if a registered entity wishes to resubmit through self-certification a rule or rule amendment that the Commission objected to on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's regulations, the registered entity must first substantively change or supplement the proposed rule or rule amendment to address the Commission's objection.

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

- ii. Costs

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

f. Proposed Amendments to § 40.7 Regarding Delegation of Authority

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

regulations to the Directors of the Division of Market Oversight and the Division of Clearing and Risk.

i. Benefits

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

ii. Costs

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

g. Proposed Amendments to Appendix D to Part 40

With the development and use of the Commission's online portal for the filing of rule and product submissions, the Commission is proposing amendments to Appendix D to Part 40 that reorganizes rule text and clarify instructions to registered entities on what information shall be uploaded to the portal. The Commission also is proposing a new requirement that DCMs and

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

SEFs indicate when listing a new product whether the new product meets the definition of “referenced contract” as defined in § 150.1 and described in Appendix C to Part 150 that is titled “Guidance Regarding the Definition of Reference Contract.” Part 150 of the Commission’s regulations outlines the requirements for federal and exchange-set position limits.<sup>89</sup> Part 150, together with §§ 40.1(j)(1)(vii), 40.1(j)(2)(vii), 40.2(a)(3)(ii) and 40.3(a)(3), require DCMs and SEFs to identify referenced contracts to assess whether a contract is subject to federal position limits.

i. Benefits

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

ii. Costs

The Commission expects that there will be negligible, if any, costs incurred by registered entities with respect to the amendments proposed to modernize Appendix D as registered entities

---

<sup>89</sup> 17 C.F.R. Part 150. The Commission’s latest amendments to Part 150 became effective on March 15, 2021. 86 FR 3236 (Jan. 14, 2021).

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

are already submitting the covered rules and products using the portal. With regards to the amendment proposing that DCMs and SEFs indicate whether a new product to be listed meets the definition of referenced contract, the Commission notes that DCMs and SEFs will incur costs to make these indications. These costs, however, will be negligible because registered entities are already making the analytical determinations as to whether contracts are referenced contracts to meet their obligations under §§ 40.1(j)(1)(vii), 40.1(j)(2)(vii), 40.2(a)(3)(ii), 40.3(a)(3) and Part 150 of the Commission’s regulations.

h. Section 15(a) Factors

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

evaluate changes and consider risks, and ultimately protect the interests of market participants and the public.

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

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

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

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



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

**PART 37 – SWAP EXECUTION FACILITIES**

**Appendix B to Part 37 – Guidance on, and Acceptable Practices in, Compliance with Core Principles.**

1. In the first sentence of the Guidance provided in paragraph (a)(1) regarding Core Principle 8 of Section 5h of the Act—Emergency Authority, with respect to the citation to the definition of emergency in part 40, replace the citation “§ 40.1(h)” with the citation “§ 40.1”.

**PART 38 – DESIGNATED CONTRACT MARKETS**

**Appendix B to Part 38– Guidance on, and Acceptable Practices in, Compliance with Core Principles.**

1. In the third sentence of the Guidance provided in paragraph (a)(1) regarding Core Principle 6 of Section 5(d) of the Act—Emergency Authority, with respect to the citation to the definition of emergency in part 40, replace the citation “§ 40.1(h)” with the citation “§ 40.1”.

**PART 40 – PROVISIONS COMMON TO REGISTERED ENTITIES**

1. Revise the authority section for part 40 to read as follows:

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

2. Amend § 40.1 by revising to read as follows:

**§ 40.1 Definitions.**

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

As used in this part:

***Business day*** means the intraday period of time starting at 8:15 a.m. and ending at 4:45 p.m.

Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect in Washington, DC, on all days except Saturdays, Sundays, and Federal holidays in Washington, DC.

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

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

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

- (1) Any manipulative or attempted manipulative activity;
- (2) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions;
- (3) Any circumstances which may materially affect the performance of agreements, contracts, swaps or transactions, including failure of the payment system or the bankruptcy or insolvency of any participant;
- (4) Any action taken by any governmental body, or any other registered entity, board of trade, market or facility which may have a direct impact on trading or clearing and settlement; and
- (5) Any other circumstance which may have a severe, adverse effect upon the functioning of a registered entity.

**Rule** means any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, margin methodology, agreement or instrument corresponding thereto, including those that authorize a

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted.

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

- (1) For a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap):
  - (i) Quality and other standards that define the commodity or instrument underlying the contract;
  - (ii) Quantity standards or other provisions related to contract size;
  - (iii) Any applicable premiums or discounts for delivery of nonpar products;
  - (iv) Trading hours, trading months and the listing of contracts;
  - (v) The pricing basis, minimum price fluctuations, and maximum price fluctuations;
  - (vi) Any price limits, no cancellation ranges, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

(vii) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the contract meets the definition of a referenced contract as defined in § 150.1 of this chapter, and if so, the name of either the core referenced futures contract or other referenced contract upon which the new referenced contract submitted under this part 40 is based.

(viii) Delivery points and locational price differentials;

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

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

(xi) [Reserved];

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

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

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

(2) For a swap:

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

- (i) Identification of the major group, category, type or class in which the swap falls (such as an interest rate, commodity, credit or equity swap) and of any further sub-group, category, type or class that further describes the swap;
- (ii) Notional amounts, quantity standards, or other unit size characteristics;
- (iii) Any applicable premiums or discounts for delivery of nonpar products;
- (iv) Trading hours and the listing of swaps;
- (v) Pricing basis for establishing the payment obligations under, and mark-to-market value of, the swap including, as applicable, the accrual start dates, termination or maturity dates, and, for each leg of the swap, the initial cash flow components, spreads, and points, and the relevant indexes, prices, rates, coupons, or other price reference measures;
- (vi) Any price limits, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;
- (vii) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the contract meets the definition of economically equivalent swap as defined in § 150.1 of this chapter, and, if so, the name of either the core referenced futures contract or referenced contract, as applicable, to which the swap submitted under this part 40 is economically equivalent.
- (viii) Payment and reset frequency, day count conventions, business calendars, and accrual features;

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

(xi) [Reserved];

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

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

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

(xv) Life cycle events.

3. Amend § 40.2 by revising paragraphs (a), (a)(1), (a)(3)(i), (a)(3)(ii), (a)(3)(v), (a)(3)(vi), and (d), to read as follows:

**§ 40.2 Listing products for trading by certification.**

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

\* \* \* \* \*

(3) \* \* \*

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

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

\* \* \* \* \*

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

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



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

\* \* \* \* \*

**(d) *Class certification of swaps.***

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

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

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

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

4. Amend § 40.3 by revising paragraphs (a), (a)(1), (a)(2), (a)(4), (a)(9), (a)(10), (c), and (d), and revising and redesignating paragraph (f) as paragraph (e), to read as follows:

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

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

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

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

\* \* \* \* \*

(4) Include an explanation and analysis that is complete with respect to the product's terms and conditions, the underlying commodity, and the product's compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

establish the basis for compliance with the applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

\* \* \* \* \*

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

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

\* \* \* \* \*

**(c) *Commission review.***

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

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

**(d) *Commission Determination.***

(1) *Approval.* Any product submitted for Commission approval in compliance with paragraph (a) of this section shall be deemed approved by the Commission under section 5c(c) of the Act at the conclusion of the applicable review period under paragraph (c) of this section, unless the

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

Commission issues a notice of non-approval to the registered entity under paragraph (d)(2) of this section within the applicable review period.

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

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

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

5. Amend § 40.4 to read as follows:

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

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

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

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

(5) Any rule or rule amendment:

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

6. Amend § 40.5 by revising paragraphs (a), (a)(1), (a)(2), (a)(5), (a)(6), (a)(9), and (c)(1); removing paragraphs (c)(1)(i) and (c)(1)(ii); revising and redesignating paragraph (d)(1) as paragraph (c)(2), revising and redesignating paragraph (d)(2) as paragraph (c)(3), adding paragraphs (c)(4), (c)(5) and (c)(6); adding paragraph (d)(1); revising and redesignating paragraph (g) as paragraph (d)(2); revising and redesignating paragraph (e) as paragraph (d)(3); revising and redesignating paragraphs (f)(1) and (f)(2) as paragraphs (e)(1) and (e)(2); and removing paragraph (g), to read as follows:

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

(a) ***Request for approval of rules.*** Pursuant to Section 5c(c) of the Act, a registered entity may request that the Commission approve a new rule or rule amendment prior to implementation of

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

the rule, or if the rule or rule amendment was initially submitted under §§ 40.2 or 40.6 of this part, subsequent to implementation of the rule. A request for approval shall:

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

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

\* \* \* \* \*

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

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

\* \* \* \* \*

(9) Identify any Commission regulation that the Commission may need to amend, or sections of the Act or the Commission's regulations that the Commission may need to interpret, in order to



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

approve the new rule or rule amendment. To the extent that such an amendment or interpretation is necessary to accommodate a new rule or rule amendment, the submission should include a reasoned analysis supporting the amendment to the Commission's regulation or the interpretation; and

\* \* \* \* \*

**(c) *Commission review.***

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

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

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

(4) Any amendment or supplementation made by the registered entity to the submission will be treated as the filing of a new submission under this section and be subject to the initial 45-day review period in accordance with paragraph (c)(1) of this section, unless the amendment or

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

supplementation is requested by the Commission or is made for correction of typographical errors, renumbering or other non-substantive revisions.

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

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

**(d) *Commission Determination.***

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

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

(3) *Notice of non-approval.* Any time during its review under this section, the Commission may notify the registered entity that it will not, or is unable to, approve the new rule or rule

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

amendment. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission's regulations, including the form or content requirements of this section, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the Act or the Commission's regulations.

**(e) *Effect of non-approval.***

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

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

7. Amend § 40.6 by revising paragraphs (a), (a)(1), (a)(2), (a)(5), (a)(6), (a)(7) and (a)(8); adding paragraph (a)(9); redesignating paragraph (b) as paragraph (b)(1); adding paragraph (b)(2); revising paragraphs (c)(2) and (c)(3); adding paragraph (c)(5); revising paragraphs (d)(1), (d)(2)(iii), (d)(2)(iv), and (d)(2)(ix); adding paragraphs (d)(2)(xi), (d)(2)(xii)

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

and (d)(2)(xiii); and revising and redesignating paragraph (d)(3) as paragraph (e), to read as follows:

**§ 40.6 Self-certification of rules.**

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

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

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

\* \* \* \* \*

(5) The rule or rule amendment is not a rule or rule amendment of a designated contract market that materially changes a term or condition of a contract for future delivery of an agricultural

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

commodity enumerated in section 1a(9) of the Act or an option on such a contract or commodity in a delivery month having open interest.

(6) Rule certifications implemented in response to an emergency.

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

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

(7) The rule submission shall include:

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

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

(iii) The date of intended implementation;

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

- (iv) A certification by the registered entity that the rule complies with the Act and the Commission's regulations thereunder;
- (v) A concise explanation and analysis that is complete with respect to the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder;
- (vi) A brief explanation of any substantive opposing views expressed to the registered entity by governing board or committee members, members of the entity or market participants, that were not incorporated into the rule, or a statement that no such opposing views were expressed; and
- (vii) As appropriate, a request for confidential treatment pursuant to the procedures provided in § 40.8;
- (8) The registered entity shall provide, if requested by Commission staff, additional evidence, information or data that may be beneficial to the Commission in conducting a due diligence assessment of the filing and the registered entity's compliance with any of the requirements of the Act or the Commission's regulations or policies thereunder; and
- (9) Notwithstanding the 10 business day filing requirement of paragraphs (a)(3) and (b)(1) of this section, a registered entity may file a submission and certification of a new rule or a rule amendment that delists, or withdraws the certification of, a product that has no open interest and may make the delisting or withdrawal of the product with no open interest effective immediately upon filing the submission, provided that the submission is made in compliance with §§ 40.6(a)(1)-(2) and § 40.6(a)(7).

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

**(b) *Review by the Commission.***

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

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

(c) \* \* \*

(1) \* \* \*

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

(3) ***Expiration of a stay of certification of new rule or rule amendment.*** A new rule or rule amendment subject to a stay pursuant to this paragraph shall become effective and can be implemented, pursuant to the certification, at the expiration of the 90-day review period

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

described in paragraph (c)(1) of this section unless the Commission withdraws the stay prior to that time, or the Commission notifies the registered entity during the 90-day time period that it objects to the certification on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's regulations.

\* \* \* \* \*

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

(ii) Notification to a registered entity under paragraph (c) of this section of the Commission's objection to a certification by a registered entity shall be presumptive evidence that the entity may not truthfully certify under § 40.6 of this part that the same, or substantially the same, proposed rule or rule amendment complies with the Act and the Commission's regulations thereunder.

(d) \* \* \*

(1) The registered entity provides to the Commission at least weekly a summary notice of all rule amendments made effective pursuant to this paragraph during the preceding week. Such notice must be labeled "Weekly Notification of Rule Amendments" and need not be filed for weeks



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

during which no such actions have been taken. One copy of each such submission shall be furnished electronically in a format and manner specified by the Commission; and

(2) \* \* \*

(i) \* \* \*

(ii) \* \* \*

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

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

\* \* \* \* \*

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

\* \* \* \* \*

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

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

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

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

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

(2) The rule governs:

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

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

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

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

**§ 40.7 Delegations.**

(a) \* \* \*

(1) \* \* \*

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

\* \* \* \* \*

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

(b) \* \* \*

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

\* \* \* \* \*

(e) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Clearing and Risk and, separately, to the Director of the Division of Market Oversight, to be exercised by either Director, as appropriate, or by such employees of the Commission that either Director may designate from time to time, the authority to specify the format and manner to be used by a registered entity when filing a submission pursuant to this part.

\* \* \* \* \*

9. Amend § 40.10 by revising paragraphs (a), (b), (d), and (h)(3); and adding paragraph (i), to read as follows:

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

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

\* \* \* \* \*

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

derivatives clearing organization to withdraw the proposed change and provide notice pursuant to this section.

\* \* \* \* \*

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

\* \* \* \* \*

(h) \* \* \*

\* \* \* \* \*

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

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

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

\* \* \* \* \*

11. Amend Appendix D by revising the header and paragraph (a), revising and redesignating paragraph (a)(1) as paragraph (a)(7), revising paragraphs (a)(4) and (a)(5), redesignating paragraphs (a)(2) through (a)(7) as paragraphs (a)(1) through (a)(6), and revising paragraphs (b) and (c), to read as follows:

**Appendix D to Part 40 - Submission Instructions for Rules and Products**

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

1. ***Date*** – The date of the filing.
2. ***Organization*** – The name of the organization filing the submission (e.g., CBOT).
3. ***Type of Registered Entity*** – An indication as to whether the rule or product is being submitted by a designated contract market (DCM), derivatives clearing organization (DCO), swap execution facility (SEF), or swap data repository (SDR).
4. ***Type of Filing*** – An indication as to whether the filing is a new rule, rule amendment or new product and the section of Part 40 under which the filing is submitted. For a new product to be listed by a DCM or a SEF, an indication whether the new product meets the definition of referenced contract as such term is defined in § 150.1 and is described in Appendix C to Part 150—Guidance Regarding the Definition of Referenced Contract.



**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

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

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

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

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

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

12. Add Appendix E to part 40 to read as follows:

**Appendix E to Part 40 – Guidance on Compliance with the Materiality Assessment in § 40.4**

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

*Materiality of a Change of a Term or Condition*

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

In order for a DCM to self-certify a change to a term or condition of a contract on an agricultural product enumerated in CEA § 1a(9) with open interest that the DCM believes to be non-material, § 40.4(b)(5) requires the DCM to make a non-materiality filing and explain why it considers the rule change to be “non-material.” To assist an exchange in assessing and explaining whether a change to the terms and conditions is non-material pursuant to § 40.4(b)(5), below are the criteria

**Voting Copy – As approved by the Commission on 7/26/2023**

*(subject to pre-publication technical corrections)*

that the Commission generally considers as evidence that an enumerated agricultural product rule change is non-material under § 40.4(a) pursuant to § 40.4(b)(5). A DCM may address these criteria in its assessment and explanation to demonstrate compliance with § 40.4(b)(5).

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

- 1) the change should not affect a reasonable trader's decision to enter into, or maintain, a position;
- 2) the change should not affect a reasonable trader's decision to make or take delivery on the contract or to exercise an option on the contract; and
- 3) the change should not have an effect on the value of existing positions, including, but not limited to, a change affecting the price of the contract due to a change in the commodity quality characteristics of the existing contract, a change to the size of the existing contract, or a change to a cost of effecting delivery for the existing contract.