COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 37, 38, and 40

RIN 3038–AF28

Provisions Common to Registered Entities

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

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

DATES: The effective date for this final rule is December 9, 2024.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Amendments
III. Related Matters
A. Regulatory Flexibility Act
B. Paperwork Reduction Act
C. Cost Benefit Considerations
D. Antitrust Considerations

I. Background

Part 40 of the Commission's regulations [1] 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'').[2] 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 products, rules, and rule amendments (which include product amendments) to the Commission. Typically, a registered entity elects to use the self-certification process through which the registered entity certifies that the product, rule or rule amendment complies with the CEA and the Commission regulations.[3] Alternatively, a registered entity may seek Commission approval of the product, rule or rule amendment.[4]

The part 40 regulations also set forth the Commission's procedures for review (including approval or non-approval) of product and rule submissions. The part 40 regulations set forth certain information that must be made publicly available in connection with an application to become designated as a DCM, or registered as a SEF, DCO or SDR and when registered entities file new products, new rules and rule amendments.[5] Additionally, the regulations include special certification provisions for certain rules submitted by systemically important DCOs (''SIDCOs'').[6]

With two exceptions, the Commission last amended the part 40 regulations in 2011,[7] in connection with implementing various amendments made to the CEA by the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). In September 2023, based on the Commission's experience applying the part 40 regulations over the ensuing years, the Commission issued a notice of proposed rulemaking (the ''NPRM'') in which it proposed amendments to the part 40 regulations.[8] The Commission proposed the amendments to the part 40 regulations in the NPRM to clarify, simplify and enhance the utility of the part 40 regulations for registered entities, market participants and the Commission.[9]

The comment period for the NPRM ended on November 6, 2023.[10] In response to the NPRM, the Commission received nine comment letters that expressed a wide range of views on the proposed revisions to part 40. The letters collectively represented eight DCMs; [11] two SEFs; [12] one SDR; [13] seven DCOs; [14] one non-profit; [15] two trade

[1] Commission regulations referred to in this release are found at 17 CFR chapter I (2024), and are accessible on the Commission's website at *https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm.*

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

[3] *See* CEA section 5c(c)(1), §§ 40.2 and 40.6. *But see, e.g.,* § 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).

[4] *See* CEA section 5c(c)(4), §§ 40.3 and 40.5.

[5] *See* § 40.8. Regulation § 40.8 is not the subject of this rulemaking. Regulations 40.11 and 40.12 (which relate to the Commission's review of certain event contracts and the staying of certification and tolling of review period pending jurisdictional determination, respectively) are also not the subject of this rulemaking. A private citizen suggested changes to §§ 40.11 and 40.12. *See* Ravnitzky at 2–3. The Commission cannot consider herein changes to §§ 40.11 and 40.12 as §§ 40.11 and 40.12 are not the subject of this rulemaking and no changes were proposed to §§ 40.11 or 40.12 in the NPRM for notice and public comment.

[6] *See* § 40.10.

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

[8] Provisions Common to Registered Entities, 88 FR 61432 (September 6, 2023).

[9] As discussed below in note 19, the Commission is also making two conforming, non-substantive changes to update the citations referencing the § 40.1 definition of emergency mentioned in appendix B to part 37 and appendix B to part 38.

[10] The comment file for responses to the NPRM is available at *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7430.*

[11] Cboe Global Markets, Inc. (''Cboe'') commented on behalf of its two DCMs—Cboe Futures Exchange, LLC and Cboe Digital Exchange, LLC. CME Group Inc. (''CME Group'') commented on behalf of its four DCMs—Chicago Mercantile Exchange Inc. (''CME''), Board of Trade of the City of Chicago, Inc., New York Mercantile Exchange, Inc. and Commodity Exchange, Inc. (collectively, the ''CME Group Exchanges''). The Intercontinental Exchange Inc. (''ICE'') commented on behalf of its DCM—ICE Futures U.S. LMX Labs, LLC, which does business as Coinbase Derivatives (''Coinbase'') commented as a DCM.

[12] Cboe commented on behalf of its SEF—Cboe SEF, LLC. ICE commented on behalf of its SEF—Ice Swap Trade.

[13] ICE commented on behalf of its SDR—Ice Trade Vault.

[14] Cboe commented on behalf of its DCO—Cboe Clear Digital, LLC. CME Group commented on behalf of CME in its capacity as a DCO (also known as ''CME Clearing''). Eurex Clearing AG (''Eurex'') commented as a DCO. ICE commented on behalf of its four DCOs—ICE Clear Credit, ICE Clear U.S., ICE Clear Europe, and ICE NGX.

[15] Better Markets.

associations; [16] one private citizen; [17] and one venture capital firm.[18]

The Commission is making revisions and additions to §§ 40.1 through 40.7, 40.10 and appendices D and E to part 40 to clarify, simplify and enhance the utility of the part 40 regulations for registered entities, market participants and the Commission. This release will address the comments received on each of the relevant regulations and appendices below.

II. Amendments

A. § 40.1—Definitions

1. Formatting Change to § 40.1

Currently, the defined terms in § 40.1 are arranged in alphabetical order, with lettered headers. The Commission is adopting the amendments proposed to remove the lettered headers from § 40.1 and to instead arrange the defined terms in § 40.1 solely in alphabetical order,[19] resulting in the Commission having to make fewer conforming changes in the future to § 40.1 and other regulations when adding or removing defined terms.[20] The Commission received no comments on these proposed changes.

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

The Commission is adopting the proposed non-substantive changes to the definition of the term ''business day'' in § 40.1(a). Currently, the definition of the term ''business day'' in § 40.1(a) uses the term ''business hour'' and defines the term ''business hour'' to mean ''any hour between 8:15 a.m. and 4:45 p.m.'' With the exception of § 40.1(a), the term ''business hour'' is not used in part 40. To enhance the readability of the definition of ''business day,'' the Commission is deleting 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'' 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.'' [21] By way of example, both prior to this amendment and as amended, the Commission must receive a § 40.2 self-certification submission before 8:15 a.m. on a business day in order for the DCM or SEF to be able to list the product starting at 8:15 a.m. on the following business day.[22] The Commission received no comments on these proposed changes.

3. Amendments to the Definitions of Dormant Entities

The Commission is amending as proposed the definitions of the terms ''dormant designated contract market,'' ''dormant derivatives clearing organization,'' ''dormant swap data repository,'' and ''dormant swap execution facility'' in § 40.1. These amendments relate to the calculation of the duration of inactivity of a registered entity that will result in the registered entity being deemed dormant. As noted in the NPRM, the definitions in § 40.1(c) through (f) were inconsistent and, in some cases, unclear as to how the applicable time periods were to be determined. Specifically, the Commission is amending the regulations as proposed to consistently state the time periods in days—*i.e.,* 365 calendar days instead of 12 months, and 1,095 calendar days rather than 36 months.

The amendments establish consistency of the regulatory text across the sections with respect to the calculation of the duration of inactivity and simplify the calculation of how long a registered entity has been inactive thereby reducing the potential that market participants may interpret the regulatory language differently. The Commission received no comments on these proposed changes.

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, if a rule of a registered entity is dormant pursuant to §§ 40.1(g), 40.6(a) prohibits the registered entity from implementing the rule until 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.

In the NPRM, the Commission proposed 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.[23] The Commission noted in the NPRM that at the time the Commission adopted the dormant contract definition and the applicable requirements, contract markets were generally required to obtain Commission approval of any new products prior to listing the products.[24] The Commission also noted that the CEA no longer requires approval of each contract or product listed by an exchange.[25] Rather, a DCM or SEF 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, DCMs and SEFs typically use the self-certification process in § 40.6(a) to delist a contract that does not have any open interest before the contract could be considered dormant. Monitoring the dormancy status of products is an inefficient and unnecessary use of Commission resources.

The Commission received comments from Cboe and CME Group in support of the proposal to remove the dormant product definition. Cboe and CME Group commented that the removal of the dormant product definition would result in little, if any, market integrity or safety concerns as the DCM or SEF listing the product has a continuing obligation to ensure that the product complies with the CEA and applicable Commission regulations.[26] Cboe and CME Group also noted that removing the dormant product definition would have the benefit of reducing, or potentially reducing, compliance costs

[16] The Futures Industry Association (''FIA'') and the International Swap Derivatives Association (''ISDA'') submitted a joint letter.

[17] Mr. Michael Ravnitzky.

[18] Andreessen Horowitz (''a16z'').

[19] The Commission also is making two conforming changes that are necessitated by this change to § 40.1. Specifically, the Commission is updating 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.

[20] 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).

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

[22] *See* § 40.2(a)(2).

[23] This release uses ''dormant contract'' and ''dormant product'' interchangeably.

[24] NPRM at 61433.

[25] 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.

[26] Cboe at 2; CME Group at 3.

for market participants and oversight costs for the Commission.[27] Cboe further commented in support of removing the dormant rule definition and noted that such removal will not result in any reduction in market integrity or safety and will reduce compliance costs for market participants and oversight costs for the Commission.[28]

While the removal of the term ''dormant product'' will enable a contract that has not been traded for an extended period of time to remain listed, the Commission believes any new trading of the contract will likely not pose concerns regarding market integrity or safety because the DCM or SEF listing the contract has a continuing obligation to ensure that the contract complies with the CEA and Commission's regulations thereunder.[29] The removal of the term ''dormant rule'' will enable a registered entity to implement a rule more than one year after the rule is certified by the registered entity as complying with the CEA and Commission regulations in accordance with § 40.6, or approved by the Commission in accordance with § 40.5. The Commission believes the implementation of a rule more than one year after it was certified or approved likely will not pose concerns regarding market integrity or safety because the registered entity implementing the rule has a continuing obligation to ensure that the rule complies with the CEA and the Commission's regulations thereunder.[30] The Commission believes that monitoring the dormancy status of rules is an inefficient and unnecessary use of Commission resources.

The Commission considered all comments received and 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 is removing the definitions of ''dormant contract or dormant product'' and ''dormant rule,'' and all references to ''dormant contract or dormant product'' and ''dormant rule'' in the regulations. 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 still need to be approved in connection with the entity being reinstated as a DCM, SEF, DCO or SDR, respectively.[31] Also, all products of a registered entity that becomes dormant (including products previously listed for trading or offered for clearing) would still need to be approved or self-certified in order to be listed for trading by the reinstated DCM or SEF or offered for clearing by the reinstated DCO.[32]

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

In the NPRM, the Commission proposed to add ''margin methodology'' to the definition of ''rule'' in § 40.1. Prior to 2011, the definition of rule in § 40.1 included a restriction on Commission review of rules relating to margin levels, based on section 8a(7) of the CEA.[33] After section 736 of the Dodd-Frank Act amended section 8a(7) of the CEA to remove the restriction on Commission review of rules relating to margin levels, the Commission removed the restriction from the definition of ''rule.'' Although DCOs have been submitting margin-related rule changes to the Commission since 2011, in order to address any perceived ambiguity regarding whether DCOs are required to do so, the Commission proposed to revise the definition of ''rule'' to include an explicit reference to margin methodology.

ISDA and FIA supported the inclusion of ''margin methodology'' in the definition of ''rule,'' and noted the change would provide further clarity to DCOs with respect to submission of proposed changes relating specifically to margin methodology.[34] CME Group also supported the addition, noting that its margin methodologies are filed as rules and it would be prudent to apply this practice uniformly across all DCOs.[35] ICE opposed the addition. ICE argued a margin methodology is not the same as a margin-related rule and the reference to ''margin methodology'' could broaden the scope of the definition of ''rule'' and place additional reporting burdens on DCOs to submit documents that are not ''rules.''[36] ICE stated that the Commission has not established a proper basis for requiring such documents to be filed.[37]

The Commission is adopting as proposed the amendment to add ''margin methodology'' to the definition of ''rule.'' The addition of ''margin methodology'' is not an expansion of the definition of ''rule,'' but a clarification that a margin methodology, which establishes a DCO's policies and procedures for the setting of margin levels, is a ''stated policy'' of the DCO, and a ''stated policy'' is already included in the definition of ''rule.'' The fact that DCOs have been submitting such margin-related rules, including margin methodologies, since 2011 demonstrates that the interpretation of the definition to include margin methodology was understood by registered DCOs generally.

The Commission proposed to amend the definition ''terms and conditions'' by removing the following two items from the scope of the definition such that the items to be removed will no longer be treated as terms and conditions, and adding the items to the categories of rules that may be implemented without certification pursuant to the notification processes in § 40.6(d). 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 proposed to remove ''payment or collection of commodity option premiums or margins'' from § 40.1(j)(1)(xi)). With respect to a swap, the Commission proposed to remove

[27] *Id.*

[28] Cboe at 2.

[29] *See* CEA sections 5(d)(1) and 5h(f)(1) and §§ 38.100(a) and 37.100(a).

[30] *See* CEA sections 5(d)(1) and 5h(f)(1) and §§ 38.100(a) and 37.100(a).

[31] *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.

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

[33] As noted in the NPRM, prior to the enactment of the CFMA in 2000, section 5a(a)(12)(A) of the CEA 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.'' The CFMA 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 CEA 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 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 § 40.1(h), as in effect prior to the July 2011 amendments to part 40. Section 8a(7)(D) of the CEA, as amended by the Dodd-Frank Act, provides that the Commission is authorized to alter or supplement rules of a DCO, including rules with respect to margin requirements, provided that the rules: (i) are limited to protecting the financial integrity of the [DCO]; (ii) are designed for risk management purposes to protect the financial integrity of transactions; and (iii) do 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.

[34] FIA/ISDA at 1.

[35] CME Group at 3.

[36] ICE at 2.

[37] ICE at 2.

''payment or collection of option premiums or margins'' from § 40.1(j)(2)(xi)).

CME Group supported the proposed amendment to § 40.1(j)(1)(xi) and the corresponding change to § 40.6(d)(2).[38] CME Group commented that this pair of changes will lower the burden on registered entities while still providing sufficient notice to the Commission.[39] The Commission received no comments objecting to the proposed deletions from § 40.1 or to the corresponding additions to § 40.6(d)(2).

The Commission is adopting these changes as proposed. The Commission continues to believe 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 are general in substance.[40]

B. § 40.2—Listing Products for Trading by Certification

1. Amendments to the Cover Sheet Requirement and the Filing Format and Manner Requirements in §§ 40.2(a)(3)(i), 40.3(a)(2), 40.5(a)(2) and 40.6(a)(7)(i), and Appendix D

The NPRM proposed to remove the requirement to submit a cover sheet when filing a product submission or a rule submission (along with related references) from §§ 40.2(a)(3)(i), 40.3(a)(2), 40.5(a)(2) and 40.6(a)(7)(i), and appendix D to part 40. Given the development and evolution of the Commission's online portal for the filing of rule and product submissions (and the fact that the cover sheet information required by Appendix D is now entered by registered entities via the portal and processed and stored in the Commission's online systems), the cover sheet itself is now unnecessary. The Commission received no comments on these proposed changes.[41]

Accordingly, the Commission is revising §§ 40.2(a)(3)(i), 40.3(a)(2), 40.5(a)(2) and 40.6(a)(7)(i), and appendix D, each as proposed, to remove the cover sheet requirement and related references. As revised, 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 proposed to amend appendix D to require a SEF or DCM when submitting a new product to indicate whether the product to be listed 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 part 150 of the Commission's regulations (position limits) that became effective on March 15, 2021 introduced the term ''referenced contract'' and incorporated the term ''referenced contract'' into the definition of ''terms and conditions'' in part 40.[42] As a result, before listing a new contract for trading, a DCM or SEF must determine whether a new contract to be listed is a referenced contract pursuant to part 150.[43] To facilitate market participants' compliance with position limits, Commission staff maintain an accessible workbook of all referenced contracts that are currently listed on DCMs and SEFs. The proposed amendment would 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.

CME Group stated it supports this proposed amendment, noting that CME Group Exchanges identify products as referenced contracts when submitting new products, and it would be prudent for this to be a uniform practice across all DCMs and SEFs.[44] The Commission believes that the identification of new products as referenced contracts as part of the filing process will enable the Commission to more efficiently process and review submissions of new contracts that are referenced contracts. The Commission is adopting the amendment as proposed to require a SEF or DCM when submitting a new product to indicate whether the product to be listed is a ''referenced contract.''

Finally, as a related matter, the Commission is amending as proposed §§ 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 also proposed to delegate the Commission's authority to specify the format and manner of filing under these regulations to the Directors of the Division of Clearing and Risk and the Division of Market Oversight by adding proposed § 40.7(e). CME Group supported this delegation, noting that their DCMs, DCO and SEF collectively submit hundreds of filings each calendar year and that they are confident that the division heads will endeavor to make the filing formats as uniform as possible.[45] No other comments were received on the proposed changes described in this paragraph. The Commission is delegating the authority to specify the format and manner of filing under §§ 40.2(a)(1), 40.3(a)(1), 40.5(a)(1) and 40.6(a)(1) to the Directors of the Division of Clearing and Risk and the Division of Market Oversight by adopting § 40.7(e) as proposed.

2. Amendments to § 40.2(a)(3)(ii)

As noted in the NPRM, both § 40.2(a)(3)(ii) and § 40.3(a)(3) describe a requirement to submit as part of a self-certification or a voluntary submission for Commission approval, respectively, the rules that set forth a contract's terms and conditions. The two provisions use similar, but slightly different, language.[46] Given that the two

[38] CME Group at 3.

[39] *Id.*

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

[41] ICE requested an alternative process to enable them to submit a single filing that would cover multiple new contracts. *See* ICE at 3. The reason that each contract must be submitted through a separate filing is not a regulatory requirement, but rather a technical limitation and is thus not addressed herein. The Commission acknowledges that a private citizen suggested: (i) that more information be provided regarding the portal to ensure registered entities and market participants know how to use the portal; (ii) the Commission provide templates for registered entities and market participants to use as models for their part 40 submissions; and (iii) the Commission ensure the portal is user-friendly, reliable and secure. Ravnitzky at 1. The Commission clarifies that only registered entities (and not market participants) submit filings pursuant to Part 40 through the portal and that no changes are being made to the portal through this rulemaking. If registered entities have questions about using the portal, Commission staff remain available to answer their questions. The content required to be included in a submission is addressed in the relevant section of Part 40.

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

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

[44] CME Group at 3.

[45] CME Group at 3.

[46] 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

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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 when submitting a self-certification or a voluntary submission for Commission approval, respectively, the Commission is amending the text of § 40.2(a)(3)(ii) as proposed to mirror the text used in § 40.3(a)(3). With this amendment, both provisions will use the same language for consistency and will avoid any potential misreading that the prior differences in language between the two provisions were intended to signify a difference in substance. The Commission received no comments on these proposed changes.

3. Amendments to § 40.2(a)(3)(v)

Section 5c(c)(1) of the Act and § 40.2(a)(2)(iv) require a DCM or SEF that elects to list a new contract or other instrument for trading through the self-certification process to provide to the Commission a written certification that the new contract or instrument complies with the Act and the Commission's regulations thereunder prior to listing the product for trading. Regulation § 40.2(a)(3)(v) requires the DCM or SEF 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.[47] Regulation § 40.2(a)(3)(v) further requires that the concise explanation and analysis must (1) be accompanied by supporting documentation, or (2) incorporate the information contained in such documentation, with appropriate citations to data sources. Additionally, § 40.2(a)(2)(vi) requires the DCM or SEF to certify that it posted on its website a notice of the pending product certification and a copy of the product submission.[48]

As noted in the NPRM and as further discussed below, staff has observed a trend of new product certifications that do not include sufficient information on the underlying commodity, particularly for contracts on new commodities (*e.g.,* rare earth metals). To ensure that a DCM or SEF's certification submission includes certain basic explanation and analysis concerning the product and its compliance with the Act and Commissions regulations thereunder, including the applicable core principles, the Commission proposed the following changes to § 40.2(a)(3)(v).

Specifically, the Commission proposed to amend the text to include references to the ''terms and conditions'' of the product and to ''the underlying commodity'' to reiterate 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 proposed 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 analyze and explain the underlying commodity and how and why the contract's terms and conditions comply with the applicable core principles. This is not intended to expand or otherwise alter the scope of the explanation or analysis required in the current regulation.

Some commenters supported the proposed amendments to § 40.2(a)(3)(v), and some commenters objected. Specifically, ISDA and FIA supported the proposed amendments, stating that they welcome the additional requirements for registered entities to provide ''complete'' information regarding a new product's terms and conditions under § 40.2.[49] ISDA and FIA noted they have observed the emergence of new asset classes over the last decade such as cryptocurrency products supporting the evolution of digital assets or environmental and carbon products to support the green transition, and that it is critical that CFTC staff have access to all relevant information in its review of new product submissions.[50]

Better Markets also commented in support of the proposed amendments, calling them (including the requirement to include additional details about the product's underlying commodity) a much-needed enhancement.[51] Better Markets stated the amendments ''acknowledge a recurring issue faced by Commission staff—the absence of sufficient information in product

Commission approval of a product to include ''a copy of the rules that set forth the contract's terms and conditions'').

[47] When reviewing a DCM's product self-certification submitted pursuant to § 40.2, Commission staff typically look to understand how the product complies with §§ 38.200 and 38.201 in connection with DCM Core Principle 3; §§ 38.250 through 38.258 in connection with DCM Core Principle 4; § 38.300 and 301, §§ 150.2 and 150.5 in connection with DCM Core Principle 5; §§ 38.400 and 38.401 in connection with DCM Core Principle 7; and §§ 38.450 and 451 in connection with DCM Core Principle 8. Generally, a DCM will address the majority of these core principle obligations and Commission regulations (such as the DCM's rules that establish surveillance, compliance and enforcement practices and procedures that apply to the trading and activity on all of the DCM's products as required by §§ 38.250 and 38.251) by concisely referencing rules that the DCM already has implemented that will apply to the trading of the new product. For core principle obligations and Commission regulations that require compliance that is tailored to reflect the product's characteristics and its underlying commodity, Commission staff typically look at how a product complies with §§ 38.200 and 38.201 in connection with DCM Core Principle 3; § 38.252 (for physical-delivery contracts) or § 38.253 (for cash-settled contracts) in connection with DCM Core Principle 4; and §§ 38.300, 38.301, 150.2 and 150.5 (position limits and accountability) in connection with DCM Core Principle 5. To the extent a product's characteristics require additional tailored compliance (*e.g.,* protections of markets and market participants from abusive practices in compliance with DCM Core Principle 12 and §§ 38.650 and 38.651, and adopting price limits or trading halts to limit periods of extreme price volatility in the contract in compliance with DCM Core Principle 4 and § 38.255), Commission staff will look to understand how the product will comply in light of the product's unique characteristics. When reviewing a SEF's product self-certification submitted pursuant to 40.2, Commission staff typically look to understand how the product complies with §§ 37.300 and 37.301 in connection with SEF Core Principle 3; §§ 37.400 through 37.408 in connection with SEF Core Principle 4; §§ 37.600, 37.601, 150.2 and 150.5 in connection with SEF Core Principle 6; and §§ 37.900 and 37.901 in connection with SEF Core Principle 9. Generally, a SEF will address the majority of these core principle obligations and Commission regulations (such as the SEF's rules that establish surveillance, compliance and enforcement practices and procedures that apply to the trading and activity on all of the SEF's products as required by §§ 37.400 and 37.401) by concisely referencing rules that the SEF already has implemented that will apply to the trading of the new product. For core principle obligations and Commission regulations that require compliance that is tailored to reflect the product's characteristics and its underlying commodity, Commission staff typically look at how a product complies with § 38.300 and 38.301 in connection with SEF Core Principle 3, 37.402 (for physical-delivery swaps) or 37.403 (for cash-settled swaps) in connection to SEF Core Principle 4, §§ 37.600 and 37.601, 150.2 and 150.5 (position limits and accountability) in connection with SEF Core Principle 6. To the extent a product's characteristics require additional tailored compliance (*e.g.,* adopting price limits or trading halts to limit periods of extreme price volatility in the contract in compliance with SEF Core Principle 4 and § 37.405), Commission staff will look to understand how the product will comply in light of the product's unique characteristics.

[48] As noted in § 40.2(a)(2)(vi), the DCM or SEF may redact information that it seeks to keep confidential from the documents published on its website, but must be republished consistent with any determination made pursuant to § 40.8(c)(4). *See also* DCM Core Principle 4 and § 38.401 that require a DCM, among other things, to have procedures, arrangements and resources for disclosing to the Commission, market participants, and the public dissemination of information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information on the DCM's website.

[49] FIA/ISDA at 1.

[50] *Id.*

[51] Better Markets at 4.

submissions to fulfill the Commission's regulatory obligations.'' [52] Better Markets characterized the amendments as requiring registered entities to provide ''a comprehensive explanation of a new product's terms and conditions'' . . . that is ''exhaustive in nature, covering the product's terms and conditions and, critically, its adherence to the applicable provisions of the CEA, including the core principles and the Commission's regulations.'' [53] Better Markets further stated that by ''mandating comprehensive information about new products, including their underlying commodities, these amendments bolster market integrity, protect the interests of market participants, and ensure that the Commission can effectively and thoroughly evaluate compliance.'' [54]

A16z requested that the Commission provide guidance on how market participants can simultaneously satisfy the requirements to be ''complete'' while also being ''concise''.[55] Cboe stated that the word ''complete'' should not be included in the product certification provisions, and, if it is included, Cboe requests, at a minimum, that the Commission clarify that the standard of completeness will be applied in a sensible and reasonable manner.[56] Cboe stated that product certifications should focus on key points, as reflected by the inclusion of the word ''concise'' in the current and proposed regulatory language which describes the explanation and analysis that is required to be included. Cboe stated that it is important that the application of the product certification provisions focuses on requiring a concise description of what is relevant with respect to the applicable product in determining what information should be included instead of completeness for the sake of completeness which can lead to the inclusion of unneeded and irrelevant information.

Coinbase opposed the proposed amendments to § 40.2(a)(3) and stated they ''believe the proposed completeness standard ''lacks clarity and would significantly alter the existing process for certification under Regulation § 40.2.'' [57] Coinbase stated that the proposed revision is ''unnecessarily burdensome in what it would require a DCM to provide to evidence compliance with the CEA and Commission regulations'' and is thus ''contrary to the policies embedded in CEA section 5c(c) that, prior to certification, the burden of evaluating a contract for compliance is with the DCM (not the Commission).'' [58] Coinbase stated that CEA section 5c mandates that the Commission rely upon a DCM's ''judgment as to the level of information and analysis to include in a product certification to explain and analyze concisely the new product, including an explanation of the terms and conditions of the contract or the spot market for the underlying commodity where they DCM considers appropriate.'' [59] Coinbase further stated that the standard could ''significantly expand a DCM's regulatory costs for preparing certified product filings'' [60] and could ''cause other adverse consequences including, but not limited to, unnecessarily limiting and delaying the availability of a process for listing of derivatives contracts quickly after expending the time, effort and diligence to develop the product in the highly competitive global derivatives market.'' [61] Coinbase further noted that the proposed amendment ''would leave little daylight between what a DCM would submit in a certified filing compared to a new product filed voluntarily for CFTC review and approval under CFTC Regulation § 40.3.'' [62]

Coinbase stated that the NPRM provides ''only modest justification'' and ''does not cite any concerns that DCMs are abusing the certification procedure by certifying non-compliant products.'' [63] Coinbase further noted that the changes are not in response to any statutory amendments, and that staff have not articulated any significant market failure or rationale that necessitates changes beyond those incorporated as a result of the 2011 amendments to part 40.[64] Coinbase noted it generally accepts the Commission's position that it is appropriate to impose some standard on a registered entity to explain in the filing the basis for its compliance with the CEA and CFTC regulations, but Coinbase believes the Commission should not move away from the standards adopted in 2011.[65]

The Commission has considered the comments received in response to the proposed amendments to § 40.2(a)(3)(v). In response to the comment that the statute mandates that the Commission rely upon a DCM's ''judgment as to the level of information and analysis to include in a product certification to explain and analyze concisely the new product,'' [66] the Commission notes that while a DCM has reasonable discretion in establishing the manner in which the DCM complies with § 40.2(a)(3)(v),[67] the DCM is nonetheless required to provide the information, explanation and analysis required by § 40.2(a)(3)(v) when self-certifying a product pursuant to § 40.2. For those DCMs and SEFs that submit written certifications that satisfy the current standards when filing § 40.2 submissions, the changes being made to § 40.2(a)(3)(v) should not expand their regulatory costs for preparing certified product filings.

Relatedly, and in response to the request for additional justification for the amendments to § 40.2(a)(3)(v), the Commission is expanding upon the statement in the NPRM that staff have observed a trend of new product certifications that do not include sufficient information on the underlying commodity, particularly for contracts on new commodities (*e.g.,* rare earth metals). The Commission has experienced numerous instances of registered entities certifying that their product complies with the Act and applicable regulations and submitting only cursory supporting analyses, evidence or documentation, which is not consistent with the current

[52] Better Markets at 2.

[53] Better Markets at 2–4.

[54] Better Markets at 4.

[55] A16z at 6.

[56] Cboe suggested the Commission can achieve the same outcome of requiring pertinent information to be included in product certification filings by using the word ''of'' instead of the phrase ''that is complete with respect to.'' Cboe stated it believes that the inclusion of the word ''complete'' can lead to the possibility that this standard will be applied in a prescriptive, inconsistent, and unreasonable manner (which would in turn undermine the utility of the product certification process for registered entities, market participants, and the Commission; delay the ability to implement products and rule enhancements that benefit the market; and inhibit innovation and competition). Cboe further stated the concept of completeness is inherently ambiguous and could be applied in a rigid, onerous, arbitrary, and/or subjective manner.

[57] Coinbase at 6.

[58] Coinbase at 6.

[59] Coinbase at 6.

[60] Coinbase at 6.

[61] Coinbase at 11.

[62] Coinbase at 8.

[63] Coinbase at 7.

[64] Coinbase at 5.

[65] Coinbase at 6. Coinbase also stated that ''[a]s required by statute, the Commission should continue to rely upon a DCM's judgment as to the level of information and analysis to include in a product certification to explain and analyze concisely the new product, including an explanation of the terms and conditions of the contract or the spot market for the underlying commodity where the DCM considers appropriate.'' For a discussion of the difference between what must be submitted under §§ 40.2(a)(3)(v) and 40.3(a)(4), see the discussion below in section II.C.1.

[66] Coinbase at 6.

[67] *See* CEA section 5(d)(1)(B).

requirement in § 40.2(a)(3)(v).[68] When the Commission requested additional information, the Commission has on numerous occasions experienced delays in receiving certain requested information, suggesting that supporting analyses had not been prepared by registered entities prior to certifying compliance.[69]

By adding the word ''complete'' to § 40.2, the Commission is not intending to create a standard that is comparable to a new product filed voluntarily for CFTC review and approval under § 40.3. That is, when a DCM or SEF voluntarily submits a product for Commission review and approval pursuant to § 40.3, the Commission is tasked with reviewing the information submitted for the product and using that information to determine whether the product would violate the Act or the Commission's regulations.[70] By contrast, when a DCM or SEF elects to submit a product pursuant to § 40.2, the DCM or SEF must certify that the product complies with the Act and the Commission's regulations thereunder.[71]

The products offered for trading by registered entities vary widely, and the applicable statutory and regulatory requirements that apply to any particular product thus also vary widely. Each registered entity should be familiar with the statutory and regulatory requirements that apply for a particular product, and therefore should be able to determine what information is reasonable and appropriate for the submission to demonstrate compliance with these requirements when preparing a § 40.2 submission.

Prior to the DCM or SEF self-certifying that a product complies with the Act and Commission regulations thereunder, the DCM or SEF must complete its diligence on the product and its terms and conditions, on the underlying commodity, and on ensuring the product complies with the applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.[72] The DCM or SEF must have also established proper risk management and supervisory oversight prior to listing the product for trading, such as the adoption of price limits or trading halt provisions when deemed necessary by the DCM or SEF to limit the impact of periods of extreme price volatility.[73] The DCM or SEF relies upon its own diligence, risk management and supervisory oversight when it self-certifies that the product complies with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.[74]

Currently, and as amended herein, DCMs and SEFs must provide a written certification that the product to be listed complies with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.[75] The DCM or SEF must include a concise explanation and analysis of the underlying commodity, the terms and conditions of the contract and the compliance of the contract with applicable provisions of the Act, including applicable core principles and Commission regulations.[76] Cursory or conclusory explanations will not suffice.[77]

The Commission is thus adding the word ''complete'' to § 40.2(a)(3)(v) to confirm that it is essential that the DCM or SEF include a concise explanation and analysis (including the supporting information and citations or together with the accompanying documentation) that explains how and why the contract's terms and conditions comply with the applicable core principles and regulations, including how the terms and conditions reflect the cash market of the underlying commodity. This is a fact-specific endeavor that is dependent on the circumstances surrounding the contract and the underlying commodity.

Given the tremendous breadth and variability of products and contracts that can be listed on CFTC regulated markets, it is not possible for the Commission to state definitively all of

[68] Coinbase's letter quoted a statement made by Commission staff in 2018 in Advisory 18–14 that ''the existing self-certification process has worked well. Typically, exchanges reach out to Commission staff in advance of launching a new contract . . . [a] lengthy engagement is not unusual for products that may implicate complex issues.'' Coinbase at 7. The Commission notes that while the Commission continues to believe it is helpful for both the registered entity and the Commission when exchanges reach out prior to self-certifying new products under § 40.2, it is not required by law and it does not always happen. Additionally, even when registered entities elect to engage informally with staff prior to submitting § 40.2 filings, separate and apart from such engagement, the § 40.2 filings must stand independently, provide the Commission with a concise explanation and analysis 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, and explain to the Commission and the public how and why the new contract is in compliance. *See also* DCM Core Principle 4 and § 38.401 that require, among other things, that a DCM have procedures, arrangements and resources for disclosing to the Commission, market participants, and the public information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information on the DCM's website.

[69] The Commission has experienced this challenge before. In 2011, when the Commission adopted the ''concise explanation and analysis'' requirement that applies today, the Commission provided the following insight into why it adopted this requirement then—stating that the Commission has encountered numerous instances in which registered entities provided only cursory supporting analyses for their product submissions or, in certain cases, failed to document the evidentiary basis for their certifications altogether. The Commission also has experienced undue delays in receiving certain requested information, suggesting that supporting analyses had not been prepared by the registered entities as of the time of request. Without prompt receipt of supporting information, the staff must expend significant resources and time to replicate existing analyses or to otherwise independently establish a product's compliance with applicable law. In addition, the staff frequently has found it necessary to contact registered entities for additional guidance on product submissions. To address these problems, final § 40.2(a)(3)(v) facilitates the staff's review of new products subsequent to certification while discouraging unsupported certification of products in the first instance. 2011 Final Rule at 44780.

[70] *See* § 40.3(a) and (b). As noted below in section II.C.1, when a DCM, SEF or DCO is requesting that the Commission review the product for Commission approval pursuant to § 40.3, the Commission needs more information for § 40.3 submissions than for § 40.2 submissions—hence the inclusion of the word ''concise'' in § 40.2 and the omission of the word ''concise'' in § 40.3. Specifically, pursuant to § 40.3, the Commission needs to receive complete information regarding the product's terms and conditions, the commodity underlying the product, and the product's compliance with applicable provisions of the Act (including core principles) and the Commission's regulations to understand and assess whether the terms and conditions of the product comply with the Act (including core principles) and the Commission's regulations.

[71] By contrast, for § 40.2 self-certification submissions, the DCM or SEF needs to submit concise information regarding the product and the commodity underlying the product that explains the terms and conditions of the product (as defined in § 40.1) and how the DCM or SEF views the terms and conditions of the product as compliant with the Act and the Commission's regulations.

[72] *See* CEA sections 5 and 5h, and parts 37 and 38 of the Commission's regulations. *See also* note 47.

[73] *See id.* When a DCM or SEF deems it necessary to adopt price limit or trading halt provisions for its new product to limit the impact of periods of extreme price volatility in the contract, Commission staff typically look for an explanation of the price limit or trading halt provisions to understand how the DCM will comply with § 38.255 in connection with DCM Core Principle 4, or how the SEF will comply with § 37.405 in connection with SEF Core Principle 4.

[74] This means that a DCM should have completed research on the underlying commodity (including delivery points if physically delivered commodity and underlying cash price series if cash settled) and how the contract complies with the core principles. All this should be completed as part of developing the contract prior to listing. *See* note 47.

[75] Regulation § 40.2(a)(3)(iv).

[76] Regulation § 40.2(a)(3)(v). The DCM or SEF must also either include the documentation the DCM or SEF relied upon to establish its basis for compliance with applicable law, or incorporate the information contained in such documentation, with appropriate citations to data sources. *See* § 40.2(a)(3)(v).

[77] *See* 2011 Final Rule at 44780. When adopting the requirement that a DCM provide a ''concise explanation and analysis'' pursuant to § 40.2(a)(3)(v) to self-certify a new product, the Commission described the required ''concise explanation and analysis'' of the certified product—and its compliance with applicable law in the 2011 Final Rule—as ''necessary for the Commission's review of a new product certification.''

the core principles and regulations that are relevant for each particular contract. However, the Commission notes that for any contract to be listed for trading on a DCM or a SEF, it is relevant for the DCM or SEF to analyze how the contract is not readily susceptible to manipulation in compliance with DCM Core Principle 3 or SEF Core Principle 3, respectively.[78] For any contract to be listed for trading on a DCM or a SEF, it is also relevant for the DCM or SEF to analyze how the contract complies with DCM Core Principle 5 or SEF Core Principle 6, respectively,[79] which relate to the adoption by the DCM or SEF of position limits or position accountability for speculators, as is necessary and appropriate, to reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month) in the contract.

In response to comments, the Commission reiterates it does not view the amended provision as altering what is intended to be the existing standard or process of complying with § 40.2(a)(3)(v). The Commission clarifies in response to a comment received[80] that the ''complete'' explanation and analysis required by § 40.2(a)(3)(v) is intended to be concise and is not intended to be exhaustive in nature.[81] The Commission also does not believe that the requirements in the amended provision to provide evidence of compliance with the CEA and Commission regulations are unnecessarily burdensome.[82]

Additionally, the Commission notes that, as proposed in the NPRM and as adopted herein, § 40.2(a)(3)(v) retains the word ''concise.'' In response to the request that the Commission provide guidance regarding how a DCM or SEF would satisfy the ''complete'' requirement while also being ''concise,'' the Commission notes that the explanation and analysis required under amended § 40.2(a)(3)(v) should explain and analyze the product's terms and conditions, the underlying commodity, and how the product complies with applicable law and is not necessarily required to be lengthy in order to be ''complete.'' Moreover, the explanation and analysis incorporates information that should already be reviewed or collected by registered entities. To the extent that registered entities may be unclear about how to apply these standards in a given submission, they are invited to engage with staff in advance of self-certifying the product.

When a DCM or SEF files a product self-certification submission with the Commission pursuant to §§ 40.2, 40.2(a)(3)(vi) requires the DCM or SEF to post a copy of its § 40.2 submission on its website, including a copy of the rules that set forth the contract's terms and conditions as required by § 40.2(a)(3)(ii) as well as the concise explanation and analysis that is complete with respect to the contract'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 as required by § 40.2(a)(3)(v).[83] By including this information in the § 40.2 submission, the DCM or SEF makes the information accessible to market participants and the public. Access to the information enables market participants to make educated choices when selecting products to trade and platforms on which to trade these products.

4. Guidance on Compliance With §§ 40.2 and 40.3

In appendix C of part 38, the Commission offers general guidance that a DCM or SEF can use to demonstrate that a contract the DCM or SEF certifies or submits for voluntary Commission approval (pursuant to § 40.2(a) or § 40.3, respectively) is not readily susceptible to manipulation.[84] Additionally, staff has offered guidance to help DCMs and SEFs understand how DCMs and SEFs might elect to demonstrate compliance with the part 40 regulations when listing contracts on novel commodities (such as the guidance regarding digital commodities in CFTC Staff Advisory No. 18–14) for trading. Recently, the Commission proposed non-binding Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts.[85]

In the NPRM, the Commission included two specific product examples (one in each of two common categories of contracts) regarding the explanation and analysis that should be provided—one for a physically-settled futures contract on copper and another for a cash-settled futures contract on a stock index price series.[86] The examples are intended to show how a DCM or SEF may use the guidance provided in appendix C to part 38 to develop the concise explanation and analysis to submit with a product self-certification filing. A16z supported the inclusion of the two examples provided in the NPRM,[87] and requested the Commission add an example focused on a digital asset.[88] A16z suggested that the Commission explicitly state it will not treat the self-certification of digital assets products and rules differently from other commodities.[89] A16z stated that the NPRM appears to reject CFTC Staff Advisory 18–14 (''Advisory 18–14'') because the NPRM identifies activities that would be sufficient to meet the proposed rules for self-certification, but would not meet Advisory 18–14.[90] Cboe commented that appendix C to part 38 is guidance and should continue to apply as guidance.[91]

In response to these comments, the Commission notes that part 40 and the amendments adopted in this Final Rule are designed to apply across the many different types of products that are traded on DCMs and SEFs, cleared by DCOs and reported to SDRs. A product's compliance, and demonstration of compliance, is a fact and circumstances specific analysis. Regardless of the underlying asset class of a product being listed for trading, when a DCM or SEF submits a new derivatives product via certification, the terms and conditions of the product should be designed to reflect the relevant commodity characteristics used by market

[78] CEA sections 5(d)(3) and 5h(f)(3).

[79] CEA sections 5(d)(5) and 5h(f)(6).

[80] *See* Better Markets at 2–4.

[81] The Commission retains the authority in § 40.2(b) to obtain 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 applicable requirements of the Act or the Commission's regulations or policies thereunder.

[82] Regulation § 40.2 (a)(3)(v) already requires that the explanation and analysis 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. For a discussion of costs, see the Cost Benefit Considerations section below.

[83] *See also* DCM Core Principle 7 (Availability of General Information) and implementing §§ 38.400(a) and 38.401.

[84] 17 CFR part 38, appendix C. Guidance set forth in appendix B to part 38 states that a DCM may use the appendix C Guidance as guidance in meeting DCM Core Principle 3 for new product listings. 17 CFR part 38, appendix B, Core Principle 3 Guidance. For a discussion of the differences between §§ 40.2(a) and 40.3, see below at section II.C.1.

[85] Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts; Request for Comment, 88 FR 89410 (December 27, 2023).

[86] NPRM at 61436.

[87] No other comments were received in response to the two specific product examples provided in the NPRM.

[88] A16z at 6.

[89] A16z at 2.

[90] Specifically, A16z stated that an entity complying with appendix C to part 38 would satisfy the proposed completeness standard, but Advisory 18–14 addresses more than appendix C (such as an information sharing agreement with any underlying spot markets). A16z at 2–4. A16z suggested the Commission make explicit that the Commission is not adopting 18–14. A16z at 4.

[91] Cboe at 3.

participants transacting in the cash market for that commodity as well as cash-market practices for pricing and delivering that commodity, as applicable.[92]

Appendix C to part 38 is intended to assist registered entities in developing new products (including due diligence, compliance, and documentation thereof). The guidance is not altered by the amendments adopted in this Final Rule. The Commission agrees that Appendix C to part 38 is and remains guidance. The Commission is including below the two illustrative examples provided in the NPRM that show what information a DCM or SEF should include in the explanation and analysis portion of its self-certification for a product it intends to list for trading pursuant to § 40.2. While the Commission will not at this time provide additional examples for other asset classes generally in this Final Rule, the Commission notes that the examples provided are intended to serve as representative samples of what information an exchange should include in a self-certification. However, the Commission notes that each product is unique and may raise novel issues that require additional analysis or explanation not provided in the examples below. In this sense, digital assets will not be treated differently than the other commodities writ large, because the diversity of other commodities already requires a case by case determination of what an exchange should include in a self-certification. Staff remain available to answer any questions as DCMs and SEFs contemplate novel products and are uncertain of their compliance obligations.[93]

A DCM or SEF would satisfy the first sentence of § 40.2(a)(3)(v) with respect to Core Principle 3 by concisely explaining how the concepts described in appendix C to part 38 are addressed for the contract.[94] 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.[95] 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.[96]

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 what would meet the standard articulated in § 40.2(a)(3)(v) of ''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.''

Generally, as noted above, when listing a cash settled or physically settled contract on a commodity, the contract must comply with, among any other relevant provisions, DCM Core Principles 3 and 5,[97] SEF Core Principles 3 and 6,[98] and part 150. To be a complete and concise explanation and analysis of compliance with those requirements, 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 contract characteristics described in appendix C to part 38. Appendix C to part 38 provides guidance on the quality standards that should be defined for the underlying commodity in the contract's terms and conditions for a physically-settled futures contract.[99] 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.[100]

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.[101] 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 Cathodes (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. Moreover, for a physically-settled futures contract on Grade 1 Electrolytic Copper Cathodes, the DCM should provide its analysis of the estimated deliverable supply of the copper meeting the contract specifications located at the delivery facilities identified by the DCM for the contract, along with the DCM's explanation and analysis explaining how the estimated deliverable supply was used to set an exchange-set speculative position limit in accordance with DCM Core Principle 5 and § 150.5.[102]

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

[92] *See* definition of terms and conditions in § 40.1, CEA sections 5(d)(3) and 5h(f)(3). *See also* explanation of Core Principle 3 in appendix C to part 38.

[93] Including new examples could create a logical outgrowth problem under the Administrative Procedures Act.

[94] For a product a DCM or SEF elects to submit for Commission review and approval, the DCM or SEF would satisfy the first sentence of § 40.3(a)(4) with respect to Core Principle 3 by explaining how the concepts described in appendix C to part 38 are addressed for the contract. As noted above, more information is needed for a 40.3 filing in order for the Commission to make an independent assessment to decide whether to approve the product than is required to understand the compliance diligence completed by a DCM or SEF in connection with their 40.2 self-certification filing of a new product.

[95] *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.

[96] *See id.*

[97] CEA section 5(d)(3) and (5).

[98] CEA section 5h(f)(3) and (6).

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

[100] *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).

[101] *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).

[102] *See* § 150.5(b)(1), part 38, § 38.201 Additional sources for compliance. Appendix C to part 38.

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.[103] Appendix C to part 38 provides guidance on the cash settlement price calculation for a cash-settled futures contract.[104] 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, and that price series should be publicly available, timely and reliable.[105] The DCM or SEF should include this information in its explanation of how the product complies with the applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.

As a specific product example for a cash-settled excluded commodity, when listing a cash-settled futures contract on a stock index price series, such as the S&P 500 (a stock index of large capitalization stocks listed on U.S. stock exchanges), the DCM should specify how the cash settlement price based on the S&P 500 Index is reflective of the underlying cash-market, and how that price series is reliable, publicly available and timely.[106] 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.[107] The DCM should describe how the S&P 500 Index is considered by industry as an accurate and reliable index of large capitalization stocks by describing how the index is used as a benchmark for measuring the movements of the U.S. stock exchanges.[108] The DCM should describe how frequently the index is calculated and where it is disseminated to the marketplace to describe how the index is publicly available and timely.[109] Moreover, for a cash-settled futures contract on the S&P 500, the DCM should provide its analysis of trading in S&P 500 futures or similar index futures and explain how this analysis was used to set an exchange-set position limit or position accountability level in accordance with DCM Core Principle 5 and § 150.5.[110]

While this rulemaking does not provide an example specifically for contracts on digital assets, the examples above for cash-settled contracts and physically-settled contracts are applicable for contracts on digital assets that are cash-settled or physically-settled, just as the examples provide guidance on contracts on agricultural, energy, metals, and financial commodities that are cash-settled or physically-settled. Appendix C to part 38 provides guidance on the relevant characteristics of the underlying commodity and contract terms and conditions that should be considered when the DCM or SEF is explaining how and why a contract is not readily susceptible to manipulation in compliance with Core Principle 3. Appendix C to part 38 also provides guidance on the estimated deliverable supply on the underlying commodity that should be considered when the DCM or SEF is explaining how and why a contract complies with DCM Core Principle 5 or SEF Core Principle 6 (Position Limits or Accountability).

5. Differences Between §§ 40.2 and 40.6

In addition to the comments noted above regarding § 40.2, Better Markets commented that the NPRM "doesn't adequately address the discrepancy in the way the Commission reviews self-certified products in CFTC Regulation § 40.2 as compared to the way it reviews self-certification of rules in CFTC Regulation § 40.6." [111] Better Markets requested a 10-business day review for products certified under § 40.2 (and noted in support of this request that the U.S Securities and Exchange Commission adopted a 10-business day period for products to be listed on security-based swap execution facilities), and to expand the stay in § 40.2(c) [112] to mirror § 40.6(c)(1) [113] and allow the Commission to postpone the certification of a product when that product introduces novel or complex issues necessitating extended analysis or is accompanied by inadequate explanation.[114]

By contrast, Coinbase stated that the Commission lacks statutory authority to reject or stay a self-certified submission for a product and suggested the proposed change to § 40.2(a)(3)(v) would create procedural confusion by incorrectly implying the Commission has this authority if it determines the registered entity did not satisfy the proposed prescriptive standard.[115] Coinbase and A16z pointed to the differences in statutory text that apply to self-certified products and self-certified rules.[116] A16z urged the Commission to reconsider its "rationale and authority for more extensive product self-certifications" given the differences in statutory documentation requirements between product and rule self-certifications.[117]

In response to those comments, the Commission notes that CEA section 5c(c)(2) and (3) provide for a 10 business day review period for rules and rule amendments that are self-certified and a process to stay the certification of a rule or rule amendment that has novel or complex issues that require additional time to analyze, an inadequate explanation by the

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

[104] 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.

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

[106] *See* CEA Sections 5(d)(3), §§ 38.200 and 201, and appendix C to part 38, paragraphs (c)(3)(iv) and (v).

[107] *See* CEA section 5(d)(3), §§ 38.200 and 201, and appendix C to part 38, paragraph (a)(2).

[108] *See* CEA section 5(d)(3), §§ 38.200 and 201, and appendix C to part 38, paragraph (a)(2).

[109] *See* CEA section 5(d)(3), §§ 38.200 and 201, and appendix C to part 38, paragraph (a)(2).

[110] *See* § 150.5(b)(1), part 38, § 38.201 Additional sources for compliance. Appendix C to part 38.

[111] Better Markets at 2.

[112] Pursuant to § 40.2(c), the Commission "may stay the listing of a contract [certified pursuant to § 40.2(a)] during the pendency of Commission proceedings for filing a false certification or during the pendency of a petition to alter or amend the contract terms and conditions pursuant to Section 8a(7) of the Act." The analogous stay language for rules is set forth in § 40.6(c)(4). Pursuant to § 40.6(c)(4), the Commission "may stay the effectiveness of an implemented rule during the pendency of Commission proceedings for filing a false certification or during the pendency of a petition to alter or amend the rule pursuant to section 8a(7) of the Act."

[113] Regulation § 40.6(c)(1) states in relevant part that the Commission "may stay the certification of a new rule or rule amendment submitted pursuant to [40.6(a)] . . . on the grounds that the rule or rule amendment presents novel or complex issues that require additional time to analyze, the rule or rule amendment is accompanied by an inadequate explanation or the rule or rule amendment is potentially inconsistent with the Act or the Commission's regulations thereunder."

[114] Better Markets at 5–7.

[115] Coinbase at 2 and 6.

[116] A16z further noted that "5c(c) has extensive provisions for the Commission to review and stay certifications of rules, but it has no similar provisions for products . . . If these statutory differences do not suggest that the CFTC lacks the authority to require extensive disclosures as part of the "written certification" of a product, at a minimum they suggest that a product self-certification should be materially more limited than a rule self-certification."

[117] A16z at 5.

submitting registered entity, or a potential inconsistency with the CEA or Commission regulations.[118] By contrast, the CEA does not provide for a 10 business day review period or an analogous stay process for products that are self-certified. Consistent with these statutory differences, for self-certified products, the Commission did not propose in the NPRM, and is not adopting, either a 10-business day review period or a stay process analogous to § 40.6(c)(1).

In response to the comment suggesting that the Commission reconsider its ''rationale and authority for more extensive product self-certifications given the differences in statutory documentation requirements for product self-certification versus rule self-certifications'' and the comment stating that the statutory differences suggest that a product self-certification should be materially more limited than a rule self-certification, the Commission notes that it is rational that the Commission needs more documentation or information at the time a new product filing is initially submitted pursuant to § 40.2 and all the terms and conditions of the new product are established than at the time a filing is submitted to amend the terms or conditions of an existing product pursuant to § 40.6. As discussed above, the second sentence of existing § 40.2(a)(3)(v) requires that the explanation and analysis submitted to support a product self-certification ''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.'' The Commission notes it did not propose, and is not adopting, any amendments to the second sentence in § 40.2(a)(3)(v).

By contrast, § 40.6(a)(7)(v) does not include this documentation requirement. In the 2011 Final Rule, the Commission stated that it elected not to adopt a documentation requirement in § 40.6(a)(7)(v) for initial rule submissions because section 5c(c) of the Act provides staff with ten business days to review new rules and rule amendments and, if necessary, authorizes staff to prevent them from becoming effective until staff receives adequate information from the submitting entity.[119] As noted therein, the Commission's staff may request additional information at any time during the applicable rule review period pursuant to existing § 40.6(a)(8). The Commission further stated that registered entities therefore should have sufficient incentives to provide adequate explanations of new submissions under § 40.6 without the provision of actual documentation.[120]

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

1. 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.'' As noted in the NPRM, 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 proposed to amend § 40.3(a)(4) to clarify that the regulation requires an explanation and analysis ''that is complete with respect to the product's terms and conditions, the underlying commodity and the product's compliance with the applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.'' [121] As noted in the NPRM, 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's terms and conditions with the applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.

ISDA and FIA supported the additional requirements for registered entities to provide ''complete'' information regarding a new product's terms and conditions under § 40.3.[122] ISDA and FIA stated that it is critical that CFTC staff have access to all relevant information in its review of new product submissions, including for new asset classes such as cryptocurrency products supporting the evolution of digital assets or environmental and carbon products to support the green transition.[123]

A16z suggested the final rule would benefit from a more fulsome explanation of the requirements necessary to satisfy the completeness standard under § 40.3, or alternatively, further clarification regarding what factors could make a submission incomplete under § 40.3 (and what additional activity, burden, and costs are necessary to comply with the new rule to help stakeholders understand what additional information, if any, the Commission requires).[124] A16z requested that the Commission provide an example of how the new language in § 40.3(a)(4) applies to digital assets.[125]

In response to the request for a more fulsome explanation, the Commission notes by way of background that when a DCM, SEF or DCO voluntarily requests that the Commission approve a new product pursuant to CEA section 5c(c) and § 40.3, the standard of review that the Commission applies in reviewing the product is set forth in § 40.3(b). Regulation § 40.3(b) states that ''[t]he Commission shall approve a new product unless the terms and conditions of the product violate the Act or the Commission's regulations.'' [126] As noted above and in the NPRM, the amendment to § 40.3(a)(4) is intended to ensure the Commission receives adequate information regarding the product and the commodity underlying the product to analyze whether the terms and conditions of the product submitted for voluntary Commission review and approval violate the CEA or Commission regulations.

Because the DCM, SEF or DCO is requesting that the Commission review the product for Commission approval pursuant to § 40.3, the Commission needs more information for § 40.3

[118] A private citizen stated that the NPRM does not define what constitutes a novel or complex issue, or how the Commission would determine if a submission is inconsistent with the CEA or the Commission's regulations, and suggested that the Commission better define what constitutes a novel or complex issue, and how the Commission would determine if a submission is inconsistent with the CEA or the Commission's regulations. Ravnitzky at 1–2. Given that the Commission did not propose amendments to these standards, the Commission is not positioned to address them herein.

[119] 2011 Final Rule at 44782.

[120] 2011 Final Rule at 44782.

[121] While the Commission is amending the regulation to include the word ''complete,'' the Commission notes that the 'explanation and analysis' requirement in § 40.3(a)(4) does not include the qualifier that the submission be 'concise' for the same reasons discussed below in footnote 144.

[122] FIA/ISDA at 1.

[123] FIA/ISDA at 1.

[124] A16z at 7. A16z referenced note 47 in the NPRM and stated that ''We are left only with a statement that the Commission requires ''a more detailed explanation'' without any further exposition about what additional details are required.''

[125] A16z at 6.

[126] *See also* CEA section 5c(c)(5)(B).

submissions than for § 40.2 submissions—hence the inclusion of the word ''concise'' in § 40.2 and the omission of the word ''concise'' in § 40.3. Specifically, pursuant to § 40.3, the Commission needs to receive complete information regarding the product's terms and conditions, the commodity underlying the product, and the product's compliance with applicable provisions of the Act (including core principles) and the Commission's regulations to understand and assess whether the terms and conditions of the product comply with the Act (including core principles) and the Commission's regulations.[127] The products offered for trading and clearing by registered entities vary widely, and the applicable statutory and regulatory requirements that apply to any particular product thus also vary widely. Each registered entity should be familiar with the statutory and regulatory requirements that apply for a particular product, and therefore should be able to determine what information is reasonable and appropriate for the submission to demonstrate compliance with these requirements.[128]

In response to the request for a digital asset example, the Commission notes it will not at this time provide guidance specifically for digital assets, but that registered entities are always welcome to reach out to staff if they have any questions regarding how the regulations apply to products they are contemplating.[129]

The Commission is adopting the amendments to § 40.3(a)(4) as proposed.

2. Amendments to § 40.3(a)(10)

Regulation § 40.3(a)(10) provides that when a DCM, SEF or DCO voluntarily submits a contract for Commission approval, Commission staff may request 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. As noted in the NPRM, § 40.3(a)(10) required the registered entity to provide the requested information by the open of business two business days after the date Commission 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.

In the NPRM, the Commission proposed 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 a DCM, SEF or DCO needs to respond depends on the nature and scope of the requested information. The Commission received no comments on this proposed amendment and is amending § 40.3(a)(10) as proposed.

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

The Commission is reorganizing and amending 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 is reorganizing § 40.3 as proposed 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).[130] The Commission is reorganizing § 40.3(d) as proposed to address the Commission's determination, including: approval through the passage of the applicable review period; and non-approval.

As noted in the NPRM, § 40.3(c) provides that all products submitted for Commission approval under § 40.3(c) shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of an extended period as provided under § 40.3(d), ''unless notified otherwise within the applicable period;'' provided that the conditions set forth in § 40.3(c)(1) and (2) are satisfied. The Commission is moving the notification language from the introductory paragraph of § 40.3(c) to § 40.3(d)(1). The Commission is replacing the phrase ''unless notified otherwise within the applicable period'' (which provides a vague reference to the notification involved) with the phrase ''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 proposed to amend the condition in § 40.3(c)(2) (which the Commission is moving to § 40.3(c)(4)) that must be met for the deemed approval to be effective. The condition in § 40.3(c)(2) 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.[131] In the NPRM, the Commission proposed to revise this condition such that any substantive amendment or supplementation by the submitting entity, including an amendment or supplementation requested by the Commission, would be treated as a new submission under § 40.3.

The Commission received two comment letters responding to proposed § 40.3(c)(4). CME Group opposed the proposed amendment, noting that the ''Commission presumably understands the basis for its requested change or changes so it should not need an additional . . . 45-day review period . . . to review the changes it has asked for.'' [132] Coinbase disagreed with the review period restarting ''under circumstances when [the Commission] has also determined that the DCM's original filing satisfies the requirements of Regulation § 40.3(a).'' [133]

[127] By contrast, as discussed above, for § 40.2 self-certification submissions, the Commission needs to receive 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.

[128] As registered entities contemplate selecting to submit new products for voluntary Commission review and approval pursuant to § 40.3 in the future, Staff remain available to review drafts of the § 40.3 filings and to offer feedback on what, if any, additional information would be required in order for a submission to be ''complete.''

[129] Including new examples could create a logical outgrowth problem under the Administrative Procedures Act.

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

[131] As noted in the NPRM, 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.

[132] CME Group at 4.

[133] Coinbase at 10. Coinbase further stated that ''Presumably, Commission staff will have carefully reviewed and analyzed the original complete submission before asking the DCM to take such

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The Commission considered the comments received on the proposed amendments to § 40.3(c)(4) and is revising the amendments to § 40.3(c)(4) such that the review period will not be restarted as a result of a DCM, SEF or DCO making an amendment or supplement in response to a Commission request. Specifically, as revised and adopted, § 40.3(c)(4) will provide that ''[a]ny amendment or supplementation made by the registered entity to the submission will be treated as the filing of a new submission under this section and be subject to the initial 45-day review period in accordance with paragraph (c)(1) of this section, unless the amendment or supplementation is requested by the Commission or is made for correction of typographical errors, renumbering or other non-substantive revisions.'' [134] As revised and adopted, § 40.3(c)(4) is not substantively different than current § 40.3(c)(2).

The Commission also proposed to amend § 40.3(d)(1) (which the Commission proposed to move to § 40.3(c)(2)) to provide that the Commission may extend the initial 45 day review period for a product approval request for up to an additional 45 days if the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner. As noted in the NPRM, the Commission has the authority to extend its review of a request for rule approval under § 40.5 if the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner,[135] and the Commission believes having the same ability to extend reviews of voluntary requests for product approval under § 40.3 will better enable the Commission to review those products. The Commission received no comments on this proposed amendment, and is adopting the amendment as proposed.

The Commission is adopting § 40.3(c)(5) as proposed to extend the review period under § 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.[136] In addition, the Commission is moving text from § 40.3(d)(1) to § 40.3(c)(2) and revising the text to permit an additional extension of *up to* 45 days. By way of background, § 40.3(d)(1) provided 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 could not exceed the 90 days permitted by section 5c(c)(4)(C) of the CEA,[137] absent agreement by the requestor to a further extension.[138] To ensure that the total review period will not extend beyond 90 days after the request is submitted under the amended regulations, the Commission is changing as proposed the extended review period from ''[a]n additional 45 days'' under § 40.3(d)(1) to ''up to an additional 45 days'' in amended § 40.3(c)(2).[139] The Commission received no comments on these proposed changes.

The Commission also is making explicit in § 40.3(c)(3) as proposed that the Commission may at any time extend its review period for any period of time (including beyond the 90-day review period), provided that it does so with the written agreement of the registered entity.[140]

Additionally, the Commission is redesignating § 40.3(f)(1) as § 40.3(e)(1) and making the proposed amendments to this provision. Regulation § 40.3(f)(1) provided 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 is 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 to help avoid any confusion as to the effect of the non-approval. Also, the changes to the section will improve consistency with §§ 40.5(e)(1) and 40.6(c)(5)(i). The Commission received no comments on these proposed changes.

Finally, the Commission is redesignating § 40.3(f)(2) as § 40.3(e)(2) and adopting the proposed amendments to this provision. Specifically, § 40.3(f)(2) provided that notification 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 is amending the text as proposed by replacing the words ''refusal'' with ''determination not'', and replacing the words ''does not violate the Act'' with ''complies with the Act.'' The Commission believes these amendments will have the effect of increasing clarity and provide consistency with §§ 40.2(a)(3)(iv) and 40.5(f)(2) (which the Commission is renumbering as § 40.5(e)(2)). The Commission received no comments on these proposed changes.

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

1. Clarification Regarding Scope of § 40.4 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

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action and this is no compelling reason why it should need a new 45-day window to complete its review of a submission with which it should already be familiar. If the new product raises novel or complex issues, the Commission has clear authority under the rule to extend the review period up to an additional 45 days . . . and to extend the review period further if the DCM agrees. Building in an arbitrary extension mechanism that could ensnare a DCM in a chain of potentially endless restarts of the clock flies in the face of the timing certainty that CEA section 5c(c)(4) is designed to provide to DCMs. The justification offered . . . does not warrant this dramatic change to Regulation § 40.3.'' *Id.*

[134] To effectuate this change, the Commission is removing the sentence currently in § 40.3(c)(2) that states ''Any voluntary, substantive amendment by the submitting entity will be treated as a new submission under this section.'' This sentence is redundant and its removal makes § 40.3(c)(4) more consistent with the analogous provision for rules submitted for Commission approval (§ 40.5(c)(4)).

[135] *See* § 40.5(d)(1) (which is being moved to § 40.5(c)(2)). Under both current § 40.5(d)(1) and final § 40.5(c)(2), the timely manner standard is dependent upon the facts and circumstances. The Commission proposed, and is adopting, the same timely manner standard for § 40.3(d)(1).

[136] The Commission is revising 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.

[137] 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.''

[138] Because an extension to which a registered entity may agree under final § 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.

[139] For example, if the end of the initial 45-day review period would fall on a Saturday, it would be extended by § 40.3(c)(5) to Monday, the next business day, for a total of 47 days. Any additional extension under § 40.3(c)(2) could not exceed 43 days (47 + 43 = 90).

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

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 requirement is clear, the Commission is adding the word ''product's'' to the text of § 40.4(a) to modify ''term or condition'' as used therein and replacing the words ''should not be submitted under this section'' in § 40.4(b) with the words ''are not required by this section to be submitted for Commission approval under the procedures of § 40.5,'' each as proposed. The Commission did not receive any comments responding to any of the amendments proposed to § 40.4.

By way of background, as noted in the NPRM, 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 must submit 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 enumerated in § 40.4(b)(1) through (4) through self-certification pursuant to § 40.6(a) or notice filing pursuant to § 40.6(d), as applicable.[141] 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 must 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, the § 40.6(d) notice process or the § 40.6(e) process (as applicable), all in accordance with § 40.4(b)(5)), the Commission is adding an appendix E to part 40 as proposed and including 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) as proposed. Specifically, appendix E to part 40 provides that a non-material change: should not affect a reasonable trader's decision to enter into, or maintain, a position; should not affect a reasonable trader's decision to make or take delivery on the contract or to exercise an option on the contract; and should not have an effect on the value of existing positions, including, but not limited to, a change affecting the price of the contract due to a change in the commodity quality characteristics of the existing contract, a change to the size of the existing contract, or a change to a cost of effecting delivery for the existing contract. The Commission did not receive any comments responding to the proposal of new appendix E to part 40.

2. Additional Amendments to § 40.4(b)

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

The Commission is removing the reference to ''changes in no cancellation ranges'' in § 40.4(b)(3) as proposed. As discussed below in section II.F.4, the Commission is amending § 40.6(d) to allow a registered entity to file rules and rule amendments governing changes in no cancellation ranges pursuant to the notification procedures of § 40.6(d). By filing rules and rule amendments governing no cancellation ranges pursuant § 40.6(d), such rules and rule amendments would be non-material pursuant to § 40.4(b)(1), making the current language ''changes in no cancellation ranges'' in § 40.4(b)(3) redundant and unnecessary.

Additionally, to enhance readability of § 40.4(b)(5), the Commission is moving 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 is deleting redundant text in § 40.4(b)(5)(iii). The Commission is adding 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 subject non-material rule or rule amendment. The Commission believes the copy of the previously approved rule or rule amendment will provide market participants with context and background that will be helpful information in understanding the subject rule or rule amendment and why it is non-material.

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

1. Reorganization and Clarification of § 40.5

The Commission is reorganizing and clarifying § 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. As amended, paragraphs (a) and (b) of § 40.5 remain largely unchanged, with the exception of the conforming amendments previously discussed[142] and the two changes discussed below. FIA and ISDA stated that they are generally supportive of all the clarifications, enhancements and reorganizations of § 40.5.[143]

The Commission proposed to clarify that § 40.5(a)(5) requires 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 for the same reasons the language regarding completeness was proposed in §§ 40.2(a)(3)(v), 40.3(a)(4), and 40.6(a)(7)(v). As noted in note 47 of the

[141] Regulations 40.4(b)(1) through (4) state that the changes covered therein are not material. Thus, a DCM filing a change under § 40.4(b)(1) through (4) is not required to file a non-materiality explanation. In addition to the § 40.6(a) self-certification process and the § 40.6(d)(2) notice filing process (which the Commission is re-designating as § 40.6(d)), if applicable, a DCM may also place a non-material rule change into effect without certification or notice to the Commission if the conditions enumerated in § 40.6(d)(3) (which the Commission is re-designating as § 40.6(e)) are satisfied.

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

[143] FIA/ISDA at 1.

NPRM, the ''explanation and analysis'' requirement in § 40.5(a)(5), like the ''explanation and analysis'' requirement in § 40.3(a)(4), does not include the qualifier that the submission be ''concise.'' [144] A16z suggested that more explanation is required regarding what additional information is needed for the explanation and analysis to be ''complete'' in the absence of the concise language.[145] A16z referenced note 47 in the NPRM and suggested further explanation is required than the statement that the Commission requires ''a more detailed explanation.'' [146]

In response to the request for additional explanation, the Commission notes by way of background that pursuant to CEA section 5c(c)(5)(A) and § 40.5(b), the Commission shall approve a new rule or rule amendment of a registered entity that the registered entity submits for Commission approval pursuant to CEA section 5c(c)(4) and in accordance with § 40.5 unless the rule or rule amendment is inconsistent with the Act or the Commission's regulations. For the Commission to review a new rule or rule amendment of a registered entity for voluntary approval pursuant to this standard, the Commission needs to understand the rule or rule amendment and the operation, purpose, and effect of the rule or rule amendment. As noted above and in the NPRM, the amendment to § 40.5(a)(5) is intended to ensure the Commission receives adequate information regarding the rule or rule amendment to analyze whether the rule or rule amendment submitted for voluntary Commission review and approval is inconsistent with the Act or the Commission's regulations.

Because the registered entity is requesting that the Commission review the rule or rule amendment for Commission approval pursuant to § 40.5, the Commission needs more information for § 40.5 submissions than for § 40.6 submissions—hence the inclusion of the word ''concise'' in § 40.6 and the omission of the word ''concise'' in § 40.5. Specifically, pursuant to § 40.5, the Commission needs to receive an explanation and analysis that is complete with respect to 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, to understand and assess whether the rule is inconsistent with the CEA or the Commission's regulations. The rules and rule amendments implemented by registered entities vary widely, and the statutory and regulatory requirements that apply to any particular rule or rule amendment thus also vary widely. Each registered entity should be familiar with the statutory and regulatory requirements that apply for a particular rule or rule amendment, and therefore should be able to determine what information is reasonable and appropriate for the submission to demonstrate compliance with these requirements. The Commission is amending § 40.5(a)(5) as proposed to clarify that this regulation requires 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.

Regulation § 40.5(a)(6) provides that the registered entity shall certify that it posted a notice on its website of the pending rule with the Commission. To clarify that the reference to the ''pending rule'' in § 40.5(a)(6) is intended to refer to the request of the registered entity for approval by the Commission of the new rule or rule amendment, the Commission is amending the text of § 40.5(a)(6) as proposed by replacing the words ''pending rule with the Commission'' with the words ''a notice of its request for Commission approval of the new rule or rule amendment.'' The amended language will also use language that is consistent with § 40.3(a)(9).[147] No comments were received in response to the proposed amendments to § 40.5(a)(6).

The Commission proposed to amend § 40.5(c) and (d), which address the Commission's review and determination (*i.e.,* approval or non-approval) of new rules and rule amendments. To enhance readability, the Commission is reorganizing § 40.5 so that all of the provisions that may affect the length of the review period of a rule submitted for Commission approval pursuant to § 40.5 appear together in § 40.5(c)—with the exception of expedited approval (which is moving to § 40.5(d)(2)).[148] The Commission is adding § 40.5(c)(6), as proposed, to extend the review period under § 40.5(c)(1) [149] when the review period would end on a day that is not a business day to instead end on the next business day.[150] The Commission is moving the text from § 40.5(d)(1) to § 40.5(c)(2)) and revising the text to permit an additional extension of *up to* 45 days. No comments were received in response to any of the proposed amendments to § 40.5(c) or (d).

By way of background, § 40.5(d)(1) (which the Commission is 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 § 40.5(c) and (d)(1), the initial 45-day review period and the 45-day extended review period could not exceed the 90 days permitted by section 5c(c)(4)(C) of the CEA, absent agreement to a further extension by the registered entity that requested the review. To ensure that the total review period will not extend beyond 90 days after the request is submitted under the amended regulations, the Commission is adopting the proposed change to 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 § 40.5(c)(6) to Monday, the next business day, for a total of 47 days, any additional extension under § 40.5(c)(2) could not exceed 43 days (47 + 43 = 90).

The other changes the Commission is adopting to the regulatory text in § 40.5(c) are non-substantive and are not intended to alter the length of time the Commission has to review a rule submitted for Commission approval under § 40.5(a).[151] As part of these non-

[144] *See* NPRM at 61439. *See also* 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.'').

[145] A16z at 7.

[146] *Id.*

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

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

[149] 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.

[150] The Commission is revising the header of § 40.5(c) from ''Forty-five- day review'' to ''Commission review'' to reflect the fact that, pursuant to § 40.5(c)(6), the review period may be extended beyond forty-five days due to adjustments so that the review period ends on a business day.

[151] The Commission is adding descriptive language into § 40.5(c)(5) to provide the reader with

substantive amendments, the Commission is making explicit in § 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.[152]

The Commission is reorganizing § 40.5(d) to address the Commission's determination with respect to a proposed rule or rule amendment, including: approval through the passage of the applicable review period; expedited approval; and non-approval. The Commission is renumbering § 40.5(g), which addresses expedited approval of a proposed rule or rule amendment, as § 40.5(d)(2) and amending it 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 is also removing the condition that ''the Commission may, at any time, alter or revoke the applicability of such a notice to any particular product or rule amendment.'' [153] The Commission believes that the quoted text that these amendments will remove is not necessary or could be misconstrued in connection with the ability of the Commission to approve proposed rules and rule amendments that are consistent with the CEA and Commission regulations on an expedited basis.[154] The Commission is also renumbering § 40.5(f), which addresses the impact of non-approval, as § 40.5(e). No comments were received in response to any of proposed § 40.5(e).

The text of § 40.5(f)(1), which the Commission is renumbering 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.'' The revisions or supplements under current § 40.5(f)(1) and new § 40.5(e)(1) must provide a substantive basis to treat the revised rule or supplemented submission differently from the previously submitted rule. To clarify that ''[n]otification to a registered entity'' means a notification of non-approval by the Commission, the Commission is amending this text by adding the words ''of the Commission's determination not to approve a new rule or rule amendment''. The Commission also is adding the words ''or supplemented'' to the text to clarify that supplemented submissions are ''reviewed without prejudice.'' [155] The Commission believes this will help avoid potential confusion and make the section more consistent with final § 40.5(e)(2) (which was previously § 40.5(f)(2)).

Regulation § 40.5(f)(2), which the Commission is renumbering as § 40.5(e)(2), provides that 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 is presumptive evidence that the entity may not truthfully certify the same, or substantially the same, proposed rule or rule amendment under § 40.6(a). To clarify that certification under § 40.6(a) is referring to the certification that the rule or rule amendment complies with the CEA and the Commission's regulations, the Commission is amending the text to add ''complies with the Act and the Commission's regulations thereunder'' and to move ''under § 40.6(a)'' to earlier in the text. The Commission believes these changes will enhance clarity and improve context.[156]

F. § 40.6—Self-Certification of Rules

1. 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 is adopting various non-substantive amendments to § 40.6(a) as proposed. The 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 that do not have any open interest from the introductory text to a new § 40.6(a)(9); and revising the header and ordering of § 40.6(a)(6) to better reflect its purposes.[157] The Commission also is removing references to dormant rules, the submission cover sheet, and the Secretary of the Commission, as previously discussed, and is correcting 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.''

FIA and ISDA stated that they are generally supportive of all the clarifications, enhancements and reorganizations of § 40.6 regarding the Commission's review and approval of new rules and amendments submitted by DCOs.[158]

The Commission proposed to replace the word ''of'' in § 40.6(a)(7)(v) with the words ''that is complete with respect to'' such that this condition, as amended, reads as follows: ''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.''

As the Commission articulated in 2011, like the explanation and analysis required for new product submissions that are self-certified under § 40.2, 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.'' [159] Similar to the discussion above in section II.B.3 regarding the explanation and analysis that must accompany new contract submissions under § 40.2, the Commission has found that some new rule submissions, while being concise, have not provided adequate information to enable the Commission to complete its analysis of the compliance of the rules or rule amendments with

context to better understand the interaction of the provisions in §§ 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.

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

[153] The Commission is unaware of ever using this condition.

[154] The Commission is also replacing 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).

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

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

[157] The Commission also is amending § 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.

[158] FIA/ISDA at 1.

[159] 2011 Final Rule at 44782–44783.

applicable provisions of the Act, including core principles, and the Commission's regulations.[160] The Commission proposed to add the words ''that is complete with respect to'' to § 40.6(a)(7)(v) to ensure that, although the explanation be concise, it nevertheless must 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.[161]

In response to the proposed amendments to § 40.6(a)(7)(v), A16z requested that the Commission provide guidance on how market participants can simultaneously satisfy the requirements to be ''complete'' while also being ''concise''.[162] Cboe stated that the word ''complete'' should not be included, and if it is, Cboe requests at a minimum that the Commission clarify that the standard of completeness will be applied in a sensible and reasonable manner.[163] Cboe stated that rule certifications should focus on key points, as reflected by the inclusion of the word ''concise'' in the current and proposed regulatory language which describes the explanation and analysis that is required to be included.[164] Cboe stated that it is important that the application of the rule certification provisions focuses on requiring a concise description of what is relevant with respect to the applicable rule in determining what information should be included instead of completeness for the sake of completeness which can lead to the inclusion of unneeded and irrelevant information.[165]

The Commission has considered the comments received in response to the proposed amendments to § 40.6(a)(7)(v). The Commission notes that prior to a registered entity self-certifying that a rule or rule amendment complies with the Act and Commission regulations thereunder, the registered entity must complete its diligence on the rule or rule amendment to ensure the rule or rule amendment complies with the applicable provisions of the Act, including core principles, and the Commission's regulations thereunder.[166] The registered entity relies upon its own diligence when it self-certifies that the rule or rule amendment complies with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder. The submitted explanation and analysis is necessary for the Commission's review of a rule certification and should allow the Commission to understand the operation, purpose, and effect of the rule or rule amendment and how the registered entity views the rule or rule amendment as compliant with the Act and Commission regulations thereunder.

In response to the request that the Commission provide guidance regarding how a registered entity would satisfy the ''complete'' requirement while also being ''concise,'' the Commission notes that as it articulated in the 2011 Final Rule, ''[a] ''concise explanation and analysis'' should be a clear and informative—but not necessarily lengthy—description of the product or rule and its implications for compliance with applicable law.'' [167] As revised to include ''complete,'' the Commission continues to believe that the concise explanation and analysis required under amended § 40.6(a)(7)(v) should be a clear and informative description of the rule and its compliance with applicable law and is not necessarily required to be lengthy in order to be ''complete.'' The registered entity must include explanation and analysis of 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. Cursory or conclusory explanations will not suffice.

The Commission is thus adding the word ''complete'' to § 40.6(a)(7)(v) as proposed to confirm that it is essential that the registered entity include a concise explanation and analysis of the operation, purpose, and effect of the rule or rule amendment and how and why the rule or rule amendment complies with the applicable core principles and regulations. The term ''complete'' is intended to denote the scope of the explanation and analysis. A complete explanation and analysis in scope will cover all core principles and the Commission's regulations thereunder that are relevant to the specific rule or rule amendment. The core principles and regulations that apply to a particular rule or rule amendment vary depending on the facts and circumstances surrounding the rule or rule amendment.

As noted in the NPRM, the introductory text to § 40.6(a) includes a provision that was intended to enable a registered entity to delist, or withdraw a certification of, a product that does not have any open interest immediately upon a submission provided that the submission complied with the submission and certification requirements in § 40.6(a)(1), (2) and (7).[168] Because the introductory provision has not been well understood, the Commission proposed to clarify it by moving it and adding an explicit statement into the regulatory text. The Commission received no comments on these proposed changes and is adopting these changes as proposed. Specifically, new § 40.6(a)(9) explicitly states that a new rule or a rule amendment that delists, or withdraws the certification of, a product that does not have any 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 (7).

2. 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 proposed 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,

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[160] *See* NPRM at 61440.

[161] *Id.*

[162] A16z at 6.

[163] Cboe at 2–3. Cboe suggested the Commission can achieve the same outcome of requiring pertinent information to be included in rule certification filings by using the word ''of'' instead of the phrase ''that is complete with respect to.'' Cboe stated it believes that the inclusion of the word ''complete'' can lead to the possibility that this standard will be applied in a prescriptive, inconsistent, and unreasonable manner (which would in turn undermine the utility of the rule certification process for registered entities, market participants, and the Commission; delay the ability to implement rule enhancements that benefit the market; and inhibit innovation and competition). Cboe further stated that the concept of completeness is inherently ambiguous and could be applied in a rigid, onerous, arbitrary, and/or subjective manner.

[164] Cboe at 3.

[165] *Id.*

[166] *See* CEA sections 5, 5b, 5h and 21, and parts 37, 38, 39 and 49 of the Commission's regulations.

[167] 2011 Final Rule at 44787.

[168] NPRM at 61440 (quoting the 2011 Final Rule at 44783 as 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.).

renumbering or other non-substantive revisions. Under proposed § 40.6(b), a substantive amendment or supplementation of a rule submission made in response to a Commission request would be deemed a new submission.

CME Group and ICE commented on proposed § 40.6(b) and stated that the review period should not be restarted for amendments requested by the Commission.[169] CME Group noted that the ''Commission presumably understands the basis for its requested change or changes so it should not need an additional . . . 10-day review period . . . to review the changes it has asked for.'' [170] Additionally, ICE requested § 40.6(b) be amended to provide for no restarting of the review period for amendments or supplemental filings made with the consent of Commission Staff.[171]

The Commission considered the comments received on the proposed amendments to § 40.6(b) and is revising the amendments to § 40.6(b) to provide that the review period will not be restarted for amendments or supplements requested by the Commission. Specifically, as revised and adopted, § 40.6(b) will provide that 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 requested by the Commission or is made for correction of typographical errors, renumbering or other non-substantive revisions. The Commission notes that it retains the authority to stay a certification of a new rule or rule amendment submitted pursuant to § 40.6(a) if, among other reasons, the certification is accompanied by an inadequate explanation, or is potentially inconsistent with the Act or the Commission's regulations thereunder.

3. Amendments to § 40.6(c)

Regulation § 40.6(c), together with sections 5c(c)(2) and (3) of the Act, set forth the Commission's procedures for staying a submission pursuant to § 40.6(a). The Commission is adding the phrase ''and can be implemented'' to § 40.6(c)(3) as proposed 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.[172]

The Commission is amending § 40.6 by adding a new § 40.6(c)(5) as proposed to address the effect of a Commission objection to a rule submitted pursuant to § 40.6(a). The provision is based on the similar provision in § 40.5(f) (which is being moved to § 40.5(e)). Regulation § 40.6(c)(5)(ii) as amended provides 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. As adopted, § 40.6(c)(5)(i) provides 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. The revisions or supplements under new § 40.6(c)(5)(i) must provide a substantive basis to treat the revised rule differently from the previously submitted rule. The Commission received no comments in response to the proposed changes to § 40.6(c).

4. 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 proposed to add the following new categories of rules to § 40.6(d)(2): updates to email addresses or other contact information that market participants use to submit block trades; amendments to existing trading months; with respect to a contract for the purchase or sale of a commodity for future delivery or an option on such a contract or an option on a commodity (other than a swap), payment or collection of commodity options premiums or margins and changes to no cancellation ranges; and with respect to a swap, payment or collection of option premiums or margins. The Commission believes that these categories are not substantive for compliance purposes and to the extent rules are addressing these categories, such rules need not be subject to self-certification and Commission review requirements of § 40.6(a).

ICE and CME Group stated that they support the amendments proposed to § 40.6(d)(2).[173] Cboe stated that it is unclear regarding what is meant by the requirement to submit weekly notifications of rule amendments for an amendment to existing trading months in connection with proposed § 40.6(d)(2)(ix).[174] Cboe stated that ''If this provision is referencing an amendment to a DCM's or SEF's rule provisions regarding its contract listing parameters, Cboe agrees that these amendments should be able to be made through a weekly notification of rule amendments.'' [175] In response to Cboe's comment, the Commission notes that an amendment to existing trading months in connection with § 40.6(d)(2)(ix) (as proposed and as amended) includes an addition or removal of contract month listings, provided that they are within the exchange's existing listing rule.[176]

As discussed above in section II.A.5, the Commission believes that registered entities should be able to submit rules or rule amendments governing the payment or collection of commodity options premiums or margins and option 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)(xiii) as these rules or rule amendments are generally operational rather than economic in nature and this change will lower the burden for registered entities and still provide sufficient notice to the Commission. The Commission also 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. The Commission is adopting the amendments to § 40.6(d)(2) as proposed.

Regulation § 40.6(d)(3) set forth various categories of rules that may be implemented without certification or notice to the Commission. The Commission is renumbering § 40.6(d)(3) as § 40.6(e) and making corresponding

[169] CME Group at 3–4; ICE at 2–3.

[170] CME Group at 4.

[171] ICE at 3.

[172] The Commission also is changing the reference in § 40.6(c)(3) from ''proposed certification'' to ''certification.''

[173] CME Group at 3; ICE at 2.

[174] Cboe at 3–4.

[175] Cboe at 4.

[176] For example, if a DCM has a quarterly listing cycle of three years for a contract (March, June, September and December), the DCM could elect to add the nearest two serial listing months on a rolling basis where an additional serial month is listed once a preceding serial month expires (*e.g.* April and May in between March and June; then July and August in between June and September). However, the DCM could not expand the quarterly listing cycle beyond the nearest three years through § 40.6(d)(2)(ix).

non-substantive numbering changes to the paragraphs of the regulation.[177] The Commission is amending § 40.6(d)(3)(ii)(v)(E)*(1)* (which is redesiganted as § 40.6(e)(2)(v)(A)) to add the words ''per contract'' so that it reads ''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 requested comment on whether there are other categories of rules that should be added to § 40.6(d)(2) or (3). ICE requested the Commission also amend § 40.6(d)(2) to allow a DCM to promptly implement changes to price and volatility control mechanism levels in response to prevailing market conditions through the § 40.6(d)(2) weekly notice process.[178] ICE specifically listed the following metrics it would like to be able to change through weekly notices to promptly address disorderly market conditions or mitigate disruptions: maximum order size, reasonability limit levels, price bands, circuit breaker trigger levels, and the duration of a market pause in periods of heightened market volatility.[179] Because these suggested additions have not been included in a proposal on which the public has had the opportunity to provide comment, the Commission cannot consider adopting them here, but the Commission may consider proposing them in a future rulemaking.

Cboe requested that the Commission clarify that DCMs and SEFs may list additional contract listings for a product subsequent to the initial contract listings for that product without any rule submission to the Commission, provided that the additional contract listings are within the parameters of the contract previously established through a rule or product submission to the Commission.[180] Cboe suggested the Commission effectuate this change by expanding the scope of new § 40.6(e)(2)(viii) to include the subsequent listing of trading months which are within the currently established cycle of trading months.[181] Because these suggested additions have not been included in a proposal on which the public has had the opportunity to provide comment, the Commission cannot consider adopting them here, but the Commission may consider proposing them in a future rulemaking.

Eurex Clearing recommended that the Commission expand the categories of rules covered by § 40.6(d)(3) to include rules and rule changes that are unrelated to the DCO's activities that are subject to the Commission's oversight.[182] This proposed category would cover a DCO rule or rule change that: (i) applies to any product class for which it provides clearing services that is outside the scope of the DCO's order of registration with the Commission; (ii) does not affect any product class cleared within the scope of the DCO's order of registration with the Commission; and (iii) does not affect the DCO's general operations.[183] Because this suggested addition has not been included in a proposal on which the public has had the opportunity to provide comment, the Commission cannot consider adopting it here, but the Commission may consider proposing it in a future rulemaking.

G. § 40.7—Delegations

1. 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. In the NPRM, the Commission proposed to amend § 40.7 to enhance the regulation's clarity and utility and to add three new delegations.

The Commission is amending the text of § 40.7(a)(5) as proposed, which delegates the Commission's authority to determine if a proposed rule is material under § 40.4(b)(5). The amendments streamline and simplify the text of the regulation by eliminating text that is not relevant to the delegation and an inconsistent reference to § 40.6(d).[184]

The Commission is amending § 40.7(b)(3) as proposed 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.[185]

The Commission proposed to delegate under proposed § 40.7(a)(1)(iv) and (v) the authority in proposed §§ 40.3(c)(3) and 40.5(c)(3) to extend the applicable review period set forth in §§ 40.3(c) and 40.5(c), respectively, for the period of time agreed to in writing by the registered entity. The Commission did not receive any comments on the proposed amendments to §§ 40.3(c)(3) and 40.5(c)(3). The Commission has determined not to adopt the two delegations proposed as § 40.7(a)(1)(iv) and (v) at this time.

Finally, as discussed above, the Commission is adopting § 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 Clearing and Risk and the Division of Market Oversight, as proposed. CME Group commented in support of this delegation, noting that their DCMs, DCO and SEF collectively submit hundreds of filings each calendar year and that they are confident that the heads of the Divisions will endeavor to make the filing formats as uniform as possible.[186] 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 have the ability to specify the format and manner of filings under these regulations to facilitate the regulations remaining current with technological advances that registered entities and the Commission may use in the future.

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 section 806(e) of the Dodd-Frank Act, requires a SIDCO to provide notice to the Commission not less than 60 days in advance of any proposed change to its rules, procedures, or operations that could ''materially affect the nature or level of risks presented'' by the SIDCO. ''Materially affect the nature or level of risks presented'' is further defined in § 40.10(b). The Commission proposed to revise this definition to provide greater specificity regarding the types of changes that would require advance notice under § 40.10(a), including, but 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

[177] The Commission believes the current numbering is inconsistent with the introductory text of § 40.6(d).

[178] ICE at 2.

[179] *Id.*

[180] *Cboe* at 4.

[181] *Id.* The Commission clarifies that it did not propose any substantive changes to § 40.6(d)(3)(ii)(H)—which is being redesignated as § 40.6(e)(2)(viii).

[182] Eurex at 2–3.

[183] *Id.*

[184] Regulation § 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).

[185] 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).

[186] CME Group at 3.

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).

FIA and ISDA supported the revised definition, noting that the non-exhaustive list provides useful guidance to SIDCOs as to when proposed changes require advance notice.[187] The Commission did not receive any comments opposing the change.

The Commission is adopting the amendment to § 40.10(b) as proposed. As the Commission noted in the NPRM, the ''may include, but are not limited to'' language means that the examples listed in the new 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).

FIA and ISDA also noted that the Commission should provide a public comment period under § 40.10 when a SIDCO submits a rule for Commission review that the Commission believes raises novel or complex issues.[188] FIA and ISDA noted this would align the § 40.10 process for SIDCOs with the self-certification process for all registered entities in § 40.6. The Commission notes that the statutory bases for these processes are different; § 40.6(c) codifies the requirement in section 5c(c)(3)(C) of the CEA for public comment when the Commission determines to stay a rule certification, while § 40.10 codifies section 806(e) of the Dodd-Frank Act, which does not provide for public comment. Further, the change that FIA and ISDA suggest would be outside the scope of this final rule. The Commission notes that even if Commission regulations do not require a public comment period, the Commission may still request public comment if the Commission determines it is appropriate, as it has done in the past.[189]

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

The Commission is adopting as proposed new § 40.10(i), which requires 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. The Commission did not receive any comments on this aspect of the proposal.

3. Technical Corrections to § 40.10

The Commission proposed 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],'' to refer to the definition of ''systemically important derivatives clearing organization'' in § 39.2. The Commission also proposed to revise § 40.10(d) and (h)(3) to remove references to ''the purposes of the Dodd-Frank Act'' that are no longer necessary. The Commission did not receive any comments on these proposed changes. The Commission is adopting these technical amendments as proposed.

I. Technical Correction to Authority Section of Part 40

The Commission is removing as proposed the reference to section 7a of the CEA, which was repealed by the Dodd-Frank Act,[190] 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 issue 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.[191] The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[192] The amendments to part 40 set forth herein impact DCMs, DCOs, SEFs and SDRs. The Commission has previously determined that DCMs,[193] DCOs,[194] SEFs,[195] and SDRs [196] 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 amended rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'') imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any ''collection of information,'' as defined by the PRA. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (''OMB''). The PRA is intended, in part, to minimize the paperwork burden created for individuals, businesses, and other persons as a result of the collection of information by Federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government. The PRA applies to all information, regardless of form or format, whenever the Federal Government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinions, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.

The final rulemaking modifies an existing collection of information previously approved by OMB, for which the Commission has received OMB control number 3038–0093, part 40, Provisions Common to Registered Entities (OMB Collection 3038–0093) (''part 40 Information Collection'').'' [197] The responses to this collection are mandatory. The Commission is revising

[187] FIA/ISDA at 1.

[188] FIA/ISDA at 1–2.

[189] *See, e.g.,* ''CFTC Seeks Public Comment on Proposed Changes to Chicago Mercantile Exchange Inc. Rules Regarding Direct Funding Participants,'' at *https://www.cftc.gov/PressRoom/PressReleases/7661-17.*

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

[191] 5 U.S.C. 601 *et seq.*

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

[193] *Id.* at 18618, 18619.

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

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

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

[197] For the previously approved estimates for OMB Collection 3038–0093, see ICR Reference No. 202312–3038–001, (conclusion date Feb. 9, 2024), available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202312-3038-001.*

its total burden estimates for this clearance to reflect the final rulemaking. 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).[198] The Commission received two comments on its burden analysis under the PRA in the proposal.[199] These comments and the Commission's response are discussed below.

Burden Estimates

The amendments to §§ 40.2(a)(3)(v), 40.3(a)(4), 40.5(a)(5), and 40.6(a)(7)(v) require registered entities to provide complete information.

For the amendments addressing §§ 40.2, 40.3, 40.5, and 40.6, the Commission is retaining its PRA burden estimates discussed in the NPRM. As discussed in the NPRM, the Commission anticipates that these amendments are likely to modestly increase the reporting burden for registered entities, although some registered entities are already providing the information required under the final rule.[200]

Accordingly, the Commission estimates the revised information collection burdens for the part 40 Information Collection associated with the final rule as follows:

Product Submissions (§§ 40.2 and 40.3)

Under §§ 40.2 and 40.3 as finalized, product submissions will be required include complete information. While this is not intended to expand or otherwise alter the scope of the explanation or analysis required in the current regulation, the Commission conservatively estimates some reporting entities may expend some additional time to ensure the completeness of their submissions. The number of respondents remains 70. The Commission estimates that the amendments to §§ 40.2(a)(3)(v) and 40.3(a)(4) may add an additional average 1 hour of burden (for a new total of 22 hours). As set out in the previously approved part 40 Information Collection, the Commission estimates that reporting entities are likely to submit on average an aggregate of 848 reports annually.

One commenter stated that the proposed revision to § 40.2 ''could significantly expand a DCM's regulatory costs for preparing certified product filings.'' [201] Although this commenter did not expressly reference the Commission's PRA burden estimates, the Commission is addressing this comment here as part of its PRA burden analysis. As stated above in section II.B.3 above, the Commission does not anticipate that the new requirement for ''complete'' § 40.2 submissions will constitute a significant expansion in regulatory costs because the registered entities, through their due diligence, will have already collected the information that they will now provide in their § 40.2 filings. Additionally, the new submissions do not necessarily need to be lengthy. Thus, the Commission continues to estimate an increase of one burden hour per product filing, averaged across all filers.

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

Estimated number of respondents: 70.

Estimated number of reports per respondent: 12.[202]

Average number of hours per report: 22.[203]

Estimated gross annual reporting burden (hours): 18,480.[204]

Rule Submissions (§§ 40.5 and 40.6)

Under § 40.6 as finalized, rule submissions will be required to include complete information to enable the Commission to perform its analysis of the submissions. While this is not intended to expand or otherwise alter the scope of the explanation or analysis required in the current regulation, the Commission conservatively estimates some reporting entities may expend some additional time to ensure the completeness of their submissions. The number of respondents remains 70. Although the final rulemaking only increases reporting burden for § 40.6 submissions,[205] 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 each respondent will spend approximately 2.5 hours to prepare and submit the required reports. Accordingly, the aggregate annual estimate for the reporting burden is as follows:

Estimated number of respondents: 70.[206]

Estimated number of reports per respondent: 20.[207]

[198] *Id.*

[199] A16z at 7–8; Coinbase at 8. The A16z comment noted an apparent inconsistency between the CBC and PRA analyses in the NPRM, in that the PRA recognized a cost associated with the completeness requirement for product and rule submissions under part 40, but the CBC did not. As discussed in note 74 of the NPRM, the amendments clarify the Commission's expectations for the content of submissions, which some registered entities had not been meeting in their recent filings. *See* NPRM at 61443 n.74. Although the Commission views the amendments as clarifying filing requirements rather than new requirements, for practical PRA purposes, the amendments will increase some registered entities' reporting burden compared to their current inadequate filing practices. However, relative to the baseline of what registered entities already *should* be doing, the burden has not changed. The A16z comment regarding the relationship between the PRA burden estimate and the CBC cost estimate is also addressed in the CBC analysis in section III.C.4(c)(ii) and III.C.4(e)(ii) below. Because A16z did not make any specific comments about the PRA estimates, but only noted an apparent inconsistency with the CBC, the Commission has not made any changes to its PRA estimates in response to the A16z comment.

[200] Some registered entities have been providing the required level of detail in their part 40 filings. They will not experience an increased burden as compared to their current practices. For PRA purposes however, the Commission's burden estimates are spread across all reporting entities covered by part 40.

[201] Coinbase at 8, 11.

[202] 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).

[203] 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.

[204] 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).

[205] While the amendments require that § 40.5 submissions provide an explanation and analysis that is complete with respect to the operation, purpose, and effect of the proposed rule or rule amendment, § 40.5 submissions are very infrequent (an average of 5 per year over the past 3 years) and most submissions already provide considerable detail. Accordingly, the Commission anticipates that the requirement that such submissions be ''complete'' will not result in a measurable increase in filing burdens associated with § 40.5 submissions.

[206] 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.

[207] As noted above, the 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

Average number of hours per report: 2.5.[208]

Estimated gross annual reporting burden (hours): 3,500.[209]

SIDCO Submissions (§ 40.10)

The Commission is retaining its existing burden estimates for SIDCO submissions under § 40.10 because the burden for SIDCO submissions is unaffected by the amendments. Section 40.10(a) 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. The Commission is revising the definition of ''materially affect the nature or level of risks presented'' in § 40.10(b), but does not anticipate that this clarification will alter submission requirements for SIDCO filers, increase the burdens associated with such filings, or affect the frequency or number of such filings. Accordingly, the Commission is retaining the burden estimates adopted under § 40.10, as approved by OMB during the most recent renewal of OMB Collection 3038–0093.[210]

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

Dormancy (§ 40.1). Registered entities are no longer 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 dormant registered entity's registration or designation. Accordingly, the change does not add any burden on registered entities, but may reduce burdens.

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

Terms and conditions; weekly notification (§§ 40.1, 40.2, and 40.6(d)(2)). The 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 will 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'' will 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 final rulemaking will 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 final rule will provide Commission staff greater flexibility to set deadlines for submission of any additional information requested by the Commission for voluntary product approval by registered entities. Currently, the regulation requires an initial two-business-day limit after the Commission requests the information. The greater staff discretion to set more flexible deadlines may reduce the need for registered entities to submit extension requests, thereby reducing their burden.

Non-materiality criteria (§ 40.4(b)(5)). This provision will provide guidance to registered entities about the non-materiality determination required for certain products. It will 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)). The final rulemaking requires that non-materiality submissions include a copy of a previously approved rule or rule amendment that is, in substance, the same as the subject non-material rule or rule amendment that supports 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 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 amendments, the definition ''materially affect the nature or level of risks presented'' for SIDCO rule submissions will be revised to provide more useful guidance to registered entities. This change will not affect the reporting burden.

SIDCO submission under § 40.10 of rules otherwise required to be submitted under § 40.5. This amendment will clarify filing requirements, but will 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 will include a new structured data element in the online portal indicating whether the product is a ''referenced contract.'' This information will 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.

C. Cost Benefit Considerations

1. CEA Section 15(a)

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before issuing regulations under the CEA.[211] By its terms, section 15(a) does not require the Commission to quantify the costs and

divided by 70 respondents (1,412 responses/70 respondents = 20 responses per respondent).

[208] 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.

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

[210] *See supra* n.197. As set out in the NPRM and the PRA renewal, the estimated gross annual reporting burden for SIDCO submissions under § 40.10 is 100 hours, which is calculated by multiplying the estimated number of respondents times the estimated number of reports per respondent times the average number of hours per report (2 respondents × 1 report per respondent per year × 50 hours per report = 100 hours per year).

[211] 7 U.S.C. 19(a).

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 Commission's 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.

In this release, the Commission is adopting amendments that may impose costs. Some of the 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 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 amendments in qualitative terms.

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.[212]

With two exceptions, the Commission last amended the part 40 regulations in 2011.[213] After years of experience with registered entities following the processes set forth in the part 40 regulations, the Commission is adopting amendments to clarify, simplify, and enhance the utility of the part 40 regulations for registered entities and the Commission. Changes include amendments to: § 40.1 to simplify the determination of whether a registered entity is deemed dormant and to remove the terms ''dormant rule'' and ''dormant contract or dormant product''; §§ 40.2, 40.3, 40.4, 40.5 and 40.6 and appendix D to part 40 to reflect the development, evolution and use of the Commission's online portal for the filing of rule and product submissions; §§ 40.2, 40.3, 40.5 and 40.6 to confirm that the registered entity must include a complete explanation and analysis when submitting its product or rule filing; add a new appendix E to part 40 to provide guidance regarding criteria the Commission considers as evidence that an enumerated agricultural product rule is non-material; §§ 40.5 and 40.6 to reorganize and enhance the regulations' utility; and § 40.7 to delegate certain authorities of the Commission to the Director of the Division of Clearing and Risk and the Director of the Division of Market Oversight. The Commission also is amending § 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 Commission identified and considered the benefits and costs of the proposed amendments relative to a baseline standard of those generated by the current statutory and regulatory framework, *i.e.,* the status quo. The baseline for the Commission's consideration of the costs and benefits of this rulemaking is the existing statutory and regulatory framework applicable to DCMs, DCOs, SDRs, and SEFs, in 17 CFR part 40. Current part 40 provides substantive and procedural regulatory requirements for the submission of registered entities' self-certifications, and requests for approval, of new products for trading and clearing and of new rules and rule amendments. Current part 40 also establishes guidelines for the Commission's review and processing of registered entities' submissions. Current part 40 regulations explain what information must be made publicly available in relation to the application to become a DCM, DCO, SDR, or SEF, and when registered entities file submissions for new products, new rules and rule amendments. There are also special requirements for certain rules submitted by SIDCOs.

The Commission notes that this cost-benefit consideration is based on its understanding that the derivatives market regulated by the Commission functions internationally with: (1) transactions that involve U.S. entities occurring across different international jurisdictions; (2) some entities organized outside of the United States that are registered with the Commission; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the 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.[214]

4. Amendments

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

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

In addition, the Commission is removing from § 40.1 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 will still need to

[212] *See* §§ 40.2 through 40.6.

[213] *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).

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

be approved and the products will 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 will 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 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, there is a cost-savings because 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.[215] The Commission also believes that the amendments to the dormancy regulations are beneficial because it is unlikely that the changes will present concerns regarding market integrity or safety. As explained above, a registered entity implementing a contract, product, or rule has a continuing obligation to ensure that the rule complies with the CEA and the Commission's regulations thereunder.

ii. Costs

The Commission believes that registered entities will not incur any increased costs related to the amendments to the current dormancy regulations in part 40. Regarding the potential for a cost related to the reduction of market oversight, based on experience with dormant products and rules to date, the Commission believes that deleting the definitions will 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.[216]

b. Amendments to the Definitions of Rule and Terms and Conditions in § 40.1

The Commission is amending the definition of the term ''rule'' in § 40.1(i) 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 in the definition and codifying the current practice of DCOs submitting margin methodologies as rules to the Commission. The Commission also is amending the definition of the term ''terms and conditions'' in current § 40.1(j) by removing from the list of terms that are considered ''terms and conditions'' payments or collections of certain premiums or margins from current § 40.1(j)(1)(xi) and (j)(2)(xi). The Commission is adding 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 in a weekly notice filing pursuant to § 40.6(d)(2).

i. Benefits

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 methodology 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. The 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 of filing under § 40.6(a).

ii. Costs

The Commission believes that the 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 changes to the definition of ''terms and conditions'' because the amendments reduce the number of items of information registered entities must submit to the Commission under § 40.6(a).

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

The Commission is amending §§ 40.2 and 40.3 to update Commission processes and filing instructions for registered entities' submission of products to the Commission. Amendments to §§ 40.2(a)(1) and 40.3(a)(1) will 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, 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.

Changes to § 40.2(a)(3)(v) specify that a registered entity's concise explanation and analysis of a product must be complete with respect to the product's terms and conditions, the underlying commodity, and the product's compliance with the CEA and associated regulations. Changes to § 40.3(a)(4) state that a registered entity's explanation and analysis of a product must be complete with respect to the product's terms and conditions, the underlying commodity, and the product's compliance with the CEA and associated regulations.

The 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.

Amendments to § 40.3(c) concern the length of the review period. The amendments to § 40.3(c) will permit the Commission to extend for an additional 45 days if the submission is incomplete or if the registered entity doesn't respond completely to Commission questions in a timely manner. The Commission also is amending § 40.3(c)(5) to provide that if an initial 45-day review period ends on a non-business day, such review is extended to the next business day.

[215] *See* Cboe at 2 (''Additionally, deleting the concepts of a dormant product and rule will reduce compliance costs for market participants and oversight costs for the Commission.'')

[216] *See* Cboe at 2 (stating ''In light of the benefits to be derived from eliminating the concepts of a dormant contract or product and dormant rule and that doing so will not result in any reduction in market integrity or safety, the Commission should remove these concepts from Commission regulations.'').

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 amendments to § 40.2(a)(3)(v) should help achieve improved regulatory effectiveness of the self-certification processes by resulting in all (rather than just some) registered entities explaining how and why their products comply with the Act and Commission's regulations, thereby enabling the Commission to more effectively complete its analysis of compliance and allowing market participants to understand the products being listed for trading.[217] 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 may provide more flexibility to registered entities to respond and better enable the Commission to manage its resources and conduct more effective oversight over registered entities. The changes to § 40.3(c)(2) that the Commission may extend the initial 45-day review period for up to an additional 45 days if the submission is incomplete or if the registered entity doesn't respond completely to Commission questions in a timely manner will 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, relative to the existing §§ 40.2 and 40.3, amending §§ 40.2 and 40.3 to expressly articulate that registered entities must provide a "complete" analysis regarding their product submissions will not measurably increase compliance costs. As mentioned above, after the Commission amended part 40 in 2011, registered entities submitted explanations and analyses when self-certifying products that were sufficient, meaning that the explanations and analyses demonstrated to the Commission that the products complied with the CEA and associated regulations. Over time, however, the Commission observed a trend of receiving new product certifications that were incomplete. Accordingly, while the Commission foresees no cognizable costs relative to the baseline, it does acknowledge that, as a practical matter, registered entities that have in the past failed to file complete analyses of their products, will likely have increased burdens related to preparing complete § 40.2 self-certification submissions moving forward.[218] The amendments to § 40.3 enabling the Commission to extend the 45-day review period as a result of the submission being incomplete or the entity not responding completely to Commission questions in a timely manner may cause registered entities to incur costs related to the offering of products submitted for voluntary Commission approval if the extended review period affects product-launch dates.

d. Amendments to § 40.4 and Appendix E to Part 40, Regarding Terms or Conditions for Enumerated Agricultural Products

Regulation § 40.4 requires DCMs to submit a rule or rule amendment for Commission approval if the rule or rule amendment affects a contract on an enumerated agricultural product and would materially change a term or condition of the contract for a delivery month with open interest. The Commission is adding 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 also is amending § 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 change to terms and conditions is material. Specifically, the guidance offered in appendix E should reduce uncertainties and enable DCMs to more efficiently determine whether a change is 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 will help them understand the current rule or rule amendment and why it is non-material.

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 for 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.

[217] In the NPRM, the Commission misplaced the following comment in the "Costs" section: "In general, the proposed amendments to §§ 40.2 and 40.3 will provide greater specificity, leaving less room for regulatory ambiguity, improve the quality of submissions, and reduce any administrative costs register entities might incur when determining what information must be submitted to the Commission for a product self-certification or product approval request." NPRM at 61447–448. The Commission recognizes that the location of the sentence in the NPRM's "Cost" section might have caused confusion and should have been placed in the benefits discussion. *See* a16z at 8 (noting that "it is not clear how this point is a cost of the Proposed Rules. . . .").

[218] a16z suggested that the Commission reevaluate its position on the costs and benefits associated with the Commission's instruction to registered entities to file "complete" analyses, after noting an apparent discrepancy in the NPRM between the PRA estimates and the cost-benefit discussion of the same amendments. a16z at 7–8. The Commission acknowledges tension between the NPRM's respective PRA and CBC analyses. To address this, the Commission clarifies that while the explicit addition of "completeness" to §§ 40.2 and 40.3 is not intended to expand or otherwise alter the scope of the explanation or analysis required in the current regulation—therefore not engendering additional costs relative to the baseline—as a practical matter, some reporting entities now may expend additional time to ensure their submissions' compliance. More specifically, registered entities that provided incomplete information under the current provision will likely incur modest costs of one hour per filing associated with the new amendment to ensure their submissions are "complete" pursuant to §§ 40.2 and 40.3, as also set out in the PRA section. For a discussion on PRA burden estimates, see section III.B, herein. Another commenter, Coinbase, asserts that "expanded information and analysis requirements on registered entities for certified product filings will impose significant, unnecessary regulatory costs on DCMs. It can be time consuming and costly to prepare lengthy, detailed filings. . . ." Coinbase at 8. As explained in section II.B.3. above, the Commission believes that a complete explanation is clear and informative, but not necessarily lengthy; and the information to be provided leverages due diligence conducted by the registered entity prior to certification.

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

The Commission is updating processes and outlining 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. Amendments to §§ 40.5(a)(1) and 40.6(a)(1) remove references to the Commission Secretary. 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 amendments to §§ 40.5(a)(5) and 40.6(a)(7) describe the scope of the explanation and analysis that registered entities must submit by adding that the explanation and analysis needs to also be ''complete'' and explain the rule or rule amendment, its operation, purpose and effect and how and why it complies with the Act and the Commission's regulations thereunder. The Commission is moving 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 that does not have any 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 (7). In addition, the 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 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 or a supplemented submission with a substantive basis for treating the revised rule differently and that the revised or supplemented submission will be reviewed without prejudice. In addition, the objection by the Commission will be treated as presumptive evidence that the registered entity may not truthfully certify that the same proposed rule or substantially the same rule complies with CEA and the Commission's regulations.

The amendments to § 40.6(d)(2) expand the categories of rules that may be implemented without a certification to include a number of new categories of rules. The new categories include rule amendments updating email addresses or contact information that market participants use to submit block trades; rules amending existing trading months; rules changing the price ranges within which a trade will not be cancelled; and rules governing the payment or collection of option premiums or margins.[219] 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 amendments to § 40.6(d)(2) align with the Commission's removal of 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 is revising the definition in § 40.10(b) to specify that 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 is amending § 40.10 to expressly state that where any provision of the Commission's regulations requires a DCO to file rules for approval under § 40.5, a SIDCO will 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.

[219] Regulation § 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. Regulation § 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). Regulation § 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). Regulation § 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.

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 amendments to § 40.5(a)(5) requiring complete submissions and § 40.6(a)(7) stating that a registered entity must provide a concise explanation and analysis that is complete with respect to the operation, purpose, and effect of a certified rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder should reinforce the need for registered entities' filings to demonstrate such compliance. The amendments to § 40.6(a)(7) should help achieve improved regulatory effectiveness of the rule self-certification processes by resulting in all (rather than just some) registered entities demonstrating how and why their rules comply with the Act and Commission's regulations, thereby enabling the Commission to more effectively complete its analysis of compliance. The amendment to § 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 that does not have any open interest upon making a § 40.6(a) submission.

The amendments to § 40.6(b)(2) that provide that the review period of a rule restarts under circumstances that are enumerated therein should encourage registered entities to be thorough when filing their initial submissions. The 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 rule or rule amendment on the grounds that the rule or rule amendment is inconsistent with the Act or the Commission's regulations. Specifically, under the 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 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 rules pursuant to § 40.6(a). 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. Addition of § 40.10(i) also should eliminate potentially duplicative regulatory filings under current § 40.5, and, as a result, SIDCOs will benefit from not having to dedicate administrative efforts two times for similar submissions.

ii. Costs

The Commission believes that, relative to the existing §§ 40.5(a) and 40.6(a)(7)(v), amending §§ 40.5(a) and 40.6(a)(7)(v) to expressly articulate that registered entities submit ''complete'' rule analysis to the Commission concerning proposed rule changes will not measurably increase compliance costs.[220] As mentioned above, there are registered entities that have filed submissions and met the requirements under the rules in effect prior to these amendments. It is unlikely that these registered entities will incur costs as a result of the changes to the § 40.6 rule-filing instructions. However, some registered entities' § 40.6(a)(7) submission have been deficient, lacking a sufficient explanation of rule or rule amendment, its operation, purpose and effect or how and why it complies with the Act and the Commission's regulations thereunder.[221] Accordingly, while the Commission foresees no cognizable costs relative to the baseline, it does acknowledge that, as a practical matter, registered entities that previously have filed deficient § 40.6(a)(7)(v) submissions will likely incur some costs, such as reporting burdens, related to preparing the preparation of material with complete information regarding the compliance of rules or rule amendments.

The Commission does not believe that there are costs associated with amendments to § 40.5(d). The Commission does not believe that there are costs associated with amendments to § 40.6(b)(2) or 40.6(c)(5). The Commission believes that the changes to § 40.10 will not place additional costs or burdens on SIDCOs because they identify the types of submissions that SIDCOs must file under § 40.10 and eliminate potential duplication in regulatory filings.

f. Amendments to § 40.7 Regarding Delegation of Authority

The Commission is amending § 40.7 to enhance the utility and clarity of the regulation and add one new delegation. As discussed above, the Commission is adding § 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 Clearing and Risk and the Division of Market Oversight.

i. Benefits

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

ii. Costs

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

g. 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 amending appendix D to part 40 that sets forth instructions to registered entities on what information must be submitted together with part 40 filings. The Commission also is adding a new requirement that DCMs and SEFs indicate when listing a new product whether the new product meets the definition of ''referenced contract'' as defined in § 150.1 and described in appendix C to part 150 that is titled ''Guidance Regarding the Definition of Reference Contract.'' [222]

i. Benefits

The Commission believes that the amendments to appendix D to part 40 will provide several benefits. First, the changes describe and modernize instructions. The text is consistent with the current technological practice where registered entities upload product and rule submissions using the Commission's online portal. Second, the amendment to appendix D to part 40 will 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 to modernize Appendix D as registered entities are already submitting the covered rules and products using the portal. With regards to the amendment 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 DCMs and SEFs are already making the analytical determinations as to whether contracts are referenced contracts to meet their obligations under 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 amendments to 17 CFR part 40 in light of the following five broad areas of market and public concern identified in section 15(a) of the CEA: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery;

[220] As discussed in the Paperwork Reduction Act discussion above, § 40.5 submissions are infrequent, and most submitters already provide considerable detail about their submissions. Consequently, the Commission does not anticipate that the addition of the term ''complete'' in § 40.5 will practically impact submitters.

[221] As explained in the Paperwork Reduction Act discussion, above, the Commission acknowledges a tension between the NPRM's respective PRA and CBC analyses. To address this, the Commission clarifies that while the explicit addition of ''completeness'' to § 40.6 (as well as § 40.5) is not intended to expand or otherwise alter the scope of the explanation or analysis required in the current regulation—therefore not engendering additional costs relative to the baseline—as a practical matter some reporting entities now may expend additional time to ensure their § 40.6 submissions' compliance. *See* a16z at 8 (noting that the NPRM's PRA section identified an additional burden but the CBC section did not). More specifically, as set out in the PRA analysis in section III.B above, registered entities that provided incomplete information under the current § 40.6 will likely incur modest costs of 0.5 hour per filing.

[222] Refer to n.40 for a discussion on Part 150.

sound risk management practices; and other public interest considerations.

Protection of market participants and the public: The Commission believes that the changes to §§ 40.2, 40.3, 40.5 and 40.6, regarding the requirement for complete explanations and analysis for product and rule submissions will help protect market participants and the public by encouraging registered entities to submit complete and informative filings for product and rule changes thereby explaining the new product, rule or rule amendment and how and why the new product, rule or rule amendment complies with the CEA and the Commission's regulations.

Efficiency, competitiveness, and financial integrity of futures markets: The improvements to the regulations providing for ''complete'' products and rules submissions better ensure that the Commission can provide adequate oversight with minimal disruption to market efficiency. The Commission has not identified any effect of the regulations on innovation and competition.

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

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

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

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to ''take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of this Act, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of this Act.'' [223]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission has considered whether the amendments to part 40 are likely to have anticompetitive effects, and if so, whether the amendments reflect the least anticompetitive means of achieving the purposes of this Act.[224] In doing so, the Commission considered the comments received addressing competition.

The Commission received three comment letters that identified potential effects on competition in connection with the proposed addition of ''complete'' to § 40.2(a)(3)(v) and one of these letters identified potential effects on competition in connection with the proposed addition of ''complete'' to § 40.6(a)(6)(v).[225] Better Markets stated that part 40 ensures that innovation takes place within the boundaries of market integrity, transparency and the protection of market participants, and provides a framework for the Commission to engage with market participants, assess innovations, and make informed decisions that contribute to the overall health and competitiveness of the derivatives markets.[226] Better Markets stated that the proposed addition of ''complete'' to § 40.2(a)(3) would bolster market integrity, protect the interests of market participants and ensure the Commission can effectively and thoroughly evaluate compliance.[227] Coinbase cautioned that adding ''complete'' to § 40.2(a)(3) as proposed could unnecessarily limit and delay the availability of a process to list contracts on its DCM after expending the time, effort and diligence to develop the product in the highly competitive global derivatives market.[228] Cboe commented that if the proposed addition of the word ''complete'' to §§ 40.2(a)(3) and 40.6(a)(v) were applied in a prescriptive, inconsistent and unreasonable manner, it would, among other things, inhibit innovation and competition.[229]

The Commission agrees with Better Markets' view that the proposed part 40 amendments—including, importantly, the addition of ''complete'' to § 40.2(a)(3)—support the overall health and competitiveness of derivatives markets. The proposed addition of ''complete'' should result in a better understanding of the product by the Commission and market participants, that in turn should promote innovation and competition. Further, the Commission does not construe Coinbase's or Cboe's generalized warnings to raise compelling anticompetitive concerns; neither comment asserts that, or articulates a realistic theory as to how, the addition of ''complete'' to § 40.2(a)(3)(v) or 40.6(a)(6)(v), would likely be anticompetitive—*i.e.,* cause price increases or inhibit innovation—in a properly defined relevant antitrust market to any consequential degree.

Accordingly, the Commission does not anticipate that the amendments to part 40 of its regulations would promote or result in anti-competitive consequences or behavior. Further, even accepting, for argument's sake, that the requirement that a DCM or SEF submit a concise explanation and analysis that is complete with respect to the contract'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 could hamper innovation to some unspecified degree, the Commission considers this requirement minimal, warranted, necessary and the least anticompetitive means to realize its critical core interests in market integrity, transparency, and protection of market integrity. Similarly, even accepting, for argument's sake, that the requirement that a registered entity submit a concise explanation and analysis of a rule to be self-certified 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 could hamper innovation to some unspecified degree, the Commission considers this requirement minimal, warranted, necessary and the least anticompetitive means to realize its critical core interests in market integrity, transparency, and protection of market integrity.

List of Subjects

17 CFR Part 37

Banks, banking, Commodity futures, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 38

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 40

Commodity futures, Reporting and recordkeeping requirements.

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

PART 37—SWAP EXECUTION FACILITIES

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

[223] 7 U.S.C. 19(b).

[224] CEA Section 3(b).

[225] No other amendments proposed in the NPRM elicited comments addressing competition.

[226] Better Markets at 3.

[227] Better Markets at 4.

[228] Coinbase at 11.

[229] Cboe at 2.

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

■ 2. Amend appendix B by revising the first sentence of paragraph (a)(1) under ''Core Principle 8 of Section 5h of the Act—Emergency Authority'' to read as follows:

Appendix B to Part 37—Guidance on, and Acceptable Practices in, Compliance With Core Principles

* * * * *

Core Principle 8 of Section 5h of the Act—Emergency Authority

* * * * *

(a) * * *

(1) A swap execution facility should have rules that authorize it to take certain actions in the event of an emergency, as defined in § 40.1 of this chapter. * * *

* * * * *

PART 38—DESIGNATED CONTRACT MARKETS

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

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

■ 4. Amend appendix B by revising the third sentence of paragraph (C)(a) under ''Core Principle 6 of Section 5(d) of the Act'' to read as follows:

Appendix B to Part 38—Guidance on, and Acceptable Practices in, Compliance With Core Principles

* * * * *

Core Principle 6 of Section 5(d) of the Act: * * *

* * * * *

(C) * * *

(a) * * * To address perceived market threats, the designated contract market should have rules that allow it to take certain actions in the event of an emergency, as defined in § 40.1 of this chapter, including: imposing or modifying position limits, price limits, and intraday market restrictions; imposing special margin requirements; ordering the liquidation or transfer of open positions in any contract; ordering the fixing of a settlement price; extending or shortening the expiration date or the trading hours; suspending or curtailing trading in any contract; transferring customer contracts and the margin or altering any contract's settlement terms or conditions; and, where applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services. * * *

* * * * *

PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES

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

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

■ 5. Revise § 40.1 to read as follows:

§ 40.1 Definitions.

As used in this part:

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

Dormant 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.

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

(1) Any manipulative or attempted manipulative activity;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) Delivery points and locational price differentials;

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

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

(xi) [Reserved];

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

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

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

(2) For a swap:

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

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

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

(iv) Trading hours and the listing of swaps;

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

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

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

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

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

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

(xi) [Reserved]

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

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

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

(xv) Life cycle events.

6. Amend § 40.2 by revising paragraphs (a) introductory text, (a)(1), (a)(3)(i), (ii), (v), and (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. A submission shall comply with the following conditions:

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

* * * * *

(3) * * *

(i) The information required by appendix D 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

* * * * *

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

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

(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 this section or § 40.3; and

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

(2) The Commission may in its discretion require a registered entity to

withdraw its certification under paragraph (d)(1) of this section and to submit each individual swap or certain individual swaps within the submission for Commission review pursuant to this section or § 40.3.

■ 7. Amend § 40.3 by:

■ a. Revising paragraphs (a) introductory text, (a)(1), (2), (4), (9), and (10), (c), and (d);

■ b. Removing paragraph (e);

■ c. Redesignating paragraph (f) as paragraph (e); and

■ d. Revising newly redesignated paragraph (e).

The revisions read as follows:

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

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

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

(2) Include the information required by appendix D 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 establish the basis for compliance with the applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

* * * * *

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

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

* * * * *

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

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

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

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

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

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

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

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

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

■ 8. Revise § 40.4 to read as follows:

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

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

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

(1) Rules or rule amendments that are enumerated in § 40.6(d)(2) may be

implemented without prior approval or certification, provided that they are implemented pursuant to the notification procedures of § 40.6(d);

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

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

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

(5) Any rule or rule amendment:

(i) The text of which has been submitted pursuant to the procedures of paragraph (b)(5) of this section 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.

■ 9. Amend § 40.5 by:

■ a. Revising paragraphs (a) introductory text, (a)(1), (2), (5), (6), and (9), and (c)(1);

■ b. Removing paragraph (c)(2);

■ c. Redesignating paragraph (d)(1) as paragraph (c)(2);

■ d. Revising newly redesignated paragraph (c)(2);

■ e. Redesignating paragraph (d)(2) as paragraph (c)(3);

■ f. Revising newly redesignated paragraph (c)(3);

■ g. Adding paragraphs (c)(4) through (6);

■ h. Revising paragraphs (d) introductory text and (d)(1);

■ i. Redesignating paragraph (g) as paragraph (d)(2);

■ j. Revising newly redesignated paragraph (d)(2);

■ k. Redesignating paragraph (e) as paragraph (d)(3);

■ l. Revising newly redesignated paragraph (d)(3);

■ m. Redesignating paragraphs (f)(1) and (2) as paragraphs (e)(1) and (2) respectively; and

■ n. Revising newly redesignated paragraphs (e)(1) and (2).

The revisions and additions read as follows:

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

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

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

(2) Include the information required by appendix D 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 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) * * *

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

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

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

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

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

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

(d) *Commission determination*—(1) *Approval.* Any rule submitted for

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

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

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

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

(2) Notification to a registered entity under paragraph (d)(3) of this section of the Commission's determination not to approve a proposed rule or rule amendment of a registered entity shall be presumptive evidence that the entity may not truthfully certify under § 40.6 that the same, or substantially the same, proposed rule or rule amendment complies with the Act and 17 CFR chapter I.

■ 10. Amend § 40.6 by:

■ a. Revising paragraphs (a) introductory text and (a)(1), (2), and (5) through (8);

■ b. Adding paragraph (a)(9);

■ c. Revising paragraph (b);

■ d. Revising paragraphs (c)(2) and (3);

■ e. Adding paragraph (c)(5);

■ f. Revising paragraphs (d)(1) and (d)(2)(iii), (iv), and (ix);

■ g. Adding paragraphs (d)(2)(xi) through (xiii);

■ h. Redesignating paragraph (d)(3) as paragraph (e); and

■ i. Revising newly redesignated paragraph (e).

The additions and revisions read as follows:

§ 40.6 Self-certification of rules.

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

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

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

* * * * *

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

(6) 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 paragraph (a) of this section 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;

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

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

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

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

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

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

(b) *Review by the Commission.* (1) The Commission shall have 10 business days to review the new rule or rule amendment before the new rule or rule amendment is deemed certified and can

be made effective, unless the Commission notifies the registered entity during the 10-business day review period that it intends to issue a stay of the certification under paragraph (c) of this section.

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

(c) * * *

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

(3) *Expiration of a stay of certification of new rule or rule amendment.* A new rule or rule amendment subject to a stay pursuant to this paragraph (c)(3) shall become effective and can be implemented, pursuant to the certification, at the expiration of the 90-day review period described in paragraph (c)(1) of this section unless the Commission withdraws the stay prior to that time, or the Commission notifies the registered entity during the 90-day time period that it objects to the certification on the grounds that the proposed rule or rule amendment is inconsistent with the Act or 17 CFR chapter I.

* * * * *

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

(ii) Notification to a registered entity under paragraph (c) of this section of the Commission's objection to a certification by a registered entity shall be presumptive evidence that the entity may not truthfully certify under this 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 (d)(1) during the preceding week. Such notice must be labeled ''Weekly Notification of Rule Amendments'' and need not be filed for weeks during which no such actions have been taken. One copy of each such submission shall be furnished electronically in a format and manner specified by the Commission; and

* * * * *

(2) * * *

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

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

* * * * *

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

* * * * *

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

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

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

* * * * *

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

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

(2) The rule governs:

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

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

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

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

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

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

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

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

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

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

■ 11. Amend § 40.7 by revising paragraphs (a)(5) and (b)(3) and adding paragraph (e) to read as follows:

§ 40.7 Delegations.

(a) * * *

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

(b) * * *

(3) Establish or amend or relate to speculative limits or position accountability provisions that are in compliance with the requirements of the Act and17 CFR chapter I;

* * * * *

(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.

■ 12. Amend § 40.10 by:

■ a. Revising paragraphs (a) introductory text, (b), (d) introductory text, and (h)(3); and

■ b. Adding paragraph (i).

The revisions and addition read as follows:

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

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

* * * * *

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

* * * * *

(d) *Notice of objection.* A systemically important derivatives clearing organization shall not implement a change to which the Commission has an objection on the grounds that the proposed change is not consistent with the Act or 17 CFR chapter I, 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 17 CFR chapter I, or any applicable rules, orders, or standards prescribed under section 805(a) of the Dodd-Frank Act.

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

■ 13. Revise appendix D 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 this part under which the filing is submitted. For a new product to be listed by a DCM or a SEF, an indication whether the new product meets the definition of referenced contract as such term is defined in § 150.1 of this chapter and is described in appendix C to part 150 of this chapter.

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

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

specificity to characterize all material aspects of the filing.

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

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

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

■ 14. Add appendix E 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. Section 40.4(a) applies strictly to rules that materially change a product's economic terms and conditions, and does not apply to other rules. Guidance is set forth 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) through (4) is not material for purposes of § 40.4(a) and may be submitted under the applicable § 40.6 provision that is specified in the applicable § 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 section 1a(9) with open interest that the DCM believes to be non-material, § 40.4(b)(5) requires the DCM to make a non-materiality filing and explain why it considers the rule change to be ''non-material.'' To assist an exchange in assessing and explaining whether a change to the terms and conditions is non-material pursuant to § 40.4(b)(5), paragraphs (1) through (4) of the following paragraph are the criteria that the Commission generally considers as evidence that an enumerated agricultural product rule change is non-material under § 40.4(a) pursuant to § 40.4(b)(5). A DCM may address these criteria in its assessment and explanation to demonstrate compliance with § 40.4(b)(5).

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

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

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

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

Issued in Washington, DC, on October 17, 2024, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

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

Appendices to Provisions Common to Registered Entities—Commission Voting Summary and Commissioner's Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Behnam, Commissioners Johnson, Goldsmith Romero, and Pham voted in the affirmative. Commissioner Mersinger voted in the negative.

Appendix 2—Statement of Commissioner Kristin N. Johnson

I support making our rules clearer and ensuring that our rules enable the Commodity Futures Trading Commission (Commission) to effectively address innovations regarding products, platforms, and technologies.

Today, the Commission issues final amendments to provisions common to registered entities set forth in Part 40 of the Commission's regulations (the Final Rule).

Part 40 implements Section 5c(c) of the Commodity Exchange Act (CEA or Act) and applies to designated contract markets (DCMs), derivatives clearing organizations (DCOs), Swap Execution Facilities (SEFs), and swap data repositories (SDRs). Notably, Part 40 includes the procedures by which registered entities list new products and implement new rules, along with standards for review and approval of the same by the Commission.

As of the date of the proposed rulemaking,[1] Part 40 had not been amended comprehensively for a decade.[2] Over the last ten years, our markets and the market structures that characterize our markets have experienced significant technological advancements. Regulation must adapt to address emerging developments.

Today's Final Rule updates the Commission's regulations governing the introduction of new products and new rules. The Final Rule includes updates that demonstrate the Commission's commitment to ongoing efforts to ensure the clarity and relevance of its regulatory requirements—for example, updates to reflect the fact that registered entities now communicate with the Commission via the internet.

The Final Rule amends Sections 40.2 (self-certification of products), 40.3 (voluntary submission of products for Commission approval), 40.5 (voluntary submission of rules for Commission approval), and 40.6 (self-certification of rules) to require that, in each case, a registered entity provide a submission ''that is complete with respect to'' key information about the product or rule. These changes reflect the Commission's commitment to ensure that registered entities provide sufficient information to the Commission to enable the Commission to complete the analysis of compliance required under the CEA and the Part 40 regulations. Several commenters noted the importance of this change in ensuring the Commission remains adequately informed about market developments.[3] And, as the Final Rule notes, the regulations retain the word ''concise,'' thus minimizing the burden on registered entities, while enabling the Commission to receive the information it needs.

I thank staff in the Division of Clearing and Risk and the Division of Market Oversight, including Rachel Kaplan, Steven Benton, Nancy Markowitz, and Eileen Chotiner, for their efforts on this rulemaking.

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[1] 88 FR 61432 (Sept. 6, 2023).

[2] Kristin N. Johnson, Commissioner, Statement in Support of Proposed Amendments to Provisions Common to Registered Entities (July 26, 2023), Statement of Commissioner Kristin N. Johnson in Support of Proposed Amendments to Provisions Common to Registered Entities at *https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement072623b.*

[3] *See* FIA Comment Letter on Provisions Common to Registered Entities (Nov. 3, 2023) at 1; Better Markets Comment Letter on Provisions Common to Registered Entities (Nov. 6, 2023) at 4.