UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DTCC DATA REPOSITORY (U.S.) LLC, 55 Water Street New York, NY 10041-0099 and THE DEPOSITORY TRUST & CLEARING CORPORATION, 55 Water Street New York, NY 10041-0099 *Plaintiffs*, v. UNITED STATES COMMODITY FUTURES TRADING COMMISSION, 3 Lafayette Centre 1155 21st Street, N.W. Washington, D.C. 20581 *Defendant*.	Case No. _____

COMPLAINT

DTCC Data Repository (U.S.) LLC ("DDR") and The Depository Trust & Clearing Corporation ("DTCC") state upon knowledge as to themselves and their own acts, and upon information and belief as to all other matters, as follows:

INTRODUCTION

1. This case challenges three interrelated actions by the Commodity Futures Trading Commission. The first was the Commission's reversal of its published pro-competitive statements regarding its cleared swap data reporting rules. The second was its administrative

action approving a new Rule 1001 of the Chicago Mercantile Exchange, Inc., which imposes anti-competitive data reporting requirements that the Commission had barred in its earlier statements. The third was its approval by inaction of a similar ICE Clear Credit rule.

2. Under the guise of these actions, the Commission made substantive changes to its regulations. As a consequence, two large swap clearinghouses have Commission-approved rules requiring that the official reports of transactions cleared by such clearinghouses be reported to their captive swap data repositories.

3. Two Commissioners wrote separate opinions in connection with the Commission's approval of Rule 1001 of the Chicago Mercantile Exchange, Inc., raising objections to the process followed by the Commission. One stated that the approval constituted "a complete reinterpretation" of CFTC rules, and that "[t]he action taken by the Commission today falls well short of the standards by which a federal agency should regulate an industry."

4. The concern that the Commission's actions completely changed the CFTC's final rules is valid, as the challenged actions violate the Administrative Procedure Act and the Commodity Exchange Act.

OVERVIEW

5. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank"), amended the Commodity Exchange Act, 7 U.S.C. §§ 1-27f. Dodd-Frank established a new, more transparent and robust compliance regime for swap transaction execution, clearing, and data reporting. For the first time, Congress required the reporting of swap trades to swap data repositories ("SDRs") in order to enhance the transparency and regulatory oversight of the swap markets.

6. In implementing its swap data reporting rules, the Commodity Futures Trading Commission ("CFTC" or "Commission") originally adhered to Congress' mandate and finalized rules that called for all data for a given transaction to be reported to a single SDR—that is, the SDR to which the initial report of swap data is made. The Commission noted (and commentators agreed) that single SDR reporting was essential to prevent fragmentation of data across multiple SDRs, which would seriously impair the ability of regulators to view or aggregate all data concerning a swap and the ability of reporting entities and counterparties to review data they report.

7. A derivatives clearing organization ("DCO") is a clearinghouse that enables parties to a derivatives transaction to substitute, through novation or otherwise, the credit of the DCO for the credit of the parties. A swap must be cleared by a DCO if the Commission finds that the swap—or group, category, type, or class of swap—is required to be cleared, unless an exception applies.

8. Dodd-Frank's core principles for DCOs, as well as other provisions in the Commodity Exchange Act, forbid unreasonable trade restraints and anti-competitive activities in trading, clearing, and data reporting of transactions in the swaps markets. The Commodity Exchange Act requires that the Commission "endeavor to take the least anti-competitive means" in implementing the statute, issuing any order, or adopting any regulation.

9. During the initial period of implementation of Dodd-Frank, the Commission adhered to the Commodity Exchange Act's pro-competitive core principles and mandates.

a. In September 2011, the Commission promulgated rules that implemented registration requirements, statutory duties, core principles, and certain compliance obligations for registered SDRs (the "Part 49 rules").

b. In November 2011, the CFTC promulgated rules regarding DCO general provisions and core principles (the "Part 39 rules").

c. In January 2012, the Commission promulgated rules to promote transparency for swap data reporting (the "Part 43 rules" and the "Part 45 rules").

10. A key purpose of all of these rules is to ensure, consistent with the Commodity Exchange Act's core principles, a competitive marketplace for reporting swap data. The preamble to the Part 45 rules provides that:

> [R]equiring that all cleared swaps be reported only to DCOs registered as SDRs or to SDRs chosen by a DCO would create a non-level playing field for competition between DCO-SDRs and non-DCO-SDRs . . . it would make DCOs collectively, and could in time make a single DCO-SDR, the sole recipient of data reported concerning cleared swaps.

11. On or about October 11, 2012, the Commission issued a series of Frequently Asked Questions ("FAQs"), which stated that:

> Market participants may choose to use a [designated contract market's], [swap execution facility's] or DCO's SDR for reporting swap transactions, but a [designated contract market], [swap execution facility] or DCO as part of its offering of trading or clearing services cannot require that market participants use its affiliated or "captive" SDR for reporting.

12. The Commission reversed its commitment to these pro-competitive principles after the November 8, 2012 filing of a complaint in this Court by the Chicago Mercantile Exchange, Inc. ("CME") challenging the Commission's implementation of the swap data reporting regime for cleared swaps and its restrictions on anti-competitive behavior by DCOs that operate affiliated or captive SDRs. This regime had been in place for nearly twelve months.

13. CME's complaint alleged that CFTC staff had taken the position that CME must amend its pending SDR application, which was predicated on CME requiring the reporting of

swap transactions cleared at CME to its affiliated SDR, "to show compliance with the FAQ before Staff will recommend approving the application."

14. On or about November 9, 2012, CME submitted proposed Rule 1001 ("CME Rule 1001") to the Commission. As later technically amended, it provided that data for trades cleared on its DCO shall be reported to its captive SDR:

> For all swaps cleared by the [CME] Clearing House, and resulting positions, the [CME] Clearing House shall report creation and continuation data to CME's swap data repository for purposes of complying with applicable CFTC rules governing the regulatory reporting of swaps. Upon the request of a counterparty to a swap cleared at the Clearing House, the Clearing House shall provide the same creation and continuation data to a swap data repository selected by the counterparty as the [CME] Clearing House provided to CME's swap data repository under the preceding sentence.

15. DTCC, DDR, and eleven other parties (representing a broad spectrum of participants in the swap markets, including end-users, energy companies, institutional investors, industry trade associations, swap dealers and inter-dealer brokers) filed comments opposing CME Rule 1001, and CME, the IntercontinentalExchange, Inc. ("ICE"), and three other parties filed comments favoring the rule.

16. Since the filing of CME's lawsuit, the Commission has been acting in a manner contrary to its own rules and regulations, departing from and violating the Commodity Exchange Act's pro-competitive core principles and mandates.

17. CME voluntarily dismissed its case against the Commission on or about November 29, 2012. One day before that, the CFTC withdrew its FAQs, which had explicitly forbidden DCOs, such as CME, from requiring that all swaps cleared by a DCO be reported to its affiliated or captive SDR. One week earlier, the CFTC had provisionally approved CME's SDR application. (The Commission's withdrawal of the FAQs is attached as Annex A.)

18. On March 6, 2013, the Commission approved CME Rule 1001. The Commission's order approving CME Rule 1001 and its accompanying explanatory statement state that they supersede several portions of the FAQs, including that portion quoted in paragraph 11 of this Complaint. The Commission's order does not mention the CME lawsuit. (The Commission's March 6, 2013 order is attached as Annex B.)

19. The Commission's abrupt withdrawal of the FAQs and its approval of CME Rule 1001 with the accompanying explanatory statement violate the Administrative Procedure Act and the Commodity Exchange Act for, among other reasons:

a. The FAQs, summarily withdrawn without explanation on the day before CME dismissed its lawsuit, were superseded in disregard of the notice and comment requirements of the Administrative Procedure Act and of the cost-benefit analysis requirements of the Commodity Exchange Act;

b. Approval of CME Rule 1001 was inconsistent with Dodd-Frank, the Commodity Exchange Act, the Commission's implementing rules, and the Commission's published FAQs;

c. Approval of CME Rule 1001 was inconsistent with section 45.10 of the Commission's regulations because CME Rule 1001 violates the single SDR requirement of Dodd-Frank by allowing CME's DCO to report data related to a cleared swap to a different SDR than the SDR to which the initial report of swap data was made;

d. To the limited extent the Commission addressed its pro-competitive statutory mandates in its review of CME Rule 1001, it wrongly defined the relevant markets and it made other fundamental errors that violate the pro-competitive provisions of the Commodity Exchange Act;

e. The Commission used pretexts contrary to law to justify not conducting the cost-benefit analysis, which it was required to conduct with respect to CME Rule 1001, in order to comply with the Commodity Exchange Act; and

f. The Commission used pretexts contrary to law to justify not conducting the full notice and comment rulemaking, which it was required to conduct with respect to CME Rule 1001 in order to comply with the Administrative Procedure Act.

20. After the Commission's rules were finalized in early 2012, DTCC and DDR, as well as their market participant-owners, spent millions of dollars to establish an SDR that would provide necessary transparency into the swap markets for the public and global regulators, including the CFTC, in reliance on the Commission's duly promulgated rules and published definitive guidance. Additionally, in developing an SDR, DTCC and DDR worked with financial market participants to establish connectivity and reporting protocols to be operational in advance of the commencement of reporting on October 12, 2012.

21. The Commission's summary withdrawal of its October 11, 2012 FAQs and its March 6, 2013 order approving CME Rule 1001, with its declaration that the order "supersedes" the FAQs, have directly affected and injured, continue to directly affect and injure, and will continue to cause additional injury to DTCC and DDR, and their investment in an SDR. The challenged actions have also directly affected and injured, continue to directly affect and injure, and will continue to cause additional injury to DTCC's and DDR's market participant-owners.

22. The certification of ICE Clear Credit's similar "captive SDR" Rule 211 on April 25, 2013 ("ICE Rule 211") and the Commission's denial by inaction of DTCC's and DDR's petition to stay ICE Clear Credit's self-certification have directly affected and injured, continue to directly affect and injure, and will continue to cause additional injury to DTCC and DDR, and

their market participant-owners, and are further violations of the Commodity Exchange Act and the Administrative Procedure Act. Furthermore, it was arbitrary and capricious for the Commission to accept at face value ICE Clear Credit's representation that its captive SDR rule would not have any material anti-competitive effect.

23. The purported availability of secondary reports as provided in CME Rule 1001 and ICE Rule 211 does not eliminate DDR's and DTCC's past and continuing injuries.

PARTIES

24. Plaintiff DDR, a wholly owned, indirect subsidiary of DTCC, is a New York limited liability company. The CFTC granted DDR provisional registration as an SDR on September 19, 2012.

25. Plaintiff DTCC is incorporated in New York State, with its headquarters in New York City. DTCC provides critical infrastructure to serve participants in the financial industry, including investors, commercial end-users, broker-dealers, banks, insurance carriers, and mutual funds. DTCC operates as a cooperative, owned collectively by its users and governed by a diverse board of directors. DTCC's governance structure includes 344 shareholders.

26. DTCC has been engaged with global regulators and its market participant-owners since 2006 in an effort to build an effective global public utility to contain all information on derivative transactions of market participants that would be capable of providing a complete and accurate picture of the distribution of risk in the financial system. Limiting the scope of data available to DDR will harm the development of this public utility.

27. Defendant Commodity Futures Trading Commission is an agency of the United States Government. It is charged with administering the Commodity Exchange Act and its actions are subject to the Administrative Procedure Act.

JURISDICTION AND VENUE

28. This action presents federal questions under the Administrative Procedure Act and the Commodity Exchange Act. Therefore, this Court has jurisdiction over this action under 28 U.S.C. § 1331. This Court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201.

29. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this action is against an agency of the United States that is located in the District of Columbia. Further, venue is proper in this Court because a substantial part of the acts or omissions giving rise to this action occurred in the District of Columbia.

FACTUAL BACKGROUND

I. DODD-FRANK ACT AND REGULATORY BACKGROUND

A. Swaps and the Global Financial Crisis

30. Swaps include a broad variety of derivative transactions and are defined in section 1a(47) of the Commodity Exchange Act. Prior to the enactment of Dodd-Frank, these products were largely unregulated in the United States.

31. Dodd-Frank brought comprehensive reform to the regulation of swaps and amended the Commodity Exchange Act to establish a regulatory framework for reporting swap data to SDRs. A central objective of Dodd-Frank is to promote transparency in the swap markets.

32. Section 727 of Dodd-Frank (section 2(a) of the Commodity Exchange Act) statutorily mandates (among other things) the reporting by "parties to a swap" of "each swap (whether cleared or uncleared)" to a "registered swap data repository."

33. Section 728 of Dodd-Frank (section 21 of the Commodity Exchange Act) establishes registration requirements, statutory duties, core principles, and certain compliance obligations for SDRs.

34. Section 729 of Dodd-Frank (section 4r of the Commodity Exchange Act) establishes additional reporting and recordkeeping requirements for uncleared swaps.

35. Section 725 of Dodd-Frank (section 5b of the Commodity Exchange Act) establishes registration requirements, statutory duties, core principles, and certain compliance obligations for DCOs.

B. The CFTC Rules and Guidance Regarding SDR Implementation

36. After Congress enacted Dodd-Frank, the CFTC conducted rulemakings, in accordance with the Administrative Procedure Act, related to nonpublic regulatory reporting of swap data and real-time public reporting of swap data.

37. Sections 727 through 729 of Dodd-Frank (sections 2(a), 21, and 4r of the Commodity Exchange Act, respectively) were partially implemented through the CFTC's Parts 43, 45, and 49 rules. These rules implement Dodd-Frank's mandate to increase the transparency of the swap markets by creating a comprehensive system of reporting cleared and uncleared trades to SDRs.

38. The Commission's regulations, promulgated after notice and comment and consistent with Dodd-Frank, mandate (among other things) a "level playing field" among participants for swap data reporting services.

39. On December 8, 2010, the CFTC proposed and invited comments on the Part 45 rules, including section 45.10 of the Commission's regulations (the "single SDR rule"). In the proposed rules for Part 45, the Commission stated that for cleared swaps, all swap data for a

given swap must be reported to the same SDR to which the initial report of swap data is made. The preamble to the proposed rules recognized that, if the initial report of trade data is made to an SDR other than an SDR affiliated with the DCO clearing the swap, the DCO would be required to report confirmation data and continuation data to the SDR receiving the initial report, noting that "the SDR receiving this initial report must transmit its own identity . . . to each counterparty to the swap, to the [swap execution facility] or [designated contract market], if any, on which the swap was executed, and to the DCO, if any, to which the swap is submitted for clearing. Thereafter, the proposed regulations would require that all data reported for the swap . . . must be reported to that same SDR."

40. In commenting on the proposed rules for Part 45, CME stated that section 4r of the Commodity Exchange Act did not authorize nonpublic regulatory reporting of cleared swaps to an SDR and that reporting such nonpublic data to an SDR would be redundant. CME argued that reporting of data for cleared swap transactions should be limited to SDRs registered by the DCOs, or to SDRs chosen by the DCOs. CME contended that DCOs should not have a reporting obligation to any non-DCO SDR.

41. On January 13, 2012, the CFTC adopted the Part 45 rules largely as proposed, rejecting CME's comments and promulgating a rule that directly conflicts with CME Rule 1001. In the operation of the single SDR rule, the Commission anticipated that "because the final rule does not require each cleared swap to be reported to an SDR affiliated with the DCO that clears the swap, in some circumstances DCOs may incur some increased costs, relative to an environment in which all cleared swaps must be reported to a DCO–SDR." The CFTC concluded that "DCOs are eligible to register as SDRs and capitalize on these existing connections," stating that the "competitive market for SDR services will dictate such an outcome

if it is indeed cost-effective." The CFTC noted that the "wide variety of suggestions by commenters concerning who should choose the SDR suggests that no single approach produces the lowest cost for all market participants in all circumstances, and that this decision is best left to the market."

42. In compliance with section 15(a) of the Commodity Exchange Act, the Part 45 rules included a seventeen-page cost-benefit analysis section.

43. Over the ensuing months, the CFTC consistently stated that the Commodity Exchange Act and its regulations stand for single-SDR reporting, open access, counterparty choice regarding SDR reporting, and a prohibition on DCOs requiring that data reports be made to their affiliated or captive SDR.

44. On October 12, 2012, the Part 45 rules, along with the CFTC's and SEC's joint rulemaking defining the terms "swap" and "security-based swap," became effective. Consequently, the Commission began requiring compliance with a comprehensive regulatory regime for cleared and uncleared swaps, requiring swap execution facilities, designated contract markets, DCOs, SDRs, swap dealers, and major swap participants to comply with the Part 45 rules with respect to two asset classes of swaps—credit swaps and interest rate swaps.

45. On the October 12, 2012 implementation date, DDR and other provisionally-registered SDRs were to begin receiving swap transaction reports pursuant to the Commodity Exchange Act and the Commission's regulations, providing a centralized location for trade information.

46. However, because the registration and regulation regime for swap dealers and major swap participants (the counterparties to the trade with reporting obligations) was not yet

finalized, reporting was delayed through the issuance of Commission "no-action" letters to provide relief for those counterparties from their swap data reporting obligations.

47. Until November 2012, the CFTC repeatedly affirmed that under the Commodity Exchange Act, the CFTC could not allow a DCO, as part of its offering of clearing services, to require that market participants use its affiliated or captive SDR for reporting.

II. THE COMMISSION CHANGES DIRECTION

A. CME's November 2012 Lawsuit Against the Commission

48. CME is a wholly-owned subsidiary of the CME Group, which claims that it is "the world's leading and most diverse derivatives marketplace" and that its clearing subsidiary is "one of the world's leading central counterparty clearing providers."

49. CME is a CFTC-registered DCO, as well as a designated contract market. CME operates four exchanges, serving all major asset classes, and provides clearing through CME Clearing and CME ClearPort.

50. On October 15, 2012, the CFTC granted CME no-action relief, which provided that CME did not have to comply with the Part 45 rules until October 26, 2012. The CFTC subsequently extended that relief until the close of business on November 13, 2012.

51. This "no-action relief" allowed CME to avoid reporting transactions cleared through CME to an independent SDR, and delayed transparency for the asset class cleared by CME. At this time, DDR was accepting and reporting cleared interest rate swap transactions, but was not receiving similar data from CME, even though the counterparties to the initial transactions expected that CME would report the cleared confirmation and continuation data to DDR.

52. On November 8, 2012, CME filed a lawsuit in this Court against the CFTC, seeking judicial review of and a permanent injunction against the enforcement of the Part 45 rules, which had been finalized in January 2012. (That case was *Chicago Mercantile Exchange Inc. v. United States Commodity Futures Trading Commission*, No. 1:12-cv-01820.)

53. CME alleged in its lawsuit that the requirement to report to a non-affiliated SDR imposes costly, cumbersome, or duplicative requirements on CME. This was similar to the arguments made by CME in its comment letter on the proposed rule. The CFTC rejected these CME arguments when it finalized the Part 45 rules.

54. CME also alleged, "CFTC Staff has taken the position that CME must amend its SDR application to show compliance with the FAQ before Staff will recommend approving the application."

55. On November 21, 2012, the Commission granted the CME SDR provisional registration status, thereby authorizing CME to operate an SDR.

B. The Commission's Revocation of Its Frequently Asked Questions

56. On October 11, 2012, the Commission published FAQs about the Commodity Exchange Act and the Commission's final rules regarding SDRs. At the time of issuance, the Commission stated: "The CFTC is issuing a FAQ document to help market participants better understand how to report cleared swaps, who has the obligation to report and the timing of reporting."

57. Specifically, the FAQs stated:

> Market participants may choose to use a [designated contract market's], [swap execution facility's] or DCO's SDR for reporting swap transactions, but a [designated contract market], [swap execution facility] or DCO as part of its offering of trading or clearing services cannot require that market participants use its affiliated or "captive" SDR for reporting.

58. Consistent with Dodd-Frank and the Commission's rules, the FAQs also affirmed that "the selection of the particular SDR to which the swap data is reported for the resulting swaps due to clearing is to be determined by the counterparties to the original swap."

59. On November 28, 2012, after CME had filed its lawsuit against the CFTC and had requested approval of proposed CME Rule 1001, the Commission withdrew the parts of the FAQs quoted in paragraphs 57 and 58 of this Complaint, plus statements on the operation of the "single SDR rule." It did so without prior notice, explanation, or request for comment.

60. On November 29, 2012, the day after the CFTC withdrew the FAQs regarding certain cleared swap reporting requirements and published the proposed CME Rule 1001 for comment, CME voluntarily dismissed its lawsuit against the CFTC.

61. Until the Commission summarily amended the FAQs, the FAQ answers were consistent with the CFTC's swap data reporting regime established under Dodd-Frank and promulgated in the Part 45 rules: a registered entity offering SDR services was not allowed to require that data for swaps cleared by the particular DCO be reported to its affiliated SDR. The CFTC did not seek public comment on its reversal of the FAQs, thus denying market participants the benefit of administrative procedures before significant and substantive changes were made to the Part 45 rules.

C. CME Rule 1001

62. On November 9, 2012, the day after filing its lawsuit against the CFTC, CME submitted to the Commission its request for expedited review and approval of a new Chapter 10 and Rule 1001 of CME's SDR Rulebook.

63. Proposed CME Rule 1001 provided that all swaps cleared by CME's Clearing Division must be reported to CME's SDR. The text of CME Rule 1001 is set forth in paragraph 14 of this Complaint.

64. On November 28, 2012, CFTC noticed CME Rule 1001 for comment with a closing date for comments of December 21, 2012.

65. As noted in paragraph 59 of this Complaint, that same day, the Commission unilaterally withdrew those elements of its October 11, 2012 FAQs, which had barred DCOs from requiring that swaps cleared by the DCOs be reported to their captive SDRs.

66. On December 6, 2012, CME submitted a new version of CME Rule 1001 to the CFTC. The Commission requested comments on this new version of CME Rule 1001.

67. DTCC and DDR filed written comments in opposition to the CME rule, plus an expert report urging the CFTC to fully examine specified cost-benefit and anti-competitive issues before acting on CME Rule 1001. Eleven other parties filed comments opposing the CME rule, and five (including CME and ICE) filed comments favoring the rule.

68. Among the comments submitted were the following:

a. "IECA questions the absence of any meaningful administrative procedures when the CFTC chose to delete [the statements in the FAQs] that [designated contract markets], [swap execution facilities] and DCOs that are also registered as SDRs may not require counterparties to use their 'captive' SDR for reporting swap transactions." International Energy Credit Association (an association of several hundred energy company management professionals), Comment (Jan. 14, 2013) at 3.

b. "The Proposed Rule would, in effect, frustrate the Commission's intent because it would permit the CME to achieve by a Commission approved DCO rule what it could not

achieve by Commission rule. Since the Commission refused to grant the CME's request in the Reporting Release, we urge the Commission to refuse to permit it by means of a DCO rule instead." The Global Foreign Exchange Division, Comment (Jan. 7, 2013) at 4.

c. "[W]e are concerned that the CFTC's sudden change of position with respect to anticompetitive tying arrangement would not only prevent JPMorgan and other similarly situated market participants from complying with the timelines set forth in the CFTC's Reporting Rules, it would create new costs and burdens in addition to increasing operational and systemic risks." JPMorgan Chase & Co., Comment (Jan. 11, 2013) at 11.

d. "[B]ecause the Proposed Rule provides that CME will report creation data for all swaps it clears to its own SDR, CME seeks to preclude a reporting counterparty from selecting the SDR to which the creation data is transmitted and instead require that such data be reported to its SDR, in direct contravention of Commission Regulations and guidance upon which market participants have relied . . . [I]t is also inconsistent with the release published in connection with the Commission's final Swap Data Recordkeeping and Reporting Requirements, which clearly indicates the Commission envisioned a regime in which reporting counterparties may opt to transmit swap data to SDRs other than the DCO's SDR." Deutsche Bank, Comment (Jan. 7, 2013) at 3.

D. CFTC's Approval of CME Rule 1001 and Adoption of It in Place of the FAQs

69. On March 6, 2013, the CFTC issued an order approving CME Rule 1001 and declared that its approval of CME Rule 1001 and its accompanying statement "supersede[]" the FAQs, to the extent they are inconsistent with approval of CME Rule 1001.

70. The CFTC's account of its procedural history in its order approving CME Rule 1001 did not mention the complaint that CME filed against the Commission, or the circumstances that led to its dismissal.

E. ICE Rule 211 Certification

71. ICE Clear Credit, the world's largest clearinghouse for credit default swaps, is a wholly-owned subsidiary of ICE, a publicly traded company. Through its numerous subsidiaries, ICE operates regulated futures exchanges, global over-the-counter markets and clearinghouses in North America and Europe. One of ICE's subsidiaries, ICE Trade Vault, is a provisionally registered SDR.

72. Shortly after approval of CME Rule 1001, ICE Clear Credit filed a submission, later amended, with the CFTC for self-certification pursuant to Commission Rule 40.6 of proposed new ICE Rule 211, a rule that, like CME Rule 1001, requires swaps cleared by ICE to be reported to ICE's captive SDR.

73. DTCC and DDR objected to certification of ICE Clear Credit's rule because of its anti-competitive effects, noting that the Commission had not conducted any analysis of ICE's market share. DTCC and DDR filed a petition asking the CFTC to deny certification and open proceedings to address the anti-competitive and other violations of the Commodity Exchange Act and Administrative Procedure Act.

74. The Commission did not do so, thus denying by inaction DTCC's and DDR's petition.

75. On April 25, 2013, the Commission's website reflected the status of ICE Rule 211 as "certified." (A copy is attached as Annex C.)

III. DTCC AND DDR HAVE BEEN HARMED BY THE COMMISSION'S ACTIONS

76. DDR and DTCC have invested millions of dollars, plus time and effort to create and register as an SDR, and to build an SDR system to provide market participants with an effective vehicle for purposes of complying with applicable Commission rules governing the regulatory reporting of swaps.

77. DDR's and DTCC's investment in and establishment of an SDR were made in reliance on the rules and regulatory framework that the CFTC had promulgated and disseminated to the public pursuant to Dodd-Frank's amendments to the Commodity Exchange Act.

78. DDR's market participant-owners invested substantial resources to build reporting infrastructure to DDR. The Commission's actions will cause them to incur unnecessary costs and burdens. Comment letters stated, for example, that:

a. "[V]arious market participants have expended significant time and expense toward designing and establishing information technology systems and infrastructure to comply with the rules for swap data reporting promulgated by the CFTC as well as foreign regulators. These efforts were undertaken on the assumption that the Commission would not permit DCOs to create anti-competitive standards such as [CME Rule 1001]." The Global Foreign Exchange Division, Comment (Jan. 7, 2013) at 2.

b. "Anticompetitive tying arrangements such as CME's proposed Rule 1001 in practice would force a reporting counterparty to report its required swap continuation data for all cleared swaps to a DCO's affiliated and captive SDR notwithstanding the fact that the reporting counterparty may choose to submit [primary economic terms] data to its chosen SDR. These arrangements would require JPMorgan and other market participants to invest significant

amounts of additional time and money (on top of what is already in place and has been spent) to establish connectivity to CME." JPMorgan Chase & Co., Comment (Jan. 11, 2013) at 9-10.

c. "Since Citi and other market participants have already undergone the cost-intensive process of selecting and establishing connectivity with their chosen SDR, [CME Rule 1001] would create significant duplicative burdens and additional issues, without countervailing benefits . . . Citi has chosen to utilize DTCC as its SDR and as a result has built the necessary real time connectivity to support reporting to DTCC's SDR." Citigroup, Inc., Comment (Jan. 14, 2013) at 2.

79. On October 31, 2011, DDR submitted an application for SDR registration, which the CFTC provisionally approved on September 19, 2012.

80. DDR is the only provisionally-registered SDR with no DCO affiliation. Further, DDR is the only SDR provisionally registered to receive data for all five swap asset classes. DDR competes with CME and ICE to be the SDR chosen by the relevant market participants to be utilized for the purposes of complying with applicable Commission rules governing the regulatory reporting of swaps.

81. On October 12, 2012, DDR began to receive trades from market participants pursuant to the Part 45 rules.

82. The CFTC's withdrawal of the FAQs, approval of CME Rule 1001, and the ICE Rule 211 certification have directly affected and injured, continue to affect and injure, and will continue to cause additional injury to DDR and DTCC and their investment in an SDR, and to their market participant-owners. Because of the CFTC's actions, market participants can no longer exercise their choice and use DDR as their official SDR to fulfill their regulatory swap

data reporting obligations for swap transactions cleared on CME, ICE, and other DCOs that might adopt a rule similar to CME Rule 1001 or ICE Rule 211.

83. DTCC and DDR operate as cooperatives. The CFTC's withdrawal of the FAQs, approval of CME Rule 1001, and the ICE Rule 211 certification have directly affected and injured, continue to directly affect and injure, and will continue to cause additional injury to DTCC's market participant-owners by causing them to develop duplicative infrastructure for CME's SDR, ICE's SDR, and others.

84. DDR and DTCC requested the Commission to conduct full notice and comment rulemaking proceedings under the Administrative Procedure Act and to prepare cost-benefit analyses for the withdrawal of the FAQs and the review of CME Rule 1001 and ICE Rule 211. The Commission denied these requests by inaction, thus violating the DTCC's and DDR's right to participate in such proceedings and their right to receive the requisite Commission statements required by the Administrative Procedure Act and the Commodity Exchange Act.

85. The Commission's approval of CME Rule 1001 also injures the public interest, as commenters predicted:

a. "Beyond imposing additional costs on individual [swap dealers] and other market participants, the duplication and fragmentation of swap data that would result from [CME Rule 1001] have the potential to create significant systemic risk to the market as a whole." Citigroup, Inc., Comment (Jan. 14, 2013) at 4.

b. "A fragmented SDR environment would undermine the efforts of regulators and market participants to achieve global harmonization and standardization across regulatory reporting and transparency regimes in recent years, leaving foreign regulators with inadequate access to necessary swap data. Moreover, the approval of [CME Rule 1001] could create a

perception that the Commission is engaged in protectionism of local infrastructure providers, which could incite retaliatory measures from foreign regulators and detract from efforts to enhance international coordination." Deutsche Bank, Comment (Jan. 7, 2013) at 6.

86. Unless the CFTC's approval is declared unlawful and vacated, CME and other entities such as ICE, which have adopted or will adopt similar rules, will be allowed to direct regulatory reporting data to their captive SDRs and away from DDR regardless of how swaps dealers, major swap participants, end users, and other registered entities choose to direct the data.

87. The harm alleged in paragraphs 77 to 86 of this Complaint would be redressed by a favorable decision and a judgment setting aside the CFTC's actions.

COUNT ONE

(Withdrawal of FAQs in Violation of the Administrative Procedure Act and Commodity Exchange Act)

88. DDR and DTCC incorporate by reference the allegations of the preceding paragraphs.

89. The CFTC's actions to amend its rules began with the withdrawal of the FAQs after CME filed its lawsuit against the Commission. The Commission withdrew the FAQs without notice, request for comments or explanation, and declared that those FAQs were superseded by its approval of CME Rule 1001. These actions violated the Administrative Procedure Act, 5 U.S.C. §§ 553, 701-706.

90. The Commodity Exchange Act requires a cost-benefit analysis as a component of a rulemaking. The CFTC's failure to conduct a cost-benefit analysis before amending the FAQs in November 2012 and superseding it on March 6, 2013 violated the Commodity Exchange Act, 7 U.S.C. § 19(a).

91. The CFTC's abrupt amendment of its FAQs, in a manner contrary to the Commodity Exchange Act, the CFTC's final rules, and the CFTC's other public guidance, without notice, request for comments, or explanation, was arbitrary and capricious and otherwise contrary to law, was without observance of procedure required by law, and thus in violation of the Administrative Procedure Act, 5 U.S.C. §§ 553, 701-706.

COUNT TWO

(Approval of CME Rule in Violation of the Administrative Procedure Act and Commodity Exchange Act)

92. DDR and DTCC incorporate by reference the allegations of the preceding paragraphs.

93. The Commission's approval of CME Rule 1001 was arbitrary and capricious and otherwise contrary to law and without observance of procedure required by law because, among other reasons, it—

a. Ignored the requirements of the Administrative Procedure Act and the Commodity Exchange Act;

b. Failed to address key elements of the Commodity Exchange Act's pro-competitive provisions, wrongly defined the relevant markets, and failed to consider available market data;

c. Did not conduct a cost-benefit analysis, as required by the Commodity Exchange Act; and

d. Was a step in the sudden switch in swap data reporting rules, which began after CME filed a complaint against the Commission.

94. The Commission's approval of CME Rule 1001 violated the Administrative Procedure Act, 5 U.S.C. §§ 553, 701-706, and the Commodity Exchange Act, including 7 U.S.C. §§ 7a-1(c)(2)(N), 19(b), 24a(f).

COUNT THREE

(Inconsistency of Approval of CME Rule 1001 with Commodity Exchange Act and CFTC Rules)

95. DDR and DTCC incorporate by reference the allegations of the preceding paragraphs.

96. On January 13, 2012, the CFTC adopted the Part 45 rules regarding the Commodity Exchange Act's swap data reporting requirement after providing notice and an opportunity to comment. The rulemaking process that preceded the final Part 45 rules included a detailed cost-benefit analysis of the rules as required by the Commodity Exchange Act, 7 U.S.C. § 19(a).

97. On October 11, 2012, the CFTC issued FAQs regarding the reporting of cleared swaps and the operation of the single SDR rule, prohibiting the anti-competitive practice of allowing CME and other DCOs to require data for swaps cleared by such DCOs to be reported to captive SDRs.

98. On March 6, 2013, the CFTC approved CME Rule 1001, even though it is inconsistent with the Commodity Exchange Act and CFTC's rules regarding SDRs.

99. The CFTC's approval of CME Rule 1001, therefore, violates the Commodity Exchange Act, including 7 U.S.C. § 7a-2(c)(5)(A).

COUNT FOUR

(Certification of ICE Rule 211 in Violation of the Administrative Procedure Act and Commodity Exchange Act)

100. DDR and DTCC incorporate by reference the allegations of the preceding paragraphs.

101. The Commission's approval by inaction of the self-certification of ICE Rule 211 and its denial by inaction of DTCC's and DDR's petition were arbitrary and capricious and otherwise contrary to law and without observance of procedure required by law because, among other reasons, it—

a. Ignored the petition of DTCC and DDR requesting the Commission to deny certification and open proceedings to address the anti-competitive and other violations of the Commodity Exchange Act by ICE Rule 211;

b. Wrongfully proceeded under the self-certification procedures of Commission Rule 40.6;

c. Ignored the requirements of the Administrative Procedure Act and the Commodity Exchange Act;

d. Failed to address key elements of the Commodity Exchange Act's pro-competitive provisions, wrongly defined the relevant markets, and failed to consider available market data showing ICE to have market power and a large share of certain markets; and

e. Did not conduct a cost-benefit analysis, as required by the Commodity Exchange Act.

102. The Commission's actions and failure to act regarding ICE Rule 211 violated the Administrative Procedure Act, 5 U.S.C. §§ 553, 701-706, and the Commodity Exchange Act, including 7 U.S.C. §§ 7a-1(c)(2)(N), 19(b), 24a(f).

COUNT FIVE

(Inconsistency of ICE Rule 211 Certification with Commodity Exchange Act and CFTC Rules)

103. DDR and DTCC incorporate by reference the allegations of the preceding paragraphs.

104. On January 13, 2012, the CFTC adopted the Part 45 rules regarding the Commodity Exchange Act's swap data reporting requirement after providing notice and an opportunity to comment. The rulemaking process that preceded the final Part 45 rules included a detailed cost-benefit analysis of the rules, as required by the Commodity Exchange Act, 7 U.S.C. § 19(a).

105. On October 11, 2012, the CFTC issued FAQs regarding the reporting of cleared swaps and the operation of the single SDR rule, prohibiting the anti-competitive practice of allowing ICE and other DCOs to require data for swaps cleared by such DCOs to be reported to captive SDRs.

106. On April 25, 2013, the CFTC approved by inaction the self-certification of ICE Rule 211, even though it is inconsistent with the Commodity Exchange Act and CFTC's rules regarding SDRs.

107. The CFTC's actions and failure to act regarding ICE Rule 211, therefore, violates the Commodity Exchange Act, including 7 U.S.C. § 7a-2(c)(5)(A).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request an order and judgment:

a. Declaring that the CFTC's actions approving CME Rule 1001 and the ICE Rule 211 certification violate the Administrative Procedure Act and the Commodity Exchange Act, and are null and void;

b. Declaring that CFTC's changes to the Part 45 rules by summarily withdrawing its October 11, 2012 FAQs and then approving CME Rule 1001 to expressly supersede the withdrawn FAQs violate the Administrative Procedure Act and the Commodity Exchange Act, and are therefore null and void;

c. Declaring that CME Rule 1001 and ICE Rule 211 are inconsistent with the Commodity Exchange Act and CFTC regulations, and are null and void;

d. Vacating and setting aside the Commission's withdrawal of the FAQs, its approval of CME Rule 1001, and the ICE Rule 211 certification;

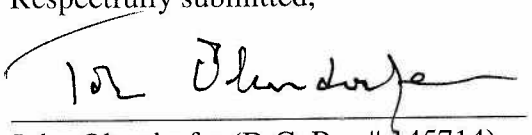
e. Reinstating the FAQs as issued on October 11, 2012;

f. Awarding Plaintiffs their reasonable costs incurred in bringing this action; and

g. Granting such other and further relief as this Court deems just and proper.

Dated: May 2, 2013

Respectfully submitted,



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ANNEX A

U.S. COMMODITY FUTURES TRADING COMMISSION
ENSURING THE INTEGRITY OF THE FUTURES & OPTIONS MARKETS

RELEASE: PR6428-12

November 28, 2012

CFTC Staff Withdraws Elements of the “Frequently Asked Questions on Reporting of Cleared Swaps”

Washington, DC –Staff of the Commodity Futures Trading Commission (Commission) today withdrew parts of its “Frequently Asked Questions on Reporting of Cleared Swaps.” Specifically, staff withdrew the following questions, and their corresponding answers:

“Which party has the authority to select the particular SDR for purposes of cleared swap reporting?”

“May a DCM, SEF or DCO that is also registered as an SDR or legally affiliated with an SDR require counterparties to use their “captive” SDR for reporting swap transactions?”

“Where must the resulting swaps created through the clearing process be reported?”

Matters raised in the questions and answers withdrawn by staff are now under consideration by the Commission as part of its review of a request from the Chicago Mercantile Exchange Inc. for approval of CME Rule 1001–“Regulatory Reporting of Swap Data,” submitted pursuant to section 40.5 of the Commission’s regulations. Today the Commission requested public comment on the CME rule submission.

The staff FAQ, as amended, is available under related links.

Last Updated: November 28, 2012

Commodity Futures Trading Commission
Office of Public Affairs
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
www.cftc.gov

Frequently Asked Questions (FAQ) on the Reporting of Cleared Swaps

What are the applicable reporting provisions in part 45 for cleared swap transactions?

Section 21(b)(1)(A) of the Commodity Exchange Act ("CEA"), added by section 728 of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), addresses the content of swap transaction data that registered entities and reporting counterparties must report to registered swap data repositories ("SDRs") and directs the Commission to "prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository." In fulfilling this statutory mandate, CEA section 21(b)(1)(B) also directs the Commission to "prescribe consistent data element standards applicable to registered entities and reporting counterparties."

Part 45 implements the requirements of section 21 of the CEA by setting forth the manner and content of reporting to SDRs and requires electronic reporting both when a swap is initially executed and over the course of the swap's existence. Reporting done at the time of execution is referred to as "creation" data and reporting done over the course of the swap's existence is referred to as "continuation" data. The part 45 regulations set forth varying reporting timeframes and compliance dates depending on the type of reporting, counterparty, execution or product.

Part 45 also requires the use of three unique identifiers in connection with reporting: Unique Swap Identifiers ("USI"), Legal Entity Identifiers ("LEI"), and Unique Product Identifiers ("UPI").

How will cleared swap transactions be reported to SDRs?

SDRs will accept data on swaps from the following sources that have an executed User Agreement with the SDR: (a) swap execution facilities ("SEFs"), (b) designated contract markets ("DCMs"), (c) derivatives clearing organizations ("DCOs"), (d) swap counterparties, or (e) 3rd party service providers (such as Markitwire) acting on behalf of any of these entities. For swaps reported to an SDR that are cleared at a particular DCO selected by the Reporting Counterparty, that DCO will send[1] to the SDR both daily trade data (having unique swap identifiers ("USIs"))[2] and position data (resulting from the netting process) for end-of-day ("EOD") processing, including valuations or net present values ("NPVs"). Any omissions or errors on previously reported swaps will be provided by those same sources.

USIs must be attached to the initial swap transaction(s) when executed (as required under current part 45 rules). Because § 45.5 requires that each swap subject to the jurisdiction of the Commission shall be identified in all recordkeeping and all swap data reporting by use of a USI, USIs must be attached to the trades resulting from the clearing process. As provided in Part 45, the SEF or DCM on which an on-facility swap[3] is traded, the

[1] The analysis for determining the party that reports primary economic terms ("PET") data is set forth under § 45.3 of the Commission's Regulations.

[2] Consistent with § 45.3 of the Commission's Regulations, USIs will be created by (i) SEFs/DCMs for on-facility swaps, (ii) the Reporting Counterparty for off-facility swaps where such Reporting Counterparty is a swap dealer ("SD") or major swap participant ("MSP"), or (iii) the SDR for an off-facility swap between two Non-SDs/MSPs.

[3] An "off-facility" swap is defined in § 45.1 as a "swap not executed on or pursuant to the rules of a swap execution facility or designated contract market."

Reporting Counterparty for an off-facility swap, or an Affirmation Platform[4] acting as a third-party service provider, assigns the USI for an original swap that will be cleared. Upon novation and clearing, the DCO should assign new USIs to the new swaps resulting from novation of the original swap to the clearing house. USIs should not be required for the aggregate net "positions" guaranteed by the DCO as these positions are subject to multi-lateral netting and will continuously change from day to day. Staff can track these USIs through data found on daily trade registers produced by the DCO, provided however, that detailed information regarding all activity taking place within the clearing house, for example, netting or compression events that took place, be contained within the trade register data.

By receiving data that is typically reported on a daily trade register, the Commission and Staff can: (i) trace USIs from day to day, (ii) see what trades make up a specific transaction (i.e. 4 trades make up 1 new trade), and (iii) see what trades make up a position (net notional) for that day only. It would be possible for the Commission and Staff in the future through computerized algorithms to trace back a USI and see when it was originally cleared, novated and/or changed into a new USI due to a partial termination or subsequent novation event.

Daily and Final settlement prices from a DCO are provided to the appropriate SDR at the instrument level (similar to futures). Non-US dollar swaps data should additionally provide a USD equivalent. All counterparties that face the DCO before and after the original swap is novated must be identified[5] using a CFTC Interim Compliant Identifier ("CICI")/LEI.[6]

How would the reporting obligations of part 45 of the Commission's Regulations apply to the reporting of a cleared swap?

The clearing of swaps requires that the original swap between counterparties ("original swap") be novated and extinguished, and thereby, replaced by different swaps (the "resulting swaps") between each counterparty and the DCO.[7] Once novated, the original swap is accordingly terminated so that there are no additional reporting obligations with respect to the original swap beyond the date of execution and/or termination, whichever is later.

For purposes of reporting, part 45 provides, with respect to the original swap, the following reporting obligations.

(1) If the original swap is executed on a SEF or DCM, the SEF/DCM is required to report PET data and confirmation data in a single report to a SDR.

(2) If the original swap is executed off-facility with the Reporting Counterparty being a SD/MSP, and the swap is accepted for clearing prior to the PET data deadline[8], then the DCO must report PET data and confirmation data in a single report as soon as technologically practical after clearing.[9]9

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[4] An Affirmation Platform is typically used by counterparties to verify the execution (i.e. match the economic terms) of a swap immediately after execution. Examples of Affirmation Platforms include ICE Link and Markitwire. An Affirmation Platform would be assigning the USI as a 3rd party service provider to the Reporting Counterparty.

[5] See § 45.5(d)(1) and (2) of the Commission's Regulations.

[6] See Commission CICI order available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister072412c.pdf.

[7] See § 39.12(b)(6) of the Commission's Regulations.

[8] The PET data deadlines in connection with Reporting Counterparties that are either SDs or MSPs for those swaps subject to mandatory clearing is 30 minutes after execution during year one and 15 minutes after execution after year one. For credit, equity, FX and rate swaps not subject to mandatory clearing, the PET data deadlines are 1 hour after execution in year one and 30 minutes after year one. However, if the non-Reporting Counterparty is not a financial entity and verification is not electronic, the PET data deadlines are 24 business hours after execution during year one; 12 business hours after execution during year two and 30 minutes after execution after year two. For other commodity swaps not subject to mandatory clearing, the PET data deadlines are 4 hours after execution in year one and 2 hours after execution after year one. However, if a non-

(3) If the original swap is an off-facility swap with the Reporting Counterparty being a non-SD/MSP, and the swap is accepted for clearing before the PET data deadline[10], then the DCO must report PET data and confirmation data in a single report as soon as technologically practical after clearing.[11] In this case, the non-SD/MSP will have no further part 45 reporting obligations.

(4) If the original swap is an off-facility swap with the Reporting Counterparty being a SD/MSP and if the swap is not accepted for clearing prior to the PET data deadline, the SD/MSP is required to report PET data as soon as technologically practical after execution but no later than the applicable PET data deadline.

(5) If the original swap is an off-facility swap with the Reporting Counterparty being a non-SD/MSP and if the swap is not accepted for clearing before, or the Reporting Counterparty has not yet reported PET data prior to, the PET data deadline, the non-SD/MSP is required to report PET and confirmation data as soon as technologically practical after execution but no later than the applicable PET data and confirmation reporting deadlines. Continuation data for these swaps must be reported no later than the applicable § 45.4(c) reporting deadlines.

As indicated above, once the original swap is accepted for clearing, and thereby extinguished, and replaced by the resulting swaps between each counterparty and the DCO, the part 45 reporting obligations for the original swap are terminated.

For purposes of reporting the "resulting swaps," part 45 provides the following reporting obligations.

(1) DCOs must report PET data and confirmation data in a single report as soon as technologically practical after execution.

(2) DCOs are also required to report valuation data daily. If the opposing counterparty to the resulting swap is a SD/MSP, the SD/MSP will also report valuation data daily and depending on whether continuation data is reported using the "state data" or "life cycle event data" approach, all other continuation data must be reported daily, on the day a life cycle event occurs, or on the second business day following a life cycle event. However, if the opposing counterparty to the resulting swap is a non-SD/MSP, there are no continuing part 45 reporting obligations after acceptance for clearing.

How does the Reporting Counterparty hierarchy set forth in § 45.8 of the Commission's Regulations apply to cleared swaps and DCOs?

The determination of the Reporting Counterparty under § 45.8 of the Commission's Regulations applies to all swaps, both cleared and non-cleared. However, Staff believes that for cleared swaps, DCOs would report

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Reporting Counterparty is not a financial entity and verification is not electronic, the PET data deadlines are 24 business hours after execution in year one; 12 business hours after execution in year two and 30 minutes after execution after year two.

[9] The Staff also notes that part 45 permits a Reporting Counterparty to report PET data to an SDR whereby the DCO would then only report confirmation data.

[10] The PET data deadlines in connection with Reporting Counterparties that are non-SDs/MSPs for those swaps subject to mandatory clearing are: (i) 4 hours after execution during year one; (ii) 2 hours after execution during year two; and (iii) 1 hour after execution after year two. For swaps not subject to mandatory clearing, the PET data deadlines are (i) 48 business hours after execution in year one; (ii) 36 business hours after execution during year two; and (iii) 24 business hours after execution after year two.

[11] See note 9 supra.

creation data (including PET data) and continuation data on the resulting swaps to the SDR. With respect to the definition of non-SD/MSP set forth in § 45.1 of the Commission's Regulations, the Staff believes that DCOs have reporting obligations irrespective of their characterization as a Reporting Counterparty.

The general hierarchy for determining the Reporting Counterparty is set forth in § 45.8 as follows:

- If only one counterparty is a SD, then the SD is the Reporting Counterparty;
- If neither counterparty is a SD, and only one counterparty is a MSP, the MSP is the Reporting Counterparty;
- If both counterparties are non-SDs/MSPs, and only one counterparty is a financial entity (as defined in CEA section 2(h)(7)(C)), the counterparty that is a financial entity is the Reporting Counterparty;
- If both counterparties are SDs or MSPs or non-SDs/MSPs that are financial entities or non-SDs/MSPs that are not financial entities, then the counterparties are required to agree which counterparty will be the Reporting Counterparty;
- If both counterparties are non-SDs/MSPs and only one counterparty is a U.S. person, that U.S. person counterparty is the Reporting Counterparty; and
- If neither counterparty is a U.S. person but the swap is executed on a SEF or DCM or otherwise executed in the U.S. or cleared by a DCO, then the counterparties are required to agree which counterparty will be the Reporting Counterparty.

As detailed above, DCOs will have reporting obligations for cleared swaps that are not dependent on whether the DCO is deemed to be a Reporting Counterparty.

What are the reporting obligations of a DCO for off-facility cleared swaps on October 12, 2012?

As of Compliance Date 1 on October 12, 2012, DCOs are required to comply with the reporting provisions set forth in part 45 for credit swaps and interest rate swaps. Accordingly, in connection with a cleared credit swap or interest rate swap transaction that is executed off-facility, the creation data (including PET data) for resulting swaps accepted for clearing must be reported by the DCO to an SDR. In addition, the DCO will be required to report all continuation data for the resulting swaps. Once the Reporting Counterparty is required to report pursuant to the compliance dates set forth in part 45, the original swap would then be reported as a historical swap with the resulting swaps "linked" back to the historical reported swap. Swaps executed on a DCM on October 12, 2012 would not have similar reporting ambiguities since part 45 requires DCMs to report creation data for the original swap transaction to an SDR on October 12, 2012.

Staff believes that this reporting anomaly could occur in the case of a swap that is subject to clearing (or voluntarily cleared) where either of the original counterparties is not yet registered as SDs/MSPs or both counterparties are non-SDs/MSPs that will not be subject to reporting until April 10, 2013. Once accepted for clearing by the DCO, the resulting swaps will be created by the DCO with each counterparty and will be subject to creation data and continuation data reporting by the DCO.

~~**Which party has the authority to select the particular SDR for purposes of cleared swap reporting?**~~

~~Part 45 of the Commission's Regulations is silent regarding which party to a swap transaction has the authority to select the SDR. However, § 45.8 of the Commission's Regulations provides a selection hierarchy for determining the Reporting Counterparty for reporting swaps to an SDR. Accordingly, Staff believes that (unless otherwise agreed to by the counterparties and the DCO) the selection of the particular SDR to which the swap data is reported for the resulting swaps due to clearing is to be determined by the counterparties to the original swap.~~

May counterparties to a swap transaction (including a cleared swap) as part of the terms of such swap designate which counterparty will report the creation and continuation data (except for valuation data) to the SDR?

Yes. As set forth in § 45.9 of the Commission's Regulations, registered entities and counterparties required to report pursuant to part 45 may contract with 3rd parties to facilitate reporting. In this context, 3rd parties may include, but are not limited to, the other counterparty to the swap, a 3rd party service provider (such as Markitwire) as well as the DCO in the case of a cleared swap. As a result, the Reporting Counterparty may delegate the actual process of reporting data to the SDR to the other counterparty as well as to a 3rd party.

~~**May a DCM, SEF or DCO that is also registered as an SDR or legally affiliated with an SDR require counterparties to use their "captive" SDR for reporting swap transactions?**~~

~~No. As set forth in § 49.27(a) of the Commission's Regulations, SDRs are prohibited from tying or bundling the offering of mandated SDR services with other "ancillary" services. In this situation, the DCM, SEF or DCO, as a registered SDR, would be tying/bundling its SDR services with its offering of trading or clearing services. Market participants may choose to use a DCM's, SEF's or DCO's SDR for reporting swap transactions, but a DCM, SEF or DCO as part of its offering of trading or clearing services cannot require that market participants use its affiliated or "captive" SDR for reporting. Such a result would be inconsistent with the intent of Section 21 and § 49.27(a) of the Commission's Regulations relating to the reporting of transactions. Consistent with Section 21 of the CEA and § 49.27(a) of the Commission's Regulations, Staff believes that access to SDR services must be fair, open and equal. Section 49.27 was adopted to ensure, to the greatest extent possible, that SDRs' fee, pricing and other access policies are not used as a means to deny or limit access to certain market participants.~~

In connection with cleared swaps, may DCOs in meeting their obligation to report "continuation data" under part 45 of the Commission's Regulations, report swap position data to SDRs rather than transactional data?

Section 45.5(e) of the Commission's Regulations requires each registered entity or swap counterparty subject to the jurisdiction of the Commission to include a unique swap identifier (USI) "for a swap in all of its records and all of its swap data reporting concerning that swap, from the time it creates or receives the unique swap identifier as provided in this section, throughout the existence of the swap and for as long as any records are required by the CEA or Commission regulations to be kept by that registered entity or counterparty concerning the swap." With respect to cleared swaps, DCOs have raised concerns about their ability to comply with § 45.5(e).

Staff understands that DCOs have the ability to accept a trade for clearing with a USI assigned by the Reporting Counterparty, extinguish that trade through novation to the clearing house upon acceptance for clearing, and then assign new USIs to each side of the original trade upon novation. In addition, DCOs can also link the original USI to the new USI(s) on that trade date, and then report that data to SDRs. This transaction data, with all the relevant economic, counterparty and, if provided, customer detail, is recorded and archived.

Staff believes that § 45.5(e) permits DCOs to report swap position data to SDRs in the same manner that is currently required for futures and options reporting to the Commission. As a result, USIs will be required for

transactional data on the trade date; however, a separate USI would not be required for position data. DCOs, however, are required to provide and maintain daily trade registers of detailed information, including but not limited to, any netting or compression events that took place on trade date. In addition, Staff believes that for cleared swap reporting to SDRs, DCOs should include a link between the original swap (and any applicable USI from the original swap) to the resulting or new swap between the DCO and each original counterparty (and any applicable USIs from the new swaps). Section 45.5 requires that reporting entities must maintain records identifying each swap by USI. In that regard, Staff believes that DCOs should include a link between the original swap and resulting or new swaps.

~~**Where must the resulting swaps created through the clearing process be reported?**~~

~~Pursuant to § 45.10 of the Commission's Regulations, all swap data for a given swap must be reported to a single SDR, which is the SDR to which the first report of required swap creation data is made. In particular, § 45.10 provides that the initial report of creation data for a swap will be made as follows: (1) for swaps executed on a SEF/DCM, the SEF/DCM reports all creation data to a single SDR, as soon as technologically practicable after execution; (2) for off-facility swaps, the Reporting Counterparty reports all PET data to a single SDR, within the deadlines provided in part 45; and (3) for off-facility swaps, if the Reporting Counterparty is excused from reporting, as provided in part 45, because the swap is accepted for clearing before the reporting deadline and before any report made by the Reporting Counterparty, the DCO reports all creation data to a single SDR, as soon as technologically practicable after execution. In each case, continuation data must be reported to the SDR to which required PET data for that swap was first reported.~~

What are the obligations of the counterparties to a cleared swap to provide updated information if such swap is allocated after clearing by a counterparty to its "clients"?

Allocations are (normally) post-trade events where a party (usually an asset manager but referred to in the part 45 regulations as the "agent") allocates a portion of an executed swap to clients who are the "actual" counterparties to the original transaction. Section 45.3(e) of the Commission's Regulations provides that the agent must inform the Reporting Counterparty of the identities of the allocated entities within 8 business hours after execution. Staff believes that the Reporting Counterparty must then assign new USIs to each individual allocated swap, report them to the SDR, and the SDR must map all the allocated swaps back to the original executed swap between the reporting counterparty and the "agent" or asset manager.
Therefore, Staff believes that swaps that are allocated after clearing are required to be updated by the original counterparties (or their agents) to provide allocation information to DCOs.

What are the obligations of the counterparties to a non-cleared swap executed on a SEF to report continuation data to an SDR?

Section 45.8(h) of the Commission's Regulations provides "[f]or all swaps executed on or pursuant to the rules of a swap execution facility or designated contract market, the rules of the swap execution facility or designated contract market must require each swap counterparty to provide sufficient information to the swap execution facility or designated contract market to enable the swap execution facility or designated contract market to report all swap creation data as provided in this part." Accordingly, § 45.8(h) sets forth the notification provisions requiring each counterparty to provide sufficient information to the SEF/DCM in connection with creation data without reference to reporting obligations of continuation data to SEFs/DCMs.

The Part 45 Adopting Release,[12] however, does indicate that the counterparties report continuation data for on-platform, uncleared swaps. In particular, the flowcharts of the Part 45 Adopting Release[13] clearly set forth these

[12] See Final Rule: Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (January 13, 2012)("Part 45 Adopting Release").

[13] See Part 45 Adopting Release at 77 FR 2156-2157.

obligations for Reporting Counterparties if an SD/MSP or non-SD/MSP. In each case, if a swap is executed on a SEF or DCM and not cleared, the continuation data will be reported by the Reporting Counterparty.

Therefore, in connection with non-cleared swaps executed on a SEF, when a SD/MSP is the Reporting Counterparty, continuation data must be reported by the SD/MSP counterparty, and when a non-SD/MSP counterparty is the Reporting Counterparty, continuation data must be reported by the non-SD/MSP counterparty.

As provided in § 45.9 of the Commission's Regulations, a Reporting Counterparty required to report continuation data may contract with a 3rd party service provider to facilitate such reporting, although the Reporting Counterparty remains responsible for reporting as required.

ANNEX B

U.S. COMMODITY FUTURES TRADING COMMISSION
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VIA EMAIL

March 6, 2013

Tim Elliott
Executive Director and Associate General Counsel
CME Group
20 South Wacker Drive
Chicago, Illinois 60606

RE: Regulation 40.5 Request for Approval: Chicago Mercantile Exchange Inc. Submission # 12-391R: Adoption of new Chapter 10 ("Regulatory Reporting of Swap Data") and Rule 1001 ("Regulatory Reporting of Swap Data")

Dear Mr. Elliott,

On December 6, 2012, CME voluntarily submitted, pursuant to Commodity Futures Trading Commission ("Commission") Regulation 40.5, for Commission review and approval, a request to adopt new Chapter 10 ("Regulatory Reporting of Swap Data") and Rule 1001 ("Regulatory Reporting of Swap Data") of CME's Rulebook. The rule provides that all swaps cleared by CME's Clearing Division ("CME's DCO") shall be reported by CME's DCO to CME's swap data repository ("SDR"). The rule also provides that upon the request of a counterparty to a swap cleared at CME's DCO, CME's DCO shall provide the same creation and continuation data to an SDR selected by the counterparty as CME's DCO provided to CME's SDR.

This is to inform you that new Chapter 10 and new Rule 1001 have been approved by the Commission pursuant to Section 5c(c)(5) of the Act and Section 40.5 of the Commission's regulations. A Commission Statement which sets forth the bases for the approval is attached.

Sincerely,

Melissa Jurgens
Secretary to the Commission

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STATEMENT OF THE COMMISSION

I. INTRODUCTION

The Commodity Futures Trading Commission ("Commission"), pursuant to Section 5c(c)(5) of the Commodity Exchange Act ("the Act")[1] and § 40.5 of the Commission's regulations, hereby grants the Chicago Mercantile Exchange Inc.'s ("CME") request for approval of new Chapter 10 and new Rule 1001—Regulatory Reporting of Swap Data in CME's Rulebook.[2] For the reasons set forth below, the Commission has determined that CME Rule 1001 meets the standard for Commission approval of registered entity rules set forth in Section 5c(c)(5)(A) in that it is not inconsistent with the Act, or the Commission's regulations thereunder.[3] The Commission's determination is based on its analysis of, among other provisions, Sections 2(a)(13)(G), 5b, and 21 of the Act, including DCO Core Principles C (Participant and Product Eligibility)[4] and N (Antitrust Considerations);[5] and Parts 39,[6] 45,[7] and 49[8] of the Commission's regulations. In sum, the Commission has determined that Rule 1001 is not inconsistent with either the Act or the regulatory structure implemented by the Commission to effectuate the Act.[9]

Sections I and II of this decision present the text of CME Rule 1001, the relevant statutory and regulatory context, and the procedural history of CME's request for approval of CME Rule 1001. Section III addresses the legal standard for approval of rule submissions, and Section IV presents the Commission's analysis of CME Rule 1001 under that legal standard in light of the relevant statutory and regulatory provisions. In Section V, the Commission addresses public comments.

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

[2] Rule 1001, a clearing rule, was submitted for approval by CME. CME is registered with the Commission as a derivatives clearing organization ("DCO") and is designated as a designated contract market ("DCM"). It also is provisionally registered with the Commission as a swap data repository ("SDR"). Although all under CME, the DCO, DCM and SDR are separate registrants subject to their own specific statutory and regulatory requirements and, therefore, are regulated as separate entities. CME is a wholly-owned subsidiary of the CME Group, which also is the holding company for four other DCMs: NYMEX, CBOT, KCBT, and COMEX.

[3] Under the Act, the Commission's legal standard in considering a rule for approval is as follows: "The Commission shall approve a new rule, or rule amendment, of a registered entity unless the Commission finds that the new rule, or rule amendment, is inconsistent with this subtitle (including regulations)." 7 U.S.C. § 7a-2(c)(5)(A).

[4] 7 U.S.C. § 7a-1(c)(2)(C).

[5] 7 U.S.C. § 7a-1(c)(2)(N).

[6] Derivatives Clearing Organization General Provisions and Core Principles, 76 Fed. Reg. 69334 (Nov. 8, 2011).

[7] Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan.13, 2012).

[8] Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. 54538 (Sep. 1, 2011).

[9] The Commission understands that CME intends this rule to become effective on the next business day following such date as the rule may be approved.

A. CME Rule 1001

CME Rule 1001 provides that:

> For all swaps cleared by the [CME] Clearing House, and resulting positions, the [CME] Clearing House shall report creation and continuation data to CME's swap data repository for purposes of complying with applicable CFTC rules governing the regulatory reporting of swaps. Upon the request of a counterparty to a swap cleared at the Clearing House, the Clearing House shall provide the same creation and continuation data to a swap data repository selected by the counterparty as the [CME] Clearing House provided to CME's swap data repository under the preceding sentence.[10]

B. Statutory and Regulatory Context

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") amended the Act to establish a comprehensive new regulatory framework for swaps.[11] Dodd-Frank includes significant new swap reporting[12] and clearing[13] obligations to increase transparency and help reduce systemic risk in the swaps markets. According to its terms, CME Rule 1001 concerns the manner in which certain of these reporting obligations for swaps are to be met.

Section 727 of Dodd-Frank added § 2(a)(13)(G) to the Act, thereby requiring that "each swap (whether cleared or uncleared) shall be reported to a registered swap data repository." Section 728 of Dodd-Frank added Section 21 to the Act and created a new category of registered entity—swap data repositories ("SDRs")—to receive the regulatory data for swaps that must be reported, and make such data available to the Commission and other regulators. While Congress mandated the reporting of swap data to an SDR, it delegated to the Commission the authority to implement the mandate as the Commission deems appropriate.

The Commission implemented Dodd-Frank's regulatory reporting requirements for swap data through Parts 45 and 49 of its regulations, which address, respectively: (1) registration standards, duties and core principles for SDRs; and (2) swap data recordkeeping and reporting requirements.[14] Part 45 sets forth swap data recordkeeping and reporting requirements for SDRs, DCOs, DCMs, swap execution facilities ("SEFs"), swap dealers ("SDs"), major swap participants ("MSPs"), and other swap counterparties who are neither SDs nor MSPs. It addresses the reporting of swap creation and continuation data; the use of unique product

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[10] *See* CME Submission No. 12-391RC.

[11] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act is available at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[12] Sections 727 and 728 of Dodd-Frank (codified at 7 U.S.C. § 2(a)(13) and 7 U.S.C. § 24, respectively).

[13] Section 723 of the Dodd-Frank Act (codified at 7 U.S.C. § 2).

[14] The Commission also adopted Part 43, which addresses the real-time reporting of swap data, and Part 46, which addresses the reporting of historical swaps. Generally, historical swaps are the aggregation of pre-Dodd-Frank swaps (*i.e.*, swaps executed before the date of Dodd-Frank's enactment and still in existence on the date of enactment) and transition swaps (*i.e.*, swaps executed between the date of Dodd-Frank's enactment and the effective date of part 45). Neither the Part 43 nor the Part 46 rules are involved in this analysis.

identifiers, unique swap identifiers, and legal entity identifiers; counterparty reporting obligations; data standards; and other related topics. As the Commission has explained, an overarching principle in the rules is "reporting by the registered entity having the easiest, fastest, and cheapest access to the data in question, and most likely to have automated systems suitable for reporting."[15] Under Part 49, "SDRs are required to perform specified functions related to the collection and maintenance of swap transaction data and information and to make such data and information directly and electronically available to regulators."[16] SDRs are specifically required to accept and maintain swap data.

With respect to clearing requirements, Section 725(c) of Dodd-Frank amended Section 5b(c)(2) of the Act, "to set forth core principles which a DCO must comply with in order to be registered and to maintain registration as a DCO."[17] The Commission implemented Dodd-Frank's clearing requirements through Part 39, which provides general provisions and core principles applicable to DCOs. Part 39 also provides for the treatment of swaps upon which the reporting rules are to operate. In Part 39, the Commission determined that a swap that is submitted for clearing (the "original swap") is "extinguished" upon novation and "replaced" by two new swaps that result from novation.[18] That determination guides the Commission's evaluation of whether CME Rule 1001 is inconsistent with the regulatory reporting rules in Part 45.

To the extent that any guidance previously issued by the Commission Staff may be inconsistent with the Commission's determination herein with respect to CME Rule 1001, the Commission's determination supersedes any such prior Staff guidance.[19]

II. Procedural History

On November 9, 2012, CME submitted a voluntary request for approval[20] of a new Chapter 10 ("Regulatory Reporting of Swap Data") in CME's Rulebook, and of a new CME Rule 1001 within Chapter 10. The Commission's procedures for reviewing CME's request are governed by Section 5c(c) of the Act and 17 C.F.R. § 40.5. Section 40.5 provides an initial 45-day review period for all voluntary requests for rule approval.[21] It further provides that the Commission may extend the review period by an additional 45 days "if the proposed rule raises novel or complex issues that require additional time for review…"[22]

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[15] 77 Fed. Reg. 2136, 2138 (Jan. 13, 2012).
[16] 76 Fed. Reg. 54538, 54539 (Sep. 1, 2011).
[17] 76 Fed. Reg. 69334, 69334 (Nov. 8, 2011).
[18] *See* 17 C.F.R. § 39.12(b)(6).
[19] On October 11, 2012, Staff issued "Frequently Asked Questions on Reporting of Cleared Swaps." *See* "CFTC Staff Responds to Frequently Asked Questions on the Reporting of Cleared Swaps," *available at* <http://www.cftc.gov/PressRoom/PressReleases/pr6381-12>. That guidance reflected the views of Staff, and those parts of the guidance that were pertinent to the issues raised by CME's Rule 1001 submission were withdrawn on November 28, 2012, pending the Commission's review of the rule. *See* "CFTC Staff Withdraws Elements of the 'Frequently Asked Questions on Reporting of Cleared Swaps,'" *available at* <http://www.cftc.gov/PressRoom/PressReleases/pr6428-12>.
[20] CME Submission No. 12-391.
[21] *See* 17 C.F.R. § 40.5(c).
[22] *See* 17 C.F.R. § 40.5(d)(1).

CME submitted an amended filing with respect to Chapter 10 and CME Rule 1001 on December 6, 2012.[23] The December 6 filing constituted a new filing under § 40.5(c)(1)(ii) and therefore restarted the initial 45-day review period. By its own terms and consistent with the Act, § 40.5 does not require notice to the public and opportunity for comment on rule approval submissions. Nonetheless, on December 10, 2012, the Commission initiated a 28-day public comment period for Chapter 10 and CME Rule 1001, which was originally scheduled to expire on January 7, 2013.

On December 14, 2012, CME submitted a corrected filing with respect to Chapter 10 and CME Rule 1001;[24] the corrected filing was posted on the Commission website on December 28, 2012. Although the corrected filing did not constitute a new submission under § 40.5(c)(1)(ii) because it contained no substantive revisions, the Commission nonetheless extended the public comment period from January 7, 2013 to January 14, 2013. The Commission received 27 comment letters from 16 commenters.[25]

On January 18, 2013, the Division of Market Oversight, under delegated authority, determined that CME Rule 1001 raised novel or complex issues that required additional time for review, and therefore extended the review period by another 45 days.[26] The extended review period expires on March 6, 2013.

III. LEGAL STANDARD

The Act sets forth a specific legal standard for the approval of rules submitted by a registered entity. The statute states: "The Commission shall approve a new rule, or rule amendment, of a registered entity unless the Commission finds that the new rule, or rule amendment, is inconsistent with this subtitle (including regulations)."[27] This statutory requirement answers DTCC's objection that addressing CME's request for consideration of Rule 1001 results in a process "that falls far short of the requirements for the Administrative

[23] CME Submission No. 12-391R.
[24] CME Submission No. 12-391RC.
[25] During the open comment period, four parties submitted comments in favor of Rule 1001. These parties are: IntercontinentalExchange, Inc. ("ICE"); Chris Barnard; Commercial Energy Working Group ("CEWG"); and Commodity Markets Council ("CMC"). Eleven parties submitted comments opposing Rule 1001. These parties are: Depository Trust & Clearing Corporation ("DTCC"); DTCC Data Repository ("DDR"); Association of Institutional Investors ("AII"); JPMorgan Chase & Co. ("JPMorgan"); Citigroup Inc. ("Citi"); Deutsche Bank; Wholesale Market Brokers' Association, Americas ("WMBAA"); International Swaps and Derivatives Association, Inc. ("ISDA"); Securities Industry and Financial Markets Association ("SIFMA"); Global Foreign Exchange Division of the Global Financial Markets Association ("GFXD"); and the Edison Electric Institute, Electric Power Supply Association, Large Public Power Council, National Rural Electric Cooperative Association, and Natural Gas Supply Association (the "Coalition"). CME submitted a comment on January 16. A number of commenters provided policy reasons for approving or disapproving Rule 1001. As noted herein, the Commission must assess only whether Rule 1001 is inconsistent with the Act or Commission regulations.
[26] *See* 17 C.F.R. § 40.5(d)(1).
[27] 7 U.S.C. § 7a-2(c)(5)(A). This statutory standard has been implemented by regulation, which states that the Commission "shall approve a new rule or rule amendment unless the rule or rule amendment is inconsistent with the [Act] or the Commission's regulations." 17 C.F.R. § 40.5(a)-(b).

Procedure Act ('APA') notice and rulemaking."[28] Indeed, no rulemaking is required because the task that confronts the Commission is limited – determining whether CME's rule is inconsistent with the CEA or with the Commission's rules. That is, there are only two possible outcomes with respect to rules submitted to the Commission for approval: if the Commission finds no inconsistency, it must approve the submitted rule, or if it finds there is inconsistency, it must reject the submitted rule. As explained in this Statement, with respect to CME Rule 1001, the Commission concludes that there is no inconsistency because nothing in the Commission's rules precludes CME from sending resulting swap data to its own SDR. In reaching this conclusion, the Commission may interpret its regulations.[29] (Of course, if the Commission were to decide that it is unhappy with the outcome that the analysis under § 7a-2(c)(5)(A) produces, it could initiate a new rulemaking to change its rules, but that would be a separate proceeding from its consideration of CME's rule.)"[30]

IV. DISCUSSION

The Commission concludes that CME Rule 1001, which provides that all creation and continuation data for resulting swaps cleared by the CME DCO shall be reported to CME's swap data repository, is not inconsistent with the Act, specifically Sections 2(a)(13)(G),[31] 5b and 21 of the Act. The Commission notes that the issues that have been raised with respect to CME Rule 1001, and addressed herein, involve the Commission's implementing regulations to those sections of the Act, particularly the regulations in Parts 39, 45 and 49 including those that

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[28] *See, e.g.*, DTCC Comment Letter at 5 (Jan. 8, 2013).

[29] "The APA does not require that all specific applications of a rule evolve by further, more precise rules." *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 96 (1995); *see also Cent. Tex. Tel. Coop. v. FCC*, 402 F.3d 205, 210 (D.C. Cor. 2005) ("Agencies often have a choice of proceeding by adjudication rather than rulemaking."). Indeed, if the regulations are silent or ambiguous, agencies can issue interpretations in any number of ways, including by adjudication, *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); internal agency memos, *see Coeur Alaska Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 277-78 (2009); and even amicus briefs, *see Auer v. Robbins*, 519 U.S. 452 (1997).

[30] Despite DTCC's assertion, there is no statutory requirement to consider costs and benefits in connection with rule approval requests under CEA Section 5c(c) and Rule 40.5. First, Congress provided in Section 5c(c) that a registered entity's rule must be approved unless it is inconsistent with the Act or the Commission's regulations. A consideration of the costs and benefits of a registered entity's rule is not pertinent to that mandate, and, in the context of considering whether a submitted rule should be approved pursuant to the statutory standard, the Commission is not free to consider whether one outcome or the other would be more costly to market participants. Second, the Commission's approval of a registered entity's rule is neither a "regulation" nor an "order" within the meaning of Section 15(a), which provides that the Commission shall consider costs and benefits before "promulgating a regulation . . . or issuing an order" subject to certain exceptions. 7 U.S.C. § 19(a)(1). Section 15(a) should be read in conjunction with Section 15(b), which makes clear that approval of a registered entity's rule does not constitute an "order" within the meaning of Section 15. *See* 7 U.S.C. § 19(b) (requiring the Commission to consider antitrust concerns when issuing either "orders" or approving rules of a "contract market or registered futures association"). Finally, under Section 5c(c) and Rule 40.5, a rule submitted by a registered entity for approval takes effect automatically if the Commission does not make any findings or take any action at all, further illustrating that Section 15(a)'s cost-benefit provision is inapplicable to approvals under Section 5c(c) and Rule 40.5.

[31] As noted above, Section 2(a)(13)(G) of the Act, added by Section 727 of Dodd-Frank, requires that all swaps, whether cleared or uncleared, be reported to SDRs. Section 727 did not prescribe particular reporting regime requirements for cleared swaps; rather the reporting requirements for cleared swaps were left within the Commission's discretion. Because the Act does not set forth any procedures for reporting of clearing swaps, there are no such statutory provisions with which the CME rule would conflict.

implement DCO Core Principles C and N. As discussed below, the Commission concludes that CME Rule 1001 also is not inconsistent with these implementing regulations.

A. CME Rule 1001 is not inconsistent with § 45.10

Section 45.10 requires that "all swap data for a given swap must be reported to a single SDR, which shall be the SDR to which the first report of required swap creation data is made pursuant to this part." The Part 45 regulations, however, do not define the term "given swap." With respect to the reporting of cleared swaps, public comments received by the Commission in response to CME Rule 1001 suggest that the Part 45 rules could arguably be interpreted in two ways. As explained below, the Commission concludes that the correct interpretation of a "given swap" is one that fits within the legal framework established for the clearing of swaps.[32]

Several comments received by the Commission suggest that the term "given swap" comprises the original swap executed between the counterparties, as well as the two swaps resulting from the clearing novation process.[33] Under that interpretation, CME Rule 1001 would be inconsistent with § 45.10, because the CME DCO, by reporting the data for the resulting swaps to the CME SDR, may be reporting that data for a single "given swap" to a different SDR than the SDR to which the original swap was reported. Consequently, under that interpretation all swap data would not be reported to a single SDR, in violation of § 45.10.

Alternatively, CME asserts that the original swap and the two swaps resulting from the clearing novation process should be considered distinct "given swaps." Under this interpretation, CME Rule 1001 would not be inconsistent with § 45.10.

The Commission affirms this latter interpretation. A cleared swap in fact comprises three separate swaps—the original swap that was terminated upon novation and the two swaps that resulted from novation. In fact, in the Part 39 provisions governing DCOs and the swap clearing process, which were adopted before Part 45, the Commission specifically determined that cleared swaps transactions comprise three different swaps.[34]

Specifically, § 39.12(b)(6) requires a DCO that clears swaps to "have rules providing that, upon acceptance of a swap by the [DCO] for clearing: (i) the original swap is extinguished; (ii) the original swap is replaced by an equal and opposite swap between the [DCO] and each clearing member acting as principal for a house trade or acting as agent for a customer trade; (iii) all terms of a cleared swap must conform to product specifications established under [DCO] rules; and (iv) if a swap is cleared by a clearing member on behalf of a customer, all terms of the swap, as carried in the customer accounts on the books of the clearing member, must conform to the terms of the cleared swap established under the [DCO's] rules."[35]

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[32] "Given swap" is not defined in the Act, nor was it defined in the Commission's regulations.

[33] For each resulting swap, the counterparties are the DCO on one side and the clearing member of the counterparty to the original swap on the other side.

[34] Part 39 sets forth regulations for DCOs which are registered, deemed to be registered or required to be registered with the Commission.

[35] 17 C.F.R. § 39.12(b)(6).

Under the terms of § 39.12(b)(6)(i) and (ii), the original swap is extinguished and replaced by two equal and opposite swaps between the DCO and each clearing member acting as either a principal for a house trade or an agent for a customer trade. In other words, through the process of novation, the bilateral contractual obligations associated with the original swap are replaced with new, and opposite, obligations between each clearing member and the DCO. [36] Therefore, the parties to the original swap are no longer obligated to each other, and the DCO becomes the central counterparty. Central counterparty clearing mitigates counterparty credit risk (by substituting the credit of the central counterparty for the credit of each bilateral counterparty) and provides increased opportunity for offset (by permitting a participant to offset trades executed with one bilateral counterparty with opposing trades executed with other counterparties), thereby increasing liquidity in the market.

The concepts of "extinguishment" and "novation" have longstanding application and industry acceptance with respect to central counterparty clearing of derivatives. In fact, they are fundamental components of such clearing. Historically, U.S. futures exchanges required that futures contracts entered into on the exchange be submitted for clearing by a central counterparty clearinghouse.[37] Upon accepting a trade for clearing, the clearinghouse interposes itself in the transaction as a principal between the parties, "becoming the seller to every buyer and the buyer to every seller."[38] As a result, "the clearinghouse assumes the rights and obligations of each exchange member with respect to the other, the contract between the exchange members becomes two separate contracts between the clearinghouse and each of the clearing members, and the individual exchange members are no longer obligated to one another."[39] In other words, "[t]he original bilateral contracts between market participants are extinguished and replaced by new contracts with the [central counterparty]."[40]

The Commission adopted §§ 39.12(b)(6)(i) and (ii) to codify these industry practices with respect to swaps. In addition, the Commission believes that §39.12(b)(6), of which §§39.12(b)(6)(i) and (ii) are integral parts, is necessary to encourage the standardization of swaps and to avoid any differences between the terms of a swap as carried at the DCO level and as

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[36] *See generally*, Raymond Knott & Alastair Mills, *Modelling Risk in Central Counterparty Clearing Houses: A Review*, 2002 BANK OF ENG. FIN. STABILITY REV. at 162; Karel Lannoo & Mattias Levin, Ctr. for Eur. Policy Studies, THE SECURITIES SETTLEMENT INDUSTRY IN THE EU: STRUCTURE, COSTS AND THE WAY FORWARD at 3 (2001); 1 Essie Linton & Mary Starks, NERA Econ. Consulting, THE DIRECT COSTS OF CLEARING AND SETTLEMENT: AN EU-US COMPARISON at 10 (2004).

[37] *See* 1 Thomas A. Russo, REGULATION OF THE COMMODITIES FUTURES AND OPTIONS MARKETS § 2.01 (1994); 4 William L. Norton, Jr., NORTON BANKRUPTCY LAW AND PRACTICE § 88:2 (3d ed. 2013).

[38] RUSSO, *supra* note 37, § 2.01. *See also* George Wright Hoffman, FUTURE TRADING UPON ORGANIZED COMMODITY MARKETS IN THE UNITED STATES 202 (1932); 13A Jerry W. Markham, COMMODITIES REGULATION: FRAUD, MANIPULATION AND OTHER CLAIMS § 27:9 (2012); 10A Harold S. Bloomenthal & Samuel Wolff, INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 31A:26 (2012); 1 Philip McBride Johnson & Thomas Lee Hazen, DERIVATIVES REGULATION § 1.05 (2004); Knott & Mills, *supra* note 36, at 162; Lannoo & Levin, *supra* note 36, at 3.

[39] RUSSO, *supra* note 37, § 2.02; *see also* Hoffman, *supra* note 38, at 203.

[40] Knott & Mills, *supra* note 36, at 162.

carried at the clearing member level, which would raise both customer protection and systemic risk concerns.[41]

Consistent with our prior determination in Part 39 and the longstanding practice it reflects, the Commission affirms that the original and resulting swaps are three separate and unique swaps, and should be treated as such for reporting purposes. For consistency and clarity, the Commission believes that it is important to adhere to the same framework established in Part 39 for original and resulting swaps for the purposes of the reporting regime for such swaps under Part 45.

Reflecting this established framework, the Commission previously indicated that in situations where a swap is novated, the two resulting swaps will each be given a new unique swap identifier ("USI"): "the final rule provides that USI codes created at the time of execution using the first-touch approach will only be replaced where a new swap takes the place of an old swap, such as where a compression or full novation has occurred."[42] Because the Commission requires that each of the swaps resulting from novation be given its own USI code, the Commission intended for those swaps to be treated as separate and distinct from the original swap for reporting purposes.[43]

Having determined that the swaps resulting from clearing novation are distinct from the original swap (and from each other) and should be recognized as such for reporting purposes, the Commission next considers whether its rules preclude the DCO from choosing the SDR to which the data from the resulting swaps will be reported. CME Rule 1001 provides for the CME DCO to report resulting swap data to its affiliated SDR. The Commission concludes that the Part 45 rules do not preclude CME from reporting the resulting swap data to an affiliated SDR.[44]

When the Commission approved Parts 45 and 49, it specifically contemplated that DCOs may report swaps to an SDR of their choosing. The Commission stated that "the rules and regulations of a particular SEF, DCM or DCO may provide for the reporting to a particular SDR."[45] The Commission has also explained that "the final rules do not preclude counterparties or registered entities from reporting swap data to existing DCOs registered as SDRs, or to SDRs chosen by DCOs, if they so choose for business or cost-benefit reasons."[46]

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[41] Risk Management Requirements for Derivatives Clearing Organizations, 76 Fed. Reg. 3698, 3702 (Jan. 20, 2011). From a customer protection standpoint, if the terms of the swap at the customer level differ from those at the clearing level, then the customer position cannot really be said to have been cleared and the customer may not receive the full transparency and liquidity benefits of clearing. In addition, if the customer position differs from the cleared position, the customer may not receive the full transparency and liquidity benefits of clearing. Similarly, from a systemic perspective, any differences could diminish overall price discovery and liquidity.

[42] 77 Fed. Reg. 2136, 2159 (Jan. 13, 2012).

[43] *See* 17 C.F.R. § 45.5 ("[e]ach swap subject to the jurisdiction of the Commission shall be identified in all recordkeeping and all swap data reporting pursuant to this part by the use of a unique swap identifier . . . .").

[44] A number of commenters assert that the rules provide the reporting counterparty, as determined under § 45.8, with the authority to choose where swap data is reported. As discussed in Section V below, that assertion is incorrect.

[45] 76 Fed. Reg. 54538, 54569 (Sep. 1, 2011).

[46] 77 Fed. Reg. 2136, 2184 (Jan. 13, 2012).

With respect to certain categories of off-facility swaps,[47] the Commission clearly acknowledged the possibility that a DCO may choose the SDR to which swap data is reported. The Commission observed, "the DCO would select the SDR to which all data is reported, by making the initial creation data report. The DCO could report to itself in its capacity as an SDR if it chooses to register as an SDR, as explicitly permitted by the statute…"[48]

Accordingly, because the Commission contemplated in both the Part 45 and Part 49 rulemakings that a DCO may report swap data to an affiliated SDR in appropriate circumstances, the Commission is unable to find that CME Rule 1001 is inconsistent with the regulations.

B. CME Rule 1001 is not inconsistent with either § 49.27(a)(2) or DCO Core Principle N

The Commission also evaluated whether CME Rule 1001 is inconsistent with § 49.27(a)(2) or DCO Core Principle N

Section 49.27(a)(2)

Section 49.27(a)(2) provides: "[c]onsistent with the principles of open access set forth in paragraph (a)(1) of this Regulation, a registered [SDR] shall not tie or bundle the offering of mandated regulatory services with other ancillary services that a [SDR] may provide to market participants."[49]

The Commission has determined that § 49.27(a)(2) is not applicable to CME Rule 1001. First, the regulation addresses conduct by a registered SDR. In contrast, CME Rule 1001 is limited to governing the conduct of a registered DCO. Second, while § 49.27(a)(2) prohibits the tying of SDR mandated services with SDR ancillary services, the provision of clearing services is neither an SDR mandated service nor an SDR ancillary service.[50] Accordingly, CME Rule 1001 is not inconsistent with the requirements of § 49.27(a)(2).

Core Principle N

Core Principle N provides: "Unless necessary or appropriate to achieve the purposes of this Act, a derivatives clearing organization shall not— (i) adopt any rule or take any action that

[47] Under § 45.1, "Off facility swaps means a swap not executed on or pursuant to the rules of a [SEF] or [DCM]." 17 C.F.R. § 45.1. *See also* 17 C.F.R. §§ 45.3(b)(1), (c)(1)(i) and (c)(2)(i).
[48] 76 Fed. Reg. 2136, 2186 (Jan. 13, 2012).
[49] Section 49.27(a)(1) provides, in part, that "A registered swap data repository, consistent with Section 21 of the Act, shall provide its services to market participants, including but not limited to designated contract markets, swap execution facilities, derivatives clearing organizations, swap dealers, major swap participants and any other counterparties, on a fair, open and equal basis."
[50] The Commission has stated that it "understands ancillary services to consist of asset servicing; confirmation, verification and affirmation facilities; collateral management, settlement, trade compression and netting services; valuation, pricing and reconciliation functionalities; position limits management; dispute resolution; and counterparty identify verification." 77 Fed. Reg. 54538, 54570 n. 307 (Sep. 1, 2011). This list does not include the provision of clearing services.

results in any unreasonable restraint of trade; or (ii) impose any material anticompetitive burden."[51]

The Commission has determined that Rule 1001 is not inconsistent with Core Principle N. In arriving at this determination, the Commission has considered the potential effects of Rule 1001 on competition. During the Part 45 rulemaking, the Commission considered the effect on competition of various alternatives for determining which entity could select the SDR to which data for a given swap would be reported. The Commission noted that, on the one hand, were the regulation to "require[] that all cleared swaps be reported only to DCOs registered as SDRs or to SDRs chosen by a DCO, [this] would create a non-level playing field between DCO-SDRs and non-DCO SDRs" and that it would "make DCOs collectively, and could in time make a single DCO-SDR, the sole recipient of data reported concerning cleared swaps."[52] The Commission also recognized the undesirable consequences of a contrary approach: "On the other hand … giving the choice of the SDR to the reporting counterparty in all cases could in practice give an SDR substantially owned by SDs a dominant market position with respect to swap data reporting within an asset class or even with respect to all swaps."[53]

Comments submitted to the Commission regarding the CME rule indicate that certain SDRs preferred by swap dealers may have been able to establish a dominant market position with respect to the reporting of swaps in certain asset classes. "[E]ntities expecting to register as swap dealers have, for months, taken necessary steps to utilize *their preferred SDR*."[54] Thus, as of January 2013, one swaps database contained "global data on … 98% of all credit default swaps."[55] It may be that approval of CME Rule 1001, which provides the choice of SDR to an entity other than a swap dealer, could foster rather than harm competition, in a manner consistent with Part 45.

In adopting Part 45, the Commission decided to avoid injecting itself into this market decision. The Commission explicitly stated that "*the final rules do not preclude* counterparties or *registered entities*[56] from reporting swap data to existing DCOs registered as SDRs, or *to SDRs chosen by DCOs*, if they so choose for business or cost-benefit reasons."[57] Accordingly, CME's DCO, in choosing an SDR (in this case, CME's SDR) to which to report the data from the swaps resulting from clearing novation is taking an action that is consistent with the swap data reporting regime that the Commission contemplated.

In its comments, DTCC states CME Rule 1001 "is a form of tying"[58] and, as such, "can violate U.S. antitrust laws like Section 2 of the Sherman Act, which makes it illegal to

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[51] 7 U.S.C. § 7a-1(c)(2)(N).
[52] 77 Fed. Reg. 2136, 2149 (Jan. 13, 2012).
[53] *Id.*
[54] DTCC Comment Letter at 7 (Nov. 20, 2012) (emphasis added).
[55] DTCC letter to FSOC at 1 (Jan. 11, 2013).
[56] A DCO is a registered entity. *See* 7 U.S.C. §1a(40)(B).
[57] 77 Fed. Reg. 2136, 2184 (Jan. 13, 2012) (emphasis added).
[58] A tying arrangement is an agreement whereby the sale of a particular product is conditioned on the purchaser's promise to purchase an additional, unrelated product.

monopolize or attempt to monopolize."[59] DTCC thus claims that the rule "is an anticompetitive action" in violation of Core Principle N.[60] The Commission disagrees. Based upon the factual circumstances and evidence presented to the Commission at this juncture, the Commission is unable to conclude that CME Rule 1001 would result in an unreasonable restraint of trade or a material anticompetitive burden in violation of Core Principle N.

At the outset, the Commission notes that Core Principle N contemplates that a DCO may adopt a practice that could have anticompetitive effects provided that the practice is necessary or appropriate to achieve the purposes of the Act. The Commission believes that the language and structure of the core principle reflects a determination by Congress that the dictates of antitrust law would not be dispositive in evaluating the legitimacy of the practices and rules of regulated entities under the Act. At the same time, Congress clearly believed the potential anticompetitive effects of a particular practice or rule be evaluated and considered by both regulated entities and the Commission in determining compliance with the core principle. Thus, while the Commission believes Congress neither instructed nor intended that the agency conduct a full antitrust review in determining compliance with the core principle,[61] the Commission has considered the antitrust laws in evaluating whether the CME rule is inconsistent with the Act and the Commission's regulations.[62]

To that end, the Commission has looked to the standards developed under the Sherman Act for guidance in evaluating DTCC's comments that Rule 1001 is an anticompetitive tying arrangement in violation of Core Principle N.[63] Determining whether Rule 1001 is anticompetitive in light of those standards depends, in part, on whether CME has either market power or monopoly power. Assessing either market power or monopoly power first requires defining the relevant market for the tying product (in this case, the market for CME's swap clearing services).[64] Once the appropriate relevant antitrust market is defined, market power or monopoly power within that market can be assessed. While there is no established numerical

[59] DTCC Comment Letter at 8 (Jan. 8, 2013).
[60] *Id*. at pp. 6-9.
[61] In addition to the language and structure of the core principle, the requirement for the Commission to take final action on a request for approval within 90 days reinforces the Commission's conclusion that Congress did not intend for the Commission to undertake a full antitrust review under the Sherman Act during this period.
[62] Although Section 15(b) of the Act, 7 U.S.C. 19(b), does not apply here, the Commission views it as instructive with respect to the nature of the inquiry because the section addresses antitrust considerations. When it applies, Section 15(b), requires the Commission to: "take into consideration the public interest to be protected by the antitrust laws… ." By its own terms, Section 15(b) does not require the Commission to strictly follow antitrust jurisprudence in its determinations; nor is the Commission required to undertake an exhaustive analysis in order to arrive at such public interest determinations.
[63] *See* 15 U.S.C. §§ 1-7. A tying arrangement may be deemed an unreasonable restraint of trade under Sherman Act § 1 and/or may be an anticompetitive means through which a firm unlawfully acquires or maintains a monopoly (monopoly maintenance), or attempts to gain a monopoly (attempted monopoly), in violation of Sherman Act § 2.
[64] "Without defining the relevant market, there is no meaningful context within which to assess the restraint's competitive effects." ABA Section of Antitrust Law, Antitrust Law Developments at 70 (7th ed. 2002); *see also id.* at 272 ("[t]o determine whether monopoly power exists, it is necessary to define the relevant market in which the power over price or competition is to be appraised").

cutoff, a market share below 30 percent is generally recognized as insufficient to support a finding of market/monopoly power.[65]

In this instance, the relevant market could be either the provision of clearing services for swaps by CFTC-registered DCOs, or the provision of clearing services for swaps and futures by CFTC-registered DCOs. Measured on the basis of cleared swap notional value at CFTC-registered DCOs, CME's DCO clears less than one percent of interest rate swaps and approximately three percent of credit swaps. Accordingly, CME's DCO would not have market power if the relevant market is the provision of clearing services for swaps by CFTC-registered DCOs.[66]

Because the mandatory clearing of swaps and the reporting of cleared swaps is just beginning, there is insufficient evidence to conclude that the relevant market in this context includes more than the clearing of swaps by Commission-registered DCOs. But even assuming the relevant market would include the clearing of futures, it is not clear that CME would possess the requisite market power. The impact, if any, of CME's market share in exchange-traded futures on the reporting of cleared swap data (the alleged tied product) must be viewed in the context of, and in conjunction with, its effect on CME's share of cleared swaps. Because CME's share of cleared swaps appears small at this time, the Commission is unable to conclude, as DTCC claims, that CME Rule 1001 will unreasonably restrain trade or impose a material anticompetitive burden under Core Principle N.[67]

The Commission's determination that CME Rule 1001 is not inconsistent with the Act or the Commission's regulations is based upon the present facts and circumstances. CME nonetheless has a continuing obligation to implement its Rule 1001 in a manner consistent with the Commission's regulations and the DCO Core Principles, including Core Principle N, based on the relevant facts and circumstances as they may change over time.[68] The Commission will continue to monitor the manner in which all market participants and registered entities implement the swap data reporting requirements, and, where necessary, take appropriate action to ensure compliance with the Act and the Commission's regulations.

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[65] *Id.* at 72; *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S 2, 26-29 (1984) (a 30 percent market share in the tying product market insufficient to support a finding of market power to sustain a tying violation). "[C]ourts virtually never find monopoly power when market share is less than about 50 percent," *id.* at 231-32, or a dangerous probability of monopolization when shares are less than 30 percent. *Id.* at 320.

[66] Besides CME's DCO, other providers of clearing services include three other DCOs registered with the Commission: LCH.Clearnet, which CME estimates clears 60 percent of cleared interest rate swaps; ICE Cleared Credit LLC; and, ICE Clear Europe Ltd. In addition, international derivatives clearing houses (not currently registered with the Commission) also provide swap clearing services, including the Singapore Exchange, Eurex Clearing AG, NOS Clearing ASA, LCH SA, and the Australian Stock Exchange.

[67] In light of the clearing mandates set forth in Dodd-Frank, it is quite possible that the clearing of swaps will increase over time. Moreover, market share among registered DCOs may change over time. The Commission will continue to monitor the market for any anticompetitive impact of CME Rule 1001.

[68] The Commission believes that the availability of secondary reports, as required under CME Rule 1001 may mitigate concerns regarding the effect on competition of CME Rule 1001. The Commission will monitor the availability and constraints on the dissemination of such reports.

V. COMMENTS

As noted above, the Commission received a number of comments on CME Rule 1001. The Commission carefully considered all comments and has grouped those comments by issue area.

One Swap vs. Three Separate Swaps

As noted above, a threshold issue in reviewing CME Rule 1001 is whether "a given swap," as stated in § 45.10, includes the original swap and the resulting swaps or whether the original and resulting swaps are separate swaps. In its comments,[69] CME relies upon § 39.12(b)(6) to support its position that the original swap and the resulting swaps are not a single "given swap," because § 39.12(b)(6) provides that the original swap is extinguished when it is accepted for clearing and replaced by two new resulting swaps.[70]

In contrast, DTCC and other commenters contend that clearing novation does not terminate a swap for reporting purposes.[71] Commenters state that clearing novation falls squarely within the definition of a 'life-cycle event'" of the original swap that continues the life of that swap and is not a "termination" of that swap that creates new swaps. Thus, commenters contend that under § 45.10 the novation must be reported to the same SDR that received the data for the original swap. [72]

DTCC and commenters misconstrue § 45.1 to treat clearing novation as a life-cycle event that continues the life of the original swap. In supporting their position, DTCC and commenters rely upon the separate references to both novation and full termination as evidence that the Commission did not view clearing novation as a termination event. They contend that because novation and termination are listed separately, they cannot both occur at the same time.

The Commission listed "a counterparty change resulting from an assignment or novation" and "full termination" separately because the terms encompass a range of events that are not identical. A swap may be terminated due to a novation, such as when clearing novation occurs, but it may be terminated for other reasons. Similarly, some counterparty changes resulting from an assignment or novation will terminate a swap, such as when clearing novation occurs, but not all counterparty changes are termination events.[73] Therefore, the Commission's view that

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[69] CME Comment Letter at 2 (Jan. 16, 2013).
[70] *Id.*
[71] DTCC Comment Letter at 20-21 (Jan. 8, 2013); Citi Comment Letter at 5-6 (Jan. 14, 2013); JPMorgan Comment Letter at 4-5 (Jan. 11, 2013); WMBAA Comment Letter at 2-3 (Jan. 14, 2013).
[72] DTCC Comment Letter at 3 (Dec. 20, 2012). *See also* Citi Comment Letter at 5 (Jan. 14, 2013) ("Under Part 45 of the Commission's rules, a novation is considered a life cycle event subject to continuation data reporting and is distinct from termination.") JPMorgan argues that life cycle events are reportable as "required swap continuation data" and treating clearing novation as anything but a life cycle event would be inconsistent with the Commission's regulations. JPMorgan Comment Letter at 4-5 (Jan. 11, 2013).
[73] It is the Commission's understanding that clearing and other types of novation that change the counterparty are common in the swaps industry and may result in termination. The Commission further notes that due to the widespread practice of novation, in 2004 ISDA developed a user guide for novations. *See* User's Guide to the 2004 ISDA Novation Definitions, *available at* http://www.isda.org/publications/pdf/2004isdanovdefinitionsug.pdf (last

clearing novation results in a termination of the original swap is not inconsistent with the separate listing of novation and termination in the rule.

In sum, the Commission will adhere to the legal framework for clearing of swaps it established in Part 39 and apply that framework to the reporting of swaps. Accordingly, when a clearing novation occurs, the life-cycle events of the original swap that are reported are "a counterparty change resulting from an assignment or novation" and "full termination."

Choice of SDR

Various comments were received regarding who has the right to choose the SDR to which a swap will be reported. CME contends that because Part 45 does not clearly address who chooses the SDR for cleared swaps, its proposed rule is merely filling a gap in the Commission's regulations and is consistent with Part 45 as promulgated.[74] CME also argues that although the rule text of Part 45 is silent as to choice of SDR, the preambles to Parts 45 and 49 support CME's approach under CME Rule 1001.[75]

DTCC and other commenters argue that Part 45 provides the reporting counterparty with authority to choose where swap data is reported.[76] These commenters argue that a DCO may choose where to report a swap only in cases where the original swap is accepted for clearing before it has been reported to another SDR. JPMorgan argues that § 45.3(b)(1) in conjunction with § 45.10 envisions that the reporting counterparty, as determined under § 45.8, will choose where the SDR data is reported.[77] AII argues that the Commission "implicitly endorsed a model for trade reporting that allows counterparty choice of the SDR by imposing a legal obligation on the swap dealer or major swap participant to report and retain data."[78] Finally, Deutsche Bank argues that the Part 45 preamble supports its contention that the reporting counterparty chooses the SDR because the preamble rejects the contention that all cleared swaps be reported to a DCO-SDR or an SDR affiliated with a DCO.[79]

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visited Feb. 18, 2013). Pursuant to the guide, ISDA treats a swap as terminated when there is a counterparty change due to a novation, such as clearing novation. *See*, *e.g.*, *Id*. at 6. ("Under a novation, upon the extinguishment of the Old Transaction, the New Transaction is simultaneously created and has identical terms to the Old Transaction (except where agreed between the parties and evidenced by the Novation Confirmation).")

[74] CME Comment Letter at 2 (Jan. 16, 2013). CME also argues that contrary to what DTCC claims, Part 45 does not grant reporting counterparties the exclusive right to select the SDR to which swap data is reported, as it claims that DTCC has argued.

[75] CME Comment Letter at 3-4 (Jan. 16, 2013).

[76] *See*, *e.g.*, DTCC Comment Letter at 18 (Jan. 8, 2013); JPMorgan Comment Letter at 4 (Jan. 11, 2013); Citi Comment Letter at 4 (Jan. 14, 2013); GFXD Comment Letter at 7 (Jan. 7, 2013); Deutsche Bank Comment Letter at 3 (Jan. 7, 2013) (also arguing that § 45.3(c) allows a reporting counterparty to select its own SDR for which to report swap creation data).

[77] JPMorgan Comment Letter at 4 (Jan. 11, 2013). Under § 45.8, CME's DCO would only be the reporting counterparty if the non-DCO counterparty to the resulting swap was not a swap dealer, major swap participant, or financial entity as defined in Section 2(h)(7)(C) of the Act. Under § 45.3(b)(1), the reporting counterparty must report creation data for off-facility swaps; however, if the swap is submitted for clearing before such creation data is reported, the reporting counterparty is excused from reporting such data. Section 45.10 requires that all swap data reported for an off-facility swap be reported to the same SDR as the creation data was reported.

[78] AII Comment Letter at 7 (Jan. 14, 2013).

[79] Deutsche Bank Comment Letter at 2-3 (Jan. 7, 2013).

The Commission notes that the premise for DTCC's and the other commenters' position is that, for reporting purposes, there is a single cleared swap that encompasses the original swap and the two resulting swaps from novation. The Commission notes that this premise is incorrect because it has determined that the legal framework for clearing of swaps set out in Part 39 should be adhered to for reporting purposes.

In addition, commenters are not correct that the reporting counterparty has primary authority to determine where swap data is reported. Part 45 does not provide any party with primary authority; instead, it leaves the choice of the SDR to market forces.[80] This approach is reflected in the Commission's statement in Part 49 that a SEF or a DCM – neither of which will be a counterparty to a swap – may choose where swap data is reported: "the rules and regulations of a particular SEF, DCM, or DCO may provide for the reporting to a particular SDR."[81] The Commission reaffirmed that a SEF or DCM may choose the SDR to which swap data is reported in the preamble to the Part 45 rules.[82]

Finally, Deutsche Bank misreads the preamble to the Part 45 rules. Although the Commission explained that it would not adopt CME's recommendation that the Commission mandate that all resulting swap data be reported to either a DCO or an SDR affiliated with a DCO, there is nothing in the preamble or the rules that precludes a DCO from choosing to report to an affiliated SDR.[83] To the contrary, the Commission acknowledged that resulting swap data may be reported to an affiliated SDR.[84]

Commercialization of Data

DTCC contends that CME Rule 1001 is inconsistent with § 49.17(g). That rule provides that "[s]wap data accepted and maintained by the swap data repository generally may not be used for commercial or business purposes by the swap data repository or any of its affiliated entities."[85] An exception to this prohibition is found in § 49.17(g)(2), which provides that "[t]he swap dealer, counterparty or any other registered entity that submits the swap data maintained by the registered swap data repository may permit the commercial or business use of that data by express written consent."[86] DTCC contends that CME Rule 1001 would "subvert the Commission's prohibition on the commercialization of data by allowing CME's DCO, the entity that desires to commercialize the data, to provide the required consent for commercialization to its own captive SDR."[87]

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[80] The Commission declined in the preamble to the Part 45 rules to determine which party or registered entity involved in a swap transaction has the primary authority to choose where swap data would be reported. 77 Fed. Reg. 2136, 2149 (Jan. 13, 2012).
[81] 76 Fed. Reg. 54538, 54569 (Sep. 1, 2011).
[82] 77 Fed. Reg. 2136, 2146 (Jan. 13, 2012).
[83] 77 Fed. Reg. 2136, 2185 (Jan. 13, 2012).
[84] *Id*.
[85] 17 C.F.R. § 49.17(g).
[86] 17 C.F.R. § 49.17(g)(a)(2).
[87] DTCC Comment Letter at 12 (Jan. 8, 2013).

CME responds to this contention, stating:

> If DTCC has its way, and CME Clearing is forced to report its swap data to an unaffiliated SDR, then CME Clearing would be free to commercialize the swap data that it maintains as a DCO. However, under Rule 1001, with CME Clearing reporting to its affiliate SDR, Rule 49.17(g) would restrict CME SDR from commercializing its data. By taking data that would not otherwise be subject to the commercialization restriction and placing the data into the hands of its SDR, thus making the data subject to the restriction, CME Clearing cannot be said to violate Rule 49.17(g).[88]

The Commission does not find CME Rule 1001 to be inconsistent with § 49.17(g). First, CME Rule 1001 is a swap data reporting rule; it does not address whether CME will use the data for commercial or business purposes. Second, CME Rule 1001 does not "subvert the intent" of § 49.17(g). The Commission recognized that a DCO could report data to its captive SDR when it adopted Part 49, and did not limit the exception in § 49.17(g)(2) to preclude a DCO from permitting its affiliated SDR to commercialize such data, because the DCO is permitted to commercialize such data already.

Appropriateness of filing rule approval under 40.10

DTCC claims that because CME's DCO is a systemically important DCO ("SIDCO"),[89] CME should have submitted CME Rule 1001 under the procedures of § 40.10.[90] Specifically, DTCC argues there is a reasonable possibility that CME Rule 1001 would "affect the overall nature or level of risk presented by CME"[91] and that the rule has a reasonable possibility to "materially impact participant eligibility, risk management efforts, and systemic risk oversight."[92] The Commission disagrees with DTCC.

Section 40.10, which implements Section 806(e) of the Dodd-Frank Act,[93] requires a SIDCO to provide at least 60 days advance notice to the Commission of any proposed changes to its rules, procedures, or operations that could "materially affect the nature or level of risks presented by *the systemically important derivatives clearing organization.*"[94] The rule sets forth a two-prong materiality standard by clarifying that the phrase "materially affect the nature or level of risks" refers to "matters as to which there is a reasonable possibility that the change

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[88] CME Comment Letter at 6-7 (Jan. 16, 2013).
[89] Section 39.2 defines a SIDCO as "a financial market utility that is a derivatives clearing organization registered under section 5b of the Act, which has been designated by the Financial Stability Oversight Council to be systemically important and for which the Commission acts as the Supervisory Agency pursuant to section 803(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act." 17 C.F.R. § 39.2.
[90] DTCC Comment Letter at 4-7 (Nov. 20, 2012).
[91] *Id*. at 5.
[92] *Id*.
[93] Pub. L. 111–203, 124 Stat. 1376 (2010). Section 806(e) requires a designated financial market utility to provide 60 days advance notice of any proposed change to its rules, procedures, or operations that could materially affect the nature or level of risks presented by the designated financial market utility.
[94] 17 C.F.R. § 40.10(a) (emphasis added).

could affect [1] the performance of essential clearing and settlement functions or [2] the overall nature or level of risk presented by the [SIDCO]."[95]

In the Commission's view, CME Rule 1001 does not meet the materiality standard of § 40.10. The SIDCO procedure therefore is not applicable here. CME Rule 1001 establishes the arrangements by which CME's DCO reports swap data to an SDR. Those arrangements do not affect the DCO's ability to provide essential clearing and settlement services. In addition, the swap data reporting arrangements would not affect the DCO's execution of its risk management responsibilities and would not alter the risk profile of the DCO in terms of the DCO's systemic impact on financial markets. Therefore, there is no "reasonable possibility" that CME Rule 1001 would materially affect the overall nature or level of risk presented by the SIDCO, CME.[96]

DCO Core Principle C

DTCC and others comment that CME Rule 1001 would violate DCO Core Principle C,[97] which requires that "[t]he participation and membership requirements of each [DCO] shall… permit fair and open access."[98] According to these commenters, CME Rule 1001 would burden swap counterparties who would prefer that resulting swap data be reported to an SDR other than CME's SDR. According to these commenters, such tying or bundling would constitute a violation of Section 5(b)(c)(2)(C)(iii)(III) of the Act, which requires a DCO's participation or membership requirements to "permit fair and open access."[99]

CME contends that the SDR cannot be construed as a "tied" product because CME is merely fulfilling its reporting obligations under Part 45 by reporting data to its own SDR.[100]

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[95] 17 C.F.R. § 40.10(b). Section 40.10(b) also states that "[s]uch changes may include, but are not limited to, changes that materially affect financial resources, participant and product eligibility, risk management (including matters relating to margin and stress testing), daily or intraday settlement procedures, default procedures, system safeguards (business continuity and disaster recovery), and governance."

[96] DTCC puts forth a number of arguments as to why CME Rule 1001 would increase the overall nature or level of risk presented by the CME's DCO, including: (1) it would be more efficient for market participants to have a single control and reconciliation point for regulatory reporting; (2) original and resulting swap data should go to the same SDR so that there can be a complete audit trail following all reported trades over their life cycle; (3) if the original and resulting swaps are not reported to the same SDR, it would be difficult to link novation of old trades with creation of economically equivalent new trades; and (4) the process of reporting true exposures may be skewed by multiple repository reports; this could make netting inaccurate, which would overstate exposures. DTCC Comment Letter, 5-7. (Nov. 20, 2012). The Commission has considered DTCC's arguments and determined that there is not a reasonable possibility that Rule 1001 would increase the overall nature or level of risk presented by the CME's DCO.

[97] *See*, *e.g.*, DTCC Comment Letter at 2 (Jan. 8, 2013); DDR Comment Letter at 2-3 (Jan. 14, 2013); Deutsche Bank Comment Letter at 2-3 (Jan. 7, 2013); Citi at 6-7 (Jan. 14, 2013); WMBAA Comment Letter at 5 (Jan. 14, 2013); AII Comment Letter at 2-4 (Jan. 14, 2013); Coalition Comment Letter at 2 (Jan. 7, 2013).

[98] 7 U.S.C. § 7a-1(c)(2)(C).

[99] *See*, *e.g.*, DTCC Comment Letter at 2 (Jan. 8, 2013); DDR Comment Letter at 2-3 (Jan. 14, 2013); Deutsche Bank Comment Letter at 2-3 (Jan. 7, 2013); Citi Comment Letter at 6-7 (Jan. 14, 2013); WMBAA Comment Letter at 5 (Jan. 14, 2013); AII Comment Letter at 2-4 (Jan. 14, 2013); Coalition Comment Letter at 2 (Jan. 7, 2013) (noting its concerns with tying SDR services to SEF trade execution services).

[100] CME Comment Letter at 7-8 (Jan. 16, 2013).

CME contends that because there is no tying arrangement, CME Rule 1001 does not violate "fair and open access" principles.[101]

The Commission does not consider CME Rule 1001 to be inconsistent with the fair and open access requirements. Core Principle C requires each DCO to establish "appropriate admission and continuing eligibility standards … for members of, and participants in the [DCO]."[102] Core Principle C further requires that such participation and membership requirements permit fair and open access.[103] A fair reading of the core principle as a whole demonstrates that "participation and membership requirements" are standards (*i.e.*, qualifications) that prospective and continuing clearing members are required to meet to be eligible for admission to, and continued participation in, the DCO.

CME Rule 1001 sets forth the manner by which CME's DCO (CME Clearing) will meet its reporting obligations under Part 45; specifically, that CME Clearing will meet such obligations by reporting to CME's SDR. The use of CME's SDR services is neither a qualification required for membership in CME Clearing, nor a qualification required for continued eligibility to participate in CME Clearing as a clearing member or participant. Therefore, CME Rule 1001 is not a "participation and membership" requirement as contemplated by Core Principle C and its implementing regulations. Commenters' assertions to the contrary are mistaken.[104] Moreover, since CME Rule 1001 is not a participant and membership requirement, the rule would not violate the fair and open access standard applicable to such requirements.

Anticompetitive claims

DTCC and other commenters state that CME Rule 1001 would constitute an anti-competitive "tying arrangement" or bundling of services in violation of § 49.27(a)(2), which prohibits an SDR from tying or bundling mandatory regulatory services with other ancillary services.[105] DTCC and Citi state that CME will exercise its dominant position as a DCO in order

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[101] CME Comment Letter at 8-9 (Jan. 16, 2013).

[102] 7 U.S.C. § 7a-1(c)(2)(C)(i)(I). Regulation 39.12(a) codifies the requirements of Core Principle C and establishes minimum membership and participation requirements that a DCO would have to meet in order to comply with Core Principle C. Such minimum requirements include: requiring clearing members to have adequate operational capacity to meet obligations arising from participation in the DCO; and requiring a minimum capital requirement on clearing members seeking admission of no greater than $50 million. 17 C.F.R. § 39.12(a).

[103] 7 U.S.C. § 7a-1(c)(2)(C)(iii)(III).

[104] Commenters' argument is based on the assumption that any requirement to which a participant is subject is a participation requirement. That is not the case. If it were, the modifier "participation and membership" before "requirements" would be mere surplusage.

[105] *See*, *e.g.*, DTCC Comment Letter at 6-7, 8-9, 11-13 (Jan. 8, 2013) (characterizing the DCO's clearing services as "ancillary"); JPMorgan Comment Letter at 6-7 (Jan. 11, 2013) (arguing that such tying would also delay compliance with reporting deadlines); Deutsche Bank Comment Letter at 2 (Jan. 7, 2013); Citi Comment Letter at 7 (Jan. 14, 2013); GFXD Comment Letter at 5 (Jan. 7, 2012); WMBAA Comment Letter at 2 (Jan. 14, 2013) (anti-competitive bundling of trade execution services and clearing services); NGSA Comment Letter at 2 (Jan. 7, 2013) (anti-competitive bundling of trade execution services and SDR services); Moore Capital Management Comment Letter at 3 (Jan. 14, 2013); Coalition Comment Letter at 2 (Jan. 7, 2013) (noting its concerns with tying SDR services to SEF trade execution services).

to carry out such an arrangement.[106] Several commenters also state that CME Rule 1001 would violate DCO Core Principle N.[107] Some commenters argue that Congress through Dodd-Frank had envisioned a "competitive landscape" for SDRs and that Dodd-Frank had created a competitive swaps marketplace that ensured DCOs would not be able to use their clearing authority to act in an anti-competitive manner.[108]

CME argues that CME Rule 1001 does not constitute anti-competitive tying or bundling because its DCO does not have requisite market power in the "tying product"—swap-clearing services. CME also argues that the provision of swap data repository services cannot be construed as a "tied" product because CME is merely fulfilling its reporting obligations under Part 45 by reporting data to its own SDR.[109]

As set forth above, the Commission has determined that Rule 1001 is not inconsistent with § 49.27 or Core Principle N.

Provision of voluntary secondary reports under the rule

Several commenters addressed the second part of CME Rule 1001: "[u]pon the request of a counterparty to a swap cleared at the Clearing House, the Clearing House shall provide the same creation and continuation data to a swap data repository selected by the counterparty as the Clearing House provided to CME's swap data repository under the preceding sentence." ISDA contends that the text of the rule is deficient because it does not contain a provision that the request may be made in connection with the submission of the swap for clearing, or on a relationship basis for all swaps submitted by the counterparty.[110] ISDA also contends that CME Rule 1001 should require CME to provide data to the designated SDR in conformity with the data standards of the recipient SDR.[111] JPMorgan states that the provision is deficient because it is silent as to the cost or process associated with sending data to an additional SDR.[112] Finally, AAI states that it is skeptical that the provision will sufficiently address open-access concerns without increasing costs for market participants.[113]

The Commission has determined that this provision of CME Rule 1001 is not inconsistent with the Act or Commission regulations. The rule would require CME to provide a second report to an SDR selected by the counterparty. Under § 45.12(a), voluntary supplemental reports are allowed, and such reports are defined as "any report of swap data to a swap data repository that is not required to be made pursuant to this part or any other part in this chapter."

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[106] DTCC Comment Letter at 8-9 (Jan. 8, 2013); DDR Comment Letter at 3 (Jan. 14, 2013); Citi Comment Letter at 8 (Jan. 14, 2013).
[107] *See*, *e.g.*, DTCC Comment Letter, at 6 (Jan. 8, 2013); SIFMA Comment Letter at 3-4 (Jan. 7, 2013).
[108] *See*, *e.g.*, WMBAA Comment Letter at 4 (Jan. 14, 2013); JPMorgan Comment Letter at 6-7 (Jan. 11, 2013).
[109] CME Comment Letter at 7-8 (Jan. 16, 2013).
[110] ISDA Comment Letter at 4 (Jan. 7, 2013).
[111] *Id*.
[112] JPMorgan Comment Letter at 10 (Jan. 11, 2013).
[113] AII Comment Letter at 4 (Jan. 14, 2013) (referencing § 49.27). Section 49.27 requires that an SDR provide for open access to its services. As discussed above, the Commission has determined that Rule 1001, a DCO rule, does not violate this provision.

Because Part 45 does not require the secondary report that CME would provide under CME Rule 1001, such a report would be a voluntary supplemental report.

CME has indicated to the Commission that it will provide to an SDR selected by a counterparty the same creation and continuation data that CME reports to its own SDR. Section 45.12 sets forth the data that a voluntary secondary report must contain, including the unique swap identifier created pursuant to the rules and the legal entity identifier. The Commission's regulations do not require CME to report the data in conformity with the data standards of the recipient SDR. Moreover, there is nothing in § 45.12 that precludes CME from charging for that report, if it decides to do so.

Nonetheless, the Commission has been informed by some reporting counterparties that if Rule 1001 is approved and becomes effective on CME's scheduled effective date, they may need additional time to establish connections with the CME SDR to fulfill certain reporting obligations under the various Commission regulations. The Commission understands that upon request by reporting counterparties, the Division of Market Oversight will prepare appropriate no–action relief.

VI. Responses to Separate Statement

The separate statement of Commissioner O'Malia ("Statement") raises various issues with the text and preamble of Part 45 as well as concerns regarding the process used by the Commission to approve CME Rule 1001. These issues and concerns are insufficient to compel a different result from the one reached by the Commission today.

The task before the Commission in this matter is limited and prescribed by statute and the Commission's regulations. Under 7 U.S.C. § 7a-2(c)(5)(A) and 17 C.F.R. § 40.5(a)-(b), the Commission must, within a limited time period that expires today, approve a rule submitted by a registered entity unless the Commission finds that it is inconsistent with the CEA or the Commission's regulations. If the Commission takes no action before the expiration of the review period, CME Rule 1001 is automatically deemed approved.[114]

In adjudicating this matter, the Commission must necessarily interpret the relevant regulations, and the law is clear that the Commission has latitude to do so through processes other than rulemaking.[115] Having interpreted its regulations in this proceeding, the Commission has determined that Rule 1001 is not inconsistent with the Commission's regulations because nothing in the Commission's rules precludes CME from sending resulting swap data to an affiliated SDR. Therefore, the Commission is required by law to approve Rule 1001.

The Commission made this determination after carefully considering the CEA and the Commission's regulations. Although not required to do so, the Commission sought public comment so that it could make a fully informed decision. The Commission received 27 comment letters, which informed the Commission's decision. Where commenters raised

[114] 17 C.F.R. § 40.5(c).
[115] *See supra* at 5 n.29.

arguments in opposition to Rule 1001, the Commission addressed them and explained why it was not persuaded.

The Statement asserts that Rule 1001 is inconsistent with § 45.8, which sets forth the reporting hierarchy.[116] However, as the Commission has explained above, Part 45 does not provide any party, including the reporting counterparty, with primary authority to choose where swap data is reported.[117] Instead, the Commission expressly left the choice of the SDR to market forces.[118] Accordingly, Rule 1001 is not inconsistent with § 45.8.

The Statement also notes that the Commission's action today leaves several issues about the operation of Part 45 unresolved.[119] The Commission's action herein, however, does not purport to determine anything other than what is necessary to comply with its statutory obligation to decide whether Rule 1001 is inconsistent with the CEA or the Commission's regulations. The Commission's decision does not preclude the Commission from taking other actions in the future, including further rulemaking, as may be appropriate.

[116] *See* Statement of Commissioner O'Malia at 2.
[117] *See supra* at 15.
[118] *See* 77 Fed. Reg. 2136, 2149 (Jan. 13, 2012); *supra* at 15 n 80. *See also* 76 Fed. Reg. 54538, 54569 (Sep. 1, 2011) ("the rules and regulations of a particular SEF, DCM, or DCO may provide for the reporting to a particular SDR."), *supra* at 15 n 81.
[119] *See* Statement of Commissioner O'Malia at 2-4.

U.S. COMMODITY FUTURES TRADING COMMISSION
ENSURING THE INTEGRITY OF THE FUTURES & OPTIONS MARKETS

SPEECHES & TESTIMONY

Concurring Statement of Commissioner Jill E. Sommers on the Chicago Mercantile Exchange Inc. (CME) Request for Commission Approval of New Chapter 10 and New Rule 1001

March 6, 2013

While I agree with the Commission's analysis that CME Rule 1001 is not inconsistent with the Commodity Exchange Act (Act) or the Commission's regulations and therefore voted to approve the rule, I would have preferred to have taken steps to amend the Commission's rules to provide explicitly that the Part 45 rules do not apply to cleared swaps. In our rush to promulgate thousands of pages of rules implementing the Dodd-Frank Act it is not surprising that market participants would come to differing conclusions regarding the Commission's intent in building the new regulatory structure for swaps.

Section 2(a)(13)(G) of the Act requires that "each swap (whether cleared or uncleared) shall be reported to a registered swap data repository." Section 4r(a)(3) establishes the reporting obligations of swap dealers (SDs), major swap participants (MSPs) and nonSDs/MSPs for uncleared swaps. While Section 4r(a)(3) sets forth a hierarchy for who must report an uncleared swap, depending on the nature of the counterparties, nothing in the Act or the Commission's regulations provides that the reporting party has a right to determine where the swap is reported, and the Act and regulations are silent as to who must report a cleared swap.

It is understandable that SDs and MSPs may prefer to report their swaps to certain swap data repositories (SDRs) because of the ancillary services a particular SDR may provide. The fundamental goal of reporting swaps to SDRs, however, is "to ensure that complete data concerning all swaps subject to the Commission's jurisdiction is maintained in SDRs, where it would be available to the Commission and other financial regulators for fulfillment of their various regulatory mandates, including systemic risk mitigation, market monitoring, and market abuse prevention." 77 Fed. Reg. 2136, 2138 (Jan. 13, 2012). From a regulator's perspective, there is an important distinction to be made between a cleared swap vs. an uncleared swap. The best record of the creation and continuing valuation data of the two new swaps resulting from a cleared swap is with the derivatives clearing organization (DCO), and the most efficient and accurate mechanism for reporting that data to an SDR lies with the DCO. The proper method to eliminate the confusion the Commission has created in this area would have been to amend our rules. By failing to do so we have missed an opportunity to eliminate any remaining doubt.

Last Updated: March 6, 2013

U.S. COMMODITY FUTURES TRADING COMMISSION
ENSURING THE INTEGRITY OF THE FUTURES & OPTIONS MARKETS

SPEECHES & TESTIMONY

Statement of Commissioner Scott O'Malia on the Commission's Approval of CME rule 1001

March 6, 2013

Today the Commission approved CME Rule 1001, which was submitted to the Commission for review pursuant to Section 40.5 of the Commission's regulations. Although I agree with the policy outcome of allowing CME to choose which Swap Data Repository (SDR) will receive data on cleared swaps, I am abstaining from the vote on this rule because approval of this rule without an amendment to the Commission's Part 45 regulations will lead to further confusion with respect to reporting requirements for cleared swaps. My preferred approach, an approach that was not presented to the Commission as an option on which to vote, would have been to re-propose the internally inconsistent Part 45 of the Commission's regulations in compliance with the Administrative Procedure Act (APA). Instead the Commission has embarked on this suspect approach.

Under Section 40.5 of the Commission's regulations, a registered entity may submit a new rule, rule amendment or dormant rule to the Commission for approval prior to the rule's implementation.[1] Section 40.5(b) sets out the standard by which the Commission will review the submission. The Commission shall approve the rule, rule amendment or dormant rule unless it is inconsistent with the Commodity Exchange Act (CEA) or the Commission's regulations.[2] As part of its review, the Commission accepted comments from the public as to the advisability of approving CME's proposed rule. The comments received highlighted the multiple interpretations one could draw from the Commission's existing regulations, particularly Part 45. Despite the commenters' concern regarding the legal sufficiency of Part 45, the Commission chose to ignore the commenters' concerns and has approved the rule without initiating the process to amend Part 45.

Part 45's Internal Inconsistencies Require Re-proposal

Part 45 sets forth recordkeeping and reporting obligations for Swap Execution Facilities (SEFs), Designated Contract Markets (DCMs), Derivatives Clearing Organizations (DCOs), SDRs, Swap Dealers (SDs), Major Swap Participants (MSPs), and all other swap participants.[3] The statutory basis for promulgating Part 45 was CEA § 4r(a), which calls for all uncleared swaps, and only uncleared swaps, to be reported to an SDR to satisfy recordkeeping and reporting requirements. [4] In setting out the reporting requirements for swap transactions however, the Commission failed to make any meaningful distinction between swap transactions that have been submitted for clearing and those that were entered into on a bilateral basis and not cleared through a DCO. As a result, Part 45 expressly requires all swaps, both cleared and uncleared, to be submitted to an SDR to satisfy the regulatory reporting requirements established by §4r(a).[5]

Section 45.8 of the Commission's regulations, titled "Determination of which counterparties must report," sets out a hierarchy of counterparties responsible for reporting swap transactions. It states, among other things, that: (1) if a counterparty to a swap transaction is either a SD or a MSP, then such SD or MSP must report; (2) if a transaction is executed on a SEF or a DCM, then the counterparties must agree which counterparty shall carry the reporting obligation and (3) if a transaction is an off-facility swap, then the counterparties must agree on the reporting counterparty.[6] Section 45.8 does not identify a DCO as a party with a reporting obligation.

However, §45.3, titled "Swap data reporting: creation data," completely ignores the reporting obligations of the relevant counterparties mentioned in § 45.8 and instead identifies SEFs and DCMs as the parties responsible for reporting creation data for swaps executed on a SEF or DCM. More importantly, §45.3(b)(2) requires that DCOs report all transactions subject to mandatory clearing. Does this mean a DCO must report swaps that have been executed on a SEF or DCM after the swap has already been reported by the SEF/DCM?

This, despite the fact that §45.8 does not list DCOs, SEFs or DCMs as reporting parties that are required to submit swap data pursuant to Part 45. The answers to these questions remain unclear to me.

To make matters worse, instead of clarifying and providing further meaning to the rule text, the preamble only serves to add even more confusion. For example, in the preamble to the final Part 45 rule, the Commission mentions a comment submitted by CME in which the company states that cleared swaps need not be reported to an SDR since the DCO at which the swap was cleared will already have that data on record.[7] In the alternative, CME argued that the clearing house should be able to report to an SDR of its choosing as that would be less costly than establishing data links with numerous SDRs.[8] The Commission rejected this argument and instead made clear that while the final rule does not prohibit reporting parties from submitting data to DCOs registered as SDRs (or to SDRs chosen by the DCO), such a choice may be made by the reporting party or registered entities for business purposes.[9]

While the preamble and rule leave open the possibility that reporting parties and registered entities may decide to have DCOs choose which SDR will receive swap data, the rule does not definitively state which party has the authority to make that decision. With reporting parties and DCOs both claiming the right to choose the SDR, and pointing to Part 45 as the source of their authority, the Commission cannot now claim that CME Rule 1001 is not inconsistent with the Commission's regulations. DCOs will point to §45.3 to support their claim, while reporting parties may rely on §45.8. Another fact making this determination more problematic is that although the Commission's action today theoretically applies only to CME, the practical result is that the Commission's statement is an interpretation that applies to the entire industry. [10] The ambiguity in Part 45 is unacceptable and highlights the necessity to re-write the rule.

Part 45 Must be Amended to Reconcile its Requirements with Existing Commission Regulations and Industry Practice

Part 45 fails to provide the clarity necessary to inform the public that the reporting obligations it creates are consistent with Part 39 and the process for clearing swaps. Section 39.12(b)(6) codifies a long-standing industry practice which holds that once a contract is accepted for clearing by a DCO, that contract is extinguished and replaced by two equal and opposite swaps between the DCO and each clearing member.[11] This long-standing practice is consistent with the policy outcome of CME Rule 1001. Section 45.3 however, fails to specify how the termination of the original swap affects the continuing reporting obligations of the original counter parties or the DCO. For example, §45.3 states that a DCO creates two equal and opposite swaps during the clearing process. It further states that the DCO, when reporting swaps that are subject to mandatory clearing, must include with the reported swap data, the new internal identifiers assigned by the automated clearing system to the two swaps resulting from the clearing process.[12]

Where Part 45 falls short, is that it never specifically states what reporting obligations remain with respect to the initial swap once clearing has taken place. Nor does Part 45 provide enough detail on how the two new swaps are related to the original swap. A better approach would be to amend Part 45 so that it makes clear, as Part 39 does that once a swap is submitted for clearing, that swap no longer exists and two new equal and opposite swaps take its place. Likewise, Part 45 should be amended to make clear what the reporting obligations are for the DCO and original counterparties once the two new swaps have been created, as provided through CME Rule 1001.

Finally, Part 45 must also be amended so that continuation data (life cycle event data and valuation data) is only required to be provided for uncleared swaps. According to §45.4, both counterparties to the swap and the DCO that clears a swap must submit continuation data on a daily basis. At best, this requirement serves no regulatory purpose, and at worst it may also lead to uncertainty in the market. Each clearing house will maintain daily valuation data for swaps cleared through its organization in order to properly carry out its clearing and risk mitigation functions. Sending that same information to an SDR serves no additional benefit and will most likely contribute to uncertainty in the marketplace. What will happen if the daily valuation data provided by the DCO is different from that which is provided by swap counterparties? Which data set will take priority?

In an emergency default situation, the Commission and clearing houses should be able to look to one centralized database from which they can calculate market exposures. Historically that source of information has been the clearing house. The last thing we need during a period of market disruption is various market participants claiming different values for their portfolios based on conflicting data sets at SDRs and clearing houses. For purposes of consistency and market stability, we should amend Part 45 to remove the continuation data reporting requirement for cleared swaps.

The Commission has Ignored Administrative Due Process when Interpreting the Requirements of Part 45

The APA requires federal agencies to publish a notice of proposed rulemaking and give interested persons an opportunity to participate in the rule making process through submission of written data, views, or arguments.[13] A Federal agency may only dispense with notice and comment in one of two situations. First, when an agency issues an interpretive rule, general statement of policy, or rules of agency organization, procedure, or practice.[14] This interpretive rule exception applies to agency statements that "explain ambiguous language, or remind parties of existing duties, not those that create new law."[15] Second, an agency may dispense with notice and comment if it is able to demonstrate "Good Cause" that notice and comment is not necessary because it would be "impracticable, unnecessary, or contrary to the public interest."[16]

In this case, the Commission has failed to meet either of the exceptions from the notice and comment requirement; instead, it is providing a new legal interpretation of Part 45, a rule that was already promulgated after a period of public notice and comment. A complete re-interpretation of the agency position with respect to the reporting requirements in Part 45 can hardly be classified as "a reminder to parties of its existing duties" or a simple clarification of ambiguous language. Thus, such re-interpretation must be expressed in the form of an agency rulemaking. Market participants should have once again been afforded a notice and comment period to specifically address the rules as they are set out in Part 45, not just the advisability of approving CME Rule 1001.

The Commission has similarly failed to provide a "Good Cause" showing for why notice and comment may be dispensed with prior to the new interpretation of Part 45 issued today. For example, a court could find "Good Cause" present when an agency must have regulations in place in order to meet a specific deadline imposed by Congress.[17] Here, Part 45 was published in its final form in January of 2012. The Commission received comments from the industry, both before and after publication of the final rule, indicating that there were inconsistencies in the rule that called for the Commission to reconsider its original proposal. The Commission cannot now claim an emergency when presented with a new rule proposal from one of its registrants. The Commission has been on notice of the problems with Part 45 for more than a year.

The Commission's overall rule writing process in implementing Dodd-Frank has proceeded at a breathtaking pace. This frenetic schedule resulted in the Commission implementing rules that did not work in harmony with each other as required in order to establish a new regulatory framework. The Commission must acknowledge the errors in the current rule and correct them now. For the reasons I have detailed above, I am abstaining from participating in the Commission's approval of CME Rule 1001. I have often spoken about the need for good government. The action taken by the Commission today falls well short of the standards by which a federal agency should regulate an industry.

[1] 17 CFR §40.5.

[2] Id.

[3] 77 Fed. Reg. 2136.

[4] CEA §4r (Reporting and Recordkeeping for Uncleared Swaps) implementing §729 of Dodd -Frank, commonly referred to as "Regulatory Reporting."

[5] 17 CFR §45.3.

[6] 17 CFR §45.8.

[7] 77 Fed. Reg. 2136, 2146.

[8] Reporting to one SDR of its choosing would relieve the DCO of having to pay for IT connectivity to each of the SDRs selected by various reporting entities for trade reporting.

[9] Id at 2184.

[10] It seems likely that following approval of this rule all other DCOs registered with the Commission would soon follow suit and file similar rules with the Commission. The end result being that all swaps submitted for clearing would be reported to the SDR affiliated or owned by the DCO that cleared the transaction.

[11] 17 CFR §39.12.(b)(6).

[12] 17 CFR §45.3(a)(2).

[13] 5 U.S.C. §553(b) & (c). The Commission codified this rule into its regulations at 17 CFR §13.5.

[14] Id §553(b)(A).

[15] Sentara-Hampton Gen. Hosp. v. Sullivan, 980 F.2d 749, 759 (D.C.Cir. 1992).

[16] 5 U.S.C. §553(b)(3)(B).

[17] Coalition for Parity, INC. v. Sebelius, 709 F.Supp. 2d 10 (2010), finding that the deadline imposed by a new regulatory regime, the need for regulatory certainty, Congress' express authorization for the agency to publish interim final rules and the temporary nature of the interim final rules justified an agency's decision to forego notice and comment in implementing interim final rules.

Last Updated: March 6, 2013

ANNEX C

U.S. COMMODITY FUTURES TRADING COMMISSION
ENSURING THE INTEGRITY OF THE FUTURES & OPTIONS MARKETS

Clearing Organization Rules

By default, rule submissions are listed in reverse chronological order. Click on any column heading to sort by that column.

SEARCH CLEARING ORGANIZATION RULES USING THE FOLLOWING CRITERIA:

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Organization	Filing Description	Official Receipt Date	Status	Date	Remarks	Associated Documents
LCHLTD	Rule amendments that clarify LCH.Clearnet's right to eject cleared contracts that result from the registration of ineligible transactions submitted to the SwapClear service.	04/26/2013	10 Day Review	04/26/2013		1
CME	Expansion of CME Clearing's Category 3 Collateral Limits; 13-155.	04/24/2013	10 Day Review	04/24/2013		1
LCHLLC	Introduction of SwapClear US's annual clearing member fees, client fee structure, and the volume discount plan.	04/19/2013	10 Day Review	04/19/2013		1
LCHLTD	Introduction of SwapClear's Volume Discount Plan, which includes three tiers of discounts applicable to client booking fees.	04/19/2013	10 Day Review	04/19/2013		1
OCC	Rule changes related to the change of expiration date from the Saturday following the third Friday of the specified expiration month to the third Friday of the specified expiration month; SR-OCC-2013-04 and SR-OCC-2013-802.	04/17/2013	10 Day Review	04/17/2013		2
LCHLTD	Changes related to implementation of SwapClear's Strategic Initial Margin Methodology.	04/15/2013	Certified	04/30/2013		1
LCHLTD	Rulebook changes to accommodate straight-through processing.	04/15/2013	Certified	04/30/2013		1
ICLREU2	Rule amendments to existing delivery procedures to accomodate new energy futures contracts to be listed on ICE Futures Europe and cleared by ICE Clear Europe.	04/12/2013	Certified	04/27/2013		1
NGX	Amendments to provide greater clarity regarding product categorization in response to the elimination of the exempt commercial market category.	04/12/2013	Certified	04/27/2013		1
ICECC	Proposed Rule 211 governing SDR reporting obligations.	04/10/2013	Certified	04/25/2013		3

Page: 1 of 101 [Results 1 - 10] of 1001
Next> >>