COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 39 and 140

RIN 3038–AE87

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

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission) is adopting regulations that will permit derivatives clearing organizations (DCOs) organized outside of the United States (hereinafter referred to as ''non-U.S. DCOs'') to be registered with the Commission yet comply with the core principles applicable to DCOs set forth in the Commodity Exchange Act (CEA) through compliance with their home country regulatory regimes, subject to certain conditions and limitations. The Commission is also amending certain related delegation provisions in its regulations.

DATES: This rule is effective November 20, 2020.

FOR FURTHER INFORMATION CONTACT: Eileen A. Donovan, Deputy Director, (202) 418–5096, *edonovan@cftc.gov;* August A. Imholtz III, Special Counsel, (202) 418–5140, *aimholtz@cftc.gov;* Abigail S. Knauff, Special Counsel, (202) 418–5123, *aknauff@cftc.gov;* Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; Theodore Z. Polley III, Associate Director, (312) 596–0551, *tpolley@cftc.gov;* Joe Opron, Special Counsel, (312) 596–0653, *jopron@cftc.gov;* Division of Clearing and Risk, Commodity Futures Trading Commission, 525 West Monroe Street, Chicago, Illinois 60661.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. Introduction

In July 2019, the Commission proposed changes to its registration and compliance framework for DCOs that would permit a non-U.S. DCO to be registered with the Commission yet comply with the core principles applicable to DCOs set forth in the CEA (DCO Core Principles) through compliance with its home country regulatory regime, subject to certain conditions and limitations.[1] To implement these changes, the Commission proposed a number of amendments to part 39 of the Commission's regulations (Part 39), as well as select amendments to part 140. After considering the comments received in response to the proposal, the Commission is adopting the amendments largely as proposed.[2]

B. DCO Registration Framework

Section 5b(a) of the CEA provides that a clearing organization may not ''perform the functions of a [DCO]'' [3] with respect to futures [4] or swaps unless the clearing organization is registered with the Commission.[5] The CEA permits the Commission to exempt a non-U.S. clearing organization from registration as a DCO for the clearing of swaps if the clearing organization is ''subject to comparable, comprehensive supervision and regulation'' by its home country regulator.[6] The Commission has granted exemptions from DCO registration but so far has limited exempt DCOs to clearing only proprietary swaps for U.S. persons due to uncertainty regarding the bankruptcy treatment of funds used to margin, guarantee, or secure cleared swaps customer positions if cleared at an exempt DCO.[7] As a result, some non-U.S. clearing organizations have opted to register with the Commission as a DCO in order to clear swaps for customers of futures commission merchants (FCMs).

The CEA requires that, in order to register and maintain registration as a DCO, a clearing organization must comply with each of the DCO Core Principles and any requirement that the Commission imposes by rule or

[1] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34819 (July 19, 2019).

[2] The Commission has made several clarifying changes to the rule text that do not otherwise alter the substance of the rules. In addition, in light of comments received, the Commission is adding a process for current non-U.S. DCOs to avail themselves of the new compliance regime without requiring *de novo* registration, but rather by amending the DCO's registration order in accordance with § 39.3(d).

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

[4] Section 4(a) of the CEA restricts the execution of a futures contract to a designated contract market (DCM), and § 38.601 of the Commission's regulations requires any transaction executed on or through a DCM to be cleared at a DCO. *See* 7 U.S.C. 6; 17 CFR 38.601. Trades executed on or through a registered foreign board of trade must be cleared through a DCO or a clearing organization that observes the CPMI–IOSCO Principles for Financial Market Infrastructures and is in good regulatory standing in its home country jurisdiction. *See* 17 CFR 48.7(d).

[5] 7 U.S.C. 7a–1(a). Under section 2(i) of the CEA, 7 U.S.C. 2(i), activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either ''have a direct and significant connection with activities in, or effect on, commerce of the United States,'' or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (Dodd-Frank Act). Therefore, pursuant to section 2(i), the DCO registration requirement extends to any clearing organization whose clearing activities outside of the United States have a ''direct and significant connection with activities in, or effect on, commerce of the United States.''

[6] Section 5b(h) of the CEA, 7 U.S.C. 7a–1(h). Section 5b(h) also permits the Commission to exempt from DCO registration a securities clearing agency registered with the Securities and Exchange Commission; however, the Commission has not granted, nor developed a framework for granting, such exemptions.

[7] In 2018, the Commission proposed regulations that would codify the policies and procedures that the Commission currently follows with respect to granting exemptions from DCO registration to non-U.S. clearing organizations. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018). On July 11, 2019, as a supplement to that proposal, the Commission proposed to permit exempt DCOs to clear swaps for U.S. customers through foreign intermediaries. *See* Exemption From Derivatives Clearing Organization Registration, 84 FR 35456 (Jul. 23, 2019). All references to exempt DCOs contained in this release relate to the existing exempt DCO regime and are not indicative of the Commission's response to comments received on either of the proposals referenced in this paragraph.

regulation.[8] The Commission adopted the regulations in subpart B of Part 39 to implement the DCO Core Principles.[9]

Of the 15 DCOs currently registered with the Commission, five are organized outside of the United States.[10] These DCOs are also registered (or have comparable status) in their respective home countries, which means they are required to comply with the CEA and Part 39 as well as their home country regulatory regimes, and they are subject to oversight by both the Commission and their home country regulators. There are, however, meaningful differences in the extent to which these non-U.S. DCOs clear swaps for U.S. persons. For example, nearly half of the swap clearing activity at LCH Limited, if measured on the basis of required initial margin, is attributable to U.S. persons,[11] whereas the percentage of clearing activity generated by U.S. persons at other non-U.S. DCOs is far less. The Commission, recognizing this regulatory overlap yet mindful of its responsibilities, proposed and is adopting changes to its DCO registration and compliance framework to differentiate between DCOs organized in the United States (U.S. DCOs) and non-U.S. DCOs. The framework also distinguishes non-U.S. DCOs that do not pose substantial risk to the U.S. financial system from those that do.

The alternative compliance framework is not available to U.S. DCOs. U.S. DCOs must comply with the CEA and all Commission regulations applicable to DCOs, including all of subparts A and B of Part 39.[12] In addition, any non-U.S. DCO registered to clear futures listed for trading on a DCM is not eligible for the alternative compliance regime at this time. Most non-U.S. DCOs are registered for the purpose of clearing swaps only, and as noted in the proposal, the Commission's regulatory framework already distinguishes between clearing of futures executed on a DCM, for which DCO registration is required, and clearing of foreign futures, for which it is not.

Under Part 39 as now amended, a non-U.S. clearing organization that wants to clear only swaps for U.S. persons has two registration options. First, the non-U.S. clearing organization may apply for DCO registration under the existing procedures in § 39.3(a)(2) and be subject to all Commission regulations applicable to DCOs, including subpart B of Part 39. If, however, the non-U.S. clearing organization does not pose substantial risk to the U.S. financial system and meets the requirements of § 39.51, as discussed below, it now has the option to be registered and maintain registration as a DCO by relying largely on its home country regulatory regime, in lieu of full compliance with Commission regulations.

C. Overview of the New Requirements

The CEA requires a DCO to comply with the DCO Core Principles and any requirement that the Commission imposes by rule or regulation.[13] The CEA further provides that, subject to any rule or regulation prescribed by the Commission, a DCO has ''reasonable discretion'' in establishing the manner by which the DCO complies with each DCO Core Principle.[14] Currently, a DCO is required to comply with all of the regulations in subpart B of Part 39, which were adopted to implement the DCO Core Principles. The Commission is amending its regulations to allow a non-U.S. clearing organization that seeks to clear swaps for U.S. persons,[15] including FCM customers, to register as a DCO and, in most instances, comply with the applicable legal requirements in its home country as an alternative means of complying with the DCO Core Principles.[16]

A non-U.S. clearing organization applying for registration as a DCO subject to alternative compliance will be eligible if: (1) The Commission determines that the clearing organization's compliance with its home country regulatory regime would satisfy the DCO Core Principles;[17] (2) the clearing organization is in good regulatory standing in its home country; and (3) a memorandum of understanding (MOU) or similar arrangement satisfactory to the Commission is in effect between the Commission and the clearing organization's home country regulator. Each of these requirements is described in greater detail below.

An applicant for DCO registration subject to alternative compliance will be required to file only certain exhibits of Form DCO,[18] including a regulatory compliance chart in which the applicant identifies the applicable, legally binding requirements in its home country that correspond with each DCO Core Principle and explains how the applicant satisfies those requirements. If the application is approved by the Commission, the DCO will be permitted to comply with its home country regulatory regime rather than the regulations in subpart B of Part 39, with the exception of § 39.15, which concerns treatment of funds, and certain regulations related to those Core Principles for which the applicant has not demonstrated that compliance with the home country requirements satisfies them. Because the DCO will be permitted to clear swaps for customers[19] through registered FCMs, the DCO will be required to fully comply with the Commission's customer protection requirements,[20] as well as the swap data reporting requirements in part 45 of the Commission's regulations. The DCO also will be required to comply with

[8] 7 U.S.C. 7a–1(c)(2)(A)(i).

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

[10] The five DCOs organized outside of the United States are Eurex Clearing AG, ICE Clear Europe Ltd, ICE NGX Canada Inc., LCH Ltd, and LCH SA.

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

[12] In addition, any DCO that has elected to be subject to subpart C of Part 39, or that has been designated as systemically important by the Financial Stability Oversight Council, must comply with subpart C.

[13] 7 U.S.C. 7a–1(c)(2)(A)(i).

[14] 7 U.S.C. 7a–1(c)(2)(A)(ii).

[15] The Commission proposes to use the interpretation of ''U.S. person'' as set forth in the Commission's Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 FR 45292, 45316—45317 (July 26, 2013) (''Cross-Border Guidance''), as such definition may be amended or superseded by a definition of the term ''U.S. person'' that is adopted by the Commission.

[16] The Commission is promulgating the final rule pursuant to its authority in section 5b(c)(2)(A), 7 U.S.C. 7a–1(c)(2)(A). The section confers on the Commission the authority and discretion to establish requirements for meeting DCO Core Principles through rules and regulations issued pursuant to section 8a(5), 12 U.S.C. 12a(5). In exercise of that discretion, the Commission has developed an alternative compliance regime whereby a non-U.S. DCO may comply with the Core Principles through compliance with its home jurisdiction's requirements.

[17] As described further below, if a non-U.S. DCO fails to demonstrate compliance with a particular DCO Core Principle, the DCO may nevertheless be able to rely on alternative compliance for those DCO Core Principles for which it is able to demonstrate compliance.

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

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

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

certain ongoing and event-specific reporting requirements that are more limited in scope than the reporting requirements for existing DCOs. The eligibility criteria, conditions, and reporting requirements will be set forth in new subpart D of Part 39.

Assuming all other eligibility criteria continue to be met, the non-U.S. DCO will be eligible for alternative compliance unless and until its U.S. clearing activity (as measured by initial margin requirements attributable to U.S. clearing members) increases to the point that the Commission determines the DCO poses substantial risk to the U.S. financial system, as described below.

D. Comments on the Notice of Proposed Rulemaking

The Commission requested comment on the proposed rulemaking and invited commenters to provide data and analysis regarding any aspect of the proposal. The Commission received a total of 15 substantive comment letters in response.[21] After the initial sixty-day comment period expired, the Commission extended the comment period for an additional sixty days.[22] After considering the comments, the Commission is largely adopting the rule changes as proposed, for the reasons explained below. In the discussion below, the Commission highlights topics of particular interest to commenters and discusses comments that are representative of the views expressed on those topics. The discussion does not explicitly respond to every comment submitted; rather, it addresses the most significant issues raised by the proposed rulemaking and analyzes those issues in the context of specific comments.

II. Amendments to Parts 39 and 140 of the Commission's Regulations

A. Regulation 39.2—Definitions

1. Good Regulatory Standing

The Commission proposed that, to be eligible for registration with alternative compliance, a DCO would have to be in good regulatory standing in its home country. The Commission further proposed that ''good regulatory standing'' be defined to mean either that there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the DCO.

In connection with the proposed definition of ''good regulatory standing,'' the Commission also requested comment on the following question: ''Although the Commission proposes to incorporate a standard of 'material' non-observance in the definition, should it instead remove references to materiality, and thus capture all instances of non-observance?''

The Commission did not receive any comments on the requirement that a DCO be in good regulatory standing in its home country to be eligible for registration with alternative compliance, but several commenters addressed the definition of ''good regulatory standing.'' Eurex, ICE, and CCIL supported the definition's standard of ''material'' non-observance. In contrast, Better Markets argued that the definition does not provide sufficient assurance of the DCO's compliance with relevant home country regulations because it allows non-U.S. DCOs that have been found non-compliant with certain home country regulations to maintain good regulatory standing. Better Markets argued that a non-U.S. DCO should be required to secure a representation from its regulator that it remains in good regulatory standing, without allowing for ''material non-observance'' of applicable law when that non-observance is in the process of being resolved to the satisfaction of the home country regulator.

The Commission is adopting the definition of ''good regulatory standing'' largely as proposed.[23] The Commission's supervisory experience with DCOs has shown that even well-functioning DCOs will experience instances of non-observance of applicable requirements—both material and immaterial. The Commission therefore seeks to refrain from adopting a mechanical or hyper-technical approach whereby isolated instances of non-observance would be disqualifying.[24] The Commission further believes that the definition provides adequate assurance of compliance with home country regulation, because any material non-observance must be resolved to the satisfaction of the home country regulator in order for the DCO to be deemed to be in good standing.

2. Substantial Risk to the U.S. Financial System

The Commission has a strong supervisory interest in any DCO that is registered, or required to register, with the Commission, regardless of its location. Given the global nature of the swaps market, these DCOs typically operate in multiple jurisdictions and are subject to overlapping or duplicative regulations. In developing the alternative compliance regime, the Commission has strived to allow for greater deference to foreign jurisdictions so as to reduce overlapping supervision and regulatory inefficiencies, while retaining direct oversight over non-U.S. DCOs that—due to the level of their U.S. clearing activity—raise a greater level of supervisory interests (relative to other non-U.S. DCOs).[25] The proposed

[21] The Commission received comment letters addressing the proposal submitted by the following: ASX Clear (Futures) Pty Ltd (ASX); Better Markets, Inc. (Better Markets); CCP12; The Clearing Corporation of India Ltd. (CCIL); Citadel; Eurex Clearing AG (Eurex); Futures Industry Association (FIA); Intercontinental Exchange, Inc. (ICE); International Swaps and Derivatives Association, Inc. (ISDA); Japan Securities Clearing Corporation (JSCC); Kermit R. Kubitz; LCH Ltd and LCH SA (LCH); Securities Industry and Financial Markets Association (SIFMA); World Federation of Exchanges (WFE); and ASX, JSCC, Korea Exchange Inc., and OTC Clearing Hong Kong Limited (''ASX, JSCC, KRX, and OTC Clear'').

[22] *See* Registration With Alternative Compliance For Non-U.S. Derivatives Clearing Organizations, 84 FR 49072 (Sept. 18, 2019).

[23] In an earlier, separate rulemaking, the Commission had proposed to define ''good regulatory standing'' in a way that would apply only to exempt DCOs. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39933 (Aug. 13, 2018). Therefore, in the proposal for this rulemaking, the Commission proposed a definition of ''good regulatory standing'' that retained the previously proposed definition for exempt DCOs but added a separate provision that would apply only to DCOs subject to alternative compliance. *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34831 (July 19, 2019). The Commission is adopting only that portion of the definition that applies to DCOs subject to alternative compliance. The Commission will amend the definition of ''good regulatory standing'' as necessary if it finalizes the rulemaking on exempt DCOs.

[24] While the Commission expects, in almost all cases, to defer to the home country regulator's determination of whether an instance of non-compliance is or is not material, it does retain the discretion, in the context of the application of these rules of the Commission, to make that determination itself, and, in order to make such a determination, to obtain information from the home country regulator pursuant to the relevant MOU.

[25] In developing the alternative compliance regime, the Commission is guided by principles of international comity, which counsel courts and agencies to act reasonably and with due regard for the important interests of foreign sovereigns in exercising jurisdiction with respect to activities taking place abroad. *See* Restatement (Third) of Foreign Relations Law of the United States (the Restatement). With regard to deference, the G20 ''agree[d] that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.'' G20 Leaders' Declaration, St. Petersburg Summit, para. 71 (Sept. 6, 2013).

''substantial risk'' test is designed to assist the Commission's assessment of its supervisory interest in a particular non-U.S. DCO.

For purposes of this rulemaking, the Commission proposed to define the term ''substantial risk to the U.S. financial system'' to mean, with respect to a non-U.S. DCO, that (1) the DCO holds 20 percent or more of the required initial margin [26] of U.S. clearing members for swaps across all registered and exempt DCOs; and (2) 20 percent or more of the initial margin requirements for swaps at that DCO is attributable to U.S. clearing members; provided, however, where one or both of these thresholds are close to 20 percent, the Commission may exercise discretion in determining whether the DCO poses substantial risk to the U.S. financial system.

The first prong of the test addresses systemic risk, and the Commission's primary systemic risk concern arises from the potential for loss of clearing services for a significant part of the U.S. swaps market in the event of a catastrophic occurrence affecting the DCO. The second prong respects international comity [27] by ensuring that the substantial risk test captures only those non-U.S. DCOs with clearing activity attributable to U.S. clearing members sufficient to warrant more active oversight by the Commission. Even if a non-U.S. DCO satisfies the first prong, it may still qualify for registration subject to alternative compliance if the proportion of U.S. activity it clears does not satisfy the second prong.

Under the test, the term ''substantial'' would apply to proportions of approximately 20 percent or greater. The Commission reiterates that this is not a bright-line test; by offering this figure, the Commission does not intend to suggest that, for example, a DCO that holds 20.1 percent of the required initial margin of U.S. clearing members would potentially pose substantial risk to the U.S. financial system, while a DCO that holds 19.9 percent would not. The Commission is instead indicating how it would assess the meaning of the term ''substantial'' in the test.

The Commission recognizes that if a test were to rely solely on initial margin requirements of U.S. clearing members, it may not fully capture the risk of that DCO to the U.S. financial system. Therefore, under the substantial risk test, the Commission retains a degree of discretion to determine whether a non-U.S. DCO poses substantial risk to the U.S. financial system. In making its determination, the Commission may look at other factors that may reduce or mitigate the DCO's risk to the U.S. financial system, or provide other indication of the systemic risk presented by the DCO.

The Commission specifically requested comment on the following question: ''Is the proposed test for 'substantial risk to the U.S. financial system' the best measure of such risk? If not, please explain why, and if there is a better measure/metric that the Commission should use, please provide a rationale and supporting data, if available.''

The Commission received a variety of comments regarding the substantial risk test. Some comments were generally supportive of the test and its component parts, but the majority of comments raised questions and concerns about the test, including the elements of the test, the discretion afforded to the Commission, and the operation of the test and its ramifications. LCH and CCIL both supported the substantial risk test. In particular, LCH supported using initial margin as an indicator of a non-U.S. DCO's risk to the U.S. financial system. LCH asserted that initial margin is superior to gross notional for analyzing risk, arguing that for cleared swaps gross notional does not provide a clear indication of risk and could lead to an over-estimation of the underlying risk managed by the DCO. CCIL agrees with the proposed test for substantial risk to the U.S. financial system based on the joint application of the two thresholds in the test.

Two commenters questioned how the Commission developed the substantial risk test, particularly the thresholds in the test, and requested additional information regarding this process. ICE stated that it is not clear from the proposal how the Commission determined that the 20 percent thresholds indicate that a non-U.S. DCO poses a substantial risk to the U.S. financial system. ICE requested that the Commission provide an explanation of the basis for this determination. Citadel requested that the Commission provide further information regarding how the criteria were developed, as well as the expected practical impact if the test were applied, including how many currently registered non-U.S. DCOs the Commission would identify as posing substantial risk to the U.S. financial system. Better Markets specifically opposed the first prong of the substantial risk test, which asks whether the DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs. It argued that because the Commission did not provide data regarding the value of 20 percent of the U.S. clearing members' initial margin across all swaps, and did not provide a data-based rationale for choosing 20 percent as the appropriate threshold, the implications of this prong of the test are highly speculative, which in turn limits the ability of the public to meaningfully comment on the proposal. Based on its analysis of 2018 data from ISDA, Better Markets suggested that LCH Ltd. would be the only non-U.S. DCO to meet the criteria for presenting a substantial risk to the U.S. financial system. Better Markets further noted that, based on the ISDA data, ICE Clear Credit (were it not U.S.-based) would be eligible for alternative compliance under the first prong of the definition, despite being deemed systemically important by the Financial Stability Oversight Council (FSOC).

In developing the ''substantial risk'' test, the Commission applied its experience in regulating non-U.S. DCOs, including circumstances in which there can be substantial overlap between the regulatory and supervisory activity of the DCO's home country regulator and that of the Commission, as well as any associated benefits and challenges. The Commission anticipates that based on current clearing activity, one non-U.S. DCO, LCH Ltd, would satisfy the substantial risk test. With respect to the reference to FSOC designation, the Commission observes that while both the substantial risk inquiry and FSOC designation relate generally to issues of systemic risk, the related assessments will necessarily differ given their different purposes and consequences.[28]

[26] In general, initial margin requirements are risk-based and are meant to cover a DCO's potential future exposure to clearing members based on price movements in the interval between the last collection of variation margin and the time within which the DCO estimates that it would be able to liquidate a defaulting clearing member's portfolio. This risk-based element of the test focuses on the initial margin attributable to those clearing members who, by virtue of their relationship and connection to the U.S. financial system, raise systemic risk concerns. Accordingly, the Commission believes the relative risk that a DCO poses to the U.S. financial system can be identified by the cumulative sum of initial margin attributable to U.S. clearing members collected by the DCO.

[27] In developing this rulemaking, the Commission was guided by principles of international comity, which counsel due regard for the important interests of foreign sovereigns. *See* Restatement (Third) of Foreign Relations Law of the United States (the Restatement).

[28] Section 804 of the Dodd-Frank Act provides the FSOC the authority to designate a financial market utility (FMU), including a DCO, that the FSOC determines is or is likely to become systemically important because the failure of or a disruption to the functioning of the FMU could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or

Continued

The substantial risk test is designed to better calibrate the Commission's oversight of non-U.S. DCOs, based on the principle of deference to their home country regulators, while at the same time taking into consideration risk to U.S. clearing members and ultimately, the U.S. financial system. If a non-U.S. DCO is determined to pose ''substantial risk,'' the Commission may not defer to the home country regulatory regime and the DCO will be required to comply with both Commission requirements and its home country requirements if it conducts activities requiring registration with the Commission. On the other hand, the FSOC designation process focuses on identifying those FMUs whose failure or disruption could threaten the U.S. financial system.[29] The consequence of FSOC designation is that the FMU becomes subject to enhanced regulatory supervision. To date, the only DCOs designated by FSOC have been U.S. DCOs. Nevertheless, a non-U.S. DCO designated by FSOC would not be eligible for alternative compliance.[30]

The Commission disagrees that commenters did not have access to sufficient information to comment on the first prong of the substantial risk test. Better Markets' analysis of how the test would apply to various DCOs based on publicly available information is inconsistent with that claim. The Commission continues to believe that the first prong of the test is properly calibrated to capture those non-U.S. DCOs that pose substantial risk to the U.S. financial system. The Commission also observes that no commenter offered an alternative version of the test.

Several commenters supported the first prong of the substantial risk test but questioned the wisdom and utility of the second prong. ISDA opposed the second prong and requested that it be eliminated. ISDA stated that although it generally supports clear thresholds for determining whether a DCO poses substantial risk to the U.S. financial system, the second prong of the test does not gauge the risk of the relevant non-U.S. DCO to the U.S. financial system, but instead signifies the importance of U.S. clearing members to that particular DCO.[31] ISDA further argued that the second prong may incentivize non-U.S. DCOs to limit clearing for U.S. persons to avoid being designated as posing substantial risk to the U.S. financial system, and thus being ineligible for registration with alternative compliance. ISDA argued that this situation would harm U.S. banking groups, and could be viewed as violating the spirit of the Principles for Financial Market Infrastructures requirement to provide non-discriminatory treatment of all clearing members.[32] WFE and Eurex also acknowledged the first prong as an appropriate measure of risk, but questioned the second prong on similar grounds.

As the Commission explained previously, the second prong ensures that the test will capture a non-U.S. DCO only if a sufficiently large portion of its clearing activity is attributable to U.S. clearing members such that the United States has a substantial interest warranting more active Commission oversight. While a non-U.S. DCO could theoretically be incentivized to discriminate against U.S. clearing members to avoid satisfying the second prong, the Commission does not view this as a significant risk as a practical matter. It is unlikely that a DCO would have enough U.S. clearing member activity to satisfy the first prong, but would be able to avoid satisfying the second prong by manipulating its U.S. clearing member activity. In any event, the discretion afforded the Commission in the substantial risk test should dull any incentive for a DCO to reject U.S. clearing member business for the purposes of the test.

Three commenters questioned whether the substantial risk test should account for other factors, including the market share a non-U.S. DCO has with respect to clearing certain classes of products, as well as the DCO's size. Citadel questioned, given the relative size of the interest rate swap market, whether a DCO clearing swaps in another asset class (such as CDS) could ever be considered to pose substantial risk to the U.S. financial system under the proposed criteria. Citadel asserted that it would be a strange outcome if only non-U.S. DCOs clearing interest rate swaps would be subject to the Commission's full regulatory framework for DCOs. Similarly, Better Markets argued that the systemic risk of a non-U.S. DCO does not turn solely on the percentage of U.S. clearing member initial margin posted as a percentage of the clearing market as a whole, but also depends on other critical systemic risk factors, such as the prominence of a particular clearing organization in a particular market (such as credit-related swaps), and the potential for correlated losses to occur across U.S. and non-U.S. DCO clearing members participating in that and other markets. Because these considerations are not part of the substantial risk test, Better Markets believes that the substantial risk test does not sufficiently addresses systemic risk concerns.

The Commission recognizes that a test based solely on initial margin requirements may not fully capture the risk of a given DCO. That is why the Commission proposed to retain discretion in determining whether a non-U.S. DCO poses substantial risk to the U.S. financial system, particularly where the DCO is close to 20 percent on both prongs of the test. The Commission noted that, in making its determination in these cases, it would look at other factors that may reduce or mitigate the DCO's risk to the U.S. financial system or provide a better indication of the DCO's risk to the U.S. financial system.[33] In appropriate circumstances, the factors cited by the commenters, along with other similar factors, may be considered in connection with an exercise of Commission discretion. The Commission discusses these considerations in additional detail below, in connection with the discussion of Commission discretion. The Commission disagrees with the assertion that the test does not account for the size of the DCO. The first prong of the test, whether the DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt

markets and thereby threaten the stability of the U.S. financial system. *See* Authority to Designate Financial Market Utilities as Systemically Important, 76 FR 44763 (July 27, 2011).

[29] In making a determination with respect to whether a FMU is, or is likely to become, systemically important, the FSOC takes into consideration: The aggregate monetary value of transactions processed by the FMU; the aggregate exposure of the FMU to its counterparties; the relationship, interdependencies, or other interactions of the FMU with other FMUs or payment, clearing, or settlement activities; the effect that the failure of or a disruption to the FMU would have on critical markets, financial institutions, or the broader financial system; and any other factors the FSOC deems appropriate. *See* 12 CFR 1320.10.

[30] The Commission did not propose to amend § 39.30(b), which subjects a ''systemically important [DCO]'' (defined in § 39.2 as a DCO designated by the FSOC for which the Commission acts as the Supervisory Agency) to the provisions of subparts A and B of Part 39.

[31] ISDA also did not recognize that the proposed definition of ''substantial risk to the financial system'' requires that both prongs of the test, and not only one or the other, be satisfied in order for a non-U.S. DCO to satisfy the test. Based on this misunderstanding, ISDA argued that the second prong does not provide an independent basis for finding that a non-U.S. DCO presents substantial risk to the financial system. In response to this comment, the Commission reaffirms that the substantial risk test is a two-prong test in which both the first and second prongs must be satisfied.

[32] *See* CPMI–IOSCO, Principles for Financial Market Infrastructures (PFMIs), at Principle 18 (Apr. 2012), available at *http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf.*

[33] *See* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 3822 (Feb. 13, 2019).

DCOs, is closely correlated with the size of the DCO in that only a large DCO will hold that amount of initial margin.

Some commenters supported the proposal that the Commission retain the ability to exercise discretion for a prong of the substantial risk test that is close to the 20 percent threshold, as opposed to being limited to a mechanical application. WFE warned against any automatic trigger, stating that the Commission should be able to determine that a non-U.S. DCO does not pose substantial risk to the U.S. financial system, even if the DCO exceeds both thresholds in the substantial risk test. LCH supports the Commission's ability to exercise its discretion, but only when the non-U.S. DCO is close to 20 percent on both prongs of the substantial risk test. Similarly, CCP12 and JSCC requested that the Commission clarify that the Commission would exercise its discretion only if both of the two thresholds are close to 20 percent. Citadel recommended that the Commission retain sufficient discretion to conduct a thorough analysis of the systemic risks associated with each non-U.S. DCO seeking to use the alternative compliance framework, taking into account both U.S. participation on that DCO (including clearing members, customers, and affiliates of U.S. firms) and the DCO's market position within the relevant asset class.

Multiple commenters questioned or criticized the scope of the Commission's discretion under the substantial risk test. ICE argued that the potential scope of discretion, and the lack of definition of relevant factors that the Commission may consider, could create significant uncertainty as to how the Commission may classify a DCO, even potentially resulting in inconsistent determinations. ICE also argued that this lack of specificity could lead to unnecessary delays in the assessment of an applicant, which would increase compliance costs and may discourage clearing organizations from submitting an application. FIA similarly argued that the Commission's discretion should be subject to some parameters so as to create more transparency and clarity. FIA suggested that the Commission list factors it will consider in determining whether a non-U.S. DCO poses substantial risk. Similarly, LCH recommended there be greater transparency around the qualitative factors that may be considered in a non-U.S. DCO's substantial risk assessment, noting that any such factors should be measurable and relevant to addressing risk in the U.S. financial system. ISDA expressed concern about the Commission's proposed ability to retain discretion, arguing that this discretion undermines the Commission's objective to provide a bright-line test, and may lead to legal and compliance uncertainty. ISDA requested that the Commission clarify the factors that might reduce, mitigate, or provide a better indication of a non-U.S. DCO's risk to the U.S. financial system.

CCIL cautioned that the Commission's discretion to determine whether a non-U.S. DCO poses substantial risk based on one or both of the thresholds may have the effect of ''undoing'' the proposed test. FIA argued that if the Commission can exercise its discretion even when a DCO is approaching the threshold of only one prong of the test, then there would be no clarity or certainty regarding whether any particular DCO satisfies the test. Both FIA and CCP12 argued that the possibility that the Commission might exercise discretion and determine that a small non-U.S. DCO presents substantial risk to the U.S. financial system based on being close to the threshold on the second prong may create uncertainty that could lead to market fragmentation, possibly exacerbate systemic risk, or otherwise harm market participants, especially if the DCO attempts to reduce its existing U.S. clearing business, or limit new U.S. clearing business, to mitigate against perceived uncertainty.

Better Markets argued that the Commission retained too much discretion in its proposed definition of substantial risk, including discretion to determine that non-U.S. DCOs above both thresholds do not pose substantial risk to the U.S. financial system and therefore remain eligible for alternative compliance. Better Markets further stated that due to the breadth of this discretion, the substantial risk test effectively only provides one indication of how the Commission might consider eligibility for alternative compliance. In the view of Better Markets, the level of discretion appears to justify determinations that a given DCO does or does not pose substantial risk based on almost any criteria or factors, and thus asks the public to foresee the discretionary application of vague regulations with a potentially wide range of possible outcomes.

In response to comments expressing concern about the Commission exercising discretion on the substantial risk determination as a whole based on only one of the two prongs being close to a 20 percent threshold, the Commission has revised the rule text to clarify when it will exercise discretion. Specifically, the rule text has been revised to provide that where one or both of these thresholds are identified as being close to 20 percent, the Commission may exercise discretion in determining whether an identified threshold is satisfied for the purpose of determining whether the DCO poses substantial risk to the U.S. financial system. This was always the Commission's intent with respect to the exercise of discretion, but the Commission agrees with commenters who indicated that the language in the proposal was not sufficiently clear.

The Commission intends to consider all factors it believes are relevant to determine whether a non-U.S. DCO poses substantial risk to the U.S. financial system. The following non-exclusive examples illustrate the factors the Commission may consider in exercising discretion under the substantial risk test: The market share of the DCO in clearing a given asset class, and the importance of those products to the U.S. financial system; whether positions cleared at the DCO are portable to another DCO and the potential disruptions associated with transferring positions; whether the sudden failure of the DCO would significantly reduce the availability of clearing services to U.S. clearing members; and whether settlements at the DCO are primarily denominated in U.S. dollars.

As one commenter correctly observed, the Commission retained discretion to determine that non-U.S. DCOs above both thresholds nevertheless remain eligible for alternative compliance. The Commission wishes to clarify, however, that it does not intend to exercise discretion in a manner that would have the effect of negating the test. Exercising discretion is the exception, not the rule, and the Commission accordingly intends to exercise its discretion sparingly, and on a case-by-case basis, weighing and considering factors that possibly are unique to the DCO and its profile in the marketplace. Lastly, the Commission wishes to clarify that it intends to exercise its discretion on a sliding scale where the further the non-U.S. DCO is from the thresholds, the more numerous or compelling the factors will need to be for the Commission to exercise discretion.

The Commission received a number of process-related comments regarding the substantial risk test. Some of the comments were directly responsive to the Commission's request in the proposal for comment regarding the frequency with which the Commission should reassess whether a DCO presents substantial risk to the U.S. financial system, and across what time period after the DCO is registered under the

alternative compliance regime, or otherwise addressed that same topic.[34] Additionally, a number of commenters had other comments, questions, and recommendations regarding the process by which the Commission would apply the substantial risk test, as well as the nature and scope of a DCO's obligations in connection with that process.

With regard to the frequency with which the Commission will assess whether a DCO poses substantial risk to the U.S. financial system, LCH suggested that the Commission reassess a DCO's risk to the U.S. financial system annually. CCIL, CCP12, and JSCC stated that the Commission should reassess a DCO every two years, and CCP12 added that the Commission should also reassess following a material change to the DCO's clearing services or home country regulatory framework. CCP12 also suggested that the reassessment be regarded more as a ''check-up'' than a complete re-application process in which the DCO would have to resubmit already available data, because the Commission already would have been receiving regular reports from the DCO. FIA stated that the substantial risk test should not be applied too frequently, to avoid DCOs oscillating between being eligible or ineligible for alternative compliance. CCP12 and JSCC suggested that the Commission look at an average of the previous 12 months when reassessing each threshold to ensure that the results are not overly influenced by any specific event, such as quarter-end or year-end.

With regard to reassessments of a DCO's status under the substantial risk test, ICE asserted that it would be difficult for a DCO to determine where it stands in relation to the threshold in the first prong of the test because this information is not available to DCOs. ICE argued that although the Commission may have this information, the standard needs to be one that is predictable and assessable for the DCOs themselves. ICE further stated that it is not clear how often a DCO must test whether it poses substantial risk to the U.S. financial system, or how long it would have to come into compliance with all requirements applicable to DCOs that are not eligible for alternative compliance if it ceases to be eligible. Similarly, ISDA requested that the Commission affirm that the Commission will monitor the 20 percent threshold test by analyzing the data DCOs already report to the Commission, and that a non-U.S. DCO has no obligations with respect to the monitoring of the 20 percent threshold apart from its reporting requirements. CCP12 recommended that the Commission use an observation period of sufficient duration before determining that a non-U.S. DCO exceeds the thresholds in the substantial risk test, to verify whether the breach is a structural trend or a temporary condition.

FIA stated that there should be a formal process to designate a DCO as one that poses substantial risk to the U.S. financial system, and that the Commission should clearly establish the frequency with which the substantial risk test will be applied to DCOs. WFE suggested that the Commission adopt and implement formal milestones in the substantial risk determination process. Specifically, WFE suggested that when a DCO approaches a threshold in the substantial risk test, but prior to any Commission determination that the DCO poses substantial risk, the Commission should initiate discussions with both the DCO and its home country supervisor, and allow the DCO to raise substantive and procedural issues with the Commission. In addition, WFE stated that if the Commission determines that a DCO poses substantial risk to the U.S. financial system, that the determination should be accompanied by a communication outlining the factors the Commission took into consideration in making the determination, and that DCOs should be able to appeal the determination.

FIA stated that the DCO, home country regulator, and, if practicable, other interested parties should be given the opportunity to provide feedback to the Commission when it is determining whether a DCO presents substantial risk, and that the DCO should be given a grace period during which time it can attempt to drop under the relevant thresholds. FIA stated that the Commission should make clear what is expected to occur if a DCO that is registered subject to alternative compliance and clears for U.S. customers becomes ineligible for alternative compliance, and should allow an appropriate timeframe for the orderly transfer or close out of any accounts held by U.S. customers at the relevant DCO in the event the non-U.S. DCO decides to limit clearing activity by U.S. clearing members to attempt to remain below the thresholds in the substantial risk test. FIA argued that it is vital that clearing members be given ample notice of a proposed determination by the Commission, together with the basis for such determination. CCP12 also requested that the Commission provide sufficient notice to the DCO to permit it to adjust its clearing business prior to a determination that the DCO poses substantial risk to the U.S. financial system.

FIA asserted that because the substantial risk test is applied on an ongoing basis, the Commission should commit to publishing and updating as appropriate a list of non-U.S. DCOs that pose substantial risk to the U.S. financial system and are therefore ineligible for alternative compliance. FIA explained that market participants will assume that a DCO that does not currently pose substantial risk to the U.S. financial system will continue to be able to facilitate U.S. customer clearing. Firms will be better positioned to plan for, and potentially mitigate, the business and market disruptions that could result from a DCO's addition to the list if they have notice of the Commission's intention.

The Commission is mindful of the concerns raised by commenters regarding the frequency with which the Commission should assess whether a DCO presents substantial risk to the U.S. financial system. At this time, however, the Commission declines to define a specific time period for reassessment of whether a DCO presents substantial risk. The Commission notes that because it will be receiving the relevant data from DCOs daily, it intends to monitor whether a non-U.S. DCO subject to alternative compliance presents ''substantial risk to the U.S. financial system'' on an ongoing basis.

In response to the concerns commenters expressed regarding the process that the Commission will use to determine whether a non-U.S. DCO satisfies the substantial risk test, and to inform the DCO of that determination, the Commission notes that it has extensive experience with engaging DCOs on a cooperative basis, and anticipates doing so in circumstances in which a non-U.S. DCO may pose substantial risk to the U.S. financial system. The Commission anticipates early and significant dialogue with non-U.S. DCOs if they approach the thresholds, and welcomes engagement with the DCO and its home country regulators, especially if it appears that the DCO is projected to exceed the thresholds in the substantial risk test. In applying the test, the Commission will focus on the non-U.S. DCO's current U.S. clearing member activity relative to the thresholds, and whether any increases in activity by U.S. clearing members appear to be temporary, or are part of a persistent trend. The Commission does not intend that, absent extraordinary circumstances,

[34] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34826 (July 19, 2019).

non-U.S. DCOs will alternate between traditional registration and registration with alternative compliance, as that would not benefit the non-U.S. DCO, market participants, or the Commission. Lastly, the Commission does not intend to publish a list of non-U.S. DCOs that pose substantial risk to the U.S. financial system. If a non-U.S. DCO subject to alternative compliance becomes ineligible for alternative compliance for any reason, the Commission will modify the DCO's registration order, which is public, to provide that it must comply with all Commission regulations applicable to DCOs and to provide a reasonable period of time for it to do so, pursuant to § 39.51(d)(4). This process should not result in any disruption to market participants. In the unlikely event that a non-U.S. DCO responds to a determination that it is no longer eligible for alternative compliance by requesting a vacation of its registration, the Commission will work with the DCO and market participants to minimize market disruption.

The Commission is adopting the substantial risk test as proposed, with one exception. As explained above, the Commission is modifying the rule text to clarify the scope of Commission discretion under the test.

3. U.S. Clearing Member

The substantial risk test focuses on the clearing activity of U.S. clearing members at non-U.S. DCOs. For purposes of the test, the Commission proposed to define ''U.S. clearing member'' as a clearing member of a non-U.S. DCO that falls within one of three categories: It is organized in the United States; it is an FCM, which means it may clear for U.S. customers; or it is a non-U.S. entity whose ultimate parent company is organized in the United States.

The comments focused on one aspect of the proposed definition of U.S. clearing member. Specifically, ICE, ISDA, WFE, CCP12, FIA, JSCC, and Eurex opposed the definition's inclusion of clearing members that are organized outside of the United States, but whose ultimate parent company is organized in the United States.[35] For example, ICE stated that the definition of ''U.S. clearing member'' is overbroad and should instead focus only on the location and activity of the clearing member itself. ICE argued that the fact that a clearing member located outside of the United States has a U.S. parent does not mean that its clearing activity at a non-U.S. DCO has or can be expected to have an effect on U.S. markets. FIA stated that affiliates with parent companies in the U.S. are significant participants in the four currently exempt DCOs and that it is not clear why all trades cleared by such a clearing member would be considered to pose risk to the U.S. financial system. WFE argues that rather than considering a non-U.S. clearing member with a U.S. parent to be a U.S. clearing member in every instance, that the Commission consider clearing members' legal organization (including with respect to separate capitalization) and parent organization recovery and resolution plans and make a determination based on the particular facts and circumstances.

Two commenters argued that this aspect of the proposed definition of U.S. clearing member is inconsistent with the Commission's existing cross-border risk management framework for swaps.[36] ISDA recommended that non-U.S. subsidiaries of U.S. swap dealers be excluded from the definition of U.S. clearing member, on the basis that the Commission's Cross-Border Guidance provides that non-U.S. subsidiaries of U.S. swap dealers are not considered U.S. persons simply because they are part of a U.S. banking group. CCP12 argued that section 2(i) of the CEA requires that the focus be on whether a non-U.S. clearing organization's activities have a direct and significant connection with activities in, or effect on, commerce of the United States. CCP12 believes that, under this approach, the focus should be on the non-U.S. clearing organization's clearing for U.S. participants.

The Commission is adopting the definition of ''U.S. clearing member'' as proposed, including in the definition those clearing members that are organized outside of the United States, but whose ultimate parent company is organized in the United States. The Commission acknowledges that the definition of ''U.S. clearing member'' is more expansive than the definition of ''U.S. person'' in the Cross-Border Guidance in that a clearing member organized outside of the United States is always considered to be a ''U.S. clearing member'' if it has a U.S. parent. Because the risk associated with a non-U.S. clearing member can potentially flow to its U.S. parent, the Commission believes that it is appropriate to consider that activity, aggregated together with other relevant activity, in applying the substantial risk test. This approach has the important advantage of being easily administered as a bright-line test, making the calculation more predictable than it would be under an approach based on specific facts and circumstances. The Commission believes this is appropriate here, where the definition does not have jurisdictional consequences impacting issues such as the need for registration. Furthermore, this definition will be used in both the numerator and denominator to measure clearing activity as a percentage for the purposes of the first prong, limiting its impact in terms of the number of non-U.S. DCOs satisfying the test.

B. Regulation 39.3(a)(3)—Application Procedures

The Commission proposed to amend § 39.3(a) to establish application procedures for a non-U.S. clearing organization seeking to register as a DCO subject to alternative compliance. Proposed § 39.3(a) would require an applicant to submit to the Commission the following sections of Form DCO, in some instances modified as described: Cover sheet, Exhibit A–1 (regulatory compliance chart), Exhibit A–2 (proposed rulebook), Exhibit A–3 (narrative summary of proposed clearing activities), Exhibit A–4 (detailed business plan), Exhibit A–7 (documents setting forth the applicant's corporate organizational structure), Exhibit A–8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), Exhibit A–9 (description of pending legal proceedings or governmental investigations), Exhibit A–10 (agreements with outside service providers with respect to the treatment of customer funds), Exhibits F–1 through F–3 (documents that demonstrate compliance with the treatment of funds requirements with respect to FCM customers), and Exhibit R (ring-fencing memorandum).

As proposed, an applicant would be required to demonstrate to the Commission in Exhibit A–1 the extent to which compliance with the applicable legal requirements in its home country would constitute compliance with the DCO Core Principles. To satisfy this requirement, the applicant would be required to provide in Exhibit A–1 the citation and

[35] CCP12, JSCC, and ISDA expressed concern that defining U.S. clearing member to include non-U.S. entities could lead small non-U.S. DCOs with significant clearing activity from non-U.S. subsidiaries of U.S. parents to satisfy the substantial risk test, given the increased likelihood that they would satisfy the second prong. As discussed above, both prongs of the test must be satisfied for the Commission to determine that a non-U.S. DCO poses substantial risk, and small DCOs will not satisfy the test because they will not satisfy the first prong.

[36] *See* Cross-Border Guidance, 78 FR 45292, 45316–45317 (July 26, 2013).

full text of each applicable legal requirement in its home country that corresponds with each DCO Core Principle and an explanation of how the applicant satisfies those requirements. In the event the home country lacks legal requirements that correspond with a particular DCO Core Principle, the applicant should explain how it would satisfy the DCO Core Principle nevertheless.

The Commission requested comment on whether it should require additional, or less, information from an applicant for alternative compliance as part of its application under proposed § 39.3(a)(3). Several commenters stated that the Commission should require less information from applicants. CCP12 stated that the proposed application procedure is substantial and therefore burdensome in terms of processes and administrative filings. ICE stated that the requirement that an applicant submit a chart comparing its home country's requirements to each DCO Core Principle would require extensive work. ICE suggested that the Commission permit applicants to meet this requirement in a more flexible manner than by requiring the provision of a mapping document, such as by allowing applicants to address categories of regulatory objectives under the Dodd-Frank Act or Commission regulations. CCIL stated that the Commission should require applicants to provide only the information required to be disclosed by the quantitative and qualitative disclosure requirements under the PFMI standards. ICE similarly stated that the Commission should benchmark its comparability assessment with regard to compliance with international standards and, in particular, the PFMIs. Eurex and LCH recommended that an existing DCO applying for alternative compliance should not have to submit all of the exhibits required under proposed § 39.3(a)(3) because the Commission would already be aware of many of the documents required by the application.

One commenter, Mr. Kubitz, suggested that the Commission should require additional information from applicants, and specifically, the applicant's current clearing volume, an explanation of any differences between the DCO Core Principles and the applicant's home country regulatory regime, and a justification for any differences in the applicant's home country reporting requirements.

After reviewing the comments, the Commission continues to believe that the information required of applicants under proposed § 39.3(a)(3) is appropriate and necessary to evaluate an applicant's eligibility for alternative compliance. This includes the regulatory compliance chart in Exhibit A–1 of Form DCO, which is necessary to ensure that an applicant is subject to requirements in its home country jurisdiction that would satisfy the DCO Core Principles. The Commission must receive this information also to ensure that an applicant for alternative compliance actually satisfies the DCO Core Principles, as is required of all registered DCOs under the CEA.[37] In addition, the Commission could not evaluate an application based on PFMI compliance because the CEA specifically requires compliance with the DCO Core Principles.

The Commission also does not believe that it needs to require additional information beyond that contained in proposed § 39.3(a)(3). If the Commission determines that it needs additional information to process a particular application, existing § 39.3(a)(3) (proposed to be renumbered as § 39.3(a)(4)) permits the Commission to request that the applicant provide that information.

With respect to a DCO that has already registered with the Commission pursuant to the procedures in § 39.3(a)(2), and that may wish to be subject to alternative compliance, those DCOs would not need to follow the procedures set forth in proposed § 39.3(a)(3). Rather, a currently registered DCO that wishes to be subject to alternative compliance would need to submit a request to amend its order of registration pursuant to § 39.3(d). The initial request would need to include only Exhibits A–1 and A–8 as described in proposed § 39.3(a)(3). Recognizing that many of the current non-U.S. DCOs are subject to the European Market Infrastructure Regulation (EMIR), the Commission has undertaken an analysis of EMIR against the DCO Core Principles that a non-U.S. DCO that wishes to apply for alternative compliance may use in preparing Exhibit A–1.[38]

The Commission received some additional comments on proposed § 39.3(a) that do not relate to the request for comment. LCH stated that it supports the alternative compliance application process under proposed § 39.3(a)(3). Citadel and Mr. Kubitz suggested that the Commission provide a public comment period for alternative compliance applications, and Mr. Kubitz specifically suggested a period of 90–120 days. Citadel stated that market participants should be provided with an opportunity to comment on each application because the costs and benefits of alternative compliance, including the impact on U.S. market participants, may vary greatly depending on the specific application and the associated home country regulatory regime. Mr. Kubitz suggested that the MOU between the Commission and the applicant's home country regulator should be made public, and that alternative compliance applications should be provided to relevant Congressional committees, the Federal Reserve, and the Department of Treasury.

The Commission is declining to require a public comment period for alternative compliance applications. There is no Commission regulation requiring a comment period for applications for DCO registration, and the Commission believes that it is well-equipped, with the benefit of the information applicants will need to submit to the Commission pursuant to § 39.3(a)(3), to determine whether an applicant should be registered subject to alternative compliance. However, the Commission notes that, even without a required comment period, DCO applications may be posted for public comment when the Commission believes it is warranted.[39] In response to Mr. Kubitz, the Commission notes that it already publishes MOUs on its website.[40] Finally, the Commission does not believe that it should require that alternative compliance applications be provided to Congressional committees, the Federal Reserve, or the Department of Treasury given that these bodies have no role assigned by statute or regulation in deciding whether to approve or deny an application.

The Commission is adopting § 39.3(a)(3) as proposed, but with one modification. In those cases where an applicant's home country lacks legal requirements that correspond to a particular DCO Core Principle, the applicant would need to explain how it would comply with the DCO Core Principle nevertheless. The Commission is adding a sentence at the end of § 39.3(a)(3) to clarify that point.

[37] 7 U.S.C. 7a–1(c)(2)(A)(i).

[38] The analysis is provided in the appendix to this release.

[39] *See, e.g.,* CFTC Press Release, CFTC Requests Public Comment on Related Applications Submitted by LedgerX, LLC for Registration as a Derivatives Clearing Organization and Swap Execution Facility (Dec. 15, 2014), *https://www.cftc.gov/PressRoom/PressReleases/pr7078-14.*

[40] *See* Memoranda of Understanding, *available at: https://www.cftc.gov/International/MemorandaofUnderstanding/index.htm.*

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

Regulation 39.4(b) requires a DCO to submit proposed new or amended rules to the Commission pursuant to the self-certification procedures of § 40.6,[41] as required by section 5c(c) of the CEA,[42] unless the rules are voluntarily submitted for Commission approval pursuant to § 40.5. Pursuant to the Commission's authority under section 4(c) of the CEA,[43] the Commission proposed to revise § 39.4(c)[44] to exempt DCOs that are subject to alternative compliance from submitting rules pursuant to section 5c(c) of the CEA and § 40.6, unless the rule is related to the DCO's compliance with the requirements of part 45 of the Commission's regulations,[45] or with section 4d(f) of the CEA,[46] parts 1 or 22 of the Commission's regulations,[47] or § 39.15,[48] which set forth the Commission's customer protection requirements, as such DCOs would remain subject to compliance with these requirements. The Commission proposed to adopt this limited exemption from the standard rule submission requirements given that DCOs subject to alternative compliance will be subject to the applicable laws in their home country and oversight by their respective home country regulators.

1. Rule Submission and Review Requirement

The Commission requested comment on whether it should require, as a condition of eligibility for alternative compliance, that an applicant be subject to a home country regulatory regime that has a rule review or approval process.

CCIL stated that it is unnecessary for the Commission to require an applicant's home country regime to have a rule review or approval process given the requirement that the home country regulator represent that an applicant is in good regulatory standing. ICE noted that regulators take different approaches to rule reviews and as such, the Commission should not require that the home country regulator have a process to review every rule, but rather should consider only whether material rule changes are reviewed by the home country regulator. ICE commented that the review process of the Bank of England, the home country regulator for central counterparties (CCPs) within the United Kingdom, only requires CCPs to file major initiatives and does not require a CCP to file each rule amendment for approval. ICE argued that as long as material rule changes are subject to review by the home country regulator, the Commission should neither deny alternative compliance nor impose a review of every rule change by either the home country regulator or the Commission for a non-U.S. DCO to be eligible for alternative compliance. Better Markets argued that permitting alternative compliance for a DCO with a home country regulatory regime that does not have a rule submission and review process commensurate with at least the Commission's part 40 rule certification process would constitute a ''black hole in DCO oversight.''

The Commission agrees with the general premise of CCIL and ICE's comments that the Commission should defer to the home country regulator, which is best situated to determine what rule submissions, if any, are necessary to effectively oversee a non-U.S. DCO's clearing activities given the other regulatory and supervisory elements of the home country regulatory regime. A DCO subject to alternative compliance will still be required to submit to the Commission rules related to critical customer protection safeguards and swap data reporting requirements. In addition, the DCO will be subject to the full extent of its home country regulator's oversight of the DCO's compliance with its home country legal requirements, compliance with which must constitute compliance with the DCO Core Principles. Even if that home country regime does not include a rule review or approval process, the lack of that specific process does not amount to an absence of oversight. The Commission further believes that its MOU with a non-U.S. DCO's home country regulator will provide the Commission with access to any additional information that it might need to evaluate or review the DCO's continued compliance with registration requirements. Therefore, the Commission is not adopting a requirement that the home country regulator of an applicant for alternative compliance have a rule review or approval process that is comparable to the Commission's part 40 rule submission procedures.

The Commission also requested comment on whether it should require a DCO to file other rules pursuant to section 5c(c) of the CEA in addition to rules that relate to the DCO's compliance with the requirements of section 4d(f) of the CEA, parts 1, 22, or 45 of the Commission's regulations, or § 39.15. If so, the Commission further requested comment on whether it should retain discretion in determining which other rules must be filed based on, for example, the particular facts and circumstances, or whether it should enumerate the types of rules that must be filed (*e.g.,* rules related to certain products cleared by the DCO).

Citadel argued that part 40 of the Commission's regulations, which among other things requires that a DCO publicly disclose its rule filings, is critical to providing U.S. market participants with sufficient transparency into a DCO's governance and operations, including with respect to the DCO's risk management and default management frameworks. Citadel argued that the Commission should ensure that market participants continue to have access to this information from DCOs registered under the alternative compliance framework. The Commission believes that the rules of a DCO subject to alternative compliance will remain sufficiently transparent, as the DCO will be subject to requirements that satisfy Core Principle L, which, among other things, requires a DCO to make information concerning the rules and operating and default procedures governing its

[41] 17 CFR 40.6. A ''rule,'' by definition, includes any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted. 17 CFR 40.1(i).

[42] 7 U.S.C. 7a–2(c).

[43] 7 U.S.C. 6(c). Section 4(c) of the CEA provides that, in order to promote responsible economic or financial innovation and fair competition, the Commission, by rule, regulation, or order, may exempt any transaction or class of transactions subject to futures trading restrictions under section 4(a), 7 U.S.C. 6(a), (including any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to, the transaction) from any of the provisions of the CEA other than certain enumerated provisions, if the Commission determines that the exemption would be consistent with the public interest and the purposes of the CEA, that the transactions will be entered into solely between appropriate persons, and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA. Section 2(d) of the CEA, 7 U.S.C. 2(d), extends the Commission's section 4(c) exemptive authority to swaps.

[44] The Commission is also renumbering existing § 39.4(c) through (e) as § 39.4(d) through (f).

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

[46] 7 U.S.C. 6d(f) (relating to segregation of customer funds).

[47] 17 CFR parts 1 and 22 (setting forth general regulations under the CEA, including treatment of customer funds, and requirements for cleared swaps, respectively).

[48] 17 CFR 39.15 (setting forth requirements for the treatment of customer funds).

clearing and settlement systems available to market participants.[49]

Better Markets criticized the scope of the Commission's rule certification exemption in § 39.4(c) as ''fatally and legally flawed'' because the Commission determined that it only needed to receive rule submissions in the customer protection and swap data reporting areas in which it will continue to exercise direct oversight. Better Markets did not, however, identify any specific additional rules that the Commission should require DCOs subject to alternative compliance to submit. Better Markets also suggested that the Commission require a DCO subject to alternative compliance to provide a notice filing for rules subject to the exemption in § 39.4(c) that demonstrates that a rule was filed with the home country regulator, and that discloses the nature and content of such a rule. The Commission is not adopting this suggestion, as a requirement along these lines would be inconsistent with the Commission's approach of deferring to the home country regulator on whether and to what extent the regulator reviews a DCO's rules.

2. CEA Section 4(c) Exemptive Authority

As noted in the proposal, the Commission believes the exemption in § 39.4(c) is consistent with the public interest and the purposes of the CEA, as required by section 4(c),[50] as it will allow the Commission to focus on reviewing those rules that relate to areas where the Commission exercises direct oversight. The exemption reflects the Commission's view that the protection of customers—and safeguarding of money, securities, or other property deposited by customers—is a fundamental component of the Commission's regulatory oversight of the derivatives markets and hence, DCOs subject to alternative compliance should be required to certify rules relating to the Commission's customer protection requirements. These customer protection-related rules will remain transparent to FCMs and their customers, as § 40.6(a)(2) requires a DCO to certify that it has posted on its website a copy of the rule submission.[51] At the same time, the exemption in § 39.4(c) will reduce the time and resources necessary for DCOs to file rules unrelated to the Commission's customer protection or swap data reporting requirements.

The Commission also believes the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA, as the Commission will continue to receive submissions for new rules or rule changes concerning customer protection and swap data reporting, matters for which a DCO subject to alternative compliance will still be subject to compliance with Commission regulation. Further, DCOs subject to alternative compliance satisfy section 4(c)(2)'s ''appropriate person'' element in clearing transactions (a rendered service) for U.S. persons.[52] These DCOs exclusively clear off-DCM swaps, which by virtue of section 2(e) of the CEA, a U.S. person cannot lawfully transact unless they qualify as an eligible contract participant (''ECP'').[53] As the Commission has previously affirmed, ECPs are appropriate persons within the scope of CEA section 4(c)(3)(K).[54]

The Commission requested comment as to whether the proposed exemption in § 39.4(c) from the rule submission requirements of section 5c(c) of the CEA meets the standards for exemptive relief set out in section 4(c) of the CEA.

Better Markets stated that the Commission should have proposed an exemption under section 5b(h) of the CEA (*i.e.,* the provision that permits the Commission to exempt DCOs from registration) instead of section 4(c). It argued that section 4(c)'s exemptive authority cannot be used to exempt non-U.S. DCOs from rule submission requirements, as doing so would impermissibly expand the Commission's general exemptive authority beyond its plain language. Better Markets contended that the plain language of section 4(c) limits the Commission to exempt agreements, contracts, or transactions that are subject to section 4(a), which only applies to futures, and that section 4(c) is best read not to contemplate an exemption with respect to swap activities at all. Therefore, Better Markets indirectly concluded that section 4(c) cannot be relied on to exempt non-U.S. DCOs, which may only list swaps, from rule submission procedures.[55] Further, Better Markets argued that relying on section 4(c) would inappropriately supersede the CEA's more specific exemptive authority within section 5b(h), and without specific, required statutory analyses.

The Commission disagrees with Better Markets' arguments. Section 5b(h) permits the Commission to exempt a DCO from registration if the Commission determines that the DCO is subject to ''comparable, comprehensive supervision and regulation'' by its home country regulator. The exemption at issue, however, is not an exemption from registration, and section 5b(h) does not provide the Commission with the ability to exempt a registered DCO from other requirements of the CEA. In addition, Better Markets' interpretation that the Commission's exemptive authority under section 4(c) is strictly limited to futures agreements, contracts, or transactions subject to section 4(a) of the CEA ignores section 2(d) of the CEA,[56] which extends the Commission's section 4(c) exemptive authority for futures transactions to swaps transactions.[57]

[49] 7 U.S.C. 7a–1(c)(2)(L).

[50] CEA section 4(c)(1) permits the Commission to exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction) from any of the requirements of subsection (a), which pertains to futures trading, or from any other provision of the CEA. 7 U.S.C. 6(c)(1).

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

[52] 7 U.S.C. 6(c)(2). Under section 4(c)(2)(B)(i) of the CEA, in order for DCOs subject to alternative compliance—*i.e.,* a class of persons that render clearing services for swap transactions—to be exempted from CEA provisions, the transactions they clear must ''be entered into solely between appropriate persons.'' 7 U.S.C. 6(c)(2)(B)(i). Section 4(c)(3) specifies categories of persons within the defined term ''appropriate person.'' 7 U.S.C. 6(c)(3). Subparagraph (K) defines ''appropriate person'' to include such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections. 7 U.S.C. 6(c)(3)(K).

[53] Section 2(e) of the CEA makes it unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a DCM. 7 U.S.C. 2(e). ''Eligible contract participant'' is defined in section 1a(18) of the CEA and § 1.3 of the Commission's regulations. 7 U.S.C. 1a(18); 17 CFR 1.3. *See also,* Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, 21754 (Apr. 11, 2013) (noting that the elements of the ECP definition set forth in section 1a(18)(A) and Commission regulation 1.3(m) generally are more restrictive than the comparable elements of the enumerated section 4(c)(3) ''appropriate person'' definition).

[54] *See, e.g.,* Exemption from Derivatives Clearing Organization Registration, 84 FR 35458 (July 23, 2019); Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21754 (April 11, 2013).

[55] *See* Better Markets, Inc. Letter on Exemption for Non-U.S. Derivatives Clearing Organizations, RIN 3038–AE65 (Nov. 22, 2019) at 7–8 (as cross-referenced in Better Markets Inc. Letter on Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations (Nov. 18, 2019) at n. 74).

[56] 7 U.S.C. 2(d).

[57] The Commission also notes that section 4(c) provides that the Commission may use the exemptive authority thereunder ''except'' with respect to certain enumerated swap provisions,

The Commission believes that section 5b(h) reflects Congress's intent that the Commission defer to other regulators that offer ''comparable, comprehensive supervision and regulation'' of DCOs, in appropriate circumstances and to an appropriate extent. With this rulemaking, the Commission has endeavored to defer to a non-U.S. DCO's home country regulator while allowing the DCO to maintain its registration and clear for FCM customers. The Commission believes its use of its section 4(c) exemptive authority in this context is appropriate and fully meets the requisite statutory standards, as outlined in the proposal and explained above.

The Commission is adopting § 39.4(c) as proposed.

D. Regulation 39.9—Scope

The Commission proposed to amend § 39.9 to provide that the provisions of subpart B of Part 39 apply to any DCO, except as otherwise provided by Commission order. In the context of alternative compliance, the Commission's order of registration would provide for the inapplicability of most subpart B provisions and address those that do apply, such as § 39.15 and those requirements corresponding to any DCO Core Principle for which the Commission does not find there to be alternative compliance in the DCO's home country regulatory regime (in those cases in which the Commission determines nevertheless to grant alternative compliance). Amended § 39.9 would also allow the Commission to not apply to a particular DCO any subpart B requirement that the Commission deems irrelevant or otherwise inapplicable due to, for example, certain characteristics of the DCO's business model. The Commission did not receive any comments on this proposal. The Commission is adopting § 39.9 largely as proposed.[58]

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

1. Regulation 39.50—Scope

The Commission proposed new § 39.50 to state that the provisions of subpart D of part 39 apply to any DCO that is registered through the process described in § 39.3(a)(3) (*i.e.,* registration with alternative compliance). The Commission did not receive any comments on this proposal. However, the Commission is modifying § 39.50 by adding language that would allow subpart D to apply to a DCO ''as otherwise provided by order of the Commission.'' This will allow for subpart D to apply to a DCO registered pursuant to § 39.3(a)(2) that subsequently applies to amend its DCO registration order in accordance with § 39.3(d).

2. Regulation 39.51—Alternative Compliance

a. Eligibility for Alternative Compliance

The Commission proposed new § 39.51(a) to permit the Commission to register a non-U.S. clearing organization subject to alternative compliance for the clearing of swaps for U.S. persons if all of the eligibility requirements listed in proposed § 39.51(a)(1) and (a)(2) are met. Proposed § 39.51(a) also provides that the Commission could subject registration to any terms and conditions that the Commission determines to be appropriate.

The Commission proposed § 39.51(a)(1)(i) to require a Commission determination that a clearing organization's compliance with its home country regulatory regime would satisfy the DCO Core Principles; § 39.51(a)(1)(ii) to require that a clearing organization be in good regulatory standing in its home country; and § 39.51(a)(1)(iii) to require a Commission determination that the clearing organization does not pose substantial risk to the U.S. financial system.

The Commission proposed § 39.51(a)(1)(iv) to require that the Commission and the clearing organization's home country regulator[59] have an MOU or similar arrangement satisfactory to the Commission in effect. Among other things, the Commission proposed to require the home country regulator to agree within the MOU to provide the Commission with any information that the Commission deems appropriate to evaluate the clearing organization's initial and continued eligibility for registration and to review compliance with any conditions of registration. The Commission clarified in the proposal that satisfactory MOUs or similar arrangements would include provisions for information sharing and cooperation, as well as for notification upon the occurrence of certain events.[60] Although the Commission would retain the right to conduct site visits, the Commission stated that it did not expect to conduct routine site visits to DCOs subject to alternative compliance.

The Commission proposed § 39.51(a)(2) to provide the Commission with discretion to grant registration with alternative compliance subject to conditions if the clearing organization's home country regulatory regime lacks legal requirements that correspond to certain DCO Core Principles, if the relevant DCO Core Principles are less related to risk.

The Commission specifically requested comment on whether the Commission should take into account regulations in Part 39, in addition to the DCO Core Principles, in determining whether alternative compliance is appropriate for a non-U.S. clearing organization.

Eurex opined that the set of requirements applicable to non-U.S DCOs under the proposed alternative compliance framework was already substantial and therefore should not take into account additional regulations in Part 39.

Citadel argued that while the Commission should not require a foreign regulatory regime to precisely replicate the U.S. framework, the Commission should take into account more than just the ''relatively high-level'' DCO Core Principles when conducting its analysis. Citadel argued that several aspects of the Commission's implementing regulations, such as non-discriminatory access within various subsections of § 39.12, straight-through processing within § 39.12(b)(7), and public rule certifications pursuant to part 40, provide critical protections to U.S. market participants that are not explicit in the DCO Core Principles. Citadel was concerned that not requiring DCOs to provide these

unless there is an expressed authorization within the specific provision. Section 4(c) does not provide that the Commission may only use the 4(c) exemptive authority with respect to the enumerated provisions. Thus, a plain reading of the relevant text, joined with section 2(d), indicates that Congress extended the Commission's general exemptive authority under section 4(c) to swaps transactions with respect to those provisions that are not in the enumerated list. Section 5c(c) of the CEA is not included in the enumerated list. Further, the Commission has previously exercised its 4(c) exemptive authority with respect to swaps. *See, e.g.,* Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 43785 (July 22, 2013).

[58] The Commission had included in the proposal a previously proposed change to § 39.9 that would clarify that the provisions of subpart B do not apply to any exempt DCO. *See* Exemption from Derivatives Clearing Organization Registration, 83 FR 39929 (Aug. 13, 2018) (proposing an addition to § 39.9 providing that the provisions of subpart B do not apply to any exempt DCO, as defined in § 39.2). The Commission will amend § 39.9 as necessary if it finalizes the rulemaking on exempt DCOs.

[59] In jurisdictions where more than one regulator supervises and regulates a clearing organization, the Commission would expect to enter into an MOU or similar arrangement with more than one regulator. *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34824 (July 19, 2019) n.38.

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

''fundamental protections'' to U.S. market participants could negatively impact market transparency, liquidity, and competition, as swaps cleared by such DCOs may be accessible to only certain types of market participants, thereby impairing market access and choice of trading counterparties. Citadel argued that the Commission recognized the importance of these key aspects of its underlying regulations when it assessed the comparability of the EU regulatory framework. Citadel urged the Commission to ''maintain this approach for purposes of other jurisdictions,'' and further recommended that the Commission reserve sufficient flexibility to conduct a case-by-case analysis of each non-U.S. clearing organization's application for alternative compliance.

The Commission agrees with Citadel that it should not require a non-U.S. DCO's home country regulatory regime to precisely replicate the U.S. framework. The Commission, however, disagrees with Citadel's suggestion that it should add other Commission regulations to the list of core customer protection and swap data reporting regulations with which all DCOs subject to alternative compliance will be required to comply. To provide a meaningful framework for deference to home country regulators, the Commission has determined to limit the universe of applicable regulations to those that provide critical protections such as those related to customer protection. In all cases, the non-U.S. DCO must still comply with home country requirements that constitute compliance with the DCO Core Principles, which the Commission's regulations were intended to implement. For example, DCO Core Principle C requires all DCOs to establish appropriate admission and continuing eligibility standards for members and participants of the DCO that are objective, publicly disclosed, and permit fair and open access to the DCO. Beyond that, the Commission may require that a given non-U.S. DCO comply with additional Commission regulations as specified in its registration order based on its particular facts and circumstances, most significantly if the Commission finds the DCO's home country requirements lacking, but the Commission does not believe it is appropriate to require compliance with additional Commission regulations as a matter of course.

While a non-U.S. DCO subject to alternative compliance will only be required to certify new and amended rules related to customer protection and swap data reporting pursuant to § 39.4(c), the DCO will still have to publicly disclose its rules and operating and default procedures governing its clearing and settlement systems pursuant to DCO Core Principle L.[61] This will provide transparency for the DCO's rules even if the DCO does not certify all of its rules pursuant to part 40.

The Commission believes that Citadel's reference to the review that the Commission undertook to determine comparability with the European Union's regulations for dually-registered DCOs and CCPs in 2016 is misplaced.[62] That exercise was by its nature a regulation-by-regulation review to determine comparability with respect to Commission regulatory requirements, and the fact that the Commission examined individual regulations in that context is not determinative of the degree of deference that should be extended to a DCO's home jurisdiction in the context at issue here.

The Commission believes that § 39.51(a) establishes clear eligibility standards by which the Commission can determine whether a non-U.S. DCO's home country regulatory regime is consistent with the DCO Core Principles, and also reserves adequate flexibility for the Commission to grant exceptions, in its discretion, as appropriate. If a non-U.S. clearing organization's home country regulatory regime lacks legal requirements that correspond to the DCO Core Principles less related to risk (*e.g.,* Core Principle N on antitrust considerations), or if the Commission determines that other conditions are appropriate to achieve compliance with a specific DCO Core Principle(s), § 39.51(a)(2) and (b)(7) would allow the Commission to, in its discretion, grant registration with alternative compliance subject to conditions that address the specific facts and circumstances at issue.

Better Markets argued that the Commission must consider Part 39 and other applicable regulations when determining whether alternative compliance is appropriate for a non-U.S. clearing organization, as section 5b(c)(2)(A)(i) of the CEA [63] requires all registered DCOs to comply with both the DCO Core Principles and ''any [DCO] requirement that the Commission may impose by rule or regulation.'' Better Markets argued that the alternative compliance framework should be re-proposed as the Commission failed to properly cite to and rely upon its exemptive authority under section 5b(h) of the CEA,[64] which Better Markets believes provides the appropriate basis for exemptions from the statutory requirements in section 5b(c) of the CEA. Better Markets argued that section 5b(h) requires that the Commission must have a reasonable basis to conclude not only that a non-U.S. DCO has satisfied all statutory elements of section 5b(c) of the CEA, but also that the applicable home country regulatory framework is comparable to, and as comprehensive as, the statutory and regulatory requirements for registered DCOs to be able to grant an exemption pursuant to section 5b(h). Better Markets premised this conclusion on Congress' inclusion of the phrase ''supervision and regulation'' within section 5b(h) of the CEA, which Better Markets opined made no distinction between U.S. statutory and U.S. regulatory requirements with respect to the Commission's exemptive authority for DCOs. Better Markets argued that as a result, non-U.S. DCOs could not receive an exemption unless their home country regulatory regime essentially mirrors the statutory and regulatory regime for U.S. DCOs.

The Commission believes that Better Markets' analysis misunderstands the status of DCOs that would be subject to the alternative compliance framework. A non-U.S. DCO subject to alternative compliance will still be a registered DCO pursuant to section 5b(a) of the CEA. In contrast, section 5b(h) of the CEA relates to exempting DCOs from registration, which is not at issue here.

Better Markets correctly notes that section 5b(c)(2)(A)(i) of the CEA requires DCOs to comply with the DCO Core Principles and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the CEA, which provides the Commission with discretionary rulemaking authority to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.[65] The Commission exercised that authority in adopting Part 39 and initially applying it to all DCOs. Here, the Commission is further exercising that authority to provide in new § 39.51 that DCOs subject to alternative compliance are subject to the DCO Core Principles and other specified requirements, but not to

[61] 7 U.S.C. 7a–1(c)(2)(L).

[62] *See* Comparability Determination for European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016).

[63] 7 U.S.C. 7a–1(c)(2)(A)(i).

[64] 7 U.S.C. 7a–1(h).

[65] 7 U.S.C. 12a(5).

all of the provisions that have until now applied to all DCOs.

Three commenters discussed the potential role of the PFMIs in the Commission's approach to registration with alternative compliance. LCH commented that the use of the DCO Core Principles to determine whether an applicant's home country requirements are comparable to the Commission's requirements is appropriate. LCH opined that the DCO Core Principles are consistent with the PFMIs, which have been agreed by the international regulatory community as essential to strengthening and preserving financial stability.

ICE commented that an outcomes-based approach that assesses an applicant's home country regulatory regime as a whole, instead of with a rule-by-rule comparison, would provide appropriate deference to the foreign jurisdiction. However, ICE questioned how the Commission would make an assessment of the home country regulatory regime. ICE cautioned that the Commission should not determine that a jurisdiction is non-comparable or non-equivalent on the basis of ''discrete'' differences from a Part 39 requirement. ICE further argued that an assessment of comparability or equivalence should accept that there will be differences between the manner in which a clearing organization's home country regulator achieves international standards and the Commission's regulations, and these differences should not be disqualifying. Otherwise, ICE warned that the alternative compliance regime would likely be of little benefit, or result in substantial delays in implementation as equivalence is determined. ICE encouraged the Commission to benchmark its comparability assessment with regard to compliance with international standards such as the PFMIs as an alternative to the DCO Core Principles. CCIL also suggested that the Commission should be satisfied with adherence by a non-U.S. DCO to the PFMIs, as certified by its home country regulator.

The Commission notes that a determination of whether compliance with a home country regulatory regime constitutes compliance with the DCO Core Principles is not a comparability or equivalence determination. The Commission nevertheless agrees with the general premise of LCH and ICE's comments, and the alternative compliance framework reflects an outcomes-based approach rather than a regulation-by-regulation comparison between Commission regulations and a non-U.S. DCO's home country regulatory regime, which is suboptimal in this context in which the Commission is showing appropriate deference to the home country regulator. The Commission must however look to the DCO Core Principles, and not the PFMIs, as the basis for determining compliance. As previously noted, all DCOs, including those DCOs subject to alternative compliance, are required by the CEA to comply with each DCO Core Principle in order to be registered and to maintain registration.

The Commission is adopting § 39.51(a) as proposed.

b. Conditions of Alternative Compliance

The Commission proposed new § 39.51(b) to set forth the conditions that a non-U.S. clearing organization must satisfy for the Commission to grant registration with alternative compliance.[66] Proposed § 39.51(b)(1) provides that a DCO subject to alternative compliance must comply with the DCO Core Principles through compliance with applicable legal requirements in its home country, and any other requirements specified in its registration order including, but not limited to, the customer protection requirements of section 4d(f) of the CEA, parts 1 and 22, and § 39.15 of the Commission's regulations; the part 45 swap data reporting requirements; and subpart A of Part 39.

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

The Commission proposed § 39.51(b)(3) to require that a DCO: Consent to jurisdiction in the United States; designate, authorize, and identify to the Commission an agent in the United States to accept any notice or service of process, pleadings, or other documents issued by or on behalf of the Commission or the U.S. Department of Justice in connection with any actions or proceedings brought against, or any investigations relating to, the DCO or any of its U.S. clearing members; and promptly inform the Commission of any change of agent to accept such notice or service of process.

The Commission proposed § 39.51(b)(4) to require a DCO to comply, and demonstrate compliance as requested by the Commission, with any condition of the DCO's registration order.

The Commission proposed § 39.51(b)(5) to require a DCO to make all documents, books, records, reports, and other information related to its operation as a DCO (hereinafter, ''books and records'') open to inspection and copying by any Commission representative, and to promptly make its books and records available and provide them directly to Commission representatives, upon the request of a Commission representative.

The Commission proposed § 39.51(b)(6) to require that a DCO request and the Commission receive an annual written representation from a home country regulator that the DCO is in good regulatory standing within 60 days following the end of the DCO's fiscal year.

Finally, under proposed § 39.51(b)(7), the Commission may condition alternative compliance on any other facts and circumstances it deems relevant.

As discussed below, the Commission received comments on the applicable requirements proposed in § 39.51(b)(1) including customer protection and swap data reporting requirements; the open access condition proposed in § 39.51(b)(2); the inspection of books and records condition proposed in § 39.51(b)(5); and the Commission's ability to grant registration subject to other conditions as proposed in § 39.51(b)(7).

i. Applicable Requirements of the CEA and Commission Regulations

Proposed § 39.51(b)(1) provided that a DCO subject to alternative compliance must comply with the DCO Core Principles through compliance with

[66] In doing so, the Commission explained that the eligibility requirements listed in proposed § 39.51(a)(1) and (a)(2) and the conditions set forth in proposed § 39.51(b) would be pre-conditions to the Commission's issuance of a registration order in this regard. Additional conditions that are unique to the facts and circumstances specific to a particular clearing organization could be imposed upon that clearing organization in the Commission's registration order. Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34824 (July 19, 2019) n.37.

applicable legal requirements in its home country, and any other requirements specified in its registration order including, but not limited to, the customer protection requirements of section 4d(f) of the CEA, parts 1 and 22, and § 39.15 of the Commission's regulations; the part 45 swap data reporting requirements; and subpart A of Part 39. The Commission received comments on customer segregation and customer portability aspects of the proposed customer protection requirements and comments on the proposed part 45 swap data reporting requirements.

(1) Customer Segregation Requirements

ASX, JSCC, KRX, and OTC Clear, all currently exempt DCOs, opined in a joint letter that requiring DCOs subject to alternative compliance to comply with the Commission's customer segregation requirements, including the treatment of U.S. customer collateral under the U.S. Bankruptcy Code, lacked any deference by the Commission to foreign regulators. They indicated that, as a result, none of them plan to register under the alternative compliance framework.

JSCC separately argued that because the alternative compliance framework is limited to DCOs that do not pose substantial risk to the U.S. financial system, the Commission should not impose its own unique customer protection requirements. JSCC recommended that the Commission defer to a home country's customer protection requirements so long as they are consistent with the PFMIs. JSCC reasoned that the direct application of the U.S. Bankruptcy Code for the protection of customer funds would create little benefit while imposing a significant burden on non-U.S. DCOs whose home country regulators have implemented their own customer protection framework in compliance with the PFMIs. JSCC stated that requiring non-U.S. DCOs to comply with both their home country regime and the U.S. regime in this regard could be impractical when those regimes are incompatible with each other.

JSCC explained that it cannot strictly comply with section 4d(f) of the CEA, which requires that customer funds be segregated at all times, as Japanese law and JSCC's rulebook require JSCC to settle customer collateral for a period of a few hours through an account at the Bank of Japan.[67] JSCC argued that, as a result, it would be unable to register under the alternative compliance regime, despite the fact that swaps customers would be protected under regulations and supervision that fully conforms with the relevant PFMIs and provides sufficient safety for customers in all of the jurisdictions where JSCC operates.

Similarly, ASX opined that its client protection model is consistent with the PFMIs and meets Australian financial stability standards, but that because it is not exactly aligned with U.S. customer protection requirements, ASX would not be able to register under the alternative compliance framework.

The Commission is not persuaded by the comments. While the PFMIs are the international standards for FMIs, they are not designed to address all of the Commission's responsibilities in this area.

The focus of the PFMIs is ''to limit systemic risk and foster transparency and financial stability. . . . Other objectives, which include . . . specific types of investor and consumer protections, can play important roles in the design of [FMIs], but these issues are generally beyond the scope of'' the PFMIs.[68] By contrast, the purposes of the CEA and thus the responsibilities of the Commission notably include ''avoidance of systemic risk'' and ''ensur[ing] the financial integrity of all transactions subject to [the CEA],'' but also include ''protect[ing] all market participants from . . . misuses of customer assets.'' [69]

While no FCM customer should suffer a loss of access to their assets for any period of time, customers of clearing members registered as FCMs have fared uniquely well in cases of FCM bankruptcy, both in protecting against loss of customer assets, and particularly in transferring all, or at least most, customer assets to a solvent FCM in the days (rather than months or years) following a bankruptcy. These very positive outcomes are a result of the combination of the customer collateral segregation requirements of section 4d of the CEA and the regulations thereunder, operating in an interlinked and mutually supporting manner with the relevant provisions of the Bankruptcy Code, Subchapter IV of Chapter 7,[70] the Commission's authorities under section 20 of the CEA,[71] and the Commission's bankruptcy regulations under part 190.

The Commission is adopting § 39.51(b)(1) as proposed, including the requirement that the DCO comply with section 4(d)(f) of the CEA, parts 1 and 22 of the Commission's regulations, and § 39.15.

(2) Customer Portability in the Event of a Default

ASX and JSCC both commented that they would not be able to register pursuant to the alternative compliance framework as they could not feasibly maintain a sufficient number of FCM clearing members to support U.S. customer clearing. ASX believes that it would be difficult to add multiple FCMs as clearing members of ASX as an FCM may already have a non-U.S. affiliate clearing member of ASX that provides access to exchange-traded futures and options products under the foreign board of trade model. Similarly, JSCC noted that entities active in swaps customer clearing are global banking groups, many of which serve customers for swaps clearing through subsidiaries in the non-U.S. markets, including Japan. JSCC noted that very few non-U.S. entities are registered as FCMs, and the overall number of FCMs has been decreasing. ASX and JSCC commented that the cost of onboarding an FCM, such as an additional foreign affiliate, solely to provide over-the-counter swaps clearing services to U.S. customers would be prohibitively expensive. As a result, ASX and JSCC concluded that non-U.S. DCOs would be unlikely to find enough FCM clearing members, particularly to achieve portability of customer positions in the event of an FCM default, as required by Commission regulations and the PFMIs. JSCC believes the requirement to have swaps customers clear through an FCM at a non-U.S. DCO likely would continue to concentrate U.S. customers at a limited number of DCOs.

The Commission is not persuaded by the commenters' suggestion that a dearth of FCMs clearing at non-U.S. DCOs should negate the requirement that a U.S. swaps customer clear through an FCM at a DCO, including a DCO subject to alternative compliance. There are multiple non-U.S. DCOs that have successfully implemented an FCM customer clearing model. The Commission believes the alternative compliance option will make registration less burdensome for non-

[67] JSCC attempted to register with the Commission as a DCO but, due to the issues JSCC discussed in its comment letter, JSCC ultimately sought and received an exemption from DCO registration. *See* JSCC Order of Exemption from Registration (Oct. 26, 2015), available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/jsccdcoexemptorder10-26-15.pdf.* Exempt DCOs are not currently permitted to clear for U.S. customers. *See* Exemption from Derivatives Clearing Organization Registration, 83 FR 39923, 39926 (Aug. 13, 2018).

[68] CPMI–IOSCO, PFMIs, ¶ 1.15 and n. 16.

[69] 7 U.S.C. 5(b).

[70] *See* 11 U.S.C. 761–767.

[71] *See* 7 U.S.C. 24.

U.S. clearing organizations, which may incentivize additional ones to register. As a result, U.S. customers could have more clearing options without sacrificing any of the protections they have come to expect and rely upon.[72] As stated above, the Commission is adopting § 39.51(b)(1) as proposed.

(3) Swap Data Reporting

ICE commented that, if an applicant's home country reporting rules correspond with the Commission's swap data reporting regulations in part 45, the Commission should consider obtaining swap data from the applicant's home country regulator through an MOU. ICE noted that compliance with the Commission's rules in addition to home jurisdiction swap reporting rules could be very costly for DCOs, and provide little additional benefit. The Commission intends for this rule to provide deference to foreign regulators on non-U.S. DCO supervision, depending on the risk the DCO poses to the U.S. financial system, and notes that the part 45 swap data reporting regulations, to which DCOs are already subject, are unrelated to DCO supervision and outside the intended scope of this rule. The Commission believes that issues relating to deference on swaps data reporting by DCOs have broad real and potential cross-border implications and should instead be addressed in a larger, comprehensive review of swaps data reporting by non-U.S. entities that the Commission may undertake through future Commission action. Therefore, the Commission is adopting the requirement that DCOs subject to alternative compliance comply with part 45 as proposed.

ii. Open Access

With respect to proposed § 39.51(b)(2) which the Commission proposed to require a DCO to treat swaps with the same terms and conditions as economically equivalent, allow offset to the extent permitted by the DCO, and provide non-discriminatory clearing for swaps executed bilaterally or on unaffiliated trading platforms, ICE stated that it is not clear why this requirement is necessary if a DCO's home jurisdiction has a comparable requirement. Regulation 39.51(b)(2) would codify for DCOs subject to alternative compliance the requirements of section 2(h)(1)(B) of the CEA, with respect to swaps cleared by a DCO to which one or more of the counterparties is a U.S. person. Even if the Commission did not adopt § 39.51(b)(2), the statutory requirements would still apply. The Commission is codifying these requirements and adopting § 39.51(b)(2) as proposed.

iii. Consent to Jurisdiction; Designation of Agent for Service of Process

The Commission proposed § 39.51(b)(3) to require that a DCO: Consent to U.S. jurisdiction; designate, authorize, and identify an agent in the United States; and promptly inform the Commission of any change of its U.S. agent. The Commission did not receive any comments on this aspect of the proposal. The Commission is adopting § 39.51(b)(3) as proposed.

iv. Compliance

The Commission proposed § 39.51(b)(4) to require a DCO to comply, and demonstrate compliance as requested by the Commission, with any condition of the DCO's registration order. The Commission did not receive any comments on this aspect of the proposal. The Commission is adopting § 39.51(b)(4) as proposed.

v. Inspection of Books and Records

The Commission proposed § 39.51(b)(5) to require a DCO to make all books and records open to inspection and copying by any Commission representative, and to promptly make its books and records available and provide them directly to Commission representatives, upon the request of a Commission representative.

CCIL stated that the proposed approach may create a ''parallel structure of regulatory bodies.'' CCIL also argued that it may undermine and conflict with principles of international comity and the home country laws and regulations of the DCO.

ICE stated that the Commission should state explicitly that it would defer to the home country regulator's examination of the DCO's books and records provided that the home country regulator shares the results of the examination with the Commission. As explained in the proposal, the Commission does not anticipate conducting routine site visits to DCOs subject to alternative compliance. However, the Commission may request a DCO to provide access to its books and records in order for the Commission to ensure that, among other things, the DCO continues to meet the eligibility requirements for alternative compliance as well as the conditions of its registration. The Commission is adopting § 39.51(b)(5) as proposed.

vi. Representation of Good Regulatory Standing

The Commission proposed § 39.51(b)(6) to require that a DCO request and the Commission receive an annual written representation from a home country regulator that the DCO is in good regulatory standing within 60 days following the end of the DCO's fiscal year. The Commission received comments on the definition of ''good regulatory standing'' as discussed above, but did not receive comments on the existence of the condition. The Commission is adopting § 39.51(b)(6) as proposed.

vii. Other Conditions

The Commission proposed § 39.51(b)(7) to provide that the Commission may condition alternative compliance on any other facts and circumstances it deems relevant. ICE supported the Commission's ability to, in its discretion, grant registration subject to conditions, provided that this flexibility is applied consistently for similarly situated DCOs from the same jurisdiction and that sufficient deference is granted to the overall home country regulatory regime. ICE agreed that the Commission should be mindful of the principles of international comity, noting that the proposal stated that the Commission may take into account, in placing conditions on alternative compliance, the extent to which the home country regulator defers to the Commission with respect to the oversight of U.S. DCOs.[73] ICE cautioned that any such approach should not be applied to create uncertainty for a DCO relying on the relief, and that such an approach might result in other regulators taking similar positions, which could have the effect of lessening cross-border cooperation. The Commission appreciates ICE's comments. As noted in the proposal, the Commission intends to use its discretion to ''advance the goal of regulatory harmonization, consistent with the express directive of Congress that the Commission coordinate and cooperate with foreign regulatory authorities on matters related to the regulation of swaps.'' [74] The recognition

[72] Moreover, while both Commission regulations and the PFMIs call for a DCO to have rules (arrangements) that foster portability (*see* 17 CFR 190.06(a); CPMI–IOSCO, PFMIs, Principle 14, Key Consideration 3), neither Commission regulations nor the PFMIs require DCOs to ensure that there are clearing members that are willing and able transferees.

[73] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34825 (July 19, 2019).

[74] In order to promote effective and consistent global regulation of swaps, section 752 of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international

Continued

that market participants and market facilities in a global swap market are subject to multiple regulators and potentially duplicative regulations, and can therefore benefit from regulatory harmonization and mutual deference among regulators, underpins the alternative compliance framework. The framework is intended to encourage collaboration and coordination among U.S. and foreign regulators in establishing comprehensive regulatory standards for swaps clearing. In addition, the framework seeks to promote fair competition and a level playing field for all DCOs. As a result, the Commission will consider the degree of deference that a home country regulator extends to the Commission's oversight of U.S. DCOs in determining whether to extend the benefits of alternative compliance to DCOs in that jurisdiction, both at the point of initially registering a non-U.S. DCO subject to alternative compliance, and in determining whether compliance under that framework should continue. The Commission is adopting § 39.51(b)(7) as proposed.

c. General Reporting Requirement

Proposed § 39.51(c) sets forth general reporting requirements pursuant to which a DCO subject to alternative compliance must provide certain information directly to the Commission (1) on a periodic basis (daily or quarterly); and (2) after the occurrence of a specified event, each in accordance with the submission requirements of § 39.19(b).

Proposed § 39.51(c)(1) requires a DCO to provide to the Commission the information specified in § 39.51(c) (and described below), as well as any other information that the Commission deems necessary, including, but not limited to, information for use in evaluating the continued eligibility of the DCO for alternative compliance, reviewing the DCO's compliance with any conditions of its registration, and conducting oversight of U.S. clearing activity.

Proposed § 39.51(c)(2)(i) requires a DCO to compile a report as of the end of each trading day, and submit the report to the Commission by 10 a.m. U.S. central time on the following business day, containing the following information with respect to swaps: (A) Total initial margin requirements for all clearing members; (B) initial margin requirements and initial margin on deposit for each U.S. clearing member, by house origin and by each customer origin, and by each individual customer account; and (C) daily variation margin, separately listing the mark-to-market amount collected from or paid to each clearing member, by house origin and by each customer origin, and by each individual customer account.

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

Proposed § 39.51(c)(2)(iii) through (vii) requires a DCO to provide information to the Commission upon the occurrence of certain specified events. Proposed § 39.51(c)(2)(iii) requires a DCO to provide prompt notice to the Commission regarding any change in its home country regulatory regime. Proposed § 39.51(c)(2)(iv) requires a DCO to provide to the Commission, to the extent that it is available to the DCO, any examination report or examination findings by a home country regulator, and notify the Commission within five business days after it becomes aware of the commencement of any enforcement or disciplinary action or investigation by a home country regulator. Proposed § 39.51(c)(2)(v) requires a DCO to provide immediate notice to the Commission of any change with respect to its licensure, registration, or other authorization to act as a clearing organization in its home country. Proposed § 39.51(c)(2)(vi) requires a DCO to provide immediate notice to the Commission in the event of a default (as defined by the DCO in its rules) by any clearing member, including the amount of the clearing member's financial obligation. If the defaulting clearing member is a U.S. clearing member, the notice must also include the name of the U.S. clearing member and a list of the positions it held. Proposed § 39.51(c)(2)(vii) requires a DCO to provide notice of any action that it has taken against a U.S. clearing member, no later than two business days after the DCO takes such action.

The Commission requested comment on whether DCOs subject to alternative compliance should be excused from reporting any particular data streams in order to limit duplicative reporting obligations in the cross-border context without jeopardizing U.S. customer protections, particularly given the existence of an MOU between the Commission and the DCO's home country regulator as a requirement for eligibility for alternative compliance.[75]

In response to the Commission's request for comment, CCP12 and Eurex stated that a global harmonization of reporting requirements would eliminate duplicative requirements and enable regulators to share data on the basis of MOUs. Eurex stated that the Commission should eliminate proposed § 39.51(c)(2)(i) and (ii) in order to enhance the benefits of alternative compliance as compared to traditional registration. CCP12 suggested that the Commission limit the daily reporting requirements of proposed § 39.51(c)(2)(i) to information related to FCM clearing members. Without specifying particular provisions, CCP12 also argued that in some cases the proposed reporting requirements would be costly and would overlap with requirements imposed by home country regulators. CCIL generally supported avoiding duplicative reporting through the use of MOUs.

Because none of the commenters identified specific proposed reporting requirements as duplicative of existing obligations, the Commission is declining to modify proposed § 39.51(c). In this rulemaking, the Commission has attempted to limit required reporting to that information it will need to perform its supervisory function. The Commission believes that the reporting requirements in § 39.51(c) are appropriately tailored to accomplish that goal with respect to DCOs subject to alternative compliance. For this reason, the Commission disagrees with Eurex that § 39.51(c)(2)(i) and (ii) should be eliminated, and notes that Eurex did not identify any particular faults with these provisions. The Commission also disagrees that the daily reports required by § 39.51(c)(2)(i) should be limited to information related to FCM clearing members. Limiting daily reports in this way would provide the Commission with incomplete data and would thus frustrate its ability to assess the risk exposure of U.S. persons and the extent of a non-U.S. DCO's U.S. clearing activity.[76]

The Commission also requested comment on the proposed requirement

standards with respect to the regulation of swaps, among other things. Section 752 of the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010), codified at 15 U.S.C. 8325.

[75] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34826 (July 19, 2019).

[76] The Commission noted in the proposal that the goal of § 39.51(c)(2)(i) is to provide the Commission with information regarding the cash flows associated with U.S. persons clearing swaps through DCOs subject to alternative compliance in order for the Commission to assess the risk exposure of U.S. persons and the extent of the DCO's U.S. clearing activity. *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34825 (July 19, 2019).

in § 39.51(c)(2)(iii) that a DCO provide prompt notice to the Commission regarding any change in its home country regulatory regime. Specifically, the Commission asked whether it should instead require a DCO subject to alternative compliance to provide prompt notice of any *material* change in its home country regulatory regime. The Commission did not receive any comments directly responsive to this question.

The Commission did receive several comments on proposed § 39.51(c)(1) that do not relate to the specific requests for comment. Mr. Kubitz stated that the reporting requirements for DCOs subject to alternative compliance should be at least as comprehensive as the requirements for other DCOs. The Commission believes that the reporting requirements in § 39.51(c) are appropriately tailored to protect its regulatory interests without requiring information on topics on which it intends to defer to the home country regulator, and notes that Mr. Kubitz did not identify why he believes the reporting requirements in § 39.51(c) are insufficient. If the Commission subsequently determines that it needs additional information, § 39.51(c)(1) requires a DCO subject to alternative compliance to provide the Commission with any information that it deems necessary.

In regards to proposed § 39.51(c)(2)(iii), CCIL stated that a DCO subject to alternative compliance should not have to notify the Commission regarding a change in its home country regulatory regime because notification could be addressed through an MOU between the Commission and the home country regulator. The Commission notes than an MOU would not obligate the home country regulator to notify the Commission and believes that it is therefore appropriate to require the DCO, as the Commission's registrant, to be responsible for reporting this information.

With regard to the event-specific reporting requirements of § 39.51(c)(2)(vi) and (vii), ICE noted that events involving U.S. clearing members would be subject to greater reporting requirements than those related to non-U.S. clearing members, and argued that requirements related to U.S. clearing members should be no greater than those related to other clearing members. The Commission has a greater supervisory interest in U.S clearing members and believes that this incremental difference in reporting obligations is justified as a result.

In light of the foregoing, the Commission is adopting § 39.51(c) as proposed.

d. Modification of Registration Upon Commission Initiative

Proposed § 39.51(d) permits the Commission to modify the terms and conditions of a DCO's order of registration, in its discretion and upon its own initiative, based on changes to or omissions in facts or circumstances pursuant to which the order was issued, or if any of the terms and conditions of the order have not been met. For example, the Commission could modify the terms of a registration order upon a determination that compliance with the DCO's home country regulatory regime does not satisfy the DCO Core Principles, the DCO is not in good regulatory standing in its home country, or the DCO poses substantial risk to the U.S. financial system.

Proposed § 39.51(d)(2) through (4) set forth the process for modification of registration upon the Commission's initiative. Proposed § 39.51(d)(2) requires the Commission to first provide written notification to a DCO that the Commission is considering modifying the DCO's order of registration and the basis for that consideration. Proposed § 39.51(d)(3) provides up to 30 days for a DCO to respond to the Commission's notification in writing following receipt of the notification, or at such later time as the Commission may permit in writing. Proposed § 39.51(d)(4) provides that, following receipt of a response from the DCO, or after expiration of the time permitted for a response, the Commission may: (i) Issue an order requiring the DCO to comply with all requirements applicable to DCOs registered pursuant to § 39.3(a)(2), effective as of a date to be specified in the order, which is intended to provide the DCO with a reasonable amount of time to come into compliance with the CEA and Commission regulations or request a vacation of registration in accordance with § 39.3(f); (ii) issue an amended order of registration that modifies the terms and conditions of the order; or (iii) provide written notification to the DCO that its order of registration will remain in effect without modification to its terms and conditions.

The Commission received four comments on proposed § 39.51(d). ICE stated that modification should be limited to instances covered by proposed § 39.51(d)(1)(i), where there has been a change in the home country regulatory regime such that it no longer satisfies the DCO Core Principles. ICE argued that the Commission should identify the process by which the Commission will notify the DCO subject to alternative compliance of the basis for a modification and provide the DCO with an opportunity to respond. LCH recommended that, if after registering a DCO subject to alternative compliance the Commission determines that the DCO poses substantial risk to the U.S. financial system, the Commission should clearly indicate the timeframe by which the DCO needs to become fully compliant with Commission regulations. CCP12 and Eurex stated that the Commission should establish a streamlined ''re-application'' process for any DCO registered under the existing framework which later applies for alternative compliance but then is subsequently deemed to pose substantial risk to the U.S. financial system and thus must again become DCOs, including all of subpart B of Part 39.

The Commission disagrees that it should only modify an order of registration granted to a DCO subject to alternative compliance when there has been a change in the DCO's home country regulatory regime such that it no longer satisfies the DCO Core Principles. The Commission must be able to modify an order if there are changes to the facts and circumstances pursuant to which the order was issued, or if any of the terms and conditions of the order have not been met.[77]

In response to ICE's suggestion that the Commission identify the process by which the Commission will notify a DCO subject to alternative compliance of the basis for a modification of its order and provide the DCO with an opportunity to respond, the Commission notes that this process is provided in § 39.51(d)(2) and (3). In response to LCH's comment that the Commission should clearly indicate the timeframe within which a DCO determined to pose substantial risk to the U.S. financial system would need to become fully compliant with Commission regulations, the Commission notes that § 39.51(d)(4)(i) requires the Commission to provide the DCO ''with a reasonable amount of time to come into compliance.'' The Commission believes it is inappropriate to set a specific timeframe in the regulation because how much time a DCO would need will depend on how far removed its current practices are from what is required by Commission regulations. In response to

[77] The Commission also notes that it has the authority to suspend or revoke a DCO's registration for the failure to comply with any provision of the CEA, regulations promulgated thereunder, or any order of the Commission, pursuant to section 5e of the CEA. 7 U.S.C. 7b.

CCP12 and Eurex, the Commission notes that a DCO that is no longer eligible for alternative compliance would not have to re-apply for registration because it would already be registered. The DCO would only have to be able to demonstrate that it has come into compliance with the applicable requirements of the CEA and Commission regulations by the date specified by the Commission pursuant to § 39.51(d)(4)(i), which it could do through the annual compliance report required by § 39.10(c)(3) (a requirement which would now apply to the DCO).

For the above stated reasons, the Commission is adopting § 39.51(d) as proposed.

F. Part 140—Organization, Functions, and Procedures of the Commission

The Commission proposed amendments to § 140.94(c) to delegate authority to the Director of the Division of Clearing and Risk for all functions reserved to the Commission in proposed § 39.51, except for the authority to grant registration to a DCO, prescribe conditions to alternative compliance of a DCO, and modify a DCO's registration order. The Commission did not receive any comments on the proposed changes to § 140.94(c) and is adopting them as proposed.

G. Responses to Additional Requests for Comment

In section IV of the proposal, the Commission requested comment on eight specific issues. In the six instances in which these requests related to particular aspects of the proposal, the responses were included in the discussion above. This section addresses the other two requests.

1. Request for Comment No. 1

In the proposal, the Commission asked whether the proposed alternative compliance regime, including both the application process and the ongoing requirements, strikes the right balance between the Commission's regulatory interests and the regulatory interests of non-U.S. DCOs' home country regulators.

Several commenters expressed support for the proposed alternative compliance regime. SIFMA stated that it supports the steps taken by the proposal to provide greater deference to home country regulation of non-U.S. DCOs. SIFMA also supported the proposal's risk-based measures to calibrate the extent of extraterritorial U.S. regulations. LCH stated that the proposal adequately balances the Commission's regulatory interests with the regulatory interests of home country regulators, and noted that the proposal appropriately accounts for both the Commission's risk-related concerns and international comity. CCIL stated that the proposed alternative compliance framework provides a better alternative to the existing structure. Specifically, CCIL supported the definitions of ''good regulatory standing'' and ''substantial risk'' in proposed § 39.2, stating that these definitions and the alternative compliance framework as a whole rightly endorse the primacy of the home country regulator and compliance under home country requirements. CCP12 stated that it welcomes the Commission's alternative compliance approach because it recognizes the importance of regulatory deference and increased cross-border cooperation. Eurex stated that the proposed framework brings welcome relief from the Part 39 rules for non-U.S. DCOs that do not pose systemic risk to the U.S. financial system. WFE advocated for an approach of regulatory deference and international comity, without taking a position on whether the proposed alternative compliance regime is such an approach. WFE added that departing from the international principle of regulatory deference should only be required if there is a clear and truly substantial risk to the financial stability of the host-authority jurisdiction.

Many of the commenters that expressed support for the proposed alternative compliance regime also recommended improvements. CCP12 recommended alleviating some of the requirements of alternative compliance, but it did not identify the requirements to which it objected. Eurex argued that the Commission should reduce the number of reporting requirements applicable to DCOs subject to alternative compliance. CCIL stated that a DCO subject to alternative compliance should not have to comply with the DCO Core Principles because its home country regulator will alternatively assess its compliance with the PFMIs. Furthermore, CCIL argued that if each country requires compliance with its own regulations, it could create a complex web of requirements that could result in a huge compliance burden on clearing organizations and confusion as to how to comply with conflicting regulations.

After reviewing these comments, the Commission continues to believe that the alternative compliance regime strikes the right balance between the Commission's regulatory interests and the regulatory interests of home country regulators. As previously discussed, the Commission does not agree that the level of reporting required of DCOs subject to alternative compliance should be further reduced. In response to CCIL, the Commission notes that the CEA requires a DCO to meet the DCO Core Principles in order to be registered and to maintain its registration, and therefore the Commission must ensure that DCOs, including DCOs subject to alternative compliance, meet the DCO Core Principles, not simply the PFMIs as implemented by each home country regulator. The Commission further notes that a non-U.S. clearing organization that wishes to meet only the PFMIs can apply for an exemption from DCO registration.

2. Request for Comment No. 2

In the proposal, the Commission asked whether there are additional regulatory requirements under the CEA or Commission regulations that should not apply to DCOs subject to alternative compliance in the interest of deference and allowing such DCOs to satisfy the DCO Core Principles through compliance with their home country regulatory regimes while still protecting the Commission's regulatory interests.

CCIL argued that the Commission should be satisfied with a certification by a home country regulator that a DCO subject to alternative compliance complies with the PFMIs. As previously noted, the CEA requires DCOs to comply with the DCO Core Principles. The Commission could not permit a DCO to be registered solely on the basis of a home country regulator's certification that the DCO complies with the PFMIs.

CCP12 stated that DCOs subject to alternative compliance could face a significant challenge complying with section 4d(f) of the CEA and the Commission's customer protection requirements, mainly because these requirements apply customer protections consistent with the U.S. Bankruptcy Code and part 190 of the Commission's regulations irrespective of the home country laws applicable to a non-U.S. DCO and its FCM clearing members. The Commission notes that all DCOs, including non-U.S. DCOs, are currently subject to these customer protection requirements. The proposal would simply leave the requirements in place. Given that CCP12 did not identify how the customer protection requirements would present new challenges for DCOs subject to alternative compliance, the Commission continues to believe that the protections afforded to customers by the requirements outweigh the burdens of compliance for these DCOs, for the reasons previously discussed.

Eurex and CCP12 each identified reporting requirements that they argued should not apply to DCOs subject to alternative compliance. In regards to the reporting requirements of § 39.51(c), CCP12 stated that oversight of U.S. customers' swaps clearing activity could be fulfilled with ''less regular and more relevant data information,'' and suggested that the daily reports required by § 39.51(c)(2)(i) be limited to FCMs. Eurex stated that the reporting requirements of proposed § 39.51(c)(2)(i) and (ii) and the part 45 reporting requirements should not apply to non-U.S. DCOs because these requirements are costly and overlap to a large degree with existing requirements imposed by home country regulators. Eurex recognized that the Commission needs data to evaluate eligibility for and compliance with the alternative compliance framework; however, Eurex would instead prefer a global standardization of reporting and cooperation among data repositories. CCP12 also encouraged international standard-setting bodies to standardize data fields and promote cooperation among repositories to avoid duplicative reporting.

As previously discussed, the Commission disagrees that the reporting required under § 39.51(c) should not apply to DCOs subject to alternative compliance, and that the daily reports required by § 39.51(c)(2)(i) should be limited to FCMs. With respect to the part 45 requirements, the Commission believes that the transparency into the swaps market provided by the swap data recordkeeping and reporting requirements—requirements applicable to all currently registered DCOs, including non-U.S., and exempt DCOs—strongly warrants the burden of requiring non-U.S. DCOs subject to alternative compliance to report such information. In response to Eurex and CCP12's comments about international reporting standards, the Commission agrees that global harmonization of reporting standards and cooperation between international regulators could reduce duplicative reporting. However, such an arrangement is beyond the scope of this rulemaking, and in the absence of such a regime, the Commission must require reporting at a level that will allow it to protect its regulatory interests. The Commission believes that the reporting requirements in proposed § 39.51(c) are appropriately tailored to accomplish that goal with respect to DCOs subject to alternative compliance.

H. Additional Comments

In addition to the comments discussed above, the Commission received several comments that did not directly relate to a specific part of the proposal or respond to a specific request for comment. The Commission appreciates the additional feedback. In the instances where these comments do not address proposed changes and are therefore outside the scope of this rulemaking, the Commission may take the comments under advisement for future rulemakings.

Citadel argued that the proposed alternative compliance framework did not appear to be specifically contemplated in the CEA. Citadel suggested that the Commission should proceed cautiously based on the lack of clear statutory guidance.

As discussed in the proposal, the Commission believes the CEA provides the Commission with the authority to adopt the regulations implementing the alternative compliance framework. The Commission has broad authority under section 8a(5) of the CEA to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.[78] Section 5b(c)(2)(A)(i) of the CEA provides that, to be registered and to maintain registration as a DCO, a DCO must comply with each DCO Core Principle and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5). Section 5b(c)(2)(A)(ii) of the CEA further provides that, subject to any rule or regulation prescribed by the Commission, a DCO has reasonable discretion in establishing the manner by which it complies with each DCO Core Principle. The Commission first adopted regulations to implement the DCO Core Principles in subpart B of Part 39, which, until now, have applied to all DCOs. With the adoption of the regulations implementing the alternative compliance framework, the Commission is using its authority under section 8a(5) of the CEA to establish a second, separate path to compliance with the DCO Core Principles for non-U.S. DCOs that do not pose substantial risk to the U.S. financial system.

ICE noted that the proposal does not address the requirement under § 39.5 for DCOs to make certain filings before clearing new swaps or categories of swaps, and asked that the Commission clarify that § 39.5 filings would not be required of DCOs subject to alternative compliance. The Commission notes that because DCOs subject to alternative compliance would still be registered, they, in fact, would be required to comply with subpart A of Part 39, which includes § 39.5.

ICE noted that there are non-U.S. clearing organizations that clear both swaps and futures, and believes that to the extent possible, any relief for swaps clearing (including under the alternative compliance framework) should also apply to swaps cleared at a DCO that clears both futures and swaps, and suggests that the final rules be clarified to make this explicit. As explained in the proposal, the Commission's regulatory framework already distinguishes between clearing of futures executed on a DCM, for which DCO registration is required, and clearing of foreign futures, for which it is not. The Commission had not contemplated permitting a non-U.S. DCO that clears futures listed for trading on a DCM to be eligible for alternative compliance as most non-U.S. DCOs are registered to clear swaps only. The Commission would have to amend the rules being adopted herein to allow non-U.S. DCOs that clear DCM futures to be eligible; for example, the Commission would have to adjust the substantial risk test to account for futures. The Commission will give this idea further consideration.

FIA requested that the Commission confirm that its 2016 EU comparability determination[79] remains in place and is not replaced or amended in any way by this rulemaking such that market participants may continue to rely on it. The EU comparability determination compared Part 39 with EU regulations and identified those instances where the requirements are so similar that compliance with the Part 39 regulation(s) would constitute compliance with the EU regulation(s) as well. Unless any of the regulations included in the determination have been amended or repealed, the Commission's determination stands.

Better Markets argued that providing DCOs with the options of traditional registration, exemption from registration, and registration subject to alternative compliance is unnecessarily complex and over time would create competitive disparities and differences in DCO risk management and other practices. Better Markets further argued that the proposed framework would facilitate forum shopping and regulatory

[78] 7 U.S.C. 12a(5).

[79] *See* Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016).

arbitrage, deferring to non-U.S. DCOs to determine for themselves how they comply with U.S. requirements.

The Commission does not believe that presenting clearing organizations with the additional option of registration with alternative compliance will result in material disparities in DCO risk management practices because all registered DCOs will still be required to satisfy the DCO Core Principles. Moreover, the Commission does not believe that the alternative compliance framework will result in regulatory arbitrage because it will only be available to an applicant that can demonstrate, among other things, that compliance with its home country requirements would satisfy the DCO Core Principles.

Citadel suggested that the primary beneficiaries of the alternative compliance framework will be non-U.S. DCOs which are already registered with the Commission (and not exempt DCOs or clearing organizations that currently have no status with the Commission). Citadel stated that permitting certain non-U.S. DCOs to use an alternative compliance framework means that these DCOs will be able to provide clearing services to U.S. market participants without complying with as many U.S. regulatory requirements as U.S. DCOs, potentially creating an un-level competitive playing field where lower operational and regulatory costs allow non-U.S. DCOs to increase market share at the expense of U.S. DCOs. Such a concern may be particularly relevant where the home jurisdiction of the non-U.S. DCO has failed to grant similar deference to U.S. DCOs. As a result, Citadel recommends that the Commission assess the foreign jurisdiction's treatment of U.S. DCOs prior to granting a non-U.S. DCO's application for alternative compliance.

The Commission believes that non-U.S. DCOs, exempt DCOs, and non-U.S. clearing organizations that are neither registered nor exempt may benefit from the alternative compliance framework, but notes that each current non-U.S. DCO had to demonstrate compliance with each of the requirements of subpart B of Part 39 during its application process, which will not be required of new applicants for registration subject to alternative compliance. The Commission noted in the proposal that one of the goals of the alternative compliance framework is to ease the regulatory burden on non-U.S. DCOs that do not pose substantial risk to the U.S. financial system, including some current DCOs. The Commission believes that doing so is appropriate because these DCOs are subject to multiple regulators and regulatory regimes, and face duplicative regulations. However, as previously noted here and in the proposal, the Commission may condition alternative compliance on any other facts and circumstances it deems relevant. In doing so, the Commission would be mindful of principles of international comity. The Commission could take into account the extent to which the relevant foreign regulatory authorities defer to the Commission with respect to oversight of U.S. DCOs, in light of international comity.

SIFMA argued that the Commission should use this opportunity to promote the competitiveness of U.S. FCMs and swap dealers by expanding their ability to access non-U.S. clearing organizations. Specifically, SIFMA believes the Commission should (1) permit U.S. FCMs to use an omnibus clearing structure for foreign cleared swaps like they currently use for foreign futures and (2) allow a non-U.S. clearing organization to accept foreign branches of U.S. bank swap dealers as members without requiring the non-U.S. clearing organization to register with the Commission as a DCO or obtain an exemption from DCO registration. SIFMA argues that these changes would also promote customer choice and reduce market concentration. The Commission appreciates this additional feedback and will give it further consideration.

ASX, JSCC, KRX, and OTC Clear argued that the Commission should finalize the exempt DCO rulemaking notwithstanding the outcome of this rulemaking.

ASX, JSCC, KRX, and OTC Clear stated that a clearing member of a non-U.S. DCO should be able to clear swaps for U.S. customers without registering as an FCM. ASX, JSCC, KRX, OTC Clear, and ICE specifically suggested that the Commission adopt an exemption similar to the § 30.10 exemption for foreign futures and foreign options. ASX believes that adopting a part 30-type regime for swaps could achieve cost savings and improved customer experience for some U.S. customers of non-FCM clearing members by allowing them to access both foreign futures markets and exempt DCOs for swaps under an aligned framework. In addition, ASX, JSCC, KRX, and OTC Clear suggested that an exemption could help address their concern that U.S. customers are being forced to concentrate their clearing in a limited number of DCOs and FCM clearing members. They argued that the situation is further exacerbated for those U.S. customers who must clear swaps denominated in foreign currencies subject to the Commission's clearing requirement, as they cannot always access swaps markets in the home country of the relevant currency where, as JSCC observed, the highest liquidity and best prices are available.

The Commission believes that the alternative compliance framework for non-U.S. DCOs registered with the Commission should retain protections available to U.S. customers by clearing through FCMs. The Commission appreciates the several comments on this topic and will give them further consideration in connection with the exempt DCO rulemaking.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[80] The regulations being adopted by the Commission will affect only DCOs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[81] The Commission has previously determined that DCOs are not small entities for the purpose of the RFA.[82] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations adopted herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[83] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring a collection of information as defined by the PRA. The regulations adopted herein would result in such a collection, as discussed below. A person is not required to respond to a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (OMB). The regulations include a collection of information for which the Commission has previously received control numbers from OMB. The title for this collection of information is ''Requirements for Derivatives Clearing

[80] 5 U.S.C. 601 *et seq.*

[81] *See* 47 FR 18618 (Apr. 30, 1982).

[82] *See* 66 FR 45604, 45609 (Aug. 29, 2001).

[83] 44 U.S.C. 3501 *et seq.*

Organizations, OMB control number 3038–0076.''

The Commission did not receive any comments regarding its PRA burden analysis in the preamble to the proposal. The Commission is revising Information Collection 3038–0076 to include the collection of information in revised § 39.3(a)(3) and new § 39.51, as well as changes to the existing information collection requirements for DCOs as a result of these changes. The Commission does not believe the regulations as adopted impose any other new collections of information that require approval of OMB under the PRA.

1. Alternative DCO Application Procedures Under § 39.3(a)(3)

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

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

Estimated number of respondents: 1.

Estimated number of reports per respondent: 1.

Average number of hours per report: 100.

Estimated gross annual reporting burden: 100.

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

New § 39.51 includes reporting requirements for DCOs subject to alternative compliance that are substantially similar to those proposed for exempt DCOs.[84] The estimated number of respondents is based on approximately three existing registered DCOs that may choose to convert to alternative compliance and one new registrant per year.

Daily Reporting

Estimated number of respondents: 6.

Estimated number of reports per respondent: 250.

Average number of hours per report: 0.1.

Estimated gross annual reporting burden: 150.

Quarterly Reporting

Estimated number of respondents: 6.

Estimated number of reports per respondent: 4.

Average number of hours per report: 1.

Estimated gross annual reporting burden: 24.

Event-Specific Reporting

Estimated number of respondents: 6.

Estimated number of reports per respondent: 1.

Average number of hours per report: 0.5.

Estimated gross annual reporting burden: 3.

Annual Certification of Good Regulatory Standing

Estimated number of respondents: 6.

Estimated number of reports per respondent: 1.

Average number of hours per report: 1.

Estimated gross annual reporting burden: 6.

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

3. Adjustment to Part 39 Reporting and Recordkeeping Requirements

As noted above, the Commission anticipates that approximately three current DCOs may seek registration under the alternative compliance process; accordingly, the information collection burden applicable to DCO applicants and DCOs will be reduced. Currently, collection 3038–0076 reflects that there are two applicants for DCO registration annually and that it takes each applicant 421 hours to complete and submit the form, including all exhibits. The Commission is reducing the number of applicants for traditional DCO registration from two to one based on the expectation that one of the annual DCO applicants will seek registration subject to alternative compliance.

Form DCO—§ 39.3(a)(2)

Estimated number of respondents: 1.

Estimated number of reports per respondent: 1.

Average number of hours per report: 421.

Estimated gross annual reporting burden: 421.

The information collection burden for DCOs, based on the Commission's alternative compliance regime, is estimated to be reduced by three, from 16 to 13. The reduction in the number of respondents is the sole change in the burden estimates previously stated for DCOs.[85] The revised burden estimates are as follows:

CCO Annual Report

Estimated number of respondents: 13.

Estimated number of reports per respondent: 1.

Average number of hours per report: 73.

Estimated gross annual reporting burden: 949.

Annual Financial Reports

Estimated number of respondents: 13.

Estimated number of reports per respondent: 1.

Average number of hours per report: 2,626.

Estimated gross annual reporting burden: 34,138.

Quarterly Financial Reports

Estimated number of respondents: 13.

Estimated number of reports per respondent: 4.

Average number of hours per report: 7.

Estimated gross annual reporting burden: 364.

Daily Reporting

Estimated number of respondents: 13.

Estimated number of reports per respondent: 250.

Average number of hours per report: 0.5.

Estimated gross annual reporting burden: 1,625.

Event-Specific Reporting

Estimated number of respondents: 13.

[84] *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018).

[85] There are minor differences in the burden estimates for quarterly and annual financial reports and event-specific reporting from the proposal, which was based on the burden estimates stated in the Commission's proposed amendments to Part 39 (84 FR 22226 (May 16, 2019)). The Commission adopted the amendments to Part 39 (85 FR 4800 (Jan. 27, 2020)) with some minor changes, so the corresponding revisions to the burden estimates are reflected in the figures stated herein.

Estimated number of reports per respondent: 14.

Average number of hours per report: 0.5.

Estimated gross annual reporting burden: 91.

Public Information

Estimated number of respondents: 13.

Estimated number of reports per respondent: 4.

Average number of hours per report: 2.

Estimated gross annual reporting burden: 104.

Governance Disclosures

Estimated number of respondents: 13.

Estimated number of reports per respondent: 6.

Average number of hours per report: 3.

Estimated gross annual reporting burden: 234.

DCOs—Recordkeeping

Estimated number of respondents: 13.

Estimated number of reports per respondent: 1.

Average number of hours per report: 150.

Estimated number of respondents-request to vacate: 1.

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

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

Estimated gross annual recordkeeping burden: 1,951.[86]

New § 39.4(c) exempts DCOs subject to alternative compliance from certifying rules unless the rule relates to the requirements under section 4d(f) of the CEA, parts 1, 22, or 45 of the Commission's regulations, or § 39.15. While this change is likely to reduce the number of rule certification submissions that would otherwise be required for DCOs subject to alternative compliance, the Commission is not expecting that this will affect the overall burden for rule certification filings by all registered entities, covered in Information Collection 3038–0093. The number of rule submissions in that information collection is intended to represent an average number of submissions per registered entity. Because the average number of submissions covers a wide range of variability in the actual numbers of rule certification submissions by registered entities, the Commission believes that the small number of DCOs subject to alternative compliance which will not be required to certify all rules would be covered by the existing burden estimate in Information Collection 3038–0093.

C. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[87] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

2. Amendments to Part 39

a. Summary and Baseline for the Final Rule

Section 5b(a) of the CEA requires a clearing organization that clears swaps to be registered with the Commission as a DCO. Once registered, a DCO is required to comply with the CEA and all Commission regulations applicable to DCOs, regardless of whether the DCO is subject to regulation and oversight in other legal jurisdictions. The Commission is adopting amendments to Part 39 that allow a non-U.S. DCO that the Commission determines does not pose substantial risk to the U.S. financial system, as defined in an amendment to § 39.2, to be subject to an alternative compliance regime that relies in part on the DCO's home country regulatory regime and will result in reduced regulatory obligations as compared to the existing registration requirements. Specifically, under the final rule, the non-U.S. DCO will comply with the DCO Core Principles established in section 5b(c)(2) of the CEA by complying with its home country's legal requirements rather than the requirements of subpart B of Part 39 (with the exception of § 39.15). The non-U.S. DCO will remain subject to subpart A of Part 39 and the Commission's customer protection and swap data reporting requirements, as well as certain reporting requirements and other conditions in its registration order. Lastly, under the final rule, § 39.4(c) exempts non-U.S. DCOs that are subject to alternative compliance from self-certifying rules pursuant to § 40.6, unless the rule relates to the Commission's customer protection or swap data reporting requirements.

The baseline for these cost and benefit considerations is the current statutory and regulatory requirements applicable to non-U.S. DCOs, including those related to application procedures for registration and self-certification of rules. Under current requirements, a non-U.S. DCO seeking to clear for U.S. participants has two options: (1) It can pursue registration under part 39 as it exists today (and comply with the DCO Core Principles and relevant Commission regulations) and have the same access to U.S. customer business as a registered U.S. DCO; or (2) it can seek exemption from DCO registration pursuant to CEA section 5b(h), but forgo access to U.S. customers (while accepting business from self-clearing U.S. proprietary traders).

Where reasonably feasible, the Commission has endeavored to estimate quantifiable costs and benefits. Where quantification is not feasible, the Commission identifies and describes costs and benefits qualitatively. Additionally, the initial and recurring compliance costs for any particular non-U.S. DCO will depend on its size, existing infrastructure, level of clearing activity, practices, and cost structure. In considering the effects of the final rule and the resulting costs and benefits, the Commission acknowledges that the swaps markets have several types of market participants including DCOs, clearing members, and their clients (who could be professional investors, public and non-public operating firms) and function internationally with: (i) Transactions that involve U.S. firms occurring across different international jurisdictions; (ii) some entities organized outside of the United States that are prospective Commission registrants; and (iii) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the amendments on all relevant swaps activities, whether based on their actual occurrence in the United States or on their connection with, or effect on U.S. commerce pursuant to, section 2(i) of the CEA.[88]

[86] The total annual recordkeeping burden estimate reflects the combined figures for 13 DCOs with an annual burden of one response and 150 hours per response ($13 \times 1 \times 150 = 1{,}950$), and one vacated DCO registration every three years with an annual burden of one hour, which is not affected by this rulemaking.

[87] 7 U.S.C. 19(a).

[88] Pursuant to section 2(i) of the CEA, activities outside of the United States are not subject to the

b. Benefits

The Commission believes that the primary benefit of the alternative compliance framework for non-U.S. DCOs is that it will promote and encourage international comity by showing deference to non-U.S. regulators in the oversight of non-U.S. DCOs that do not pose substantial risk to the U.S. financial system. The second prong of the substantial risk test in particular is directed at comity by making a non-U.S. DCO that satisfies the first prong of the test eligible for registration subject to alternative compliance if the proportion of U.S. activity it clears is not at a level that warrants more active oversight by the Commission. Based on its past, and continued, coordination with non-U.S. regulators, the Commission expects that non-U.S. regulators will, in turn, defer to the Commission in the supervision and regulation of DCOs organized in the United States, thereby reducing the regulatory and compliance burdens of these U.S. DCOs.[89] While the Commission believes that international comity will occur, it acknowledges that the realization of the benefit from international comity is dependent on the actions of non-U.S. regulators and therefore, may not come to fruition.

There are currently 15 DCOs registered with the Commission, five of which are organized outside of the United States and have comparable registration status in their respective home countries. The Commission expects that, in light of the substantial risk test as discussed below, four of these DCOs may be eligible for alternative compliance.

The Commission reviewed quarterly statistics for six registered DCOs, including four non-U.S. DCOs, that account for the vast majority of swaps initial margin (IM) held in the United States. The statistics included the share of total U.S. swaps IM held by each DCO and the U.S. share of total IM held by each DCO. These statistics were calculated by Commission staff for the period from first quarter 2018 through second quarter 2020. Regarding the first prong of the substantial risk test (the DCO's share of U.S. swaps IM), Commission staff found that one non-U.S. DCO consistently accounted for at least 47% of U.S. swaps IM, while none of the other three non-U.S. DCOs ever exceeded 5% of U.S. swaps IM (and thus may be eligible for alternative compliance). Any threshold between 10% and 40% would have yielded the same results, but the 20% level is more likely to result in a stable set of DCOs eligible for alternative compliance than other possible thresholds. This is because the share of the three smaller non-U.S. DCOs would have to at least quadruple to approach 20% while the share of the largest non-U.S. DCO (LCH Limited) would have to be cut in half to approach the threshold. A stable set of eligible DCOs due to large distances from the threshold should benefit DCOs by reducing concerns that a DCO could lose its eligibility for alternative compliance.

Regarding the second prong (U.S. IM as a share of DCO IM), U.S. swaps IM as a share of IM at LCH Limited has consistently been at least 45%, which is more than double the 20% threshold. The Commission notes that the level of the second prong does not matter if a DCO is below the threshold for the first prong.

The adoption of the alternative compliance framework will benefit qualifying non-U.S. DCOs by potentially reducing their regulatory requirements to the extent that the non-U.S. DCOs' home country laws and regulations impose obligations similar to those imposed by the CEA. Furthermore, the option of seeking registration with alternative compliance will also benefit the qualifying non-U.S. DCOs by allowing them to accept U.S. customer business at lower cost.

The Commission also believes that the non-U.S. DCOs that qualify for the alternative compliance framework will benefit from amendments to § 39.4(c), which remove the requirement to certify their rules that do not relate to the Commission's customer protection or swap data reporting requirements, by reducing their ongoing compliance costs. In 2019, the four non-U.S. DCOs potentially eligible for alternative compliance submitted 108 rule certifications to the Commission, ranging from a low of 10 submissions for one DCO to a high of 62 submissions for another DCO. Based on its experience reviewing DCO rule submissions, the Commission expects that a DCO subject to alternative compliance would make few, if any, rule submissions each year. The Commission receives very few rule submissions from DCOs that relate to customer protection or swap data reporting.

Non-U.S. clearing organizations applying for DCO registration with alternative compliance will benefit from new § 39.3(a)(3), which simplifies and reduces the application procedures from the current list of over three dozen exhibits to only a dozen sections of Form DCO, mostly drawn from Exhibits A and F thereto. The Commission has estimated that an applicant must spend 421 hours preparing a complete Form DCO.[90] As noted in the PRA discussion above, the Commission estimates that preparing the sections of Form DCO that would be required under the alternative compliance application procedures would take 100 hours.

Given the lower initial application and ongoing compliance costs, the Commission anticipates that some non-U.S. clearing organizations that are not currently registered as DCOs, including, but not limited to, exempt DCOs, may pursue registration with alternative compliance. Exempt DCOs in particular would receive the additional benefit of being able to accept U.S. customer clearing through FCMs.[91] Because of the reduced requirements under the alternative compliance regime, the Commission believes it may be eliminating barriers to entry for these non-U.S. clearing organizations that are not currently registered with the Commission, which may increase the number of non-U.S. DCOs providing services to U.S. customers over time. To the extent that new non-U.S. DCO entrants decide to compete with existing DCOs to increase their share of the U.S. customer market, U.S. customers and clearing members may benefit from more clearing options, including potentially lower fees and access to cleared products that are not otherwise available.

The Commission received several comments on the proposing release describing the benefits of the alternative compliance framework. SIFMA stated that by enhancing deference to foreign regulation of non-U.S. DCOs and implementing risk-based measures to calibrate the extent of U.S. regulations,

swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either ''have a direct and significant connection with activities in, or effect on, commerce of the United States;'' or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376. 7 U.S.C. 2(i).

[89] As the Commission previously noted, the G20 ''agree[d] that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.'' G20 Leaders' Declaration, St. Petersburg Summit, para. 71 (Sept. 6, 2013).

[90] *See* Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800, 4828–4829 (Jan. 27, 2020).

[91] If the Exempt DCO rulemaking is finalized, exempt DCOs would be able to accept U.S. customer clearing through non-FCM intermediaries, which could reduce, but would not eliminate, the relative benefit of registering with alternative compliance. All DCOs would still need to register with (or without) alternative compliance to accept U.S. customer clearing through FCMs.

the alternative compliance framework will help expand opportunities for U.S. customers, promote globally integrated swaps markets, reduce undue regulatory duplication and burdens, responsibly make more effective use of the Commission's resources, and encourage reciprocal deference by foreign regulators. LCH commended the Commission's efforts to enhance regulatory deference and cooperation and stated that it believes that the alternative compliance framework will continue to drive progress towards a more harmonized regulatory approach that supports the global nature of the cleared swaps markets. CCIL stated that the alternative compliance framework provides a better alternative to the existing structure. CCP12 stated that it welcomes the Commission's alternative compliance approach because it recognizes the importance of regulatory deference and increased cross-border cooperation. CCP12 added that the alternative compliance framework will allow local policymakers to adopt legal and regulatory requirements that are appropriate for the markets they oversee, while increasing cross-border cooperation.

c. Costs

One effect of adopting the amendments is that it may increase competition among U.S. and non-U.S. DCOs. Some academic research indicates that competition among DCOs may result in negative effects, such as lower margin or increased counterparty risk.[92]

However, the Commission expects that these potential ill effects will be mitigated because DCOs subject to alternative compliance would still need to comply with the DCO core principles through their home regulators and that these DCOs would be subject to rules that would, for example, prevent them from competing on margin.

The Commission recognizes that DCOs registered under the existing procedures, including non-U.S. DCOs that are ineligible for alternative compliance, may face a competitive disadvantage as a result of this proposal. A DCO subject to full Commission regulation and oversight may have higher ongoing compliance costs than a DCO subject to alternative compliance.[93] However, this competitive disadvantage, based on reduced costs, may be mitigated by the fact that DCOs subject to alternative compliance would, as a precondition of such registration, be subject to a home country regulator that is likely to impose costs similar to those associated with Commission regulation, as the home country regulation would have to meet the same standards as set out in the Commission's DCO Core Principles. This competitive disadvantage also would only arise where DCOs are competing to clear the same or similar products.[94]

The Commission also recognizes that currently unregistered non-U.S. clearing organizations applying for registration under the alternative compliance application procedures would incur costs in preparing the application. This would include preparing and submitting certain parts of Form DCO, including the requirement to provide in Exhibit A–1 the citation and full text of each applicable legal requirement in its home country that corresponds with each core principle and an explanation of how the applicant satisfies those requirements. If a clearing organization were required instead to apply under the existing application process, however, it would need to prepare and submit a complete Form DCO, which is a significantly more costly and burdensome process. Thus, although an applicant will incur costs in preparing the application under § 39.3(a)(3), the alternative compliance application procedures represent a substantial cost savings relative to the existing procedures. As discussed in connection with the PRA above, the Commission estimates that an application for registration with alternative compliance pursuant to § 39.3(a)(3) will take approximately 100 hours to complete, as opposed to an estimated 421 hours for an application pursuant to § 39.3(a)(2).

A currently registered DCO that wishes to be subject to alternative compliance would not need to file a new application but would need to submit a request to amend its order of registration. The initial request would need to include only Exhibits A–1 and A–8 as described in § 39.3(a)(3). The currently registered DCO would typically not need to file the other exhibits required in a new application for registration with alternative compliance, thus reducing costs further.

Furthermore, because a DCO subject to alternative compliance will not be held to many of the Commission's requirements, there may be an increase in the potential for systemic risk. However, the Commission does not believe that the alternative compliance framework will materially increase the risk to the U.S. financial system because DCOs that pose substantial risk to the U.S. financial system as defined in § 39.2 would not be eligible for alternative compliance. Furthermore, a DCO cannot avail itself of this process unless the Commission determines that a DCO's compliance with its home country regulatory regime would satisfy the DCO Core Principles, meaning that the DCO would be subject to regulation comparable to that imposed on DCOs registered under the existing procedure. An MOU or similar arrangement must be in effect between the Commission and the DCO's home country regulator, allowing the Commission to receive information from the home country regulator to help monitor the DCO's continuing compliance with its legal and regulatory obligations. In addition, DCOs subject to alternative compliance remain subject to the Commission's customer protection requirements set forth in section 4d(f) of the CEA, parts 1 and 22 of the Commission's regulations, and § 39.15. The Commission also notes that home country regulators have a strong incentive to ensure the safety and soundness of the clearing organizations that they regulate, and their oversight, combined with the alternative compliance regime, will enable the Commission to more efficiently allocate its own resources in the oversight of traditionally registered DCOs. Finally, the substantial risk test is designed to identify those DCOs that pose substantial risk to the U.S. financial system and will be administered frequently, so in the event that one of these non-U.S. DCOs meets the test, it will be required to comply with all of the Commission's DCO requirements.

The amendments will have no effect on the risks posed by exempt DCOs or by clearing organizations that are neither registered nor exempt from registration.

The Commission believes that determining eligibility for alternative compliance should generally be a simple, low-cost process given that it is in large part based on objective initial margin figures and, as discussed in the benefits section above, eligibility is

[92] *See, e.g.,* Duffie, D., and Zhu, H. (2011). Does a Central Clearing Counterparty Reduce Counterparty Risk. The Review of Asset Pricing Studies, 1, 74–95.

[93] The Commission notes that these costs would include complying with at least two sets of regulations for the non-U.S. DCO and may include additional costs to the U.S. DCO to the extent that they are subject to another jurisdiction's requirements.

[94] It is possible that a DCO subject to alternative compliance could begin clearing the same products as a DCO that is not eligible for alternative compliance and attempt to take advantage of the lower costs associated with alternative compliance by offering a lower clearing fee for these products. It is not certain that the cost savings associated with alternative compliance would be sufficient to cover the cost of lowering fees enough to induce clearing members to change DCOs.

expected to be stable with changes in eligibility for alternative compliance for particular DCOs likely to be very rare in the foreseeable future.

The Commission notes that non-U.S. DCOs that are eligible for alternative compliance because they satisfy the first prong, but not the second prong, of the substantial risk test could potentially impose costs associated with an increase in systemic risk. It is very unlikely, however, that a non-U.S. DCO will meet this profile in the foreseeable future given current initial margin shares. To do so, a non-U.S. DCO would have to hold over 20% of the total initial margin for U.S. clearing members while also having less than 20% of its initial margin provided by those clearing members, a situation that is unlikely to occur unless non-U.S. DCOs were to experience explosive growth in initial margin provided by non-U.S. clearing members. Moreover, there are significant mitigating factors even in the unlikely event that a non-U.S. DCO eventually meets that profile. The DCO would, even when registered with alternative compliance, be required to meet the DCO Core Principles and critical customer protection provisions and would be subject to supervision from its home country regulator. The home country regulator's incentive to provide intensive oversight is likely to be particularly high in this scenario given that the largest share of the DCO's clearing activity would likely have been generated from within the home country jurisdiction. Thus, the Commission believes that the risk associated with this unlikely scenario is low.

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

d. Consideration of Alternatives

The Commission received several comments suggesting alternatives that the commenters believe would further reduce costs of the alternative compliance framework. ICE argued that the Commission should identify the specific factors that it will consider when exercising its discretion to deem a DCO to pose substantial risk to the U.S. financial system. ICE stated that without a list of relevant factors, the Commission could unnecessarily delay its assessment, which would increase compliance costs for the DCO. As discussed above, the Commission reserves the right to consider all factors it believes are relevant, and does not believe that it is helpful to attempt to list every possible factor given that it is impossible to anticipate all possible facts and circumstances. However, the Commission did provide in the discussion above a non-exclusive list of examples to illustrate the factors that it could consider in exercising discretion under the substantial risk test.

Three commenters argued that the Commission could reduce the costs to DCOs by not requiring DCOs to follow certain reporting requirements. CCP12 stated generally that in some cases the alternative compliance reporting requirements would be costly, and believes that oversight of U.S. customers' swaps clearing activity could be fulfilled with less frequent and more relevant data reporting. ICE stated that if an applicant's home country reporting rules correspond with part 45 swap data reporting rules, the Commission should consider obtaining swap data from the applicant's home country regulator through an MOU. ICE claimed that compliance with the Commission's rules in addition to home country rules would be very costly for DCOs, and provide little additional benefit. Eurex similarly stated that the general reporting requirements and part 45 swap data reporting requirements are substantial and costly, and overlap to a large degree with existing requirements from home country regulators.

The Commission notes that the reporting required by the alternative compliance framework is considerably less than that required by the baseline. In particular, as noted in the PRA section, each DCO with alternative compliance is expected to spend about 31 hours per year preparing various reports to the Commission as compared to 2,892 hours for each DCO registered under current procedures. Thus, DCOs will face significantly reduced legal and compliance costs associated with reporting as a result of the amendments.

3. Section 15(a) Factors

a. Protection of Market Participants and the Public

The amendments will not materially reduce the protections available to market participants and the public because they would require, among other things, that a DCO subject to alternative compliance: (i) Must demonstrate to the Commission that compliance with the applicable legal requirements in its home country would constitute compliance with the DCO Core Principles; (ii) must be licensed, registered, or otherwise authorized to act as a clearing organization in its home country and be in good regulatory standing; and (iii) must not pose substantial risk to the U.S. financial system. The regulations also protect market participants and the public by ensuring that FCM customers clearing through a DCO subject to alternative compliance would continue to receive the full benefits of the customer protection regime established in the CEA and Commission regulations.

b. Efficiency, Competitiveness, and Financial Integrity

The amendments promote efficiency in the operations of DCOs subject to alternative compliance by reducing duplicative regulatory requirements. This reduction in duplicative requirements will reduce compliance costs for DCOs, which may promote competitiveness. Furthermore, adopting the amendments might prompt other regulators to adopt similar deference frameworks, which could further reduce compliance costs and increase competitiveness among DCOs.

The Commission expects the amendments to maintain the financial integrity of swap transactions cleared by DCOs because DCOs subject to alternative compliance would be required to comply with a home country regulatory regime that satisfies the DCO Core Principles, and because they would be required to satisfy the Commission's regulations regarding customer protection. In addition, the amendments may contribute to the financial integrity of the broader financial system if they encourage additional non-U.S. clearing organizations to register as DCOs, which could spread the risk of clearing swaps among a greater number of DCOs, thus reducing concentration risk.

c. Price Discovery

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

d. Sound Risk Management Practices

The amendments continue to encourage sound risk management practices because a DCO would be eligible for alternative compliance only if it is held to risk management requirements in its home country that satisfy the DCO Core Principles, which

include that a DCO: (1) Ensure that it possesses the ability to manage the risks associated with discharging its responsibilities through the use of appropriate tools and procedures; (2) measure and monitor its credit exposures to each clearing member daily; (3) through margin requirements and other risk control mechanisms, limit its exposure to potential losses from a clearing member default; (4) require sufficient margin from its clearing members to cover potential exposures in normal market conditions; and (5) use risk-based models and parameters in setting margin requirements and review them on a regular basis.

e. Other Public Interest Considerations

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

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.[95]

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission requested, but did not receive, any comments on whether the proposed rulemaking implicated any other specific public interest to be protected by the antitrust laws.

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

The Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requested but did not receive any comments on whether there are less anticompetitive means of achieving the purposes of the CEA that would be served by adopting the amendments.

List of Subjects

17 CFR Part 39

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

17 CFR Part 140

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

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

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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

Authority: 7 U.S.C. 2, 6(c), 7a–1, and 12a(5); 12 U.S.C. 5464; 15 U.S.C. 8325; Section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, title VII, sec. 752, July 21, 2010, 124 Stat. 1749.

■ 2. In § 39.2, add definitions of ''Good regulatory standing'' and ''Substantial risk to the U.S. financial system'' in alphabetical order to read as follows:

§ 39.2 Definitions.

* * * * *

Good regulatory standing means, with respect to a derivatives clearing organization that is organized outside of the United States, and is licensed, registered, or otherwise authorized to act as a clearing organization in its home country, that either there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization.

* * * * *

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

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

(2) Twenty percent or more of the initial margin requirements for swaps at that derivatives clearing organization is attributable to U.S. clearing members; *provided, however,* where one or both of these thresholds are identified as being close to 20%, the Commission may exercise discretion in determining whether an identified threshold is satisfied for the purpose of determining whether the derivatives clearing organization poses substantial risk to the U.S. financial system. For purposes of this definition and § 39.51, *U.S. clearing member* means a clearing member organized in the United States, a clearing member whose ultimate parent company is organized in the United States, or a futures commission merchant.

* * * * *

■ 3. Amend § 39.3 by:
■ a. Redesignating paragraphs (a)(3) through (6) as paragraphs (a)(4) through (7);
■ b. Adding new paragraph (a)(3); and
■ c. Revising newly redesignated paragraphs (a)(5) and (6).

The addition and revisions read as follows:

§ 39.3 Procedures for registration.

(a) * * *

(3) *Alternative application procedures.* An entity that is organized outside of the United States, is seeking to register as a derivatives clearing organization for the clearing of swaps, and does not pose substantial risk to the

[95] 7 U.S.C. 19(b).

U.S. financial system may apply for registration in accordance with the terms of this paragraph in lieu of filing the application described in paragraph (a)(2) of this section. If the application is approved by the Commission, the derivatives clearing organization's compliance with its home country regulatory regime would satisfy the core principles set forth in section 5b(c)(2) of the Act, subject to the requirements of subpart D of this part. The applicant shall submit to the Commission the following sections of Form DCO, as provided in appendix A to this part: Cover sheet, Exhibit A–1 (regulatory compliance chart), Exhibit A–2 (proposed rulebook), Exhibit A–3 (narrative summary of proposed clearing activities), Exhibit A–4 (detailed business plan), Exhibit A–7 (documents setting forth the applicant's corporate organizational structure), Exhibit A–8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), Exhibit A–9 (description of pending legal proceedings or governmental investigations), Exhibit A–10 (agreements with outside service providers with respect to the treatment of customer funds), Exhibits F–1 through F–3 (documents that demonstrate compliance with the treatment of funds requirements with respect to customers of futures commission merchants), and Exhibit R (ring-fencing memorandum). For purposes of this paragraph, the applicant must demonstrate to the Commission, in Exhibit A–1, the extent to which compliance with the applicable legal requirements in its home country would constitute compliance with the core principles set forth in section 5b(c)(2) of the Act. To satisfy this requirement, the applicant shall provide in Exhibit A–1 the citation and full text of each applicable legal requirement in its home country that corresponds with each core principle and an explanation of how the applicant satisfies those requirements. If there is no applicable legal requirement for a particular core principle, the applicant shall provide an explanation of how it would satisfy the core principle.

* * * * *

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

(6) *Public information.* The following sections of an application for registration as a derivatives clearing organization will be public: First page of the Form DCO cover sheet (up to and including the General Information section), Exhibit A–1 (regulatory compliance chart), Exhibit A–2 (proposed rulebook), Exhibit A–3 (narrative summary of proposed clearing activities), Exhibit A–7 (documents setting forth the applicant's corporate organizational structure), Exhibit A–8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), and any other part of the application not covered by a request for confidential treatment, subject to § 145.9 of this chapter.

* * * * *

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

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

* * * * *

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

* * * * *

■ 5. Revise § 39.9 to read as follows:

§ 39.9 Scope.

Except as otherwise provided by Commission order, the provisions of this subpart B apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and § 1.3 of this chapter, that is registered with the Commission as a derivatives clearing organization pursuant to section 5b of the Act.

§ § 39.43 through 39.49 [Reserved]

■ 6. Add and reserve §§ 39.43 through 39.49 to subpart C.

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

Subpart D—Provisions Applicable to Derivatives Clearing Organizations Subject to Compliance with Core Principles Through Compliance with Home Country Regulatory Regime

§ 39.50 Scope.

The provisions of this subpart D apply to any derivatives clearing organization that is registered through the process described in § 39.3(a)(3) of this part or as otherwise provided by order of the Commission.

§ 39.51 Compliance with the core principles through compliance with home country regulatory regime.

(a) *Eligibility.* (1) A derivatives clearing organization shall be eligible for registration for the clearing of swaps subject to compliance with this subpart if:

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

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

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

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

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

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

(1) *Applicable requirements under the Act and Commission regulations.* The derivatives clearing organization shall comply with: The core principles set forth in section 5b(c)(2) of the Act through its compliance with applicable

legal requirements in its home country; and other requirements applicable to derivatives clearing organizations as specified in the derivatives clearing organization's registration order including, but not limited to, section 4d(f) of the Act, parts 1, 22, and 45 of this chapter, subpart A of this part and § 39.15.

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

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

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

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

(i) Consent to jurisdiction in the United States;

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

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

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

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

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

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

(c) *General reporting requirements.* (1) A derivatives clearing organization shall provide to the Commission the information specified in this paragraph and any other information that the Commission deems necessary, including, but not limited to, information for the purpose of the Commission evaluating the continued eligibility of the derivatives clearing organization for compliance with this subpart, reviewing compliance by the derivatives clearing organization with any conditions of its registration, or conducting oversight of U.S. clearing members, and the swaps that are cleared by such persons through the derivatives clearing organization. Information provided to the Commission under this paragraph shall be submitted in accordance with § 39.19(b).

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

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

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

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

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

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

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

(iv) As available to the derivatives clearing organization, any examination report or examination findings by a home country regulator, and notify the Commission within five business days after it becomes aware of the commencement of any enforcement or disciplinary action or investigation by a home country regulator;

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

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

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

(d) *Modification of registration upon Commission initiative.* (1) The Commission may, in its discretion and upon its own initiative, modify the terms and conditions of an order of registration subject to compliance with this subpart if the Commission determines that there are changes to or omissions in facts or circumstances pursuant to which the order was issued, or that any of the terms and conditions of its order have not been met, including, but not limited to, the requirement that:

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

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

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

(2) The Commission shall provide written notification to a derivatives

clearing organization that it is considering whether to modify an order of registration pursuant to this paragraph and the basis for that consideration.

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

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

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

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

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

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

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

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

■ 9. Amend § 140.94 as follows:
■ a. Revise paragraph (c) introductory text and paragraph (c)(1);
■ b. Add and reserve paragraph (c)(14); and
■ c. Add paragraph (c)(15).

The revisions and addition read as follows:

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

* * * * *

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

(1) The authority to review applications for registration as a derivatives clearing organization filed with the Commission under § 39.3(a)(1) of this chapter, to determine that an application is materially complete pursuant to § 39.3(a)(2) of this chapter, to request additional information in support of an application pursuant to § 39.3(a)(4) of this chapter, to extend the review period for an application pursuant to § 39.3(a)(7) of this chapter, to stay the running of the 180-day review period if an application is incomplete pursuant to § 39.3(b)(1) of this chapter, to review requests for amendments to orders of registration filed with the Commission under § 39.3(d)(1) of this chapter, to request additional information in support of a request for an amendment to an order of registration pursuant to § 39.3(d)(2) of this chapter, and to request additional information in support of a rule submission pursuant to § 39.3(g)(3) of this chapter;

* * * * *

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

(i) Grant registration under § 39.51(a) of this chapter;

(ii) Prescribe conditions to registration under § 39.51(b) of this chapter; and

(iii) Modify registration under § 39.51(d)(4) of this chapter.

* * * * *

Issued in Washington, DC, on September 22, 2020, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations—Commission Voting Summary, Chairman's Statement, Commissioners' Statements, and Regulatory Compliance Demonstration for an EU-Based Applicant for Registration Subject to Compliance With the Core Principles Applicable to Derivatives Clearing Organizations in Accordance With Subpart D of Part 39

Appendix 1—Commission Voting Summary

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

Appendix 2—Statement of Support of Chairman Heath P. Tarbert

Nations have borders, but markets rarely do. That is certainly the case with the global derivatives markets.

For more than a century, U.S. derivatives markets have provided hedging and price discovery opportunities not only for Americans but also to individuals and businesses from abroad. In the 21st century, these markets involve participants domiciled in the Americas, Europe, Asia and elsewhere each and every day. And the clearinghouses that provide the credit risk management services for our exchanges have members and ultimate customers from around the world. The same is true for clearinghouses based in, for example, Europe. So the question that has naturally arisen is how the home regulator of the clearinghouse—which in the United States we refer to as a derivatives clearing organization (DCO)—should work with regulators in home jurisdictions of the DCO's members and customers.

When it comes to international regulatory comity, I find the concept of the ''categorical imperative'' of the great philosopher Immanuel Kant instructive.[1] Basically, Kant asks us to consider what would happen if everyone was bound by the same regulation—that is, we should take a particular obligation (imperative) and make it universal (categorical). If the result is chaos, then it is probably not a good regulation. Therefore, if every jurisdiction mandated that its own detailed, domestic DCO regulations applied to every foreign DCO that accepted its members or customers from that domestic jurisdiction, the result would likely be a mishmash of duplicative or contradictory regulations at best. At worst, the result would be market fragmentation, because DCOs might not accept members or customers from certain jurisdictions.[2] Neither result is good for the integrity, resilience, and vibrancy of global derivatives markets. Consequently, such an approach cannot be considered sound regulation.

Today we are finalizing a rule that meets the categorical imperative—a rule for non-U.S. DCOs that we would hope foreign jurisdictions would impose on U.S.DCOs in return. Specifically, I am pleased to support today's final rule for Registration with Alternative Compliance for Non-U.S. DCOs under Parts 39 and 140 of our regulations. This rule is a significant step in building an effective, efficient and cooperative international regulatory framework for the oversight of DCOs operating in the international derivatives markets. The alternative compliance rule takes a principles-based approach, and also reflects deference in the form of international regulatory cooperation. The rule recognizes that certain foreign regulatory systems can mirror the requirements of the CFTC's Core Principles for DCOs, but not necessarily all our detailed rules implementing those Core

[1] ''Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.'' Immanuel Kant, Grounding for the Metaphysics of Morals (1785) [1993], translated by James W. Ellington (3rd ed.).

[2] *See* CFTC Chairman J. Christopher Giancarlo, Cross-Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation (Oct. 1, 2018), at 34 (noting that ''overlapping regulation and supervision create inefficiencies that limit the ability and increase the costs of U.S. persons accessing non-U.S. CCPs and hamper the growth of the global economy''), available at *https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf*.

Principles. Provided that a foreign regulatory system produces similar outcomes to the CFTC's Core Principles, it makes sense to afford it flexibility in how to do it. The rule acknowledges that, while a foreign jurisdiction may take a different route, it can still reach the same endpoint.

In terms of the particulars, the final rule allows a DCO organized outside the United States to comply with our Core Principles through compliance with its home country's regulatory regime, provided:

1. The CFTC determines that compliance by the DCO with its home country regulatory regime constitutes compliance with the Core Principles set forth in section 5b(c)(2) of the Act;

2. The DCO is in good regulatory standing in its home jurisdiction;

3. The DCO does not pose a substantial risk to the U.S. financial system; and

4. A memorandum of understanding or similar arrangement satisfactory to the CFTC is in effect with the DCO's home country regulator.

As we vote to adopt this rule today, our approach is already bearing fruit. I am pleased to note that the European Union has finalized its Delegated Acts addressing EU oversight of DCOs domiciled abroad. The Delegated Acts take a similar approach as does our final rule,[3] insofar as they allow non-EU clearinghouses to meet EU requirements by following their home jurisdiction's rules if the EU determines those rules are designed to have equivalent outcomes. In short, both the United States and European Union are recognizing our respective national borders without being unduly confined by them.

Appendix 3—Supporting Statement of Commissioner Brian Quintenz

Today's final rule providing for registration with alternative compliance for non-U.S. derivatives clearing organizations (DCOs) is a significant milestone in the CFTC's policy of deferring to foreign regulatory counterparts that have taken a serious and committed approach, similar to the CFTC's, to adopting the swaps reforms called for by the 2009 G20 Summit in Pittsburgh and championed by important international bodies like the International Organization of Securities Commissions (IOSCO) and the Financial Stability Board (FSB). Like the CFTC, several foreign regulatory authorities have issued numerous regulations over the past decade regulating the swaps markets at clearinghouses, exchanges, and dealers.[1] Specific to CCP oversight, numerous jurisdictions, including the CFTC, have implemented the CPMI–IOSCO Principles for Financial Market Infrastructures (PFMIs).[2] Throughout my tenure at the Commission, I have stated that deference to our foreign counterparts is a necessary way to reduce compliance burdens for industry and to conserve the Commission's precious resources.[3] Previous CFTC Chairman Giancarlo promoted a workable deference policy, as evidenced by the publication, during his chairmanship, of the proposed version of the final rule before the Commission today.[4] I am pleased to see Chairman Tarbert continue this policy, exemplified not only with this final rule, but also with the final rule published by this Commission in July, which sets forth the cross-border application of many of the Commission's regulations for swap dealers (SDs).[5]

The alternative registration rule for non-U.S. DCOs will prevent non-U.S. DCOs registered with the CFTC from being subject to unnecessary duplicative regulation by both the CFTC and their home country regulator that has issued comparable rules. The rule will permit a non-U.S. DCOs that does not pose ''substantial risk to the U.S. financial system'' to be registered with the CFTC but comply with regulations issued by its home country regulator instead of with CFTC regulations, with the limited exception of certain CFTC customer protection and swap data reporting requirements. The rule recognizes that non-U.S. regulators have a substantial regulatory interest in supervising the DCOs located in their home jurisdictions and appropriately defers to their oversight when compliance with the home country regulatory regime would constitute compliance with DCO core principles. I note that this rule is consistent with, and an expansion of, the CFTC's 2016 Equivalence Agreement with the European Union (E.U.), pursuant to which the CFTC granted substituted compliance to dually-registered DCOs based in the E.U.[6]

While the alternative DCO registration rule would provide for a deference-based approach for certain clearinghouses organized abroad, it would not be available to a non-U.S. clearinghouse posing ''substantial risk to the U.S. financial system.'' The final rule, like the proposal which I supported, defines this term according to two simple criteria: (i) The foreign DCO holds 20 percent or more of the required initial margin U.S. clearing members for swaps across all registered and exempt DCOs; and (ii) 20 percent or more of the initial margin requirements for swaps at that foreign DCO is attributable to U.S. clearing members.[7] I believe this two-prong test correctly assesses the DCO's focus on U.S. firms and impact on the U.S. marketplace.

In voting to adopt the alternative DCO registration final rule, I recognize that E.U. authorities have recently adopted regulations for clearinghouses located outside of the E.U. that access the E.U. market, which are in the spirit of the 2016 agreement on CCPs between the CFTC and the European Commission.[8] These regulations, issued by the European Commission in July, will only require a U.S. CCP to be generally subject to E.U. regulation and supervision (as a ''tier 2 CCP'') if its E.U. presence exceeds certain clear thresholds.[9] I am pleased that these regulations have now been agreed to by the European Council and by the European Parliament. The adoption of these regulations represents a marked shift in E.U. policy from the one that existed at the beginning of my term as CFTC Commissioner. In March of 2018, I stated that I would neither support the CFTC granting additional equivalence determinations within the E.U., nor would I support any relief requested by E.U. authorities, until the E.U. recommitted to honoring its 2016 agreements with the CFTC on CCP oversight.[10] That agreement had been in jeopardy since the E.U.'s issuance of a revised European Market Infrastructure Regulation (''EMIR 2.2'') in 2017, which raised the possibility of E.U. authorities directly supervising US clearinghouses and requiring them to comply with EMIR. I am very pleased to see this shift in E.U. policy, which I already recognized in July when voting to expand the Commission's exemption registration for E.U.-recognized swap trading platforms for additional platforms in several E.U. member states.[11]

In conclusion, I look forward to the CFTC continuing to work cooperatively with our E.U. counterparts in the crucial area of CCP

---

[3] European Commission C(2020)4892: Commission delegated regulation supplementing regulation (EU) No 648/2012 with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third-country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States.

[1] *See, e.g.,* FSB OTC Derivatives Market Reforms: 2019 Progress Report on Implementation (Oct. 15, 2019), *https://www.fsb.org/wp-content/uploads/P280519-2.pdf* and FSB, Implementation and Effects of the G20 Financial Regulatory Reforms: Fifth Annual Report (Oct. 16, 2019), *https://www.fsb.org/2019/10/implementation-and-effects-of-the-g20-financial-regulatory-reforms-fifth-annual-report/.*

[2] PFMI Implementation Database, *https://www.bis.org/pfmi/index.htm.*

[3] *See, e.g.,* Remarks of CFTC Commissioner Brian Quintenz at 2019 ISDA Annual Japan Conference, ''Significant's Significance'' (Oct. 25, 2019), *https://www.cftc.gov/PressRoom/SpeechesTestimony/opaquintenz20.*

[4] Registration with Alternative Compliance for Non-U.S. DCOs, 84 FR 34819 (July 19, 2019).

[5] Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to SDs and MSPs, 85 FR 56924 (Sept. 14, 2020).

[6] Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (March 22, 2016).

[7] Regulation 39.2.

[8] Joint Statement from CFTC Chairman Timothy Massad and European Commissioner Jonathan Hill, CFTC and the European Commission: Common approach for transatlantic CCPs (Feb. 10, 2016), *https://www.cftc.gov/PressRoom/PressReleases/pr7342-16.*

[9] European Commission Delegated Regulation (''Delegated Acts''), dated July 14, 2020, supplementing Regulation (EU) No. 648/2012 of the European Parliament . . . with regard to the criteria that ESMA should take into account to determine whether a CCP established in a third-country is systemically important . . . for the financial stability of the Union. . . . , *https://webgate.ec.europa.eu/regdel/#/delegatedActs/1382.*

[10] Keynote Address of Commissioner Brian Quintenz before FIA Annual Meeting, Boca Raton, Florida (March 14, 2018), *https://www.cftc.gov/PressRoom/SpeechesTestimony/opaquintenz9.*

[11] Supporting Statement of Commissioner Brian Quintenz Regarding the Amendment to the Commission's Order Exempting EU Swap Trading Facilities from SEF Registration (July 23, 2020), *https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement072320b.*

oversight, in a manner that eliminates unnecessary duplicative burdens at both the regulator and registered entity.

Appendix 4—Statement of Support of Commissioner Rostin Behnam

I support today's final rule permitting derivatives clearing organizations (''DCOs'') organized outside of the United States (''non-U.S. DCOs'') that the CFTC determines do not pose substantial risk to the U.S. financial system to register with the Commission and comply with the core principles applicable to DCOs (''Core Principles'') set forth in the Commodity Exchange Act (''CEA'') through compliance with their home country regulatory regime. This registration category establishes a new model for regulatory deference aimed at reducing regulatory burdens and ongoing compliance costs for non-U.S. clearing organizations.

As we move forward in executing this new framework, the Commission's evaluation of the suitability of any particular non-U.S. DCO and the comparability of its home country's regulatory regime to the Core Principles will be closely watched and analyzed by regulatory and supervisory bodies as well as market participants around the world. To the extent the Commission is codifying a definition for ''substantial risk to the U.S. financial system'' that commingles a bright-line test with autonomous agency discretion, its aptitude for exercising a policy rooted in relationships aimed at leveling the global playing field for all, with favoritism towards none will be routinely tested. As demand for U.S. customer swap clearing evolves and risk neither contemplated nor captured by the dual 20 percent criteria of the substantial risk threshold emerges, the CFTC's commitments to transparency, ongoing monitoring and market surveillance, preservation of customer protections, and coordination with home country regulators must not fall by the wayside.

I am encouraged by the Commission's efforts to take a leading role in injecting greater international coordination and mutual respect and deference into the supervision of DCOs, the majority of which operate on a cross-border basis. Inasmuch as the CFTC's registration of non-U.S. DCOs with alternative compliance is an expression of the CFTC's efforts to engage foreign regulators in establishing reciprocity regarding DCO supervision and regulatory oversight, delivering on comity should not overtake fulfilling the core purposes under the CEA, particularly in regard to the avoidance of systemic risk and protection of market participants. The decisions we make as a Commission, whether driven by policy, statute, regulatory agenda—or even budget—impact and alter risk profiles and interdependencies within the markets we oversee directly and in which U.S. persons participate. Our markets facilitate both the creation and management of risks in an interconnected web of systems and operations. It is critical that in all of our undertakings, we consider how our actions alter the landscape and ensure to the greatest extent possible that we build end-to-end resilience into the overall financial system.

Appendix 5—Statement of Commissioner Dan M. Berkovitz

I support today's final rule permitting derivative clearing organizations (''DCOs'') organized outside of the United States (''non-U.S. DCOs'') to register with the Commission and provide clearing to U.S. customers, yet comply with certain DCO Core Principles through their home country regulatory regime. This final rule maintains the Commission's authority to protect U.S. customers and markets, while also recognizing the interests of foreign regulators in supervising DCOs located in their home jurisdictions. It will foster U.S. market participants' access to foreign clearing organizations while maintaining key customer protections.

This rule is being adopted in furtherance of the Commission's work with our international colleagues to, where appropriate, mutually recognize third-country central counterparties. International comity was a key pillar of the 2009 G20 Pittsburgh Summit and effective cooperation among financial regulators bolsters the safety and utility of our global derivatives markets. Central clearing is critical to managing risk throughout our financial markets, but can only be fully achieved where international regulators work together toward a common goal. This rule is consistent with the spirit of the CFTC–EU Common Approach [1] regarding requirements for central counterparties, and builds upon the EU equivalence determination [2] and the CFTC comparability determination,[3] issued in connection with the Common Approach.

For a non-U.S. DCO that would like to clear only swaps for U.S. persons and does not pose ''substantial risk to the U.S. financial system,'' the final rule would provide two options for CFTC registration. The non-U.S. DCO may apply for DCO registration through the normal course and be subject to all Commission regulations applicable to DCOs. In the alternative, if the non-U.S. DCO is in good regulatory standing with its home country, it may apply for registration by relying in large part on its home country regime, provided it can demonstrate that the regime satisfies certain DCO Core Principles. The non-U.S. DCO will still be required to comply with CFTC regulations that provide critical protections to U.S. customers and markets. The home country regulator must have a memorandum of understanding with the Commission that includes provisions for information sharing and cooperation, so that the Commission may evaluate initial and continued eligibility for registration. The goal is to encourage registration with the Commission, which enhances our oversight and maintains certain important safeguards, while providing greater clearing options for U.S. market participants.

Non-U.S. DCOs subject to registration under this alternative path will still need to clear swaps for U.S. customers through registered futures commission merchants. Accordingly, they will be required to fully comply with the requirements under Commission Regulation 39.15 covering treatment of funds, swap data reporting requirements in part 45 of the Commission's regulations, certain ongoing and event-specific reporting requirements, and the segregation requirements of Commodity Exchange Act (''CEA'') section 4d(f)(2) and related regulations. In addition, a non-U.S. DCO is required to comply with CEA section 39.51(c)(2), which requires it to provide notice to the Commission upon the occurrence of certain important regulatory events. These events include any change in its home country regime or registration status, an examination report or notice of enforcement action issued by a home country regulator, the default of a clearing member, or any action taken by the non-U.S. DCO against any U.S. clearing member.

Only non-U.S. DCOs that do not pose substantial risk to the U.S. financial system will be eligible for registration with alternative compliance. A non-U.S. DCO that poses substantial risk to the U.S. financial system will still be required to comply with the CEA and all Commission regulations applicable to DCOs, including all of subparts A and B of Part 39, in the same manner as a domestic DCO.

The final rule defines ''substantial risk'' to mean that (i) the non-U.S. DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (ii) 20 percent or more of the initial margin requirements for swaps at the non-U.S. DCO is attributable to U.S. clearing members. Despite being characterized as a risk-based test, this is in fact more in the nature of an activity-based test. I believe an activity-based test is appropriate as a proxy in this instance, as it represents a transparent, objective, and relatively easy-to-measure benchmark. The 20/20 test, however, may not always accurately measure when the risk to the U.S. financial system presented by the non-U.S. DCO becomes ''substantial.'' Accordingly, the Commission will retain the discretion to evaluate other factors in determining whether a non-U.S. DCO poses substantial risk to the U.S. financial system.

I thank the staff of the Division of Clearing and Risk for their work in finalizing this rule. I also would like to recognize the staff in the Office of International Affairs, the Chairman's office, and the New York regional office for their hard and productive work over the past few years with our international counterparts. These efforts to promote harmonization and mutual recognition have provided the foundation for today's rulemaking.

---

[1] The U.S. Commodity Futures Trading Commission and the European Commission: Common Approach for Transatlantic CCPs (Feb. 10, 2016), at *https://www.cftc.gov/PressRoom/PressReleases/cftc_euapproach021016.*

[2] *See* European Commission adopts equivalence decision for CCPs in USA (Mar. 15, 2016), at *https://ec.europa.eu/commission/presscorner/detail/en/IP_16_807.*

[3] Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016).

Appendix 6—Regulatory Compliance Demonstration for an EU-Based Applicant for Registration Subject to Compliance With the Core Principles Applicable to Derivatives Clearing Organizations in Accordance With Subpart D of Part 39

I. Introduction

Section 5b(a) of the Commodity Exchange Act (CEA) provides that a clearing organization may not ''perform the functions of a derivatives clearing organization'' (DCO) with respect to futures or swaps unless the clearing organization is registered with the Commission.[1] The CEA further requires that, to register and maintain registration as a DCO, a DCO must comply with each of the core principles applicable to DCOs set forth in the CEA (DCO Core Principles) and any requirement that the Commission imposes by rule or regulation.[2] The Commission adopted the regulations in subpart B of part 39 of the Commission's regulations (part 39) to implement the DCO Core Principles.[3] Subpart B of part 39 sets forth most of the requirements applicable to DCOs.

The Commission has adopted amendments to its regulations that will permit qualifying DCOs organized outside of the United States to be registered with the Commission yet comply with the DCO Core Principles through compliance with their home country regulatory regime, subject to certain conditions and limitations. Under this regime, an option now available to non-U.S. DCOs that clear only swaps for U.S. persons and meet other qualifying criteria, a non-U.S. DCO may demonstrate compliance with the DCO Core Principles by complying with the applicable legal requirements in its home country in lieu of many of the provisions of part 39.

To provide a meaningful framework for deference to home country regulators, the Commission has determined to limit the universe of applicable regulations that it imposes upon non-U.S. DCOs in this context to those that provide critical protections, such as those related to customer protection. Registered DCOs subject to compliance with the DCO Core Principles in accordance with subpart D of part 39 (subpart D compliance) are required by the CEA to comply with each DCO Core Principle, and other specified requirements—but not to all of the provisions set forth in part 39—in order to be registered and to maintain registration. In all cases, these DCOs must still comply with home country requirements that constitute compliance with the DCO Core Principles, which the Commission's regulations were intended to implement.

A DCO subject to subpart D compliance remains a registered DCO pursuant to section 5b(a) of the CEA. A non-U.S. DCO would be eligible for this subpart D compliance regime if, among other things, the Commission determines that the DCO's compliance with its home country regulatory regime would satisfy the DCO Core Principles.[4] As discussed in the release, an applicant for registration subject to subpart D compliance, or a currently registered DCO seeking to avail itself of this regime, would be required to file only certain exhibits of Form DCO, including a regulatory compliance chart in which the applicant would identify the applicable legal requirements[5] in its home country that correspond with each DCO Core Principle and explain how the applicant satisfies those home country requirements. If the application is approved by the Commission, the DCO would be permitted to comply with its home country regulatory regime rather than part 39, with certain exceptions and subject to potential conditions that the Commission may determine appropriate.[6]

Central counterparties (CCPs) authorized in the European Union (EU) are subject to the legal requirements set forth in the European Market Infrastructure Regulation (EMIR),[7] the Regulatory Technical Standards (RTS), and the Settlement Finality Directive[8] (collectively, the EMIR Framework). The EMIR Framework establishes uniform legal requirements for EU CCPs that, as EU-level legislation, have an immediate, binding, and direct effect in all EU member states without the need for additional action by national authorities.[9] The European Parliament and the European Council passed EMIR on July 4, 2012, and it entered into force on August 16, 2012. The relevant technical standards for CCPs referenced herein include the RTS for CCPs (RTS–CCP), which generally entered into force on March 15, 2013.[10]

In 2016, the Commission undertook a review of the legal requirements applicable to CCPs authorized in the EU as compared with the Commission's regulations (EU Comparability Determination).[11] The EU Comparability Determination compared part 39 regulations with EU regulations and identified those instances where the requirements are so similar that compliance with the part 39 regulation(s) would constitute compliance with the EU regulation(s) as well. Unless any of the regulations included in the determination have been amended or repealed, the Commission's determination stands. Given the Commission's previous review in the EU Comparability Determination, the Commission has further endeavored to identify the legal requirements in the EU that appear to correspond to the DCO Core Principles.[12]

Since the publication of the Commission's EU Comparability Determination covering the EMIR Framework, both the U.S. and EU CCP supervisory frameworks have continued to evolve. On October 23, 2019, the European Parliament and the European Council adopted a substantial set of amendments to EMIR as to the authorization of CCPs in the EU and requirements for the recognition of non-EU (or third country) CCPs to operate in the EU (EMIR 2.2).[13] EMIR 2.2 entered into force on January 1, 2020. In establishing a more deferential framework through the subpart D compliance regime, and in recognition of the decades of supervisory experience the Commission has regarding non-U.S. DCOs (including with respect to compliance with the Commission's regulations and their applicable home country regulations), the Commission sees merit to this demonstration to provide further transparency and clarity to market participants, including DCOs that are dually registered with the Commission and authorized by the European Securities and Markets Authority.

The analysis set forth below presents the DCO Core Principles and the corresponding provisions of the EMIR Framework. The descriptions provided herein of the DCO Core Principles and the corresponding provisions of the EMIR Framework are summaries of the actual provisions. Statements of regulatory objectives are general in nature and provided only for purposes of this Appendix. Likewise, the discussion below identifies provisions of the EMIR Framework that correspond to the DCO Core Principles. There may be aspects that are not cited, including particular features

[1] 7 U.S.C. 7a–1(a).

[2] 7 U.S.C. 7a–1(c)(2)(A)(i).

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

[4] The Commission notes that the home country regulatory regime would not need to satisfy the Commission's regulations under part 39.

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

[6] Because a DCO subject to subpart D compliance would clear swaps for customers through registered futures commission merchants, the DCO would be required to fully comply with the Commission's customer protection requirements, including those under § 39.15 covering treatment of funds, as well as the swap data reporting requirements in part 45 of the Commission's regulations.

[7] Regulation (EU) No 648/2012 of the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories of 4 July 2012.

[8] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

[9] *See* EMIR (stating that ''[t]his Regulation shall be binding in its entirety and directly applicable in all Member States.'').

[10] Commission Delegated Regulation No. 153/2013 with regard to regulatory technical standards on requirements for central counterparties. For purposes of this Appendix, the Commission considered only those EMIR Framework provisions published as of the date of this Appendix.

[11] Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016).

[12] The Commission offers this as a potential aid to guide applicants in completing the regulatory compliance chart as part of an application for registration subject to subpart D compliance. While the charts, provided in this Appendix as non-binding guidance that does not create new rights or obligations, may be used to assist applicants in identifying and citing to EU legal requirements that correspond to specific DCO Core Principles, applicants are nevertheless responsible for completing another compulsory element of the regulatory compliance chart, *i.e.,* explaining how they satisfy each requirement. Applicants may submit the required regulatory compliance chart using a different format.

[13] Regulation (EU) No 2019/2099, 23 Oct. 2019, of the European Parliament and the Council, amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, 2019 O.J. (L322) 1.

that may not be comparable, but that may not affect the overall determination with respect to that provision or set of provisions. Furthermore, the Commission relied on the plain language of the EMIR Framework; the Commission recognizes that there may be interpretations of the EMIR Framework or other applicable laws that could impact the Commission's determination. To the extent that the EMIR Framework lacks legal requirements that correspond to certain DCO Core Principles, as identified herein, the Commission may, in its discretion, grant or amend registration subject to conditions that would address those DCO Core Principles.

II. Regulatory Compliance Demonstration

A. Compliance (DCO Core Principle A)

DCO Core Principle A requires a DCO to comply with each DCO Core Principle and any requirement that the Commission may impose by rule or regulation, provided that a DCO shall have reasonable discretion in establishing the manner by which it complies with each DCO Core Principle. The Commission adopted the requirements in § 39.10 to implement DCO Core Principle A.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle A.

EMIR, Art. 26(2): A CCP shall adopt policies and procedures which are sufficiently effective so as to ensure compliance with EMIR, including compliance of its managers and employees with all the provisions of EMIR.

RTS–CCP, Art. 5: A CCP shall establish, implement, and maintain adequate policies and procedures designed to detect any risk of failure by the CCP and its employees to comply with its obligations under this RTS and EMIR, as well as the associated risks, and put in place adequate measures and procedures designed to minimize such risk.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle A.

TABLE A—COMPLIANCE

Subject area	DCO core principle	EMIR framework
Compliance	A	EMIR, Art. 26(2); RTS–CCP, Art. 5.

B. Financial Resources (DCO Core Principle B)

DCO Core Principle B requires a DCO to: (1) Have adequate financial, operational, and managerial resources to discharge each of its responsibilities; and (2) possess financial resources that, at a minimum, exceed the total amount that would: (a) Enable the DCO to meet its financial obligations to its members and participants notwithstanding a default by the member or participant creating the largest financial exposure for the DCO in extreme but plausible market conditions; and (b) enable the DCO to cover its operating costs for a period of one year, as calculated on a rolling basis. The Commission adopted the requirements in § 39.11 to implement DCO Core Principle B.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle B.

EMIR, Art. 43: At all times, a CCP shall maintain sufficient prefunded available financial resources to enable the CCP to withstand the default of at least the two clearing members to which it has the largest exposure under extreme but plausible market conditions.

EMIR, Art. 16(2): A CCP's capital, including retained earnings and reserves, shall be proportionate to the risk stemming from the activities of the CCP.

EMIR, Art. 44(1): At all times, a CCP shall have access to adequate liquidity to perform its services and activities and, on a daily basis, shall measure its potential liquidity needs.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle B, as they set standards to ensure that DCOs have adequate financial resources. These standards seek to ensure that DCOs can meet their financial obligations to market participants, thus contributing to the financial integrity of the derivatives market as a whole.

TABLE B—FINANCIAL RESOURCES

Subject area	DCO core principle	EMIR framework
Default financial resources	B	EMIR, Art. 43.
General business risks		EMIR, Art. 16(2).
Liquidity of financial resources		EMIR, Art. 44(1).

C. Participant and Product Eligibility (DCO Core Principle C)

DCO Core Principle C requires a DCO to: (1) Establish appropriate admission and continuing eligibility standards (including sufficient financial resources and operational capacity to meet obligations arising from participation in the DCO) for members of, and participants in, the DCO; (2) establish appropriate standards for determining eligibility of agreements, contracts, or transactions submitted to the DCO for clearing; and (3) establish and implement procedures to verify, on an ongoing basis, compliance with the DCO's participation and membership requirements, which must be objective, be publicly disclosed, and permit fair and open access. The Commission adopted the requirements in § 39.12 to implement DCO Core Principle C.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle C.

EMIR, Art. 37(1): A CCP shall establish, where relevant per type of product cleared, the categories of admissible clearing members and the admission criteria, upon the advice of the risk committee. Such criteria shall be non-discriminatory, transparent, and objective so as to ensure fair and open access to the CCP and shall ensure that clearing members have sufficient financial resources and operational capacity to meet the obligations arising from participation in a CCP. Criteria that restrict access shall be permitted only to the extent that their objective is to control the risk for the CCP.

EMIR, Art. 37(2): A CCP shall ensure that the application of the criteria referred to in Article 37(1) of EMIR is met on an ongoing basis and shall have timely access to the information relevant for such assessment. A CCP shall conduct, at least once a year, a comprehensive review of compliance with this Article by its clearing members.

EMIR, Art. 37(3): Clearing members that clear transactions on behalf of their clients shall have the necessary additional financial resources and operational capacity to perform this activity. The CCP's rules for clearing members shall allow it to gather relevant basic information to identify, monitor, and manage relevant concentrations of risk relating to the provision of services to clients. Clearing members shall, upon request, inform the CCP about the criteria and arrangements they adopt to allow their clients to access the services of the CCP. Responsibility for ensuring that clients comply with their obligations shall remain with clearing members.

EMIR, Art. 37(4): A CCP shall have objective and transparent procedures for the suspension and orderly exit of clearing members that no longer meet the criteria referred to in Article 37(1) of EMIR.

EMIR, Art. 37(5): A CCP may only deny access to clearing members meeting the criteria referred to in Article 37(1) of EMIR where duly justified in writing and based on a comprehensive risk analysis.

EMIR, Art. 7(1): A CCP that has been authorized to clear over-the-counter derivatives contracts shall accept clearing such contracts on a non-discriminatory and transparent basis, including as it relates to collateral requirements and fees related to access, regardless of the trading venue. A CCP may require that a trading venue comply with the operational and technical requirements established by the CCP, including the risk-management requirements.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would substantially satisfy DCO Core Principle C. While EMIR Art. 7(1) sets forth a standard for eligibility of transactions and permits the CCP to require that the trading venue offering the products meet requirements that the CCP has established, the EMIR Framework does not specifically require a CCP to establish standards for determining eligibility of agreements, contracts, or transactions submitted to it for clearing. Therefore, an applicant would be required to explain how it will satisfy this aspect of DCO Core Principle C nevertheless.

TABLE C—PARTICIPANT AND PRODUCT ELIGIBILITY

Subject area	DCO core principle	EMIR framework
Eligibility standards and ongoing requirements for members and participants.	C	EMIR, Art. 37(1)–(5).
Standards for determining eligibility of contracts submitted for clearing.		EMIR, Art. 7(1).

D. Risk Management (DCO Core Principle D)

DCO Core Principle D requires a DCO to: (1) Ensure that it possesses the ability to manage the risks associated with discharging its responsibilities through the use of appropriate tools and procedures; (2) measure and monitor its credit exposures to each clearing member daily; (3) through margin requirements and other risk control mechanisms, limit its exposure to potential losses from a clearing member default; (4) require sufficient margin from its clearing members to cover potential exposures in normal market conditions; and (5) use risk-based models and parameters in setting margin requirements and review them on a regular basis. The Commission adopted the requirements in § 39.13 to implement DCO Core Principle D.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle D.

RTS–CCP, Art. 4(1): A CCP shall have a sound framework for the comprehensive management of all material risks to which it is or may be exposed. A CCP shall establish documented policies, procedures, and systems that identify, measure, monitor, and manage such risks. In establishing risk management policies, procedures, and systems, a CCP shall structure them in a way to ensure that clearing members properly manage and contain the risks they pose to the CCP.

RTS–CCP, Art. 4(3): A CCP shall develop appropriate risk management tools to be in a position to manage and report on all relevant risks.

EMIR, Art. 40: A CCP shall measure and assess its liquidity and credit exposures to each clearing member on a near to real-time basis.

RTS–CCP, Art. 4(5): A CCP shall employ robust information and risk-control systems to provide the CCP and, where appropriate, its clearing members and, where possible, clients with the capacity to obtain timely information and to apply risk management policies and procedures appropriately. These systems shall ensure at least that credit and liquidity exposures are monitored continuously at the CCP level as well as at the clearing member level and, to the extent practicable, at the client level.

EMIR, Art. 41(1): A CCP shall impose, call, and collect margins to limit its credit exposures from its clearing members. Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. A CCP shall regularly monitor and, if necessary, revise the level of its margins to reflect current market conditions taking into account any potentially procyclical effects of such revisions.

EMIR, Art. 48(2): A CCP shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member's positions does not disrupt its operations or expose non-defaulting clearing members to losses that they cannot anticipate or control.

EMIR, Art. 41(4): A CCP shall call and collect margins that are adequate to cover the risk stemming from the positions registered in each account kept in accordance with Article 39 of EMIR with respect to specific financial instruments.

EMIR, Art. 41(2): A CCP shall adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared and take into account the interval between margin collections, market liquidity, and the possibility of changes over the duration of the transaction. The models and parameters shall be validated by the competent authority.

EMIR, Art. 49(1): A CCP shall regularly review the models and parameters adopted to calculate its margin requirements, default fund contributions, collateral requirements, and other risk control mechanisms. It shall subject the models to rigorous and frequent stress tests to assess their resilience in extreme but plausible market conditions and shall perform back tests to assess the reliability of the methodology adopted.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle D. Both regimes require that a DCO have a comprehensive framework for risk management, the ability to measure and monitor its credit exposures, mechanisms to limit its potential exposure to clearing member default, sufficient margin coverage, and use of risk-based models that are regularly reviewed.

TABLE D—RISK MANAGEMENT

Subject area	DCO core principle	EMIR framework
Management of risks	D	RTS–CCP, Art. 4(1), 4(3).
Monitoring of credit exposures		EMIR, Art. 40; RTS–CCP, Art. 4(5).
Limiting exposure to clearing member default		EMIR, Art. 41(1), 41(4), 48(2).
Sufficiency of margin requirements		EMIR, Art. 41(4).
Use of risk-based models		EMIR, Art. 41(2), 49(1).

E. Settlement Procedures (DCO Core Principle E)

DCO Core Principle E requires a DCO to: (1) Complete money settlements on a timely basis, but not less frequently than once each business day; (2) employ money settlement arrangements to eliminate or strictly limit the DCO's exposure to settlement bank risks; (3) ensure that money settlements are final when effected; (4) maintain an accurate record of the flow of funds associated with each money settlement; (5) possess the ability to comply with each term and condition of any permitted netting or offset arrangement with any other DCO; and (6) regarding physical settlements, establish rules that clearly state the obligations of the DCO with respect to physical deliveries, while ensuring that each risk arising from any such obligation is identified and managed. The Commission adopted the requirements in § 39.14 to implement DCO Core Principle E.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle E.

EMIR, Art. 41(3): A CCP shall call and collect margins on an intraday basis, at least when predefined thresholds are exceeded.

Settlement Finality Directive, Art. 3: Transfer orders used to transfer financial instruments and payments must be finally settled, regardless of whether the sending participant has become insolvent or the transfer orders have been revoked in the meantime.

EMIR, Art. 50(1): A CCP shall, where practical and available, use central bank money to settle its transactions. Where central bank money is not used, steps shall be taken to strictly limit cash settlement risks.

EMIR, Art. 50(3): Where a CCP has an obligation to make or receive deliveries of financial instruments, it shall eliminate principal risk through the use of delivery-versus-payment mechanisms to the extent possible.

RTS–CCP, Art. 4(2): A CCP shall take an integrated and comprehensive view of all relevant risks. These shall include the risks it bears from and poses to settlement banks.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle E. Both regimes require a DCO to have procedures designed to reduce the risk exposure to settlement banks or otherwise attributable to settlement, including through the frequent collection of margin, and require that money settlements are final when effected.

TABLE E—SETTLEMENT PROCEDURES

Subject area	DCO core principle	EMIR framework
Settlement procedures	E	EMIR, Art. 41(3), 50(1), 50(3); RTS–CCP, Art. 4(2).
Settlement finality		Settlement Finality Directive, Art. 3.

F. Treatment of Funds (DCO Core Principle F)

DCO Core Principle F requires a DCO to: (1) Establish standards and procedures that are designed to protect and ensure the safety of member and participant funds and assets; (2) hold such funds and assets in a manner that would minimize the risk of loss or of delay in the DCO's access to the funds and assets; and (3) hold such funds and assets invested by the DCO in instruments with minimal credit, market, and liquidity risks. The Commission adopted the requirements in § 39.15 to implement DCO Core Principle F.

Unlike other Commission requirements discussed herein, a DCO subject to subpart D compliance would be required to comply with the Commission's customer protection requirements, including DCO Core Principle F and the Commission's regulations thereunder. The EMIR Framework seeks to achieve the same outcome of protecting customers by requiring, for example: That a CCP keep separate records and accounts to enable it to distinguish the assets and positions held for the account of one clearing member from the assets and positions held for the account of any other clearing member and from its own assets; [14] that a clearing member keep separate records and accounts that enable it to distinguish its own assets and positions from the assets and positions held for the account of its clients at the CCP; [15] and that a CCP invest its financial resources only in cash or highly liquid financial instruments with minimal market and credit risk.[16] However, because a DCO subject to subpart D compliance would clear swaps for U.S. customers, the DCO would be held to the Commission's customer protection requirements. Therefore, an applicant would not be required to identify the applicable legal requirements in its home country that would satisfy DCO Core Principle F; however, the applicant would be required to explain how it will satisfy DCO Core Principle F and the Commission's regulations thereunder.

G. Default Rules and Procedures (DCO Core Principle G)

DCO Core Principle G requires a DCO to: (1) Have rules and procedures designed to allow for the efficient, fair, and safe management of events when members or participants become insolvent or otherwise default on their obligations to the DCO; (2) clearly state its default procedures; (3) make its default rules publicly available; and (4) ensure that it may take timely action to contain losses and liquidity pressures, and to continue meeting each of its obligations. The Commission adopted the requirements in § 39.16 to implement DCO Core Principle G.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle G.

EMIR, Art. 48(1): A CCP shall have detailed procedures in place to be followed where a clearing member does not comply with the participation requirements of the CCP within the time limit and in accordance with the procedures established by the CCP. The CCP shall set out in detail the procedures to be followed in the event the default of a clearing member is not declared by the CCP. Those procedures shall be reviewed annually.

EMIR, Art. 48(2): A CCP shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member's positions does not disrupt its operations or expose the non-defaulting clearing members to losses that they cannot anticipate or control.

EMIR, Art. 48(4): A CCP shall verify that its default procedures are enforceable. It shall take all reasonable steps to ensure that it has the legal powers to liquidate the proprietary positions of the defaulting clearing member and to transfer or liquidate the clients' positions of the defaulting clearing member.

RTS–CCP, Art. 61(2): A CCP shall make available to the public key aspects of its default procedures, including: (a) The circumstances in which action may be taken; (b) who may take those actions; (c) the scope of the actions which may be taken, including the treatment of both proprietary and client positions, funds and assets; (d) the mechanisms to address a CCP's obligations to non-defaulting clearing members; and (e) the mechanisms to help address the defaulting clearing member's obligations to its clients.

RTS–CCP, Art. 10(1)(b)(i): A CCP shall make its default management procedures available to the public.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle G. Both regimes require a DCO to have procedures to follow in the event of a default and public disclosure of such procedures. These standards seek to ensure that DCOs may take timely action to contain losses and liquidity pressures and to continue meeting their obligations.

[14] EMIR, Art. 39(1).

[15] EMIR, Art. 39(4).

[16] EMIR, Art. 47(1).

TABLE G—DEFAULT RULES AND PROCEDURES

Subject area	DCO core principle	EMIR framework
Default rules and procedures	G	EMIR, Art. 48(1), 48(4); RTS–CCP, Art. 61(2), 10(1)(b)(i).
Ability to contain losses		EMIR, Art. 48(2).

H. Rule Enforcement (DCO Core Principle H)

DCO Core Principle H requires a DCO to: (1) Maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with its rules and for resolution of disputes; (2) have the authority and ability to discipline, limit, suspend, or terminate a clearing member's activities for violations of those rules; and (3) report to the Commission regarding rule enforcement activities and sanctions imposed against members and participants. The Commission adopted the requirements in § 39.17 to implement DCO Core Principle H.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle H.

EMIR, Art. 36(2): A CCP shall have accessible, transparent, and fair rules for the prompt handling of complaints.

EMIR, Art. 37(4): A CCP shall have objective and transparent procedures for the suspension and orderly exit of clearing members that no longer meet the CCP's participation requirements.

EMIR, Art. 38(5): A CCP shall publicly disclose any breaches by clearing members of the CCP's participation requirements.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle H. Because participation requirements generally include ongoing compliance with a DCO's rules, both regimes require procedures to discipline clearing members that do not follow the DCO's rules, including through suspension or termination. Both regimes also require a DCO to have adequate dispute resolution mechanisms.

A DCO subject to subpart D compliance would be required to comply with § 39.51(c)(2)(vii), which requires a DCO to provide notice of any action that it has taken against a U.S. clearing member. Therefore, an applicant would not be required to identify the applicable legal requirements in its home country that would satisfy DCO Core Principle H's requirement that a DCO report to the Commission regarding rule enforcement activities and sanctions imposed against members and participants; however, the applicant would be required to explain how it will satisfy § 39.51(c)(2)(vii).

TABLE H—RULE ENFORCEMENT

Subject area	DCO core principle	EMIR framework
Rule enforcement	H	EMIR, Art. 36(2), 37(4), 38(5).

I. System Safeguards (DCO Core Principle I)

DCO Core Principle I requires a DCO to: (1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through appropriate controls, procedures, and automated systems, that are reliable, secure, and have adequate scalable capacity; (2) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for the timely recovery and resumption of the DCO's operations and the fulfillment of each of its obligations and responsibilities; and (3) periodically conduct tests to verify that the DCO's backup resources are sufficient to ensure daily processing, clearing, and settlement. The Commission adopted the requirements in § 39.18 to implement DCO Core Principle I.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle I.

EMIR, Art. 26(6): A CCP shall maintain information technology systems adequate to deal with the complexity, variety, and type of services and activities performed so as to ensure high standards of security and the integrity and confidentiality of the information maintained.

RTS–CCP, Art. 9(1): A CCP shall design and ensure that its information technology systems are reliable, secure, and capable of processing the information necessary for the CCP to perform its activities and operations in a safe and efficient manner. The systems shall be designed to deal with the CCP's operational needs and the risks the CCP faces; resilient, including in stressed market conditions; and scalable, if necessary, to process additional information. The CCP shall provide for procedures and capacity planning as well as for sufficient redundant capacity to allow the system to process all remaining transactions before the end of the day in circumstances where a major disruption occurs.

RTS–CCP, Art. 9(2): A CCP must base its information technology systems on internationally recognized technical standards and industry best practices.

RTS–CCP, Art. 9(3): A CCP must maintain a robust information security framework that appropriately manages its information security risk, including policies to protect information from unauthorized disclosure, ensure data accuracy and integrity, and guarantee the availability of the CCP's services.

EMIR, Art. 34(1): A CCP shall establish, implement, and maintain an adequate business continuity policy and disaster recovery plan aimed at ensuring the preservation of its functions, the timely recovery of operations and the fulfillment of the CCP's obligations. Such a plan shall at least allow for the recovery of all transactions at the time of disruption to allow the CCP to continue to operate with certainty and to complete settlement on the scheduled date.

RTS–CCP, Art. 19(1): A CCP shall have in place arrangements to ensure continuity of its critical functions based on disaster scenarios. These arrangements shall at least address the availability of adequate human resources, the maximum downtime of critical functions, and fail over and recovery to a secondary site.

RTS–CCP, Art. 20(1): A CCP shall test and monitor its business continuity policy and disaster recovery plan at regular intervals and after significant modifications or changes to the systems or related functions to ensure the business continuity policy achieves the stated objectives, including the two hour maximum recovery time objective. Tests shall be planned and documented.

RTS–CCP, Art. 20(2): Testing of the business continuity policy and disaster recovery plan shall fulfill the following conditions: (a) Involve scenarios of large scale disasters and switchovers between primary and secondary sites; and (b) include involvement of clearing members, external providers and relevant institutions in the financial infrastructure with which interdependencies have been identified in the business continuity policy.

RTS–CCP, Art. 21(1), (2): A CCP shall regularly review and update its business continuity policy to include all critical functions and the most suitable recovery strategy for them, and shall regularly review and update its disaster recovery plan to include the most suitable recovery strategy for all critical functions.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle I. Requirements under both regimes are intended to ensure that a DCO has appropriate procedures and controls for the reliability, security, and capacity of its automated systems; has a plan for disaster recovery and the ability to resume operations and meet all of its obligations; and conducts tests to verify that the DCO's backup resources are sufficient.

TABLE I—SYSTEM SAFEGUARDS

Subject area	DCO core principle	EMIR framework
Identify and minimize operational risks through appropriate controls, procedures and automated systems.	I	EMIR, Art. 26(6); RTS–CCP, Art. 9(1), 9(2), 9(3).
Emergency procedures, backup facilities, and disaster recovery plan.		EMIR, Art. 34(1); RTS–CCP, Art. 19(1).
Periodic testing of sufficiency of backup resources		RTS–CCP, Art. 20(1), 20(2), 21(1), 21(2).

J. Reporting (DCO Core Principle J)

DCO Core Principle J requires a DCO to provide to the Commission all information necessary for the Commission to conduct oversight of the DCO. The Commission adopted the requirements in § 39.19 to implement DCO Core Principle J.

Relevant EU Laws and Regulations: The following provision of the EMIR Framework appears to correspond to DCO Core Principle J.

RTS–CCP, Para. 16: To carry out its duties effectively, the relevant competent authority should be provided with access to all necessary information to determine whether the CCP is in compliance with its conditions of authorization. Such information should be made available by the CCP without undue delay.

Conclusion: A DCO's compliance with the cited provision of the EMIR Framework would satisfy DCO Core Principle J. Both regimes require a DCO to provide all information necessary to enable the regulator to conduct oversight of the DCO.

TABLE J—REPORTING

Subject area	DCO core principle	EMIR framework
Reporting	J	RTS–CCP, Para. 16.

K. Recordkeeping (DCO Core Principle K)

DCO Core Principle K requires a DCO to maintain records of all activities related to its business as a DCO in a form and manner acceptable to the Commission for a period of not less than five years. The Commission adopted the requirements in § 39.20 to implement DCO Core Principle K.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle K.

EMIR, Art. 29(1): A CCP shall maintain, for a period of at least 10 years, all the records on the services and activity provided so as to enable the competent authority to monitor the CCP's compliance with EMIR, and shall make such records available upon request.

RTS–CCP, Art. 5(2): The rules, procedures and contractual arrangements of the CCP shall be recorded in writing or another durable medium, and shall be accurate, up-to-date, and readily available to the competent authority, clearing members and, where appropriate, clients.

RTS–CCP, Art. 12–16: These provisions set forth general requirements regarding records and specific requirements for transaction records, position records, business records, and records related to reporting to a trade repository.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle K. Both regimes require that the DCO maintain records related to its business activities as a DCO, and the EMIR Framework requires that these records be kept for at least 10 years, which exceeds the minimum period of five years required under DCO Core Principle K.

TABLE K—RECORDKEEPING

Subject area	DCO core principle	EMIR framework
Recordkeeping	K	EMIR, Art. 29(1); RTS–CCP Art. 5(2), 12–16.

L. Public Information (DCO Core Principle L)

DCO Core Principle L requires a DCO to: (1) Provide market participants with sufficient information to enable them to identify and evaluate accurately the risks and costs associated with using the DCO's services; (2) make information concerning the rules and operating and default procedures governing its clearing and settlement systems available to market participants; and (3) disclose publicly and to the Commission information concerning: (a) The terms and conditions of each contract, agreement, and transaction cleared and settled by the DCO; (b) the fees that the DCO charges its members and participants; (c) the DCO's margin-setting methodology, and the size and composition of its financial resource package; (d) daily settlement prices, volume, and open interest for each contract the DCO settles or clears; and (e) any other matter relevant to participation in the DCO's settlement and clearing activities. The Commission adopted the requirements in § 39.21 to implement DCO Core Principle L.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle L.

EMIR, Art. 26(7): A CCP shall make its governance arrangements, the rules governing the CCP, and its admission criteria for clearing membership, publicly available.

EMIR, Art. 38(1): A CCP and its clearing members shall publicly disclose the prices and fees associated with the services provided. They shall disclose the prices and fees of each service provided separately, including discounts and rebates and the conditions to benefit from those reductions.

EMIR, Art. 38(2): A CCP shall disclose to clearing members and clients the risks associated with the services provided.

EMIR, Art. 38(3): A CCP shall disclose to its clearing members and to its competent authority the price information used to calculate its end-of-day exposures to its clearing members. A CCP shall publicly disclose the volumes of the cleared transactions for each class of instruments cleared by the CCP on an aggregated basis.

EMIR, Art. 38(7): A CCP shall provide its clearing members with information on the initial margin models it uses, which shall: (a) Clearly explain the design of the initial margin model and how it operates; (b) clearly describe the key assumptions and limitations of the initial margin model and the circumstances under which those assumptions are no longer valid; and (c) be documented.

RTS–CCP, Art. 10(1): A CCP must make information relating to the following available to the public: (a) Its governance arrangements; (b) its rules (including default procedures, risk management systems, rights and obligations of clearing members and clients, clearing services and rules governing access to the CCP (including admission, suspension and exit criteria for clearing membership), contracts with clearing

members and clients, interoperability arrangements and use of collateral and default fund contributions); (c) eligible collateral and applicable haircuts; and (d) a list of all current clearing members.

RTS–CCP, Art. 61(1): A CCP shall publicly disclose the general principles underlying its models and their methodologies, the nature of tests performed, with a high level summary of the test results and any corrective actions undertaken.

RTS–CCP, Art. 61(2): A CCP shall make available to the public key aspects of its default procedures, including: (a) The circumstances in which action may be taken; (b) who may take those actions; (c) the scope of the actions which may be taken, including the treatment of both proprietary and client positions, funds and assets; (d) the mechanisms to address a CCP's obligations to non-defaulting clearing members; and (e) the mechanisms to help address the defaulting clearing member's obligations to its clients.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle L. Both regimes require disclosure to clearing members and the public of key information regarding the clearing services provided, the costs and risks of such services, the DCO's margin methodology, its financial resources and default procedures, the volume of contracts cleared, and its rules.

TABLE L—PUBLIC INFORMATION

Subject area	DCO core principle	EMIR framework
Disclosure of costs and risks of DCO's services	L	EMIR, Art. 38(1), 38(2).
Disclosure of rules, and operating and default procedures.		EMIR, Art. 26(7); RTS–CCP, Art. 10(1).
Information on cleared transactions, margin methodology, and financial resources.		EMIR, Art. 38(3), 38(7); RTS–CCP, Art. 10(1), 61(1), 61(2).

M. Information Sharing (DCO Core Principle M)

DCO Core Principle M requires a DCO to enter into and abide by the terms of each appropriate and applicable domestic and international information-sharing agreement, and use relevant information obtained from each agreement in carrying out the DCO's risk management program. As set out in § 39.22, the Commission has not adopted specific requirements to further implement DCO Core Principle M; rather, the Commission provides DCOs with discretion in how they meet this DCO Core Principle. Therefore, an applicant for DCO registration subject to subpart D compliance would not need to demonstrate that compliance with its home country requirements would satisfy DCO Core Principle M; however, the applicant would be required to explain how it will satisfy DCO Core Principle M nevertheless.

N. Antitrust Considerations (DCO Core Principle N)

DCO Core Principle N requires a DCO to avoid, unless necessary or appropriate to achieve the purposes of the CEA, adopting any rule or taking any action that results in any unreasonable restraint of trade, or imposing any material anticompetitive burden. As set out in § 39.23, the Commission has not adopted specific requirements to further implement DCO Core Principle N; rather, the Commission provides DCOs with discretion in how they meet this DCO Core Principle. Therefore, an applicant for DCO registration subject to subpart D compliance would not need to demonstrate that compliance with its home country requirements would satisfy DCO Core Principle N; however, the applicant would be required to explain how it will satisfy DCO Core Principle N nevertheless.

O. Governance Fitness Standards (DCO Core Principle O)

DCO Core Principle O requires a DCO to establish governance arrangements that are transparent to fulfill public interest requirements and to permit the consideration of the views of owners and participants. A DCO must also establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the DCO, any other individual or entity with direct access to the settlement or clearing activities of the DCO, and any party affiliated with any of the foregoing individuals or entities. The Commission adopted the requirements in § 39.24 to implement DCO Core Principle O.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle O.

EMIR, Art. 26(1): A CCP shall have robust governance arrangements, which include a clear organizational structure with well-defined, transparent, and consistent lines of responsibility, effective processes to identify, manage, monitor, and report the risks to which it is or might be exposed, and adequate internal control mechanisms, including sound administrative and accounting procedures.

EMIR, Art. 26(7): A CCP shall make its governance arrangements, the rules governing the CCP, and its admission criteria for clearing membership, publicly available.

EMIR, Art. 27(1): The senior management of a CCP shall be of sufficiently good repute and shall have sufficient experience so as to ensure the sound and prudent management of the CCP.

EMIR, Art. 27(2): The members of a CCP's board, including its independent members, shall be of sufficiently good repute and shall have adequate expertise in financial services, risk management, and clearing services.

EMIR, Art. 27(3): A CCP shall clearly determine the roles and responsibilities of the board and shall make the minutes of the board meetings available to the competent authority and auditors.

EMIR, Art. 36(1): When providing services to its clearing members, and where relevant, to their clients, a CCP shall act fairly and professionally in accordance with the best interests of such clearing members and clients and sound risk management.

EMIR, Art. 36(2): A CCP shall have accessible, transparent, and fair rules for the prompt handling of complaints.

RTS–CCP, Art. 3(1): The key components of a CCP's governance arrangements that define its organizational structure as well as clearly specified and well-documented policies, procedures, and processes by which its board and senior management operate shall include the roles and responsibilities of the management, the reporting lines between the senior management and the board, and the processes for ensuring accountability to stakeholders.

RTS–CCP, Art. 3(3): A CCP shall establish lines of responsibility that are clear, consistent, and well-documented.

RTS–CCP, Art. 4(4): The governance arrangements shall ensure that the CCP's board assumes final responsibility and accountability for managing the CCP's risks.

RTS–CCP, Art. 7(1): A CCP shall define the composition, role, and responsibilities of the board and senior management and any board committees. These arrangements shall be clearly specified and well-documented.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle O. Both regimes require fitness standards for directors and others, and both require transparent governance arrangements.

TABLE O—GOVERNANCE FITNESS STANDARDS

Subject area	DCO core principle	EMIR framework
Governance arrangements	O	EMIR, Art. 26(1), 26(7), 27(3), 36(1), 36(2); RTS–CCP, Art. 3(1), 3(3), 4(4), 7(1).
Governance fitness standards		EMIR, Art. 27(1), 27(2).

P. Conflicts of Interest (DCO Core Principle P)

DCO Core Principle P requires a DCO to establish and enforce rules to minimize conflicts of interest in the decision-making process of the DCO, and establish a process for resolving such conflicts of interest. The Commission adopted the requirements in § 39.25 to implement DCO Core Principle P.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle P.

EMIR, Art. 26(5): A CCP shall adopt, implement, and maintain a remuneration policy that promotes sound and effective risk management and does not create incentives to relax risk standards.

EMIR, Art. 27(2): The compensation of the independent and other non-executive members of the board shall not be linked to the business performance of the CCP.

EMIR, Art. 33(1): A CCP shall maintain and operate effective written organizational and administrative arrangements to identify and manage any potential conflicts of interest between itself, including its managers, employees, or any person with direct or indirect control or close links, and its clearing members or their clients known to the CCP. It shall maintain and implement adequate procedures aimed at resolving possible conflicts of interest.

RTS–CCP, Art. 7(5): The arrangements by which the board and senior management operate shall include processes to identify, address, and manage potential conflicts of interest of members of the board and senior management.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle P. Both regimes require a DCO to manage or minimize conflicts of interest and to establish or maintain a process for resolving conflicts of interest.

TABLE P—CONFLICTS OF INTEREST

Subject area	DCO core principle	EMIR framework
Conflicts of interest	P	EMIR, Art. 26(5), 27(2), 33(1); RTS–CCP, Art. 7(5).

Q. Composition of Governing Boards (DCO Core Principle Q)

DCO Core Principle Q requires a DCO to ensure that the composition of its governing board or committee includes market participants, as set out in § 39.26.

Relevant EU Laws and Regulations: The following provision of the EMIR Framework appears to correspond to DCO Core Principle Q.

EMIR, Art. 27(2): A CCP shall have a board. At least one third, but no less than two, of the members of that board shall be independent. Representatives of the clients of clearing members shall be invited to board meetings for certain matters. The members of a CCP's board, including its independent members, shall be of sufficiently good repute and shall have adequate expertise in financial services, risk management, and clearing services.

Conclusion: A DCO's compliance with the cited provision of the EMIR Framework would satisfy DCO Core Principle Q. Both regimes require a DCO to ensure that its board of directors includes members that are independent of the DCO and have market expertise, and that the board receives input from market participants.

TABLE Q—COMPOSITION OF GOVERNING BOARDS

Subject area	DCO core principle	EMIR framework
Composition of governing boards	Q	EMIR, Art. 27(2).

R. Legal Risk (DCO Core Principle R)

DCO Core Principle R requires a DCO to have a well-founded, transparent, and enforceable legal framework for each aspect of its activities. The Commission adopted the requirements in § 39.27 to implement DCO Core Principle R.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle R.

EMIR, Art. 26(2): A CCP shall adopt policies and procedures which are sufficiently effective so as to ensure compliance with EMIR, including compliance of its managers and employees with all the provisions of EMIR.

EMIR, Art. 36(1): When providing services to its clearing members, and where relevant, to their clients, a CCP shall act fairly and professionally in accordance with the best interests of such clearing members and clients and sound risk management.

RTS–CCP, Art. 5(2): A CCP shall ensure that its rules, procedures, and contractual arrangements are clear and comprehensive and they ensure compliance with relevant EU requirements as well as all other applicable regulatory and supervisory requirements. A CCP shall identify and analyze the soundness of the rules, procedures, and contractual arrangements of the CCP.

RTS–CCP, Art. 5(4): A CCP's rules and procedures shall clearly indicate the law that is intended to apply to each aspect of the CCP's activities and operations.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle R. Both regimes require a DCO to have a clear legal framework grounded in the applicable legal and regulatory regime.

TABLE R—LEGAL RISK

Subject area	DCO core principle	EMIR framework
Legal risk	R	EMIR, Art. 26(2), 36(1); RTS–CCP, Art. 5(2), 5(4).

[FR Doc. 2020–21306 Filed 10–20–20; 8:45 am]
BILLING CODE 6351–01–P