

space with its affiliated entities. Accordingly, the Commission believes that it would be reasonable, for purposes of calculating its projected operating costs, for a swap execution facility to prorate any shared expense that the swap execution facility pays for, but only to the extent that such shared expense is actually attributable to the affiliate and for which the swap execution facility is reimbursed. Similarly, a reasonable calculation of a swap execution facility's projected operating costs must include the prorated amount of any expense paid for by an affiliated entity to the extent that the shared expense is attributable to the swap execution facility. In order to prorate a shared expense, the swap execution facility should:

(i) Maintain sufficient documentation that reasonably shows the extent to which the shared expense is attributable to and paid for by the swap execution facility and/or affiliated entity;

(ii) Identify any shared expense in the financial reports that it submits to the Commission; and

(iii) Sufficiently explain why it prorated any shared expense. A swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation methodologies, that reasonably shows how expenses are attributable to, and paid for by, the swap execution facility and/or its affiliated entities to support its determination to prorate an expense.

CORE PRINCIPLE 14 OF SECTION 5H OF THE ACT—SYSTEM SAFEGUARDS [RESERVED]

CORE PRINCIPLE 15 OF SECTION 5H OF THE ACT—DESIGNATION OF CHIEF COMPLIANCE OFFICER

(A) *In general.* Each swap execution facility shall designate an individual to serve as a chief compliance officer.

(B) *Duties.* The chief compliance officer shall:

(1) Report directly to the board or to the senior officer of the facility;

(2) Review compliance with the core principles in this subsection;

(3) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(4) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(5) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 5h of the Act; and

(6) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, inter-

nal or external audit findings, self-reported errors, or through validated complaints.

(C) *Requirements for procedures.* In establishing procedures under paragraph (B)(6) of this section, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(D) *Annual reports*—(1) *In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(i) The compliance of the swap execution facility with the Act; and

(ii) The policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(2) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in clause (1) with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 5h of the Act; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices*—(1) *Qualifications of chief compliance officer.* In determining whether the background and skills of a potential chief compliance officer are appropriate for fulfilling the responsibilities of the role of the chief compliance officer, the swap execution facility has the discretion to base its determination on the totality of the qualifications of the potential chief compliance officer, including, but not limited to, compliance experience, related career experience, training, and any other relevant factors to the position. A swap execution facility should be especially vigilant regarding potential conflicts of interest when appointing a chief compliance officer.

(2) [Reserved]

[78 FR 33582, June 4, 2013, as amended at 78 FR 47154, Aug. 5, 2013; 81 FR 64312, Sept. 19, 2016; 86 FR 9249, Feb. 11, 2021; 89 FR 88622, Nov. 7, 2024]

## PART 38—DESIGNATED CONTRACT MARKETS

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

SOURCE: 66 FR 42277, Aug. 10, 2001, unless otherwise noted.

### Subpart A—General Provisions

#### § 38.1 Scope.

The provisions of this part 38 shall apply to every board of trade that has been designated or is applying to be-

come designated as a contract market under Sections 5 and 6 of the Act. *Provided, however,* nothing in this provision affects the eligibility of designated contract markets to operate under the provisions of parts 37 or 49 of this chapter.

[71 FR 1964, Jan. 12, 2006, as amended at 77 FR 36697, June 19, 2012]

#### § 38.2 Exempt provisions.

A designated contract market, the designated contract market's operator and transactions traded on or through a designated contract market under section 5 of the Act shall comply with all applicable regulations under Title 17 of the Code of Federal Regulations, except for the requirements of § 1.39(b), § 1.44, § 1.53, § 1.54, § 1.59(b) and (c), § 1.62, § 1.63(a) and (b) and (d) through (f), § 1.64, § 1.69, part 8, § 100.1, § 155.2, and part 156.

[77 FR 66343, Nov. 2, 2012]

#### § 38.3 Procedures for designation.

(a) *Application procedures.* (1) A board of trade seeking designation as a contract market must file electronically, in a format and manner specified by the Secretary of the Commission, the Form DCM provided in appendix A of this part, with the Secretary of the Commission at its Washington, DC headquarters at [submissions@cftc.gov](mailto:submissions@cftc.gov) and the Division of Market Oversight at [DMOSubmissions@cftc.gov](mailto:DMOSubmissions@cftc.gov). The Commission will review the application for designation as a contract market pursuant to the 180-day timeframe and procedures specified in section 6(a) of the Act. The Commission shall approve or deny the application or, if deemed appropriate, designate the applicant as a contract market subject to conditions.

(2) The application must include information sufficient to demonstrate compliance with the core principles specified in section 5(d) of the Act. Form DCM consists of instructions, general questions and a list of exhibits (documents, information and evidence) required by the Commission in order to determine whether an applicant is able to comply with the core principles. An application will not be considered to be

materially complete unless the applicant has submitted, at a minimum, the exhibits required in Form DCM. If the application is not materially complete, the Commission shall notify the applicant that the application will not be deemed to have been submitted for purposes of starting the 180-day review period set forth in paragraph (a)(1) of this section.

(3) The applicant must identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of this chapter.

(4) Section 40.8 of this chapter sets forth those sections of the application that will be made publicly available, notwithstanding a request for confidential treatment pursuant to § 145.9 of this chapter.

(5) If any information contained in the application or in any exhibit is or becomes inaccurate for any reason, an amendment to the application or a submission filed under part 40 of this chapter must be filed promptly correcting such information.

(b) *Reinstatement of dormant designation.* Before listing or relisting products for trading, a dormant designated contract market as defined in § 40.1 of this chapter must reinstate its designation under the procedures of paragraphs (a)(1) and (2) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(c) *Delegation of authority.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, upon consultation with the General Counsel or the General Counsel's designee, authority to notify the applicant seeking designation under section 6(a) of the Act that the application is materially incomplete and the running of the 180-day period is stayed.

(2) The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph.

(3) Nothing in this paragraph prohibits the Commission, at its election,

from exercising the authority delegated in paragraph (c)(1) of this section.

(d) *Request for transfer of designation—*  
 (1) *Request for transfer of designation, listed contracts and open interest.* A designated contract market that wants to request the transfer of its designation from its current legal entity to a new legal entity, as a result of a corporate reorganization or otherwise, must file a request with the Commission for approval to transfer the designation, listed contracts and positions comprising all associated open interest. Such request must be filed electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters at [submissions@cftc.gov](mailto:submissions@cftc.gov) and the Division of Market Oversight at [DMOSubmissions@cftc.gov](mailto:DMOSubmissions@cftc.gov).

(2) *Timing of submission.* The request must be filed no later than three months prior to the anticipated corporate change; provided that the designated contract market may file a request with the Commission later than three months prior to the anticipated corporate change if the designated contract market does not know and reasonably could not have known of the anticipated change three months prior to the anticipated corporate change. In such event, the designated contract market shall be required to immediately file the request with the Commission as soon as it knows of such change, with an explanation as to the timing of the request.

(3) *Required information.* The request shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A narrative description of the corporate change, including the reason for the change and its impact on the designated contract market, including its governance and operations, and its impact on the rights and obligations of market participants holding the open interest positions;

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to designated contract markets, and the Commission's regulations thereunder;

(iv) The governing documents of the transferee including, but not limited to, articles of incorporation and by-laws;

(v) The transferee's rules marked to show changes from the current rules of the designated contract market;

(vi) A list of contracts, agreements, transactions or swaps for which the designated contract market requests transfer of open interest;

(vii) A representation by the transferee that it:

(A) Will be the surviving legal entity and successor-in-interest to the transferor designated contract market and will retain and assume, without limitation, all the assets and liabilities of the transferor;

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission's regulations thereunder, including part 38 and Appendices thereto;

(C) Will assume, maintain and enforce all rules implementing and complying with these core principles, including the adoption of the transferor's rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of the Commission's regulations; and

(D) Will comply with all self-regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all self-regulatory programs.

(viii) A representation by the transferee that upon the transfer:

(A) All open interest in all contracts listed on the transferor will be transferred to and represent equivalent open interest in all such contracts listed on the transferee;

(B) It will assume responsibility for and maintain compliance with the core principles for all contracts previously listed for trading through the transferor, whether by certification or approval; and

(C) That none of the proposed rule changes will affect the rights and obligations of any market participant with open positions transferred to it and that the proposed rule changes do not modify the manner in which such contracts are settled or cleared.

(ix) A representation by the transferee that market participants will be notified of all changes to the transferor's rulebook prior to the transfer and will be further notified of the concurrent transfer of the contract market designation, and the related transfer of all listed contracts and all associated open interest, to the transferee upon Commission approval and issuance of an order permitting this transfer.

(4) *Commission determination.* The Commission will review a request as soon as practicable and such request will be approved or denied pursuant to a Commission order and based on the Commission's determination as to the transferee's ability to continue to operate the designated contract market in compliance with the Act and the Commission's regulations thereunder.

(e) *Request for withdrawal of application for designation.* An applicant for designation may withdraw its application submitted pursuant to paragraphs (a)(1) and (2) of this section by filing such a request with the Commission. Such request must be filed electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters, at [submissions@cftc.gov](mailto:submissions@cftc.gov), and the Division of Market Oversight, at [DMOSubmissions@cftc.gov](mailto:DMOSubmissions@cftc.gov). Withdrawal of an application for designation shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the application for designation was pending with the Commission.

(f) *Request for vacation of designation.* A designated contract market may vacate its designation under section 7 of the Act by filing a request electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters at [submissions@cftc.gov](mailto:submissions@cftc.gov) and the Division of Market Oversight at [DMOSubmissions@cftc.gov](mailto:DMOSubmissions@cftc.gov). Vacation of designation shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that

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the facility was designated by the Commission.

[77 FR 36697, June 19, 2012]

### **§ 38.4 Procedures for listing products and implementing contract market rules.**

(a) *Request for Commission approval of rules and products.* (1) An applicant for designation, or a designated contract market, may request that the Commission approve under section 5c(c) of the Act, any or all of its rules and contract terms and conditions, and subsequent amendments thereto, prior to their implementation or, notwithstanding the provisions of section 5c(c)(4) of the Act, at any time thereafter, under the procedures of § 40.3 or § 40.5 of this chapter, as applicable. A designated contract market may label a future, swap or options product in its rules as “Listed for trading pursuant to Commission approval,” if the future, swap or options product and its terms or conditions have been approved by the Commission, and it may label as “Approved by the Commission” only those rules that have been so approved.

(2) Notwithstanding the timeline under §§ 40.3(c) and 40.5(c) of this chapter, the operating rules, and terms and conditions of futures, swaps and option products that have been submitted for Commission approval at the same time as an application for contract market designation or an application under § 38.3(b) of this part to reinstate the designation of a dormant designated contract market, as defined in § 40.1 of this chapter, or while one of the foregoing is pending, will be deemed approved by the Commission no earlier than when the facility is deemed to be designated or reinstated.

(b) *Self-certification of rules and products.* Rules of a designated contract market and subsequent amendments thereto, including both operational rules and the terms or conditions of futures, swaps and option products listed for trading on the facility, not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section, must be submitted to the Commission with a certification that the rule, rule amendment or futures, swap or options product complies with the Act or rules thereunder pursuant to

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the procedures of § 40.6 of this chapter, as applicable. Provided, however, any rule or rule amendment that would, for a delivery month having open interest, materially change a term or condition of a swap or a contract for future delivery in an agricultural commodity enumerated in section 1a(9) of the Act, or of an option on such contract or commodity, must be submitted to the Commission prior to its implementation for review and approval under § 40.4 of this chapter.

(c) An applicant for designation, or a designated contract market, may request that the Commission consider under the provisions of section 15(b) of the Act any of the contract market’s rules or policies, including both operational rules and the terms or conditions of products listed for trading.

[66 FR 42277, Aug. 10, 2001, as amended at 67 FR 62878, Oct. 9, 2002; 77 FR 36698, June 19, 2012]

### **§ 38.5 Information relating to contract market compliance.**

(a) *Requests for information.* Upon request by the Commission, a designated contract market must file with the Commission information related to its business as a designated contract market, including information relating to data entry and trade details, in the form and manner and within the time specified by the Commission in its request.

(b) *Demonstration of compliance.* Upon request by the Commission, a designated contract market must file with the Commission a written demonstration, containing supporting data, information and documents, in the form and manner and within the time specified by the Commission, that the designated contract market is in compliance with one or more core principles as specified in the request, or that is requested by the Commission to show that the designated contract market satisfies its obligations under the Act.

(c) *Equity interest transfers*—(1) *Equity interest transfer notification.* A designated contract market shall file with the Commission a notification of each transaction that the designated contract market enters into involving the transfer of ten percent or more of the

equity interest in the designated contract market.

(2) *Timing of Notification.* The equity transfer notice described in paragraph (1) shall be filed electronically with the Secretary of the Commission at its Washington, DC headquarters at [submissions@cftc.gov](mailto:submissions@cftc.gov) and the Division of Market Oversight at [DMOSubmissions@cftc.gov](mailto:DMOSubmissions@cftc.gov), at the earliest possible time but in no event later than the open of business ten business days following the date upon which the designated contract market enters into a firm obligation to transfer the equity interest.

(3) *Rule filing.* Notwithstanding the foregoing, any aspect of an equity interest transfer described in paragraph (c)(1) of this section that necessitates the filing of a rule as defined in part 40 of this chapter shall comply with the requirements of 5c(c) of the Act and part 40 of this chapter, and all other applicable Commission regulations.

(d) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, the authority set forth in paragraph (b) of this section to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

[77 FR 36698, June 19, 2012]

#### § 38.6 Enforceability.

An agreement, contract or transaction entered into on or pursuant to the rules of a designated contract market shall not be void, voidable, subject to rescission or otherwise invalidated or rendered unenforceable as a result of:

(a) A violation by the designated contract market of the provisions of section 5 of the Act or this part 38; or

(b) Any Commission proceeding to alter or supplement a rule, term or condition under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to

alter, supplement, or require a designated contract market to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

#### § 38.7 Prohibited use of data collected for regulatory purposes.

A designated contract market may not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; provided however, that a designated contract market may use such data or information for business or marketing purposes if the person from whom it collects or receives such data or information clearly consents to the designated contract market's use of such data or information in such manner. A designated contract market, where necessary, for regulatory purposes, may share such data or information with one or more designated contract markets or swap execution facilities registered with the Commission. A designated contract market may not condition access to its trading facility on a market participant's consent to the use of proprietary data or personal information for business or marketing purposes.

[77 FR 36699, June 19, 2012]

#### § 38.8 Listing of swaps on a designated contract market.

(a) A designated contract market that lists for the first time a swap contract for trading on its contract market must, either prior to or at the time of such listing, file with the Commission a written demonstration detailing how the designated contract market is addressing its self-regulatory obligations and is fulfilling its statutory and regulatory obligations with respect to swap transactions.

(b)(1) Prior to listing swaps for trading on or through a designated contract market, each designated contract market must obtain from the Commission a unique, alphanumeric code assigned to the designated contract market by the Commission for the purpose of identifying the designated contract market with respect to unique swap identifier creation. (2) Each designated

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contract market must generate and assign a unique swap identifier at, or as soon as technologically practicable following, the time of execution of the swap, in a manner consistent with the requirements of part 45.

[77 FR 36699, June 19, 2012]

### § 38.9 Boards of trade operating both a designated contract market and a swap execution facility.

(a) A board of trade that operates a designated contract market and that intends to also operate a swap execution facility must separately register, pursuant to the swap execution facility registration requirements set forth in part 37 of this chapter, and on an ongoing basis, comply with the core principles under section 5h of the Act, and the swap execution facility rules under part 37 of this chapter.

(b) A board of trade that operates both a designated contract market and a swap execution facility, and that uses the same electronic trade execution system for executing and trading swaps that it uses in its capacity as a designated contract market, must clearly identify to market participants for each swap whether the execution or trading of such swap is taking place on the designated contract market or on the swap execution facility.

[77 FR 36699, June 19, 2012]

### § 38.10 Reporting of swaps traded on a designated contract market.

With respect to swaps traded on and/or pursuant to the rules of a designated contract market, each designated contract market must maintain and report specified swap data as provided under parts 43 and 45 of this chapter.

[77 FR 36700, June 19, 2012]

### § 38.11 Trade execution compliance schedule.

(a) A swap transaction shall be subject to the requirements of section 2(h)(8) of the Act upon the later of:

(1) The applicable deadline established under the compliance schedule provided under § 50.25(b) of this chapter; or

(2) Thirty days after the available-to-trade determination submission or certification for that swap is, respec-

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tively, deemed approved under § 40.5 of this chapter or deemed certified under § 40.6 of this chapter.

(b) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 2(h)(8) of the Act sooner than as provided in paragraph (a) of this section.

[78 FR 33630, June 4, 2013]

### § 38.12 Process for a designated contract market to make a swap available to trade.

(a)(1) *Required submission.* A designated contract market that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap as a rule, as that term is defined by § 40.1 of this chapter, pursuant to the procedures under part 40 of this chapter.

(2) *Listing requirement.* A designated contract market that makes a swap available to trade must demonstrate that it lists or offers that swap for trading on its trading system or platform.

(b) *Factors to consider.* To make a swap available to trade, for purposes of section 2(h)(8) of the Act, a designated contract market shall consider, as appropriate, the following factors with respect to such swap:

(1) Whether there are ready and willing buyers and sellers;

(2) The frequency or size of transactions;

(3) The trading volume;

(4) The number and types of market participants;

(5) The bid/ask spread; or

(6) The usual number of resting firm or indicative bids and offers.

(c) *Applicability.* (1) Upon a determination that a swap is available to trade on any designated contract market or swap execution facility pursuant to part 40 of this chapter, all other designated contract markets and swap execution facilities shall comply with the requirements of section 2(h)(8)(A) of the Act in listing or offering such swap for trading.

(d) *Removal—(1) Determination.* The Commission may issue a determination that a swap is no longer available to trade upon determining that no swap

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execution facility or designated contract market lists such swap for trading.

(2) *Delegation of Authority.* (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to issue a determination that a swap is no longer available to trade.

(ii) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

[78 FR 33631, June 4, 2013]

### Subpart B—Designation as Contract Market

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

#### § 38.100 Core Principle 1.

(a) *In general.* To be designated, and maintain a designation, as a contract market, a board of trade shall comply with:

(1) Any core principle described in section 5(d) of the Act, and

(2) Any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act.

(b) *Reasonable discretion of the contract market.* Unless otherwise determined by the Commission by rule or regulation, a board of trade described in paragraph (a) of this section shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection.

### Subpart C—Compliance With Rules

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

#### § 38.150 Core Principle 2.

(a) *In general.* The board of trade shall establish, monitor, and enforce

compliance with the rules of the contract market, including:

(1) Access requirements;

(2) The terms and conditions of any contracts to be traded on the contract market; and

(3) Rules prohibiting abusive trade practices on the contract market.

(b) *Capacity of contract market.* The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

(c) *Requirement of rules.* The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this section, including the capacity to carry out such international information-sharing agreements, as the Commission may require.

#### § 38.151 Access requirements.

(a) *Jurisdiction.* Prior to granting any member or market participant access to its markets, a designated contract market must require that the member or market participant consent to its jurisdiction.

(b) *Impartial access by members, persons with trading privileges and independent software vendors.* A designated contract market must provide its members, persons with trading privileges, and independent software vendors with impartial access to its markets and services, including:

(1) Access criteria that are impartial, transparent, and applied in a non-discriminatory manner; and

(2) Comparable fee structures for members, persons with trading privileges and independent software vendors receiving equal access to, or services from, the designated contract market.

(c) *Limitations on access.* A designated contract market must establish and impartially enforce rules governing denials, suspensions, and revocations of a member's and a person with trading privileges' access privileges to the designated contract market, including when such actions are part of a disciplinary or emergency action by the designated contract market.

**§ 38.152 Abusive trading practices prohibited.**

A designated contract market must prohibit abusive trading practices on its markets by members and market participants. Designated contract markets that permit intermediation must prohibit customer-related abuses including, but not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that must be prohibited by all designated contract markets include front-running, wash trading, pre-arranged trading (except for certain transactions specifically permitted under part 38 of this chapter), fraudulent trading, money passes, and any other trading practices that a designated contract market deems to be abusive. In addition, a designated contract market also must prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.

**§ 38.153 Capacity to detect and investigate rule violations.**

A designated contract market must have arrangements and resources for effective enforcement of its rules. Such arrangements must include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the designated contract market's members and by persons under investigation. A designated contract market's arrangements and resources must also facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation occurred.

**§ 38.154 Regulatory services provided by a third party.**

(a) *Use of third-party provider permitted.* A designated contract market may choose to utilize a registered futures association or another registered entity, as such terms are defined under the Act, (collectively, "regulatory service provider"), for the provision of services to assist in complying with the core principles, as approved by the Commission. Any designated contract

market that chooses to utilize a regulatory service provider must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A designated contract market will at all times remain responsible for the performance of any regulatory services received, for compliance with the designated contract market's obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf.

(b) *Duty to supervise third party.* A designated contract market that elects to utilize a regulatory service provider must retain sufficient compliance staff to supervise the quality and effectiveness of the services provided on its behalf. Compliance staff of the designated contract market must hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern. A designated contract market also must conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. Such reviews must be documented carefully and made available to the Commission upon request.

(c) *Regulatory decisions required from the designated contract market.* A designated contract market that elects to utilize a regulatory service provider must retain exclusive authority in decisions involving the cancellation of trades, the issuance of disciplinary charges against members or market participants, and the denials of access to the trading platform for disciplinary reasons. A designated contract market may also retain exclusive authority in other areas of its choosing. A designated contract market must document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the designated contract market chose a different course of action.

**§ 38.155 Compliance staff and resources.**

(a) *Sufficient compliance staff.* A designated contract market must establish and maintain sufficient compliance department resources and staff to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The designated contract market's compliance staff also must be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in § 38.158(b) of this part.

(b) *Ongoing monitoring of compliance staff resources.* A designated contract market must monitor the size and workload of its compliance staff annually, and ensure that its compliance resources and staff are at appropriate levels. In determining the appropriate level of compliance resources and staff, the designated contract market should consider trading volume increases, the number of new products or contracts to be listed for trading, any new responsibilities to be assigned to compliance staff, the results of any internal review demonstrating that work is not completed in an effective or timely manner, and any other factors suggesting the need for increased resources and staff.

**§ 38.156 Automated trade surveillance system.**

A designated contract market must maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations. The automated system must load and process daily orders and trades no later than 24 hours after the completion of the trading day. In addition, the automated trade surveillance system must have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; compute trade gains, losses, and futures-equivalent positions; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.

**§ 38.157 Real-time market monitoring.**

A designated contract market must conduct real-time market monitoring of all trading activity on its electronic trading platform(s) to identify disorderly trading and any market or system anomalies. A designated contract market must have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its electronic trading platform(s) or errors in orders submitted by members and market participants. Any trade price adjustments or trade cancellations must be transparent to the market and subject to standards that are clear, fair, and publicly available.

**§ 38.158 Investigations and investigation reports.**

(a) *Procedures.* A designated contract market must establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation must be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the designated contract market that indicates a reasonable basis for finding that a violation may have occurred or will occur.

(b) *Timeliness.* Each compliance staff investigation must be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff.

(c) *Investigation reports when a reasonable basis exists for finding a violation.* Compliance staff must submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report

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must include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued.

(d) *Investigation reports when no reasonable basis exists for finding a violation.* If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a violation, it must prepare a written report including the reason(s) the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff's analysis and conclusions.

(e) *Warning letters.* No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period.

**§ 38.159 Ability to obtain information.**

A designated contract market must have the ability and authority to obtain any necessary information to perform any function required under this subpart C of the Commission's regulations, including the capacity to carry out international information-sharing agreements as the Commission may require. Appropriate information-sharing agreements can be established with other designated contract markets and swap execution facilities, or the Commission can act in conjunction with the designated contract market to carry out such information sharing.

**§ 38.160 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.150 of this part.

**Subpart D—Contracts Not Readily Subject to Manipulation**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.200 Core Principle 3.**

The board of trade shall list on the contract market only contracts that

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are not readily susceptible to manipulation.

**§ 38.201 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance in appendix C of this part to demonstrate to the Commission compliance with the requirements of § 38.200 of this part.

**Subpart E—Prevention of Market Disruption**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.250 Core Principle 4.**

The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including:

- (a) Methods for conducting real-time monitoring of trading; and
- (b) Comprehensive and accurate trade reconstructions.

**§ 38.251 General requirements.**

A designated contract market must:

(a) Collect and evaluate data on individual traders' market activity on an ongoing basis in order to detect and prevent manipulation, price distortions and, where possible, disruptions of the physical-delivery or cash-settlement process;

(b) Monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand;

(c) Demonstrate an effective program for conducting real-time monitoring of market conditions, price movements and volumes, in order to detect abnormalities and, when necessary, make a good-faith effort to resolve conditions that are, or threaten to be, disruptive to the market; and

(d) Demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purposes of detecting trading abuses and violations of exchange-set position

limits, including those that may have occurred intraday.

(e) Adopt and implement rules governing market participants subject to its jurisdiction to prevent, detect, and mitigate market disruptions or system anomalies associated with electronic trading;

(f) Subject all electronic orders to exchange-based pre-trade risk controls to prevent, detect, and mitigate market disruptions or system anomalies associated with electronic trading; and

(g) Promptly notify Commission staff of any significant market disruptions on its electronic trading platform(s) and provide timely information on the causes and remediation.

[77 FR 36700, June 19, 2012, as amended at 86 FR 2071, Jan. 11, 2021]

**§ 38.252 Additional requirements for physical-delivery contracts.**

For physical-delivery contracts, the designated contract market must demonstrate that it:

(a) Monitors a contract's terms and conditions as they relate to the underlying commodity market and to the convergence between the contract price and the price of the underlying commodity and show a good-faith effort to resolve conditions that are interfering with convergence; and

(b) Monitors the supply of the commodity and its adequacy to satisfy the delivery requirements and make a good-faith effort to resolve conditions that threaten the adequacy of supplies or the delivery process.

**§ 38.253 Additional requirements for cash-settled contracts.**

(a) For cash-settled contracts, the designated contract market must demonstrate that it:

(1) Monitors the pricing of the index to which the contract will be settled; and

(2) Monitors the continued appropriateness of the methodology for deriving the index and makes a good-faith effort to resolve conditions, including amending contract terms where necessary, where there is a threat of market manipulation, disruptions, or distortions.

(b) If a contract listed on a designated contract market is settled by

reference to the price of a contract or commodity traded in another venue, including a price or index derived from prices on another designated contract market, the designated contract market must have rules or agreements that allow the designated contract market access to information on the activities of its traders in the reference market.

**§ 38.254 Ability to obtain information.**

(a) The designated contract market must have rules that require traders in its contracts to keep records of their trading, including records of their activity in the underlying commodity and related derivatives markets, and make such records available, upon request, to the designated contract market.

(b) A designated contract market with participants trading through intermediaries must either use a comprehensive large-trader reporting system (LTRS) or be able to demonstrate that it can obtain position data from other sources in order to conduct an effective surveillance program.

**§ 38.255 Risk controls for trading.**

The designated contract market must establish and maintain risk control mechanisms to prevent and reduce the potential risk of price distortions and market disruptions, including, but not limited to, market restrictions that pause or halt trading in market conditions prescribed by the designated contract market.

**§ 38.256 Trade reconstruction.**

The designated contract market must have the ability to comprehensively and accurately reconstruct all trading on its trading facility. All audit-trail data and reconstructions must be made available to the Commission in a form, manner, and time that is acceptable to the Commission.

**§ 38.257 Regulatory service provider.**

A designated contract market must comply with the regulations in this subpart through a dedicated regulatory department, or by delegation of that function to a registered futures association or a registered entity (collectively, "regulatory service provider"),

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as such terms are defined in the Act and over which the designated contract market has supervisory authority.

**§ 38.258 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.250 of this part.

**Subpart F—Position Limitations or Accountability**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.300 Core Principle 5.**

To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators. For any contract that is subject to a position limitation established by the Commission, pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

**§ 38.301 Position limitations and accountability.**

A designated contract market must meet the requirements of parts 150 and 151 of this chapter, as applicable.

**Subpart G—Emergency Authority**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.350 Core Principle 6.**

The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority:

- (a) To liquidate or transfer open positions in any contract;
- (b) To suspend or curtail trading in any contract; and

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(c) To require market participants in any contract to meet special margin requirements.

**§ 38.351 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.350.

**Subpart H—Availability of General Information**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.400 Core Principle 7.**

The board of trade shall make available to market authorities, market participants, and the public accurate information concerning:

- (a) The terms and conditions of the contracts of the contract market; and
- (b)(1) The rules, regulations and mechanisms for executing transactions on or through the facilities of the contract market, and
- (2) The rules and specifications describing the operation of the contract market's:
  - (i) Electronic matching platform, or
  - (ii) Trade execution facility.

**§ 38.401 General requirements.**

(a) *General.* (1) A designated contract market must have procedures, arrangements and resources for disclosing to the Commission, market participants and the public accurate information pertaining to:

- (i) Contract terms and conditions;
- (ii) Rules and regulations pertaining to the trading mechanisms; and
- (iii) Rules and specifications pertaining to operation of the electronic matching platform or trade execution facility.

(2) Through the procedures, arrangements and resources required in paragraph (a) of this section, the designated contract market must ensure public dissemination of information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information, in accordance with the

timeline provided in paragraph (c) of this section.

(3) A designated contract market shall meet the requirements of this paragraph (a), by placing the information described in this paragraph (a) on the designated contract market's Web site within the time prescribed in paragraph (c) of this section.

(b) *Accuracy requirement.* With respect to any communication with the Commission, and any information required to be transmitted or made available to market participants and the public, including on its Web site or otherwise, a designated contract market must provide information that it believes, to the best of its knowledge, is accurate and complete, and must not omit material information.

(c) *Notice of regulatory submissions.* (1) A designated contract market, in making available on its Web site information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information, must place such information and submissions on its Web site concurrent with the filing of such information or submissions with the Secretary of the Commission.

(2) To the extent that a designated contract market requests confidential treatment of any information filed with the Secretary of the Commission, the designated contract market must post on its Web site the public version of such filing or submission.

(d) *Rulebook.* A designated contract market must ensure that the rulebook posted on its Web site is accurate, complete, current and readily accessible to the public. A designated contract market must publish or post in its rulebook all new or amended rules, both substantive and non-substantive, on the date of implementation of such new or amended rule, on the date a new product is listed, or on the date any changes to previously-disclosed information take effect.

### Subpart I—Daily Publication of Trading Information

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

### § 38.450 Core Principle 8.

The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

### § 38.451 Reporting of trade information.

A designated contract market must meet the reporting requirements set forth in part 16 of this chapter.

## Subpart J—Execution of Transactions

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

### § 38.500 Core Principle 9.

The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade. The rules of the board of trade may authorize, for bona fide business purposes:

- (a) Transfer trades or office trades;
- (b) An exchange of:
  - (1) Futures in connection with a cash commodity transaction;
  - (2) Futures for cash commodities; or
  - (3) Futures for swaps; or
- (c) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

## Subpart K—Trade Information

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

### § 38.550 Core Principle 10.

The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information:

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(a) To assist in the prevention of customer and market abuses; and

(b) To provide evidence of any violations of the rules of the contract market.

**§ 38.551 Audit trail required.**

A designated contract market must capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses. Such data must be sufficient to reconstruct all transactions within a reasonable period of time and to provide evidence of any violations of the rules of the designated contract market. An acceptable audit trail must also permit the designated contract market to track a customer order from the time of receipt through fill, allocation, or other disposition, and must include both order and trade data.

**§ 38.552 Elements of an acceptable audit trail program.**

(a) *Original source documents.* A designated contract market's audit trail must include original source documents. Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded, whether recorded manually or electronically. Records for customer orders (whether filled, unfilled, or cancelled, each of which shall be retained or electronically captured) must reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry. For open-outcry trades, the time of report of execution of the order shall also be captured.

(b) *Transaction history database.* A designated contract market's audit trail program must include an electronic transaction history database. An adequate transaction history database includes a history of all trades executed via open outcry or via entry into an electronic trading system, and all orders entered into an electronic trading system, including all order modifications and cancellations. An adequate transaction history database also includes:

(1) All data that are input into the trade entry or matching system for the transaction to match and clear;

(2) The customer type indicator code;

(3) Timing and sequencing data adequate to reconstruct trading; and

(4) Identification of each account to which fills are allocated.

(c) *Electronic analysis capability.* A designated contract market's audit trail program must include electronic analysis capability with respect to all audit trail data in the transaction history database. Such electronic analysis capability must ensure that the designated contract market has the ability to reconstruct trading and identify possible trading violations with respect to both customer and market abuse.

(d) *Safe storage capability.* A designated contract market's audit trail program must include the capability to safely store all audit trail data retained in its transaction history database. Such safe storage capability must include the capability to store all data in the database in a manner that protects it from unauthorized alteration, as well as from accidental erasure or other loss. Data must be retained in accordance with the recordkeeping requirements of Core Principle 18 and the associated regulations in subpart S of this part.

**§ 38.553 Enforcement of audit trail requirements.**

(a) *Annual audit trail and recordkeeping reviews.* A designated contract market must enforce its audit trail and recordkeeping requirements through at least annual reviews of all members and persons and firms subject to designated contract market recordkeeping rules to verify their compliance with the contract market's audit trail and recordkeeping requirements. Such reviews must include, but are not limited to, the following:

(1) For electronic trading, audit trail and recordkeeping reviews must include reviews of randomly selected samples of front-end audit trail data for order routing systems; a review of the process by which user identifications are assigned and user identification records are maintained; a review of usage patterns associated with user identifications to monitor for violations of user identification rules; and reviews of account numbers and customer type indicator codes in trade

records to test for accuracy and improper use.

(2) For open outcry trading, audit trail and recordkeeping reviews must include reviews of members' and market participants' compliance with the designated contract market's trade timing, order ticket, and trading card requirements.

(b) *Enforcement program required.* A designated contract market must establish a program for effective enforcement of its audit trail and recordkeeping requirements for both electronic and open-outcry trading, as applicable. An effective program must identify members and persons and firms subject to designated contract market recordkeeping rules that have failed to maintain high levels of compliance with such requirements, and levy meaningful sanctions when deficiencies are found. Sanctions must be sufficient to deter recidivist behavior. No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period.

### Subpart L—Financial Integrity of Transactions

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

#### § 38.600 Core Principle 11.

The board of trade shall establish and enforce:

(a) Rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and

(b) Rules to ensure:

(1) The financial integrity of any:

(i) Futures commission merchant, and

(ii) Introducing broker; and

(2) The protection of customer funds.

#### § 38.601 Mandatory clearing.

(a) Transactions executed on or through the designated contract market must be cleared through a Commission-registered derivatives clearing organization, in accordance with the provisions

of part 39 of this chapter. Notwithstanding the foregoing, transactions in security futures products executed on or through the designated contract market may alternatively be cleared through a clearing agency, registered pursuant to section 17A of the Securities Exchange Act of 1934.

(b) A designated contract market must coordinate with each derivatives clearing organization to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing in accordance with the requirements of § 39.12(b)(7) of this chapter.

[77 FR 36700, June 19, 2012, as amended at 77 FR 37803, June 25, 2012]

#### § 38.602 General financial integrity.

A designated contract market must provide for the financial integrity of its transactions by establishing and maintaining appropriate minimum financial standards for its members and non-intermediated market participants.

#### § 38.603 Protection of customer funds.

A designated contract market must have rules concerning the protection of customer funds. These rules shall address appropriate minimum financial standards for intermediaries, the segregation of customer and proprietary funds, the custody of customer funds, the investment standards for customer funds, intermediary default procedures and related recordkeeping. A designated contract market must review the default rules and procedures of the derivatives clearing organization that clears for such designated contract market to wind down operations, transfer customers, or otherwise protect customers in the event of a default of a clearing member or the derivatives clearing organization.

#### § 38.604 Financial surveillance.

A designated contract market must monitor members' compliance with the designated contract market's minimum financial standards and, therefore, must routinely receive and promptly review financial and related information from its members, as well as continuously monitor the positions

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of members and their customers. A designated contract market must have rules that prescribe minimum capital requirements for member futures commission merchants and introducing brokers. A designated contract market must:

(a) Continually survey the obligations of each futures commission merchant created by the positions of its customers;

(b) As appropriate, compare those obligations to the financial resources of the futures commission merchant; and

(c) Take appropriate steps to use this information to protect customer funds.

### § 38.605 Requirements for financial surveillance program.

A designated contract market's financial surveillance program for futures commission merchants, retail foreign exchange dealers, and introducing brokers must comply with the requirements of § 1.52 of this chapter to assess the compliance of such entities with applicable contract market rules and Commission regulations.

### § 38.606 Financial regulatory services provided by a third party.

A designated contract market may comply with the requirements of § 38.604 (Financial Surveillance) and § 38.605 (Requirements for Financial Surveillance Program) of this part through the regulatory services of a registered futures association or a registered entity (collectively, "regulatory service provider"), as such terms are defined under the Act. A designated contract market must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and appropriate surveillance systems. A designated contract market will at all times remain responsible for compliance with its obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf. Regulatory services must be provided under a written agreement with a regulatory services provider that shall specifically document the services to be performed as well as the capacity and resources of the regulatory service pro-

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vider with respect to the services to be performed.

### § 38.607 Direct access.

A designated contract market that permits direct electronic access by customers (*i.e.*, allowing customers of futures commission merchants to enter orders directly into a designated contract market's trade matching system for execution) must have in place effective systems and controls reasonably designed to facilitate the FCM's management of financial risk, such as automated pre-trade controls that enable member futures commission merchants to implement appropriate financial risk limits. A designated contract market must implement and enforce rules requiring the member futures commission merchants to use the provided systems and controls.

## Subpart M—Protection of Markets and Market Participants

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

### § 38.650 Core Principle 12.

The board of trade shall establish and enforce rules:

(a) To protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

(b) To promote fair and equitable trading on the contract market.

### § 38.651 Protection of markets and market participants.

A designated contract market must have and enforce rules that are designed to promote fair and equitable trading and to protect the market and market participants from abusive practices including fraudulent, non-competitive or unfair actions, committed by any party. The designated contract market must have methods and resources appropriate to the nature of the trading system and the structure of the market to detect trade practice and market abuses and to discipline such behavior, in accordance with Core Principles 2 and 4, and the associated regulations in subparts C

and E of this part, respectively. The designated contract market also must provide a competitive, open and efficient market and mechanism for executing transactions in accordance with Core Principle 9 and the associated regulations under subpart J of this part.

### Subpart N—Disciplinary Procedures

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

#### § 38.700 Core Principle 13.

The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

#### § 38.701 Enforcement staff.

A designated contract market must establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the contract market. A designated contract market must also monitor the size and workload of its enforcement staff annually, and ensure that its enforcement resources and staff are at appropriate levels. The enforcement staff may not include either members of the designated contract market or persons whose interests conflict with their enforcement duties. A member of the enforcement staff may not operate under the direction or control of any person or persons with trading privileges at the contract market. A designated contract market's enforcement staff may operate as part of the designated contract market's compliance department.

#### § 38.702 Disciplinary panels.

A designated contract market must establish one or more disciplinary panels that are authorized to fulfill their obligations under the rules of this subpart. Disciplinary panels must meet the composition requirements of part 40 of this chapter, and must not include

any members of the designated contract market's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

#### § 38.703 Notice of charges.

If compliance staff authorized by a designated contract market or a designated contract market disciplinary panel determines that a reasonable basis exists for finding a violation and that adjudication is warranted, it must direct that the person or entity alleged to have committed the violation be served with a notice of charges and must proceed in accordance with the rules of this section. A notice of charges must adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated (or about to be violated); and prescribe the period within which a hearing on the charges may be requested. The notice must also advise that the charged respondent is entitled, upon request, to a hearing on the charges.

#### § 38.704 Right to representation.

Upon being served with a notice of charges, a respondent must have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except any member of the designated contract market's board of directors or disciplinary panel, any employee of the designated contract market, or any person substantially related to the underlying investigations, such as material witness or respondent.

#### § 38.705 Answer to charges.

A respondent must be given a reasonable period of time to file an answer to a notice of charges. The rules of a designated contract market governing the requirements and timeliness of a respondent's answer to charges must be fair, equitable, and publicly available.

#### § 38.706 Denial of charges and right to hearing.

In every instance where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent

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must be given an opportunity for a hearing in accordance with the requirements of § 38.707 of this part.

### § 38.707 Hearings.

(a) A designated contract market must adopt rules that provide for the following minimum requirements for any hearing conducted pursuant to a notice of charges:

(1) The hearing must be fair, must be conducted before members of the disciplinary panel, and must be promptly convened after reasonable notice to the respondent. The formal rules of evidence need not apply; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing. No member of the disciplinary panel for the matter may have a financial, personal, or other direct interest in the matter under consideration.

(2) In advance of the hearing, the respondent must be entitled to examine all books, documents, or other evidence in the possession or under the control of the designated contract market. The designated contract market may withhold documents that are privileged or constitute attorney work product, documents that were prepared by an employee of the designated contract market but will not be offered in evidence in the disciplinary proceedings, documents that may disclose a technique or guideline used in examinations, investigations, or enforcements proceedings, and documents that disclose the identity of a confidential source.

(3) The designated contract market's enforcement and compliance staffs must be parties to the hearing, and the enforcement staff must present their case on those charges and sanctions that are the subject of the hearing.

(4) The respondent must be entitled to appear personally at the hearing, must be entitled to cross-examine any persons appearing as witnesses at the hearing, and must be entitled to call witnesses and to present such evidence as may be relevant to the charges.

(5) The designated contract market must require persons within its jurisdiction who are called as witnesses to participate in the hearing and to produce evidence. It must make reasonable efforts to secure the presence

of all other persons called as witnesses whose testimony would be relevant.

(6) If the respondent has requested a hearing, a copy of the hearing must be made and must become a part of the record of the proceeding. The record must be one that is capable of being accurately transcribed; however, it need not be transcribed unless the transcript is requested by Commission staff or the respondent, the decision is appealed pursuant to the rules of the designated contract market, or is reviewed by the Commission pursuant to section 8c of the Act or part 9 of this chapter. In all other instances a summary record of a hearing is permitted.

(b) [Reserved]

### § 38.708 Decisions.

Promptly following a hearing conducted in accordance with § 38.707 of this part, the disciplinary panel must render a written decision based upon the weight of the evidence contained in the record of the proceeding and must provide a copy to the respondent. The decision must include:

(a) The notice of charges or a summary of the charges;

(b) The answer, if any, or a summary of the answer;

(c) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(d) A statement of findings and conclusions with respect to each charge, and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(e) An indication of each specific rule that the respondent was found to have violated; and

(f) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

### § 38.709 Final decisions.

Each designated contract market must establish rules setting forth when a decision rendered pursuant to this section will become the final decision of such designated contract market.

**§ 38.710 Disciplinary sanctions.**

All disciplinary sanctions imposed by a designated contract market or its disciplinary panels must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, must take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction must also include full customer restitution, except where the amount of restitution, or to whom it should be provided, cannot be reasonably determined.

**§ 38.711 Warning letters.**

Where a rule violation is found to have occurred, no more than one warning letter may be issued per rolling 12-month period for the same violation.

**§ 38.712 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.700 of this part.

**Subpart O—Dispute Resolution**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.750 Core Principle 14.**

The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

**§ 38.751 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.750 of this part.

**Subpart P—Governance Fitness Standards**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.800 Core Principle 15.**

The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

**§ 38.801 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.800 of this part.

**Subpart Q—Conflicts of Interest**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.850 Core Principle 16.**

The board of trade shall establish and enforce rules:

- (a) To minimize conflicts of interest in the decision-making process of the contract market; and
- (b) To establish a process for resolving conflicts of interest described in paragraph (a) of this section.

**§ 38.851 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.850 of this part.

**Subpart R—Composition of Governing Boards of Contract Markets**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.900**

**§ 38.900 Core Principle 17.**

The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

**Subpart S—Recordkeeping**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.950 Core Principle 18.**

The board of trade shall maintain records of all activities relating to the business of the contract market:

- (a) In a form and manner that is acceptable to the Commission; and
- (b) For a period of at least 5 years.

**§ 38.951 Additional sources for compliance.**

A designated contract market must maintain such records, including trade records and investigatory and disciplinary files, in accordance with the requirements of §1.31 of this chapter, and in accordance with part 45 of this chapter, if applicable.

**Subpart T—Antitrust Considerations**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.1000 Core Principle 19.**

Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not:

- (a) Adopt any rule or taking any action that results in any unreasonable restraint of trade; or
- (b) Impose any material anticompetitive burden on trading on the contract market.

**§ 38.1001 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of §38.1000 of this part.

**17 CFR Ch. I (4–1–25 Edition)**

**Subpart U—System Safeguards**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.1050 Core Principle 20.**

Each designated contract market shall:

(a) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

(b) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(c) Periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, transmission of matched orders to a designated clearing organization for clearing, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

**§ 38.1051 General requirements.**

(a) A designated contract market's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(1) *Enterprise risk management and governance.* This category includes, but is not limited to: Assessment, mitigation, and monitoring of security and technology risk; security and technology capital planning and investment; board of directors and management oversight of technology and security; information technology audit and controls assessments; remediation of deficiencies; and any other elements of enterprise risk management and governance included in generally accepted best practices.

(2) *Information security.* This category includes, but is not limited to, controls relating to: Access to systems and data (including least privilege, separation of

duties, account monitoring and control); user and device identification and authentication; security awareness training; audit log maintenance, monitoring, and analysis; media protection; personnel security and screening; automated system and communications protection (including network port control, boundary defenses, encryption); system and information integrity (including malware defenses, software integrity monitoring); vulnerability management; penetration testing; security incident response and management; and any other elements of information security included in generally accepted best practices.

(3) *Business continuity-disaster recovery planning and resources.* This category includes, but is not limited to: Regular, periodic testing and review of business continuity-disaster recovery capabilities, the controls and capabilities described in paragraphs (c), (d), (j), and (k) of this section; and any other elements of business continuity-disaster recovery planning and resources included in generally accepted best practices.

(4) *Capacity and performance planning.* This category includes, but is not limited to: Controls for monitoring the designated contract market's systems to ensure adequate scalable capacity (including testing, monitoring, and analysis of current and projected future capacity and performance, and of possible capacity degradation due to planned automated system changes); and any other elements of capacity and performance planning included in generally accepted best practices.

(5) *Systems operations.* This category includes, but is not limited to: System maintenance; configuration management (including baseline configuration, configuration change and patch management, least functionality, inventory of authorized and unauthorized devices and software); event and problem response and management; and any other elements of system operations included in generally accepted best practices.

(6) *Systems development and quality assurance.* This category includes, but is not limited to: Requirements development; pre-production and regression testing; change management procedures and approvals; outsourcing and

vendor management; training in secure coding practices; and any other elements of systems development and quality assurance included in generally accepted best practices.

(7) *Physical security and environmental controls.* This category includes, but is not limited to: Physical access and monitoring; power, telecommunication, and environmental controls; fire protection; and any other elements of physical security and environmental controls included in generally accepted best practices.

(b) In addressing the categories of risk analysis and oversight required under paragraph (a) of this section, a designated contract market shall follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(c) A designated contract market shall maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations. Such responsibilities and obligations include, without limitation: Order processing and trade matching; transmission of matched orders to a designated clearing organization for clearing; price reporting; market surveillance; and maintenance of a comprehensive audit trail. The designated contract market's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of the designated contract market's products during the next business day following the disruption. Designated contract markets determined by the Commission to be critical financial markets are subject to more stringent requirements in this regard, set forth in § 40.9 of this chapter. Electronic trading is an acceptable backup for open outcry trading in the event of a disruption. A designated contract market shall update its business continuity-disaster

recovery plan and emergency procedures at a frequency determined by an appropriate risk analysis, but at a minimum no less frequently than annually.

(d) A designated contract market that is not determined by the Commission to be a critical financial market satisfies the requirement to be able to resume trading and clearing during the next business day following a disruption by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations; or

(2) Contractual arrangements with other designated contract markets or disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of the designated contract market's products, and ongoing fulfillment of all of the designated contract market's responsibilities and obligations with respect to those products, in the event that a disruption renders the designated contract market temporarily or permanently unable to satisfy this requirement on its own behalf.

(e) A designated contract market must notify Commission staff promptly of all:

(1) Electronic trading halts and significant systems malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(3) Activation of the designated contract market's business continuity-disaster recovery plan.

(f) A designated contract market must give Commission staff timely advance notice of all material:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the designated contract market's program of risk analysis and oversight.

(g) As part of a designated contract market's obligation to produce books and records in accordance with §1.31 of

this chapter, Core Principle 18 (Recordkeeping), and §§38.950 and 38.951, a designated contract market shall provide to the Commission the following system safeguards-related books and records, promptly upon the request of any Commission representative:

(1) Current copies of its business continuity-disaster recovery plans and other emergency procedures;

(2) All assessments of its operational risks or system safeguards-related controls;

(3) All reports concerning system safeguards testing and assessment required by this chapter, whether performed by independent contractors or by employees of the designated contract market; and

(4) All other books and records requested by Commission staff in connection with Commission oversight of system safeguards pursuant to the Act or Commission regulations, or in connection with Commission maintenance of a current profile of the designated contract market's automated systems.

(5) Nothing in this paragraph (g) shall be interpreted as reducing or limiting in any way a designated contract market's obligation to comply with Core Principle 18 (Recordkeeping) or with §1.31 of this chapter, or with §§38.950 or §38.951.

(h) A designated contract market shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Such testing and review shall include, without limitation, all of the types of testing set forth in this paragraph (h). A covered designated contract market, as defined in this section, shall be subject to the additional requirements regarding minimum testing frequency and independent contractor testing set forth in this paragraph (h).

(1) *Definitions.* As used in paragraph (h) of this section:

*Controls* means the safeguards or countermeasures employed by the designated contract market in order to protect the reliability, security, or capacity of its automated systems or the

confidentiality, integrity, and availability of its data and information, and in order to enable the designated contract market to fulfill its statutory and regulatory responsibilities.

*Controls testing* means assessment of the designated contract market's controls to determine whether such controls are implemented correctly, are operating as intended, and are enabling the designated contract market to meet the requirements established by this section.

*Covered designated contract market* means a designated contract market whose annual total trading volume in calendar year 2015, or in any subsequent calendar year, is five percent (5%) or more of the combined annual total trading volume of all designated contract markets regulated by the Commission for the year in question, based on annual total trading volume information provided to the Commission by each designated contract market pursuant to the procedure set forth in this chapter. A covered designated contract market that has annual total trading volume of less than five percent (5%) of the combined annual total trading volume of all designated contract markets regulated by the Commission for three consecutive calendar years ceases to be a covered designated contract market as of March 1 of the calendar year following such three consecutive calendar years.

*Enterprise technology risk assessment* means a written assessment that includes, but is not limited to, an analysis of threats and vulnerabilities in the context of mitigating controls. An enterprise technology risk assessment identifies, estimates, and prioritizes risks to designated contract market operations or assets, or to market participants, individuals, or other entities, resulting from impairment of the confidentiality, integrity, and availability of data and information or the reliability, security, or capacity of automated systems.

*External penetration testing* means attempts to penetrate the designated contract market's automated systems from outside the systems' boundaries to identify and exploit vulnerabilities. Methods of conducting external penetration testing include, but are not

limited to, methods for circumventing the security features of an automated system.

*Internal penetration testing* means attempts to penetrate the designated contract market's automated systems from inside the systems' boundaries, to identify and exploit vulnerabilities. Methods of conducting internal penetration testing include, but are not limited to, methods for circumventing the security features of an automated system.

*Key controls* means those controls that an appropriate risk analysis determines are either critically important for effective system safeguards or intended to address risks that evolve or change more frequently and therefore require more frequent review to ensure their continuing effectiveness in addressing such risks.

*Security incident* means a cyber security or physical security event that actually jeopardizes or has a significant likelihood of jeopardizing automated system operation, reliability, security, or capacity, or the availability, confidentiality or integrity of data.

*Security incident response plan* means a written plan documenting the designated contract market's policies, controls, procedures, and resources for identifying, responding to, mitigating, and recovering from security incidents, and the roles and responsibilities of its management, staff and independent contractors in responding to security incidents. A security incident response plan may be a separate document or a business continuity-disaster recovery plan section or appendix dedicated to security incident response.

*Security incident response plan testing* means testing of a designated contract market's security incident response plan to determine the plan's effectiveness, identify its potential weaknesses or deficiencies, enable regular plan updating and improvement, and maintain organizational preparedness and resiliency with respect to security incidents. Methods of conducting security incident response plan testing may include, but are not limited to, checklist completion, walk-through or table-top exercises, simulations, and comprehensive exercises.

*Vulnerability testing* means testing of a designated contract market's automated systems to determine what information may be discoverable through a reconnaissance analysis of those systems and what vulnerabilities may be present on those systems.

(2) *Vulnerability testing.* A designated contract market shall conduct vulnerability testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A designated contract market shall conduct such vulnerability testing at a frequency determined by an appropriate risk analysis. At a minimum, a covered designated contract market shall conduct such vulnerability testing no less frequently than quarterly.

(ii) Such vulnerability testing shall include automated vulnerability scanning, which shall follow generally accepted best practices.

(iii) A designated contract market shall conduct vulnerability testing by engaging independent contractors or by using employees of the designated contract market who are not responsible for development or operation of the systems or capabilities being tested.

(3) *External penetration testing.* A designated contract market shall conduct external penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A designated contract market shall conduct such external penetration testing at a frequency determined by an appropriate risk analysis. At a minimum, a covered designated contract market shall conduct such external penetration testing no less frequently than annually.

(ii) A covered designated contract market shall engage independent contractors to conduct the required annual external penetration test. The covered designated contract market may conduct other external penetration testing by using employees of the covered designated contract market who are not responsible for development or operation of the systems or capabilities being tested.

(iii) A designated contract market which is not a covered designated con-

tract market shall conduct external penetration testing by engaging independent contractors or by using employees of the designated contract market who are not responsible for development or operation of the systems or capabilities being tested.

(4) *Internal penetration testing.* A designated contract market shall conduct internal penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A designated contract market shall conduct such internal penetration testing at a frequency determined by an appropriate risk analysis. At a minimum, a covered designated contract market shall conduct such internal penetration testing no less frequently than annually.

(ii) A designated contract market shall conduct internal penetration testing by engaging independent contractors, or by using employees of the designated contract market who are not responsible for development or operation of the systems or capabilities being tested.

(5) *Controls testing.* A designated contract market shall conduct controls testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A designated contract market shall conduct controls testing, which includes testing of each control included in its program of risk analysis and oversight, at a frequency determined by an appropriate risk analysis. Such testing may be conducted on a rolling basis. At a minimum, a covered designated contract market shall conduct testing of its key controls no less frequently than every three years. The covered designated contract market may conduct testing of its key controls on a rolling basis over the course of three years or the period determined by such risk analysis, whichever is shorter.

(ii) A covered designated contract market shall engage independent contractors to test and assess the key controls included in its program of risk analysis and oversight no less frequently than every three years. The covered designated contract market

may conduct any other controls testing required by this section by using independent contractors or employees of the covered designated contract market who are not responsible for development or operation of the systems or capabilities being tested.

(iii) A designated contract market which is not a covered designated contract market shall conduct controls testing by engaging independent contractors or by using employees of the designated contract market who are not responsible for development or operation of the systems or capabilities being tested.

(6) *Security incident response plan testing.* A designated contract market shall conduct security incident response plan testing sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A designated contract market shall conduct such security incident response plan testing at a frequency determined by an appropriate risk analysis. At a minimum, a covered designated contract market shall conduct such security incident response plan testing no less frequently than annually.

(ii) A designated contract market's security incident response plan shall include, without limitation, the designated contract market's definition and classification of security incidents, its policies and procedures for reporting security incidents and for internal and external communication and information sharing regarding security incidents, and the hand-off and escalation points in its security incident response process.

(iii) A designated contract market may coordinate its security incident response plan testing with other testing required by this section or with testing of its other business continuity-disaster recovery and crisis management plans.

(iv) A designated contract market may conduct security incident response plan testing by engaging independent contractors or by using employees of the designated contract market.

(7) *Enterprise technology risk assessment.* A designated contract market shall conduct enterprise technology

risk assessment of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A designated contract market shall conduct an enterprise technology risk assessment at a frequency determined by an appropriate risk analysis. At a minimum, a covered designated contract market shall conduct an enterprise technology risk assessment no less frequently than annually. A designated contract market that has conducted an enterprise technology risk assessment that complies with this section may conduct subsequent assessments by updating the previous assessment.

(ii) A designated contract market may conduct enterprise technology risk assessments by using independent contractors or employees of the designated contract market who are not responsible for development or operation of the systems or capabilities being assessed.

(i) To the extent practicable, a designated contract market shall:

(1) Coordinate its business continuity-disaster recovery plan with those of the members and other market participants upon whom it depends to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the designated contract market's business continuity-disaster recovery plan;

(2) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan and the business continuity-disaster recovery plans of the members and other market participants upon whom it depends to provide liquidity; and

(3) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

(j) Part 46 of this chapter governs the obligations of those registered entities that the Commission has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Section 40.9 of this

chapter establishes the requirements for core principle compliance in that respect.

(k) *Scope of testing and assessment.* The scope for all system safeguards testing and assessment required by this part shall be broad enough to include the testing of automated systems and controls that the designated contract market's required program of risk analysis and oversight and its current cybersecurity threat analysis indicate is necessary to identify risks and vulnerabilities that could enable an intruder or unauthorized user or insider to:

(1) Interfere with the designated contract market's operations or with fulfillment of its statutory and regulatory responsibilities;

(2) Impair or degrade the reliability, security, or adequate scalable capacity of the designated contract market's automated systems;

(3) Add to, delete, modify, exfiltrate, or compromise the integrity of any data related to the designated contract market's regulated activities; or

(4) Undertake any other unauthorized action affecting the designated contract market's regulated activities or the hardware or software used in connection with those activities.

(l) *Internal reporting and review.* Both the senior management and the Board of Directors of a designated contract market shall receive and review reports setting forth the results of the testing and assessment required by this section. A designated contract market shall establish and follow appropriate procedures for the remediation of issues identified through such review, as provided in paragraph (m) of this section, and for evaluation of the effectiveness of testing and assessment protocols.

(m) *Remediation.* A designated contract market shall identify and document the vulnerabilities and deficiencies in its systems revealed by the testing and assessment required by this section. The designated contract market shall conduct and document an appropriate analysis of the risks presented by such vulnerabilities and deficiencies, to determine and document whether to remediate or accept the associated risk. When the designated con-

tract market determines to remediate a vulnerability or deficiency, it must remediate in a timely manner given the nature and magnitude of the associated risk.

(n) *Required production of annual total trading volume.* (1) As used in this paragraph, *annual total trading volume* means the total number of all contracts traded on or pursuant to the rules of a designated contract market during a calendar year.

(2) Each designated contract market shall provide to the Commission for calendar year 2015 and each calendar year thereafter its annual total trading volume, providing this information for 2015 within 30 calendar days of the effective date of the final version of this rule, and for 2016 and subsequent years by January 31 of the following calendar year. For calendar year 2015 and each calendar year thereafter, the Commission shall provide to each designated contract market the percentage of the combined annual total trading volume of all designated contract markets regulated by the Commission which is constituted by that designated contract market's annual total trading volume, providing this information for 2015 within 60 calendar days of the effective date of the final version of this rule, and for 2016 and subsequent years by February 28 of the following calendar year.

(3) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to provide each designated contract market with its percentage of the total annual trading volume of all designated contract markets regulated by the Commission, as set forth in paragraph (n)(2) of this section. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter that has been delegated pursuant to this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

[77 FR 36700, June 19, 2012, as amended at 81 FR 64312, Sept. 19, 2016; 82 FR 45434, Sept. 29, 2017]

**Subpart V—Financial Resources**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.1100 Core Principle 21.**

(a) *In General.* The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.

(b) *Determination of adequacy.* The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.

**§ 38.1101 General requirements.**

(a) *General rule.* (1) A designated contract market must maintain financial resources sufficient to enable it to perform its functions in compliance with the core principles set forth in section 5 of the Act and regulations thereunder.

(2) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the designated contract market, or applicant for designation as such, to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(3) An entity that is registered with the Commission as both a designated contract market and a derivatives clearing organization also shall comply with the financial resource requirements of § 39.11 of this chapter, demonstrating that it has sufficient financial resources to operate the single, combined entity as both a designated contract market and a derivatives clearing organization. In lieu of filing separate quarterly reports under paragraph (a)(2) of this section and § 39.11(f) of this chapter, such entity shall file single quarterly reports in accordance with § 39.11.

(b) *Types of financial resources.* Financial resources available to satisfy the requirements of paragraph (a) of this section may include:

(1) The designated contract market's own capital, calculated in accordance

with U.S. generally accepted accounting principles; and

(2) Any other financial resource deemed acceptable by the Commission.

(c) *Computation of financial resource requirement.* A designated contract market must, on a quarterly basis, based upon its fiscal year, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a) of this section. The designated contract market shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

(d) *Valuation of financial resources.* At appropriate intervals, but not less than quarterly, a designated contract market must compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect market and credit risk ("haircuts") must be applied as appropriate.

(e) *Liquidity of financial resources.* The financial resources allocated by the designated contract market to meet the requirements of paragraph (a) of this section must include unencumbered, liquid financial assets (*i.e.*, cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the designated contract market may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(f) *Reporting requirements.* (1) Each fiscal quarter, or at any time upon Commission request, a designated contract market must:

(i) Report to the Commission:

(A) The amount of financial resources necessary to meet the requirements of paragraph (a) of this section; and

(B) The value of each financial resource available, computed in accordance with the requirements of paragraph (d) of this section; and

(ii) Provide the Commission with a financial statement, including the balance sheet, income statement, and

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statement of cash flows of the designated contract market or of its parent company.

(2) The calculations required by this paragraph shall be made as of the last business day of the designated contract market's fiscal quarter.

(3) The designated contract market must provide the Commission with:

(i) Sufficient documentation explaining the methodology used to compute its financial requirements under paragraph (a) of this section;

(ii) Sufficient documentation explaining the basis for its determinations regarding the valuation and liquidity requirements set forth in paragraphs (d) and (e) of this section; and

(iii) Copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the designated contract market's conclusions.

(4) The reports shall be filed not later than 40 calendar days after the end of the designated contract market's first three fiscal quarters, and not later than 60 calendar days after the end of the designated contract market's fourth fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the designated contract market.

(g) *Delegation of authority.* (1) The Commission hereby delegates, until it orders otherwise, the authority to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, to:

(i) Determine whether a particular financial resource under paragraph (b)(2) may be used to satisfy the requirements of paragraph (a)(1) and (2) of this section;

(ii) Review and make changes to the methodology used to compute the requirements of paragraph (c) of this section;

(iii) Request financial reporting from a designated contract market (in addition to quarterly reports) under paragraph (f)(1) of this section; and

(iv) Grant an extension of time for a designated contract market to file its quarterly financial report under paragraph (f)(4) of this section.

(2) The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

**Subpart W—Diversity of Board of Directors**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.1150 Core Principle 22.**

The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

**Subpart X—Securities and Exchange Commission**

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.

**§ 38.1200 Core Principle 23.**

The board of trade shall keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

**§ 38.1201 Additional sources for compliance.**

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.1200 of this part.

APPENDIX A TO PART 38—FORM DCM

Appendix A to Part 38 – Form DCM

COMMODITY FUTURES TRADING COMMISSION

FORM DCM

CONTRACT MARKET

APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

DESIGNATION INSTRUCTIONS

Intentional misstatements or omissions of material fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) or grounds for disqualification from designation.

**DEFINITIONS**

Unless the context requires otherwise, all terms used in this Form DCM have the same meaning as in the Commodity Exchange Act, as amended (“CEA” or “Act”), and in the General Rules and Regulations of the Commodity Futures Trading Commission (“Commission”) thereunder.

For the purposes of this Form DCM, the term “Applicant” shall include any board of trade applying for designation as a contract market, any board of trade amending a pending application, or any designated contract market that is applying for an amendment to its order of designation.

**GENERAL INSTRUCTIONS**

1. This Form DCM, which includes instructions, a Cover Sheet, and required Exhibits (together, “Form DCM”) is to be filed with the Commission by all Applicants, pursuant to Section 5 of the CEA and the Commission’s regulations thereunder. Applicants may prepare their own Form DCM but must follow the format prescribed herein. Upon the filing of an application for designation or a designation amendment in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and arguments concerning such application. No application for designation or designation amendment shall be effective unless the Commission, by order, grants such designation or amended designation.
2. Individuals’ names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).
3. Signatures on all copies of the Form DCM filed with the Commission can be executed electronically. If this Form DCM is filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company’s behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent, i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.
4. If this Form DCM is being filed as an application for designation, all applicable items must be answered in full. If any item is inapplicable, indicate by “none,” “not applicable,” or “N/A,” as appropriate.
5. Under Section 5 of the CEA and the Commission’s regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form DCM from any Applicant seeking designation as a contract market and from any designated contract market. Disclosure by the Applicant of the information specified on this Form DCM is mandatory prior to the start of the processing of an

application for, or an amendment to, designation as a contract market. The information provided in this Form DCM will be used for the principal purpose of determining whether the Commission should grant or deny designation to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. **A Form DCM which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form DCM, however, shall not constitute a finding that the Form DCM has been filed as required or that the information submitted is true, current, or complete.**

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this Form DCM will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

#### APPLICATION AMENDMENTS

1. Part 38 of the Commission's regulations requires that if any information contained in this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment to Form DCM, or a submission under Part 40 of the Commission's regulations, in either case correcting such information must be filed promptly with the Commission.
2. Applicants, when filing this Form DCM for purposes of amending an application, must re-file the Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable. The submission of an amendment represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

#### WHERE TO FILE

This Form DCM must be filed electronically with the Secretary of the Commission in a format specified by the Secretary of the Commission.

### COMMODITY FUTURES TRADING COMMISSION

#### FORM DCM

#### CONTRACT MARKET

#### APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

#### COVER SHEET

---

Exact name of Applicant as specified in charter

---

Address of principal executive offices

- If this is an **APPLICATION** for designation, complete in full and check here.

**Commodity Futures Trading Commission**

**Pt. 38, App. A**

If this is an **AMENDMENT** to an application, or to an existing designation, list all items that are amended and check here.

_____	_____
_____	_____
_____	_____
_____	_____

**GENERAL INFORMATION**

1. Name under which the business of the designated contract market is or will be conducted, if different than name specified above (include acronyms, if any):

\_\_\_\_\_

2. If name of designated contract market is being amended, state previous designated contract market name:

\_\_\_\_\_

3. Contact information, including mailing address if different than address specified above:

\_\_\_\_\_

Number and Street

\_\_\_\_\_

City	State	Country	Zip Code
------	-------	---------	----------

\_\_\_\_\_

Main Phone number	Fax
-------------------	-----

\_\_\_\_\_

Website URL	E-mail Address
-------------	----------------

\_\_\_\_\_

4. List of principal office(s) and address(es) where designated contract market activities are/will be conducted:

<u>Office</u>	<u>Address</u>
_____	_____
_____	_____
_____	_____

5. If Applicant is a successor to a previously designated contract market, please complete the following:

a. Date of succession

\_\_\_\_\_

b. Full name and address of predecessor designee

\_\_\_\_\_

Name

\_\_\_\_\_

\_\_\_\_\_

Number and Street

City	State	Country	Zip Code
Main Phone Number		Website URL	

**BUSINESS ORGANIZATION**

6. Applicant is a:

- Corporation
- Partnership
- Limited Liability Company
- Other form of organization (specify) \_\_\_\_\_

7. Date of incorporation or formation: \_\_\_\_\_

8. State of incorporation or jurisdiction of organization: \_\_\_\_\_

9. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

\_\_\_\_\_  
Print Name and Title

\_\_\_\_\_  
Name of Applicant

\_\_\_\_\_  
Number and Street

\_\_\_\_\_  
City State Zip Code

**SIGNATURES**

10. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. The Applicant and the undersigned represent hereby that all information contained herein is true, current, and complete. It is understood that all required items and Exhibits are considered integral parts of this Form DCM and that the submission of any amendment represents that all un-amended items and Exhibits remain true, current, and complete as previously filed.

\_\_\_\_\_  
Name of Applicant

\_\_\_\_\_  
Signature of Duly Authorized Person

\_\_\_\_\_  
Print Name and Title of Signatory

## COMMODITY FUTURES TRADING COMMISSION

## FORM DCM

## CONTRACT MARKET

## APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

EXHIBITS INSTRUCTIONS

The following Exhibits must be filed with the Commission by each Applicant applying for designation as a contract market, or by a designated contract market amending its designation, pursuant to Section 5 of the CEA and the Commission's regulations thereunder. The Exhibits must be labeled according to the items specified in this Form DCM.

The application must include a Table of Contents listing each Exhibit required by this Form DCM and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify "none," "not applicable," or "N/A," as appropriate.

LIST OF EXHIBITS**EXHIBITS – BUSINESS ORGANIZATION**

1. Attach as **Exhibit A**, the name of any person(s) who own(s) ten percent (10%) or more of the Applicant's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of Applicant.

Provide as part of Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as **Exhibit B**, a list of the present officers, directors, governors (and, in the case of an Applicant that is not a corporation, the members of all standing committees grouped by committee), or persons performing functions similar to any of the foregoing, of the designated contract market or of any entity that performs the regulatory activities of the Applicant, indicating for each:
  1. Name
  2. Title
  3. Dates of commencement and termination of present term of office or position
  4. Length of time each present officer, director, or governor has held the same office or position
  5. Brief account of the business experience of each officer and director over the last five (5) years
  6. Any other business affiliations in the derivatives and securities industry
  7. For directors, list any committees on which they serve and any compensation received by virtue of their directorship
  8. A description of:
    - (1) Any order of the Commission with respect to such person pursuant to Section 5e of the CEA;
    - (2) Any conviction or injunction against such person within the past ten (10) years;
    - (3) Any disciplinary action with respect to such person within the last five (5) years;
    - (4) Any disqualification under Sections 8b and 8d of the CEA;
    - (5) Any disciplinary action under Section 8c of the CEA; and
    - (6) Any violation pursuant to Section 9 of the CEA.
3. Attach as **Exhibit C**, a narrative that sets forth the fitness standards for the Board of Directors and its composition including the number and percentage of public directors.

4. Attach as **Exhibit D**, a narrative or graphic description of the organizational structure of the Applicant. Include a list of all affiliates of the Applicant and indicate the general nature of the affiliation. Note: If the designated contract market activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity, corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision or separate entity, as applicable. Additionally, provide any relevant jurisdictional information, including any and all jurisdictions in which you or any affiliated entity are doing business, and registration status, including pending applications (e.g., country, regulator, registration category, date of registration). Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.
5. Attach as **Exhibit E**, a description of the personnel qualifications for each category of professional employees employed by the Applicant or the division, subdivision, or other separate entity within the Applicant as described in Item 4.
6. Attach as **Exhibit F**, an analysis of staffing requirements necessary to carry out operations of the Applicant as a designated contract market and the name and qualifications of each key staff person.
7. Attach as **Exhibit G**, a copy of the constitution, articles of incorporation, formation or association with all amendments thereto, partnership or limited liability agreements, and existing by-laws, operating agreement, rules or instruments corresponding thereto, of the Applicant. Include any additional governance fitness information not included in Exhibit C. Provide a certificate of good standing dated within one week of the date of this Form DCM.
8. Attach as **Exhibit H**, a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency where the proceeding(s) are pending, the date(s) instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any proceeding(s) known to be contemplated by the governmental agencies.

#### EXHIBITS — FINANCIAL INFORMATION

9. Attach as **Exhibit I**:
  1. (i) Balance sheet, (ii) Statement of income and expenses, (iii) Statement of cash flows, and (iv) Statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant, or of its parent company, if applicable. If a balance sheet and any statement(s) certified by an independent public accountant are available, that balance sheet and statement(s) should be submitted as Exhibit I.
  2. Provide a narrative of how the value of the financial resources of the Applicant is at least equal to a total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis, and whether such financial resources include unencumbered, liquid financial assets (i.e. cash and/or highly liquid securities) equal to at least six months' operating costs.
  3. Attach copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the Applicant's conclusions regarding the liquidity of its financial assets.
  4. Representations regarding sources and estimates for future ongoing operational resources.
10. Attach as **Exhibit J**, a balance sheet and an income and expense statement for each affiliate of the designated contract market that also engages in designated contract market activities as of the end of the most recent fiscal year of each such affiliate, and each affiliate of the designated contract market that engages in swap execution facility activities.
11. Attach as **Exhibit K**, the following:

1. A complete list of all dues, fees and other charges imposed, or to be imposed, by or on behalf of Applicant for its designated contract market services that are provided on an exclusive basis and identify the service or services provided for each such due, fee, or other charge.
2. A description of the basis and methods used in determining the level and structure of the dues, fees and other charges listed in paragraph (a) of this item.
3. If the Applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar exclusive services, so state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differentiations.

**EXHIBITS — COMPLIANCE**

12. Attach as **Exhibit L**, a narrative and any other form of documentation that may be provided under other Exhibits herein that describe the manner in which the Applicant is able to comply with each core principle. Such documentation must include a regulatory compliance chart setting forth each core principle and providing citations to the Applicant's relevant rules, policies, and procedures that address each core principle. To the extent that the application raises issues that are novel, or for which compliance with a core principle is not self-evident, include an explanation of how that item and the application satisfy the core principles. Applicant must include a description of how it meets the definition of "Board of Trade" as defined in §1a(2) of the CEA.
13. Attach as **Exhibit M**, a copy of the Applicant's rules (as defined in § 40.1 of the Commission's regulations) and any technical manuals, other guides or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Include rules citing applicable federal position limits and aggregation standards in Part 150 or 151, as applicable, of the Commission's regulations and any exchange set position limit rules. Include rules on publication of daily trading information with regards to the requirements of Part 16 of the Commission's regulations. The Applicant should include an explanation, and any other forms of documentation the Applicant thinks will be helpful to its explanation, demonstrating how its rules, technical manuals, other guides or instructions for users of, or participants in, the market, or minimum financial standards for members or market participants as provided in this Exhibit M help support the designated contract market's compliance with the core principles.
14. Attach as **Exhibit N**, executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third party regulatory service provider or member or user agreements that enable or empower the Applicant to comply with applicable core principles. Identify: (1) the services that will be provided; and (2) the core principles addressed by such agreement.
15. Attach as **Exhibit O**, a copy of any compliance manual, and any other documents, that describe with specificity the manner in which the Applicant will conduct trade practice, market and financial surveillance.
16. Attach as **Exhibit P**, a description of the Applicant's disciplinary and enforcement protocols, tools, and procedures and the arrangements for alternative dispute resolution.
17. Attach as **Exhibit Q**, a description of the Applicant's trading system and trade matching algorithm, and examples of how that algorithm works in various trading scenarios involving various types of orders.
18. Attach as **Exhibit R**, a list of rules prohibiting specific trade practice violations.
19. Attach as **Exhibit S**, a discussion of how trading data will be maintained by the designated contract market.

20. Attach as **Exhibit T**, a list of the name of the clearing organization(s) that will be clearing the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades.
21. Attach as **Exhibit U**, any information (described with particularity) included in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of the Commission's regulations.

#### EXHIBITS—OPERATIONAL CAPABILITY

22. Attach as **Exhibit V**, information responsive to the Technology Questionnaire (link). This questionnaire focuses on information pertaining to the Applicant's program of risk analysis and oversight. Main topic areas include: information security; business continuity-disaster recovery planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls.

[77 FR 36709, June 19, 2012]

#### APPENDIX B TO PART 38—GUIDANCE ON, AND ACCEPTABLE PRACTICES IN, COMPLIANCE WITH CORE PRINCIPLES

1. This appendix provides guidance on complying with core principles, both initially and on an ongoing basis, to obtain and maintain designation under section 5(d) of the Act and this part 38. Where provided, guidance is set forth in paragraph (a) following the relevant heading and can be used to demonstrate to the Commission compliance with the selected requirements of a core principle, under §§ 38.3 and 38.5 of this part. The guidance for the core principle is illustrative only of the types of matters a designated contract market may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues set forth in this appendix would help the Commission in its consideration of whether the designated contract market is in compliance with the selected requirements of a core principle; provided however, that the guidance is not intended to diminish or replace, in any event, the obligations and requirements of applicants and designated contract markets to comply with the regulations provided under this part.

2. Where provided, acceptable practices meeting selected requirements of core principles are set forth in paragraph (b) following guidance. Designated contract markets that follow specific practices outlined in the acceptable practices for a core principle in this appendix will meet the selected requirements of the applicable core principle; provided however, that the acceptable practice is not intended to diminish or replace, in any event, the obligations and requirements of applicants and designated contract markets to comply with the regulations provided under this part 38. The acceptable practices are for illustrative purposes only and do not

state the exclusive means for satisfying a core principle.

#### *Core Principle 1 of section 5(d) of the Act:* DESIGNATION AS CONTRACT MARKET.—

(A) IN GENERAL.—To be designated, and maintain a designation, as a contract market, a board of trade shall comply with—

(i) Any core principle described in this subsection; and

(ii) Any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

(B) REASONABLE DISCRETION OF CONTRACT MARKET.—Unless otherwise determined by the Commission by rule or regulation, a board of trade described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

#### *Core Principle 2 of section 5(d) of the Act:* COMPLIANCE WITH RULES—(A) IN GENERAL.—

The board of trade shall establish, monitor, and enforce compliance with the rules of the contract market, including—

(i) Access requirements;

(ii) The terms and conditions of any contracts to be traded on the contract market; and

(iii) Rules prohibiting abusive trade practices on the contract market.

(B) CAPACITY OF CONTRACT MARKET.—The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

(C) REQUIREMENT OF RULES.—The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance*—(1) *Investigations and investigation reports—Warning letters.* The rules of a designated contract market may authorize compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action.

(2) *Additional rules required.* A designated contract market should adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart C of this chapter

(b) *Acceptable Practices.* [Reserved]

*Core Principle 3 of section 5(d) of the Act: CONTRACTS NOT READILY SUBJECT TO MANIPULATION.*—The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

(a) *Guidance.* (1) Designated contract markets may list new products for trading by self-certification under §40.2 of this chapter or may submit products for Commission approval under §40.3 of this chapter.

(2) Guidance in appendix C to this part may be used as guidance in meeting this core principle for both new products listings and existing listed contracts.

(b) *Acceptable Practices.* [Reserved]

*Core Principle 4 of section 5(d) of the Act: PREVENTION OF MARKET DISRUPTION.*—The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including—

(A) Methods for conducting real-time monitoring of trading; and

(B) Comprehensive and accurate trade reconstructions.

(a) *Guidance.* The detection and prevention of market manipulation, disruptions, and distortions should be incorporated into the design of programs for monitoring trading activity. Monitoring of intraday trading should include the capacity to detect developing market anomalies, including abnormal price movements and unusual trading volumes, and position-limit violations. The designated contract market should have rules in place that allow it broad powers to intervene to prevent or reduce market disruptions. Once a threatened or actual disruption is detected, the designated contract market should take steps to prevent the disruption or reduce its severity.

(2) *Additional rules required.* A designated contract market should adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart E of this part.

(b) *Acceptable Practices*—(1) *General Requirements.* Real-time monitoring for market anomalies and position-limit violations are the most effective, but the designated contract market may also demonstrate that it

has an acceptable program if some of the monitoring is accomplished on a T+1 basis. An acceptable program must include automated trading alerts to detect market anomalies and position-limit violations as they develop and before market disruptions occur or become more serious. In some cases, a designated contract market may demonstrate that its manual processes are effective.

(2) *Physical-delivery contracts.* For physical-delivery contracts, the designated contract market must demonstrate that it is monitoring the adequacy and availability of the deliverable supply, which, if such information is available, includes the size and ownership of those supplies and whether such supplies are likely to be available to short traders and saleable by long traders at the market value of those supplies under normal cash marketing conditions. Further, for physical-delivery contracts, the designated contract market must continually monitor the appropriateness of a contract's terms and conditions, including the delivery instrument, the delivery locations and location differentials, and the commodity characteristics and related differentials. The designated contract market must demonstrate that it is making a good-faith effort to resolve conditions that are interfering with convergence of its physical-delivery contract to the price of the underlying commodity or causing price distortions or market disruptions, including, when appropriate, changes to contract terms.

(3) *Cash-settled contracts.* At a minimum, an acceptable program for monitoring cash-settled contracts must include access, either directly or through an information-sharing agreement, to traders' positions and transactions in the reference market for traders of a significant size in the designated contract market near the settlement of the contract.

(4) *Ability to obtain information.* With respect to the designated contract market's ability to obtain information, a designated contract market may limit the application of the requirement to keep and provide such records only to those that are reportable under its large-trader reporting system or otherwise hold substantial positions.

(5) *Risk controls for trading.* An acceptable program for preventing market disruptions must demonstrate appropriate trade risk controls, in addition to pauses and halts. Such controls must be adapted to the unique characteristics of the markets to which they apply and must be designed to avoid market disruptions without unduly interfering with that market's price discovery function. The designated contract market may choose from among controls that include: pre-trade limits on order size, price collars or bands around the current price, message throttles, and daily price limits, or design other types

of controls. Within the specific array of controls that are selected, the designated contract market also must set the parameters for those controls, so long as the types of controls and their specific parameters are reasonably likely to serve the purpose of preventing market disruptions and price distortions. If a contract is linked to, or is a substitute for, other contracts, either listed on its market or on other trading venues, the designated contract market must, to the extent practicable, coordinate its risk controls with any similar controls placed on those other contracts. If a contract is based on the price of an equity security or the level of an equity index, such risk controls must, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

(6) *Market disruptions and system anomalies associated with electronic trading.* To comply with §38.251(e), the contract market must adopt and implement rules that are reasonably designed to prevent, detect, and mitigate market disruptions or system anomalies associated with electronic trading. To comply with §38.251(f), the contract market must subject all electronic orders to exchange-based pre-trade risk controls that are reasonably designed to prevent, detect, and mitigate market disruptions or system anomalies.

*Core Principle 5 of section 5(d) of the Act: POSITION LIMITATIONS OR ACCOUNTABILITY—(A) IN GENERAL.*—To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) *MAXIMUM ALLOWABLE POSITION LIMITATION.*—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 6 of section 5(d) of the Act: EMERGENCY AUTHORITY.*—The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority—

(A) To liquidate or transfer open positions in any contract;

(B) To suspend or curtail trading in any contract; and

(C) To require market participants in any contract to meet special margin requirements.

(a) *Guidance.* In consultation and cooperation with the Commission, a designated contract market should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the DCM's market or as part of a coordinated, cross-market intervention. DCM rules should include procedures and guidelines to avoid conflicts of interest in accordance with the provisions of §40.9 of this chapter, and include alternate lines of communication and approval procedures to address emergencies associated with real-time events. To address perceived market threats, the designated contract market should have rules that allow it to take certain actions in the event of an emergency, as defined in §40.1 of this chapter, including: imposing or modifying position limits, price limits, and intraday market restrictions; imposing special margin requirements; ordering the liquidation or transfer of open positions in any contract; ordering the fixing of a settlement price; extending or shortening the expiration date or the trading hours; suspending or curtailing trading in any contract; transferring customer contracts and the margin or altering any contract's settlement terms or conditions; and, where applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services. In situations where a contract is fungible with a contract on another platform, emergency action to liquidate or transfer open interest must be as directed, or agreed to, by the Commission or the Commission's staff. The DCM has the authority to independently respond to emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the DCM are made in good faith to protect the integrity of the markets. The Commission should be notified promptly of the DCM's exercise of emergency action, explaining how conflicts of interest were minimized, including the extent to which the DCM considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contract market and similar markets on other trading venues. Information on all regulatory actions carried out pursuant to a DCM's emergency authority should be included in a timely submission of a certified rule pursuant to part 40 of this chapter.

(b) *Acceptable Practices.* A designated contract market must have procedures and guidelines for decision-making and implementation of emergency intervention in the market. At a minimum, the DCM must have the authority to liquidate or transfer open positions in the market, suspend or curtail trading in any contract, and require market participants in any contract to meet special

margin requirements. In situations where a contract is fungible with a contract on another platform, emergency action to liquidate or transfer open interest must be directed, or agreed to, by the Commission or the Commission's staff. The DCM must promptly notify the Commission of the exercise of its emergency authority, documenting its decision-making process, including how conflicts of interest were minimized, and the reasons for using its emergency authority. The DCM must also have rules that allow it to take such market actions as may be directed by the Commission.

*Core Principle 7 of section 5(d) of the Act:* AVAILABILITY OF GENERAL INFORMATION.—The board of trade shall make available to market authorities, market participants, and the public accurate information concerning—

(A) The terms and conditions of the contracts of the contract market; and

(B)(i) The rules, regulations, and mechanisms for executing transactions on or through the facilities of the contract market; and

(ii) The rules and specifications describing the operation of the contract market's—

(I) Electronic matching platform; or

(II) Trade execution facility.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 8 of section 5(d) of the Act:* DAILY PUBLICATION OF TRADING INFORMATION.—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 9 of section 5(d) of the Act:* EXECUTION OF TRANSACTIONS.—“(A) IN GENERAL.—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.

(B) RULES.—The rules of the board of trade may authorize, for bona fide business purposes—

(i) Transfer trades or office trades;

(ii) An exchange of—

(I) Futures in connection with a cash commodity transaction;

(II) Futures for cash commodities; or

(III) Futures for swaps; or

(iii) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 10 of section 5(d) of the Act:* TRADE INFORMATION.—The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information—

(A) To assist in the prevention of customer and market abuses; and

(B) To provide evidence of any violations of the rules of the contract market.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 11 of section 5(d) of the Act:* FINANCIAL INTEGRITY OF TRANSACTIONS.—The board of trade shall establish and enforce—

(A) Rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and

(B) Rules to ensure—

(i) The financial integrity of any—

(I) Futures commission merchant; and

(II) Introducing broker; and

(ii) The protection of customer funds.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 12 of section 5(d) of the Act:* PROTECTION OF MARKETS AND MARKET PARTICIPANTS.—The board of trade shall establish and enforce rules—

(A) To protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

(B) To promote fair and equitable trading on the contract market.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 13 of section 5(d) of the Act:* DISCIPLINARY PROCEDURES.—The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

(a) *Guidance*—(1) *Notice of charges.* If the rules of the designated contract market so provide, a notice may also advise: (i) That failure to request a hearing within the period prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and (ii) That failure to answer or to deny expressly a charge may be deemed to be an admission of such charge.

(2) *Admission or failure to deny charges.* The rules of a designated contract market may provide that if a respondent admits or fails to deny any of the charges, a disciplinary

panel may find that the violations alleged in the notice of charges for which the respondent admitted or failed to deny any of the charges have been committed. If the designated contract market's rules so provide, then:

(i) The disciplinary panel should impose a sanction for each violation found to have been committed;

(ii) The disciplinary panel should promptly notify the respondent in writing of any sanction to be imposed pursuant to paragraph (2)(i) of this section and shall advise the respondent that it may request a hearing on such sanction within the period of time, which shall be stated in the notice;

(iii) The rules of a designated contract market may provide that if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

(3) *Settlement offers.* (i) The rules of a designated contract market may permit a respondent to submit a written offer of settlement at any time after an investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of a settlement offer unless the respondent agrees.

(ii) The rules of a designated contract market may provide that, in its discretion, a disciplinary panel may permit the respondent to accept a sanction without either admitting or denying the rule violations upon which the sanction is based.

(iii) If an offer of settlement is accepted, the panel accepting the offer should issue a written decision specifying the rule violations it has reason to believe were committed, including the basis or reasons for the panel's conclusions, and any sanction to be imposed, which should include full customer restitution where customer harm is demonstrated, except where the amount of restitution and to whom it should be provided cannot be reasonably determined. If an offer of settlement is accepted without the agreement of the enforcement staff, the decision should adequately support the disciplinary panel's acceptance of the settlement. Where applicable, the decision should also include a statement that the respondent has accepted the sanctions imposed without either admitting or denying the rule violations.

(iv) The respondent may withdraw his or her offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent should not be deemed to have made any admissions by reason of the offer of settlement and should not be otherwise prejudiced by having submitted the offer of settlement.

(4) *Hearings.* The rules of a designated contract market may provide that a sanction

may be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

(5) *Right to appeal.* The rules of a designated contract market may permit the parties to a proceeding to appeal promptly an adverse decision of a disciplinary panel in all or in certain classes of cases. Such rules may require a party's notice of appeal to be in writing and to specify the findings, conclusions, or sanctions to which objection are taken. If the rules of a designated contract market permit appeals, then both the respondent and the enforcement staff should have the opportunity to appeal and the designated contract market should provide for the following:

(i) The designated contract market should establish an appellate panel that should be authorized to hear appeals of respondents. In addition, the rules of a designated contract market may provide that the appellate panel may, on its own initiative, order review of a decision by a disciplinary panel within a reasonable period of time after the decision has been rendered.

(ii) The composition of the appellate panel should be consistent with the requirements set forth in part 40 of this chapter and paragraph (4) of the acceptable practices for Core Principle 16, and should not include any members of the designated contract market's compliance staff, or any person involved in adjudicating any other stage of the same proceeding. The rules of a designated contract market should provide for the appeal proceeding to be conducted before all of the members of the appellate panel or a panel thereof.

(iii) Except for good cause shown, the appeal or review should be conducted solely on the record before the disciplinary panel, the written exceptions filed by the parties, and the oral or written arguments of the parties.

(iv) Promptly following the appeal or review proceeding, the appellate panel should issue a written decision and should provide a copy to the respondent. The decision issued by the appellate panel should adhere to all the requirements of §38.708 of this part, to the extent that a different conclusion is reached from that issued by the disciplinary panel.

(6) *Summary fines for violations of rules regarding timely submission of records, decorum, or other similar activities.* A designated contract market may adopt a summary fine schedule for violations of rules relating to the timely submission of accurate records required for clearing or verifying each day's transactions, decorum, attire, or other similar activities. A designated contract market may permit its compliance staff, or a designated panel of contract market officials, to summarily impose minor sanctions against persons within the designated contract market's jurisdiction for violating such rules. A

designated contract market's summary fine schedule may allow for warning letters to be issued for first-time violations or violators. If adopted, a summary fine schedule should provide for progressively larger fines for recurring violations.

(7) *Emergency disciplinary actions.* (i) A designated contract market may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the marketplace.

(ii) Any emergency disciplinary action should be taken in accordance with a designated contract market's procedures that provide for the following:

(A) If practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity. The notice should state the action, briefly state the reasons for the action, and state the effective time and date, and the duration of the action.

(B) The respondent should have the right to be represented by legal counsel or any other representative of its choosing in all proceedings subsequent to the emergency action taken. The respondent should be given the opportunity for a hearing as soon as reasonably practicable and the hearing should be conducted before the disciplinary panel pursuant to the requirements of §38.707 of this part.

(C) Promptly following the hearing provided for in this rule, the designated contract market should render a written decision based upon the weight of the evidence contained in the record of the proceeding and should provide a copy to the respondent. The decision should include a description of the summary action taken; the reasons for the summary action; a summary of the evidence produced at the hearing; a statement of findings and conclusions; a determination that the summary action should be affirmed, modified, or reversed; and a declaration of any action to be taken pursuant to the determination, and the effective date and duration of such action.

(b) *Acceptable Practices.* [Reserved]

*Core Principle 14 of section 5(d) of the Act: DISPUTE RESOLUTION.*—The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

(a) *Guidance.* A designated contract market should provide customer dispute resolution procedures that are: appropriate to the nature of the market; fair and equitable; and available on a voluntary basis, either directly or through another self-regulatory organization, to customers that are non-eligible contract participants.

(b) *Acceptable Practices.* (1) *Fair and equitable procedure.* Every contract market shall provide customer dispute resolution procedures that are fair and equitable. An acceptable customer dispute resolution mechanism would:

(i) Provide the customer with an opportunity to have his or her claim decided by an objective and impartial decisionmaker;

(ii) Provide each party with the right to be represented by counsel at the commencement of the procedure, at the party's own expense;

(iii) Provide each party with adequate notice of the claims presented against such party, an opportunity to be heard on all claims, defenses and permitted counterclaims, and an opportunity for a prompt hearing;

(iv) Authorize prompt, written, final settlement awards that are not subject to appeal within the designated contract market; and

(v) Notify the parties of the fees and costs that may be assessed.

(2) *Voluntary Procedures.* The use of dispute settlement procedures shall be voluntary for customers other than eligible contract participants as defined in section 1a(18) of the Dodd-Frank Act, and may permit counterclaims as provided in §166.5 of this chapter.

(3) *Member-to-Member Procedures.* If the designated contract market also provides procedures for the resolution of disputes that do not involve customers (*i.e.*, member-to-member disputes), the procedures for resolving such disputes must be independent of and shall not interfere with or delay the resolution of customers' claims or grievances.

(4) *Delegation.* A designated contract market may delegate to another self-regulatory organization or to a registered futures association its responsibility to provide for customer dispute resolution mechanisms, provided, however, that in the event of such delegation, the designated contract market shall in all respects treat any decision issued by such other organization or association with respect to such dispute as if the decision were its own, including providing for the appropriate enforcement of any award issued against a delinquent member.

*Core Principle 15 of section 5(d) of the Act: GOVERNANCE FITNESS STANDARDS.*—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

(a) *Guidance.* (1) A designated contract market should have appropriate eligibility criteria for the categories of persons set

forth in the Core Principle that should include standards for fitness and for the collection and verification of information supporting compliance with such standards. Minimum standards of fitness for persons who have member voting privileges, governing obligations or responsibilities, or who exercise disciplinary authority are those bases for refusal to register a person under section 8a(2) of the Act. In addition, persons who have governing obligations or responsibilities, or who exercise disciplinary authority, should not have a significant history of serious disciplinary offenses, such as those that would be disqualifying under §1.63 of this chapter. Members with trading privileges but having no, or only nominal, equity, in the facility and non-member market participants who are not intermediated and do not have these privileges, obligations, responsibilities or disciplinary authority could satisfy minimum fitness standards by meeting the standards that they must meet to qualify as a “market participant.” Natural persons who directly or indirectly have greater than a ten percent ownership interest in a designated contract market should meet the fitness standards applicable to members with voting rights.

(2) The Commission believes that such standards should include providing the Commission with fitness information for such persons, whether registration information, certification to the fitness of such persons, an affidavit of such persons’ fitness by the contract market’s counsel or other information substantiating the fitness of such persons. If a contract market provides certification of the fitness of such a person, the Commission believes that such certification should be based on verified information that the person is fit to be in his or her position.

(b) *Applicable Practices.* [Reserved]

*Core Principle 16 of section 5(d) of the Act:* CONFLICTS OF INTEREST.—The board of trade shall establish and enforce rules—

(A) to minimize conflicts of interest in the decisionmaking process of the contract market; and

(B) to establish a process for resolving conflicts of interest described in subparagraph (A).

(a) *Guidance.* The means to address conflicts of interest in decisionmaking of a contract market should include methods to ascertain the presence of conflicts of interest and to make decisions in the event of such a conflict. In addition, the Commission believes that the contract market should provide for appropriate limitations on the use or disclosure of material non-public information gained through the performance of official duties by board members, committee members and contract market employees or gained through an ownership interest in the contract market.

(b) *Acceptable Practices.* All designated contract markets (“DCMs” or “contract markets”) bear special responsibility to regulate effectively, impartially, and with due consideration of the public interest, as provided for in section 3 of the Act. Under Core Principle 15, they are also required to minimize conflicts of interest in their decisionmaking processes. To comply with this Core Principle, contract markets should be particularly vigilant for such conflicts between and among any of their self-regulatory responsibilities, their commercial interests, and the several interests of their management, members, owners, customers and market participants, other industry participants, and other constituencies. Acceptable practices for minimizing conflicts of interest shall include the following elements:

(1) Board composition for contract markets

(i) At least thirty-five percent of the directors on a contract market’s board of directors shall be public directors; and

(ii) The executive committees (or similarly empowered bodies) shall be at least thirty-five percent public.

(2) Public director

(i) To qualify as a public director of a contract market, an individual must first be found, by the board of directors, on the record, to have no material relationship with the contract market. A “material relationship” is one that reasonably could affect the independent judgment or decisionmaking of the director.

(ii) In addition, a director shall be considered to have a “material relationship” with the contract market if any of the following circumstances exist:

(A) The director is an officer or employee of the contract market or an officer or employee of its affiliate. In this context, “affiliate” includes parents or subsidiaries of the contract market or entities that share a common parent with the contract market;

(B) The director is a member of the contract market, or an officer or director of a member. “Member” is defined according to section 1a(34) of the Commodity Exchange Act and Commission Regulation 1.3;

(C) The director, or a firm with which the director is an officer, director, or partner, receives more than \$100,000 in combined annual payments from the contract market, or any affiliate of the contract market (as defined in subsection (2)(ii)(A)), for legal, accounting, or consulting services. Compensation for services as a director of the contract market or as a director of an affiliate of the contract market does not count toward the \$100,000 payment limit, nor does deferred compensation for services prior to becoming a director, so long as such compensation is in no way contingent, conditioned, or revocable;

(D) Any of the relationships above apply to a member of the director's "immediate family," i.e., spouse, parents, children and siblings.

(iii) All of the disqualifying circumstances described in subsection (2)(ii) shall be subject to a one-year look back.

(iv) A contract market's public directors may also serve as directors of the contract market's affiliate (as defined in subsection (2)(ii)(A)) if they otherwise meet the definition of public director in this section (2).

(v) A contract market shall disclose to the Commission which members of its board are public directors, and the basis for those determinations.

(3) Regulatory oversight committee

(i) A board of directors of any contract market shall establish a Regulatory Oversight Committee ("ROC") as a standing committee, consisting of only public directors as defined in section (2), to assist it in minimizing actual and potential conflicts of interest. The ROC shall oversee the contract market's regulatory program on behalf of the board. The board shall delegate sufficient authority, dedicate sufficient resources, and allow sufficient time for the ROC to fulfill its mandate.

(ii) The ROC shall:

(A) Monitor the contract market's regulatory program for sufficiency, effectiveness, and independence;

(B) Oversee all facets of the program, including trade practice and market surveillance; audits, examinations, and other regulatory responsibilities with respect to member firms (including ensuring compliance with financial integrity, financial reporting, sales practice, recordkeeping, and other requirements); and the conduct of investigations;

(C) Review the size and allocation of the regulatory budget and resources; and the number, hiring and termination, and compensation of regulatory personnel;

(D) Supervise the contract market's chief regulatory officer, who will report directly to the ROC;

(E) Prepare an annual report assessing the contract market's self-regulatory program for the board of directors and the Commission, which sets forth the regulatory program's expenses, describes its staffing and structure, catalogues disciplinary actions taken during the year, and reviews the performance of disciplinary committees and panels;

(F) Recommend changes that would ensure fair, vigorous, and effective regulation; and

(G) Review regulatory proposals and advise the board as to whether and how such changes may impact regulation.

(4) Disciplinary panels

All contract markets shall minimize conflicts of interest in their disciplinary processes through disciplinary panel composition

rules that preclude any group or class of industry participants from dominating or exercising disproportionate influence on such panels. Contract markets can further minimize conflicts of interest by including in all disciplinary panels at least one person who would qualify as a public director, as defined in subsections (2)(ii) and (2)(iii) above, except in cases limited to decorum, attire, or the timely submission of accurate records required for clearing or verifying each day's transactions. If contract market rules provide for appeal to the board of directors, or to a committee of the board, then that appellate body shall also include at least one person who would qualify as a public director as defined in subsections (2)(ii) and (2)(iii) above.

*Core Principle 17 of section 5(d) of the Act:* COMPOSITION OF GOVERNING BOARDS OF CONTRACT MARKETS.—The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 18 of section 5(d) of the Act:* RECORDKEEPING.—The board of trade shall maintain records of all activities relating to the business of the contract market—

(A) In a form and manner that is acceptable to the Commission; and

(B) For a period of at least 5 years.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 19 of section 5(d) of the Act:* ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not—

(A) Adopt any rule or taking any action that results in any unreasonable restraint of trade; or

(B) Impose any material anticompetitive burden on trading on the contract market.

(a) *Guidance.* An entity seeking designation as a contract market may request that the Commission consider under the provisions of section 15(b) of the Act, any of the entity's rules, including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading, at the time of designation or thereafter. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable Practices.* [Reserved]

*Core Principle 20 of section 5(d) of the Act:* SYSTEM SAFEGUARDS.—The board of trade shall—

(A) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of

automated systems, that are reliable, secure, and have adequate scalable capacity;

(B) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(C) Periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 21 of section 5(d) of the Act:*  
FINANCIAL RESOURCES.—

(A) **IN GENERAL.**—The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.

(B) **DETERMINATION OF ADEQUACY.**—The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 22 of section 5(d) of the Act:*  
DIVERSITY OF BOARD OF DIRECTORS.—

The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

*Core Principle 23 of section 5(d) of the Act:*  
SECURITIES AND EXCHANGE COMMISSION.—

The board of trade shall keep any such records relating to swaps defined in section 1a(47)(A)(v) open to inspection and examination by the Securities and Exchange Commission.

(a) *Guidance.* A designated contract market should have arrangements and resources for collecting and maintaining accurate records pertaining to any swaps agreements defined in section 1a(47)(A)(v) of the Act, and should leave them open to inspection and examination for a period of five years.

(b) *Acceptable Practices.* [Reserved]

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APPENDIX C TO PART 38—DEMONSTRATION OF COMPLIANCE THAT A CONTRACT IS NOT READILY SUSCEPTIBLE TO MANIPULATION

(a) *Futures Contracts—General Information.*  
When a designated contract market certifies or submits for approval contract terms and conditions for a new futures contract, that submission should include the following information:

(1) A narrative describing the contract, including data and information to support the contract's terms and conditions, as set by the designated contract market. When designing a futures contract, the designated contract market should conduct market research so that the contract design meets the risk management needs of prospective users and promotes price discovery of the underlying commodity. The designated contract market should consult with market users to obtain their views and opinions during the contract design process to ensure the contract's term and conditions reflect the underlying cash market and that the futures contract will perform the intended risk management and/or price discovery functions. A designated contract market should provide a statement indicating that it took such steps to ensure the usefulness of the submitted contract.

(2) A detailed cash market description for physical and cash-settled contracts. Such descriptions should be based on government and/or other publicly-available data whenever possible and be formulated for both the national and regional/local market relevant to the underlying commodity. For tangible commodities, the cash market descriptions for the relevant market (*i.e.*, national and regional/local) should incorporate at least three full years of data that may include, among other factors, production, consumption, stocks, imports, exports, and prices. Each of those cash market variables should be fully defined and the data sources should be fully specified and documented to permit Commission staff to replicate the estimates of deliverable supply (defined in paragraph (b)(1)(A) of this appendix C). Whenever possible, the Commission requests that monthly or daily prices (depending on the contract) underlying the cash settlement index be submitted for the most recent three full calendar years and for as many of the current year's months for which data are available. For contracts that are cash settled to an index, the index's methodology should be provided along with supporting information showing how the index is reflective of the underlying cash market, is not readily subject to manipulation or distortion, and is based on a cash price series that is reliable, acceptable, publicly available and timely (defined in paragraphs (c)(2) and (c)(3) of this

appendix C). The Commission recognizes that the data necessary for accurate and cogent cash market analyses for an underlying commodity vary with the nature of the underlying commodity. The Commission may require that the designated contract market submit a detailed report on commodity definitions and uses.

(b) *Futures Contracts Settled by Physical Delivery.* (1) For listed contracts that are settled by physical delivery, the terms and conditions of the contract should conform to the most common commercial practices and conditions in the cash market for the commodity underlying the futures contract. The terms and conditions should be designed to avoid any impediments to the delivery of the commodity so as to promote convergence between the price of the futures contract and the cash market value of the commodity at the expiration of a futures contract.

(i) *Estimating Deliverable Supplies.*

(A) *General definition.* The specified terms and conditions, considered as a whole, should result in a "deliverable supply" that is sufficient to ensure that the contract is not susceptible to price manipulation or distortion. In general, the term "deliverable supply" means the quantity of the commodity meeting the contract's delivery specifications that reasonably can be expected to be readily available to short traders and salable by long traders at its market value in normal cash marketing channels at the contract's delivery points during the specified delivery period, barring abnormal movement in interstate commerce. Typically, deliverable supply reflects the quantity of the commodity that potentially could be made available for sale on a spot basis at current prices at the contract's delivery points. For a non-financial physical-delivery commodity contract, this estimate might represent product which is in storage at the delivery point(s) specified in the futures contract or can be moved economically into or through such points consistent with the delivery procedures set forth in the contract and which is available for sale on a spot basis within the marketing channels that normally are tributary to the delivery point(s). Furthermore, an estimate of deliverable supply would not include supply that is committed for long-term agreements (*i.e.*, the amount of deliverable supply that would not be available to fulfill the delivery obligations arising from current trading). The size of commodity supplies that are committed to long-term agreements may be estimated by consulting with market participants. However, if the estimated deliverable supply that is committed for long-term agreements, or significant portion thereof, can be demonstrated by the designated contract market to be consistently and regularly made available to the spot market for shorts to acquire at prevailing economic values, then those "available" supplies com-

mitted for long-term contracts may be included in the designated contract market's estimate of deliverable supply for that commodity. An adequate measure of deliverable supply would be an amount of the commodity that would meet the normal or expected range of delivery demand without causing futures prices to become distorted relative to cash market prices. Given the availability of acceptable data, deliverable supply should be estimated on a monthly basis for at least the most recent three years for which data are available. To the extent possible and that data resources permit, deliverable supply estimates should be constructed such that the data reflect, as close as possible, the market defined by the contract's terms and conditions, and should be formulated, whenever possible, with government or publicly available data. All deliverable supply estimates should be fully defined, have all underlying assumptions explicitly stated, and have documentation of all data/information sources in order to permit estimate replication by Commission staff.

(B) *Accounting for variations in deliverable supplies.* To assure the availability of adequate deliverable supplies and acceptable levels of commercial risk management utility, contract terms and conditions should account for variations in the patterns of production, consumption and supply over a period of years of sufficient length to assess adequately the potential range of deliverable supplies. This assessment also should consider seasonality, growth, and market concentration in the production/consumption of the underlying cash commodity. Deliverable supply implications of seasonal effects are more straightforwardly delineated when deliverable supply estimates are calculated on a monthly basis and when such monthly estimates are provided for at least the most recent three years for which data resources permit. In addition, consideration should be given to the relative roles of producers, merchants, and consumers in the production, distribution, and consumption of the cash commodity and whether the underlying commodity exhibits a domestic or international export focus. Careful consideration also should be given to the quality of the cash commodity and to the movement or flow of the cash commodity in normal commercial channels and whether there exist external factors or regulatory controls that could affect the price or supply of the cash commodity.

(C) *Calculation of deliverable supplies.* Designated contract markets should derive a quantitative estimate of the deliverable supplies for the delivery period specified in the proposed contract. For commodities with seasonal supply or demand characteristics, the deliverable supply analysis should include that period when potential supplies

typically are at their lowest levels. The estimate should be based on statistical data, when reasonably available, covering a period of time that is representative of the underlying commodity's actual patterns of production, patterns of consumption, and patterns of seasonal effects (if relevant). Often, such a relevant time period should include at least three years of monthly deliverable supply estimates permitted by available data resources. Deliverable supply estimates should also exclude the amount of the commodity that would not be otherwise deliverable on the futures contract. For example, deliverable supplies should exclude quantities that at current price levels are not economically obtainable or deliverable or were previously committed for long-term agreements.

(2) Contract terms and conditions requirements for futures contracts settled by physical delivery.

(i) For physical delivery contracts, an acceptable specification of terms and conditions would include, but may not be limited to, rules that address, as appropriate, the following criteria and comply with the associated standards:

(A) *Quality Standards.* The terms and conditions of a commodity contract should describe or define all of the economically significant characteristics or attributes of the commodity underlying the contract. In particular, the quality standards should be described or defined so that such standards reflect those used in transactions in the commodity in normal cash marketing channels. Documentation establishing that the quality standards of the contract's underlying commodity comply with those accepted/established by the industry, by government regulations, and/or by relevant laws should also be submitted. For any particular commodity contract, the specific attributes that should be enumerated depend upon the individual characteristics of the underlying commodity. These may include, for example, the following items: grade, quality, purity, weight, class, origin, growth, issuer, originator, maturity window, coupon rate, source, hours of trading, etc. If the terms of the contract provide for the delivery of multiple qualities of a specific attribute of the commodity having different cash market values, then a "par" quality should be specified with price differentials applicable to the "non-par" qualities that reflect discounts or premiums commonly observed or expected to occur in the cash market for that commodity.

(B) *Delivery Points and Facilities.* Delivery point/area specifications should provide for futures delivery at a single location or at multiple locations where the underlying cash commodity is normally transacted or stored and where there exists a viable cash market(s). If multiple delivery points are specified and the value of the commodity differs

between these locations, contract terms should include price differentials that reflect usual differences in value between the different delivery locations. If the price relationships among the delivery points are unstable and a designated contract market chooses to adopt fixed locational price differentials, such differentials should fall within the range of commonly observed or expected commercial price differences. In this regard, any price differentials should be supported with cash price data for the delivery location(s). The terms and conditions of the contracts also should specify, as appropriate, any conditions the delivery facilities and/or delivery facility operators should meet in order to be eligible for delivery. Specification of any requirements for delivery facilities also should consider the extent to which ownership of such facilities is concentrated and whether the level of concentration would be susceptible to manipulation of the futures contract's prices. Commodity contracts also should specify appropriately detailed delivery procedures that describe the responsibilities of deliverers, receivers and any required third parties in carrying out the delivery process. Such responsibilities could include allocation between buyer and seller of all associated costs such as load-out, document preparation, sampling, grading, weighing, storage, taxes, duties, fees, drayage, stevedoring, demurrage, dispatch, etc. Required accreditation for third-parties also should be detailed. These procedures should seek to minimize or eliminate any impediments to making or taking delivery by both deliverers and takers of delivery to help ensure convergence of cash and futures at the expiration of a futures delivery month.

(C) *Delivery Period and Last Trading Day.* An acceptable specification of the delivery period would allow for sufficient time for deliverers to acquire the deliverable commodity and make it available for delivery, considering any restrictions or requirements imposed by the designated contract market. Specification of the last trading day for expiring contracts should consider whether adequate time remains after the last trading day to allow for delivery on the contract.

(D) *Contract Size and Trading Unit.* An acceptable specification of the delivery unit and/or trading unit would be a contract size that is consistent with customary transactions, transportation or storage amounts in the cash market (e.g., the contract size may be reflective of the amount of the commodity that represents a pipeline, truckload or railcar shipment). For purposes of increasing market liquidity, a designated contract market may elect to specify a contract size that is smaller than the typical commercial transaction size, storage unit or transportation size. In such cases, the commodity contract should include procedures that

allow futures traders to easily take or make delivery on such a contract with a smaller size, or, alternatively, the designated contract market may adopt special provisions requiring that delivery be made only in multiple contracts to accommodate reselling the commodity in the cash market. If the latter provision is adopted, contract terms should be adopted to minimize the potential for default in the delivery process by ensuring that all contracts remaining open at the close of trading in expiring delivery months can be combined to meet the required delivery unit size. Generally, contract sizes and trading units should be determined after a careful analysis of relevant cash market trading practices, conditions and deliverable supply estimates, so as to ensure that the underlying market commodity market and available supply sources are able to support the contract sizes and trading units at all times.

(E) *Delivery Pack*. The term "delivery pack" refers to the packaging standards (e.g., product may be delivered in burlap or polyethylene bags stacked on wooden pallets) or non-quality related standards regarding the composition of commodity within a delivery unit (e.g., product must all be imported from the same country or origin). An acceptable specification of the delivery pack or composition of a contract's delivery unit should reflect, to the extent possible, specifications commonly applied to the commodity traded or transacted in the cash market.

(F) *Delivery Instrument*. An acceptable specification of the delivery instrument (e.g., warehouse receipt, depository certificate or receipt, shipping certificate, bill of lading, in-line transfer, book transfer of securities, etc.) would provide for its conversion into the cash commodity at a commercially-reasonable cost. Transportation terms (e.g., FOB, CIF, freight prepaid to destination) as well as any limits on storage or certificate daily premium fees should be specified. These terms should reflect cash market practices and the customary provision for allocating delivery costs between buyer and seller.

(G) *Inspection Provisions*. Any inspection/certification procedures for verifying compliance with quality requirements or any other related delivery requirements (e.g., discounts relating to the age of the commodity, etc.) should be specified in the contract rules. An acceptable specification of inspection procedures would include the establishment of formal procedures that are consistent with procedures used in the cash market. To the extent that formal inspection procedures are not used in the cash market, an acceptable specification would contain provisions that assure accuracy in assessing the commodity, that are available at a low cost, that do not pose an obstacle to delivery on the contract and that are per-

formed by a reputable, disinterested third party or by qualified designated contract market employees. Inspection terms also should detail which party pays for the service, particularly in light of the possibility of varying inspection results.

(H) *Delivery (Trading) Months*. Delivery months should be established based on the risk management needs of commercial entities as well as the availability of deliverable supplies in the specified months.

(I) *Minimum Price Fluctuation (Minimum Tick)*. The minimum price increment (tick) should be set at a level that is equal to, or less than, the minimum price increment commonly observed in cash market transactions for the underlying commodity. Specifying a futures' minimum tick that is greater than the minimum price increment in the cash market can undermine the risk management utility of the futures contract by preventing hedgers from efficiently establishing and liquidating futures positions that are used to hedge anticipated cash market transactions or cash market positions.

(J) *Maximum Price Fluctuation Limits*. Designated contract markets may adopt price limits to: (1) Reduce or constrain price movements in a trading day that may not be reflective of true market conditions but might be caused by traders overreacting to news; (2) Allow additional time for the collection of margins in times of large price movements; and (3) Provide a "cooling-off" period for futures market participants to respond to bona fide changes in market supply and demand fundamentals that would lead to large cash and futures price changes. If price limit provisions are adopted, the limits should be set at levels that are not overly restrictive in relation to price movements in the cash market for the commodity underlying the futures contract.

(K) *Speculative Limits*. Specific information regarding the establishment of speculative position limits are set forth in part 150, and/or part 151, as applicable, of the Commission's regulations.

(L) *Reportable Levels*. Refer to §15.03 of the Commission's regulations.

(M) *Trading Hours*. Should be set by the designated contract market to delineate each trading day.

(c) *Futures Contracts Settled by Cash Settlement*. (1) Cash settlement is a method of settling certain futures or option contracts whereby, at contract expiration, the contract is settled by cash payment in lieu of physical delivery of the commodity or instrument underlying the contract. An acceptable specification of the cash settlement price for commodity futures and option contracts would include rules that fully describe the essential economic characteristics of the underlying commodity (e.g., grade, quality, weight, class, growth, issuer, maturity, source, rating, description of the underlying

index and index's calculation methodology, etc.), as well as how the final settlement price is calculated. In addition, the rules should clearly specify the trading months and hours of trading, the last trading day, contract size, minimum price change (tick size) and any limitations on price movements (e.g., price limits or trading halts).

(2) Cash settled contracts may be susceptible to manipulation or price distortion. In evaluating the susceptibility of a cash-settled contract to manipulation, a designated contract market should consider the size and liquidity of the cash market that underlies the listed contract in a manner that follows the determination of deliverable supply as noted above in (b)(1). In particular, situations susceptible to manipulation include those in which the volume of cash market transactions and/or the number of participants contacted in determining the cash-settlement price are very low. Cash-settled contracts may create an incentive to manipulate or artificially influence the data from which the cash-settlement price is derived or to exert undue influence on the cash-settlement price's computation in order to profit on a futures position in that commodity. The utility of a cash-settled contract for risk management and price discovery would be significantly impaired if the cash settlement price is not a reliable or robust indicator of the value of the underlying commodity or instrument. Accordingly, careful consideration should be given to the potential for manipulation or distortion of the cash settlement price, as well as the reliability of that price as an indicator of cash market values. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash settlement price. Documentation demonstrating that the settlement price index is a reliable indicator of market values and conditions and is commonly used as a reference index by industry/market agents should be provided. Such documentation may take on various forms, including carefully documented interview results with knowledgeable agents.

(3) Where an independent, private-sector third party calculates the cash settlement price series, a designated contract market should consider the need for a licensing agreement that will ensure the designated contract market's rights to the use of the price series to settle the listed contract.

(i) Where an independent, private-sector third party calculates the cash settlement price series, the designated contract market should verify that the third party utilizes business practices that minimize the opportunity or incentive to manipulate the cash-settlement price series. Such safeguards may include lock-downs, prohibitions against derivatives trading by employees, or public dissemination of the names of sources and the

price quotes they provide. Because a cash-settled contract may create an incentive to manipulate or artificially influence the underlying market from which the cash-settlement price is derived or to exert undue influence on the cash-settlement computation in order to profit on a futures position in that commodity, a designated contract market should, whenever practicable, enter into an information-sharing agreement with the third-party provider which would enable the designated contract market to better detect and prevent manipulative behavior.

(ii) Where a designated contract market itself generates the cash settlement price series, the designated contract market should establish calculation procedures that safeguard against potential attempts to artificially influence the price. For example, if the cash settlement price is derived by the designated contract market based on a survey of cash market sources, the designated contract market should maintain a list of such entities which all should be reputable sources with knowledge of the cash market. In addition, the sample of sources polled should be representative of the cash market, and the poll should be conducted at a time when trading in the cash market is active.

(iii) The cash-settlement calculation should involve computational procedures that eliminate or reduce the impact of potentially unrepresentative data.

(iv) The cash settlement price should be an accurate and reliable indicator of prices in the underlying cash market. The cash settlement price also should be acceptable to commercial users of the commodity contract. The registered entity should fully document that the settlement price is accurate, reliable, highly regarded by industry/market agents, and fully reflects the economic and commercial conditions of the relevant designated contract market.

(v) To the extent possible, the cash settlement price should be based on cash price series that are publicly available and available on a timely basis for purposes of calculating the cash settlement price at the expiration of a commodity contract. A designated contract market should make the final cash settlement price and any other supporting information that is appropriate for release to the public, available to the public when cash settlement is accomplished by the derivatives clearing organization. If the cash settlement price is based on cash prices that are obtained from non-public sources (e.g., cash market surveys conducted by the designated contract market or by third parties on behalf of the designated contract market), a designated contract market should make available to the public as soon as possible after a contract month's expiration the final cash settlement price as well as any other supporting information that is appropriate or feasible to make available to the public.

(4) Contract terms and conditions requirements for futures contracts settled by cash settlement.

(i) An acceptable specification of the terms and conditions of a cash-settled commodity contract will also set forth the trading months, last trading day, contract size, minimum price change (tick size) and daily price limits, if any.

(A) *Commodity Characteristics*: The terms and conditions of a commodity contract should describe the commodity underlying the contract.

(B) *Contract Size and Trading Unit*: An acceptable specification of the trading unit would be a contract size that is consistent with customary transactions in the cash market. A designated contract market may opt to set the contract size smaller than that of standard cash market transactions.

(C) *Cash Settlement Procedure*: The cash settlement price should be reliable, acceptable, publicly available, and reported in a timely manner as described in paragraphs (c)(3)(iv) and (c)(3)(v) of this appendix C.

(D) *Pricing Basis and Minimum Price Fluctuation (Minimum Tick)*: The minimum price increment (tick) should be set a level that is equal to, or less than, the minimum price increment commonly observed in cash market transactions for the underlying commodity. Specifying a futures' minimum tick that is greater than the minimum price increment in the cash market can undermine the risk management utility of the futures contract by preventing hedgers from efficiently establishing and liquidating futures positions that are used to hedge anticipated cash market transactions or cash market positions.

(E) *Maximum Price Fluctuation Limits*: Designated contract markets may adopt price limits to: (1) Reduce or constrain price movements in a trading day that may not be reflective of true market conditions but might be caused by traders overreacting to news; (2) Allow additional time for the collection of margins in times of large price movements; and (3) Provide a "cooling-off" period for futures market participants to respond to bona fide changes in market supply and demand fundamentals that would lead to large cash and futures price changes. If price-limit provisions are adopted, the limits should be set at levels that are not overly restrictive in relation to price movements in the cash market for the commodity underlying the futures contract. For broad-based stock index futures contracts, rules should be adopted that coordinate with New York Stock Exchange ("NYSE") declared Circuit Breaker Trading Halts (or other market coordinated Circuit Breaker mechanism) and would recommence trading in the futures contract only after trading in the majority of the stocks underlying the index has recommenced.

(F) *Last Trading Day*: Specification of the last trading day for expiring contracts should be established such that it occurs before publication of the underlying third-party price index or determination of the final settlement price. If the designated contract market chooses to allow trading to occur through the determination of the final settlement price, then the designated contract market should show that futures trading would not distort the final settlement price calculation.

(G) *Trading Months*: Trading months should be established based on the risk management needs of commercial entities as well as the availability of price and other data needed to calculate the cash settlement price in the specified months. Specification of the last trading day should take into consideration whether the volume of transactions underlying the cash settlement price would be unduly limited by occurrence of holidays or traditional holiday periods in the cash market. Moreover, a contract should not be listed past the date for which the designated contract market has access to use a proprietary price index for cash settlement.

(H) *Speculative Limits*: Specific rules and policies for speculative position limits are set forth in part 150 and/or part 151, as applicable, of the Commission's regulations.

(I) *Reportable Levels*: Refer to §15.03 of the Commission's regulations.

(J) *Trading Hours*: Should be set by the designated contract market to delineate each trading day.

(d) *Options on a Futures Contract*. (1) The Commission's experience with the oversight of trading in futures option contracts indicates that most of the terms and conditions associated with such trading do not raise any regulatory concerns or issues. The Commission has found that the following terms do not affect an option contract's susceptibility to manipulation or its utility for risk management. Thus, the Commission believes that, in most cases, any specification of the following terms would be acceptable; the only requirement is that such terms be specified in an automatic and objective manner in the option contract's rules:

- Exercise method;
- Exercise procedure (if positions in the underlying futures contract are established via book entry);
- Strike price listing provisions, including provisions for listing strike prices on a discretionary basis;
- Strike price intervals;
- Automatic exercise provisions;
- Contract size (unless not set equal to the size of the underlying futures contract); and
- Option minimum tick should be equal to or smaller than that of the underlying futures contract.

(2) **Option Expiration & Last Trading Day.** For options on futures contracts, specification of expiration dates should consider the relationship of the option expiration date to the delivery period for the underlying futures contract. In particular, an assessment should be made of liquidity in the underlying futures market to assure that any futures contracts acquired through exercise can be liquidated without adversely affecting the orderly liquidation of futures positions or increasing the underlying futures contract's susceptibility to manipulation. When the underlying futures contract exhibits a very low trading activity during an expiring delivery month's final trading days or has a greater risk of price manipulation than other contracts, the last trading day and expiration day of the option should occur prior to the delivery period or the settlement date of the underlying future. For example, the last trading day and option expiration day might appropriately be established prior to first delivery notice day for option contracts with underlying futures contracts that have very limited deliverable supplies. Similarly, if the futures contract underlying an option contract is cash settled using cash prices from a very limited number of underlying cash market transactions, the last trading and option expiration days for the option contract might appropriately be established prior to the last trading day for the futures contract.

(3) **Speculative Limits.** In cases where the terms of an underlying futures contract specify a spot-month speculative position limit and the option contract expires during, or at the close of, the futures contract's delivery period, the option contract should include a spot-month speculative position limit provision that requires traders to combine their futures and option position and be subject to the limit established for the futures contract. Specific rules and policies for speculative position limits are set forth in part 150 and/or part 151, as applicable, of the Commission's regulations.

(4) **Options on Physicals Contracts.**

(i) Under the Commission's regulations, the term "option on physicals" refers to option contracts that do not provide for exercise into an underlying futures contract. Upon exercise, options on physicals can be settled via physical delivery of the underlying commodity or by a cash payment. Thus, options on physicals raise many of the same issues associated with trading in futures contracts regarding adequacy of deliverable supplies or acceptability of the cash settlement price series. In this regard, an option that is cash settled based on the settlement price of a futures contract would be considered an "option on physicals" and the futures settlement price would be considered the cash price series.

(ii) In view of the above, acceptable practices for the terms and conditions of options

on physicals contracts include, as appropriate, those practices set forth above for physical-delivery or cash-settled futures contracts plus the practices set forth for options on futures contracts.

(e) **Security Futures Products.** The listing of security futures products are governed by the special requirements of part 41 of the Commission's regulations.

(f) **Non-Price Based Futures Contracts.** (1) Non-price based contracts are typically construed as binary options, but also may be designed to function similar to traditional futures or option contracts.

(2) Where the contract is settled to a third party cash-settlement series, the designated contract market should consider the nature and sources of the data comprising the cash-settlement calculation, the computational procedures, and the mechanisms in place to ensure the accuracy and reliability of the index value. The evaluation also considers the extent to which the third party has, or will adopt, safeguards against unauthorized or premature release of the index value itself or any key data used in deriving the index value.

(3) The designated contract market should follow the guidance in paragraph (c)(4) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Cash Settlement) of this appendix C to meet compliance.

(g) **Swap Contracts.** (1) In general, swap contracts are an agreement to exchange a series of cash flows over a period of time based on reference price indices. When listing a swap for trading, a swap execution facility or designated contract market should determine that the reference price indices used for its contracts are not readily susceptible to manipulation. Accordingly, careful consideration should be given to the potential for manipulation or distortion of the cash settlement price, as well as the reliability of that price as an indicator of cash market values. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash settlement price. Documentation demonstrating that the settlement price index is a reliable indicator of market values and conditions and is highly regarded by industry/market agents should be provided. Such documentation may take on various forms, including carefully documented interviews with principal market trading agents, pricing experts, marketing agents, etc. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash flows of the swap.

(i) Where an independent, private-sector third party calculates the referenced price index, the designated contract market

should verify that the third party utilizes business practices that minimize the opportunity or incentive to manipulate the cash-settlement price series. Such safeguards may include lock-downs, prohibitions against derivatives trading by employees, or public dissemination of the names of sources and the price quotes they provide. Because a cash-settled contract may create an incentive to manipulate or artificially influence the underlying market from which the cash-settlement price is derived or to exert undue influence on the cash-settlement computation in order to profit on a futures position in that commodity, a designated contract market should, whenever practicable, enter into an information-sharing agreement with the third-party provider which would enable the designated contract market to better detect and prevent manipulative behavior.

(ii) Where a designated contract market itself generates the cash settlement price series, the designated contract market should establish calculation procedures that safeguard against potential attempts to artificially influence the price. For example, if the cash settlement price is derived by the designated contract market based on a survey of cash market sources, the designated contract market should maintain a list of such entities which all should be reputable sources with knowledge of the cash market. In addition, the sample of sources polled should be representative of the cash market, and the poll should be conducted at a time when trading in the cash market is active.

(iii) The cash-settlement calculation should involve appropriate computational procedures that eliminate or reduce the impact of potentially unrepresentative data.

(2) *Speculative Limits:* Specific rules and policies for speculative position limits are set forth in part 151 and/or part 151, as applicable, of the Commission's regulations.

(3) *Intraday Market Restrictions:* Designated contract markets or swap execution facilities should have in place intraday market restrictions that pause or halt trading in the event of extraordinary price moves that may result in distorted prices. Such restrictions need to be coordinated with other markets that may be a proxy or a substitute for the contracts traded on their facility. For example, coordination with NYSE rule 80.B Circuit Breaker Trading Halts. The designated contract market or swap execution facility should adopt rules to specifically address who is authorized to declare an emergency; how the designated contract market or swap execution facility will notify the Commission of its decision that an emergency exists; how it will address conflicts of interest in the exercise of emergency authority; and how it will coordinate trading halts with markets that trade the underlying price reference index or product.

(4) *Settlement Method.* The designated contract market or swap execution facility should follow the guidance in paragraph (c)(4) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Cash Settlement) of this appendix C to meet compliance, or paragraph (b)(2) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Physical Delivery) of this appendix C, as appropriate.

[77 FR 36717, June 19, 2012]

## PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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