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U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

FOIA Office

November 14, 2022

RE: 22-00167-FOIA

This is in response to your request dated September 7, 2022, under the Freedom of Information Act ("FOIA") seeking access to: [A copy of each memo in the Legislative and Intergovernmental Affairs office at CFTC regarding each of the following topics: RINS Markets, Automated/High Frequency/Electronic Trading, Position Limits and Bona Fide Hedge Exemptions, End-User related concerns, "Bad Actor" waivers within the Enforcement context, and Live Cattle Futures. Please limit this request to records during the time frame January 1, 2017 to the present.].

In accordance with the FOIA and agency policy, we have searched our records, as of September 13, 2022, the date we received your request in our FOIA office. We are granting partial access to and are attaching copies of the accessible records. Some pages are draft material and fall within the exemptions to the FOIA's disclosure requirements, as explained below. The Commission considers the foreseeable harm standard when reviewing records and applying FOIA exemptions. We have conducted a segregability analysis and have segregated any non-exempt final versions of the records from the exempt draft versions, which are withheld in full.

Some responsive records contain staff analyses, opinions, and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision-making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5. 5 U.S.C. § 552(b)(5); *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

If you have any questions about the way we handled your request, or about our FOIA regulations or procedures, please contact Bridget McFarland at 202-418-5319, or Jonathan Van Doren, our FOIA Public Liaison, at 202-418-5505.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 8th Floor, 1155 21st Street, N.W., Washington, D.C. 20581, within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

Sincerely,

Rosemary B. Killoy
Assistant General Counsel

IV. o. Agriculture Background and Issues

A. Introduction

Futures contracts for agricultural commodities have been traded in the United States for more than 150 years and have been under Federal regulation since the 1920s.[1] At the time, trading in grains and other agricultural commodities was the predominant activity and the U.S. Department of Agriculture was the agency charged with overseeing the trading on organized futures exchanges. The Commodity Futures Trading Commission Act of 1974 created the Commodity Futures Trading Commission ("CFTC") as an independent agency and granted it exclusive jurisdiction over the futures trading industry.

Today, the derivatives industry has become increasingly varied and complex across different asset classes beyond agriculture. In terms of volume, trading in agricultural futures products is significantly smaller than for other asset classes such as in financial, energy and metals futures.[2] Many of the innovations that play a key role in the operation and integrity of derivatives market today, however, occurred or were introduced when the markets were exclusively agricultural.

Because of its origins in the USDA and with agricultural commodities, CFTC oversight committees in Congress are the House Agriculture Committee and the Senate Agriculture, Nutrition and Forestry Committee.[3]

Additional history on the Commission and its origins in the agricultural markets is available on the CFTC website: **CFTC History**. In addition, crop production maps for the major agricultural commodities is included in **Appendix A** to this document. A list of the benchmark agricultural contracts and a summary of their delivery point and form of settlement is included as **Appendix B**.

B. Background

One of the very unique aspects of the CFTC as a regulatory agency is its core principles-based regime. CFTC-regulated derivatives exchanges, that is, Designated Contract Markets ("DCMs") or Swap Execution Facilities ("SEFs"), are self-regulatory organizations ("SROs") that are

[1] Commodity exchanges were subject to state laws until the passage of the Cotton Futures Act 1916. That law authorized the USDA to establish quality standards and spot markets for cotton and levied a tax of 2 cents per bushel on any transaction not in conformance with the standards and regulations issued by the Secretary of Agriculture. The Grain Futures Act followed shortly after in 1922, requiring all grain futures to be traded on regulated futures exchanges and creating an office within USDA to administer the law. Notably, the Grain Futures Act was the first use of the interstate commerce clause to establish the need for federal regulation of the commodity markets. One of the first activities of the newly established Grain Trading Commission was to collect and publish data on volume, open interest and market composition which is still published by the CFTC today in its Commitments of Traders Report.

[2] Will Acworth, Erin Perzov and Simon Gittins, *2020 annual trends in futures and options trading*, Futures Industry Association, January 27, 2021, available at: https://www.fia.org/resources/2020-annual-trends-futures-and-options-trading.

[3] House Agriculture Committee, *available at*: https://agriculture.house.gov/ and the Senate Agriculture, Nutrition and Forestry Committee, *available at*: https://www.agriculture.senate.gov/.

responsible for front-line oversight of their marketplaces. These exchanges design and list derivatives contracts, issue and enforce their own rules and operate market surveillance and enforcement functions all subject to a set of "core principles," which are not prescriptive rules but more like a broad set of standards. Unless CFTC regulations or rules pursuant to those core principles provide otherwise, the exchanges have reasonable discretion in establishing the manner in which they comply with the core principles. There are 23 core principles for DCMs[4] and 15 for SEFs.[5] The core principle regime is intended to provide deference to the SROs, as well as flexibility in regulating a very broad set of asset classes and individual commodities with differing characteristics.

The system of self-regulation of commodity markets dates back to 1859 when the Governor of Illinois issued a corporate charter granting self-regulatory authority over its members to the Board of Trade of the City of Chicago ("CBOT") and enabled the exchange to make binding decisions on the quality of grain. At approximately the same time (1858), the standardization of terms for "to arrive" contracts laid the foundation for significant expansion of commodity markets.[6] Standardization made the contracts tradeable and greatly expanded the pool of potential buyers and sellers by lowering counterparty search costs and giving each party confidence in the amount, quality and location of potential deliveries.

Legislative changes have also enabled the expansion of the CFTC's authority over commodity markets beyond agriculture. For example, the Commodity Futures Trading Commission Act of 1974 also amended the definition of a "commodity," expanding the defined term from a finite list of agricultural commodities to its current definition, which encompasses a list of enumerated agricultural commodities, as well as "and all other goods and articles, except onions … and motion picture box office receipts …, and all services, rights, and interests … in which contracts for future delivery are presently or in the future dealt in."[7] This groundbreaking definitional change set the foundation for the expansion of commodity markets into metals, energy and financial products, as well as cryptocurrencies.

Even though the CFTC has been an independent agency since 1975 and the commodity markets have evolved beyond agriculture, the Commission and the exchanges continue to rely on the USDA, its staff and data products to assess critical aspects of the underlying cash agricultural commodity markets. For example, USDA staff in the Agricultural Marketing Service ("AMS") perform unbiased quality grading services to ensure that cattle delivered under a CME Live Cattle futures contract conforms with the required contract specifications of that physically delivered futures contract.[8] The CME also relies on prices published by the USDA to determine the final

[4] CFTC Regulations, Part 38, Designated Contract Markets, *available at*:https://www.ecfr.gov/cgi-bin/text-idx?SID=4a16b40e49596492b7a93daef8683e04&mc=true&tpl=/ecfrbrowse/Title17/17cfr38_main_02.tpl
[5] CFTC Regulations, Part 37, Swap Execution Facilities, *available at*: https://www.ecfr.gov/cgi-bin/text-idx?SID=4a16b40e49596492b7a93daef8683e04&mc=true&tpl=/ecfrbrowse/Title17/17cfr37_main_02.tpl
[6] US Futures Trading and Regulation Before the Creation of the CFTC, Commodity Futures Trading Commission, *available at*: https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html.
[7] CEA Section 1a(9).
[8] CME Live Cattle Contract Specifications, CME Rulebook, Chapter 101 Live Cattle Futures, *available at*: https://www.cmegroup.com/markets/agriculture/livestock/live-cattle.contractSpecs.html.

settlement price for the CME dairy complex[9] and livestock futures contracts.[10] Similarly, the CBOT uses standards established by the USDA Federal Grain Inspection Service to specify the quality of its Corn, Wheat, Rough Rice and Oats futures contracts, as well as for the Soy Complex.[11]

Most importantly, USDA publishes cash prices for grains, oilseeds and livestock, which the CFTC and exchanges use as a reference point from which to measure market performance convergence between cash and futures prices. This convergence measurement is critical to identifying price anomalies, which may stem from, among other things, attempts to manipulate the futures market or futures contract terms that have diverged from cash market practices. Finally, representatives from the USDA's Office of the Chief Economist and AMS participate as members of the CFTC's Agricultural Advisory Committee[12], sponsored by Commissioner Stump. Separately, as necessary and appropriate, the CFTC may share its trading data with USDA to coordinate on enforcement matters.

C. Profile of Agriculture Market Participants in Derivatives Markets

Price risk management and the use of futures, options and swaps to manage that price risk, underpins the entire US economy. From interest rates to electricity, oats to gasoline and diesel fuel, exchange rates to iron ore, most Americans have interacted with a commodity that has been hedged in the CFTC's jurisdictional markets by the time they eat breakfast.

Generally, commercial market participants use futures to hedge the price risk attendant to their business.[13] For example, agricultural market participants with an inherent "short" position are those with crops or livestock that they plan to market in the future and are concerned about the price of the commodity *going down*, *e.g.*, grain elevators and producers. On the other hand, participants with an inherent "long" position are those who need to purchase a product in the future and are concerned about the price of the commodity *going up*, *e.g.*, food product manufacturers. While commercial market participants enter the market to mitigate or "lay off" price risk attendant to their business, speculators assume that risk (on either the long *or* short side), without necessarily having cash market exposure, with the hope of making a profit. Trading activity from speculators also helps long and short hedgers connect in the markets over time. For example, the hedging needs of producers of an annual crop with one significant harvest period per year do not necessarily match (in quantity or time) with the hedging need of a cereal producer who has a constant and consistent demand for the commodity, but each may offset their positions against a speculator.

[9] Class III and IV Milk, Nonfat Dry Milk, Dry Whey, Cheese, Block Cheese, and Cash-Settled Butter futures contracts.

[10] CME Feeder Cattle, Lean Hogs and Pork Cutout futures contracts.

[11] Soybeans, Soybean Meal and Soybean Oil futures contracts.

[12] The full list of the Agricultural Advisory Committee, which includes representatives of national farm organizations, major commodity groups, agribusiness concerns, and agricultural bankers is available here: https://www.cftc.gov/About/AdvisoryCommittees/AAC.

[13] Every transaction in the futures market involves the anonymous matching of a short (sell) side and a long (buy) side. Futures positions that represent a commercial hedging strategy are opposite cash position.

Cattle feeders, meat packers, merchandizers and processors may be on both sides of the market – livestock packers purchasing cattle for slaughter and cattle feeders who intend to purchase cattle for their feedlots have exposure to the long side of the market (at risk of price rises), while the same packers who are selling to grocery stores or feeders who are selling to packers have exposure on the short side of the market (at risk of price declines).

D. Hot Topics & Recent Rulemakings

1. Consolidation and Price Volatility in the Cattle Industry

As discussed below, several factors have disrupted or impacted the markets and processing systems responsible for the production and sale of U.S. beef, including (i) corporate consolidation in the meat packing industry, (ii) an extended closure due to a fire at a major beef packing plant, and (iii) additional plant closures due to social distancing and labor shortages caused by the coronavirus ("COVID-19") pandemic.

Unlike corn or wheat, cattle can vary considerably in terms of quality, maturity and yield by season, region, producer and even within a pen. Additionally, livestock production and marketing practices have evolved significantly over the past several decades. For these reasons, ensuring the Live Cattle and other livestock futures contracts are performing their intended risk management and price discovery functions is a perennial issue for the CFTC.

There are currently two cattle futures contracts, both of which are listed by the Chicago Mercantile Exchange Inc. ("CME"):

Live Cattle	Physically delivered futures contract, which specifies 40,000 lbs. of fully finished ("fed" or "fat") steers or heifers weighing 1,050-1,500 lbs. each of typical grade and yield that is ready, or near-ready for slaughter. Delivery of one futures contract worth of Live Cattle is between 26-38 live animals and occurs within a territory designated by USDA as the "Five Areas."[14]
Feeder Cattle	Cash-settled futures contract, which specifies 50,000 lbs. of feeder cattle weighing between 700-899 lbs., which is typically 6 months from full maturity after placement in a feedlot. This futures contract is cash-settled based on a 7-day weighed average price of feeder cattle within a 12-state production region.[15]

Consolidation in the meat packing industry and price volatility often gives rise to concerns about prices and market integrity. Most recently, President Biden issued Executive Order 14036 on

[14] Texas/Oklahoma/New Mexico; Kansas; Nebraska; Colorado; Iowa/Minnesota.

[15] Understanding The CME Feeder Cattle Index, *available at*: https://www.cmegroup.com/trading/agricultural/files/understanding-cme-feeder-cattle-index.pdf

Promoting Competition in the American Economy ("Executive Order"),[16] which among other things, is intended to impact the agriculture, healthcare, shipping, transportation and technology industries. Per the White House, regarding agriculture, the Executive Order directs the USDA and the Federal Trade Commission to take certain actions, including new rules under the Packers and Stockyards Act, with the goal of addressing what the White House refers to as concentrated and less competitive agricultural markets. Furthermore, the Executive Order also creates the President's Competition Council, which includes corporate consolidation in the meat processing industry as one of its issues to discuss. The CFTC is a member of the President's Competition Council.

Regarding price volatility, the Government Accountability Office ("GAO") concluded an investigation in 2018 on the cattle markets in response to the wide price fluctuations in fed cattle prices from 2013 to 2016.[17] These price fluctuations raised concerns about the market and questions about USDA's oversight of U.S. cattle markets. In its report, GAO recommended the USDA review its statutory authority to review pricing data from the cattle markets. The report (1) describes key factors that affected changes in fed cattle prices from 2013 through 2016; (2) describes what CFTC found about possible trading irregularities in the futures market for fed cattle in 2015 and any changes to the futures contract for fed cattle since 2015; and (3) examines factors that may affect USDA's routine monitoring to ensure against discriminatory or anticompetitive practices in the fed cattle market. Between 2016 and 2018, while the GAO investigation was ongoing, CME submitted to the Commission for approval certain amendments to the Live Cattle futures contract. Generally, the amendments implemented some new contract and trading specifications regarding coordination with the USDA on the live-grading process, oversight of delivery facilities and the management of the delivery process.[18]

[16] Executive Order 14036 Promoting Competition in the American Economy, 86 Fed. Reg. 36987, July 14, 2021, *available at: https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy.*

[17] Government Accountability Office, U.S. Department of Agriculture, Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market, April 2018, GAO-18-296, *available at*: https://www.gao.gov/products/gao-18-296

[18] See, (1) CFTC Regulation 40.6(a) Notification. Amendments to the Live Cattle Futures Contract. CME Submission No. 16-432 (October 25, 2016), *available at*: https://www.cftc.gov/sites/default/files/filings/ptc/16/10/ptc102616cmedcm001.pdf ; (2) CFTC Regulation 40.5(b)(5) Request for Non-Material Agricultural Rule Change, Amendments to the Live Cattle Futures Contract Related Delivery Rules in CME Chapter 7 ("Delivery Facilities and Procedures"), CME Submission NO. 16-458 (November 14, 2016), *available at*: https://www.cftc.gov/sites/default/files/filings/ptc/16/11/ptc111516cmedcm001.pdf; (3) CFTC Regulation 40.4(a)/40.5(a) Amendments to the Expiring Month Position Limits of the Live Cattle Futures Contract, CME Submission No. 17-054 (February 15, 2017), *available at*: https://www.cftc.gov/sites/default/files/filings/ptc/17/02/ptc021617cmedcm002.pdf; (4) CFTC Regulation 40.4(b)(5) "Non-Material Agricultural Rule Change" Notification Regarding Amendments to CME Chapter 7 ("Delivery Facilities and Procedures") and CME Chapter 101 ("Live Cattle Futures"), CME Submission No. 17-092 (March 10, 2017) *available at*: https://www.cftc.gov/sites/default/files/filings/ptc/17/03/ptc031117cmedcm001.pdf; (5) CFTC Regulation 40.6(a) Certification. Notification Regarding Amendments to the Live Cattle Futures and Options Contracts, CME Submission No. 17-208 (June 9, 2017), *available at*: https://www.cftc.gov/sites/default/files/filings/ptc/17/06/ptc060917cmedcm001.pdf; (6) CFTC Regulation

Not long after the GAO concluded its investigation, there were two significant events that placed additional scrutiny on the livestock sector: a packing plant fire in Kansas and COVID-19. On August 9, 2019, a Tyson-owned meat packing plant in Holcomb, KS, caught on fire and temporarily ceased production for a period of approximately four months. The plant was responsible for approximately one-sixth of all cattle processing in the US. When processing capacity is constricted, cattle have no where to go, which drives the price of the live animals down. The other impact is that grocery stores and restaurants have trouble accessing supplies of meat, which means an increase in the price to the consumer.[19] The COVID outbreaks at meat packing plants and ensuing labor shortages had a similar impact as the Holcomb fire. Prices to the producer went down while prices to the consumer went up.

The industry measures this pricing phenomenon using the "Live-to-Cutout" spread which is a comparison of the Live Cattle futures price to the price of finished cuts of meat ("boxed beef"), colloquially known as the "packer margin." During the fire and the pandemic, the packer margin reached historic proportions. While the spread is not a statistical representation of actual packer profits, meat packing firms did report record profits during the pandemic.[20] In response to producer and consumer concerns, the USDA conducted its own investigation into market conditions, fed cattle prices, boxed beef values, and the Live-to-Cutout spread. [21]

While there is much discussion and some proposed legislation about competition and concentration within the meat packing industry, the CFTC's role is primarily working with the exchange to ensure that they are confident that there is an adequate amount of negotiated trade for price discovery, and that the futures contract is reflective of commercial transactions and cash market practices to the extent practicable. In addition to the work of CFTC staff mentioned above, CFTC staff engaged with the Exchange at the beginning of the pandemic to review and rationalize price limit levels to accommodate additional price volatility and diminish the number of disruptions to the market.[22]

2. *Position limits and automated trading rules*

As discussed in more detail in the Briefing Book section on the Division of Market Oversight, a recent significant rulemaking that has impacted many of the CFTC's agriculture related stakeholders was the rulemaking on position limits for derivatives. While this final rule expanded the universe of contracts that would be subject to federal position limits, the only contracts that

40.4(a)/40.5(a) Amendments to the Live Cattle Futures Contract, CME Submission No. 17-258RR (June 21, 2017), *available at*: https://www.cftc.gov/sites/default/files/filings/ptc/18/02/ptc021518cmedcm004.pdf.

[19] Michael Nepveux, *Impacts of the Packing Plant Fire in Kansas*, The American Farm Bureau Federation (Sept. 10, 2019) *available at*: https://www.fb.org/market-intel/impacts-of-the-packing-plant-fire-in-kansas.

[20] Nayara Figueiredo and Ana Mano, *Brazil's JBS profit bolstered by weak currency, strong Chinese and U.S. markets*, Reuters (March 24, 2021), *available at*: https://www.reuters.com/article/jbs-results-idAFL1N2LM3EZ.

[21] Boxed Beef & Fed Cattle Price Spread Investigation Report, United States Department of Agriculture, Agricultural Marketing Service (July 22, 2021) *available at*: https://www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf

[22] CFTC Regulations 40.4(a)/40.5(a), Request for Approval: Amendments to Daily Price Limit Rule of all Livestock and Dairy Futures Contracts, CME Submission No. 20-212SSS (May 26, 2020), *available at*: https://www.cftc.gov/sites/default/files/filings/ptc/20/06/ptc060220cmedcm001.pdf.

were previously subject to federal position limits were nine agricultural contracts. Agricultural market participants were also concerned with the recent rulemaking on automated trading, or electronic risk principles final rule, also discussed in the DMO briefing book section.

3. Aluminum Pricing Issues

As discussed in more detail in the Briefing Book section on the Hot Topics – Aluminum Report to Congress 2021, there has been legislation introduced in both the 115th and 116th Congress (the "APEX bill") to address concerns that have been raised with the CFTC and Congress regarding the Midwest Premium benchmark price for aluminum published by Platts, which some argue should be subject to regulatory oversight by the CFTC.

4. Expansion of Agriculture Related Contracts to Manage Climate Risks

As discussed in more detail in the Briefing Book section on the Hot Topics – Climate and ESG Related Derivatives Products and Markets, there has been a recent expansion of currently listed weather or agriculture related futures contracts which may be utilized to hedge or speculate on climate related risks.

Appendix A

United States Department of Agriculture – Crop Production Maps

Link: United States Crop Production Maps

USDA Crop Product
Maps.pdf

Appendix B

Settlement and Delivery Terms for Benchmark Agricultural Contracts

Exchange	Futures Contract	Settlement Type	Summary of Delivery Points/Settlement
CME	Butter	Cash	USDA monthly weighted average price in the U.S. for butter. https://www.cmegroup.com/rulebook/CME/II/50/56/56.pdf
CME	Cheese	Cash	USDA monthly weighted average price in the U.S. for cheese. The reported USDA monthly weighted average price for cheese uses both 40-pound cheddar block and 500-pound barrel prices. https://www.cmegroup.com/rulebook/CME/II/50/60/60.pdf
IFUS	Cocoa (CC)	Physical	Licensed warehouses in the Port of New York District, Delaware River Port District, Port of Hampton Roads, Port of Albany or Port of Baltimore. See https://www.theice.com/productguide/ProductSpec.shtml?specId=7
IFUS	Coffee "C" (KC)	Physical	Exchange licensed warehouses in the Port of New York District (at par), the Port of New Orleans, the Port of Houston, the Port of Bremen/Hamburg, the Port of Antwerp, the Port of Miami and the Port of Barcelona (at a discount of 1.25 cents/lb.). See https://www.theice.com/productguide/ProductSpec.shtml?specId=15
CBT	Corn (C)	Physical	Shipping Certificates from warehouses or shipping stations currently regular for delivery in Chicago and Burns Harbor, Indiana Switching District, Lockport-Seneca Shipping District, Ottawa-Chillicothe Shipping District, Peoria-Pekin Shipping District, Havana-Grafton Shipping District, St. Louis-East St. Louis and Alton Switching Districts. See http://www.cmegroup.com/rulebook/CBOT/II/11/11.pdf.
IFUS	Cotton No. 2 (CT)	Physical	Warehouse receipt or delayed certification. Exchange licensed warehouses in Galveston, TX, Houston, TX, Dallas/Ft. Worth, TS, Memphis, TN and Greenville/Spartanburg, SC. See https://www.theice.com/productguide/ProductSpec.shtml?specId=254.
CME	Dry Whey (DY)	Cash	USDA monthly weighted average price for dry whey, as first released. See https://www.cmegroup.com/rulebook/CME/II/50/57/57.pdf.
IFUS	Frozen Concentrated Orange Juice (OJ)	Physical	Warehouse receipt from exchange-licensed warehouses in Florida, New Jersey, and Delaware.

Exchange	Futures Contract	Settlement Type	Summary of Delivery Points/Settlement
CME	Feeder Cattle (FC)	Cash	CME Feeder Cattle Index™ based on sample of transactions from weight/frame score categories: 650 to 849 pound Medium and Large Frame #1 feeder steers, and 650 to 849 pound Medium and Large Frame #1-2 feeder steers. The sample consists of all feeder cattle auction, direct trade, video sale, and Internet sale transactions within the 12-state region of CO, IA, KS, MO, MT, NE, NM, ND, OK, SD, TX and WY for which the number of head, weighted average price and weighted average weight are reported by the Agricultural Marketing Service of the USDA (USDA-AMS). See http://www.cmegroup.com/rulebook/CME/II/100/102/102.pdf
MGEX	Hard Red Spring Wheat (MWE)	Physical	Warehouse receipt from elevators located in Minneapolis/St. Paul, Red Wing and Duluth/Superior See Chapter 8 of rulebook, available at http://www.mgex.com/documents/Rulebook.pdf
CBT	KC HRW (Hard Red Winter Wheat) (KW)	Physical	Shipping certificates from regular elevators or warehouses located in the switching limits of: 1.) Kansas City, Missouri/Kansas; 2.) Hutchinson, Kansas; 3.) Salina/Abilene, Kansas; or 4.) Wichita, Kansas. See http://www.cmegroup.com/rulebook/CBOT/II/14h.pdf
CME	Lean Hogs (LH)	Cash	CME Lean Hog Index® for the 2–day period ending on the day on which trading terminates. That index is based on a sample consisting of all producer-sold negotiated and swine or pork market formula barrows and gilts purchased on a lean value direct basis by packers for which the head count, average net price and average carcass weight are reported in the "National Daily Direct Hog Prior Day Report-Slaughtered Swine" released by the USDA. See http://www.cmegroup.com/rulebook/CME/II/150/152/152.pdf.
CME	Live Cattle (LC)	Physical	A par delivery of live beef cattle at an approved livestock yards in the 5-Areas: Colorado (Sterling, Wray); IA-MN-SD (Worthing, South Dakota); Kansas (Dodge City, Syracuse); Nebraska (Burwell, Kearney, Lexington, Ogallala, West Point); TX-OK-NM (Tulia, Texas; Amarillo, Texas; Texhoma, Oklahoma; Clovis, New Mexico). Carcass graded beef at buyer's discretion. See http://www.cmegroup.com/rulebook/CME/II/100/101/101.pdf.
CME	Milk, Class III (DA)	Cash	USDA Class III price for milk for the particular contract month, as first released. See http://www.cmegroup.com/rulebook/CME/II/50/52/52.pdf.

Exchange	Futures Contract	Settlement Type	Summary of Delivery Points/Settlement
CME	Nonfat Dry Milk (NF)	Cash	USDA monthly weighted average price for nonfat dry milk, as first released. See https://www.cmegroup.com/rulebook/CME/II/50/54/54.pdf.
CBT	Oats (O)	Physical	Shipping certificates from regular facilities within the Chicago Switching District, the Burns Harbor, Indiana Switching District or the Minneapolis, Minnesota or St. Paul, Minnesota Switching Districts, or within the Duluth, Minnesota or Superior, Wisconsin Switching District. See http://www.cmegroup.com/rulebook/CBOT/II/15/15.pdf
CBT	Rough Rice (RR)	Physical	Shipping certificates issued by regular warehouses located in the Arkansas counties of Craighead, Jackson, Poinsett, Woodruff, Cross, St. Francis, Lonoke, Prairie, Monroe, Jefferson, Arkansas and DeSha. See http://www.cmegroup.com/rulebook/CBOT/II/17/17.pdf.
CBT	Soybeans (S)	Physical	Shipping Certificates from warehouses or shipping stations regular for delivery in Chicago and Burns Harbor, Indiana Switching District, Lockport-Seneca Shipping District, Ottawa-Chillicothe Shipping District, Peoria-Pekin Shipping District, Havana-Grafton Shipping District, St. Louis-East St. Louis and Alton Switching Districts. See http://www.cmegroup.com/rulebook/CBOT/II/11/11.pdf.
CBT	Soybean Meal (SM)	Physical	Shipping certificates at plant locations in Central Territory (Par): Bloomington, IL; Cairo, IL; Danville, IL; Decatur, IL; Galesburg, IL; Gibson City, IL; Quincy, IL; Owensboro, KY. Northeast Territory (+$2.00): Bellevue, OH; Claypool, IN; Decatur, IN; Fostoria, OH; Frankfurt, IN; Lafayette, IN; Morristown, IN; Mt. Vernon, IN; Sidney, OH. Midsouth Territory (+$9.50): Decatur, AL; Guntersville, AL; Little Rock, AR; Stuttgart, AR. Missouri Territory (+$3.00): Kansas City; Mexico; St. Joseph. Eastern Territory (+$2.00): Cedar Rapids (East), IA; Des Moines, IA; Iowa Falls, IA. Northern Territory (+$2.50): Eagle Grove, IA; Council Bluffs, IA. See http://www.cmegroup.com/rulebook/CBOT/II/13/13.pdf.
CBT	Soybean Oil (BO)	Physical	Shipping certificates from warehouse locations in Illinois Territory (Par): Bloomington; Danville; Decatur; Galesburg; Gibson City; Quincy. Eastern Territory (20 differential): Decatur, IN; Frankfort, IN; Lafayette, IN; Logansport, IN. Eastern Iowa Territory (130 differential): Ackley; Buffalo; Cedar Rapids; Cedar Rapids (E); Des

Exchange	Futures Contract	Settlement Type	Summary of Delivery Points/Settlement
			Moines; Iowa Falls; Mason City. Southwest Territory (85 differential): Kansas City, MO; Mexico, MO; St. Joseph, MO; Emporia, KS. See http://www.cmegroup.com/rulebook/CBOT/II/12/12.pdf.
ICUS	Sugar No. 11 (SB)	Physical	Port in the country of origin or berth or anchorage in the customary port of export. Growths of Argentina, Australia, Barbados, Belize, Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Ecuador, Fiji Islands, French Antilles, Guatemala, Honduras, India, Jamaica, Malawi, Mauritius, Mexico, Mozambique, Nicaragua, Peru, Republic of the Philippines, South Africa, Swaziland, Taiwan, Thailand, Trinidad, United States, and Zimbabwe. See:https://www.theice.com/productguide/ProductSpec.shtml;jsessionid=1C2B4DCEFA9B312C66B03F67345E0587?specId=23.
ICUS	Sugar No. 16 (SF)	Physical	New York, Baltimore, Galveston, New Orleans and Savannah. See https://www.theice.com/productguide/ProductSpec.shtml?specId=914.
CBT	Wheat (W)	Physical	Shipping certificates from regular delivery facilities located in: Chicago/ Burns Harbor, Indiana Switching District, the Northwest Ohio Territory, the St. Louis – Alton Territory, on the Ohio River, on the Mississippi River or the Toledo, Ohio Switching District. The Northwest Ohio Territory shall be shuttle loading facilities within the following 12 counties: Allen, Crawford, Hancock, Hardin, Henry, Huron, Marion, Putnam, Sandusky, Seneca, Wood, and Wyandot. See http://www.cmegroup.com/rulebook/CBOT/II/14/14.pdf.

Last Updated 8/10/2021

V. Hot Topics – Renewable Identification Numbers ("RINs") Market

A. Background

As discussed below, the Environmental Protection Agency ("EPA") and the Commodity Futures Trading Commission ("CFTC") have a standing Memorandum of Understanding ("MOU") to address the sharing of information between the two agencies specific to EPA's oversight of the RINs markets. Specifically, the MOU addresses the CFTC's review and analysis of information shared by the EPA specific to EPA's oversight of the Renewable Identification Numbers ("RINs") market. For example, the CFTC has provided advice to EPA on conducting possible investigations into potential fraud, market abuse, or other violations relating to the generation of, and trading in, RINs and the trade in renewable fuels subject to the EPA's regulation or oversight.

The Renewable Fuel Standard ("RFS") program is a national policy implemented by the EPA that requires a certain volume of renewable fuel to replace or be blended to reduce the quantity of petroleum-based transportation fuel, heating oil or jet fuel. Under the RFS, refiners or importers of gasoline or diesel fuel achieve compliance with the program by blending renewable fuels into transportation fuel, or by obtaining credits, called RINs, to meet their EPA-specified obligation. Generally, RINs are records of individual batches of renewable fuel being blended into the US gasoline and diesel pools. RINs are generated when a batch of renewable fuel is produced. Each batch receives a unique identification number (hence the name). A RIN is attached to the volume of renewable fuel produced but may be "separated" from the fuel once the renewable fuel is blended into gasoline or diesel in the US. The separated RIN may then be traded to refiners and importers of gasoline and diesel to allow them to meet their Renewable Volume Obligation ("RVO").

Early on in the implementation of the RFS program, the RINs market faced a fraud scandal when several producers sold fraudulent RINs, which called into question the validity of the RINs created, as well allegations of possible manipulation of the RINs markets. In 2013, Senator Stabenow, then the Chairwoman of the Senate Ag Committee, called on the CFTC to review possible manipulation of the renewable fuels market.[1]

B. Memorandum of Understanding

In March, 2016, the CFTC and the Environmental EPA announced that the EPA would share RFS data and CFTC would provide an analysis of that data pursuant to an MMOU. Specifically, the MOU sets forth that the EPA can share information in its possession relating to participants and

[1] Chairwoman Stabenow Calls on CFTC to Review Possible Manipulation of Renewable Fuels Market, U.S. Senate Committee on Agriculture, Nutrition and Forestry, September 24, 2013, *available at*: https://www.agriculture.senate.gov/newsroom/press/release/chairwoman-stabenow-calls-on-cftc-to-review-possible-manipulation-of-renewable-fuels-market.

activities in the RIN and RFS markets. The CFTC in turn, may review and analyze that information and provide advice to EPA on techniques to minimize potential fraud, market abuse, or other violations relating to the generation of, and trading in RINs and renewable fuels subject to the EPA's regulation and oversight.

To read the MOU, click **here.**

1. Terms of the MOU

The proposed MOU contains provisions regarding the permissible uses of non-public information and proprietary business information exchanged under the MOU and the confidentiality of that information. In particular, the proposed MOU sets forth the understanding of the Parties with respect to treatment of non-public information and proprietary business information obtained from or shared between the CFTC and EPA. The MOU does not obligate the Parties to create, maintain, share or provide any information, and does not create any enforceable rights against the Parties or any of their officers or employees or any other person. The MOU also provides that any information sharing between the Parties shall not be burdensome.

The Commission is subject generally to the prohibitions set forth in Section 8(a) of the CEA, which states in pertinent part that "except as specifically authorized in this Act, the CFTC may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." However, under Section 8(e) of the CEA, the CFTC, in its discretion, may transmit any information it possesses to any other governmental department or agency. The receiving department or agency is not permitted to further disclose such information, unless there is a legal proceeding to which it, the CFTC, or the United States is a party.

2. Use of Information for Enforcement Purposes

Importantly, the MOU provides that it does not modify in any way the ability and responsibility of the CFTC or EPA to enforce their respective statutes and regulations, and it does not diminish in any way the independence of the CFTC or EPA in any of their respective agency functions. Non-public information and PBI received under the MOU may be used by the Party receiving the information for or in any enforcement investigation, examination, proceeding, or civil action, except that the Party receiving the information may disclose such information to a third party or the public only with the prior written consent of the Party that provided the information.

Congressional Interest

Senators on the Senate Agriculture Committee have raised questions over the years regarding the integrity of the RINS markets. They have expressly asked the agency whether we have the ability to oversee those markets, or at a minimum assist EPA in overseeing the markets. The aforementioned MOU between the EPA and CFTC expressly outlines the role that each regulator plays related to those markets. CFTC's role is strictly limited to assisting EPA in interpreting data and sharing information about how we as an agency enforce our rules and regulations in an effort to ensure the integrity of the derivatives markets.

Question: Bad actor disqualification, like that in Rule 262 and Rule 506, is intended to prevent bad actors (recidivists) from taking advantage of exemptions from registration available under the securities laws. Congress required the SEC to implement bad actor disqualification provisions as part of Dodd-Frank. The SEC has been criticized for being too lenient in granting waivers, especially to large financial firms. We understand that the CFTC in four recent orders concerning Deutsche Bank in two actions, HSBC, and UBS essentially granted requests for waivers from disqualification that otherwise would have been directed to the SEC for its consideration under SEC rules.

Is the CFTC too liberally granting waivers? Isn't the consideration of waiver requests better left to the SEC? How is further limiting the effect of the disqualification provisions—as the CFTC has done by issuing advice against disqualification—consistent with Congressional intent?

- The Commission is following the relevant provision of Dodd Frank, as passed by Congress, as well as the rules and guidance promulgated by the SEC in implementing Dodd Frank.

    - In promulgating its rules, as we understand it, the SEC made certain thoughtful policy decisions. *First*, there was an explicit determination that certain orders by the CFTC would trigger the disqualification. These are orders that sound in fraud, deceit or manipulation. *Second*, the SEC also determined that it would be appropriate for the CFTC to make the determination that disqualification should not automatically arise as a result of the CFTC's order in the CFTC case. *Third*, the SEC determined that if the CFTC made such a determination that automatic disqualification was not necessary, the SEC would accept that determination and would not undertake a review of the waiver of the automatic disqualification. *Finally*, although the SEC has stated its intention to accept the CFTC's determination that automatic disqualification is not appropriate, the SEC retains authority to bring a separate SEC action for disqualification should the SEC disagree with the CFTC's determination. (Disqualification in such circumstances would not be automatic, but would be a result of the separate SEC action.)

- In SEC's notice of rulemaking, the SEC expressed its view that this approach "strikes an appropriate balance" because "[i]t allows the relevant authorities to determine the impact of their orders and conserves [SEC] Commission resources (which might otherwise be devoted to consideration of waiver applications) in cases where the relevant authority determines that disqualification from Rule 506 offerings is not warranted." *Disqualification of Felons and Other "Bad Actors" From Rule 506 Offerings*, 78 FR 44730, 44748 (July 24, 2013, effective Sept. 23, 2013).

- [Note for background: Former Chair White explained that the disqualification provisions are very broad and and must be tempered by this waiver authority.[1] Chair White also

[1] Chair Mary Jo White, *Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws* (Mar. 12, 2015), https://www.sec.gov/news/speech/031215-spch-cmjw.html.

noted that the purpose of the waiver inquiry is "to determine whether the entity or individual, going forward, can engage responsibly and lawfully in the activity at issue in the particular disqualification"; explained that the "ultimate objective is for the waiver decision to safeguard the public interest and protect investors"; and cautioned that "waivers were never intended to be, and we should not use them as, an additional enforcement tool designed to address misconduct or as an unjustified mechanism for deterring misconduct."[2]]

- Against that backdrop, the determination was made that it was appropriate for the CFTC to consider requests for such waivers. It is a sound and pragmatic approach that ensures the regulator most knowledgeable about the particular facts and markets at issue determines what the appropriate consequences of the misconduct should be.

- In moving forward, I directed staff that the Commission's consideration and resolutions of any such requests must be well grounded on the facts and circumstances of the particular case and we should be informed by any guidance and actions taken by the SEC requests. I also wanted the basis of the Commission's determination to be transparent in the Commission's orders. That is how we have proceeded.

- As set forth in the Commission's orders, the Commission considered the nature of the violations, the findings made, the sanctions, conditions and undertakings imposed, and the facts and representations in the request letters by the Respondents. In particular, we considered whether the violations in our cases had any relationship to the areas covered by the bad actor provisions private placements and public offerings for small businesses and we concluded that the conduct at issue in our cases had no such bearing on those areas.

- When I consider potential enforcement actions as Chairman of the Commission, my overarching principal is that the Commission must always be acting to safeguard the public interest, protect investors and ensure the integrity of the markets. The Commission's robust enforcement record demonstrates that commitment.

Did the CFTC consult with the SEC before providing advice against disqualification in these orders? Commissioner Stein has said that you did not. Why not? Will you commit to doing so in the future?

- I am personally committed to working together with the SEC on all matters of mutual concern. It is important that we work together not only on a staff level but that the senior leaders of each agency ensure that they regularly meet and discuss the important issues.

- I am aware generally that CFTC leaders and staff have discussed waiver issues, including CFTC staff directing potential respondents to talk with SEC staff about the applicable disqualification provisions and waivers, and communications between CFTC and SEC

[2] *Id.*

staff about disqualification provisions and waivers. I will continue to encourage that a healthy dialogue occur, and in particular, I will ensure that those discussions take place at the senior management level.

. **What factors does the CFTC consider in determining to provide advice against disqualification?**

- As set forth in our orders,[3] the CFTC considers factors similar to those considered by the SEC when it issues waivers of disqualification under Regulation A and Regulation D. The SEC grants waivers where an applicant has shown good cause and if the SEC determines that it is not necessary under the circumstances that an exemption be denied.[4] The SEC has delegated its waiver authority to its Division of Corporation Finance, which has set forth the following factors for consideration in determining whether to grant a waiver request: (i) the nature of the violation and whether it involved the offer or sale of securities; (ii) whether the violation required scienter; (iii) who was responsible for the misconduct; (iv) what was the duration of the misconduct; (v) what remedial steps have been taken; and (vi) the impact on the party seeking a waiver and third parties if a waiver is denied.
- The CFTC considers these factors in the context of the markets it regulates, and also takes into account whether a statutory disqualification under the CEA should arise based on the misconduct at issue (which would also be the misconduct resulting in disqualification under Rule 262 and Rule 506). The CFTC noted that it would be guided by waivers granted by the SEC in prior cases involving similar facts and circumstances.

What are these factors based on?

- As noted, the factors considered by the CFTC in determining whether to provide advice against disqualification are based on those considered by the SEC in determining whether to grant waivers of disqualification, modified as appropriate to reflect the particular markets the CFTC regulates and its responsibilities under the CEA. Indeed, the CFTC determined in these cases that statutory disqualification or revocation of registration under the CEA were not necessary, and sensibly reached the same result with respect to the exemptions under the SEC's Rule 251 and Rule 506.

Do you believe that waiver based on these factors appropriately considers the public interest?

- The CFTC always strives to consider the public interest in all its activities, and I believe we have done so here. Based on the specific facts of each case, CFTC Enforcement staff made a recommendation that disqualification should not arise here, and the Commission determined, based on its own review, to accept that recommendation. Indeed, the

[3] *See, e.g., In re HSBC Sec. (USA) Inc.*, CFTC No. 18-08, at 9 n.3 (Jan. 29, 2018), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfhsbcsecuritiesorder012918.pdf.

[4] *See* 17 C.F.R. §§ 230.262(b)(2), 230.506(d)(2)(ii); *see also* SEC, Div. of Corp. Fin., *Waivers of Disqualification Under Regulation A and Rules 505 and 506 of Regulation D*, https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml.

misconduct at issue here, relating to spoofing committed by a small number of traders, for the most part did not even touch the securities markets, and certainly does not cast doubt on the suitability of these institutions to rely on the offering exemptions under Regulation A and Regulation D here at issue.

Are these factors the same as or similar to those the CFTC considers in determining whether to impose any CFTC registration sanctions?

- The Commodity Exchange Act sets forth specific bases upon which the Commission may consider whether it should take any action affecting a registration, including from revocation, conditioning or restricting. In determining whether any registration sanction is appropriate, I believe these factors are also relevant.

How were these factors applied to the three entities at issue here?

- The CFTC considers the issue of whether to provide advice against disqualification on a case-by-case basis. Without getting into the details of our deliberations, I will note that in each of these cases the CFTC noted the cooperation and remediation undertaken by each of the institutions subject to the orders, which led to a reduction in the size of the civil monetary penalties imposed. Additionally, the misconduct at issue was limited to a relatively small number of employees, none of whom were responsible for offerings under the securities exemptions at issue. Finally, in none of these cases did the CFTC determine to impose any registration sanctions under the CEA or CFTC Regulations. These considerations, among others, including the market impact if these entities were disqualified from relying on the exemptions, led us to provide the advice against disqualification in each order.
- In addition, by providing the requested advice, we were able to more expeditiously settle these cases, thereby conserving CFTC resources and achieving the positive remediation and other undertakings agreed to in the orders.

How many times have the three entities who were protected from disqualification here been the subject of orders (from any authority) that would have led to disqualification absent advice or waiver?

- We asked each entity to tell us about any prior relief from disqualification they may have obtained as part of their request and justification to us as to why advice should issue. Based on those letters, as well as our independent confirmation, I understand that each of these entities had obtained prior relief from disqualification, either from the CFTC or the SEC. **[JMM NOTE: If you'd like the specific number for each entity, I can get it for you.]**

Even if it may be appropriate to prevent disqualification of firms subject to CFTC orders, would you agree that recidivist violators should undergo stricter scrutiny? Did you consider the issue of recidivism in granting advice against disqualification to these firms?

- It is important to consider recidivism. It is also important that the particular facts and circumstances of each case be considered. We consider the issue of recidivism—for example, where a pattern of misconduct could indicate underlying failings in internal controls or broader issues with respect to compliance with the laws (whether the CEA, the securities laws, or more generally). As part of our consideration of whether to provide advice against disqualification here, we considered the prior orders against these entities, but for the reasons I explained, we determined to grant the requested relief.

How many pending cases are there where the CFTC is considering or potentially could issue similar advice? Do any of those cases involve recidivists?

- Because my response would potentially require me to share information about non-public confidential enforcement investigations, I would respectfully defer on that question,

Does the Commission itself carefully consider whether advice against disqualification should be granted? Or is it relying on the recommendation of staff?

- The Commission takes its responsibility to the public seriously. The Commission duly considers the thoughtful and comprehensive recommendations of its staff, deliberates and then votes on the action it determines is necessary.

Has the Commission ever rejected such a recommendation?

- Without getting into the specifics of particular cases or deliberations, I am informed that there have been instances where the CFTC declined to consider waiver applications and referred the requesting entity to the SEC for waiver consideration.

Does the CFTC have written policies and procedures governing its provision of advice against disqualification?

- The Commission's Division of Enforcement has policies and procedures that govern the conduct of investigations and litigations and the process of the making recommendations to the Commission for potential enforcement action, including with respect to requests for waivers under these bad actor disqualification provisions.

What sorts of records are kept of this process? Which are public?

- We maintain all required records under the Federal Records Act, the CEA, and our own Regulations. In general, there are records of the materials submitted by entities seeking advice against disqualification, as well as the recommendation of the Division of Enforcement, and the deliberative materials of the Commission itself. The orders resulting from this process, in which we set forth our reasoning as well as our advice against disqualification, are public. In the future, we may make the request letters public as well.

Is it possible to search your website (or elsewhere) to determine which entities have been disqualified, under both the CEA and the securities laws, or which entities have received waivers of disqualification?

- The Commission's orders contain the information about the waivers of disqualification. We are considering centralizing such information in an attempt to make it easier to access.

Livestock Task Force

In April 2020, Chairman Tarbert created the Livestock Task Force. The Livestock Task Force consists of staff with relevant expertise from multiple CFTC Divisions and Offices, including economists and data scientists from our DMO's Market Intelligence and Product Review branches, as well as the Division of Enforcement's Surveillance branch, and the Office of Legislative and Intergovernmental Affairs.

The mission of the Livestock Task Force is to provide enhanced oversight and surveillance of livestock markets in the face of extreme volatility and risks brought on by COVID-19. Livestock futures markets play a critical role for price discovery and risk management for the industry.

The Livestock Task Force has been in close consultation and dialogue with the Chicago Mercantile Exchange (CME), livestock industry groups, and individual market participants during this pandemic, discussing agricultural issues ranging from convergence, to price limits, to market surveillance.

Enhanced surveillance of all livestock contract expirations was and continues to be conducted. As an example of this work includes our surveillance of the April 2020 CME Live Cattle Expiration:

In April 2020, there were significant cash/futures convergence concerns going into the last days of trading for the April 2020 Live Cattle Contract. These concerns stemmed from the absence or near absence of cash markets in many locations, as packer demand for more animals evaporated and feed yard operators had limited, if any, options to send their slaughter-ready cattle due to closures caused by COVID-19. During the April spot expiration period, the Task Force was in frequent contact with CME Market Regulation, market participants, and futures commission merchants throughout the last week of trading. The Task Force reminded traders of their responsibility for an orderly liquidation, and engaged in confidential discussions that served to make clear that the Task Force was watching market trading activity closely. Ultimately, on the last trade day the April, futures prices rose to expire at S90, and cash price sales occurred between $92-94, making the ending basis $2-4 cash over the April future. This reflects solid convergence, especially considering the unprecedented conditions in the cash market at that time. This future expired with no apparent problems.

In terms of our internal work product, this work included verbal market status updates to the Commissioners, and regular Task Force presentations to the Commissioners. In terms of external work product, the Livestock Task Force has briefed the Agricultural Advisory Committee, Congressional offices, other government agencies such as the Department of Justice, the USDA, the Department of Homeland Security, the Financial and Banking Information Infrastructure Committee, and the Financial Stability Oversight Council.

Though we are not able to discuss non-public analysis, one analysis was publicly announced on September 18, 2020. The CFTC brought a spot month position limit violation against a foreign meat processor for violating June 2020 live cattle futures position limits. The associated order requires the firm to pay a $35,000 civil monetary penalty in addition to the $25,000 fine levied by the CME. This case was brought in connection with the CFTC's Livestock Markets Task Force work and the work of the CFTC Enforcement Surveillance branch.

These expanded efforts by the Task Force will continue for as long as the virus is active. Although the supply chain has improved dramatically in recent months, we are aware from the events of this past spring with the virus and the Holcomb fire in 2019 that all it takes is one or more significant packing plants to go offline for the supply chain, and prices, to be significantly impacted. In general, livestock and other agricultural price movements are reacting the way we would expect given the volatile fundamentals. However, we are living in historic times by any measure. The Task Force will continue to support market integrity through our own enhanced surveillance, our cooperation with the CME and other government agencies conducting their own analysis, and through our outreach to agricultural industry groups, while continuing to keep the CFTC Chairman and Commissioners informed about the livestock markets.

Electronic Trading Risk Principles Notice of Proposed Rulemaking
(Risk Principles NPRM)

During June 2020, the Commission proposed a set of principles for designated contract markets (DCMs) to address the prevention, detection and mitigation of market disruptions and system anomalies associated with the entry of electronic orders and messages into DCMs' electronic trading platforms. Such disruptions or anomalies may negatively impact the proper functioning of the trading platforms and the ability of other market participants to trade and manage their own risk. These disruptions and anomalies can arise from excessive messaging caused by malfunctioning systems, "fat finger" orders or erroneous messages manually entered that result in unintentionally large or off-price orders, and the loss of connection between an order management system and the trading platform. The proposed Risk Principles will help ensure that DCMs continue to monitor risks as they evolve along with the markets, and make reasonable modifications as appropriate. The proposed Risk Principles reflect a flexible framework under which DCMs can adapt to evolving technology and markets.

There are three Risk Principles in the proposed amendments to Part 38 of the Commission's regulations. The first Risk Principle, proposed 38.251(e), requires each DCM to adopt rules governing participants subject to its jurisdiction to prevent, detect, and mitigate market disruptions or system anomalies associated with electronic trading. The second Risk Principle, proposed 38.251(f), requires DCMs to implement adequate risk controls designed to address the potential threat of market disruptions and system anomalies associated with electronic trading. The third Risk Principle, 38.251(g), requires DCMs to notify CFTC staff in the event of a market disruption.

The Risk Principles supplement existing Commission regulations governing DCMs by directly addressing certain requirements in DCM Core Principle 4 (Prevention of Market Disruption) and its implementing regulations in two key ways. First, the Risk Principles provide for prospective action by DCMs to take steps to prevent market disruptions and systems anomalies, building on existing requirements to conduct real-time monitoring and resolve conditions that are disruptive to the market. Second, the Risk Principles explicitly focus on disruptions or system anomalies associated with electronic trading.

Withdrawal of Regulation Automated Trading ("Reg AT") and Supplemental Regulation Automated Trading ("Supplemental Reg AT")

The Commission formally withdrew the Reg AT and Supplemental Reg AT NPRMs (collectively, "Reg AT NPRMs") at the same time the Commission issued the Risk Principles NRPM. The Reg AT NPRM was issued in 2015 and the Supplemental Reg AT NPRM was issued in 2016. Key areas of concern that were voiced in response to those proposed rules included Reg AT's NPRM source code provisions; registration requirements; and the underlying assumption that automated trading is inherently riskier than other forms of electronic trading not addressed by the Reg AT rules. Although the Reg AT NPRMs were intended to be principles based, the passage of time, receipt of comments (the vast majority of which were negative), and further developments of industry technology, standards, and market structure caused the Commission to conclude that the Reg AT NPRMs were overly complex and prescriptive, and should be withdrawn. The Risk Principles NPRM reflects a higher level, principles-based framework founded on an updated understanding of the issues and risks to the market. To that end, the Risk Principles NPRM takes a more practical, risk-principle-based approach to a critical, specific area of concern, namely the risk that electronic trading poses to DCM trading platforms.

V. Rulemaking or Issues by Division

A. Market Participants Division ("MPD")

1. *Mission*

The Market Participants Division ("MPD") (formerly known as the Division of Swap Dealer and Intermediary Oversight) primarily oversees derivatives market intermediaries, including commodity pool operators ("CPOs"), commodity trading advisors ("CTAs"), futures commission merchants ("FCMs"), introducing brokers ("IBs"), major swap participants ("MSPs"), retail foreign exchange dealers ("RFEDs"), and swap dealers ("SDs"), as well as designated self-regulatory organizations ("DSROs").

MPD's mission is to protect derivatives market users and their funds by ensuring the financial integrity, fitness, and fair business conduct of registered derivatives market intermediaries.

MPD achieves its mission by:

1. Examining intermediaries and DSROs;
2. Maintaining appropriate standards for registration of intermediaries;
3. Providing expertise to the Commission in its promulgation of rules; and
4. Issuing concise and timely interpretations and guidance for intermediaries.

There are a significant number of registered intermediaries subject to regulation by the CFTC. As of July 31, 2021, there are 109 SDs, 61 FCMs including retail foreign exchange dealers ("RFEDs"), 1,043 IBs, 1,239 CPOs, and 1,353 CTAs, and four RFEDs. Each of these registrants is subject to primary oversight by MPD, as well as the two DSROs, the National Futures Association ("NFA") and the Chicago Mercantile Exchange ("CME").

2. *Structure*

MPD is comprised of five branches: Chief Counsel Branch, Registration and Compliance ("R&C") Branch, Managed Funds and Financial Requirements ("MFFR") Branch, Examinations Branch, and since, December 2020, Customer Education and Outreach Branch.

- **Chief Counsel Branch**

  The Chief Counsel Branch provides legal counsel, performs legal research, and participates in legal policy development in connection with the regulatory oversight of swap and futures market intermediaries. The Chief Counsel Branch also leads international regulatory comparability assessments and is primarily responsible for MPD's participation in international standard setting initiatives.

- **Registration and Compliance Branch**

The R&C Branch provides legal and technical counsel, policy development, and guidance regarding registration and compliance requirements applicable to SDs, IBs, FCMs, MSPs, CPOs, CTAs, RFEDs, associated persons, and the Volcker Rule. In this capacity, the R&C Branch plays a lead role in interacting with NFA and the CFTC's Division of Enforcement regarding compliance-related issues encountered by registrants, and supporting the Examinations Branch in overseeing DSROs..

- **Managed Funds and Financial Requirements Branch**

MFFR Branch provides legal counsel and policy development, and implements the MPD's legal interpretation of existing regulatory requirements, in connection with capital, segregation of customer funds, uncleared margin, and financial reporting requirements for SDs, MSPs, FCMs, IBs, and RFEDs. These intermediaries are subject to various and complex capital adequacy and financial reporting requirements intended to ensure that they maintain the financial resources to meet their obligations to customers, counterparties, clearing organizations, and to the derivatives markets in general. There are also highly technical and comprehensive customer funds segregation and protection regimes applicable to FCMs with regard to domestic and foreign futures and cleared swaps customer funds, as well as comprehensive margin calculation and custody requirements for SDs and MSPs and their counterparties.

As part of its responsibility for establishing financial reporting requirements, MFFR Branch participates in industry meetings with the American Institute of Certified Public Accountants to address regulatory accounting and public accounting issues that impact registered intermediaries.

MPD staff in this branch fall under two groups that interact in a close and coordinated manner to further the Division's objectives. The first group primarily focuses on addressing legal and policy issues associated with capital, margin, segregation, customer protection, and financial reporting. The second group primarily focuses on the policy implications associated with the issue of models, and the initial and ongoing assessment of statistical models, including proprietary valuation models (such as value-at-risk models) and stress test methodologies, submitted by SDs, MSPs, and FCMs for the computation of regulatory capital and margin purposes.

- **Examinations Branch**

The Examinations Branch provides the necessary oversight of swap and futures market intermediaries to help ensure customer funds are protected and that these firms remain in compliance with the CFTC's regulations. The Examinations Branch focuses on monitoring the risks and controls at the intermediaries, principally focusing on FCMs that hold customer funds. Through its Major Review Unit, the Branch also oversees the financial surveillance and examination functions at the DSROs - NFA and CME. Beginning in October 2021, Examinations will also assume oversight responsibility for ensuring SDs' compliance with the applicable capital regime.

As of June 30, 2021, the Examinations Branch had oversight responsibility for 63 FCMs, of which 56 carry customer funds. These firms had aggregate capital of $175 billion and aggregate obligations to customers of $442 billion (includes five firms with retail forex obligations).

3. *Priorities and Hot Topics*

a) MPD COVID-19 response.

MPD has acted through temporary, targeted no-action relief to respond to the COVID-19 pandemic. These efforts are designed to help facilitate orderly trading and liquidity in the U.S. derivatives markets as well as to allow market participants to implement lifesaving social distancing measures. Specifically, MPD has granted no-action relief:

- Temporarily permitting registrants to forego required recording of traders' phone calls and required timestamping when operating from remote locations.

- Temporarily permitting eligible FCMs and IBs taking advantage of covered loans under the Paycheck Protection Program administered pursuant to the CARES Act to add back to capital certain amounts under covered loans that are forgivable in accordance with Regulation 1.17.

- Temporarily permitting certain foreign affiliates of FCMs that are exempt from registration with the Commission by Regulation 30.5 to accept orders from U.S. persons for execution on U.S. contract markets in the event an affiliated FCM's U.S. personnel are unable to handle the order flow of U.S. customers due to their absence from normal business sites.

- Temporarily permitting CPOs more time to meet filing deadlines for Form CPO-PQR, Pool Annual Reports, and Pool Periodic Account Statements and FCMs and Swap Dealers more time to meet filing deadlines for Chief Compliance Officer annual reports.

- Temporarily permitting registrants listing new principals and to applicants for registration as associated persons (APs) to forego the requirement to submit a fingerprint card for any such principal or AP registration applicant.

b) MPD response to LIBOR transition to alternative rates.

In response to significant concerns regarding the reliability and robustness of the London Interbank Offered Rate ("LIBOR") and other interbank offered rates (collectively with LIBOR, the "IBORs"), the Financial Stability Board ("FSB") called for the identification of alternative benchmarks to the IBORs and transition plans to support implementation.[1] The U.S. Financial Stability Oversight Council ("FSOC") has made repeated calls for member agencies to work closely with market participants to identify and mitigate risks that may arise during an IBOR transition process.[2] In response to ongoing efforts such as these, central banks in various jurisdictions, including the United States, the United Kingdom, Japan, Switzerland, and the European Union, have convened working groups of market participant and official sector representatives.

In 2014, the Federal Reserve Bank of New York convened the Alternative Reference Rates Committee ("ARRC") in order to identify best practices for U.S. alternative reference rates, identify best practices for contract robustness, develop an adoption plan and create an implementation plan with metrics of success and a timeline.[3]

In June 2017, ARRC identified a broad Treasuries repo financing rate, the secured overnight financing rate ("SOFR"), as the preferred alternative benchmark to U.S. Dollar LIBOR for certain new U.S. Dollar derivatives and other financial contracts.[4] It also published an updated "Paced Transition Plan" outlining the steps that ARRC, central counterparties, and other market participants intend to take in order to help build the liquidity required to support the issuance of, and transition to, contracts referencing SOFR.[5] In accordance with ARRC's Paced Transition Plan[6] and similar plans in other jurisdictions, trading of SOFR-based derivatives and other financial contracts linked to alternative benchmarks commenced in 2018 and has expanded in scope in 2019.[7]

In July 2017, the U.K. Financial Conduct Authority ("FCA"), which regulates ICE Benchmark Administration Limited, the administrator of ICE LIBOR, announced that it has sought commitments from LIBOR panel banks to continue to contribute to LIBOR through the end of

[1] *See generally* FSB statement, *available at*: https://www.fsb.org/2018/07/interest-rate-benchmark-reform-overnight-risk-free-rates-and-term-rates/; IOSCO *Principles for Financial Benchmarks: Final Report* (July 2013), available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf.

[2] *E.g.*, FSOC 2018 Annual Report, pages 4-5, 8-9, 108-109 (Dec. 19, 2018), *available at*: https://home.treasury.gov/system/files/261/FSOC2018AnnualReport.pdf; FSOC 2013 Annual Report, pages 6, 14-15, 137, 140-142 (June 2013) *available at*: https://www.treasury.gov/initiatives/fsoc/Documents/FSOC%202013%20Annual%20Report.pdf.

[3] Similar committees have been established in other jurisdictions, including the United Kingdom, Japan, Switzerland, and the European Union.

[4] ARRC, Press Release, June 22, 2017, *available at* https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2017/ARRC-press-release-Jun-22-2017.pdf.

[5] ARRC, Second Report, pp.17-24, March 5, 2018, *available at* https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Second-report.

[6] ARRC, *2019 Incremental Objectives*, *available at*: https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC_2019_Incremental_Objectives.pdf.

[7] ARRC, *SOFR: A Year in Review* (Apr. 2019), *available at*: https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/SOFR_Anniversary.pdf; ISDA, *Interest Rate Benchmarks Review: Full Year 2018 and the Fourth Quarter of 2018* (Jan. 2019), *available at*: https://www.isda.org/a/xogME/Benchmarks-Full-Year-2018.pdf.

2021, but that the FCA will not use its powers to compel or persuade contributions beyond such date.

A benchmark rate is a critical term for calculating payments under a swap. Due to the potential discontinuation of LIBOR at the end of 2021, market participants face uncertainty about the way their swaps referencing the LIBOR benchmark and other IBORs will operate after the permanent discontinuation date without a reliable benchmark rate. In many instances, these firms may decide to amend existing swaps to replace an IBOR before the IBOR becomes discontinued. In order to facilitate the transition from IBORs to alternative reference rates, ARRC requested that MPD provide certain no-action relief from certain CFTC regulations applicable to uncleared swaps.

In response, MPD issued no-action letter 20-23[8] outlines conditions under which counterparties will qualify for relief in connection with amending swaps to update provisions referencing LIBOR, or other interbank offered rates, to replacement rates. The MPD letter provides relief to swap dealers from registration *de minimis* requirements, uncleared swap margin rules, business conduct requirements, confirmation, documentation, and reconciliation requirements, and certain other eligibility requirements.

c) MPD Brexit response

Brexit is of concern to UK-based registrants that are relying on existing regulatory relief involving European Union ("EU") entities issued by MPD or relying on substituted compliance based on comparability determinations for the EU issued by the CFTC.

The UK has ceased to be a member of the EU, although during a transition period ending on December 31, 2020, EU law and EU regulatory, budgetary, supervisory, judiciary, and enforcement instruments and structures continued to apply in the UK as if it were a member of the EU.

MPD has been engaged with staff of the relevant UK authorities to learn about the regulatory and supervisory framework that will apply in the UK after the transition period. The UK government has taken actions to provide regulatory certainty, including passing the European Union (Withdrawal) Act 2018 ("EU(W)A"), which has transposed relevant EU law and regulations into UK law and regulations, and granted existing authority vested in certain EU institutions to the Financial Conduct Authority, the Bank of England including the Prudential Regulation Authority, and Her Majesty's Treasury. Thus, MPD understands that the UK authorities and the EU authorities intend that the regulatory environment affecting UK entities relevant to CFTC comparability determinations and existing MPD no-action relief will not change in any material respect. Accordingly, MPD has provided regulatory certainty to UK entities pursuant to no-action letters 19-08[9] and 19-09.[10] These letters maintain the status quo by permitting UK entities to rely

[8] Available at: https://www.cftc.gov/csl/20-23/download.

[9] Available at: https://www.cftc.gov/csl/19-08/download.

[10] Available at: https://www.cftc.gov/csl/19-09/download.

on CFTC comparability determinations and MPD no-action letters to the same extent as EU entities.

d) MPD market volatility response

MPD issued a joint advisory with the Division of Clearing and Risk and the Division of Market Oversight on May 13, 2020 in response to the extreme market volatility experienced February and March of 2020. Part of the advisory was directed at FCMs and reminded them of their obligation to engage in robust risk management, which is particularly necessary during volatile markets. The advisory also provided that it would be prudent of FCMs to engage customers to ensure that the customers appreciate the risks of engaging in futures and swaps transactions.

4. *Rulemakings*

a) Margin Requirements for Uncleared Swaps

The Commission's margin requirements for uncleared swaps for SDs and MSPs for which there is not a prudential regulator ("covered swap entities") require covered swap entities to exchange initial and variation margin with certain counterparties ("CFTC Margin Rule"). The Commission recently adopted several amendments to the CFTC Margin Rule:

- **Exemption for European Stability Mechanism**: On May 11, 2020, the Commission published in the Federal Register a final rule amending the CFTC Margin Rule to include the European Stability Mechanism ("ESM") in the list of entities that are expressly excluded from the definition of financial end-user. The amended regulation effectively treats the ESM comparable to other entities excluded from the definition of financial end user, such as multilateral development banks, and exempts the uncleared swaps entered into by the ESM and covered swap entities from the CFTC Margin Rule.

- **Rulemakings to Delay Final Two Phases of Initial Margin ("IM") Requirements:** In a series of rulemakings, the Commission has taken steps to extend the implementation dates for firms coming into the scope of the IM requirements for uncleared swaps during the final two phases. These extension provide relief for firms that engage in lower levels of uncleared swap trading compared to entities that came into scope in four earlier phases during the 2016-2019 period.

  - **Creation of an Additional Margin Compliance Phase**: On April 9, 2020, the Commission published in the Federal Register a rule amendment that extends the schedule for compliance with the IM requirements by splitting the final phase-in date of September 1, 2020, into two phases beginning on September 1, 2020, and September 1, 2021, respectively. The amendment effectively extended by one year the compliance date for SDs, MSPs and financial end users with smaller (*i.e.*, between $8 billion - $50 billion) average daily aggregate notional amounts ("AANA") of swaps and certain other financial products ("Phase 6 entities"). The Commission's intent in adopting the extension was to mitigate the potential for market disruption that could have resulted from the large number of entities that would have come into IM compliance on September 1, 2020.

  - **Extension of Compliance Schedule for Phase 5 Entities**: On July 10, 2020, to mitigate the operational challenges faced by certain entities subject to the CFTC Margin Rule as a result of the COVID-19 pandemic, the Commission published in the Federal Register an interim final rule ("IFR") extending the September 1, 2020 compliance date for entities with AANA of $50 billion - $750 billion ("Phase 5 entities") by one year to September 1, 2021.
  - **Extension of Compliance Schedule for Phase 6 Entities**: Because the IFR had the effect of consolidating Phase 5 and Phase 6 entities into one compliance phase beginning on September 1, 2021, the Commission approved and published in the Federal Register on November 6, 2020, a final rule further amending the IM compliance schedule. The final rule extended the Phase 6 entities' compliance date of September 1, 2021, to September 1, 2022, thus reducing the risk of congestion and market disruption that could result from a large number of entities coming into compliance at the same time.

- **Application of Minimum Transfer Amount**: On January 25, 2021, the Commission published in the Federal Register a final rule concerning the application of the minimum transfer amount ("MTA"), as the term is defined in the CFTC Margin Rule. The final rule amended the CFTC Margin Rule to permit the application of an MTA of up to $50,000 to each separately managed account of a counterparty to a covered swap entity. The final rule also permits the application of separate MTAs for IM and variation margin ("VM") in recognition of market participants' practice of allocating separate amounts of MTA for IM and VM in credit support documents.
- **Material Swaps Exposure ("MSE") Definition and Calculation of Initial Margin**: On January 5, 2021, the Commission published in the Federal Register a final rule to amend the definition of MSE. The amendment had the effect of aligning the CFTC's method for identifying entities that come into the scope of the IM requirements in the last phase of compliance and after, as well as the timing for compliance with the IM requirements after the end of the compliance schedule, with the Basel Committee on Banking Supervision and the International Organization of Securities Commissions' margin framework for non-centrally cleared derivatives. The final rule also amended the CFTC Margin Rule to permit covered swap entities to calculate IM collectable from a counterparty that is a CFTC-registered SD or MSP by using such counterparty's risk-based model calculation of IM subject to certain terms and conditions set forth in the rule.

b) Capital and Financial Reporting for Swap Dealers

On September 15, 2020, the Commission published in the federal register final rules establishing capital and financial reporting requirements for SDs and MSPs.[11] The final SD capital rules provide flexibility to allow SDs to choose among three basic approaches. The first, a bank or Basel-based method, incorporates by reference certain capital adequacy rules of the Federal Reserve Board and applies such rules to the SD as if the SD itself is a bank holding company. The second, a net liquid assets method, incorporates by reference the SEC's capital rules applicable to SBSD

[11] Capital Requirements for Swap Dealers and Major Swap Participants, Final Rule, 85 F.R. 57462 (Sept. 15, 2020).

and is based on the existing capital requirements traditionally imposed on FCMs and broker dealers. And the third, a tangible net worth method, is designed for SDs that are predominantly engaged in non-financial activities.

The rules also include a capital comparability determination process wherein foreign domiciled SDs can apply to the Commission to satisfy their capital and financial reporting requirements through substituted compliance with the capital and financial reporting requirements of their home country regulator. The rules also incorporate a capital model approval process, with the National Futures Association as the primary reviewer and approver of such applications.

Finally, the rules include reporting, recordkeeping and notification requirements. These requirements are comparable to already existing reporting, recordkeeping and notification requirements for FCMs and to the maximum extent practicable with the SEC's requirements for SBSDs. While the effective date of the rules is November 16, 2020, a compliance date for the rules was established for October 6, 2021, which is aligned with the compliance date of the SEC's final rules for SBSDs.

c) Cross-border regulations

On September 14, 2020, the Commission published in the Federal Register a final rule that addresses the cross-border application of the SD and MSP registration thresholds and certain requirements applicable to SDs and MSPs; establishes a formal process for requesting comparability determinations for the requirements from the CFTC; and defines key terms for the purpose of applying the Commodity Exchange Act's (CEA) swaps provisions to cross-border transactions.[12] The cross-border final rule includes a risk-based approach that advances the goals of Title VII of Dodd-Frank's swap reforms, while fostering greater liquidity and competitive markets, promoting enhanced regulatory cooperation, and improving the global harmonization of swap regulation. This approach also considers international comity principles and the CFTC's interest in focusing its authority on potential significant risks to the U.S. financial system. The final rule supersedes the CFTC's 2013 cross-border guidance with respect to the CFTC requirements covered by the final rule. The final rule was effective in mid-November 2020, but compliance will be required in September 2021.

d) SD de minimis threshold

a. **Floor trader exclusion** – On June 27, 2019, MPD provided no-action relief to registered floor traders from compliance with certain conditions of the floor trader exclusion in the SD definition.[13] Under paragraph (6)(iv) of the SD definition, a floor trader does not need to consider cleared swaps executed on or subject to the rules of a designated contract market or swap execution facility ("DCM and SEF Cleared Swaps") when determining whether it is a SD, provided certain conditions are satisfied. The no-action relief permits a registered floor trader to exclude DCM and SEF Cleared Swaps from the determination of whether it is a SD,

[12] Available at: https://www.cftc.gov/sites/default/files/2020/09/2020-16489a.pdf.

[13] Available at: https://www.cftc.gov/csl/19-14/download.

notwithstanding the registered floor trader: (1) entering into swaps other than DCM and SEF Cleared Swaps; (2) directly or through an affiliated person, negotiating the terms of swaps other than DCM and SEF Cleared Swaps; or (3) not submitting periodic risk reports as required by Regulation 23.600(c)(2). The relief is conditioned upon the registered floor trader complying with Regulations 23.201, 23.202, 23.203, and 23.600 (other than 23.600(c)(2)) with respect to each of its swaps as if it were a SD.

b. **IDI exception** – On April 1, 2019, the Commission published in the Federal Register a final rule to amend the de minimis exception by establishing as a factor in the de minimis threshold determination whether a given swap has specified characteristics of swaps entered into by insured depository institutions ("**IDIs**") in connection with loans to customers.[14] The amendment addressed concerns that there are circumstances where swaps not covered by the IDI loan-related swap exclusion in paragraph (5) of the SD definition should be excluded from the de minimis calculation.

c. **$8 billion threshold** – On November 13, 2018, the Commission published in the Federal Register a final rule to amend to the SD de minimis exception by setting the aggregate gross notional amount threshold for the de minimis exception at $8 billion in swap dealing activity entered into by a person over the preceding 12 months.[15] Prior to the amendment, the de minimis exception was $3 billion, subject to a phase-in period during which the threshold was set at $8 billion. The phase-in period was scheduled to terminate on December 31, 2019.

c) CPOs

a. **Form CPO-PQR** – On October 6, 2020, the Commission approved a final rule to amend certain compliance requirements for CPOs in Regulation 4.27, as well as the Commission's Form CPO-PQR.[16] The amendments eliminate certain pool-specific reporting requirements (including the majority of former Schedules B and C),, add a prompt in remaining Schedule A to request legal entity identifiers for registered CPOs and their commodity pools, to the extent they have them, and establish substituted compliance with NFA Form PQR. The amendments in this final rule focus Form CPO-PQR on data elements that facilitate the Commission's oversight of CPOs and their pools (*e.g.*, the Pool Schedule of Investments), while reducing overall data collection burdens for reporting CPOs, in favor of streamlining and coordinating data from this form and other CFTC sources.

[14] Available at: https://www.cftc.gov/sites/default/files/2019-04/2019-06109a.pdf.

[15] Available at: https://www.cftc.gov/sites/default/files/2018-11/2018-24579a.pdf.

[16] Compliance Requirements for Commodity Pool Operators on Form CPO-PQR, 85 Fed. Reg. 71772 (Nov. 10, 2020), available at: https://www.cftc.gov/sites/default/files/2020/11/2020-22874a.pdf.

b. **Statutory disqualifications of Exempt CPOs** – On July 8, 2020, the Commission published in the Federal Register a final rule to amend Regulation 4.13.[17] The amendments generally prohibit persons who have, or whose principals have, in their backgrounds any of the statutory disqualifications listed in CEA section 8a(2) from seeking to claim a CPO registration exemption under Regulation 4.13. Specifically, the final rule amends the notice filing provision in that regulation to require any person claiming such CPO exemption to also represent that, subject to limited exceptions, neither the claimant nor any of its principals has in their background a CEA section 8a(2) disqualification that would require disclosure, if the claimant sought registration with the CFTC.

c. **Offshore commodity pools** – On December 7, 2020, the Commission published a final rule amending Regulation 3.10(c), including Regulation 3.10(c)(3), which governed when intermediaries outside of the U.S., acting on behalf of non-U.S. customers, would be exempt from regulation of their commodity interest activities.[18] Importantly, part of the amended regulation (now paragraph (c)(5)) permits a non-U.S. CPO to claim an exemption thereunder with respect to its qualifying offshore commodity pools on a pool-by-pool basis, allowing the CPO to maintain another exemption from registration, rely on an exclusion or other relief, or register as a CPO, with respect to its operation of any other pools. To address inadvertent U.S. participation in offshore pools, the final rule also added a safe harbor, by which a non-U.S. CPO may rely upon the exemption, if the enumerated factors related to their offshore pool's operation are satisfied. Additionally, the final rule allows certain U.S. affiliates under common control with a non-U.S. CPO to contribute capital to such non-U.S. CPO's exempt offshore pools, without affecting the non-U.S. CPO's eligibility for the relief available in Regulation 3.10(c)(5).

f) Volcker rule

a. **Memorandum of Understanding** On January 15, 2021, the CFTC, the Board, the SEC, and the FDIC entered into a Memorandum of Understanding to identify arrangements for the sharing, collection, processing, and distribution of the metrics data. The Memorandum of Understanding is a statement of intent to collaborate, cooperate, and share information in connection with the collection of the metrics data in a manner consistent with, and permitted by, the laws and requirements that govern the Board, the FDIC, the SEC, and the CFTC. It is anticipated that such cooperation may include, where permitted by law and applicable regulation and at each agency's discretion, the sharing of information regarding other relevant matters of common regulatory and supervisory interest, periodic meetings, written

[17] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Prohibiting Exemptions on Behalf of Persons Subject to Certain Statutory Disqualifications, 85 Fed. Reg. 40877 (July 8, 2020), available at: https://www.cftc.gov/sites/default/files/2020/07/2020-12607a.pdf.

[18] Exemption from Registration for Certain Foreign Intermediaries, 85 Fed. Reg. 78718 (Dec. 7, 2020), available at: https://www.cftc.gov/sites/default/files/2020/06/2020-12034a.pdf. This rulemaking also finalized several other amendments to Regulation 3.10(c) that were initially proposed by the Commission in 2016. *Id.* at 78722.

requests as needed, and other practical arrangements as may be developed by the agencies.

b. **Covered funds –** On July 31, 2020, the five federal agencies responsible for the Volcker rule published a final rule amending their regulations that implement the Volcker Rule's prohibition on banking entities investing in or sponsoring hedge funds or private equity funds (known as, covered funds).[19] The final rule adopted several changes to the existing exclusions from the covered fund provisions, as well as several new exclusions from the "covered fund" definition itself, to address its overbreadth. Additionally, to more effectively limit the extraterritorial impact of these regulations, the final rule exempted the activities of certain funds that are organized and offered to foreign investors outside of the U.S. from certain restrictions therein. Finally, to further clarify these regulations and simplify compliance, this final rule also adopted revisions to the provisions governing the relationship between a banking entity and a fund, as well as the definition of "ownership interest."

c. **Proprietary trading** – On November 14, 2019, the five federal agencies responsible for the Volcker rule published a final rule amending compliance requirements relating to the Volcker rule.[20] The final rule adopted a risk-based approach to revising the 2013 Volcker rule that relied on a set of clearly articulated standards for both prohibited and permitted activities and investments. First, the final rule tailored the application of the Volcker Rule, based on a firm's risk profile and size and scope of trading activities. Second, the final rule streamlined and clarified certain definitions and requirements related to the proprietary trading prohibition and limitations on covered fund activities and investments. Lastly, the final rule reduced metrics reporting, recordkeeping, and compliance program requirements for all banking entities, and expanded available tailoring, such that the scale of compliance activity required by the Volcker Rule is commensurate with a firm's size and risk profile.

[19] Prohibitions and Restrictions on Proprietary Trading and Certain Interest in, and Relationships With, Hedge Funds and Private Equity Funds, 85 Fed. Reg. 46422 (July 31, 2020), available at: https://www.cftc.gov/sites/default/files/2020/07/2020-15525a.pdf.

[20] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 61974 (Nov. 14, 2019), available at: https://www.cftc.gov/sites/default/files/2019/11/2019-22695a.pdf.

Updated
6.11.18

PROPOSED RULES FOR "REGULATION AUTOMATED TRADING" (REGULATION AT)

Background

Building off of a "Concept Release on Risk Controls and System Safeguards for Automated Trading Environments" ("Concept Release") published in September 2013, the Commission proposed a Reg AT rule in December of 2015. Commission staff held a day-long public roundtable in June 2016 to gather input on various aspects of the proposed rule, and the Commission re-opened the comment period for an additional two weeks. In November 2016, the Commission published a Supplemental NPRM modifying elements of its original proposal. The comment period for the Supplemental lasted until May 1, 2017 (approximately 180 days in total). The Commission received 24 comments in response to the Supplemental NPRM.

Proposed Rule

Together, the NPRM and Supplemental NPRM propose certain risk controls, transparency measures, and other safeguards to enhance the safety and soundness of automated trading on all designated contract markets ("DCMs"). Specifically, the NPRM and Supplemental NPRM:

- Require certain high-volume, high-impact market participants who are currently beyond the Commission's regulatory perimeter to register with the Commission. Such market participants would register as Floor Traders, and would become members of a registered futures association. Together with certain existing registrants, these "New Floor Traders" would be considered AT Persons and be subject to all relevant requirements of Regulation AT.
- Pursuant to the NPRM, the proposed registration criteria for New Floor Traders were that such persons be engaged in (1) proprietary, (2) Algorithmic Trading (3) through Direct Electronic Access ("DEA") on a DCM. The Supplemental NPRM retained these requirements but also incorporated a volume-based quantitative test for registration as a New Floor Trader.
- Establish certain pre-trade risk controls and other measures set at the levels of (1) the AT Person or its futures commission merchant ("FCM"); and (2) the DCM. Such pre-trade controls would help decrease the likelihood that disruptive orders and messages will reach the live matching engine.
- Set standards regarding AT Persons' development, testing, and monitoring of Algorithmic Trading systems. These standards would help address common sources of disruption in algorithmic trading, including inadequate testing prior to introducing new or amended programs into live trading environments.
- Provide for annual certifications from AT Persons and FCMs to their DCMs. Such certifications would address AT Persons' and FCMs' compliance with applicable risk control and testing requirements.

Updated
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Key Concerns Reflected in Public Comments

Industry participants generally have not developed a single viewpoint towards the proposed rules. Almost all industry commenters have requested that the Commission modify its proposals, sometimes significantly, but different sectors of the industry each point towards different, sometimes contradictory, approaches. Examples of comments received include:

- The proposed pre-trade risk controls are overly prescriptive.
- The Commission should abandon its proposed registration requirement.
- The proposed rules should be withdrawn altogether.
- Many trading entities commented that if not withdrawn, the proposed rules should be replaced with an approach where FCMs and DCMs are required to address the risks of market disruptions. However, the more sophisticated trading entities typically prefer to run their own risk controls (i.e., would prefer that their FCMs not act as gatekeeper). FCMs and DCMs are generally averse to the costs that would come with a gatekeeper role, and also concerned about potential liability in the event of a significant market disruption.
- The costs of the proposed rules outweigh the benefits.
- The Commission underestimated the number of AT Persons. The Commission should withdraw or amend the tests it proposed for registration.
- The Commission should abandon its proposals around source code. Source code should only be available via subpoena.
- The proposed rules would impose too great a cost on DCMs.
- The proposed rules introduce impossible or impractical requirements for users of third-party algorithmic trading software.

Last Updated: 6/11/18

POSITION LIMIT RULEMAKINGS July 5, 2017

Background
The Commission has authority to establish and enforce speculative position limits for futures and options contracts under Commodity Exchange Act ("CEA") Section 4a; it has done so for years on nine agricultural commodities. The Commission also has statutory authority to enforce speculative position limits set by exchanges. The Commission's position limits regulations generally are found in Part 150. The Part 150 position limits regime generally includes three components:

1. The level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot month, individual month, and all months combined;
2. Exemptions for positions that constitute bona fide hedging positions and certain other exemptions;
3. Aggregation rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.

(1) **Position Limits for Derivatives – Part 150 – Reproposal**

- *Background of Reproposal*
  - *Adoption of Part 151 in 2011*
    - Part 151 originally finalized as replacement for Part 150 in 2011.
    - Part 151 was vacated by D.C. district court in 2012.
  - *Amendments to Part 150.*
    Part 150 Notice of Proposed Rulemaking ("NPRM"). After Part 151 was vacated, the CFTC proposed amendments to Part 150 on December 12, 2013
    - *Supplemental NPRM.* In response to comments, the Commission published a Supplemental NPRM on June 13, 2016, which: (i) amended the earlier bona fide hedging definition; (ii) proposed relief for swaps trading; and (iii) proposed processes for DCMs and SEFs to recognize certain positions as bona fide hedges and provide exemptions from federal speculative position limits.
    - *Reproposal:* a "reproposal," responding to comments received, was published December 30, 2016; comment period closed on February 28, 2017.

- *27 comment letters received on Reproposal*
  - Staff is working on a summary of the comment letters.
  - Key outstanding requests include: (i) bona fide hedging definition is too narrowly interpreted; (ii) requests for additional positions enumerated as bona fide hedges in the definition; (iii) CFTC wrong on mandate and necessity arguments; (iv) requests for complete delegation to exchanges of non-enumerated bona fide hedge recognition; (v) limit levels should be higher; and (vi) position accountability should be adopted for non-spot months in lieu of limits. But consumer groups and some market participants disagreed.

- *Scope of Commodities.* The Reproposal covers contracts on only 25 core physical commodity futures contracts and their "economically equivalent" futures, options, and swaps.

  - The 25 core physical commodity derivatives contracts generally represent the largest physical commodity derivative contracts based on exchange traded contracts and significant price discovery contracts.
  - The 25 core physical commodity derivatives contracts include:
    - 9 ag futures contracts currently subject to federal position limits
    - 16 additional futures contracts
    - By open interest, they generally represent the top 16 agricultural contracts, the top 4 energy contracts and the top 5 metals contracts

- *Spot-month position limits.*
  - Initial levels generally based on 25 percent of estimated of deliverable supply or DCM recommended lower level.
  - Conditional spot-month limit exemption only for cash-settled NG contracts.

- *Non-spot-month position limits:* Initial levels generally based on the 10% / 2.5% formula applied to open interest in futures and swaps.

- *The bona fide hedging position definition for physical commodities*:
  - Closely tracks standards in CEA § 4a(c), including a temporary substitute test, an economically appropriate test, and a change-in-value requirement.
  - Eliminates the incidental test and orderly trading requirement, both of which have been in the definition for many years but are not in the CEA.
  - Addresses pass-through swap offsets and offsets of hedging swaps.
  - Enumerates exemptions largely as previously proposed, but removes: the 12-month constraint on certain agricultural anticipatory hedges, and a condition that allowed the exemption only when a utility was required/encouraged to hedge by its public utility commission.
  - Applies the five-day rule to four types of enumerated hedges (five-day rule does not recognize position as bona fide hedges in last five days of trading).
  - Withdraws the safe harbor quantitative test for cross-commodity hedges.
  - Deems certain trade options (which are excluded from position limits), if adjusted on a futures-equivalent basis, to be equivalent to a cash position as the basis of a bona fide hedging position, which effectively allows netting down of trade options and derivatives that offset the risk of trade options.
  - *Excluded commodities*: removes the economically appropriate test from the guidance for exchange-recognized risk management exemptions.

- *DCM/SEF recognition of positions as bona fide hedges and granting of spreads*: permits, for purposes of federal limits, exchanges to recognize certain positions as non-enumerated bona fide hedges or enumerated anticipatory hedges, and to grant spread exemptions.

- *Swap relief*: Provides relief to DCMs and SEFs temporarily from the obligation to establish position limits on swaps that are subject to a federal position limit, when such exchange lacks access to position information on swaps.

- *DCM/SEF provisions* DCMs and SEFs position limit:

    - Must follow CFTC's bona fide hedge definition and aggregation standards
    - Set DCM/SEF limit levels no greater than Federal limits (statutory)
    - Allows broader bona fide hedge definitions for excluded commodities (based on two 1987 CFTC interpretations permitting the use of risk management exemptions)

- *Part 19*: Updates Part 19 reporting requirements.

- *Other Sections of the Reproposal*:
    - *Legal mandate* Reproposal: "The Commission construes CEA section 4a(a) to mandate that the Commission impose position limits."
    - *Necessity finding* –While the Commission concluded that Dodd-Frank required the Commission to impose position limits on all physical commodity derivative contracts, alleviating the need for a necessity finding, the Commission determined to include in the Reproposal a necessity finding, as a separate basis and independent basis for proposing speculative position limits, "out of an abundance of caution in light of the district court decision." Price distortions caused by the large positions amassed by the Hunt brothers, in 1979-80, and Amaranth, in 2006, were provided as examples of the necessity for position limits, as a prophylactic measure, to prevent price distortions.
    - *Studies and Reports* – Reproposal: "There is a demonstrable lack of consensus in the studies."

(2) **Final Regulations on Aggregation of Positions** – *effective as of 2/14/17—but subject to staff no-action relief*

- *Amended* § 150.4 aggregation standards and related provisions.

- *Permits new exemptions* from aggregation where circumstances warrant, including where:
    - Sharing the information needed to aggregate would cause position holders to violate, or create reasonable risk of violating, Federal, state or foreign jurisdiction law or regulation, such as information sharing restrictions in federal or state public utility codes, or liability under antitrust law.
    - Ownership interest is greater than or equal to 10 percent in an entity whose trading is independently controlled and a notice filing is submitted to the Commission.
    - Ownership results from broker-dealer activities in the normal course.

- *DMO No-Action Letter* provides relief (from 2/14/17 to 8/14/17) from the notice filing requirement for certain aggregation exemptions from federal position limit levels.

- *CFTC.gov portal* provided for participants to file a notice with the CFTC of their intent to take advantage of certain aggregation exemptions.