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STATEMENT OF THE COMMISSION

I. INTRODUCTION

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

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

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

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

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

[4] 7 U.S.C. § 7a-1(c)(2)(C).

[5] 7 U.S.C. § 7a-1(c)(2)(N).

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

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

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

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

A. CME Rule 1001

CME Rule 1001 provides that:

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

B. Statutory and Regulatory Context

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

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

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

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

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

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

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

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

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

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

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

II. Procedural History

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

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

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

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

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

III. LEGAL STANDARD

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

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

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

IV. DISCUSSION

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

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

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

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

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

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

A. CME Rule 1001 is not inconsistent with § 45.10

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

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

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

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

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

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

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

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

[35] 17 C.F.R. § 39.12(b)(6).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 49.27(a)(2)

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

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

Core Principle N

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. COMMENTS

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

One Swap vs. Three Separate Swaps

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

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

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

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

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

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

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

Choice of SDR

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

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

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

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

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

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

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

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

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

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

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

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

Commercialization of Data

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

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

CME responds to this contention, stating:

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

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

Appropriateness of filing rule approval under 40.10

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

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

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

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

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

DCO Core Principle C

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

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

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

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

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

[98] 7 U.S.C. § 7a-1(c)(2)(C).

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

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

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

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

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

Anticompetitive claims

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

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

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

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

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

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

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

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

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

Provision of voluntary secondary reports under the rule

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

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

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

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

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

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

VI. Responses to Separate Statement

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

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

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

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

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

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

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

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

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