

1 U.S. COMMODITY FUTURES TRADING COMMISSION (CFTC)

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Open Commission Meeting

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Tuesday, December 8, 2020

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9:30 a.m.

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Virtual

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17 BEFORE:

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Heath P. Tarbert, Chairman

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Brian D. Quintenz, Commissioner

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Rostin Behnam, Commissioner

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Dawn DeBerry Stump, Commissioner

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Dan M. Berkovitz, Commissioner

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1 P R O C E E D I N G S

2 CHAIRMAN TARBERT: Good morning. This
3 meeting will come to order. This is a public meeting
4 of the Commodity Futures Trading Commission, and it is
5 our last open meeting of the year 2020. I would like
6 to welcome members of the public and market
7 participants as well as those on the phone or watching
8 our webcast. I would also like to welcome my fellow
9 commissioners: Commissioner Quintenz, Commissioner
10 Behnam, Commissioner Stump, and Commissioner Berkovitz.

11 As always, we will begin with the Pledge of
12 Allegiance. I will lead, and anyone is welcome to
13 join. If everyone could unmute your mikes?

14 [Pledge of Allegiance.]

15 CHAIRMAN TARBERT: Well, we originally had a
16 very packed agenda for this meeting. In fact, we had
17 eight items in total that we sent out a public notice
18 on. But the good news for all of you that are watching
19 is that we were able to vote on many of these items via
20 seriatim. Specifically, the Commission voted to
21 approve the following matters: a final rule on swap
22 execution facilities that focused on the audit trail,

1 financial resources, and chief compliance officer
2 requirements. We voted on a final rule for exemptions
3 for the swap trade execution requirement. We voted to
4 withdraw the unadopted proposals from the 2018 SEF
5 proposed rule. We also voted on two final rules
6 regarding margin requirements for uncleared swaps, one
7 relating to the minimum transfer amount and another one
8 relating to the material swap exposure definition and
9 the initial margin calculation. And, then, finally, we
10 voted on sort of conforming changes to our regulations
11 that conformed with our changes to our administrative
12 structure here at the agency. So announcements on
13 those votes with more information will be released
14 shortly.

15 However, today, we are gathered because we
16 are going to be discussing and voting on what I think
17 are the two most important final rules to conclude the
18 year 2020 with. For each matter, we will hear a staff
19 presentation before the Commission deliberates and
20 votes. We will first have staff presentations at
21 Commission deliberations relating to the final rules on
22 risk principles to elect for electronic trading. We

1 will then consider and vote on a final rule revising
2 our bankruptcy regulations in Part 190.

3 We will now move to opening statements. I
4 will go first, followed by my fellow commissioners in
5 order of seniority. Commissioners are free to reserve
6 their time to make a longer closing statement if they
7 wish.

8 Well, this is the 20th open meeting of this
9 Commission of five commissioners we have had since I
10 became chairman. That is more open meetings than the
11 prior seven years combined. So, needless to say, we
12 have been very busy.

13 Twelve of those meetings were held after the
14 COVID pandemic started. And we just didn't have these
15 open meetings to talk about the weather. When I was
16 laying out my plans for this agency in the early days
17 of my chairmanship, they focused on five key goals that
18 have since been adopted by our Commission. The first
19 goal was to strengthen the resilience and integrity of
20 our derivatives markets while fostering their vibrancy.
21 The second goal is to regulate our markets, derivatives
22 markets, to promote the interests of all Americans.

1 Third, we want to encourage innovation and enhance the
2 regulatory experience for market participants at home
3 and abroad. Fourth, we want to be tough on those who
4 break the rules. And, finally, CFTC wants to focus on
5 our unique mission and improve our operational
6 effectiveness.

7 A plan is only a piece of paper unless it is
8 executed. Like Thomas Edison said, vision without
9 execution is hallucination. The amazing thing is that
10 this agency has advanced each of those five goals
11 during the past year. In short, thanks to the
12 incredible work of my fellow commissioners and CFTC
13 staff, we have gone from goals to action.

14 In fact, this agency this morning has
15 approved 38 final rules. So my fingers are crossed
16 because we have two more we are going to consider today
17 that I guess would take us up to an even 40. That
18 includes finishing all of the major rulemakings to
19 implement the Dodd-Frank Act and much more.

20 Also, I want to specifically highlight and
21 thank the men and women of the Enforcement Division for
22 their incredibly hard work. For those of you that

1 didn't see, we recently issued the annual enforcement
2 report. And the CFTC had a record-breaking year in
3 2020. I am immensely proud of their accomplishments as
4 well as their perseverance during the pandemic. Their
5 efforts have made a real difference to stopping fraud
6 and particularly where Americans were most vulnerable.
7 This record-breaking year demonstrates the continued
8 growth of our enforcement program as well as the
9 commitment and resolve of our staff.

10 So, just to provide a few of the highlights
11 of that annual report, which, again, I encourage all of
12 you to read, we filed the most enforcement actions ever
13 in the agency's 45-year history this past fiscal year:
14 113. So it was an increase over our previous high of
15 102 and significantly higher than our 30-year average
16 of about 58.

17 We collected more than \$1.3 billion in
18 monetary relief orders, which is the fourth highest
19 total in CFTC history and the third year-over-year
20 increase, the second straight year in excess of a
21 billion dollars.

22 We also had our largest monetary relief order

1 of any CFTC case in history, which was \$920 million.
2 We had more retail fraud actions filed in a single
3 fiscal year, 56, than all of CFTC history, including a
4 record number in the digital-asset space, where we do
5 see fraud and attempted market manipulation in this
6 nascent and growing field.

7 We also filed a total of 16 actions with
8 other Federal criminal authorities, including the
9 3-year total of such actions was 46. And that is
10 nearly double the prior seven fiscal years combined.

11 We also for the first time filed a state
12 joint enforcement action with 30 state regulators and
13 attorneys general. And that has been the most partners
14 that the CFTC has ever had in any case in our history,
15 so just an amazing job that our Enforcement Division
16 has done. And I wanted to take the opportunity --
17 since they are not normally talked about at open
18 meetings where we consider rulemakings from the other
19 divisions, I wanted to highlight their outstanding
20 work.

21 We have also been busy on the international
22 front. One could say we hit the reset button on many

1 of our relationships around the world. I have detailed
2 those in other speeches, but the bottom line here is
3 that I think we have actually created and built upon
4 strong win-win relationships with jurisdictions such as
5 the European Union, with the United Kingdom, and others
6 around the world and where the CFTC is also playing a
7 much more prominent role in places like the Financial
8 Stability Board and IOSCO, so, really, just an amazing
9 job.

10 Looking internally, I would say that, despite
11 the fact that we had a pandemic and many of the same
12 problems that all of you in the public were facing, our
13 own agency was facing, our employees moved in power
14 work overnight. Our technology team went into
15 overdrive to make sure our systems can handle the
16 change. And I am really proud to say that this agency
17 not only faced a crisis, but it thrived in the crisis.

18 And once we settled into our new normal, we
19 revamped some aspects of our organization so we can
20 better serve the markets and the American people. In
21 particular, we recently announced the reorganization of
22 the agency, some additions to our executive team. And

1 one of the most exciting changes is the creation of a
2 new Division of Data. This division pulls together
3 parts of the agency that take in and analyze all the
4 market data we rely on to do our jobs.

5 So, again, let me just conclude by saying I
6 am so proud of this agency, my fellow commissioners,
7 the staff, but we are not yet finished. Today, we are
8 going to consider two additional rulemakings that will
9 make important contributions to the efficient operation
10 of our markets and market participants, risk principles
11 for electronic trading, and also amendments to our
12 bankruptcy regime. I will reserve my comments on both
13 of those items as we discuss them in turn.

14 Thank you so very much. And I will now turn
15 to Commissioner Quintenz. Commissioner Quintenz, you
16 have the floor.

17 [No response.]

18 CHAIRMAN TARBERT: Well, in light of
19 potential technical difficulties, why don't I go ahead
20 and turn to Commissioner Behnam.

21 COMMISSIONER BEHNAM: Good morning, Mr.
22 Chairman. Can you hear me?

1 CHAIRMAN TARBERT: Loud and clear. We can
2 see you as well, Commissioner Behnam.

3 COMMISSIONER BEHNAM: Great. Thanks. Sorry
4 for the glare in the background, but good morning to
5 everyone.

6 It is wonderful to be here, and I look
7 forward to discussing these two important rules today.
8 I think it has been a little bit of time since we have
9 been together, so glad to be here and interested to
10 hear what the staff says.

11 I do want to just comment and thank you for
12 your brief remarks in the beginning. A lot of stuff
13 that we have accomplished and a lot of work that we
14 have done together in a unanimous fashion, which I
15 think is just a testament to the work we do and the
16 sort of collegial atmosphere that this agency has
17 historically had and that we continue to sort of work
18 through and advocate, despite the many challenges that
19 we are facing.

20 I do want to point out you mentioned at the
21 very end the Division of Data, which I am particularly
22 excited about. I think is a great concept that all of

1 us have thought about and understand that in order to
2 do our jobs and fulfill our mandate, we need a better
3 understanding of the data that comes from our markets,
4 through our markets to the agency so we can surveil,
5 enforce in certain cases but also just monitor for
6 certain risks across the board, so something I think is
7 a great starting point, and it can certainly be built
8 on over time as we learn more about our capabilities
9 and what we can do to better improve the markets'
10 transparency and integrity.

11 So I will end there. Looking forward to the
12 discussion. Thanks again to you, Mr. Chairman, and I
13 will pass it back to you now. Thank you.

14 CHAIRMAN TARBERT: Thank you so very much,
15 Commissioner Behnam.

16 We will turn back to Commissioner Quintenz.

17 [No response.]

18 CHAIRMAN TARBERT: Okay. Commissioner
19 Quintenz is still having some technical issues with the
20 interface, but we will hear from him soon enough. For
21 now, we will go ahead and turn to Commissioner Stump.

22 COMMISSIONER STUMP: Thank you, Mr. Chairman.

1 Good morning. I am very pleased to be here.
2 I think you did a very nice job of summing up how busy
3 we have been. Not only over the course of the past
4 year but, quite frankly, the past few weeks have been
5 incredibly active. And so I wanted to just take a
6 moment to talk about the past few weeks. And I think I
7 would sum up the things we have done over the past few
8 weeks as updating our rules for a better market but
9 with tremendous engagement and coordination from the
10 industry that we regulate. And I think that is what
11 sets the CFTC apart from perhaps other regulator--that
12 we have that sort of unique relationship and
13 coordination with the industry.

14 And, most specifically, I just wanted to
15 mention that we are recognizing today the effectiveness
16 of the self-regulatory structure that Congress has
17 established. And that requires day-to-day coordination
18 with the trading facilities that oversee that self-
19 regulatory structure.

20 Also, we have engaged in tremendous teamwork
21 and public input to drive us to the point of updating
22 our bankruptcy regulations for the first time in 37

1 years. There are a number of people who should be
2 commended for assisting us in that effort.

3 And I also wanted to mention the Global
4 Markets Advisory Committee. Although we have now
5 dispensed with the uncleared margin rules via seriatim
6 and won't be considering them at today's meeting, I
7 think that this highlights this particular benefit that
8 we as an agency, the value-add that we receive from the
9 Commission's ability to utilize our advisory committees
10 as they advance recommendations to assist us in our
11 policymaking effort.

12 And then, notably, with regard to swap
13 execution, the amendments that we have made to achieve
14 the swap execution facility goals, have resulted from
15 us listening and leveraging what we have observed over
16 the past decade. And that, too, required an amazing
17 amount of input from those who have utilized and
18 established this entirely new market structure,
19 entirely new regulated market structure, for swap
20 execution.

21 So I just wanted to take the opportunity to
22 not only thank those inside the agency who have worked

1 on these efforts, but also those outside the agency who
2 have really helped us enhance our regulatory updates
3 and refinements. Thank you.

4 CHAIRMAN TARBERT: Thank you so much,
5 Commissioner Stump.

6 We will go ahead and go to Commissioner
7 Berkovitz before returning to Commissioner Quintenz.

8 COMMISSIONER BERKOVITZ: Thank you, Mr.
9 Chairman. I think I have got my video and my audio on.
10 Thank you, Mr. Chairman.

11 I am pleased to be here today and I want to
12 second the remarks that you have made and Commissioner
13 Behnam and Commissioner Stump certainly on the work
14 that has gone into the rules that we are considering
15 today and the ones that we have approved by seriatim.
16 There is a tremendous amount of work that has gone into
17 these, both within the agency and from stakeholders
18 interested in the CFTC. And I think that, as
19 Commissioner Stump noted, that is a testament to our
20 collaborative nature, both internally and externally.

21 And I will have more to say, recognizing
22 particular contributions, in my final remarks, but just

1 at this point, I do want to second the remarks that my
2 colleagues have made so far. So I am going to reserve
3 some of my time after the two rules that we are
4 considering here to debate in order to recognize some
5 of the work that has gone into them.

6 I do want to note, as you indicated, Mr.
7 Chairman, we have approved a number of items by
8 seriatim, rather than by public meeting. I think
9 public meetings and transparency are absolutely
10 critical for the function of this agency. In these
11 instances, given the nature of those rules as well as
12 just the overall prep business and the challenge of
13 considering eight rules or something in one public
14 meeting, I think there is a risk of overloading the
15 public on that and ensuring that each of these rules
16 that we are considering in public, just the two before
17 us today, the bankruptcy rule and the risk principles
18 rules, due to their significance, we really should be
19 giving our undivided attention, our full attention on
20 those two rules in particular. So I have supported
21 moving the other rules into seriatim, but in the
22 interest of full transparency and accountability, I

1 have written statements on each of those rules that
2 will be up on our website. At least in terms of my
3 vote in support of those rules, my reasons are set
4 forth in the statement. They will be on the web. I
5 think I have been supportive of accountability and
6 transparency, regardless of whether we do these by
7 seriatim or in public.

8 With that, I thank you, and I look forward to
9 the discussion today.

10 CHAIRMAN TARBERT: Thank you very much,
11 Commissioner Berkovitz.

12 Let's see if we have Commissioner Quintenz.
13 And yes, we do.

14 COMMISSIONER QUINTENZ: Okay. Can you hear
15 me, Mr. Chairman?

16 CHAIRMAN TARBERT: I can, indeed.

17 COMMISSIONER QUINTENZ: Okay. Sorry about
18 that. You would think that after all of these 20 open
19 meetings that we have had, a number through the
20 pandemic and virtual environment, I would have figured
21 this out by now, but I appreciate the media assistance
22 I received and nothing like turning off and turning

1 back on to solve any technical challenges. Luckily, I
2 think that is not what the exchanges do. We have got
3 some principles to talk about later there. So thanks
4 for everyone's patience.

5 I would also like to join in echoing your and
6 all of my colleagues' compliments to the staff for
7 their hard work, not only on these rules today. And,
8 like Commissioner Berkovitz and the others, I will
9 have individuals to thank for their efforts there later
10 but, Mr. Chairman, to you and your team for an
11 incredibly productive and transparent tenure, for
12 having 20 open meetings and hopefully finalizing at
13 least 38, if not 40, rules in that process. Like
14 others, you know, I believe that having these open
15 meetings not only is beneficial from a transparency
16 perspective to add some discussion and color to the
17 rules we are discussing, but we can each put out
18 statements on rules that we don't do via seriatim.
19 This gives us a chance to interact with other
20 commissioners' thoughts. And I have such a great deal
21 of respect for all of you, my colleagues, and your
22 thinking and your rationale that I value the

1 opportunity to interact with the environment with those
2 thoughts and critiques and suggestions. And I think it
3 refines how each of us think. And hopefully it further
4 supports the rationale for each of our votes beyond
5 what would come out in a written statement that is
6 stale and on the web.

7 So I would like to compliment you, Mr.
8 Chairman. Sometimes for those of us who might have a
9 limited government philosophy, we might not think that
10 having 20 open meetings to consider regulations would
11 be positive. In this case, I unequivocally think that
12 it has been. I think we have met the mission statement
13 of the agency to promote the integrity, vibrancy, and
14 resilience of the derivatives markets through sound
15 regulation. If we look back on the rules that have
16 been finalized, sound regulation, rationalized
17 regulation that is calibrated appropriately to risk is
18 exactly what we have achieved. So it has been a
19 pleasure to be a part of it. Thank you.

20 CHAIRMAN TARBERT: Thank you very much,
21 Commissioner Quintenz.

22 We will now move to the first agenda item,

1 which is the consideration of risk principles for
2 electronic trading. After the presentation, the floor
3 will be open for one round of questions and remarks
4 from each commissioner. Following the close of
5 discussion, the Commission will vote on the rule. The
6 final votes conducted in the public meeting will be
7 recorded votes. The results of the votes approving the
8 issuance of the rulemaking documents will be included
9 with each document in the Federal Register.

10 So to facilitate the preparation of the
11 approved documents for publication in the Federal
12 Register, I would now ask the Commission to grant
13 unanimous consent for the staff to make necessary
14 technical corrections prior to submitting them to the
15 Federal Register.

16 COMMISSIONER QUINTENZ: So moved.

17 COMMISSIONER BEHNAM: Second.

18 CHAIRMAN TARBERT: Thank you. Without
19 objection, so ordered.

20 So at this time, it is my great pleasure to
21 invite a combined staff presentation that will focus on
22 the final rulemaking on electronic trading principles.

1 So from our Division of Market Oversight are Dorothy
2 DeWitt, our director; Marilee Dahlman, special counsel;
3 Joseph Otchin, special counsel; Rachel Berdansky,
4 deputy director; and David Steinberg, associate
5 director. From the Office of the Chief Economist are
6 Esen Onur and Eleni Gousgounis. And from the Legal
7 Division, we have Carlene Kim and Jeffrey Burns. And
8 then, finally, from our Division of Enforcement is
9 Carlin Metzger and from our Division of Market
10 Participants is Greg Scopino, so a big host of people
11 that worked on getting this final rule across the
12 finish line for the Commission's consideration today.

13 Dorothy and everyone else, the floor is
14 yours.

15 MS. DeWITT: Good morning, Mr. Chairman and
16 commissioners. Thank you for the opportunity to
17 present today. My name is Dorothy DeWitt, and I am the
18 director of the Division of Market Oversight, or DMO.

19 Today, we present the final rule entitled
20 "Electronic Trading Risk Principles" for consideration
21 by the Commission. These risk principles reflect the
22 CFTC's mission to promote integrity, resilience, and

1 vibrancy of the U.S. derivatives market through sound
2 principles-based regulation. They build on prior work
3 by the Commission, Commission staff, and industry to
4 ensure market integrity. In addition, they reflect
5 industry feedback during the comment period for the
6 rule.

7 These risk principles are designed to ensure
8 that, moving forward, designated contract markets or
9 DCMs continue to take reasonable measures to address
10 the risk of market disruption as technologies and
11 markets evolve.

12 I would like to thank the DMO team who led
13 this project: Marilee Dahlman and Joe Otchin. The
14 risk principles team -- and it truly was an
15 interdivisional team effort -- also included our DMO
16 colleagues Jeanette Curtis, Bridget Weyls, David
17 Steinberg, and Rachel Berdansky as well as colleagues
18 from multiple CFTC divisions and offices. That
19 includes our colleagues from the Office of the Chief
20 Economist Esen Onur and Eleni Gousgounis, Carl Metzger
21 from the Division of Enforcement, Greg Scopino from the
22 Market Participants Division, and Jeff Burns from the

1 Legal Division. We would like to thank them for their
2 valuable contributions to this final rule.

3 We would also like to thank the Chairman,
4 each of the commissioners, and their staffs for their
5 constructive comments as we prepare the final rule. I
6 would like to especially thank Andrew Ridenour, senior
7 counsel to the chairman, for his contributions and
8 stewardship on this rule as well as others during the
9 past year or more. These comments all serve to improve
10 the risk principles we present here today.

11 Before turning to the matter at hand, I would
12 like to thank the whole Division of Market Oversight
13 team. During the best of times, DMO oversees
14 approximately 400 trillion notional derivatives
15 markets, identifying emerging risks and recommending
16 policy to the Commission and briefing the Commission
17 and others throughout the government and industry about
18 the market we oversee and the market structural
19 changes. DMO also designates and examines exchanges
20 trading our derivatives and reviews the products
21 traded, among other things.

22 As the first woman director of the Division

1 of Market Oversight, I am going to take a moment to
2 borrow a quote from Ginger Rogers. This was regarding
3 her long career dancing with Fred Astaire, "I did
4 everything he did but backwards and in heels." In this
5 case, the entire DMO division did everything they
6 normally did, but in this case, in the case of a COVID
7 pandemic working from home with all of the challenges
8 that that may entail. And, notwithstanding, they
9 delivered and performed their jobs with excellence,
10 with leadership, and with dedication worthy of our
11 mission, our agency, and our country.

12 The DMO did not do this alone. And credit
13 should be spread widely. They worked hand in hand with
14 incredibly talented staff across the agency. And I am
15 truly proud of the team, the agency, and honored and
16 humbled to have had the opportunity to lead DMO during
17 this challenging year, 2020, as it comes to a close and
18 we mark our last open meeting of the year.

19 I do want to take a quick moment to give a
20 special thanks to Vince McGonagle, acting director of
21 enforcement, for the contributions he has made to DMO
22 and the agency as a whole since I joined last year.

1 We will now come back to the matter at hand.
2 And I will turn it over to Marilee, who will discuss
3 the purposes of risk principles and summarize what they
4 require.

5 MS. DAHLMAN: Thank you, Dorothy. And thank
6 you, Mr. Chairman and commissioners, for the
7 opportunity to present.

8 Today, we present the final rule establishing
9 a set of risk principles and related acceptable
10 practices applicable to DCMs for the purpose of
11 preventing, detecting, and mitigating market
12 disruptions or system anomalies associated with the
13 entry of electronic orders and messages into DCM's
14 electronic trading platform. Such market disruptions
15 or anomalies originating at a market participant may
16 negatively impact the proper functioning of a DCM
17 trading platform by limiting the ability of other
18 market participants to trade, engage in price
19 discovery, or manage risks. The Commission, DCMs, and
20 market participants all have an interest in effective
21 prevention, detection, and mitigation of market
22 disruptions or system anomalies associated with

1 electronic trading.

2 As discussed in the notice of proposed
3 rulemaking for the risk principles and as noted by
4 several NPRM commenters, DCMs are addressing most, if
5 not all, of the electronic trading risks currently
6 presented to their trading platforms. The risk
7 principles will require DCMs to continue monitoring
8 these risks as they evolve along with the markets and
9 make reasonable modifications as appropriate. The risk
10 principles reflect the flexible approach that
11 complements industry-wide initiatives and previous
12 Commission measures to address market disruptions risk.
13 The risk principles provide further regulatory clarity
14 to market participants while preserving the DCMs'
15 ability to adapt to evolving technology and markets.

16 The risk principles supplement existing DCM
17 Core Principal 4 regulations in Part 38, namely
18 Commission regulations 38.251 and 38.255. The first
19 risk principle, regulation 38.251(e), requires each DCM
20 to adopt rules governing participants subject to its
21 jurisdiction to prevent, detect, and mitigate market
22 disruptions or system anomalies associated with

1 electronics trading.

2 The second risk principle, 38.251(f),
3 requires DCMs to implement adequate risk controls
4 designed to address potential threat of market
5 disruptions or system anomalies associated with
6 electronic trading.

7 The third risk principle, 38.251(g), requires
8 the DCMs to properly notify Commission staff of a
9 significant market disruption to its electronic trading
10 platform and provide timely information on the causes
11 and remediation.

12 In addition to the three risk principles
13 codified in regulation 38.251(e), (f), and (g), the
14 final rule will also include acceptable practices to
15 risk principles went into, which provides that a DCM
16 can comply with these principles by adopting rules and
17 subjecting all electronic orders to exchange space with
18 trade risk controls that are reasonably designed to
19 prevent, detect, and mitigate market disruptions or
20 system anomalies associated with electronic trading.

21 The risk principles attempt to balance the
22 need for flexibility in a rapidly changing

1 technological landscape with the need for a clear
2 regulatory requirement that DCMs establish rules
3 governing electronic orders as well as market
4 participants themselves to prevent and mitigate market
5 disruptions or system anomalies associated with
6 electronic trading activities.

7 I will note that the final rule makes only
8 one change to regulation text that was proposed by the
9 NPRM. In the NPRM, Risk Principle 3 refers to
10 significant disruptions to a DCM platform. Consistent
11 with Risk Principles 1 and 2, which use the term
12 "market disruption," Risk Principle 3 was revised to
13 add the word "market." It now states that a DCM must
14 promptly notify Commission staff of any significant
15 market disruptions on its platforms. This clarifies
16 that the notification requirement in Risk Principle 3
17 applies to a subset of the market disruptions under
18 Principles 1 and 2.

19 As to Risk Principles 1 and 2, the preamble
20 to the final rule clarifies that market disruptions
21 means events originating with the market participants
22 that disrupt the operation of the DCM or the ability of

1 other market participants to trade, engage in price
2 discovery, or manage risk. Market disruptions must
3 materially impact the proper functioning of a DCM's
4 trading platform and does not encompass disruptions
5 that would only have a de minimis effect.

6 All significant market disruptions under Risk
7 Principle 3 also would be market disruptions under Risk
8 Principles 1 and 2. However, the converse is not true.
9 Some market disruptions under the first two risk
10 principles will not be sufficiently significant to
11 trigger the reporting requirement under Risk Principle
12 3. Thus, the standard for a significant market
13 disruption under the notification requirements is
14 higher than the standard for a market disruption under
15 Risk Principles 1 and 2.

16 I will now turn it over to Joe, who will
17 discuss the main issues addressed in the preamble to
18 the final rule.

19 MR. OTCHIN: Thank you, Marilee. And thank
20 you, Mr. Chairman and commissioners.

21 As Dorothy noted, we appreciate the industry
22 feedback we received for this final rule. The comments

1 are discussed in greater detail in the preamble, but we
2 will address some of the main issues here.

3 In the NPRM, the Commission proposed a
4 principles-based approach, to provide DCMs with the
5 flexibility to impose the most efficient and effective
6 rules and pre-trade risk controls for the market
7 participants. Most commenters supported this approach.
8 Some noted that it takes into account future
9 technological advances and allows for differences
10 between markets.

11 In contrast, several commenters disagreed,
12 asserting, among other things, that the regulations
13 provided too much deference to DCMs. However, the
14 final rule adopts the principles-based approach,
15 supported by the majority of commenters. Consistent
16 with that approach, the risk principles are enforceable
17 regulations that provide appropriate flexibility for
18 DCMs to adopt and implement measures reasonably
19 designed to achieve the objectives of the risk
20 principles.

21 Some commenters also indicated potential
22 overlap with existing regulations. As discussed in the

1 preamble, the risk principles should be interpreted to
2 supplement existing Core Principle for regulations to
3 require prospective action to prevent and detect market
4 disruptions or system anomalies in the context of
5 electronic trading.

6 As Marilee noted in her presentation, the
7 risk principles supplement existing Commission
8 regulations governing DCMs, by directly addressing
9 certain risks associated with electronic trading in DCM
10 Core Principle 4 and its implementing regulation,
11 namely regulations 38.251 and 38.255. Regulation
12 38.251(c) requires DCMs to conduct real-time monitoring
13 and resolve conditions that are disruptive to the
14 market. Regulation 38.255 requires DCMs to “establish
15 and maintain risk control mechanisms to prevent and
16 reduce the potential risk of price distortions and
17 market disruptions,” including “market restrictions
18 that pause for halt trading in market conditions
19 prescribed” by the DCM.

20 The risk principles supplement these existing
21 regulations by specifically requiring action by DCMs to
22 prevent, detect, and mitigate market disruption or

1 system anomalies associated with electronic trading.
2 For example, exceptive messaging that may materially
3 limit participant access-- and not only disruptions
4 that involve trading halt or price distortions.

5 In addition, Risk Principle 1 "specifically
6 requires the adoption of exchange-based "rules." And
7 Risk Principle 3 sets forth a new notification
8 requirement for significant market disruptions.
9 Finally, as previously noted, the acceptable practices
10 to Risk Principles 1 and 2 provide that a DCM can
11 comply with those principles by adopting rules and
12 implementing risk controls that are reasonably
13 designed. The preamble emphasizes that this is an
14 objectively reasonable standard. Commission staff as
15 part of its oversight responsibilities would consider a
16 DCM's measure in light of that market's product,
17 volume, participants, and other factors, and how such
18 measures compare to those adopted by similarly
19 positioned DCMs to address similar risks.

20 That concludes staff's presentation of the
21 risk principles final rule. And we are happy to answer
22 any of your questions.

1 CHAIRMAN TARBERT: Well, thank you very much,
2 Dorothy, Marilee, and Joe, for an excellent
3 presentation.

4 To begin the Commission's discussion and
5 consideration of these matters, I will entertain a
6 motion to improve the final rule on electronic trading
7 risk principles.

8 COMMISSIONER QUINTENZ: So moved.

9 COMMISSIONER BEHNAM: Second.

10 CHAIRMAN TARBERT: Thank you.

11 I would now like to open the floor for one
12 round of commissioner questions and statements in order
13 of seniority. So I will start. First of all, before I
14 get into the substance, I just want to extend my thanks
15 to DMO staff; in particular, you, Marilee; Joe; and
16 Dorothy; but also David Steinberg, Rachel Berdansky,
17 and others. Particularly, I want to thank you for your
18 tireless work, not only in the last few months but in
19 the last few years, from the concept release to Reg AT
20 to this summer's proposal to today's vote on the final
21 rule. All of you have worked with stakeholders to
22 develop a real understanding of electronic markets and

1 how best to solve the novel issues by the move to those
2 markets. This team, in particular, has been
3 instrumental to the agency's evolution as we address
4 this fundamental shift in our markets. I would also
5 like to thank our Office of the Chief Economist, Esen
6 Onur, Eleni Gousgounis; as well as Jeff Burns and
7 Carlene Kim in the Legal Division; Greg Scopino in our
8 Market Participants Division; and Carlin Metzger in the
9 Division of Enforcement. This final rule and all of
10 the development that went into it has truly been a
11 cross-functional team effort. And that has raised the
12 understanding of electronic markets across our agency.
13 So thank you from the bottom of my heart. And I know
14 many other fellow commissioners feel the same way.

15 So on to the substance, I mean, I guess I
16 have -- I spoke on this topic in June, when we looked
17 at the proposal. And we are largely adopting the
18 proposal as is. So I won't repeat much of what I have
19 to say but just in terms of the public to get a sense
20 of kind of what we are doing here, I actually think in
21 many ways, this is a good problem to have in the sense
22 that if you think about one of the big lessons learned

1 by the COVID pandemic, it was the fact that our markets
2 could remain orderly and liquid and continue to run,
3 despite social distancing in the large part and one
4 could argue simply because of a "but for" cause of
5 electronic trading. If we had had the system that we
6 had 30 years ago and even sooner than that with respect
7 to an outcry, trading in pit, for example, and then we
8 had imposed social distancing, our markets would have
9 closed overnight. They would have not been able to
10 remain open, and they would have not been orderly and
11 liquid and allow the American people and others around
12 the world to hedge their risks in derivatives market.

13 So big picture, electronic trading did a very
14 good thing for our market, more ambition, more
15 effective, and certainly more resilient. However, of
16 course, electronic trading comes with risk. And that
17 is what today is all about.

18 And this is an issue, as I mentioned, that
19 the Commission has been thinking about now for several
20 years. We haven't yet gotten anything over the finish
21 line specifically on the topic, but it is really
22 important that we do so, and it is important that we do

1 so in a thoughtful way. And so, you know, this is
2 where the question of principles-based versus rules-
3 based, how prescriptive should we be really comes into
4 play. One of the things that I think this rule, in
5 particular, acknowledged is because this area is
6 changing so dramatically that if we came out with
7 something very specific, very detailed, the concern
8 would be that it would be obsolete overnight
9 potentially.

10 And so by coming up with a set of principles,
11 we allow market evolution and innovations to continue
12 to keep up with or our regulation to continue to keep
13 up with the market evolution. And, therefore, we as
14 long as we are vigilant can remain ahead of the curve.
15 So I think it is really important for a principles-
16 based approach here.

17 A couple of questions I have are, number one
18 -- and I think, Joe, your presentation, in particular,
19 really honed in on this -- is the fact that we have
20 some stuff on the books that kind of deal with risk
21 controls, on one hand; and maybe market disruptions and
22 trading halts and things, on the other hand, but we

1 don't have anything specifically targeting market
2 disruptions and system anomalies coming from electronic
3 trading and, in particular, a directive to exchanges to
4 create their own rules addressing this as well as a
5 notification requirement. Is that basically it? You
6 know, in terms of supplementing it, there is this gap
7 there. And it is important that we fill the gap.

8 MS. DeWITT: Yes, Chairman.

9 CHAIRMAN TARBERT: Terrific. And, then, the
10 only other question I have is we have had a very
11 exciting year in the market in terms of developments
12 but particularly volatility brought on by COVID-19 and
13 other trends. And this has really put electronic
14 trading to the test. Is there anything that we have
15 seen throughout this year that would either, a) urge
16 you to maybe pause this rulemaking and say, "We need to
17 think more about it because there may be stuff we
18 missed" or perhaps the opposite, saying, "It is more
19 important than ever that we finalize this rule"? So
20 any sort of lessons learned, anything you saw during
21 the volatility earlier in this year that would in any
22 way impact this?

1 MS. DeWITT: Chairman, I think, as you know
2 -- first, thank you for the question. The market fell
3 off, reflected turbulent times for our market, for our
4 derivatives market, since there are many types of
5 commodities and for many contracts and investors as a
6 whole. We did observe rapid and large changes in those
7 markets, reflecting the uncertainty in the markets and
8 some historic movement. However, the market worked
9 well. There was high volatility. There was high
10 methods volume. There was high trading volume. We
11 spent the better part of the end of the first quarter
12 or that second half of the first quarter and all of the
13 second quarter of this year speaking on a daily basis
14 with our exchanges, with our market participants in
15 conjunction with my colleagues at the other divisions
16 that oversee our registrants.

17 And, by and large, the pipes worked. The
18 systems worked. They flowed. We asked our registrants
19 to ensure that they were thinking about and looking at
20 very carefully the controls that are reflected or the
21 principles that are -- their risk and control work
22 frameworks in the framework of some of these

1 principles. They did, and it reinforced our view that
2 this risk control rule is appropriate, is well-
3 designed, and it is flexible enough to have legs and to
4 have a long future that adapts with technology, and
5 manages the risks of human error and/or malfunctions
6 that could cause market disruption.

7 So I hope that answers your question,
8 Chairman.

9 CHAIRMAN TARBERT: Right. So I guess if I
10 could sort of summarize it, you know, essentially, we
11 didn't necessarily see any major market disruptions or
12 system anomalies from electronic trading and certainly
13 none that would cause us to reformulate these
14 principles, but, arguably, in the future, we may see
15 enhanced volatility, continued risk. You know, should
16 we see that in the future, having rules in place now,
17 having the exchanges and market participants focus on
18 them would be helpful.

19 MS. DeWITT: That's exactly right and well-
20 said.

21 CHAIRMAN TARBERT: Terrific. Well, again, I
22 will issue a statement I think outlining all of the

1 reasons I am supportive of these rules and voting for
2 it. And I will reserve that for later issuance.

3 And, with that, I will conclude my questions
4 and turn to Commissioner Quintenz.

5 COMMISSIONER QUINTENZ: Thank you very much,
6 Mr. Chairman. And thank you to you, Dorothy, Marilee,
7 Joe, David, and Rachel, for your work on the final rule
8 and on the proposal and for working with me and my
9 staff throughout the entire process.

10 I think what I would like to do is go through
11 some of my thinking in my statement and ask a question
12 or two maybe in the middle where I get to a relevant
13 part.

14 I am going to be supporting today's final
15 rule requiring DCMs to adopt rules that are reasonably
16 designed to prevent, detect, and mitigate material
17 market disruptions or system anomalies associated with
18 electronic trading. This rule also requires DCMs to
19 subject all electronic orders to pre-trade risk
20 controls designed to address the risks posed by
21 electronic trading.

22 As I have noted previously, many, if not all,

1 of the risks posed by electronic trading are already
2 being effectively addressed through the market
3 incentive structure, including exchanges' and firms'
4 own self-interest, DCMs through their interest in
5 operating markets with integrity, and firms through
6 their interest in not exposing their or their clients'
7 and customers' funds to large losses in a matter of
8 minutes through algorithmic operational error. Both
9 exchanges and firms have been leaders in implementing
10 best practices around electronic trading risk controls.
11 Therefore, today's final rule merely codifies
12 principles underlying existing market practice of DCMs
13 to have reasonable controls in place to mitigate
14 electronic trading risks.

15 Significantly, the rule puts forth a
16 principles-based approach, allowing DCM trading and
17 risk management controls to continue to evolve with the
18 trade technology itself, like you described, Mr.
19 Chairman. As we have witnessed over the past decade,
20 risk controls are constantly being updated to improve
21 and respond to market developments. In my view, these
22 continuous enhancements are made possible because

1 exchanges and firms have the flexibility and the
2 incentives to evolve and hold themselves to an ever-
3 higher set of standards, rather than being held to a
4 set of prescriptive regulatory requirements which can
5 quickly become obsolete. By developing a principles-
6 based approach, the final rule provides exchanges and
7 market participants with that flexibility they need to
8 continue innovating and evolving with technological
9 developments.

10 As the preamble states very clearly, DCMs are
11 best positioned to determine and implement the rules
12 and risk controls most effective for their markets.
13 Under this rule, DCMs are required to adopt and
14 implement rules and risk controls that are objectively
15 reasonable. The Commission would monitor DCMs for
16 compliance and take action if it determines that the
17 DCM's rules and risk controls are objectively
18 unreasonable.

19 Now, importantly, the appendix to the final
20 rule, as was described, points out that a DCM will be
21 held to the standard of reasonableness and not to how
22 other DCMs implement their own rules or risk controls,

1 which brings me to my question. And I don't know if,
2 Marilee, you would be the best or if someone else would
3 be, but can someone please explain what kind of
4 information or analysis you would expect the agency to
5 take into account in reviewing DCMs' rules and risk
6 controls under that reasonableness standard?

7 MR. OTCHIN: Thank you, Commissioner. This
8 is Joe.

9 Under the risk principles, a DCM has
10 discretion to determine what rules and risk controls
11 are appropriate, but Commission staff as part of its
12 oversight responsibility will consider the objective
13 reasonableness of those measures in light of the DCMs'
14 products, volumes, market participants, and other
15 factors, and how a DCM's measures compare to those
16 employed by similarly positioned DCMs to address
17 similar risk. Staff recognizes there will be
18 differences among DCMs, but the rules and risk controls
19 one DCM implements to address the risk of material
20 market disruption may be relevant in assessing other
21 DCMs' compliance.

22 For example, if staff finds that a particular

1 DCM is an outlier in terms of its rules or controls,
2 that may cause staff to inquire further into whether
3 there are legitimate reasons for those differences.

4 CHAIRMAN QUINTENZ: Thank you, Joe. I think
5 that is very important that any horizontal review
6 across DCMs of rules or risk controls would only inform
7 objectively unreasonable determinations and not create
8 a baseline set of specific risk controls that become de
9 factor regulatory requirements. And I think that that
10 makes logical sense that in order to objectively
11 determine if something is unreasonable, it helps for a
12 context, you know, across the market but not to create
13 de facto regulatory requirements that we think one
14 control works better and, therefore, anything else
15 would be unreasonable. I think that there is plenty of
16 flexibility for exchanges to abide by these rules in a
17 way that they think is most appropriate and reasonable
18 and there is also the legitimate opportunity for us as
19 an agency to take into account the entire spectrum in
20 deciding whether or not something is objectively
21 unreasonable.

22 The Technology Advisory Committee, which I am

1 very pleased to sponsor, has explored the risk posed by
2 electronic trading at length. And in each of those
3 discussions, it has become obvious that both DCMs and
4 market participants take the risks of electronic
5 trading very seriously and have expended enormous
6 effort and resources to address those risks.

7 For example, at one TAC meeting, we heard how
8 the CME group has implemented trading and volatility
9 controls that complement and in some cases exceed eight
10 recommendations published by the International
11 Organization of Securities Commissions, IOSCO,
12 regarding practices to manage volatility and preserve
13 orderly trading.

14 At a different TAC meeting, the FIA presented
15 on current best practices for electronic trading risk
16 controls. FIA reported that through its survey of
17 exchanges, clearing firms, and trading firms, it found
18 widespread adoption of market integrity controls since
19 2010, including price banding and exchange market
20 halts. FIA also previewed some of the next generation
21 controls and best practices currently being developed
22 by exchanges and firms to further refine and improve

1 electronic trading systems.

2 The Intercontinental Exchange also presented
3 on the risk controls ICE currently employs across all
4 of its exchanges, noting how its implementation of
5 controls was fully consistent with FIA's best
6 practices. These presentations emphasize how critical
7 it is for the Commission to adopt a principles-based
8 approach, the one contained in this rule, that enables
9 best practices to evolve over time.

10 I believe the final rule issued today adopts
11 that approach and provides DCMs with the flexibility to
12 continue to improve their risk controls in response to
13 technological and market advancements. Because this
14 rule allows for flexible implementation and effectively
15 places that burden on market participants with the most
16 aligned interests and most motivated interests, I
17 believe this rule will stand the test of time and serve
18 as a paradigm of the CFTC's mission statement: sound
19 regulation that promotes the integrity, resiliency, and
20 vibrancy of the U.S. derivatives market.

21 Thank you, Mr. Chairman.

22 CHAIRMAN TARBERT: Thank you very much,

1 Commissioner Quintenz.

2 Commissioner Behnam?

3 COMMISSIONER BEHNAM: Hello? Thanks, Mr.
4 Chairman. And thank you, first and foremost, to the
5 team: Dorothy, Joe, Marilee, and everyone else who has
6 been a part of this process. Mr. Chairman, I
7 appreciate your comment that this certainly does not
8 just go back a few months. This goes back a number of
9 years as this particular rulemaking has taken on a
10 number of iterations, certainly engagement with the
11 public and the market to get into the current
12 condition.

13 I do want to start with a few questions, and
14 then I am going to read a statement. And I think,
15 Dorothy, to your point, this rule has not changed much
16 since we proposed it a few months ago. So, if you
17 don't mind, I do want to talk about two quick things.
18 And I think, Joe, you may have mentioned this, but
19 excuse me if it was Marilee. The material versus de
20 minimis market disruption, who is going to be the judge
21 of that standard if there is a disruption, the DCM, and
22 within the context of having to report it to the

1 Commission? What is that communication going to be
2 like? Who are we going to be relying on to make those
3 calls? Is there any sort of process that would go into
4 that decision-making?

5 MS. DAHLMAN: Thank you for that question. I
6 think, first and foremost, we would say that
7 reasonableness is an objective standard. And so while
8 a DCM does have discretion to determine what rules and
9 risk controls are appropriate, the Commission and
10 Commission staff as part of oversight responsibility
11 will consider the objective reasonableness of those
12 measures in light of different factors, including the
13 DCMs' products and volume and market participants and
14 other factors and how effective those measures are.
15 And when evaluating the effectiveness of those rules
16 and controls, we would consider how a DCM's measures
17 compare to those employed by similarly positioned DCMs
18 to address similar risks.

19 So while there might be differences among
20 DCMs, what one DCM may implement in terms of rules or
21 risk controls to address market disruptions may be
22 relevant to assessing another DCM's compliance. For

1 example, if the Commission were to find that one DCM
2 was an outlier in terms of rules or controls, that
3 might cause Commission staff to go ahead and inquire
4 further about whether or not there are legitimate
5 reasons for those differences.

6 COMMISSIONER BEHNAM: Thanks, Marilee. And
7 in terms of market events, I think I understand your
8 response in the sense of implementing a rule to make a
9 determination, it being objective, but in terms of
10 market events -- and I don't want to assume anything,
11 but, you know, there may be anomalies I assume that
12 happen at periodic times with the DCMs. To what extent
13 are we going to be informed about these market events
14 within the context of this rule? And that is where I
15 would like to get a better understanding if it is
16 possible. And it might be too premature at this point,
17 but if a market event does occur, how are we going to
18 be able to essentially know about it if we are relying
19 on the DCM to make a call about what constitutes either
20 de minimis or a material event such that it would need
21 to be shared with us?

22 MS. BERDANSKY: Hi, Mr. Commissioner. Thank

1 you for that question. I can take this one.

2 I think this is really similar in process to
3 what we have in the systems safeguards role in the
4 sense that we are saying it is a significant disruption
5 and the DCMs will have discretion. And that is
6 something that we will certainly look at in our
7 oversight.

8 It is also something -- and you asked earlier
9 about the process. We expect it to be very similar to
10 what we have in the systems safeguards context in that,
11 you know, we have a market interruption site. The DCMs
12 know they file notices. And we have a whole process.
13 And I would expect this to work much the same way.

14 COMMISSIONER BEHNAM: Thank you very much.

15 MS. DeWITT: And this is Dorothy. I am just
16 going to mention that that was Rachel Berdansky, deputy
17 for compliance and examinations. Thank you, Rachel,
18 for those comments.

19 COMMISSIONER BEHNAM: My final question is
20 regarding -- I also appreciate, Dorothy, both your
21 statements and the chairman's statements about the
22 March-April period, where we had, obviously, extreme

1 volatility and movements in our market. And I think we
2 were all very pleased to see the outcomes at large;
3 most importantly, that the pipes I think, taking a
4 phrase from you, Dorothy, worked well, all things
5 considered, from an historical context for sure. But
6 there have been a number of events. I think there were
7 some comments.

8 And if you could just either verify this for
9 me or give me a sense of what you all at the division
10 thought about with respect to essentially the WTI event
11 in April? And then also I do believe -- and confirm
12 this or not -- that something like climate change, you
13 know, the outside market events were going through a
14 pandemic, which caused the March-April period, right?
15 These events that we need to start thinking about and
16 anticipating, how could these shock events start to
17 affect our markets such that we need to build them into
18 our sort of policy lens? And to the extent that you
19 have thought about either of those, whether it is WTI
20 or potential climate events in the future, how did that
21 shape at all the rulemaking process?

22 MS. DeWITT: Sure. Thank you, Commissioner,

1 for an excellent question. I think there are very
2 important elements that I would like to break down in
3 answering your questions. Number one is that there are
4 events, external events, some related to the market,
5 some not. You know, a health pandemic or climate
6 change would be exogenous forces. And there are
7 market-related forces that can cause events, the crises
8 in 2008 being one of the most studied ever over the
9 past decade and informs us.

10 This set of principles in this rule is
11 designed to apply to events that are anticipated and
12 events that are unanticipated equally. It is designed
13 to enable exchanges and exchanges to identify what
14 their risks are from human error and/or malfunctioning
15 systems to design reasonable controls, reasonable risk
16 control frameworks to address those, that are
17 reasonably designed to address those, and to allow for
18 flexibility that is necessary to reflect what is and
19 isn't a known unknown, which is changes in technology.
20 And those changes happen quickly and can be happening
21 as an underlying platform, during which a market event,
22 anticipated or unanticipated, may happen. So the rules

1 were designed to anticipate exactly issues like the two
2 that you just outlined.

3 I do think that when it comes to April 20th
4 WTI crude prices, which, as those on the call and
5 certainly the commissioners know, were outlined, and
6 the facts around which were outlined in a November 23rd
7 published report entitled, "Trading in NYMEX WTI Crude
8 Oil Futures Contract Leading up to, on, and Around
9 April 20, 2020." I think there is an important
10 distinction to be made between this rule and some of
11 the events that you described, including the events of
12 April 20th in the WTI crude market.

13 As I said in response to an earlier question,
14 by and large and quite consistently, the pipes worked.
15 They worked for the exchanges, for clearing, and for
16 other types of registrants with principles designed to
17 prevent the trio of market disruptions that were
18 systems anomalies. And that might be human error or
19 malfunctioning the systems; in other words, where the
20 pipes don't work. And that might be a crack. It might
21 be a leak. It might be degradation of the pipes. It
22 might be a plug in the pipes, so on and so forth. And

1 so with principles, it is in some ways different, very
2 different, from what is outlined in the WTI crude
3 report that we issued. In that case, the pipes did
4 work. And, in particular, I would go in to say that,
5 using how these pipes worked because there are risks
6 and controls that exchanges put in place. And insofar
7 as those operate in the manner and way that they were
8 intended and designed, then it is unrelated to these
9 risk principles, what can be achieved by these risk
10 principles. And that is exactly what happened on April
11 20th.

12 The exchange had designed circuit breakers.
13 And those circuit breakers operated, triggered 39 times
14 that day. The exchange also had designed philosophy
15 logic, like the speed at which prices changed;
16 algorithms, launched logic algorithms. Those were
17 introduced after the flash crash of 2010. And those
18 worked exactly as designed.

19 So I do understand the relevance of your
20 question both in terms of the scope and flexibility of
21 the rule over time to operate well in unanticipated
22 scenarios, but I do also want to emphasize that, at

1 least in one of the recent market events that you
2 described, the WTI cleared markets, the mechanisms of
3 this rule are unrelated. The pipes worked in that
4 situation.

5 COMMISSIONER BEHNAM: Thanks, Dorothy. That
6 is extremely helpful. And I think a couple of things.
7 One, certainly I understand that distinction, but I
8 think it really, if nothing else, it sort of manifests
9 or displays the differences in opinion that I have with
10 you and the chairman about how to approach this.

11 And, as was pointed out by my colleague
12 earlier, you know, a lot of what we are doing now is
13 really nothing more than codifying what is already
14 being done by the DCMs and the market, and they have
15 been doing it for a number of years. So I think from a
16 regulatory policy perspective, it raises questions
17 about, you know, why are we doing this if it is being
18 done and being done well? And if we are going to
19 approach automated trading and electronic trading, how
20 do we have to think about it from a policy perspective?
21 And is this the right approach?

22 And these events, which are -- you know, they

1 are external events. I don't think anyone could have
2 imagined 5 or 10 years ago that a health crisis, a
3 health pandemic, would have had such direct
4 consequential effects on our financial markets for such
5 a prolonged period of time. And I think as we start to
6 think about these recurring external events, whether it
7 is climate change or otherwise, we have to build into
8 the reality that the economy and financial markets
9 really underpin everything we do on a day-to-day basis.
10 And whatever exogenous event may occur, it is going to
11 have an effect on financial markets, both in the U.S.
12 and overseas.

13 So I appreciate your point. I understand
14 that distinction. And your articulation was very nice
15 and well-taken. And I think it is important to
16 understand that, both for us but also for the public at
17 large, about, really, the differences that I think we
18 have and the chairman has in terms of how we are going
19 to approach this.

20 So, with that, I do want to thank you again.
21 I am going to spend, Mr. Chairman, if you will indulge
22 me, a few minutes in just reading my statement.

1 And, again, I would like to start by thanking
2 the DMO staff for their tireless work on this rule. As
3 I pointed out, while the risk principles are short,
4 that is not reflective of the work that has been done
5 by staff to produce them. This is the same DMO staff
6 that worked on the much broader Reg AT, and I
7 appreciate all of your work over many, many years.

8 Last June, I stated in my dissent to the
9 electronic trading risk principles proposal that I
10 strongly support thoughtful and meaningful policy that
11 addresses the ever-increasing use of automated systems
12 in our markets. The proposal regarding electronic
13 trading risk principles did not achieve this in my
14 view. Far from utilizing over a decade of experience
15 that should have profoundly shaped how we address
16 operational risks that are consistently unpredictable
17 and have wide-ranging impact, today's final rule
18 changes only a single word from the proposal aimed at
19 codifying the status quo. Accordingly, I have to
20 respectfully dissent.

21 A little over 10 years ago, as was pointed
22 out by Dorothy, on May 6, 2010, the flash crash shook

1 our markets. The prices of many U.S.-based equity
2 products, including stock index futures, experienced an
3 extraordinarily rapid decline and recovery. Following
4 that, in 2012, Knight Capital, a securities trading
5 firm, suffered losses of more than \$460 million due to
6 a trading software coding error. Other volatility
7 events related to automated trading have followed with
8 increasing regularity. In September and October of
9 2019, the Eurodollar futures market experienced a
10 significant increase in messaging. According to
11 reports, the volume of data generated by activity in
12 Eurodollar futures increased tenfold. A lesson of
13 these events is that under stressed market conditions,
14 automated execution of a large sell order can trigger
15 extreme price movements and the interplay between
16 automated execution programs and algorithmic trading
17 strategies can quickly result in disorderly markets.

18 Recent events further amplify that in
19 increasingly interconnected markets, which are informed
20 by growing access to real-time data and information, we
21 do not always know how and where the next market stress
22 event will materialize.

1 This past April 20th, the May contract for
2 the West Texas intermediate light sweet crude oil
3 futures contract, or WTI, on the New York Mercantile
4 Exchange settled at a price of -\$37.63 per barrel. The
5 May contract's April 20 negative settlement price was
6 the first time that the WTI contract traded at a
7 negative price since being listed for trading 37 years
8 ago.

9 Technology glitches have continued to impact
10 our markets. Just yesterday, a large retail broker
11 that was significantly impacted by the events of April
12 20th suffered a significant failure in data storage.

13 Recent technology glitches overseas have
14 hampered our international colleagues as well,
15 handcuffing markets for extended periods of time
16 without clear explanation. In Japan this past
17 September, the Tokyo Stock Exchange shut down for a day
18 due to technical glitches in equities trading.

19 Just last month, Australia's stock exchange
20 lost an entire day of trading due to a software problem
21 impacting trading of multiple securities in a single
22 order. This discrete issue was enough to lead to

1 inaccurate market data that necessitated shutting down
2 the exchange for an entire trading day.

3 As we consider today's final rule, there is a
4 tendency to think that something is better than
5 nothing, and that today's risk principles, if nothing
6 else, demonstrate the Commission's belief that
7 mitigating automated trading risk is important.
8 However, I continue to question whether these risk
9 principles improve upon the status quo, or even do
10 anything of marginal substance relative to the status
11 quo.

12 The preamble seems to go to great lengths to
13 make it clear that the Commission is not asking DCMs to
14 do anything. The preamble states at the very outset
15 that the "Commission believes that DCMs are addressing
16 most, if not all, of the electronic trading risks
17 currently presented to their trading platforms." The
18 preamble presents each of the three risk principles as
19 "new" but then goes on to describe all of the actions
20 already taken by DCMs that meet the principles. If the
21 appropriate structures are in place and we have
22 dutifully conducted our DCM rule enforcement reviews

1 and have found neither deficiencies nor areas for
2 improvement, then is the exercise before us today
3 anything more than creating a box that will
4 automatically be checked?

5 The only potentially new aspect of these risk
6 principles is that the preamble suggests different
7 application in the future as circumstances change. As
8 I said in regard to the proposal, the Commission seems
9 to want it both ways in many respects. We want to
10 reassure DCMs that what they do now is enough, but at
11 the same time the new risk principles potentially
12 provide a blank check for the Commission to apply them
13 differently in the future.

14 We do not know what the next external event
15 to stress market conditions will be, but one likely
16 possibility is climate change. In establishing new
17 rules for automated trading, I would have liked the
18 Commission to have taken a more fulsome look at both
19 the events of April 20th, the COVID-19 pandemic more
20 broadly, and the potential impacts of climate change on
21 our automated markets. The recently published Interim
22 Staff Report on the events of April 20 provides a stark

1 example of what can happen to automated markets under
2 times of economic stress.

3 The April 20th price plummet triggered both
4 dynamic circuit breakers and velocity logic, exactly
5 the type of risk controls discussed in the proposal
6 that preceded the electronic trading risk principles
7 proposal, commonly referred to as Reg AT. Regulation
8 AT was formally withdrawn at the chairman's direction
9 and without my support. Further troubling, it was
10 withdrawn before the Commission staff had any
11 meaningful opportunity to consider whether and how the
12 risk controls in either Reg AT or the electronic
13 trading risk principles, as proposed, performed during
14 trading around April 20th. There was, arguably, no
15 better test case. And, yet, yet we charged forward
16 without looking back.

17 If the risk controls were effective, we
18 should consider whether more specific controls along
19 these lines should be part of the electronic trading
20 risk principles in order to be certain that all DCMs
21 are prepared to maintain orderly trading during such a
22 confluence of events. If they are not, we should

1 consider whether stronger risk controls are necessary.

2 I also think that the risk principles would
3 be improved if they were informed by a consideration of
4 the possible impacts of climate change, as I said. The
5 preamble states, "The principles-based approach
6 provides DCMs with flexibility to address risks to
7 markets as they evolve, including any idiosyncratic
8 events." Referring to events such as climate change as
9 "idiosyncratic" downplays their impact and places
10 regulators and DCMs in a purely reactive posture.
11 While we cannot know for certain what the next external
12 event that causes stressed market conditions will be,
13 that does not mean that we should remain idle until it
14 hits. As we will continue to experience unanticipated
15 and unprecedented events that will impact our markets
16 and the larger U.S. economy, I am concerned that a
17 policy of simply checking a box will do nothing more
18 than shield DCMs from public scrutiny and fault for the
19 fallout.

20 So often we hear that markets have evolved
21 from a technological and innovative standpoint at an
22 exponential rate as compared to their regulators.

1 Rulemakings like this provide our greatest opportunity
2 to proactively close that gap. We need to be
3 proactive. Being proactive means studying the
4 incidents of the past, like the flash crash, Knight
5 Capital, and most recently April 20th and the pandemic,
6 so that we can recognize the precursors of events to
7 come. Instead of just reacting, we can predict,
8 prepare for, and possibly prevent the next crisis
9 events.

10 Again, while there is a temptation to advance
11 this rule under the theory that something is better
12 than nothing, in this case I do not think that the
13 final rules add much at all beyond the opportunity to
14 take a victory lap. In other words, the theme in this
15 case states that nothing is better than something. I
16 believe that we can and should do better. And,
17 therefore, I cannot support today's final rule.

18 Again, thanks to the staff for all of your
19 work engaging with my staff over many, many months and
20 years. But, again, you know, I think this is just a
21 distinction and a difference in opinion about policy,
22 how we should approach automated trading, electronic

1 trading, as it increasingly grows in our marketplace.

2 And, despite moving forward today, in spite
3 of my "no" vote, I certainly look forward to working
4 with all of you, DMO, and the other divisions in the
5 future as we will have to work with these issues over
6 the course of many years to come. So thank you again.

7 And, Mr. Chairman, I will send it back to
8 you.

9 CHAIRMAN TARBERT: Thank you very much,
10 Commissioner Behnam.

11 Commissioner Stump?

12 COMMISSIONER STUMP: Thank you, Mr. Chairman.

13 As has been discussed by others, I do not
14 want our adoption of additional Commission- prescribed
15 risk principles regarding electronic trading on DCMs to
16 be taken as an indication that adequate attention has
17 not been paid -- or that insufficient resources have
18 not been invested -- by the exchanges to date to
19 address the lessons learned over the course of many
20 years of experience with electronic trading as it has
21 become more prevalent in these markets.

22 But I also want to take the opportunity to

1 stress the significance of something that is often
2 overlooked in the direction that we receive from
3 Congress in Section 3 of the Commodity Exchange Act.
4 Section 3(a) sets out Congress's finding that the
5 transactions subject to the Commodity Exchange Act are
6 affected with a national public interest. And, then,
7 in Section 3(b), Congress stated that it is the purpose
8 of the Commodity Exchange Act to serve this public
9 interest, and I quote, "through a system of effective
10 self-regulation of trading facilities, clearing
11 systems, market participants and market professionals
12 under the oversight of the Commission."

13 I support adopting these electronic trading
14 principles as an appropriate exercise of the
15 Commission's oversight that Congress expects from us,
16 as stated in the Commodity Exchange Act. And while I
17 have not questioned the exchanges' diligence in
18 addressing the risks in electronic trading on their
19 platforms to date, I am comfortable incorporating these
20 principles into our existing rule set in order to make
21 clear that DCMs must continue to monitor these risks as
22 they evolve along with the markets, and make reasonable

1 modifications when appropriate.

2 Importantly, though, I also support the
3 principles-based approach of this final rule. This
4 approach recognizes that the frontline responsibility
5 for preventing, detecting, and mitigating material
6 risks posed by electronic trading rests with the
7 exchanges themselves. At the same time, this approach
8 serves the public interest through a system of
9 effective self-regulation of trading facilities, just
10 as Congress directed us in the statement of purpose of
11 the Commodity Exchange Act.

12 I do want to take the opportunity to just ask
13 a few questions, but I would note that my colleagues
14 have already asked a number of clarifying questions. I
15 just want to highlight a few related points contained
16 in the adopting release for the public's attention and
17 interest.

18 So I will first ask again what types of
19 situations these principles are intended to address,
20 just to clarify and perhaps respond to any confusion
21 that may exist. And I would call the attention of the
22 public to page 32. The question -- and I suspect that

1 the risk principles are not intended to deal with
2 intentional or reckless disruptive trading behavior,
3 things like manipulation or prearranged trading.
4 Rather, I think Dorothy pointed out the focus of these
5 risk principles is on unintended technological
6 malfunctions that disrupt the operation of the DCM or
7 the ability of the market participants to trade or
8 engage in price discovery or manage risk. But I just
9 want to make certain that I read page 32 correctly.

10 MR. OTCHIN: Commissioner, this is Joe. What
11 you said was correct. There are, of course, provisions
12 in the CEA and Commission regulations that address
13 intentional or reckless acts of disruptive trading, but
14 that is outside the scope of this rulemaking, which is
15 focused on unintentional disruptions.

16 COMMISSIONER STUMP: Thank you. And, Joe, I
17 think you have already mentioned this, but the release
18 also makes clear that there is a materiality standard
19 built into Risk Principles 1 and 2. In other words,
20 the DCMs' rules and risk controls must be reasonably
21 designed to prevent, detect, and mitigate disruptions
22 that materially impact the function of its trading

1 platform.

2 Marilee mentioned that Risk Principle 3 is
3 distinct. And I note that it specifically uses the
4 word "significant." That is, the DCM must notify the
5 Commission "of any significant market disruptions on
6 its electronic trading platform(s)."

7 Commissioner Behnam spoke to this a bit. For
8 the members of the public listening today, can you
9 maybe relay and elaborate a bit on how the materiality
10 standards in Risk Principles 1 and 2 relate to the word
11 "significant" in Risk Principle 3?

12 MR. OTCHIN: Thank you for the question,
13 Commissioner.

14 So Risk Principles 1 and 2 use the term
15 "market disruption." And Risk Principle 3 uses the
16 term "significant market disruption" with respect to
17 the reporting requirement. So under Risk Principles 1
18 and 2, the rules and risk controls that the DCMs need
19 to adopt to address the risk of market disruptions,
20 there is a de minimis exception, which is related to
21 the reasonableness standard for compliance with the
22 risk principles. So a DCM could determine, in its

1 reasonable discretion, that a disruption had only de
2 minimis effects. And then it wouldn't constitute a
3 market disruption for purposes of the risk principles.

4 With respect to Risk Principle 3 and the
5 reporting requirement, as Rachel mentioned earlier, it
6 is analogous to regulations with respect to systems
7 safeguards. So under a existing regulations, a DCM
8 must report to the Commission "significant" system
9 safeguards incidents. And so, similarly here, where it
10 is a reporting requirement, the Risk Principle 3
11 regulation states that in the event of a market
12 disruption that also meets a significant threshold,
13 that significant market disruption would need to be
14 reported to the Commission. And so, you know, again, I
15 think that our view is that it would benefit both the
16 Commission and the DCMs themselves that they don't have
17 to report every conceivable market disruption under the
18 first two risk principles but that there is this added
19 significance threshold with respect to what would be
20 reported to the Commission in a real-time or a near-
21 real-time basis.

22 COMMISSIONER STUMP: Great. Thank you.

1 I don't have any further questions. I do
2 want to take the opportunity to call everyone's
3 attention to the Commodity Exchange Act. I think most
4 people know I always hearken back to the statute when I
5 ask questions about where we should and should not be
6 meandering. And I think that the Commodity Exchange
7 Act makes it very clear that self-regulation is, in
8 fact, a hallmark of our regulatory system, and it has
9 worked very well. Obviously, it requires oversight by
10 the CFTC. And we want to ensure we are doing that in
11 the most effective way possible.

12 So I am pleased to support today's rule
13 because I do think it advances that approach, and I
14 think it advances our obligation to continue to apply
15 that approach.

16 I want to thank the team. As has been
17 pointed out, you all have worked on this for many, many
18 years, long before I came to the Commission. And I
19 appreciate the time you spent with my team helping us
20 to get to the point we are today and to Marilee, Joe,
21 Dorothy, and Rachel for answering all of their
22 questions. I very much appreciate it.

1 So I will turn it back to you, Mr. Chairman.

2 Thank you.

3 CHAIRMAN TARBERT: Thank you very much,
4 Commissioner Stump.

5 Commissioner Berkovitz?

6 COMMISSIONER BERKOVITZ: Thank you. Thank
7 you, Mr. Chairman. And thank you to my colleagues for
8 a very interesting discussion.

9 I do have some questions for the staff.

10 First, I would like to thank the team, all the folks on
11 the team, as well as the Chairman's Office and my
12 colleagues for the work they put into this rule and
13 especially the team for working with my office on a
14 number of specific comments on the proposed rule and
15 clarifications. It has been a very productive,
16 collaborative relationship. And so I thank you for the
17 work you put into this.

18 I am going to be supporting the rule today.
19 This is an area where we have needed to act for a long
20 time. There has been extensive debate over this issue,
21 really for nearly a decade now. The flash crash, over
22 a decade, in May of 2010 really is what prompted

1 heightened focus. It was there even before the flash
2 crash, but the flash crash really brought it back.
3 And, then, some of the other incidents that have
4 already been mentioned. Knight Capital was another
5 issue in early 2010 that prompted the attention on
6 automated trading and risk controls. And the
7 Commission -- I forget the exact year, whether it was
8 2013 or '14 or '15 -- came up with Reg AT.

9 I was disappointed that in consideration of
10 this rule, we didn't adopt anything from Reg AT. I
11 voted against the withdrawal of Reg AT. I think some
12 of the elements in Reg AT were worthwhile and that this
13 rulemaking could have been informed, better informed,
14 by incorporating some of those elements in Reg AT. But
15 elections have consequences. And the majority took a
16 different route. And so we don't have any of those
17 elements from Reg AT.

18 Nonetheless, I think that something after a
19 decade is better than nothing. And even Reg AT, even
20 Reg AT at its core, with its additional level of
21 descriptiveness -- I wouldn't go so far as to say it
22 was overly descriptive, but it had an additional level

1 of descriptiveness in certain areas. But even Reg AT
2 in its descriptiveness to a large extent was reflective
3 of industry best practices. It didn't go beyond
4 industry best practices. It was reflective of industry
5 best practices. So the question of how you do that and
6 some of the questions and issues we have been
7 discussing this morning in terms of uniformity across
8 exchanges and how do you from a regulator's perspective
9 incorporate industry's best practices into a set of
10 regulations so that you maintain best practices and you
11 keep up with new events and new risks?

12 These markets are not bad. If we had a
13 regulation that addressed the flash crash of 2010, if
14 we had had that in 2011 or 2012, maybe we would have
15 learned something from the Knight Capital that would
16 have been different. We will learn something over the
17 ensuing decade. And then we will learn something from
18 WTI. And then we are going to learn something from
19 climate risk. Each time one of these risks emerges and
20 the camp has the new regulation to address that new
21 risk, we have to have regulations that are able to
22 encompass new risk and that are somewhat stable and

1 that evolve. At the same time, they have to give this
2 agency the ability to enforce those regulations as
3 those new risks emerge and whether or not the industry
4 and the exchanges and the market participants properly
5 address those new risks. So we have to have both the
6 certainty as well as the flexibility because we can't
7 just keep passing regulations. And, frankly, the fact
8 that it has been a decade after the flash crash and we
9 still don't have a regulation and that, finally, we are
10 going to get one I think attests to the problem with
11 waiting until perfect regulations to address it.

12 This regulation isn't perfect. I would have
13 liked to have seen more from Reg AT in here. But I
14 think it is a step forward, and I think it is an
15 important step forward. And one of the things I think
16 is important about this regulation is it does give us
17 the authority based on the facts and circumstances for
18 an objective reasonableness standard. If this
19 Commission concludes in the future that an exchange
20 does not have reasonable risk controls according to an
21 objective standard, we can take action. We don't
22 necessarily need to pass a new regulation to address

1 that risk.

2 So the objective standard in this regulation
3 as well as the Commission's ultimate authority and
4 responsibility to enforce that objective standard for
5 these risk controls to me is a critical element here.
6 And it is one reason why, despite the flexibility and,
7 as I said, some of those elements in Reg AT are not
8 here, I am still able to support this rule.

9 To a large extent, whether this approach is
10 successful is going to depend upon the DCM and the
11 market participants, their commitment and thoroughness
12 with which they implement it and the thoroughness with
13 which and attentiveness with which they address new
14 risks as they emerge. And these are some of the
15 reasons Commissioner Quintenz has articulated.

16 I think there is reason for optimism. The
17 world has not been static while we have been debating
18 this for 10 years. The exchanges have not been sitting
19 by and saying, "Well, what is the CFTC going to do on
20 risk controls? And we are not going to do anything
21 until they do something."

22 I think the market has really moved

1 significantly and there have been significant
2 investment and significant improvements in the risk
3 controls. So we are not regulating against a static
4 2010-2012 background here. The market really has moved
5 forward, but this regulation I think has enforceability
6 in terms of ensuring that they will continue to move
7 forward.

8 Now, Commissioner Behnam, for example, has
9 raised climate risk. And I want to commend
10 Commissioner Behnam for his excellent leadership on
11 that issue. And it is definitely something that I
12 think that I agree with that we should be looking at
13 and looking into in how our markets are designed to
14 address that risk. I would suggest that we can do that
15 and build upon this structure that we have today, if
16 necessary, rather than wait another two to three years
17 perhaps until we understand that completely and then
18 are able to incorporate it. I think both of those
19 objectives can be accomplished in this framework.

20 Finally, if this doesn't work, if it is not
21 working, if it is not adequate, we can always pass a
22 new regulation. I hope that is not the case. I don't

1 see this as the end of this road between us and the
2 market in terms of how to get these risk controls in
3 place, but I go back to what I said initially.

4 It has been 10 years now since the flash
5 crash. We have really got to make some progress. The
6 debate will continue. The debate should continue.
7 There are new risks all of the time. We need to
8 understand the WTI. And we need to understand climate.
9 We have got to go forward. At the same time, we can't
10 keep on continuing debating the flash crash.

11 I think this rule, while not perfect by any
12 means, will enable us to make some progress on this
13 issue, is some authority, some significant authority,
14 to ensure that the DCMs and the market participants are
15 addressing the issue. And it preserves our flexibility
16 for additional prescriptive or additional principles-
17 based, however we decide or a future Commission decides
18 it wants to approach this issue in the future.

19 For those reasons, I am able to support
20 today's rulemaking. In that context, I think some of
21 my questions that I had with respect to the materiality
22 standard and the difference between materiality and

1 significant have been asked and answered already. So I
2 will forego those questions and just ask in terms of
3 enforceability and the objective reasonableness
4 standard, is it correct that if we believe that an
5 exchange of the DCMs, risk controls are not adequate
6 according to what we believe is an objective reasonable
7 standard taking into account the circumstances, taking
8 into account whether the DCMs do, taking into account
9 best practices that we can take appropriate action
10 under this authority to require DCMs to impose such
11 risk controls? Is that accurate under this regulation?

12 MS. DeWITT: Yes, Commissioner Berkovitz. I
13 am going to turn it to Joe and Marilee, who will go
14 into more detail.

15 MS. DAHLMAN: Yes. Thank you for that
16 question, Commissioner.

17 The Commission does have several tools in
18 terms of ensuring compliance. First of all, you know,
19 whenever there is an application for designation as a
20 contract market, if the Commission were to find that
21 the applicant's rules were not reasonably designed to
22 prevent and detect and mitigate market disruption or

1 system anomalies, the entity would not be in
2 compliance with Core Principle 4 and the Commission
3 would not issue a designation order.

4 In another context, if a DCM were to certify
5 rules or controls to be in compliance with the act or
6 Commission regulations, the Commission can always
7 object and deny certification or could save the
8 certification. In another situation, a DCM could
9 request that the Commission approve a new rule or a
10 rule amended under Rule 40.5. And under that
11 regulation, the Commission can only approve a new rule
12 or rule amendment if it is not inconsistent with the
13 act or Commission regulations.

14 Finally, a DMO rule enforcement review also
15 can find that an exchange rule or risk control and
16 format to comply with this new 38.251 is not
17 reasonable. In that case, examination could issue a
18 decision to finding that the DCM was not in compliance
19 with the rule. And the deficiency could be referred to
20 DOE. If the DOE were to take action, the Commission
21 would have to approve that.

22 COMMISSIONER BERKOVITZ: Just to expand on

1 that so maybe the viewers can appreciate, so we do
2 these rule enforcement reviews where we actually review
3 the various rules of the DCM. If we find that a DCM
4 rule, let's say, for example, on risk controls, does
5 not meet the objective standard, some new risk has
6 emerged, for example, or we find some deficiency in
7 their practice in their risk controls under the
8 objective standard, we do the rule enforcement review.
9 And typically in a rule enforcement review, we would
10 present the findings to the DCM and ask them to correct
11 it. We take a basic issue of finding a material
12 deficiency or something and work with them. The first
13 step we would take is to ask them or request or tell
14 them to correct it, rather than go to enforcement? Is
15 that correct?

16 MS. DeWITT: Yes, Commissioner Berkovitz. I
17 will ask if either Rachel Berdansky, who is charge of
18 compliance examinations; or Marilee would like to
19 expand upon that, but the short answer is yes.

20 MS. BERDANSKY: Yes. Hi. This is Rachel
21 Berdansky, and I can take that.

22 The way we define deficiencies, the way

1 typically we do work, I mean, the whole point behind
2 examinations is an automatic we want to send you to
3 enforcement. It is that, you know, we really want to
4 work with the exchanges to seek corrective action. I
5 mean, that is not to say if we saw a really significant
6 violation or matter of noncompliance, I mean, depending
7 on facts and circumstances, a matter could get referred
8 to enforcement, but the objective really is to work
9 with the exchanges and bring them into compliance.

10 You know, I would also add -- and I think
11 Marilee touched on this in her earlier response to you
12 -- that we work with in her group. We will review.
13 And a lot of times, we consult on that. We are looking
14 at rules as they are certified. So if we identified a
15 rule that we thought was inconsistent with the regs we
16 had an issue with, we would certainly have some back
17 and forth with the exchanges on that. So, you know, I
18 would hope that we would be at that stage, but it is
19 certainly something we would review as part of a rule
20 enforcement review.

21 COMMISSIONER BERKOVITZ: Okay. Thank you.

22 I would note a number of years ago, one of

1 the more effective use of rule enforcement review that
2 I am familiar with was with a disruptive trading
3 practice. I remember a number of years ago, the
4 Commission issued a rule enforcement review which found
5 I think certain deficiencies in the prevention of
6 disruptive trading practices, which that enforcement
7 review really resulted in a significant upgrading of
8 the disruptive trading practice prevention programs at
9 DCMs. I think that was very effective in that regard.

10 And, typically, also the public doesn't
11 necessarily see rule enforcement. These days, they are
12 not made public anymore. Correct? So it is not a
13 visible process, unfortunately?

14 MS. BERDANSKY: That is correct.

15 COMMISSIONER BERKOVITZ: But the bottom-line
16 answer is if we find that a risk control is not
17 adequate, there are mechanisms. We could use the
18 authority to address that.

19 MS. BERDANSKY: Absolutely.

20 MS. DeWITT: Yes.

21 COMMISSIONER BERKOVITZ: Okay. So I think,
22 to conclude again, the rule is not a perfect rule.

1 There are issues. There are emerging issues that have
2 been discussed that definitely we need to understand,
3 the market needs to understand and that specific risk
4 controls may need to be developed to address those
5 issues. This can happen under this rule.

6 I think this rule takes a step forward. I
7 think we will see how it is implemented, but I think it
8 is a step forward. And, therefore, I am going to be
9 voting for the rule.

10 So thank you. And thank you. Thank you
11 again to the team.

12 MS. DeWITT: Thank you.

13 CHAIRMAN TARBERT: Thank you very much,
14 Commissioner Berkovitz. Again I want to thank the
15 excellent staff from DMO for your great presentation.
16 Thank you very much.

17 The commissioners are welcome to get back on
18 camera now to answer the following question. Are the
19 commissioners prepared to vote?

20 COMMISSIONER BEHNAM: Yes.

21 COMMISSIONER QUINTENZ: Yes.

22 CHAIRMAN TARBERT: Fantastic. Okay. Mr.

1 Kirkpatrick, our secretary, would you please call the
2 roll for the motion on the final rule on electronic
3 trading principles?

4 MR. KIRKPATRICK: Thank you, Mr. Chairman.

5 The motion now before the Commission is on
6 the approval of the final rule on electronic trading
7 risk principles. Commissioner Berkovitz?

8 COMMISSIONER BERKOVITZ: Commissioner
9 Berkovitz votes aye.

10 MR. KIRKPATRICK: Commissioner Berkovitz
11 votes aye.

12 Commissioner Stump?

13 COMMISSIONER STUMP: Commissioner Stump votes
14 aye.

15 MR. KIRKPATRICK: Commissioner Stump votes
16 aye.

17 Commissioner Behnam?

18 COMMISSIONER BEHNAM: Commissioner Behnam
19 votes no.

20 MR. KIRKPATRICK: Commissioner Behnam votes
21 no.

22 Commissioner Quintenz?

1 COMMISSIONER QUINTENZ: Commissioner Quintenz
2 votes aye.

3 MR. KIRKPATRICK: Commissioner Quintenz votes
4 aye.

5 Chairman Tarbert?

6 CHAIRMAN TARBERT: Chairman Tarbert votes
7 aye.

8 MR. KIRKPATRICK: Chairman Tarbert votes aye.

9 Mr. Chairman, on this matter, the ayes have
10 four, the noes have one.

11 CHAIRMAN TARBERT: Thank you very much, Mr.
12 Secretary. The ayes have it, and the motion on the
13 issuance of the final rule on electronic risk
14 principles is hereby approved. Well, thank you,
15 everyone.

16 We will now move to our final item,
17 rulemaking item, for today's open meeting. And that is
18 the final rulemaking for Part 190, which governs the
19 CFTC's bankruptcy regulation. From the Division of
20 Clearing and Risk, we have Chief Counsel and Senior
21 Advisor Bob Wasserman, who will present the final rule
22 for our Commission's consideration. Bob, the floor is

1 yours.

2 MR. WASSERMAN: Thank you, Mr. Chairman. Can
3 you hear me?

4 CHAIRMAN TARBERT: Loud and clear.

5 MR. WASSERMAN: Excellent. Well, thank you,
6 Mr. Chairman and commissioners. To all of you and to
7 all of you on this conference, my best wishes for good
8 health for you and yours in these very trying times.

9 Today, I am honored to present to the
10 Commission a final rule on amending comprehensively the
11 Commission's Part 190 regulations governing bankruptcy
12 proceedings for commodity brokers, that is, futures
13 commission merchants and clearing organizations.

14 The structure of Part 190 was proposed in
15 1981 and finalized in 1983. While a number of
16 rulemakings amended these regulations in light of
17 specific issues or statutory changes, this is the first
18 comprehensive revision of Part 190.

19 Before going into the details of this
20 presentation, it is meet and fitting to express
21 appreciation for the many colleagues, both inside and
22 outside the Commission, who have made this complex,

1 detailed, and intricate final rule possible.

2 First, I would like to thank my DCR
3 colleagues Ward Griffin, Jody Partridge, Abigail
4 Knauff, and Eileen Chotiner, who tirelessly worked
5 extraordinary hours on drafting the preamble and on
6 keeping me honest. I also want to thank my director,
7 Clark Hutchison, for his comments and leadership. I
8 would especially like to thank Mark Fajfar, of the
9 Legal Division, for his trenchant and thoughtful
10 criticisms, and also for invariably providing excellent
11 suggestions on how to address those criticisms. I also
12 appreciate the work of Scott Mixon, David Reiffen, and
13 Ayla Kayhan of the Office of Chief Economist for very
14 helpful criticism on the CBC.

15 As I noted back in April, the Part 190
16 Subcommittee of the ABA Business Law Section submitted
17 a set of Model Part 190 rules that served as the
18 foundation for the original proposal. These model
19 rules, an impressive and meticulous piece of work,
20 represented a consensus across a broad cross-section of
21 interested parties and extraordinary effort *pro bono*
22 *publico*.

1

2 When the Commission issued the proposal back
3 in April, I noted how very important it would be for
4 interested members of the public, in particular,
5 industry participants, to go closely over the proposal
6 to find ways to improve it. I am deeply pleased to
7 note that that call was well-answered, and this final
8 rule has benefited from a set of extraordinarily
9 thoughtful, well-reasoned, detailed, and helpful public
10 comments.

11 Now, whenever we talk about commodity broker
12 bankruptcies, it is important to put the issue in
13 context: The FCM and DCM ecosystems are strong, given
14 stringent FCM capital requirements, daily mark-to-
15 market, continuous risk management, active regulatory
16 and self-regulatory supervision, and strict customer
17 fund segregation requirements for FCMs as well as
18 tested and reviewed marginal models, ongoing risk
19 management, and strong default resources and recovery
20 plans, as well as, again, strong regulatory supervision
21 for DCMs.

22 While we have had a literal handful of FCM

1 bankruptcies over the past 37 years, no CFTC-regulated
2 clearing organization has ever even come close to
3 insolvency. The strength of those ecosystems was
4 recently demonstrated during the unprecedented market
5 volatility we saw this past spring, during which we had
6 zero FCM bankruptcies; zero clearing member payment
7 defaults at CFTC-registered DCOs; and only one clearing
8 member, a non-FCM, that was liquidated quickly,
9 efficiently, and in an orderly manner due to
10 insufficient capital.

11 Turning to today's revisions to Part 190,
12 they can be summarized in 10 major themes.

13 First, they add a new section 190.00 that
14 sets up the core concepts of Part 190. These rules of
15 interpretation set out what the Commission intends to
16 be doing in Part 190 in order to enhance the
17 understanding of DCOs, FCMs and their customers, and
18 the public at large; as well as, crucially, the
19 understanding of bankruptcy trustees. Moreover, by
20 setting these out after a notice and comment
21 rulemaking, the Commission demonstrates that they are
22 an authoritative statement of a fair and considered

1 judgment that is well within the Commission's
2 substantive expertise consistent with *Kisor versus*
3 *Wilkie*.

4 Many of these changes are designed to support
5 one of the Commission's most important
6 responsibilities: the protection of public customers
7 and of the collateral they had posted.

8 A third major theme is to foster the policy
9 preference embodied in Section 764 of the Bankruptcy
10 Code, for transferring, rather than liquidating,
11 positions of public customers in a proportionate share
12 of the associated collateral.

13 One of the most important changes we are
14 making is from the case-by-case approach to clearing
15 organization bankruptcy taken by the Commission in the
16 1980s to create an explicit framework for the
17 bankruptcy of a DCO. There was support from the
18 commenters for creating this framework and for the
19 majority of the elements in the proposed framework.
20 There were some exceptions, and we will discuss those
21 shortly.

22 The fifth major theme is to note the

1 applicability of Part 190 in the context of both the
2 Securities Investors Protection Act of BD/FCMs and
3 resolution under Title II of Dodd-Frank.

4 A sixth major theme is to clarify that
5 customers posting letters of credit as collateral are
6 treated in an economic sense the same, no better and no
7 worse, as customers who post other types of collateral.

8 Another major theme is to clarify trustee
9 discretion. Trustees must make decisions as to how to
10 handle thousands of customers with perhaps hundreds of
11 thousands of commodity contracts in the days, in some
12 cases, in the hours, after being appointed. Moreover,
13 over the few FCM bankruptcies we have seen, each
14 presents a unique set of circumstances and problems.
15 As a matter of necessity, Part 190 permits the trustee
16 to treat customers on an aggregate, rather than a
17 bespoke basis.

18 On a related note, Part 190, following
19 Subchapter IV of the Bankruptcy Code, favors efficiency
20 and promptness over strict precision, in order to
21 foster prompt transfer and distribution of customer
22 assets, and thus mitigates administrative costs.

1 The eighth major theme is updating Part 190
2 in light of changes to the regulatory framework over
3 the past four decades or nearly so, nearly four
4 decades.

5 Another major change is recognizing changes
6 to the technological ecosystem, including electronic
7 records and communications, as well as digital assets.

8 And the tenth, and the last, theme is that
9 revised Part 190 takes the opportunity to clarify
10 language in existing regulations.

11 As I noted before, we received numerous
12 detailed and helpful public comments. And I would like
13 to share with you some examples of where those comments
14 resulted in improvements to the final product you are
15 considering today. First, commenters expressed
16 concerns about the discretion afforded the trustee.
17 How can we be sure that this discretion will be
18 exercised to support the welfare of public customers?
19 As a result, the final rule adds a new paragraph, in
20 190.00, directing explicitly the trustee to exercise
21 their discretion in a manner that they determine best
22 achieves the overarching goal of protecting public

1 customers as a class, and to use "reasonable efforts"
2 that are less than "best efforts" only to the extent
3 that doing so furthers that overarching goal.

4 Similarly, we are clarifying that the implementation of
5 DCO recovery and wind-down plans should be not only to
6 the extent reasonable and practicable but also
7 explicitly note that that it needs to be consistent
8 with the protection of customers.

9 Another example is in the case of cash
10 delivery property, where, following the comments, the
11 final rule clarifies that cash delivered post-petition
12 to pay for delivery constitutes cash delivery property,
13 and that where a contract calls for the exchange of two
14 fiat currencies, each of those currencies will
15 constitute cash delivery property.

16 In physical delivery property, the final rule
17 addresses the potential for physical delivery where the
18 settlement price is negative, in light of some unusual
19 events in the oil markets this past spring. And that,
20 too, was addressed in the comments.

21 Commenters provided a lot of support for
22 ensuring that customers posting letters of credit were

1 subjected to the same pro rata treatment as customers
2 posting other forms of collateral, but significant
3 concerns were raised regarding certain delivery letters
4 of credit in the context of an FCM bankruptcy. The
5 final rule directs trustees to make sure that pro rata
6 treatment is achieved, but to do so in a manner that,
7 to the extent practicable, mitigates the adverse
8 effects on the customers posting those letters of
9 credit.

10 Moreover, and again consistent with a
11 comment, the preamble confirms that delivery letters of
12 credit where the FCM is not a beneficiary are not part
13 of the FCM's estate and, thus, are not subject to these
14 pro rata distribution provisions.

15 With respect to DCO bankruptcies, the final
16 rule addresses the issue raised by a number of
17 commenters of the application of Part 190 to registered
18 DCOs based outside of the United States. It clarifies
19 that Part 190 in these cases would apply only to a
20 limited extent, just the technical provisions of
21 Subpart A, the notice provisions, and to the positions
22 and distribution of the funds of the public customers

1 of FCM clearing members, thus achieving consistency
2 between the U.S. bankruptcy and the foreign insolvency
3 proceeding.

4 The final rule clarifies, at the behest of a
5 range of commenters, that a DCO's skin in the game is
6 part of customer property. It deletes the provision in
7 the proposal that would have used the DCO's guaranty
8 fund to plug any shortfalls in customer property for
9 FCM clearing members' public customers because of the
10 concern raised in the comments that doing so might
11 result in more onerous treatment for default fund
12 contributions under bank capital rules.

13 The final rule also addresses a number of
14 technical matters raised in the comments, such as
15 recodifying certain business-as-usual provisions into
16 Part 1 of the Commission's regulations, revisions to
17 framework 2 to Appendix B to Part 190 addressing losses
18 due to sovereign risk, the use of the term "allowed" in
19 a manner consistent with other bankruptcy contexts, and
20 how to deal with customer instructions concerning
21 specifically identifiable property.

22 I should also talk about a few areas where

1 the final rule goes in a slightly different direction,
2 despite certain comments.

3 The final rule modifies a requirement in the
4 proposed definition of cash delivery property that the
5 cash needs to be posted no earlier than three days
6 before the delivery date, which would be consistent
7 with Part 190, current Part 190, that is. Some
8 commenters wanted this limitation removed entirely,
9 noting, among other things, that the three-day period
10 may be too short in the context of some holidays,
11 including the interaction of U.S. and foreign holidays,
12 or if FCMs required the cash to be posted sooner.

13 However, while delivery property has
14 protections in bankruptcy, it is not subject to
15 segregation protections during business as usual.
16 Accordingly, to protect customers and to avoid
17 unintended consequences, the final rule takes a middle
18 ground, extending the three-day period to seven days
19 and, thus, addressing the problems identified. The
20 question of additional customer collateral protection
21 for delivery property remains under consideration. And
22 if there are additional protections for the delivery

1 accounts enacted, it will be appropriate to revisit
2 this aspect of Part 190.

3 In the context of Subpart C, addressing DCO
4 bankruptcies, a number of commenters objected to the
5 use of assessments in determining proprietary claims of
6 clearing members. Our concern is that the assessment
7 powers of DCO are part of a default waterfall that sets
8 forth the basis for the allocation of default losses
9 among all of the stakeholders.

10 Clearing members know in advance the amount
11 of assessments that they are exposed to. If we permit
12 clearing members to benefit from the happenstance that
13 certain assessments were not called before bankruptcy,
14 it would necessarily be public customers that would
15 suffer corresponding additional losses. That would
16 violate the longstanding preference to protect public
17 customers. However, in response to a comment, we did
18 clarify that this applies only to the extent necessary
19 to address defaults.

20 We also had some comments that address issues
21 relating to DCO default rules and recovery plans.
22 First, some commenters wanted the Part 190 rules to

1 reverse the effects of variation margin-gains
2 haircutting, both in FCM bankruptcies and in DCO
3 bankruptcies. One key problem with doing so is that
4 there is a limited amount of customer property
5 available. That is a pie of essentially fixed size.
6 So, if you increase the claims of some customers and
7 their share of the pie, you will necessarily decrease
8 the distributions to other customers. The effect of
9 this reallocation of the pie could be to reduce the
10 distributions to some unfortunate customers below the
11 amount of those customers' claims for initial margin,
12 despite the fact that the FCM or the DCO was in full
13 compliance with segregation requirements immediately
14 before bankruptcy. I think it is fair to say that the
15 industry has a very broad consensus opposing initial
16 margin haircutting. And, yet, that would be the
17 necessary effect of reversing variation margin
18 haircutting.

19 Second, some commenters opposed 190.15's
20 deference to DCOs' default rules and recovery plans.
21 These concerns stem from objections to the governance
22 of how those rules and plans are adopted and the level

1 of input from market participants exposed to
2 utilization of losses. However, disapplying these
3 rules and plans in the unprecedented an exponentially
4 unlikely context of DCO bankruptcy would do little to
5 address the broader concern these commenters have over
6 that governance since those rules and plans would be
7 much more likely to be implemented, if ever they are,
8 outside of DCO bankruptcy.

9 Moreover, to the extent we create a regime
10 where participants will be treated better if a DCO goes
11 into bankruptcy than if it does not, we would be
12 creating troubling incentives for those participants to
13 grease the wheels towards DCO bankruptcy scenarios.

14 Finally, as discussed above, we did add the
15 qualification that applying recovery and wind-down
16 plans must be consistent with the protection of
17 customers.

18 While Part 190 is not the appropriate place
19 to address these concerns over the governance process
20 by which DCO default rules or recovery plans were
21 adopted, those concerns are very, very real and, I
22 would submit, very much need to be actively and

1 thoughtfully considered. And I believe that staff will
2 indeed be doing so in 2021.

3 Finally, I would like to address the
4 supplemental proposal. This proposal was made to
5 address a potential problem - that a SIDCO, a
6 systemically important DCO, could file for bankruptcy
7 before the so-called key-turning process for Title II
8 could be completed. That bankruptcy filing would, in
9 turn, have the inevitable effect of terminating all of
10 the SIDCO's contracts because of the SIDCO's closeout
11 netting rules. The supplemental proposed to address
12 this problem by implementing a two-day post-bankruptcy
13 stay before those contracts can be closed out.
14 However, to address the concerns raised from comments
15 on the original proposal regarding the treatment of DCO
16 rules as qualifying master netting agreements, or
17 QMNAs, in the bank capital regulations, the
18 supplemental proposed to make the stay provision
19 effective only if and when the prudential regulators
20 made it consistent with QMNA status for SIDCO rules.

21 It is fair to say that the commenters had
22 significant concerns with the supplemental. First,

1 many of them said that a bankruptcy filing before Title
2 II key-turning would be "implausible," "hard to
3 imagine," or "extraordinarily unlikely." While the
4 premise that this problem is unlikely to occur is quite
5 sound, "unlikely" is simply not enough given the
6 structural effects on the U.S. financial system of
7 terminating all of a SIDCO's derivatives contracts.

8 However, the commenters also strongly urged
9 that the use of the two-day stay in bankruptcy would
10 itself cause significant and unacceptable risks, even
11 if the QMNA problem was avoided. Accordingly, this
12 problem, which is very real, will, nonetheless, not,
13 not be addressed through the use of a bankruptcy stay.

14 Some of the commenters answered the
15 Commission's call for a better way of achieving the
16 goal by suggesting a requirement in Part 39 for
17 requiring notice to the Commission before a SIDCO's
18 filing of a bankruptcy petition. Confidential advance
19 notice does seem to be a very fruitful path to consider
20 in that it would achieve the goal without causing the
21 problems identified by the commenters.

22 However, in light of the concerns raised with

1 the previous approaches to addressing this problem, it
2 would very much seem the better part of wisdom to
3 engage in further analysis and development before
4 proposing this or any other alternative. This work as
5 well as the additional work I mentioned that we have to
6 do in Part 39 are issues that we will be focused on in
7 the near term.

8 Part 190 along with Subchapter IV of the
9 Bankruptcy Code have served our corner of the financial
10 system very well. In almost all prior bankruptcy
11 cases, it helped public customers reliably to, within
12 days, transfer their positions, and regain control of
13 most or all of their collateral. This has both helped
14 to protect public customers and to enhance the
15 reputation and, thus, the competitiveness, of U.S.
16 derivatives markets and clearing. Revised Part 190
17 builds on that strong foundation, implementing lessons
18 learned, updating in light of changes of the past four
19 decades, and taking many opportunities to make
20 improvements.

21 Mr. Chairman, commissioners, we have come a
22 long way. And, thanks to the dedication and

1 extraordinary efforts both of folks within the
2 Commission and of interested parts of the public, we
3 have comprehensively revised Part 190 that is well-fit
4 for its purpose. I thank you for your cooperation and
5 help throughout and for your attention today.

6 CHAIRMAN TARBERT: Well, thank you very much,
7 Bob, for that excellent presentation and all of your
8 work during these past few years. Thank you also,
9 Clark, for your leadership of the division and your
10 oversight of this critically important project.

11 To begin the Commission's discussion and
12 consideration of this rulemaking, I will now entertain
13 a motion to adopt the final rule.

14 COMMISSIONER QUINTENZ: So moved.

15 COMMISSIONER BEHNAM: Second.

16 CHAIRMAN TARBERT: Thank you.

17 Well, I will begin by offering my own remarks
18 on this final rule. And the good news for everyone is
19 that they will be rather brief. When you are a first-
20 year law student, you learn the concept of *res ipsa*
21 *loquitur*, which basically means the thing speaks for
22 itself. So I was thinking about, well, how do I convey

1 how important updating our bankruptcy rules after 37
2 years are? And, quite frankly, I don't think I have to
3 because the thing speaks for itself.

4 Our bankruptcy regulations are absolutely
5 critically important for both customer protection in an
6 insolvency situation of a commodity broker as well as
7 promoting financial stability. So it is absolutely
8 important and fundamental to sound regulation, which is
9 part of our agency's mission statement, to ensure that
10 our insolvency rules are up to date and reflect the
11 current state of affairs. And, of course, we have done
12 that right today and will do that as we vote for this
13 final rule.

14 I think you did a phenomenal job, Bob, of
15 summarizing all of the aspects of the final rule as
16 well as ultimately what we decided to do with respect
17 to the supplemental, which is at this point, we will
18 stop where we are and potentially consider those issues
19 down the line, which do raise a number of interesting
20 questions. But at this point, I don't think we need to
21 get to those questions because ultimately, this
22 proposal I think really brings up to date, again after

1 37 years, where our regulations need to be and, in so
2 doing, reduces systemic risk and also makes sure that
3 our customers have the very latest terms of
4 protections.

5 So I want to just commend you. I will say a
6 little bit about that a little later, but I do not have
7 any questions at this time. And I know I will benefit
8 from the discussion and potential questions from my
9 fellow commissioners.

10 So, with that, I will hand it over to
11 Commissioner Quintenz.

12 COMMISSIONER QUINTENZ: Thank you, Mr.
13 Chairman. And thank you to both Clark and Bob for a
14 lot of extraordinary work. And, Bob, I would like to
15 echo your thanks to the ABA for the product that they
16 developed that informed and maybe inspired or motivated
17 a critical moment for what we are hoping to finalize
18 today.

19 I just have two quick questions because I
20 think this is a complicated topic, certainly for me but
21 I think for anyone that may be tuning in. I think you
22 did speak about these a little bit, but I just wanted

1 to, you know, give a chance to highlight them. Could
2 you provide a couple of maybe general examples of how
3 this will foster the longstanding policy of promptly
4 transferring the positions of public customers from any
5 bankrupt FCM to an FCM that has not defaulted?

6 MR. WASSERMAN: Yes. Thank you,
7 Commissioner.

8 There are a couple of examples. So, for
9 instance, in 190.00(c)(4), we make that preference
10 explicit. As well, the trustee is directed to use
11 their best efforts to transfer all customer positions
12 as soon as possible within seven days in -- oh, gosh.
13 I am always forgetting whether it is .07 or .04.

14 Additionally, in 190.07, consistent with 764
15 of the Bankruptcy Code, we protect all pre-relief and
16 post-relief transfers from avoidance, that is to say,
17 from voidable preference actions. So, in other words,
18 that protects those transfers that were made before
19 bankruptcy but as well up to seven calendar days after
20 the bankruptcy.

21 And, finally, another example is in
22 190.07(b)(3), we do provide some extra time to do

1 account-opening due diligence that would otherwise need
2 to be on a different schedule for the accounts that are
3 transferred; in other words, from the perspective of
4 the transferee.

5 Thank you.

6 COMMISSIONER QUINTENZ: Great. Thanks so
7 much for that. That is very helpful, and I appreciate
8 it.

9 Last question. I note that the final rule
10 acknowledges the applicability of the Commission's
11 commodity broker bankruptcy regulations when an FCM is
12 duly registered with the SEC and different proceedings
13 have begun. Can you explain how there would not be a
14 conflict here between the Commission's regulations and
15 SIPA.

16 MR. WASSERMAN: Sure. So in the SIPA
17 statute the trustee is appointed not as part of the
18 U.S. trustee system and bankruptcy but, rather, by SIPC
19 with the approval of a district judge. But that
20 trustee has responsibilities for distributing not only
21 securities customer property but, as well, commodity
22 customer property pursuant to Subchapter IV of the

1 Bankruptcy Code. And then there is SIPC. So what we
2 have are securities customer claims that are addressed
3 under SIPC and dealing with the funds that are
4 segregated in what is known as the 3-3 account for
5 securities customers, and commodities customers' claims
6 are addressed under Subchapter IV and Part 190 through
7 the futures account, the foreign futures account, the
8 cleared swaps account, and delivery accounts. And so,
9 in other words, what we have are separate groups of
10 property that are being distributed under the separate
11 regimes.

12 Now, I should note that in the unprecedented
13 event that there is a shortfall on both the securities
14 side and the commodities side, both sides would be
15 looking to the general estate to make up that
16 shortfall. This has never happened, but there will be
17 some rather interesting issues if ever it did.

18 COMMISSIONER QUINTENZ: Okay. Thanks for
19 that. And I recognize that a lot of the policy
20 measures that we put in place here are looking towards
21 the hypothetical but hopefully not a reality, but they
22 are important to put into place in the event that the

1 hypothetical does become reality. But, as you said and
2 I would like to echo what you said, the resiliency you
3 saw across the clearinghouse space during the
4 extraordinary volatility and market move during the
5 March and April time period is something for you and
6 for our agency and the market as a whole in the
7 clearinghouse space should be very proud of.

8 That is all the questions I have. I have a
9 statement that I am going to release that goes through
10 a number of the provisions that you highlighted that I
11 would like to re-highlight. I won't read that now, but
12 thank you for your hard work. I am very pleased to
13 support it today.

14 MR. WASSERMAN: Thank you.

15 CHAIRMAN TARBERT: Thank you very much,
16 Commissioner Quintenz.

17 Commissioner Behnam?

18 COMMISSIONER BEHNAM: Thanks, Mr. Chairman.
19 And, first off and foremost, thanks to Bob for all your
20 work, your engagement, and your dedication to this over
21 many, many years. You deserve all of the praise that
22 you have received so far and that in the future for

1 really dedication to this very important role.

2 Thanks to you, Clark, too, and the entire DCR
3 team for leadership and commitment to this as well.

4 Mr. Chairman, I am just going to briefly read
5 my statement, take a few minutes for that. Some
6 comments in here will address points that I think I
7 have worked on with DCR over the course of these
8 months. But, by and large, I am very pleased to
9 support this important rule.

10 The final rule is the product of years of
11 staff analysis and engagement with market participants,
12 including, as was mentioned, the Part 190 Subcommittee
13 of the Business Law Section of the American Bar
14 Association, which provided a detailed submission of
15 suggested model Part 190 rules in response to a prior
16 Commission request for information. Several agency
17 chairs going back many years deserve recognition and
18 thanks for pushing to update Part 190 and starting this
19 process and getting us today where we are. Customer
20 protections are at the heart of the Commodity Exchange
21 Act, and it is imperative that the Commission have
22 clear rules that direct how proceedings occur during a

1 commodity broker bankruptcy.

2 The revision is designed to recognize the
3 many changes in our industry over the past 37 years.
4 And, most importantly, it is informed by the
5 Commission's experience with past bankruptcies; most
6 recently, the MF Global bankruptcy in 2011, which was
7 the eighth largest corporate bankruptcy in American
8 history. It gave the Commission firsthand experience
9 with what worked, what did not, and what could be
10 improved.

11 And that was my time when I first met Bob,
12 when I was working on the Hill. And I would like to
13 just make some comments about that time and engaging
14 with him and my first exposure to Part 190. At the
15 time, I was an advisor during the Senate's
16 investigation of the MF Global bankruptcy. And during
17 that investigation, I learned the intricate contours of
18 Part 190, its relationship to the Bankruptcy Code, and
19 how the larger puzzle of creditors, customers, and
20 equity holders, among others, fit together. It was
21 during those frenzied days that I truly appreciated the
22 regulatory principle that customer margin is sacrosanct

1 property. Because of my experience during those few
2 months, I have made customer protections an absolute
3 priority in my time as a commissioner, and I know my
4 colleagues feel the same way. Having spoken with many
5 market participants at the time throughout that
6 bankruptcy proceeding, including those whose money
7 disappeared in the days immediately following, customer
8 protection is the most pressing responsibility I
9 believe we have as an agency.

10 Just a few months later, in early 2012, the
11 bankruptcy of Peregrine Financial Group, the
12 catastrophic culmination of a fraudulent scheme by a
13 FCM involving over \$220 million in customer funds,
14 further laid bare the strengths and weaknesses of the
15 Commission's bankruptcy regime. Important lessons have
16 been learned, both in terms of what works and what does
17 not, and I believe today's final rule implements the
18 lessons learned in both of those events and those that
19 preceded them.

20 Many of the changes to Part 190 in today's
21 final rule further support provisions that have worked
22 in prior bankruptcies. One of the themes of this

1 refresh is clarity. The goal is to be as clear as
2 possible about the Commission's intentions regarding
3 Part 190 in order to enhance the understanding of DCOs,
4 FCMs, their customers, trustees, and the public at
5 large. Changes in this final rule will foster the
6 longstanding and continuing policy preferring for
7 transferring, as opposed to liquidating, the positions
8 of public customers, an important customer protection
9 aimed at preserving the status quo and asset value.
10 Other changes further support existing requirements
11 including that shortfalls in segregated property should
12 be shored up from the FCM's general assets and that
13 public customers are favored over non-public customers.
14 The new provisions provide trustees with enhanced
15 discretion based upon prior positive experience and
16 codify practices adopted in past bankruptcies by
17 requiring FCMs to notify the Commission of their intent
18 to file for voluntary bankruptcy.

19 Other changes address what has not worked or
20 has become outdated. In light of lessons learned from
21 MF Global, the Commission is enacting changes to the
22 treatment of letters of credit as collateral, both

1 during business as usual and during bankruptcy, in
2 order to ensure that customers who post letters of
3 credit as collateral have the same proportional loss as
4 customers who post other types of collateral.

5 The final rule also addresses a number of
6 changes that have naturally occurred in our markets
7 since the Part 190 finalization in 1983. The
8 Commission is promulgating a new Subpart C to part 190,
9 specifically governing the bankruptcy of a clearing
10 organization. As DCOs have grown in importance over
11 time, including being deemed systemically important by
12 the FSOC following the financial crisis, the Commission
13 believes that it is imperative to have a clear plan in
14 place for exactly how a DCO bankruptcy would be
15 resolved. The final rule also addresses changes in
16 technology over the past 37 years and the movement from
17 paper-based to electronic-based means of communication,
18 a lesson learned from the PFG bankruptcy.

19 In many ways, this final rule is exactly how
20 the rulemaking process should work. It looks
21 retrospectively at major relevant events and applies
22 important lessons learned regarding what works in the

1 existing Part 190 rules and what does not and what can
2 be improved. But it also looks forward in a sense,
3 recognizing changes in market structure and thinking
4 ahead to the possibility of the bankruptcy of a
5 clearing organization. This is a stark contrast to the
6 risk principles final rule that we considered earlier
7 today. And while the bankruptcy final rule looks back
8 at the Commission's past experiences with MF Global and
9 PFG and others, the risk principles final rule seems to
10 ignore past events. While the bankruptcy final rule
11 looks ahead and plans for the possibility of addressing
12 a DCO bankruptcy, the risk principles rule ignores
13 future events such as, as had been pointed out earlier,
14 climate change.

15 My only concern regarding the bankruptcy rule
16 -- and it is a relatively small one -- is one of
17 timing. The proposal for this rule was issued this
18 past April. The comment period just closed on July
19 13th. The Commission, as Mr. Wasserman pointed out,
20 issued a supplemental notice of proposed rulemaking in
21 September. That comment period ended on October 26th.
22 Particularly for a rule of this size and intricacy, the

1 time that staff had to review and analyze the comment
2 letters and draft the final rule and preamble has been
3 incredibly short. Staff has worked tirelessly on this
4 rule to get to the finish line. However, I think both
5 the Commission and the public might well have benefited
6 from more time for review and reflection before issuing
7 such an important rule. But I think we are in a good
8 place. I again commend staff for all their work, Bob
9 for your work, Clark as well. And I think, as we
10 always say within the Commission and we said earlier,
11 we will continue to work on this over time on a daily
12 basis, on a weekly basis, and we will continue to
13 improve our policy as needed.

14 On that note, again, I would like to thank
15 again staff for all of their work in producing this
16 refresh of Part 190 rules to provide important customer
17 protections.

18 Thank you, Bob. Thank you, Clark. And, Mr.
19 Chairman, I will send it back to you. Thank you.

20 CHAIRMAN TARBERT: Thank you very much,
21 Commissioner Behnam.

22 Commissioner Stump?

1 COMMISSIONER STUMP: Thank you, Mr. Chairman.

2 Well, there is not much left to be said. But
3 Mr. Wasserman is correct. We have come a long way in
4 37 years, and we didn't get here alone. And, as I said
5 at the beginning of the meeting, I have long believed
6 that one of the attributes that distinguishes our
7 agency and the industry that we regulate is the level
8 of engagement and the spirit of cooperation between the
9 derivatives market participants and the CFTC. As
10 others have pointed out, the proposal to amend Part 190
11 of our regulations was itself the product of
12 constructive external engagement with the ABA
13 Derivatives and Futures Law Committee. And we do owe
14 them a great debt of gratitude.

15 And today's final rule, which accounts for
16 the comments we received in response to that proposal,
17 is an exemplary product of engagement and cooperation
18 between the CFTC and our market stakeholders. Not only
19 did we receive public input, but this final rule
20 demonstrates how we carefully considered those views.
21 And, in response, I believe it is prudent that we are
22 not finalizing the provision in the original proposal

1 or the concept in the supplemental proposal that
2 attempted to provide an opportunity for the FDIC,
3 should it step in after a DCO has entered bankruptcy,
4 to conduct an effective resolution of a DCO pursuant to
5 Title II of the Dodd-Frank Act. I believe that any
6 perceived problem in this regard and any contemplated
7 solution requires further discussion amongst industry
8 participants, the Commission, and perhaps even other
9 regulators. This type of engagement that has
10 benefitted this rule thus far should also be sought as
11 we contemplate how to proceed with that particular
12 matter going forward.

13 I do look forward to further engagement on
14 the topic. And, as always, I enjoy working with Bob.
15 And I look forward to having further discussions with
16 him in this matter.

17 I do want to thank Bob and his team, everyone
18 in DCR for this amazing accomplishment. For those of
19 you who have not read it, I encourage you to do so. It
20 will only take you a few minutes to understand how
21 difficult the challenge of working in the Division of
22 Clearing and Risk is on a daily basis, quite technical.

1 It is complex. And we have all benefitted from their
2 expertise.

3 So, with that, Mr. Chairman, I don't have any
4 questions. I really just wanted to thank the team not
5 only for the many years they have spent on this rule
6 but for the manner in which they engaged with the
7 public in doing so. Thank you.

8 CHAIRMAN TARBERT: Thank you very much,
9 Commissioner Stump.

10 Commissioner Berkovitz?

11 COMMISSIONER BERKOVITZ: Thank you, Mr.
12 Chairman.

13 I, too, would like to start off by commending
14 the team, DCR team, on this rule and particularly Bob
15 Wasserman. I was at the Commission with MF Global, the
16 bankruptcy. And the weekend prior to the bankruptcy, I
17 was working on our rulemakings. And Bob was there at
18 the right hand of the chairman in discussions about MF
19 Global leading into the -- prior to the bankruptcy, I
20 think they didn't know necessarily, you know, that the
21 following bankruptcy would occur but trying to take
22 measures to preserve as many assets as possible prior

1 to the bankruptcy in the event of bankruptcy.

2 And when the bankruptcy occurred that Monday
3 morning, early Monday morning, we deputized Bob right
4 away to represent the agency. I think Bob went right
5 up to New York and was really right there with the
6 trustee in the court representing the Commission and
7 not just when I say representing the Commission, really
8 representing the customers. And our involvement, the
9 agency's involvement, Bob's involvement was really
10 critical to customers getting as much recovery as
11 possible. And this agency's rule in ensuring
12 customers' recovery is really integral. And that was a
13 really important public service that we did, Bob did at
14 the time. And if ever called on in another bankruptcy,
15 our role is going to be critical in there, too.

16 The Bankruptcy Code, as you can see by this
17 rule, is somewhat challenging to actually implement it
18 because it is something you hope is never implemented.
19 You can count on one hand the number of bankruptcies,
20 and it is incredibly complex. So from a practitioner's
21 standpoint, it is incredibly challenging because you
22 really have to know the intricacies of the code and the

1 regulation. The on-point person, as Bob was at MF
2 Global, for example, well, you have two days. You are
3 in court. The trustee is asking you, "Can I do this?
4 Can I transfer that?" There is a lot of money at
5 stake. And you have to know the answers right off the
6 top of your head for something that occurs once, what,
7 every 5, 7, 10 years in good circumstances. Hopefully
8 it doesn't occur more often than that. So it is
9 difficult enough maintaining proficiency in the law,
10 but to maintain the proficiency in this code that is
11 never used is even more of a challenge. I commend Bob
12 and the team on this.

13 I just want to also say that thinking about
14 it presents a challenge to this agency in terms of the
15 depths of our bench and our ability to support this
16 type of activity because our role in these bankruptcies
17 is absolutely critical in the distribution and the
18 maximization of customer assets. So I think we have to
19 think about that to ensure that we have the continuity
20 and the depths to be able to handle one or multiple of
21 these in the unfortunate event should they occur.

22 The other thing that I think those of you who

1 would either be blessed or cursed with reading this
2 rule in its entirety, the rules, CFTC rules, the
3 Federal Register notice, I think our rules have been
4 written to do a good job, be clear and simple. It is
5 unusual, though, that there is any voice in any of
6 these rules. And I think in the bankruptcy rule, Bob's
7 voice comes through clearly in setting it up in how the
8 agency responded to comments and considered the
9 comments. I think that that will live on. Your voice
10 will live on in the Code of Federal Regulations, with
11 the Federal Register, more so the register than the
12 CFR.

13 Let me ask you in that regard in terms of
14 comments. In bankruptcy necessarily there is a
15 shortfall of assets versus liabilities. So in many
16 cases, there is going to be less than 100 percent
17 recovery. We try to maximize recovery. And we
18 received many good comments. Many of the comments
19 received were about recovery -- and I think this is
20 fundamental for the approach that we are taking. We
21 want to get as much recovered as possible quickly to
22 get customer assets recovered quickly. And that has

1 resulted in greater discretion to the trustee.

2 I think some of the themes in the comments
3 were -that you are basically telling us trust the
4 trustee and everything will work out. The trustee has
5 the charge. Maximize distribution quickly. And I
6 think there were some reservations like, "That's it?
7 Are we just trusting the trustee to do a good job?"

8 So can you respond? How do you respond to
9 that comment that they are just turning us over to this
10 trustee and telling him, you know, "Do what is
11 reasonable under the circumstances"?

12 MR. WASSERMAN: Sure. Well, I think, well,
13 why do we need this discretion in the first place? And
14 I think some of the things that you have talked about
15 in your remarks dealing with the very different
16 circumstances -- you know, happily, as I mentioned, we
17 have only had literally a handful of FCM bankruptcies
18 over the course of the decades. But, you know, we have
19 had very different circumstances in Refco, where the
20 entity actually was fully capitalized, fully segregated
21 and fully capitalized; in Lehman, where, happily, we
22 had all of the funds in segregation, but, as folks

1 know, there were problems elsewhere in Lehman that
2 required the sale; MF Global, where we were able to do
3 a transfer, but, uniquely at the time, there was a
4 shortfall; and then, of course, in Peregrine, where
5 there was that massive fraud that meant that, in fact,
6 transfer was not possible, although the trustee there
7 has been doing a very good job over the years in
8 getting funds out. So we have all of these unique
9 circumstances.

10 There are some very strong guidelines,
11 though, as to what the trustee needs to do in terms of
12 ultimately the calculations, but in the details, there
13 is the need to handle these bespoke situations. And,
14 remember, the most important time is literally the
15 hours after the bankruptcy, when we try, and in most
16 cases have succeeded, in getting to transfer as much as
17 possible the customer positions so we don't roil the
18 markets and hurt the customers by having this mass
19 liquidation. We get to transfer the customer positions
20 and transfer as much as possible of the customer
21 collateral. Having the trustee have the discretion to
22 figure out how best to do things is really the only

1 thing that makes that practicable.

2 And so, in other words, we could be very
3 meticulous and say, "You need to do things in this way
4 and then in this way and then in this way." And every
5 customer would be treated in a meticulous and precise
6 manner. And within 5 years, no more than 10, they
7 would get all of their money back. There is that
8 tension, right? If you deal with things in a very
9 precise manner, then everyone is treated very
10 precisely, but it takes a long time.

11 And, oh, by the way, it costs a lot of money
12 to do so. I mean, one thing that sticks out in my head
13 is that in the Lehman bankruptcy proceeding as a whole,
14 they have \$5 billion in administrative costs. This
15 sort of approach tends to mitigate the administrative
16 cost because the trustee is basically doing things,
17 rather than spending lots of time, profitable billable
18 time, asking permission as to exactly how to do things.
19 And so that is really the reason why we favor the
20 discretion.

21 I will say in my experience working with
22 trustees over the years, they have been extraordinarily

1 dedicated to doing their job the right way and to
2 getting as much as possible out to public customers.
3 And, as a result of the comments, we have added in a
4 number of places, you know, most particularly in
5 190.00(c), a very explicit provision making that
6 pellucidly clear that the goal in exercising
7 discretion, the trustee needs to exercise that with the
8 goal of looking after the interests of the public
9 customers as a whole -- right? -- as a group.

10 And there were some concerns about reasonable
11 efforts versus best efforts, making clear that in doing
12 something less than best efforts, it should only be in
13 aid of achieving that overarching goal of looking after
14 the interests of the public customers.

15 I hope that helps.

16 COMMISSIONER BERKOVITZ: Yes, that is very
17 helpful, so there is a necessity for this discretion.

18 Who are the other players, so to speak, in
19 terms of the CFTC or the court? Is there oversight put
20 to the trustee? How does the CFTC or the court oversee
21 the trustee?

22 MR. WASSERMAN: Oh, yes.

1 COMMISSIONER BERKOVITZ: How?

2 MR. WASSERMAN: So in actually, you know,
3 making distributions, that is supervised by the court.
4 The CFTC, by 762, gives us the right to appear and be
5 heard on any matter within such a bankruptcy. In fact,
6 my experience has been the trustees work very, very
7 closely with us. Look, the trustee does not want to be
8 in a position where they are coming in and saying to
9 the court, "You should do X" and the CFTC comes in and
10 says, "Well, we have got some problems with that."
11 Essentially, you know, as a matter of practicality, the
12 trustee and the CFTC work hand in hand in terms of
13 trying to make things work and in terms of trying to
14 get to the right outcome.

15 COMMISSIONER BERKOVITZ: Yes. That was my
16 recollection from the MF Global situation, where you
17 were reporting back on what the trustee was proposing
18 and that we were working very closely with him. He
19 wanted to make sure he had -- you know, he may have had
20 the authority. He wanted that CFTC stamp of approval
21 on it to do the proper --

22 MR. WASSERMAN: Yes, absolutely.

1 COMMISSIONER BERKOVITZ: So that should
2 provide some additional support for the trustee's
3 discretion to do the right thing under the
4 circumstances.

5 Turning to a similar issue, on the other
6 rules for the first time regulatory DCO bankruptcies,
7 again, here again, we have got comments regarding
8 Section 190.15, which directs the trustee within
9 reasonable discretion to follow the debtor's DCO
10 recovery and wind-down plans. And so we got questions
11 on that regarding the extent to which the trustee
12 should follow the DCO recovery and wind-down plans and
13 how that might relate to customer recovery. Could you
14 explain how we responded to that comment, what we did
15 in response to the reliance on the DCO recovery and
16 wind-down plan?

17 MR. WASSERMAN: Sure. So, I think it is fair
18 to say that there have been some concerns raised about
19 how DCO default rules and how their recovery and wind-
20 down plans are designed and the governance process
21 around that. And those concerns have been raised by,
22 you know, a bunch of folks among the clearing members

1 and among some of the larger firms. And, as I
2 mentioned, this is an issue that we really do need to
3 address but, for various reasons, as I mentioned, I
4 think we need to address those outside of Part 190
5 because, really, to the extent folks are concerned
6 about the recovery and wind-down plans, those are
7 designed and intended and, frankly, I think expected to
8 prevent bankruptcy.

9 And so the concerns that folks have with
10 those plans could not be addressed, you know, other
11 than to a small extent by addressing them in Part 190.
12 And, again, the other concern is we don't want folks
13 feeling like, "Ah. If we get this into bankruptcy,
14 then we get where we want to be" because that creates
15 some very, very bad incentives.

16 But, on the other hand, as you mentioned,
17 yes, there is a concern, yes, but if we do get this
18 into Part 190, we want to make sure that the trustee in
19 implementing the recovery plans, which I should note
20 are not necessarily public and parts of them will most
21 likely not be, how can we be sure that the trustee in
22 implementing them is doing so consistent with the

1 interests of customers?

2 And so, whereas, the proposal had said that
3 the trustee should implement those recovery and wind-
4 down plans to the extent reasonable and practicable, we
5 added explicitly a modifier "and consistent with the
6 protection of customers" to make it clear that, look,
7 that is the goal here, right? Once we are in
8 bankruptcy, the top priority here is to protect the
9 interests of customers. And so, we added that to the
10 rule as a change from the proposal into the final rule
11 to make that explicitly clear.

12 COMMISSIONER BERKOVITZ: So does that mean
13 you would not necessarily follow the plan if it is
14 inconsistent with customer recovery?

15 MR. WASSERMAN: Yes. I mean, essentially the
16 trustee would modify it. And, again, an idea which has
17 been like we put into reasonable and practicable in the
18 first instance because it might not, you know,
19 translate perfectly, but this says yes. And another
20 reason to modify the plan and to diverge from what the
21 plan says is because you need to make sure that what
22 you are doing is consistent with the protection of

1 customers.

2 COMMISSIONER BERKOVITZ: Okay. I will say
3 thank you. And, as you noted and I would agree, the
4 recovery and wind-down, that is an issue that we need
5 to continue to address. And there has been dialogue
6 going on. And we need to continue that dialogue and
7 address the concern. There are a lot of concerns that
8 need to be addressed. And it is not a simple
9 challenge, but we need to face it. That is our job.
10 So I would support the continued work in that area.

11 Thank you again, Bob and team, on this rule.
12 I am very pleased to be able to support the rule. And
13 after 37 years, to comprehensively revise the rule is
14 really a significant achievement. So thank you for
15 your efforts in this regard.

16 MR. WASSERMAN: Thank you.

17 CHAIRMAN TARBERT: Thank you very much,
18 Commissioner Berkovitz.

19 So I think at this point, we can have all of
20 the commissioners who would like to appear appear. I
21 want to thank Bob for your outstanding work again,
22 which in many ways represents a culmination of your

1 career at the CFTC and also, Clark, for your leadership
2 on this issue.

3 Are the commissioners prepared to vote?

4 [No response.]

5 CHAIRMAN TARBERT: Okay. May I please ask
6 Mr. Kirkpatrick, our dutiful secretary, to please call
7 the roll for the vote to adopt the final rule revising
8 the bankruptcy regulations in Part 190?

9 MR. KIRKPATRICK: Thank you, Mr. Chairman.

10 The matter now before the Commission is on
11 the adoption of the final rule revising the bankruptcy
12 regulations in Part 190. Commissioner Berkovitz?

13 COMMISSIONER BERKOVITZ: Commissioner
14 Berkovitz votes aye.

15 MR. KIRKPATRICK: Commissioner Berkovitz
16 votes aye.

17 Commissioner Stump?

18 COMMISSIONER STUMP: Commissioner Stump votes
19 aye.

20 MR. KIRKPATRICK: Commissioner Stump votes
21 aye.

22 Commissioner Behnam?

1 COMMISSIONER BEHNAM: Commissioner Behnam
2 votes aye.

3 MR. KIRKPATRICK: Commissioner Behnam votes
4 aye.

5 Commissioner Quintenz?

6 COMMISSIONER QUINTENZ: Commissioner Quintenz
7 votes aye.

8 MR. KIRKPATRICK: Commissioner Quintenz votes
9 aye.

10 Chairman Tarbert?

11 CHAIRMAN TARBERT: Chairman Tarbert votes
12 aye.

13 MR. KIRKPATRICK: Chairman Tarbert votes aye.

14 Mr. Chairman, on this matter, the ayes have
15 five, the noes have zero.

16 CHAIRMAN TARBERT: Thank you very much, Mr.
17 Secretary. I am pleased to say that the ayes have it,
18 and the motion to adopt the final rule revising the
19 Part 190 bankruptcy regulations is hereby approved.

20 Well, now that we have approved our final
21 bankruptcy rule and concluded both of our rulemakings
22 for today and for the year, I would like to make a

1 statement, which I think the other commissioners will
2 share, in connection with Part 190. And many of my
3 fellow commissioners as well as those in DCR raised
4 this issue. And, in fact, I would like to recognize on
5 behalf of the agency the Part 190 Subcommittee of the
6 Business Law Section of the American Bar Association,
7 representing a broad cross-section of interested
8 parties and stakeholders, and co-chaired by Vincent
9 Lazar of Jenner and Block and Kathryn Trkla of Foley
10 and Lardner. And I believe both Vincent and Kathryn
11 are here with us today. So please feel free to appear.
12 You guys have led and all of the other members of the
13 committee an extraordinary pro bono effort that
14 ultimately culminated in the submission to our
15 Commission of a model Part 190 proposal. It was a
16 comprehensive amendment of the current regulation, and
17 it really served as the foundation of the rulemaking
18 that we ultimately voted on today.

19 So, Vincent and Kathryn, on behalf of the
20 Commission, I am honored to present to the Part 190
21 Committee the Chairman's Award for Regulatory
22 Excellence. And it should appear on the screen, a

1 picture of it. And I appreciate you being here,
2 Vincent and Kathryn, to accept this award on behalf of
3 the Part 190 Committee.

4 This is just a great example, again, as many
5 other commissioners echoed throughout this meeting, how
6 important it is for our agency to work with market
7 participants, with the American public as a whole, and
8 stakeholders here in the United States and around the
9 world to make our regulations better. So it is an
10 honor for me to bestow this award on you today. And,
11 again, I think it is a great example of win-win.

12 Well, I don't think there is any other
13 business for today's meeting. So I would like to now
14 move on and give my fellow commissioners an opportunity
15 to make any potential closing statement. We will do it
16 in reverse seniority order. That means I will start
17 with Commissioner Berkovitz.

18 COMMISSIONER BERKOVITZ: Thank you again, Mr.
19 Chairman.

20 At this point, I would like to recognize the
21 hard work of everybody at the agency as well as the
22 public commenters for all of the rulemakings we have

1 done this year and recognize also the work of everyone
2 in the agency for all of the other work that we have
3 done this year.

4 We have accomplished a lot this year, in
5 2020, under very challenging circumstances. And, to a
6 certain extent, I wish more people were aware of what
7 we do. I think the folks looking at the CFTC and
8 certainly our community I hope realizes and understands
9 in watching us that our political system and our
10 government isn't completely broken, that Washington,
11 D.C. is not all politics and personal attack, that
12 people of different backgrounds and philosophies can
13 come together to debate and sometimes find consensus
14 and sometimes disagreement toward what is in the public
15 interest.

16 The CFTC was set up as a five-person agency
17 with diverse viewpoints to bring the diversity of
18 viewpoints to the matters of great importance regarding
19 the stability of our derivative and commodity markets.
20 And it is through that interaction of those diverse
21 viewpoints that the overall public interest comes out.
22 As I said, sometimes we agree, sometimes disagree, but

1 I think the real winner in that process is the American
2 public.

3 We have the strongest capital and risk
4 management markets in the world. And a large degree of
5 the success of those markets is due to the confidence
6 and integrity of those markets. Why do people invest
7 money in our markets? They believe that capital
8 appreciates. They can discover prices or they can
9 manage their risk. It is not going to be taken away by
10 fraud or cheating. It is safe and secure, and our
11 systems are safe and secure. And that is proven time
12 and time again. And yes, there are instances where not
13 everything works perfectly, and we work to correct
14 those.

15 I am very proud of the work that we have done
16 at the agency in the past year toward maintaining and
17 improving the integrity of our markets. And all of the
18 people at the CFTC I know in my time at the agency are
19 absolutely dedicated to that. And I think that is
20 shown, particularly in this time with COVID and working
21 remotely, where people are making sacrifices daily,
22 adjusting to challenges of working at home, tending to

1 families, at the same time having a very demanding work
2 schedule.

3 Today, we have appropriately recognized the
4 rulemaking team and those who appeared before us, but
5 there is a whole organization supporting those teams
6 and those rulemakings. I can't obviously identify
7 everybody in the agency. There would be not time for
8 that. So I am going to have to be somewhat
9 abbreviated.

10 A couple of offices I want to name in
11 particular. One would be the Office of General
12 Counsel. Knowing from personal experience what the
13 rulemaking schedule and the accomplishments, Mr.
14 Chairman, that you listed out over this year, I can
15 attest firsthand to the amount of work that the Legal
16 Office puts in to supporting an agenda like that. To
17 support this rulemaking agenda, to support the
18 enforcement agenda, to support the administrative work
19 at the agency, to ensure that our interactions with the
20 public are according to statute, that is a tremendous
21 amount of work. The Office of General Counsel, I guess
22 the Legal Division now, doesn't always appear in front

1 in public, but I certainly appreciate all the work they
2 have done. They have done a great job in supporting
3 the rulemakings, supporting enforcement actions, and
4 done a great job in the litigation face in the agency.

5 The Division of Administration has really
6 kept this agency running throughout this year. They
7 have helped us secure the budgetary resources, the
8 personnel resources, and keep our computers running.
9 And it is something we take for granted a lot. And we
10 get upset if we have got a five-second delay in some of
11 our emails or whatever. But, just like the markets
12 have worked well under these remote conditions, so has
13 our agency.

14 I remember, I think it was March 11th, we
15 were told March 12th is going to be a test day.
16 Everybody, you know, stay at home and log in from home
17 to see if the system can handle everybody logging in
18 remotely at the same time. And so we were home on
19 March 12th remotely or wherever we were remotely at
20 work. And it did work. And from then on, we have been
21 in the situation where we have been working remotely,
22 and now we have this video.

1 It is not optimal. It is not as good as
2 being in person. I miss the office. I miss the
3 personal interaction. I think there is something lost
4 from doing it remotely, but those are the circumstances
5 we are in. And we are all making the best of it. And
6 there has been tremendous dedication and commitment to
7 making the best of it. And I am so proud of the agency
8 and everybody in it. And, again, there are many others
9 working very hard to make all of this happen.

10 I would like to thank each one of my fellow
11 commissioners. I came to the Commission knowing at
12 that time the chairman, Chris Giancarlo, and Dawn and
13 Russ, having known each of you for many years. It was
14 great, something I was really, really looking forward
15 to after working in various other capacities with each
16 of you coming onto the Commission and working with you.
17 And it has been just a great experience, lifted up all
18 my expectations. So I want to thank you for that.

19 I didn't know, Mr. Chairman, you or
20 Commissioner Quintenz prior to coming on, but after
21 serving with you for a year, two years, I can really
22 call you friends. We have agreed. We have disagreed.

1 We have worked together in the public interest. I have
2 enjoyed the dialogue, the give and take. And I think
3 the outcome has been to the benefit of the American
4 public. So I now have several new friends on the
5 Commission and strengthened my old friendships.

6 Finally, I would like to thank my office,
7 Lucy Hynes; Eric Remmler; Sebastian Pujol; and my
8 administrative assistant, Latonia Williams. We were
9 all working, emailing, working late Friday, Saturday,
10 and into the evenings, Friday evening, Saturday
11 evening, Sunday evening, to get all of our comments
12 considered working with the staff, who were working at
13 those same hours, working on the statements that are up
14 on the website. And that is true commitment and
15 dedication working at home on the weekends in early
16 December, as they had done on so many weekends
17 throughout the year.

18 And that is one of the things. I came to the
19 agency. I want to make a contribution to public
20 policy. But one of the great treasures of working in a
21 place like this is not just the contributions to public
22 policy, but the great friendships and relationships

1 that get built along the way. And that is really one
2 of the great parts of this journey that we are all on,
3 is building those friendships. And I certainly --
4 really, my office and the support and the friendships
5 and the professionalism of my staff and their
6 commitment to this agency and the public interest is
7 really outstanding. Those relationships I will also
8 treasure.

9 So I have gone on at some length, but I think
10 it is appropriate at this time where we are in the
11 year, looking back on the accomplishments in the
12 holiday season as well as the recognition of the
13 challenges placed upon us by the pandemic. We are
14 certainly not out of the woods yet. But this agency, I
15 am very proud of the way we have met those challenges,
16 and we will continue to do so.

17 So thank you, Mr. Chairman. And I look
18 forward to whatever is next.

19 CHAIRMAN TARBERT: Thank you very much,
20 Commissioner Berkovitz.

21 Commissioner Stump?

22 COMMISSIONER STUMP: Thank you, Mr. Chairman.

1 And while I don't think I could say it any
2 better than Commissioner Berkovitz, 2020 certainly was
3 not the year we all had anticipated: global health
4 pandemic, civil unrest, extreme market volatility.

5 But as we approach the holiday season, I do
6 think that it is worthwhile to reflect on some of our
7 favorite things. Yes, that is a Rogers and Hammerstein
8 song. But don't worry. I am not going to sing, and I
9 am not going to talk about roses or kittens or whiskers
10 or anything like that. I want to talk about my
11 favorite things at our agency.

12 In 2020, I think that it is worth noting, as
13 Commissioner Berkovitz laid out, that our agency has
14 performed extremely well under tremendous stress and
15 that the industry we regulate has also continued to
16 innovate, which is going to be extremely important as
17 we move forward with economic recovery. And to ensure
18 that those efforts were not in vain, our robust
19 enforcement program continued to ensure that those who
20 jeopardize the integrity of our markets were held
21 accountable.

22 But my absolute favorite thing about the CFTC

1 is that, even though my Commission colleagues may
2 sometimes differ in our opinions or the way we approach
3 our jobs, we stay the course to refine and update the
4 regulations that ensure that they remain fit for
5 purpose. And I think we have built upon the progress
6 that those who came before us have made. And I know
7 that going forward, we will continue to refine those
8 rules and continue to ensure that the markets that we
9 regulate are serving their intended function.

10 So, with that, I wish everyone happy
11 holidays. And I am hopeful that 2021 won't be quite as
12 eventful as 2020, but I know that we are all up for the
13 challenge and I appreciate that I get to do it with the
14 four of you and a tremendous team at the CFTC,
15 including my own personal staff, who, as Commissioner
16 Berkovitz pointed out, have worked almost every weekend
17 I think all year. And I really do appreciate their
18 time and their energy and their attitude.

19 So thank you, Mr. Chairman.

20 CHAIRMAN TARBERT: Thank you very much,
21 Commissioner Stump.

22 Commissioner Behnam?

1 COMMISSIONER BEHNAM: Thank you, Mr.
2 Chairman.

3 And I would support a motion to sing holiday
4 songs if Commissioner Stump insisted. So there is
5 certainly that in this interesting year.

6 There is really not much to add to what
7 Commissioners Berkovitz and Stump said, echoing
8 everything they said about the agency, our relationship
9 with each other at the Commission level, all the
10 amazing work that the divisions had done given the
11 challenges of this year, but I think we are all looking
12 forward to some time to reflect and be with our
13 families in the next two weeks and hopefully start the
14 new year off on a better foot with a lot to look
15 forward to in 2021. So I just want to thank all of
16 them, Commissioners Berkovitz; Stump; Quintenz; and
17 yourself, Mr. Chairman, for your friendships.

18 And working with each of you, I know, as
19 Commissioner Berkovitz pointed out, we do differ on a
20 number of policy issues. But, as I have said to many
21 people, this is the beauty of commissions and
22 bipartisan commissions, being able to learn from each

1 other, understand each other's points of view, and
2 ultimately use the friction of our differences to come
3 out with better results that are end products that
4 support the markets that we care very deeply about.

5 And, Mr. Chairman, thanks for your leadership
6 during this particular year. It has been a very
7 exciting and busy year and a half since you took over
8 at this point. And I think we have done a lot. And I
9 think, above all else, I have appreciated your
10 transparency in laying out your agenda. Although busy
11 -- and I think that is good for all of us. Given what
12 we are going through I think in our personal lives and
13 at the workplace, having a sense of what is to come is
14 extremely important, having that certainty in our
15 calendar and what policies you support just make it a
16 good year. So I thank you for that.

17 And I am going to just end with thanking my
18 staff, David Gillers, my chief of staff; Laura Gardy;
19 and John Dunfee, who all did an amazing amount of work
20 leading up to today on a number of issues that were not
21 necessarily discussed this morning, but we did a lot of
22 work to get to where we are today with the number of

1 actions, Mr. Chairman, that you pointed out at the
2 beginning of the meeting. A special thanks to John for
3 the bankruptcy and the risk principles matters that we
4 discussed today.

5 And, as I reflect on 2020 and think about my
6 staff, we have all been through a lot, good things and
7 bad things, both personal and professional, but we
8 stuck it out together. We have worked together. We
9 have supported each other. And we have picked up where
10 others, you know, have been busy or have not the best
11 expertise. And we have done a number of things. And I
12 think it is a testament to teamwork. And also I think
13 the collegiality and the teamwork that the entire
14 agency displays on a daily basis. So a special thanks
15 to them.

16 And I do wish everyone a happy holiday as we
17 end the year and look forward to a brighter 2021 and
18 many things to look forward to.

19 So thank you, Mr. Chairman. And I will send
20 it back to you.

21 CHAIRMAN TARBERT: Thank you very much,
22 Commissioner Behnam.

1 Commissioner Quintenz?

2 COMMISSIONER QUINTENZ: Thank you, Mr.
3 Chairman.

4 Those are tough acts to follow. I would just
5 like to acknowledge, reciprocate all of the prior
6 commissioners' sentiments around how wonderful it is to
7 work with them on issues of concern to the markets,
8 issues of concern to the public and to the government.
9 And while we can agree or while we can disagree, we
10 have an underlying amount of respect for each other.
11 And, as I think all of them have said, I certainly
12 consider them friends, more than colleagues. It is
13 just a privilege to work at an agency where you can
14 interact with such intellectual firepower, in some
15 cases in opposition to your own views and consider
16 those people close friends during those discussions.

17 2020 certainly has been a year of the
18 unpredictable, I think as was described before, but, as
19 was also described, we have the most resilient,
20 deepest, most liquid, risk-catching markets in the
21 world. And these markets were designed for the
22 unexpected. These markets were designed to handle the

1 mitigation of known risks and unknown risks. And I
2 think we have seen that borne out. And I think we have
3 seen it borne out because the market to a large degree
4 relies on the innovative spirit of entrepreneurial
5 capitalism with the appropriate, reasonable, regulatory
6 framework to ensure that everyone is meeting their
7 obligations for fraud and for abuse and to ensure that
8 we have the information we need that these markets
9 operate efficiently and effectively when any one firm
10 may not necessarily have that incentive on their own.
11 And so it is important that we continue to embrace, you
12 know, rationalize well-thought-out, calibrated
13 regulations, like I think we have done, Mr. Chairman,
14 under your tenure and certainly here today. And I
15 would like to thank you for all of your work, your
16 diligence, that of your team and that of the agency in
17 seeing this through, and certainly that of my own.

18 You know, for the past two meetings, I have
19 had the opportunity to thank and wish good luck and
20 goodbye, maybe not goodbye but until next time, to two
21 of my former staffers. I get the opportunity to do
22 that today again with Peter Kals, who joined my staff

1 from DCR. Peter is just an incredibly dedicated and
2 hardworking and incisive lawyer and member of this
3 agency. He has provided an enormous amount of insights
4 and background and analysis of highly complicated
5 topics, including the bankruptcy rule we considered
6 today as well as many other clearing matters and
7 Commission precedence, with which I was not familiar or
8 had any background in before coming to the Commission.

9 And, in addition, for the past few weeks, as
10 I said, Peter has been my lone staffer. And for anyone
11 who knows how many items come through a commissioner's
12 office for review and opinion, you would know that
13 Peter has been handling a huge number of diverse items
14 and sometimes with deadlines that don't correspond to
15 their complexity or priority.

16 So, in short, I would just like to say I
17 wouldn't have been able to do this job without Peter.
18 And I am thrilled that the American public, our
19 markets, and this agency will continue to receive the
20 benefit of his expertise in the future.

21 And, with that, Mr. Chairman, I wish you and
22 all of my colleagues and everyone watching a happy

1 holiday and a happy New Year. Thank you.

2 CHAIRMAN TARBERT: Well, thank you very much,
3 Commissioner Quintenz and all of the commissioners.

4 The great thing about going last is that this
5 may be my easiest closing statement ever because I can
6 simply associate myself with all of the great things
7 that my fellow commissioners have just said. And I
8 truly agree. All of the points they raised I couldn't
9 agree with more.

10 I also want to thank everyone here at the
11 CFTC, not only my fellow commissioners but their staffs
12 as well. Their staffs have worked incredibly hard this
13 year alongside the agency staff. All of our divisions,
14 all of our offices, from the Division of Administration
15 to the Legal Division, to the Policymaking Division,
16 everyone has really made 2020 an important year. And,
17 quite frankly, I think in decades from now, people
18 looking back when they think about what happened during
19 the past 12 months about, you know, the historic
20 volatility brought by COVID, not only in the markets
21 but also in our agency, how we responded and worked
22 extra to ensure our markets remained orderly and liquid

1 and how we achieved at the same time an historic
2 rulemaking agenda and record-breaking enforcement, I
3 think people may very well look back at 2020 and say
4 this was among the finest hours of the CFTC. So it is
5 a tremendous privilege to be the chair of this agency.

6 I want to thank everyone for having attended
7 this meeting today. There being no further business, I
8 would entertain now a motion to adjourn the meeting.

9 COMMISSIONER QUINTENZ: So moved.

10 COMMISSIONER BEHNAM: Second.

11 CHAIRMAN TARBERT: Thank you. I mean, it was
12 such a great meeting I could see you wanting to prolong
13 it. We will speak again.

14 Those in favor of adjourning the meeting will
15 say, "Aye."

16 [Chorus of "Ayes."]

17 CHAIRMAN TARBERT: Those opposed, "No"?

18 [No response.]

19 CHAIRMAN TARBERT: The ayes have it. I am
20 truly grateful again to the CFTC staff for their great
21 work. I want to wish everyone a happy holiday season.
22 And, of course, best wishes for 2021. This meeting is

1 hereby adjourned. Thank you.

2 [Whereupon, at 12:33 p.m., the meeting was
3 adjourned.]

4