

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 48

RIN 3038-AD19

### Registration of Foreign Boards of Trade

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is proposing rules to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These proposed rules establish a registration requirement that applies to foreign boards of trade (FBOT) that wish to provide their identified members or other participants located in the United States with direct access to their electronic trading and order matching systems.

**DATES:** Comments must be received on or before January 18, 2011. The Commission is not inclined to grant extensions of this comment period.

**ADDRESSES:** You may submit comments, identified by RIN number 3038-AD19, by any of the following methods:

- *Agency Web site, via its Comments Online process:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Hand Delivery/Courier:* same as mail above.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in CFTC Regulation 145.9.<sup>1</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or

remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Duane C. Andresen, Senior Special Counsel, (202) 418-5492, [dandresen@cftc.gov](mailto:dandresen@cftc.gov), or David Steinberg, Special Counsel, (202) 418-5102, [dsteinberg@cftc.gov](mailto:dsteinberg@cftc.gov), Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act).<sup>2</sup> Title VII of the Dodd-Frank Act<sup>3</sup> amended the Commodity Exchange Act (CEA or the Act)<sup>4</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

Section 738 of the Dodd-Frank Act amends Section 4(b) of the CEA to provide that the Commission may adopt rules and regulations requiring registration with the Commission for an FBOT that provides the members of the FBOT or other participants located in the United States with direct access to the electronic trading and order matching system of the FBOT, including

rules and regulations prescribing procedures and requirements applicable to the registration of such FBOTs. The Commission has determined to promulgate rules to implement these provisions by July 15, 2011.<sup>5</sup>

Accordingly, the Commission is proposing to adopt a new part 48<sup>6</sup> to its regulations to establish a registration requirement and related registration procedures and conditions that apply to FBOTs that wish to provide their members or other participants located in the United States with direct access to their electronic trading and order matching systems. The Commission requests comment on all aspects of the proposed rules, as well as comment on the specific provisions and issues highlighted in the discussion below.

##### II. Relief Granted to Foreign Boards of Trade

Since 1996, FBOT requests to provide direct access to their electronic trading and order matching systems (trading systems) from within the U.S. have been addressed by Commission staff via the no-action process set forth in Commission regulation 140.99.<sup>7</sup> Specifically, an FBOT wishing to provide its U.S.-located participants with direct access to the FBOT's trading system traditionally has submitted a request for a no-action letter to the Division of Market Oversight (DMO). The FBOT's no-action request must be accompanied by representations and supporting documentation from the FBOT regarding, among other things, its organization, presence in the U.S., participants, the products it wishes to list for direct access, its trading system and the regulatory regime and information-sharing arrangements to which the FBOT is subject. Staff then reviews the request and related information and documentation and, where appropriate, issues a "direct access" (formerly known as a "foreign terminal") no-action relief letter. When reviewing no-action requests, staff looks for a home regulatory regime that provides oversight over the FBOT in a manner that is comparable to the CFTC's oversight of DCMs. Specifically, does the FBOT's regulatory authority

<sup>5</sup> See Section 738 of the Dodd-Frank Act.

<sup>6</sup> Commission regulations referred to herein are found at 17 CFR Ch. 1.

<sup>7</sup> See, e.g., CFTC Letter No. 96-28 (February 29, 1996). Commission regulation 140.99 defines the term "no-action letter" as a written statement issued by the staff of a Division of the Commission or of the Office of the General Counsel that it will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted by the beneficiary.

<sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>3</sup> Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

<sup>4</sup> 7 U.S.C. 1 *et seq.*

<sup>1</sup> 17 CFR 145.9.

support and enforce “substantially equivalent regulatory objectives” in its oversight of the FBOT?

In the no-action letter, DMO staff represents that, provided the FBOT meets the conditions set out in the letter, DMO will not recommend that the Commission institute enforcement action against the FBOT for failure to register as a designated contract market (DCM) or derivatives transaction execution facility (DTEF) if the FBOT provides direct access to its order entry and trade matching system to FBOT members and other participants located in the U.S. The scope of the staff no-action relief has been restricted to providing relief from (1) the requirement that the FBOT obtain DCM or DTEF registration pursuant to Sections 5 and 5a of the CEA and (2) regulatory requirements related to the trading or offering of contracts on a DCM and DTEF if the contracts identified in the no-action letter (foreign futures or option contracts) are made available in the U.S. for trading in the manner set forth in the letter.

The no-action relief also has been limited historically to FBOTs that provide direct access to the FBOTs’ members and other participants that: (1) Trade in the U.S. for their proprietary accounts; (2) are registered with the Commission as futures commission merchants (FCM); or (3) are registered with the Commission as commodity pool operators (CPO) or are exempt from such registration and that are submitting orders for execution on behalf of U.S. pools they operate or commodity trading advisors (CTA) or are exempt from such registration and that are submitting orders for execution on behalf of accounts for which they have discretionary authority. With respect to such CPOs or CTAs, an FCM or a firm exempt from registration as an FCM pursuant to Commission Rule 30.10 (Rule 30.10 Firm)<sup>8</sup> must act as a clearing firm and guarantees such trades. The no-action relief typically has been subject to numerous conditions designed to keep staff informed regarding the FBOT’s status and activities from within the U.S., additional contracts to be made available, and significant changes in the information provided to the Commission in support of the no-action

<sup>8</sup> A Rule 30.10 order permits firms that are members of a self-regulatory organization and subject to regulation by the foreign regulator to conduct business from locations outside of the U.S. for U.S. persons on non-U.S. boards of trade without registering under the Act, based upon the person’s substituted compliance with a foreign regulatory structure found comparable to that administered by the Commission under the CEA.

request. Significant changes in information include changes in the membership criteria, the location of the management, personnel or operations (particularly changes that may suggest an increased nexus between the FBOT’s activities and the U.S.); the basic structure, nature, or operation of the trading system or its clearing organization; the regulatory or self-regulatory regime the FBOT is subject to; and any change in the authorization, licensure or registration of the FBOT.

In 2006, following a series of market events and Commission deliberations, the Commission endorsed the continued use of the no-action process as a mechanism for facilitating direct access to an FBOT’s trading system. On January 17, 2006, ICE Futures Europe, a U.K. recognized investment exchange that provided direct access to its U.S. members pursuant to a no-action letter,<sup>9</sup> notified the Commission that it would list a futures contract on West Texas Intermediate (WTI) light sweet crude oil whose settlement price would be linked to contracts traded on the New York Mercantile Exchange (NYMEX).<sup>10</sup> ICE Futures Europe’s notification of the proposed contract linked to a U.S. domestic contract prompted the Commission to undertake an evaluation of the use of the no-action process to permit direct access, including a re-examination of certain issues with respect to the Commission’s statutory obligations to maintain the integrity of U.S. markets and to protect U.S. customers. Accordingly, on May 3, 2006, the Commission directed its staff to initiate a formal process to define what constitutes a “board of trade, exchange, or market located outside the United States, its territories or possessions” as that phrase is used in section 4(a) of the CEA and, in furtherance of that process, scheduled a public hearing.<sup>11</sup> The Commission also issued a related Request for Public

<sup>9</sup> On November 12, 1999, the Commission’s Division of Trading and Markets (the predecessor to the CFTC’s Division of Market Oversight) granted no-action relief to the International Petroleum Exchange of London (now ICE Futures Europe), permitting it to make its electronic trading and order matching system, known as Energy Trading System II, available to its members in the United States. CFTC Letter No. 99-69 (November 12, 1999).

<sup>10</sup> On April 12, 2006, ICE Futures Europe notified the Division of Market Oversight of its intent to launch the ICE Futures New York Harbour Heating Oil Futures Contract and the ICE Futures New York Harbour Unleaded Gasoline Blendstock (RBOB) Futures Contract each of which is cash-settled on the price of physically-settled contracts traded on the NYMEX.

<sup>11</sup> The hearing was conducted on June 27, 2006, at the Commission’s headquarters in Washington, DC.

Comment.<sup>12</sup> On October 27, 2006, following extensive debate, a review of comments submitted pursuant to the Commission’s request for public comment and the Commission Hearing,<sup>13</sup> the Commission issued a Policy Statement in which it endorsed the no-action process for FBOTs that want to provide direct access to their trading systems to U.S.-based participants.<sup>14</sup>

In order to address concerns raised by the listing by ICE Futures Europe of the linked WTI contract for trading by direct access, Commission staff, on June 17, 2008, amended ICE Futures Europe’s no-action relief letter by adding additional conditions. The additional conditions included requirements relating to the reporting of large trader positions, the publication of daily trading information in the linked contracts, and the establishment of position limits or accountability levels that are comparable to the position limits or accountability levels for the counterpart linked contracts at NYMEX.<sup>15</sup>

<sup>12</sup> 71 FR 34070 (June 13, 2006). The Commission requested comment on the issues related to developing an objective standard establishing a threshold that, if crossed by a foreign board of trade that permits direct access, would indicate that the board of trade is no longer outside the United States and, accordingly, may be required to become registered under the CEA.

<sup>13</sup> Comments submitted in response to the request for comment and at the Commission’s Hearing were generally supportive of the no-action process, praising the process in general for its flexibility. Many commenters suggested that the Commission should retain in large measure the essential contours of the no-action process. A transcript of the Commission’s *Hearing on what constitutes a board of trade located outside the United States under the Commodity Exchange Act section 4(a) (June 27, 2006)*, (“Hearing Tr.”) as well as all comment letters (“CL”), are located in comment file 06-002 to 17 FR 34070 (June 13, 2006), available at [http://www.cftc.gov/foia/comment06/foi06-002\\_1.htm](http://www.cftc.gov/foia/comment06/foi06-002_1.htm).

<sup>14</sup> *Boards of Trade Located Outside of the United States and No-Action Relief From the Requirement To Become A Designated Contract Market or Derivatives Transaction Execution Facility*, 71 FR 64843 (Nov. 2, 2006) (Policy Statement). In the Policy Statement, the Commission endorsed the no-action process for addressing FBOT direct access relief requests: “The Commission endorses the continued use of the no-action process as an appropriate and flexible mechanism that should be used prospectively to facilitate direct access to the electronic trading system of a foreign board of trade by its U.S. members or authorized participants.” *Id.* at 64846.

<sup>15</sup> CFTC Letter No. 08-09 (June 17, 2008). The Commission subsequently announced in the **Federal Register** that these additional conditions would apply to any FBOT that made available for trading by direct access a linked contract. See *Notice of Additional Conditions on the No-Action Relief When Foreign Boards of Trade That Have Received Staff No-Action Relief To Permit Direct Access to Their Automated Trading Systems from Locations in the United States List for Trading from the U.S. Linked Futures and Option Contracts and*

Commission staff subsequently reexamined the issues raised by linked contracts and concluded that there were additional measures that should be taken to further allay concerns with respect to effective market surveillance and maintaining the integrity of the market. Accordingly, on June 20, 2009, staff again amended ICE Futures Europe's no-action relief by adding additional conditions with respect to linked contracts. These conditions included requirements that ICE Futures Europe provide CFTC staff trade execution and audit trail data for all linked contracts; copies of, or hyperlinks to, all rules, rule amendments, circulars and other notices published by the exchange; and copies of all disciplinary notices involving the linked contracts. They also provided for CFTC on-site visits to examine ICE Futures Europe's ongoing compliance with its no-action relief and, in the event that the CFTC directs that NYMEX take emergency action with respect to a linked contract (e.g., to cease trading in the contract), ICE Futures Europe, subject to information-sharing arrangements between the CFTC and the United Kingdom's Financial Services Authority (FSA), is required to promptly take similar action (e.g., cease trading in the contract) with respect to the linked contract at ICE Futures Europe.<sup>16</sup>

Since 1996, Commission staff has issued 23 direct access no-action relief letters to FBOTs, 20 of which remain active (one relief letter was superseded and two were revoked when the FBOTs ceased operations).<sup>17</sup> While the no-action process has served a useful purpose, given the clear authority provided by Congress to create a registration program for FBOTs, the Commission concludes that it is in the public interest to replace the staff-initiated no-action process with a formal Commission registration provision.

The no-action process is better suited for discrete, unique factual circumstances and where regulations do not address the issue presented. In circumstances where the same type of relief is granted on a regular and recurring basis, as it has been with respect to permitting FBOTs to provide direct access to their trading systems to specified members and other participants that are located in the U.S., the Commission concludes believes that it is no longer appropriate to handle

such matters through the no-action process. Instead, the process should become more transparent and standardized through generally applicable regulations. Among other things, a rulemaking would provide for a uniform application process, enhance the visibility of the process to both applicants and the public and assure fair and consistent treatment to all applicants. Further, no-action relief letters are issued by the staff and are not binding on the Commission and do not provide the same legal certainty to the FBOT recipients that a Commission-issued order would provide. The Commission believes that a formal registration procedure would provide more legal certainty for registered FBOTs and would be more consistent with the manner in which other countries permit U.S. DCMs to provide direct access internationally. Accordingly, for the reasons noted above and pursuant to the new authority of amended CEA Section 4(b), new Part 48 of the Commission's regulations, as proposed herein, would replace the existing policy of accepting and reviewing requests for no-action relief to permit an FBOT to provide for direct access to its trading system from within the U.S. with a requirement that an FBOT seeking to provide such access must apply for and be granted registration with the Commission.<sup>18</sup>

As a starting point for the proposed registration requirements, the Commission considered the experience gained from the current no-action review process. The proposed application submission requirements and staff review standards for FBOT registration under the new regulations generally are consistent with the application requirements and review standards that have guided the Commission's staff in issuing the more recent FBOT no-action relief letters. Under the proposed registration requirements, for instance, the Commission would not evaluate FBOTs for compliance with the core principles and/or regulatory requirements applicable to DCMs. Rather, the Commission would look to the FBOT's regulatory authority to determine that

<sup>18</sup> The proposed rules would provide for a "limited" application process for FBOTs currently operating under existing no-action relief. The limited application would have to be submitted within 120 days of the effective date of the registration rules and the FBOT could continue to operate pursuant to the no-action relief during the 120 day period and until the Commission notifies the FBOT that the application has been approved or denied. In the event that the Commission denies an FBOT's application, it would expect staff to simultaneously withdraw the FBOT's no-action relief.

the home regulatory regime provides oversight over the FBOT in a manner that is comparable to the CFTC's oversight of DCMs. Specifically, the Commission would review the application to determine if the FBOT's regulatory authority supports and enforces substantially equivalent regulatory objectives, such as prevention of market manipulation and customer protection, in its oversight of the FBOT.

The Commission notes that the staff's no-action process has not remained static since the first no-action relief letter was issued in 1996. Instead, staff has generally been expanding the scope and level of its review of FBOTs to address activities not originally foreseen when the first no-action letter was issued. Likewise, the number and types of conditions imposed upon FBOTs seeking no-action relief have gradually expanded over time.<sup>19</sup> Those conditions have generally been included in the proposed regulations, along with proposed conditions intended to address increasing technological innovation, new types of products, the impact on the market of different trading entities listing substantially similar or even connected products, and the requirements of the Dodd-Frank Act.

### III. The Proposed Rules

The proposed regulation is divided into 10 sections and an appendix (Appendix), each proposed as described below.

#### A. Scope

The first section, 48.1, provides that part 48 applies to any FBOT that is registered or is applying to become registered with the Commission in order to provide its identified members or other participants located in the U.S.<sup>20</sup> with direct access to its electronic trading and order matching system.

<sup>19</sup> The first no-action relief letter required that Deutsche Terminbörse comply with eight terms and conditions. CFTC Letter No. 96-28 (February 29, 1996). Subsequent letters generally have required compliance with approximately 16 conditions, although the number varies based on the manner in which the FBOT operates. More recent additions to the conditions address, among other things, restriction to certain types of members, the inclusion of CTAs and CPOs as entities eligible for no-action relief, and a requirement that the FBOT provide an annual certification from its regulatory authority that the FBOT retains its authorization in good standing as an FBOT in its home country. As previously discussed, the staff has also added several conditions to the ICE Futures Europe no-action letter in order to address the listing of linked contracts.

<sup>20</sup> For purposes of FBOT registration, the term "United States" or "U.S." includes the United States, its territories and possessions.

*a Revision of Commission Policy Regarding the Listing of Certain New Option Contracts.* 74 FR 3570 (January 21, 2009).

<sup>16</sup> CFTC Letter No. 09-37 (August 20, 2009).

<sup>17</sup> Currently, 14 of the FBOTs with active no-action relief report volume originating from the U.S. via direct access.

### B. Definitions

Section 48.2 includes definitions applicable to FBOT registration. For instance, section 48.2 defines an "FBOT" as any board of trade, exchange or market located outside the U.S., its territories or possessions, whether incorporated or unincorporated, where foreign agreements, contracts or transactions are entered into. Section 48.2 also identifies certain criteria an FBOT would have to meet in order to register to provide direct access, such as possessing the attributes of an established, organized exchange; adhering to appropriate rules prohibiting abusive trading practices; and enforcing appropriate rules to maintain market and financial integrity. Another defined term, further addressed below, is "direct access," which is defined in the Dodd-Frank Act to refer to "an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the foreign board of trade." Section 48.2 also includes definitions, for purposes of this part, of "linked contract," "communications," "material change," "clearing organization," "existing no-action relief," "swaps," "affiliate" and "member or other participant."

### C. Registration Required

Section 48.3 provides that, except as otherwise specified in proposed new Part 48, it shall be unlawful for an FBOT to permit direct access to its electronic trading and order matching system from within the U.S. unless and until the Commission has issued an Order of Registration to the FBOT pursuant to the provisions of Part 48. The proposal also would provide that it would be unlawful for a board of trade to make false or misleading statements in any application for registration or in connection with any application for registration.

### D. Registration Eligibility

Section 48.4 describes registration eligibility. Generally, FBOTs that meet the requirements of the definition in section 48.2(b) would be eligible to be registered. Section 48.4 also identifies the persons to whom the registered FBOT could grant authority to trade by direct access. The Commission proposes that the persons that would be permitted by the FBOT to trade by direct access from the U.S. pursuant to the registration rules would be the types of persons that are currently able to trade by direct access pursuant to staff issued no-action relief letters.

Specifically, an FBOT could request registration in order to permit direct access from within the U.S. by identified members and other participants<sup>21</sup> that: (1) Trade in the U.S. for their proprietary accounts; (2) are registered with the Commission as FCMs and submit orders to the trading system for execution on behalf of U.S. customers; or (3) are, subject to a specific clearing and guarantee requirement, registered with the Commission as CPOs or CTAs, or are exempt from such registration pursuant to Commission Rules 4.13 or 4.14. The CPOs would be permitted to submit orders for execution on behalf of U.S. pools they operate, and CTAs would be permitted to do so for accounts of U.S. customers for which they have discretionary authority. The Commission requests comment concerning additional entities that should be eligible for direct access to the trading and order matching systems of the FBOT from the U.S.

### E. Registration Procedures

Section 48.5 describes procedures to be followed to request and receive registration.<sup>22</sup> The registration application must be submitted electronically, must be signed by the FBOT's chief executive officer (or functional equivalent), and must include the information and documentation set forth in the Appendix to Part 48 and any information and documentation necessary, in the discretion of the Commission, to effectively demonstrate that the FBOT and its clearing organization satisfy the registration requirements set forth in section 48.7.

Section 48.5 also provides that the Commission will review the application for FBOT registration and may approve or deny the application. At this time, the proposed rule does not contain a timeline for Commission action.<sup>23</sup> If the

application is approved, the Commission will so notify the FBOT and will issue an Order of Registration. The Commission could, after appropriate notice and an opportunity for a hearing, amend, suspend, terminate or otherwise restrict the terms of the Order of Registration. If the application is denied, the Commission will issue a Notice of Action specifying that the application was not approved and the FBOT will not be registered and may not provide direct access to its trade matching engine from within the U.S. Following a denial, the FBOT may reapply for registration 360 days after the date of denial.

The Commission is also proposing that, in determining whether to grant or deny an application for FBOT registration, the Commission will thoroughly review the information and documentation submitted in the application and, as necessary, conduct an on-site due diligence visit at the FBOT to determine, as mandated by the Dodd-Frank Act, whether the FBOT and its clearing organization are subject to comprehensive supervision and regulation by the appropriate governmental authorities in their home country that is comparable to the comprehensive supervision and regulation to which DCMs and derivatives clearing organizations (DCO) are subject in the U.S.<sup>24</sup> In this context, as previously noted, comparable does not necessarily mean identical. The comparability determination for registration purposes will be similar to that followed when reviewing direct access no-action requests. The Commission will evaluate whether the FBOT's home regulatory authority supports and enforces regulatory objectives in its oversight of the FBOT that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight of DCMs.

The Commission notes that it uses a similar "comparability" analysis when evaluating foreign entities in the context of issuing Rule 30.10 exemptions to

<sup>21</sup> For purposes of FBOT registration, identified member or other participant of the FBOT shall include any affiliate of any registered FBOT's member or other participant that has been granted direct access by the registered FBOT to the trading system. An affiliate of a registered FBOT member or other participant shall mean any person, as that term is defined in section 1a(38) of the CEA, that: (i) Owns 50% or more of the member or other participant; (ii) is owned 50% or more by the member or other participant; or (iii) is owned 50% or more by a third person that also owns 50% or more of the member or other participant.

<sup>22</sup> Draft submissions and a request for a preliminary review by Commission staff would be encouraged under the proposed rule. The Commission proposes that the final copy of an application for registration would be published on its Web site.

<sup>23</sup> The Commission expects a surge of activity shortly after the registration rule goes into effect. Once this period has ended, the Commission

anticipates that a timeline would be established. Such a timeline might require a Commission response to a completed application for registration within 120 days after the Commission, in its sole discretion, determines that the application is complete.

<sup>24</sup> The Dodd-Frank Act also mandated that the Commission consider any previous Commission findings that the FBOT and its clearing organization are subject to such comprehensive supervision and regulation by the appropriate government authorities in their home country. Such previous Commission findings would include staff conclusions drawn previously during the course of reviewing an application for direct access no-action relief.

intermediaries.<sup>25</sup> When determining whether to issue a Rule 30.10 exemption, staff evaluates whether the applicant is subject to a comparable regulatory scheme in the country in which it is located. In this evaluation, comparable does not necessarily mean identical: as set forth in Appendix A to Rule 30.10 with respect to the comparability determination, “the Commission would have broad discretion to determine that the policies of any program element generally are met, notwithstanding the fact that the offshore program does not contain an element identical to that of the Commission’s regulatory program.” In the case of FBOT registration, a determination that the foreign regulatory authority enforces substantially equivalent regulatory objectives is a determination of comparability: The regulatory regime is comparable, although not necessarily identical, to that of the CFTC.

In its review, the Commission would also consider whether the FBOT is eligible to be registered as defined in section 48.2(b) of this part and whether the FBOT has adequately demonstrated that it meets the requirements for registration specified in section 48.7 and any other requirements that the Commission, in its discretion, believes are necessary or appropriate to impose under the facts and circumstances presented.

#### *F. FBOTs Providing Direct Access Pursuant to No-action Relief*

In Section 48.6, the Commission proposes to provide for a “limited” application process for FBOTs currently operating pursuant to existing no-action relief. Such FBOTs would apply for registration by (1) identifying the specific requirements for registration set forth in section 48.7 or information and documentation required by the Appendix to Part 48 that are satisfied by information previously submitted in the request for no-action relief that remain current and true and resubmitting such information and documentation,<sup>26</sup> and (2) submitting any information and documentation required in a complete application for registration that was not previously provided or is no longer current. The limited application for registration would have to be submitted within 120 days of the effective date of the registration rules, during which time

the FBOT could continue to operate pursuant to the no-action relief. The no-action relief would, upon notice to the FBOT, be revoked after 120 days if a complete limited application is not received by the Commission by that time. If the FBOT files an application for registration within 120 days, the FBOT could continue to operate pursuant to the no-action relief until notified by the Commission that the application has been approved or denied. If the Commission revokes the no-action relief or denies the application, it will provide for a transition period for phasing out direct access.

#### *G. Requirements for Registration*

Section 48.7 describes the requirements that the Commission proposes that an FBOT would be required to demonstrate in order to be registered. The requirements are divided into the same seven general categories currently evaluated during the course of a review of an application for no-action relief and they would be reviewed in a similar manner. Whether they are successfully met would be determined by a review of the information and documentation submitted by the applicant pursuant to the Appendix to proposed Part 48, any additional information or documentation requested by the Commission in connection with the application review, and, as necessary, a Commission staff due diligence on-site visit to the FBOT and clearing organization.

First, with respect to FBOT and clearing membership, the FBOT would be required to demonstrate that FBOT and clearing organization members and other participants are fit and proper and meet appropriate financial and professional standards; that the FBOT and clearing organization have adequate conflict of interest provisions; and that the FBOT and clearing organization have and enforce rules prohibiting the disclosure of material, non-public information obtained as a result of a member’s/other participant’s performance of official duties.

Second, the FBOT’s automated trading system would be required to comply with the Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions (IOSCO Principles) and adopted by the Commission on November 21, 1990.<sup>27</sup>

In addition, the FBOT’s trade matching algorithm would be required to match trades fairly and timely, the audit trail would be required to capture all relevant data (including changes to orders), and audit trail data would be required to be securely maintained and available for an adequate time period. Trade data would be required to be made available to users and to the public, the trading system would be required to have demonstrated reliability, and access to the trading system would be required to be secure and protected. Finally, adequate provisions for emergency operations and disaster recovery would be required, trading data would be required to be backed up to prevent its loss, and only approved contracts could be made available for trading by direct access from the U.S.

Third, the contracts to be made available by direct access in the U.S. would be required to be futures, option or swaps contracts that would be eligible to be traded on a DCM and would be subject to prior review by the Commission. With respect to swaps, Section 733 of the Dodd-Frank Act adds section 5h to the CEA, which provides that a person operating a facility for the trading or processing of swaps must be registered as a swaps execution facility (SEF) or as a DCM. Section 733 also adds section 5(g) to the CEA which provides that the “Commission may exempt, conditionally or unconditionally, a swap execution facility from registration under this section if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the [SEC], a prudential regulator, or the appropriate governmental authorities in the home country of the facility.” The approach for granting a SEF exemption (namely, “subject to comparable, comprehensive supervision and regulation \* \* \* in the home country of the facility”) is similar to that which applies to FBOTs seeking registration. Moreover, there is nothing in the Dodd-Frank Act, including Section 738 of the Dodd-Frank Act amending Section 4(b) of the CEA, which expressly precludes a registered FBOT from offering swaps through direct access.<sup>28</sup> Accordingly, the Commission is proposing to permit a registered FBOT to offer and trade swaps through direct access, subject to the condition that the FBOT meet

*Oversight of Screen-Based Trading Systems*, 55 FR 48670 (Nov. 21, 1990).

<sup>28</sup> Furthermore, under the Dodd-Frank Act, a DCM may trade swaps without additionally registering as a SEF.

<sup>25</sup> See *supra* note 8.

<sup>26</sup> The Commission is requesting resubmission of original documentation, where appropriate, because such documentation, some of which dates back as much as fourteen years, may no longer be readily available for review because of incomplete and or misplaced files.

<sup>27</sup> The Commission adopted the IOSCO Principles as a statement of regulatory policy for the oversight of screen-based trading systems for derivative products. *Policy Statement Concerning the*

certain standards or requirements that may apply to SEFs, as the Commission deems appropriate. The Commission requests comment with respect to whether a registered FBOT should be allowed to make available swaps through direct access and if so, under what conditions.

Contracts that are linked to a contract listed for trading on a U.S. registered entity would be required to be identified, as would contracts that share any other commonality with a contract listed for trading on a U.S. registered entity, *i.e.*, both the FBOT's and the U.S. registered entity's contract settle to the price of the same third party-constructed index. Finally, the FBOT would be required to certify that it has listing standards in place that require that contracts not be readily susceptible to manipulation.<sup>29</sup>

Fourth, with respect to settlement and clearing, the clearing organization, would be required to comply with the current Recommendations for Central Counterparties (RCCPs) that have been issued jointly by the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO), as updated, revised or otherwise amended, or successive standards, principles and guidance for central counterparties or financial market infrastructures adopted jointly by IOSCO and CPSS, and the clearing organization would be required to be in good regulatory standing in its home country jurisdiction. In the alternative, the clearing organization may be registered with the Commission as a DCO.<sup>30</sup>

Fifth, the FBOT's and the clearing organization's regulatory authorities would be required to provide comprehensive supervision and regulation of the FBOT and the clearing organization that is comparable to the comprehensive supervision and regulation to which DCMs and DCOs are subject in the U.S., would be required to have the power to intervene in the

market and authority to share information with the Commission, and would be required to provide for ongoing regulatory supervision of the FBOT and its trading system, the clearing organization and its clearing system and intermediaries—with particular attention to market integrity and customer protection and the manner in which the exchange enforces its rules. In the case of FBOTs with listed swaps, the Commission proposes to take into consideration the regulation of relevant market participants (*e.g.*, swap dealers) regarding their exchange-trading activity when analyzing the comparability and comprehensiveness of the regulatory regime applicable to exchange-listed swaps in the FBOT's home country.

Sixth, the FBOT and the clearing organization would be required to have appropriate rules and would be required to enforce them. Among other things, the FBOT and the clearing organization would be required to have sufficient compliance staff and resources to fulfill their respective regulatory responsibilities, including the capacity to detect, investigate, and sanction persons who violate their respective rules. The FBOT would be required to implement and enforce rules relating to oversight of trading practices, including appropriate trade practice surveillance, real-time market monitoring and market surveillance. The FBOT's and the clearing organization's rules would be required to authorize the compliance staff to obtain, from market participants, any information and cooperation necessary to conduct effective rule enforcement and investigations, and the FBOT would be required to have and enforce rules with respect to access to the trading system and the means by which the connection is accomplished. The FBOT and the clearing organization (or their respective regulatory authorities) would be required to have implemented and enforce disciplinary procedures that empower them to recommend and prosecute disciplinary actions for suspected rule violations, impose adequate sanctions for such violations, and provide adequate protections to charged parties pursuant to fair and clear standards. The FBOT would be required to have the capacity to detect and deter market manipulation, attempted manipulation, price distortion, and other disruptions of the market and would be required to have and enforce rules designed to maintain market and financial integrity and prohibit other trading and market abuses. Finally, the FBOT would be required to have and enforce rules and

procedures that ensure a competitive, open and efficient market and mechanism for executing transactions.

Finally, satisfactory information-sharing arrangements among the FBOT, the clearing organization, their respective regulatory authorities, and the Commission would be required to be in place. The regulatory authorities would be required to be signatories to the IOSCO Multilateral Memorandum of Understanding (IOSCO MOU)<sup>31</sup> or, if not signatories to the IOSCO MOU, would have to inform the Commission of the reasons why the document has not been signed, supply any additional information requested by the Commission, and ensure alternative information sharing arrangements that are satisfactory to the Commission are in place. The regulatory authority also would be required to be a signatory to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations (Boca Declaration),<sup>32</sup> or otherwise commit to share the types of information contemplated by the International Information Sharing Memorandum of Understanding and Agreement (Exchange International MOU)<sup>33</sup> with the Commission. The FBOT would be required to have executed, or have committed to execute, the Exchange International MOU. In addition, pursuant to the proposed conditions of registration described in section 48.8(a)(6)(iii), the FBOT would

<sup>31</sup> Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information of the International Organization of Securities Commissions, October 16, 2003. The IOSCO MOU is the first worldwide multilateral enforcement cooperation arrangement among securities and derivatives regulators. It provides for the exchange of essential information to investigate cross-border securities and derivatives violations, including the most serious offenses, such as manipulation, insider trading and customer fraud. The IOSCO MOU enables regulators to share critical information, including bank, brokerage, and client identification records and to use that information in civil and criminal prosecutions.

<sup>32</sup> The Boca Declaration was developed through discussions at the CFTC's international regulators conference, and was motivated by work recommendations issued from the Windsor Conference and Tokyo Conference, which were convened by the CFTC, the U.K. FSA and Japanese regulators to respond to the cross-border issues raised by the failure of Barings Plc. The Declaration was developed to address instances in which an exchange would not be able to share information directly with another exchange under the Exchange International MOU, described below.

<sup>33</sup> The development of the Exchange International MOU was one of the achievements that resulted from the Futures Industry Association-sponsored Global Task Force on Financial Integrity, which was convened to address the cross-border issues that were identified in connection with the failure of Barings Plc.

<sup>29</sup> The Commission considers that contracts that can be found to have the following are less likely to be susceptible to manipulation: (1) They rely for settlement pricing on a robust and transparent calculation, whether based on the contract's own trading or an externally calculated index; (2) they are subject to measures to reduce the ability of any party to disrupt pricing, *e.g.* position limits, intraday surveillance, and pre-trade screens; and (3) there is either ample deliverable supply or flexibility in the contract (alternate delivery mechanisms).

<sup>30</sup> The Commission is including the option for the clearing organization to be registered as a DCO because it is aware that some foreign clearing organizations are registered as such. These include ICE Clear Europe Limited, LCH Clearnet Ltd. and Natural Gas Exchange Inc.

be required to provide certain information directly to the Commission.

#### H. Conditions Upon FBOT Registration

As previously noted, Section 738 of the Dodd-Frank Act amends Section 4(b) of the CEA to provide that the Commission may adopt rules and regulations requiring registration with the Commission of an FBOT that provides identified members of the FBOT or other participants located in the United States with direct access to the electronic trading and order matching system of the FBOT, including rules and regulations prescribing procedures and requirements applicable to the registration of such FBOTs. Proposed Section 48.8 provides for certain procedures and requirements applicable to maintaining the registration of such FBOTs and describes the specified conditions upon FBOT registration that the Commission believes are essential in assuring effective market integrity and customer protection. As previously noted, the conditions applicable to existing no-action relief have expanded over time to address activities not foreseen when the earliest no-action letters were issued. In the proposed regulations, the Commission has added further conditions to address increasing technological innovation, new types of products, the impact on the market of different trading entities listing substantially similar or even connected products, and the requirements of the Dodd-Frank Act. The specified conditions are divided into three categories: Specified conditions for maintaining registration, other continuing obligations, and additional specified conditions for FBOTs with linked contracts. A registered FBOT would have an ongoing obligation to monitor and enforce compliance with the specified conditions of its registration and with any additional conditions that the Commission, in its discretion and upon notice to the FBOT and subsequent to an opportunity to be heard, may impose.

##### (1) Specified Conditions

With respect to the regulatory regimes under which they operate, the FBOT and the clearing organization, respectively, would be required to continue to satisfy the criteria for a regulated market and clearing organization pursuant to their home regulatory regimes identified in the application for registration and would be required to continue to be subject to oversight by their home regulatory authorities. In addition, the laws, systems, rules, and compliance

mechanisms of the applicable regulatory regimes would be required to continue to require the FBOT to maintain fair and orderly markets; prohibit fraud, abuse, and market manipulation; and provide that such requirements are subject to the oversight of appropriate regulatory authorities. With respect to international standards, the FBOT would be required to continue to adhere to the IOSCO Principles, to the extent such principles do not contravene U.S. law. The clearing organization would be required to continue to satisfy, as applicable, the rules, regulations and core principles applicable to its registration as a DCO or the RCCPs or successive standards, principles or guidance that may be adopted jointly by IOSCO and CPSS, to the extent such recommendations, standards, principles or guidance do not contravene U.S. law.

The FBOT would be required to restrict direct access to the trading system from the U.S. to identified members or other participants and take reasonable steps to prevent third parties from providing such access to the FBOT's trading system to persons other than the identified members or other participants.<sup>34</sup> All orders transmitted through the FBOT's trading system by an FBOT-identified member or other participant by direct access would be required to be for the member's or other participant's own account unless: (a) The member or other participant is an FCM or (b) subject to certain clearing requirements, the member or other participant is a CPO or CTA, or is exempt from such registration pursuant to Commission regulation 4.13 or 4.14.

The specified conditions also include several documentation requirements to assist the Commission in monitoring the activities of a registered FBOT and the clearing organization. Each current and prospective member or other participant that is granted direct access to the FBOT's trading system from the U.S. and that is not registered as an FCM, a CTA or a CPO would be required to file with the FBOT (a) A written representation stating that the member or other participant agrees to and submits to the jurisdiction of the CFTC with respect to activities conducted

<sup>34</sup> The Commission believes that such steps would include specific prohibitions on sharing access in the FBOT's rules and membership agreements and a review of how access is granted by and to the identified member's or other participant's infrastructure during audits of those entities.

The Commission will continue to evaluate new developments in technology and business arrangements that may be used by FBOTs to provide U.S. participants with direct access to its trade matching system in the context of these proposed rules.

pursuant to the registration; (b) a valid and binding appointment of a U.S. agent for service of process in the U.S.; and (c) a written representation that the member or other participant granted direct access pursuant to this regulation will provide, upon the request of the Commission, the U.S. Department of Justice and, if appropriate, the National Futures Association (NFA) (collectively, the U.S. Agencies), prompt access to the entity's, member's or other participant's original books and records or, at the election of the requesting U.S. Agency, a copy of specified information containing such books and records, as well as access to the premises where the trading system is available in the U.S. The FBOT and the clearing organization also would be required to file with the Commission a valid and binding appointment of an agent for service of process in the U.S. and maintain with the FBOT written representations concerning U.S. Agencies' access to original books and records or, at the election of the requesting U.S. Agency, a copy of specified information containing such books and records, as well as access to the premises where the trading system is available in the U.S. The FBOT would be required to maintain all the representations required pursuant to this regulation as part of its books and records and make them available upon the request of a Commission representative.

With respect to information sharing, the specified conditions mandate that information-sharing arrangements satisfactory to the Commission are in effect among the Commission and the regulatory authorities that oversee both the FBOT and the clearing organization and that the Commission is able to obtain sufficient information regarding the FBOT, the clearing organization and their respective members and other participants operating pursuant to the FBOT's registration. The FBOT would be required to provide information directly to the Commission in response to a Commission request. In the event that the FBOT and the clearing organization are separate entities, the proposed rule would require the clearing organization to enter into a written agreement with the FBOT in which the clearing organization is contractually obligated to promptly provide any and all information and documentation that may be required of the clearing organization under the regulation.

With respect to swaps contracts, if the FBOT makes swaps contracts available by direct access, the FBOT would be required to report to the public, on a real-time basis, data relating to each

swap transaction, including price and volume, as soon as technologically practicable after execution of the swap transaction. In addition, the FBOT would be required to ensure that all swap transaction data is timely reported to a swap data repository that is either registered with, or has an information-sharing arrangement with, the Commission. The FBOT also must agree to coordinate with the Commission with respect to arrangements established to address cross market oversight issues, including surveillance, emergency actions and the monitoring of trading. In addition, particularly with respect to the listing of swaps contracts, the Commission may, in its discretion and after notice and an opportunity to be heard, impose additional conditions upon the FBOT's registration. Finally, all futures, option and swaps contracts must be cleared.

## (2) Other Continuing Obligations

Among the proposed specified conditions identified as other continuing obligations are quarterly, upon occurrence, and annual reporting requirements that the Commission determines are necessary to provide ongoing visibility with respect to a registered FBOT's performance as it relates to U.S. persons. First, as is the case now with the no-action relief recipients, the FBOT would be required to maintain and provide to the Commission on at least a quarterly basis, and at any time promptly upon request, volume data that reflects the percentage of trading originating in the U.S. Thus, the FBOT would be required to provide, for each contract available to be traded through its trading system, the following: (a) The total trade volume originating from electronic trading devices providing direct access to the trading system in the U.S., (b) the total trade volume for such products traded through the trading system worldwide, and (c) the total trade volume for such products traded on the FBOT generally. The FBOT would also be required to provide a listing of the names, NFA ID numbers (if applicable), and main business addresses in the U.S. of all members and other participants that have access to the trading system in the U.S.

With respect to reporting the occurrence of events that may have an impact on the FBOT's capability to meet its registration requirements, the FBOT would be required to promptly provide the Commission with written notice of the following: (a) Any material change in the information provided in the FBOT's registration application or in the FBOT's or clearing organization's rules

or in the laws, rules, and regulations in the home jurisdictions of the FBOT or the clearing organization; (b) any matter known to the FBOT or the clearing organization that, in their judgment, could affect the financial or operational viability of the FBOT or the clearing organization; (c) any default, insolvency, or bankruptcy of any FBOT trading member or other participant that may have a material, adverse impact upon the condition of the FBOT or upon any U.S. customer or firm, or any default, insolvency or bankruptcy of any member of the FBOT's clearing organization; (d) any known violation by the FBOT, its clearing organization or any trading or clearing member or other participant of the specified conditions of registration or failure to satisfy the requirements for registration; and (e) any disciplinary action taken by the FBOT or its clearing organization against any FBOT trading member or other participant or a member of the clearing organization that involves any market manipulation, fraud, deceit, or conversion or that results in suspension or expulsion that involves a contract or contracts available for trading from within the U.S. pursuant to registration.

Finally, the FBOT or the clearing organization, as applicable, would be required to provide the following to the Commission on an annual basis: (a) A certification from the FBOT's regulatory authority confirming that the FBOT retains its authorization in good standing as a regulated market/exchange; (b) a certification from the clearing organization's regulatory authority confirming the clearing organization's regulatory status (*i.e.*, its authorization, licensure, or registration) and continued "good standing" in its authorized jurisdiction; (c) if the clearing organization is not a DCO, recertification of the clearing organization's compliance with the RCCPs or successive standards, principles or guidance; (d) a description of any material changes to any relevant representation regarding the FBOT or clearing organization made to the Commission that have not been previously disclosed; (e) a description of any significant disciplinary or enforcement actions that have been instituted by or against the FBOT or the clearing organization or the senior officers of either in the prior year; and (f) a written description of any material changes to the regulatory regime to which the FBOT or the clearing organization are subject that have not been previously disclosed, in writing, to the Commission (or a certification that no material changes have been made).

## (3) Linked Contract Conditions

The proposed rule also would include additional specified conditions for FBOTs that make linked contracts available for direct access. These proposed additional specified conditions are divided into two categories: Statutory conditions, which are specifically required by the Dodd-Frank Act, and other conditions on linked contracts, which are additional conditions that the Commission believes are necessary because such linkages create a single market for the subject contracts and, in the absence of certain preventive measures at the FBOT, could compromise the Commission's ability to carry out its market surveillance responsibilities. Because of the linkage, the trading of the linked contracts on an FBOT affects the pricing of contracts traded on U.S.-registered entities.

### (a) Statutory Conditions

The statutory conditions mandated by Section 738 of the Dodd-Frank Act are substantially similar to the previously discussed additional conditions the Commission imposed on the no-action relief issued to ICE Futures Europe when that exchange made available a WTI futures contract that cash-settled on the price of a physically-settled Light Sweet Crude Oil futures contract traded on the NYMEX,<sup>35</sup> include the following: (i) The FBOT must make public certain daily trading information regarding the linked contract; (ii) the FBOT (or its regulatory authority) must (A) Adopt position limits for the linked contract that are comparable to the position limits adopted by the registered entity for the contract to which it is linked; (B) have the authority to require or direct market participants to limit, reduce, or liquidate any position the FBOT (or its regulatory authority) determines to be necessary to prevent or reduce the threat of price manipulation, excessive speculation as described in section 4a of the Act, price distortion, or disruption of delivery or the cash settlement process; (C) agree to promptly notify the Commission, with regard to the linked contract, of any changes with respect to (i) and (ii) above and any other area of interest expressed by the Commission to the FBOT or its regulatory authority; (D) provide information to the Commission regarding large trader positions in the linked contract that is comparable to the large trader position information collected by the Commission for the contract to which it is linked; and (E) provide the Commission such information as is necessary to publish

<sup>35</sup> See CFTC Letter No. 08-09 (June 17, 2008).



reports on aggregate trader positions for the linked contract that are comparable to such reports on aggregate trader positions for the contract to which it is linked.

One statutory condition is mandated by Section 737 of the Dodd-Frank Act, and would require that if the Commission establishes speculative position limits (including related hedge exemption provisions) on the aggregate number or amount of positions in a contract traded on a U.S. registered entity and the registered FBOT lists a linked contract, the FBOT (or its regulatory authority) must adopt position limits (including related hedge exemption provisions) for the linked contract as determined by the Commission.

#### (b) Other Conditions on Linked Contracts

The other conditions on linked contracts, also imposed pursuant to the Commission's new Section 4(b)(1)(A) authority to adopt rules and regulations prescribing procedures and requirements applicable to the registration of FBOTs, represent the second set of additional conditions the Commission imposed on the no-action relief issued to ICE Futures Europe when that exchange made available for trading by direct access contracts linked to the prices of contracts traded on NYMEX.<sup>36</sup> The conditions as proposed would require that the FBOT, among other things, (i) Inform the Commission in a quarterly report of any member that had positions in a linked contract above the applicable FBOT position limit, (ii) provide trade execution and audit trail data for input to the CFTC's Trade Surveillance System on a trade-date plus one basis, (iii) provide for CFTC on-site visits for the purpose of overseeing the FBOT's and the clearing organization's ongoing compliance with registration requirements and the conditions of registration, (iv) provide, at least one day prior to the effective date, copies of, or hyperlinks to, all rules, rule amendments, circulars and other notices published by the FBOT with respect to all linked contracts, (v) provide copies of all Disciplinary Notices involving the FBOT's linked contracts upon closure of the action, and (vi) promptly take similar action with respect to its linked contract in the event that the CFTC, pursuant to its emergency powers authority, directs that the U.S. registered entity which lists the contract to which the FBOT's contract is linked to take emergency

action with respect to a linked contract (e.g., to cease trading in the contract).

The Commission questions whether there are additional conditions that it could impose on registered FBOTs that list linked contracts to promote orderly markets and customer protection, such as automatic safety features to protect against errors in the entry of orders, price-banding mechanisms, maximum order size limitations, or trading pauses to prevent cascading stop-loss orders.<sup>37</sup>

#### I. Revocation of Registration

Section 48.9 addresses certain events which could lead the Commission to revoke an FBOT's registration. With respect to failure to satisfy any of the registration requirements or conditions of registration, the proposed rule provides that if the Commission believes that a registration requirement or condition is not being met, the Commission may request that the registered FBOT file a written demonstration showing it is in compliance with the requirement or condition. If the Commission determines that an FBOT (or its clearing organization) has failed to satisfy any of the registration requirements or conditions, the FBOT would be given an opportunity to bring itself into compliance with the requirement or condition. If the FBOT fails to make changes necessary to comply with the requirement or condition within 30 days after receiving a notification that it was not satisfying one or more requirements or conditions, the Commission may revoke the FBOT's registration, after appropriate notice and an opportunity for a hearing. If the Commission revokes the registration, it will provide for a transition period for phasing out direct access. Finally, an FBOT whose registration has been revoked for failure to satisfy a registration requirement or condition could apply for re-registration after 360 days if the deficiency causing the revocation has been cured or relevant facts and circumstances have changed.

Section 48.9 of the proposed rule also identifies four other events that, without limitation, could result in revocation, generally after appropriate notice and an opportunity for a hearing. The Commission may revoke an FBOT's registration (1) If the Commission determines that a representation made in the application for registration

relevant to the Commission's decision to register the entity is found to have been untrue or materially misleading; (2) if there is a material change in the regulatory regime applicable to the FBOT or clearing organization; (3) in the event of an emergency or in a circumstance where the Commission determines that revocation would be necessary or appropriate in the public interest; or (4) the FBOT or the clearing organization is no longer authorized, licensed or registered, as applicable, as a regulated market and/or exchange or clearing organization or ceases to operate as an FBOT or clearing organization. Revocation under these circumstances would not necessarily follow the procedures delineated for revocation for failure to continue to satisfy registration requirements or conditions, but would be handled by the Commission as relevant facts or circumstances warrant.

The Commission acknowledges that there are other actions that, if undertaken by a registered FBOT, could lead the Commission to exercise its discretion and consider a full range of corrective actions, including revocation of the FBOT's registration, requiring enhanced information sharing arrangements and surveillance procedures, imposing trading restrictions on U.S. persons trading on the FBOT, imposing additional conditions on the registration, or taking other appropriate action. For instance, the Commission believes that the listing of certain products on an FBOT could potentially have an adverse impact on the market and the public interest. Thus, the Commission would take corrective action as necessary if it become aware that a registered FBOT permits the trading of products that potentially could: (1) Affect adversely the pricing of contracts traded on any registered entity as defined in section 1a(40) of the Act, or of contracts traded on any cash market for commodities subject to the CEA; (2) create unacceptable systemic risks or disruptions in those markets or the U.S. financial system, including capital markets; or (3) facilitate abusive trading practices on U.S. markets or otherwise interfere with the ability of the Commission to carry out its regulatory responsibilities. The Commission retains plenary authority to address manipulative or abusive trading practices that affect U.S. futures and cash markets and market users, and would use that enforcement authority when necessary and appropriate.

<sup>37</sup> Many of these mechanisms are discussed in the Commission's recent joint study with the SEC of the market events of May 6, 2010. See *Preliminary Findings Regarding the Market Events of May 6, 2010—Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues* (May 18, 2010), Appendix B-11.

<sup>36</sup> See CFTC Letter No. 09-37 (August 20, 2009).

### J. Additional Contracts

Section 48.10 would establish the procedures for a registered FBOT to make available futures, option and swaps contracts that were not included in the registration application on a trading system to which FBOT members and other participants in the U.S. have been granted direct access. These procedures are substantially similar to the procedures established for the listing of additional contracts under direct access no-action relief.<sup>38</sup> Generally, for other than security index futures contracts, a registered FBOT would be required to submit a written request prior to offering the additional futures and option and swaps contracts from within the U.S. Such a written request would include the terms and conditions of the additional contracts to be made available and a certification that (1) the additional contracts meet the requirements of Section 48.7(c) of this part and (2) the FBOT and the clearing organization continue to satisfy the conditions of registration. The FBOT would be permitted to make available for trading the additional contracts ten business days after the date of receipt by the Commission of the written request, unless the Commission notifies the FBOT that additional time is needed to complete its review of policy or other issues pertinent to the additional contracts.

A registered foreign board of trade would be permitted to list for trading an additional futures contract on a non-narrow-based security index pursuant to the no-action relief procedures set forth in Appendix D to Part 30 of the Commission's regulations. Such procedures would require that the registered FBOT's request to make the non-narrow-based security index futures contract available for trading by direct access be included in the FBOT's request that the Commission's Office of the General Counsel issue no-action relief providing that the non-narrow-based security index futures contract may be offered or sold to persons located within the U.S. in accordance with Section 2(a)(1)(C)(iv) of the Act.

With respect to making available for trading by direct access an option contract on a previously approved futures contract, the proposed procedures are also substantially similar to the procedures established for the listing such option contracts under

direct access no-action relief.<sup>39</sup> The proposed procedures would provide the following, depending on the type of option contract. (1) If the option is on a futures contract that is not a linked contract, the option contract could be made available for trading by direct access by filing with the Commission no later than the business day preceding the initial listing of the contract: (i) A copy of the terms and conditions of the additional contract and (ii) a certification that the FBOT continues to satisfy the conditions of its registration. (2) If the option is on a futures contract that is a linked contract, the option contract may be made available for trading by direct access in the same manner as (1) above except that the certification must represent that the FBOT continues to satisfy the conditions of its registration, including the conditions specifically applicable to linked contracts set forth in Section 48.8(c). (3) If the option is on a non-narrow-based security index futures contract which may be offered or sold in the U.S. pursuant to a no-action letter issued by the Office of General Counsel, the option contract could be listed for direct access without further action by either the registered FBOT or the Commission.

### K. Appendix to Part 48—Contents of Application

The Appendix to the proposed Part 48 includes a description of what the Commission believes should be included in the application for registration in order for the FBOT to demonstrate, and for the Commission to conclude, that the FBOT meets the requirements for registration. The Appendix reflects submission requirements in eight areas, including general information about the FBOT and seven areas that specifically address the registration requirements identified in Section 48.7. The Commission requests comments with respect to whether the application contents requirements of the Appendix are adequate to completely address the registration requirements.

### IV. Request for Comments Regarding the Proposed Registration Procedures

In the proposed rule, the Commission has included swaps in the set of contracts that a registered FBOT may list on a trading system to which it has

provided direct access to U.S.-located members and other participants. As previously stated, there is nothing in the Dodd-Frank Act, including Section 738 of the Dodd-Frank Act amending Section 4(b) of the CEA, which expressly precludes a registered FBOT from offering swaps through direct access. Accordingly, the Commission is proposing to permit a registered FBOT to offer and trade swaps through direct access, subject to the condition that the FBOT meet certain standards or requirements that may apply to SEFs, as the Commission deems appropriate.<sup>40</sup> The Commission requests comment with respect to whether a registered FBOT should be allowed to make available swaps through direct access and if so, under what conditions. FBOTs have historically, at least in the context of granting direct access no-action relief, been viewed by Commission staff as DCM-equivalent entities. The proposed FBOT registration requirements are based upon the premise that in reviewing the FBOT for being subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in its home country, the point of reference is how DCMs operate and are regulated and overseen by the CFTC.

Finally, the Commission requests comment on whether, to the extent an FBOT is permitted to list swaps on a trading system to which the FBOT has granted direct access to members and other participants in the U.S., the Commission should examine the oversight of relevant market participants (e.g., the functional equivalents of swap dealers and major swap participants, as those terms are defined by the Dodd-Frank Act) in the applicable home country jurisdictions when making a determination as to the comparability and comprehensiveness of the supervision and regulation of the relevant regulatory regime. For example, the Commission may wish to consider whether swap dealers are permitted to provide counterparties with the right to segregate collateral. In the case of swaps, certain portions of the regulatory regime applicable to market participants with respect to their exchange trading activity (e.g., business conduct standards) may be imposed by the primary regulatory authority in the home jurisdiction of the participant instead of by the exchange on which such participants conduct their transactions. Accordingly, it may be necessary or appropriate to review the

<sup>38</sup> See Notice of Revision of Commission Policy Regarding the Listing of New Futures and Option Contracts by Foreign Boards of Trade That Have Received Staff No-Action Relief to Provide Direct Access to Their Automated Trading Systems from Locations in the United States. 71 FR 19877 (April 18, 2006); corrected at 71 FR 21003 (April 24, 2006).

<sup>39</sup> See Notice of Additional Conditions on the No-Action Relief When Foreign Boards of Trade That Have Received Staff No-Action Relief To Permit Direct Access to Their Automated Trading Systems from Locations in the United States List for Trading from the U.S. Linked Futures and Option Contracts and a Revision of Commission Policy Regarding the Listing of Certain New Option Contracts. 74 FR 3570 (January 21, 2009).

<sup>40</sup> As previously noted, under the Dodd-Frank Act, a DCM may trade swaps without additionally registering as a SEF.

regulations applicable to such participants in order to ascertain whether the foreign regulatory regime with respect to the foreign board of trade, in its totality, is both comprehensive and comparable to that in the U.S. The Commission requests comment regarding whether such a review is necessary or appropriate. The Commission invites public comment with respect to all areas described in the proposed registration rule.

## V. Related Matters

### A. The Paperwork Reduction Act

The purposes of the Paperwork Reduction Act (“PRA”) are, among other things, to minimize the paperwork burden to the private sector, ensure that any collection of information by a government agency is put to the greatest possible uses, and minimize duplicative information collections across government.<sup>41</sup> The PRA applies with extraordinary breadth to all information, “regardless of form or format,” a government agency is “obtaining, causing to be obtained [or] soliciting” and includes requiring “disclosure to third parties or the public, of facts or opinion,” when the information collection calls for “answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more people.”<sup>42</sup> This provision has been determined to include not only mandatory but also voluntary information collections, and to not only written but also oral communications.<sup>43</sup>

To effect the purposes of the PRA, Congress requires all agencies to quantify and justify the burden of any information collection it imposes.<sup>44</sup> This includes submitting each collection, whether or not it is contained in a rulemaking, to the Office of Management and Budget (“OMB”) for review.<sup>45</sup> The OMB submission process includes completing a form 83–I and a supporting statement with the agency’s burden estimate and justification for the collection. When the information collection is established within a rulemaking, the agency’s burden estimate and justification should be provided in the proposed rulemaking, subjecting it to the rulemaking’s public comment process.

The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, “Commission Records and

Information.” In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

If the proposed rules are promulgated in final form, they would require FBOT registrants to collect and submit, pursuant to part 48 of the Regulations, information to the Commission, which has never been required. For each proposed requirement, set forth below are estimates of: (i) The number of respondents; (ii) the number of annual responses by each respondent; (iii) the average hours per response; and (iv) the aggregate annual reporting burden. New OMB control numbers will be assigned to these proposed information collection requirements.

#### 1. New Collection 3038–NEW

Regulation 48.6 requires each FBOT currently providing direct access pursuant to no-action relief to submit a “complete limited application” with the Commission to satisfy the registration requirement, which includes information and documentation set forth in the Appendix to this part that was not previously provided or is not current.

*OMB Control Number 3038–NEW.*

*Estimated number of respondents: 20.*

*Annual responses by each*

*respondent: 1.*

*Estimated average hours per response: 50.*

*Aggregate annual reporting burden: 1,000.*

#### 2. New Collection 3038–NEW

Regulation 48.7 provides the information and documentation requirements that a new FBOT must submit to become registered with the Commission, including FBOT membership information, automated trading system, terms and conditions of contracts to be made available in the U.S., settlement and clearing, the regulatory regime governing the FBOT and clearing organization, the FBOT and clearing organization rules and enforcement thereof, and information sharing agreements.

*OMB Control Number 3038–NEW.*

*Estimated number of respondents: 7.*

*Annual responses by each*

*respondent: 1.*

*Estimated average hours per response: 1,000.*

*Aggregate annual reporting burden: 7,000.*

#### 3. New Collection 3038–NEW

Regulation 48.8(a)(8)(i) requires each registered FBOT that makes swap contracts available by direct access to report to the public, on a real-time basis, data relating to each swap transaction, including price and volume, as soon as technologically practicable after execution of the swap transactions.<sup>46</sup>

*OMB Control Number 3038–NEW.*

*Estimated number of respondents: 4.*

*Annual responses by each*

*respondent: 250.*

*Estimated average hours per response: 8.32.*

*Aggregate annual reporting burden: 8,320.*

#### 4. New Collection 3038–NEW

Regulation 48.8(a)(8)(ii) requires each registered FBOT that makes swap contracts available by direct access to ensure that all swap transaction data is timely reported to a swap data repository.<sup>47</sup>

*OMB Control Number 3038–NEW.*

*Estimated number of respondents: 4.*

*Annual responses by each*

*respondent: 250.*

*Estimated average hours per response: 8.32.*

*Aggregate annual reporting burden: 8,320.*

#### 5. New Collection 3038–NEW

Regulation 48.8(b)(1)(i)(A) and (B) requires each registered FBOT to provide the Commission with certain trading volume information and certain information regarding the FBOT members and other participants in the U.S. that have direct access to the FBOT’s trading system on at least a quarterly basis.

*OMB Control Number 3038–NEW.*

*Estimated number of respondents: 27.*

*Annual responses by each*

*respondent: 4.*

*Estimated average hours per response:*

*6.*

*Aggregate annual reporting burden: 648.*

#### 6. New Collection 3038–NEW

Regulation 48.8(b)(1)(ii)(A)–(F) requires each registered FBOT to

<sup>46</sup> Because the Commission has not previously regulated the swap market, the Commission was unable to collect data relevant to these estimates. Therefore, the Commission requests comment on these estimates.

<sup>47</sup> Because the Commission has not previously regulated the swap market, the Commission was unable to collect data relevant to these estimates. Therefore, the Commission requests comment on these estimates.

<sup>41</sup> 44 U.S.C. 3501.

<sup>42</sup> 44 U.S.C. 3502.

<sup>43</sup> 5 CFR 1320.3(c)(1).

<sup>44</sup> 44 U.S.C. 3506.

<sup>45</sup> 44 U.S.C. 3507.

provide the Commission on an ongoing basis with written notice of certain information, including any material changes to the registration information and documents previously submitted to the Commission; any matter known to the FBOT concerning the financial or operational viability of the FBOT or its clearing organization; and any known violation by the FBOT, its clearing organization, any member of the FBOT or its clearing organization or any other participant of the terms or conditions of registration.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 27.*

*Annual responses by each*

*respondent: 1.*

*Estimated average hours per response:*

2. *Aggregate annual reporting burden:*

54.

#### 7. New Collection 3038-NEW

Regulation 48.8(b)(1)(iii)(A)-(F) requires each registered FBOT to provide the Commission on an annual basis with certain information including a certification from the FBOT's regulatory authority that the FBOT retains its authorization in good standing as a regulated exchange under the licensing used in the FBOT's home country, a description of any significant disciplinary or enforcement actions that have been instituted by the FBOT in the prior year, and a written description of any material changes to the regulatory regime to which the FBOT is subject to that have not previously been disclosed to the Commission.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 27.*

*Annual responses by each*

*respondent: 1.*

*Estimated average hours per response:*

4. *Aggregate annual reporting burden:*

108.

#### 8. New Collection 3038-NEW

Regulation 48.8(c)(1)(ii)(C)(1)-(4) requires each registered FBOT to promptly notify the Commission, with regard to the linked contract, of any changes regarding information that the FBOT will make publicly available, enforcement of position limits, and position reductions required to prevent manipulation, excessive speculation as described in section 4a of the Act, price distortion, or disruption of delivery or the cash settlement process, and any other area of interest expressed by the Commission to the FBOT or its regulatory authority.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 1.*

*Annual responses by each*

*respondent: 2.*

*Estimated average hours per response:*

3. *Aggregate annual reporting burden:*

#### 9. New Collection 3038-NEW

Regulation 48.8(c)(1)(ii)(D) requires each registered FBOT with a linked contract to provide the Commission with large trader position information.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 1.*

*Annual responses by each*

*respondent: 250.*

*Estimated average hours per response:*

2. *Aggregate annual reporting burden:*

500.

#### 10. New Collection 3038-NEW

Regulation 48.8(c)(1)(ii)(E) requires each registered FBOT with a linked contract to provide the Commission with such information as necessary to publish reports on aggregate trader positions.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 1.*

*Annual responses by each*

*respondent: 250.*

*Estimated average hours per response:*

2. *Aggregate annual reporting burden:*

500.

#### 11. New Collection 3038-NEW

Regulation 48.8(c)(2)(i) requires each registered FBOT with a linked contract to provide the Commission with a quarterly report of any member that had positions in a linked contract above the FBOT position limit, whether a hedge exemption was granted, and if not, whether a disciplinary action was taken.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 1.*

*Annual responses by each*

*respondent: 4.*

*Estimated average hours per response:*

3. *Aggregate annual reporting burden:*

12.

#### 12. New Collection 3038-NEW

Regulation 48.8(c)(2)(ii) requires each registered FBOT with a linked contract to provide the Commission with trade execution and audit trail data on a trade-date plus one basis.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 1.*

*Annual responses by each*

*respondent: 250.*

*Estimated average hours per response:*

3. *Aggregate annual reporting burden:*

750.

#### 13. New Collection 3038-NEW

Regulation 48.8(c)(2)(iv) requires each registered FBOT with a linked contract

to provide the Commission with a copy of all rules, rule amendments, and other notices published by the FBOT with respect to all linked contracts.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 1.*

*Annual responses by each*

*respondent: 20.*

*Estimated average hours per response:*

2. *Aggregate annual reporting burden:*

40.

#### 14. New Collection 3038-NEW

Regulation 48.8(c)(2)(v) requires each registered FBOT with a linked contract to provide the Commission with a copy of all disciplinary notices involving the FBOT's linked contract upon closure of the action.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 1.*

*Annual responses by each*

*respondent: 2.*

*Estimated average hours per response:*

2. *Aggregate annual reporting burden:*

4.

#### 15. New Collection 3038-NEW

Regulation 48.9 requires each registered FBOT, upon request by the Commission, to file a written demonstration that the FBOT is in compliance with the conditions for registration.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 26.*

*Annual responses by each*

*respondent: .25.*

*Estimated average hours per response:*

8. *Aggregate annual reporting burden:*

52.

#### 16. New Collection 3038-NEW

Regulation 48.10 requires each registered FBOT that wishes to list additional futures and options contracts for trading by direct access to request in writing and receive approval from the Commission prior to offering the contracts from within the U.S.

*OMB Control Number 3038-NEW.*

*Estimated number of respondents: 27.*

*Annual responses by each*

*respondent: 1.*

*Estimated average hours per response:*

4. *Aggregate annual reporting burden:*

108.

The Commission invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the

functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by e-mail at [OIRASubmissions@omb.eop.gov](mailto:OIRASubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting [RegInfo.gov](http://RegInfo.gov). OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release in the **Federal Register**. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

#### B. Cost Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing a new regulation or order under the Act.<sup>48</sup> By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new rule or to determine whether the benefits of the adopted rule outweigh its costs. Rather, Section 15(a) requires the Commission to "consider the costs and benefits" of a proposed rule. Section 15(a) further specifies the costs and benefits of proposed rules shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. In

conducting its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the rule.<sup>49</sup>

The proposed regulations implement the Dodd-Frank Act by establishing a registration requirement for all FBOTs that wish to provide their members or other participants located in the U.S. with direct access to the FBOT's electronic trading and order matching system. Pursuant to proposed Commission Regulation 48.5, FBOTs wishing to provide direct access to their trading systems to members and other participants located in the U.S. would be required to file an application for registration with the Commission that contains all of the information and documentation set forth in the Appendix to the Part 48 regulations and any additional information and documentation required to successfully demonstrate that the FBOT satisfies the registration requirements contained in Rule 48.7.

Regarding FBOTs that currently do not have no-action relief from Commission staff, the Commission understands that costs associated with the submission of an application for registration could be considerable. However, the cost of applying for no-action relief under existing procedures is substantial. FBOTs requesting no-action relief currently are required to provide much of the information that would be required under the proposed regulation. For example, FBOTs requesting no-action relief under existing procedures have been required to provide the Commission with information including the FBOT's trading system, terms and conditions of contracts made available in the U.S., and the regulatory regime governing the FBOT in its home country. This same information would be required as part of the registration process under the proposed regulations. The additional cost of applying for registration rather than applying for no-action relief is significant, but not overly large.

FBOTs that currently have no-action relief from the Commission would be required to register with the Commission and only provide a limited application pursuant to the proposed

regulations. This should have the effect of limiting the costs to these FBOTs since they would be required only to provide information that was not previously provided or is not current.

The proposed regulations would authorize the Commission to impose additional conditions on FBOTs that desire to make a linked contract available by direct access to members of the FBOT or other participants located in the U.S. These conditions would be required as part of the FBOT registration process, and include among other things, the imposition of speculative position limits and the submission of audit trail data and large trader position information to the Commission for all linked contracts. Any additional costs incurred by an FBOT with existing no-action relief would be offset in part due to the substantial overlap between the conditions already promulgated by the Commission as a general policy applicable to FBOTs with linked contracts and the conditions being proposed by the Commission under regulation 48.8.<sup>50</sup>

The proposed FBOT registration regulations offer significant benefits over the no-action process through which requests to provide direct access to FBOT trading systems were handled in the past. While the no-action process has served a useful purpose, the no-action process is designed for discrete, unique factual circumstances where regulations do not address the issue presented. Where the same type of relief is granted on a regular and recurring basis, as it has been with respect to direct access to FBOT trading systems, the Commission believes that it is more appropriate to provide the relevant relief through a generally applicable rulemaking. The proposed regulations would provide a more standardized and efficient application process, enhance the visibility of the process to both applicants and the public, and ensure fair and consistent treatment to applicants. Moreover, the Order of Registration issued by the Commission pursuant to this proposal would provide greater legal certainty to FBOTs operating pursuant to those Orders than no-action letters, which are issued by the staff and not binding on the Commission.

In addition, there is substantial value in the information and documentation that the Commission will be able to obtain, and the obligations that may be imposed pursuant to the conditions applicable to FBOT registration. For example, an FBOT that lists for trading a contract which settles on the price of

<sup>49</sup> *E.g., Fishermen's Dock Co-op., Inc v. Brown*, 75 F3d 164 (4th Cir. 1996); *Center for Auto Safety v. Peck*, 751 F.2d 1336 (D.C. Cir. 1985) (agency has discretion to weigh factors in undertaking cost-benefit analyses).

<sup>50</sup> See CFTC Letter No. 08-09, June 17, 2008.

<sup>48</sup> 7 U.S.C. 19(a).

a contract traded on a Commission-regulated exchange raises serious concerns for the Commission. The position limit requirement and the submission of large trader position information and audit trail data to the Commission, pursuant to the conditions placed upon an FBOT that offers a linked contract for trading via direct access to its members or other participants located in the U.S., will enhance the Commission's ability to carry out its market surveillance responsibilities. The proposed regulations and related conditions also will ensure that transactions executed on an FBOT do not adversely affect U.S. cash and futures markets, market participants, and customers, as well as the consumers affected by those transactions. Finally, the proposed regulations are designed to ensure that the U.S. commodity markets operate fairly and efficiently and are free from fraud, manipulation and other market abuses.

After considering the costs and benefits, the Commission has determined to propose the regulations discussed above. The Commission invites public comment on its evaluation of the costs and benefits of the proposed regulations. Specifically, commenters are invited to submit data quantifying the costs and benefits of the proposed regulations with their comment letters.

### C. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")<sup>51</sup> requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>52</sup> The proposed rules detailed in this release would only affect FBOTs. The rules would replace the policy of issuing staff no-action letters to permit FBOTs to provide for direct access, defined in the Dodd-Frank Act to refer to an explicit grant of authority by an FBOT to an identified member or other participant to enter trades directly into the FBOT's trade matching system.

As a threshold matter, because the proposed application requirements and standards for FBOT registration under the new rules generally are consistent with the application requirements and review standards that have guided the Commission's staff in issuing FBOT no-action relief letters, the Commission believes that these rules will not have a significant economic effect on any

substantial number of FBOTs, whether they are large or small entities. Moreover, the Commission does not believe that FBOTs would be small entities. For both reasons, the Commission believes that a regulatory flexibility analysis is not required for this rulemaking.

The Commission has not previously addressed the question whether FBOTs are, in fact, small entities for purposes of the RFA since FBOTs are a new category of registrant created by the Dodd-Frank Act. However, the term "foreign board of trade" has been used in the CEA and defined in the Commission Regulations to be a "board of trade, exchange or market located outside the U.S."<sup>53</sup> The term "board of trade," in turn, is defined in the CEA as "any organized exchange or trading facility."<sup>54</sup> An organized exchange includes designated or registered exchanges, such as DCMs.<sup>55</sup>

The Commission has previously determined that DCMs are not "small entities" for purposes of the RFA.<sup>56</sup> Key to the Commission's determination was that DCMs perform a central role in the regulatory scheme for futures trading, requiring the DCM to employ significant resources, including personnel, in the performance of this statutory role. The Commission designates a contract market only when it meets specific criteria including expenditure of sufficient resources to establish and maintain adequate self-regulatory programs.

Likewise, the Commission will register an FBOT to provide direct access only after it has met similar criteria. Critically, an FBOT will only be registered by demonstrating that it possesses the attributes of an established, organized exchange; adheres to appropriate rules prohibiting abusive trading practices; and enforces appropriate rules to maintain market and financial integrity. Because FBOTs and DCMs are functionally equivalent entities in these regards, the Commission is determining that FBOTs, like DCMs, are not small entities for purposes of the RFA. In light of the

<sup>53</sup> See Commission Regulation 1.33(ss). Additionally, the term "board of trade, exchange or market located outside the U.S." is used interchangeably in the CEA with the term "foreign board of trade." For example, Section 4(a) carves out "board of trade, exchange or market located outside the U.S." from the requirement that futures contracts in the U.S. must be traded on a DCM or DTEF; new Section 4(b)(2)(C) provides that the Commission may not, except as provided in section 4(b)(1) and (2), directly regulate a "foreign board of trade."

<sup>54</sup> CEA § 1a(2).

<sup>55</sup> CEA § 1a(27).

<sup>56</sup> 47 FR 18618, 18619 (April 30, 1982).

foregoing, the Chairman on behalf of the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed rules will not have a significant impact on a substantial number of small entities.

### List of Subjects in 17 CFR Part 48

Foreign boards of trade, Commodity futures, Options, Swaps, Direct access, Linked contract, Registration, Existing no-action relief, Conditions of registration.

In consideration of the foregoing, and pursuant to the authority contained in the Act, and, in particular, sections 3, 4 and 8a of the Act, the Commission hereby proposes to amend Chapter I of Title 17 of the Code of Federal Regulations by adding a new part 48 to read as follows:

### PART 48—REGISTRATION OF FOREIGN BOARDS OF TRADE

Sec.

48.1 Scope.

48.2 Definitions.

48.3 Registration required.

48.4 Registration eligibility.

48.5 Registration procedures.

48.6 Foreign boards of trade providing direct access pursuant to existing no-action relief.

48.7 Requirements for registration.

48.8 Conditions of registration.

48.9 Revocation of registration.

48.10 Additional contracts.

Appendix—Part 48—Contents of Application

**Authority:** 7 U.S.C. 5, 6 and 12a, unless otherwise noted.

#### § 48.1 Scope.

The provisions of this part apply to any foreign board of trade that is registered or is applying to become registered with the Commission in order to provide its identified members or other participants located in the United States with direct access to its electronic trading and order matching system.

#### § 48.2 Definitions.

(a) *Foreign board of trade.* For purposes of this part, foreign board of trade means any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated, where foreign agreements, contracts or transactions are entered into.

(b) *Foreign board of trade eligible to be registered.* A foreign board of trade eligible to be registered means a foreign board of trade that satisfies the requirements for registration specified in section 48.7 of this part and

(1) Possesses the attributes of an established, organized exchange,

<sup>51</sup> 5 U.S.C. 601 *et seq.*

<sup>52</sup> 5 U.S.C. 601 *et seq.*

(2) Adheres to appropriate rules prohibiting abusive trading practices,

(3) Enforces appropriate rules to maintain market and financial integrity,

(4) Has been authorized by a regulatory process that examines customer and market protections, and

(5) Is subject to continued oversight by a regulator that has power to intervene in the market and the authority to share information with the Commission.

(c) *Direct access.* For purposes of this part, direct access means an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the foreign board of trade.

(d) *Linked contract.* For purposes of this part, a linked contract is a futures or option or swaps contract made available for direct access from the United States by a registered foreign board of trade that settles against any price (including the daily or final settlement price) of one or more contracts listed for trading on a registered entity as defined in section 1a(40) of the Act.

(e) *Communications.* For purposes of this part, communications is defined to include any summons, complaint, order, subpoena, request for information, notice, or any other written or electronic documentation or correspondence issued by or on behalf of the Commission.

(f) *Material change.* For purposes of this part, material changes in the information provided to the Commission in support of the registration application would include, without limitation, a modification of any of the following: The membership criteria of the foreign board of trade or its clearing organization; the location of the management, personnel or operations of the foreign board of trade or its clearing organization (particularly changes that may suggest an increased nexus between the foreign board of trade's activities and the United States); the basic structure, nature, or operation of the trading system or its clearing organization; the regulatory or self-regulatory regime applicable to the foreign board of trade, its clearing organization, and their respective members and other participants (including, without limitation, the rules applicable to or oversight thereof), any change in the authorization, licensure or registration of the foreign board of trade or clearing organization, and any information that may impact the ability of the clearing organization to satisfy the current Recommendations for Central

Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions as updated, revised or otherwise amended, or successive standards, principles and guidance for central counterparties or financial market infrastructures adopted jointly by the International Organization of Securities Commissions and the Committee on Payment and Settlement Systems.

(g) *Clearing organization.* For purposes of this part, clearing organization means the foreign board of trade, affiliate of the foreign board of trade or any third party clearing house, clearing association, clearing corporation or similar entity, facility or organization that, with respect to any agreement, contract or transaction executed on or through the foreign board of trade, would be:

(1) Defined as a derivatives clearing organization under section 1a(9) of the Act;

(2) Defined as a central counterparty by the Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, as updated, revised or otherwise amended, or successive standards, principles and guidance for central counterparties adopted or financial market infrastructures adopted jointly by the Committee on Payment and Settlement Systems or the International Organization of Securities Commissions; or

(3) Otherwise interposes itself between the counterparties to the agreements, contracts or transactions (or subset thereof) executed on or through the foreign board of trade, becoming the buyer to every seller and the seller to every buyer.

(h) *Existing no-action relief.* For purposes of this part, existing no-action relief means a no-action letter issued by a division of the Commission to the foreign board of trade in which the division informs the foreign board of trade that it will not recommend that the Commission institute enforcement action against the foreign board of trade if the foreign board of trade does not seek designation as either a designated contract market pursuant to section 5 of the Act or a derivatives transaction execution facility pursuant to section 5a of the Act in connection with the provision of direct access to the foreign board of trade's trade matching system

by its members and other participants located in the United States.

(i) *Swaps.* For purposes of this part, swaps is defined to mean swaps as defined in section 1a(47) of the Act, and any Commission regulation adopted thereunder, and any transaction or contract that is regulated as a swap under the regulatory regime to which the FBOT is subject.

(j) *Affiliate.* For purposes of this part, an affiliate of a registered foreign board of trade member or other participant shall mean any person, as that term is defined in section 1a(38) of the CEA, that:

(1) Owns 50% or more of the member or other participant;

(2) Is owned 50% or more by the member or other participant; or

(3) Is owned 50% or more by a third person that also owns 50% or more of the member or other participant.

(k) *Member or other participant.* For purposes of this part, the terms member or other participant of the registered foreign board of trade shall include any affiliate of any registered foreign board of trade's member or other participant that has been granted direct access to the trading system by the registered foreign board of trade.

#### § 48.3 Registration required.

(a) Except as specified in this part, it shall be unlawful for a foreign board of trade to permit direct access to its electronic trading and order matching system from within the United States unless and until the Commission has issued a valid and current Order of Registration to the foreign board of trade pursuant to the provisions of this part.

(b) It shall be unlawful for a board of trade to make false or misleading statements in any application for registration or in connection with any application for registration under this part.

#### § 48.4 Registration eligibility.

(a) Only foreign boards of trade eligible to be registered, as defined in § 48.2(b) of this part, are eligible for registration with the Commission pursuant to this part.

(b) An applicant may request foreign board of trade registration in order to permit direct access from within the United States to its members and other participants that:

(1) Trade in the United States for their proprietary accounts;

(2) Are registered with the Commission as futures commission merchants and submit orders for United States customers to the trading system for execution; or

(3) Are registered with the Commission as a commodity pool

operator or commodity trading advisor, or are exempt from such registration pursuant to section 4.13 or 4.14 of this chapter, and that submit orders for execution on behalf of United States pools they operate or accounts of United States customers for which they have discretionary authority, respectively, provided that a futures commission merchant or a firm exempt from such registration pursuant to Commission Rule 30.10 acts as clearing firm and guarantees, without limitation, all such trades of the commodity pool operator or commodity trading advisor effected through submission of orders to the trading system.

#### **§ 48.5 Registration procedures.**

(a) A foreign board of trade seeking registration with the Commission pursuant to this part must electronically file an application for registration, labeled as an Application for Foreign Board of Trade Registration pursuant to part 48 of the Commission's Regulations, with the Secretary of the Commission, at [FBOTRegistration@cftc.gov](mailto:FBOTRegistration@cftc.gov).

(b) An application for registration must be signed by the foreign board of trade's chief executive officer (or functional equivalent) and must include the information and documentation set forth in the Appendix to this part 48 and any information and documentation necessary, in the discretion of the Commission, to effectively demonstrate that the foreign board of trade and its clearing organization satisfy the registration requirements set forth in this part. The application must include a certification by the chief executive officer (or functional equivalent) of the foreign board of trade and the clearing organization that representations made in connection with, or relevant to, the application and the information and documentation provided in support thereof are true, correct and complete.

(c) A foreign board of trade registration applicant must identify with particularity any information in the application that will be subject to a request for confidential treatment and must provide support for any request for confidential treatment pursuant to the procedures set forth in section 145.9 of this chapter.

(d) The Commission will review the application for foreign board of trade registration and, if the Commission finds the application to be complete, may approve or deny the application. In its review, the Commission will consider, among other things:

(1) Whether the foreign board of trade is eligible to be registered as defined in section 48.2(b) of this part;

(2) Whether the foreign board of trade and its clearing organization are subject to comprehensive supervision and regulation by the appropriate governmental authorities in their home country that is comparable to the comprehensive supervision and regulation to which designated contract markets and derivatives clearing organizations are respectively subject in the United States;

(3) Any previous Commission findings that the foreign board of trade and its clearing organization are subject to comprehensive supervision and regulation by the appropriate governmental authorities in the foreign board of trade's home country that is comparable to the comprehensive supervision and regulation to which designated contract markets and derivatives clearing organizations are subject in the United States; and

(4) Whether the foreign board of trade and its clearing organization have adequately demonstrated that they meet the requirements for registration specified in section 48.7 of this part.

(e) If the Commission approves the application, the Commission will register the foreign board of trade by issuing an Order of Registration. If the Commission does not approve the application, the foreign board of trade will not be registered and may not provide direct access to its electronic trading and order matching systems from within the United States, and the Commission will issue a Notice of Action specifying that the application was not approved and setting forth the reasons therefor. The Commission may, after appropriate notice and an opportunity for a hearing, amend, suspend, terminate or otherwise restrict the terms of the Order of Registration.

(f) A foreign board of trade whose application is not approved may reapply for registration 360 days after the issuance of the Notice of Action if the foreign board of trade has addressed any deficiencies in its original application or facts and circumstances relevant to the Commission's review of the application have changed.

#### **§ 48.6 Foreign boards of trade providing direct access pursuant to existing no-action relief.**

(a) A foreign board of trade operating pursuant to existing no-action relief as of the effective date of this Part 48 must register with the Commission pursuant to this Part 48 in order to continue to provide direct access to its electronic trading and order matching system from the United States.

(b) Such foreign board of trade's application for registration must include

all of the information and documentation set forth in the Appendix to this part 48. To the extent that the foreign board of trade intends to rely upon previously submitted information or documentation to demonstrate that it satisfies the requirements of the Appendix or the registration requirements set forth in section 48.7 of this part, the foreign board of trade must resubmit the information or documentation, identify the specific requirements for registration set forth in section 48.7 of this part that are satisfied by the resubmitted information, and certify that the information remains current and true (limited application).

(c) Foreign boards of trade operating pursuant to existing no-action relief must submit a complete limited application for registration within 120 days of the effective date of this regulation and the no-action relief will, upon notice to the foreign board of trade, be revoked if a complete limited application is not received by the Commission within that 120 days. The foreign board of trade may continue to provide direct access from the United States pursuant to the no-action relief during the 120-day period, during the period in which the complete limited application is being reviewed by the Commission, and until the Commission notifies the foreign board of trade that the application has been approved or not approved or that the existing no-action relief has otherwise been withdrawn.

#### **§ 48.7 Requirements for registration.**

An applicant for registration under this part must include all of the information and documentation set forth in the Appendix to this Part 48 and any other information and documentation necessary or appropriate to determine that the following requirements for registration are met. The Commission, in its discretion, may impose additional registration requirements and request additional information and documentation in connection with an application for registration. An applicant for registration must provide promptly any additional information or documentation requested by the Commission in connection with the application.

(a) Foreign Board of Trade and Clearing Membership. An applicant for registration must demonstrate that:

(1) The members and other participants of the foreign board of trade and its clearing organization are fit and proper and meet appropriate financial and professional standards,



(2) The foreign board of trade and its clearing organization have and enforce provisions to minimize and resolve conflicts of interest, and

(3) The foreign board of trade and its clearing organization have and enforce rules prohibiting the disclosure of material non-public information obtained as a result of a member's or other participant's performance of duties as a member of their respective governing boards and significant committees.

(b) The Automated Trading System. An applicant for registration must demonstrate that:

(1) The trading system complies with Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions,

(2) The trade matching algorithm matches trades fairly and timely,

(3) The audit trail captures all relevant data, including changes to orders, and audit trail data is securely maintained and available for an adequate time period,

(4) Trade data is made available to users and the public,

(5) The trading system has demonstrated reliability,

(6) Access to the trading system is secure and protected,

(7) There are adequate provisions for emergency operations and disaster recovery,

(8) Trading data is backed up to prevent loss of data, and

(9) Only those futures and option contracts or swaps that have been identified to the Commission as part of the application or permitted to be made available for trading by direct access pursuant to the procedures set forth in section 48.10 of this part are made available for trading on connections in the United States.

(c) Terms and Conditions of Contracts To Be Made Available in the United States.

(1) Contracts that may be made available by direct access must meet the following standards:

(i) Contracts must be futures, option or swaps contracts—only such contracts as would be eligible to be traded on a designated contract market are eligible to be traded by direct access on a registered foreign board of trade,

(ii) Contracts must be cleared,

(iii) Contracts must not be prohibited from being traded by United States persons, and

(iv) Contracts must not be readily susceptible to manipulation.

(2) Contracts that have the following characteristics must be identified:

(i) Contracts that are linked to a contract listed for trading on a United States registered entity, and

(ii) Contracts that share any other commonality with a contract listed for trading on a United States registered entity, for example, if both the foreign board of trade's and the United States registered entity's contract settle to the price of the same third party-constructed index.

(d) Settlement and Clearing. An applicant for registration must demonstrate that:

(1) The clearing organization complies with the current Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions as updated, revised or otherwise amended, or successive standards, principles and guidance for central counterparties and financial market infrastructures adopted jointly by the International Organization of Securities Commissions and the Committee on Payment and Settlement Systems or is registered with the Commission as a derivatives clearing organization, and

(2) The clearing organization is in good regulatory standing in its home country jurisdiction.

(e) The Regulatory Regime Governing the Foreign Board of Trade and the Clearing Organization. An applicant for registration must demonstrate that:

(1) The regulatory authorities governing the activities of the foreign board of trade and clearing organization provide comprehensive supervision and regulation of the foreign board of trade and the clearing organization that is comparable to the comprehensive supervision and regulation provided by the Commission to designated contract markets and derivatives clearing organizations, that is, the regulatory authorities support and enforce regulatory objectives in the oversight of the foreign board of trade and clearing organization that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight of designated contract markets and derivatives clearing organizations,

(2) The regulatory authorities governing the activities of the foreign board of trade, the clearing organization and their respective members and other participants engage in ongoing regulatory supervision and oversight of the foreign board of trade and its trading system, the clearing organization and its clearing system, the members, intermediaries and other participants of

the foreign board of trade and clearing organization, with respect to, among other things, market integrity, customer protection, clearing and settlement and the enforcement of exchange and clearing organization rules,

(3) The regulatory authorities governing the foreign board of trade and the clearing organization have the power to share information directly with the Commission, upon request, including information necessary to evaluate the continued eligibility of the foreign board of trade for registration and to audit for compliance with the terms and conditions of the registration.

(4) The regulatory authorities governing the foreign board of trade and the clearing organization have the power to intervene in the market.

(f) The Rules of the Foreign Board of Trade and Clearing Organization and Enforcement Thereof. An applicant for registration must demonstrate that:

(1) The foreign board of trade and its clearing organization have implemented and enforce rules to ensure compliance with the requirements of registration contained in this part,

(2) The foreign board of trade and its clearing organization have the capacity to detect, investigate, and sanction persons who violate their respective rules,

(3) The foreign board of trade and the clearing organization (or their respective regulatory authorities) have implemented and enforce disciplinary procedures that empower them to recommend and prosecute disciplinary actions for suspected rule violations, impose adequate sanctions for such violations, and provide adequate protections to charged parties pursuant to fair and clear standards,

(4) The foreign board of trade and its clearing organization are authorized by rule or by contractual agreement to obtain, from members and other participants, any information and cooperation necessary to conduct investigations, to effectively enforce their respective rules, and to ensure compliance with the conditions of registration,

(5) The foreign board of trade and its clearing organization have sufficient compliance staff and resources, including by delegation and/or outsourcing to a third party, to fulfill their respective regulatory responsibilities, including appropriate trade practice surveillance, real time market monitoring, market surveillance, financial surveillance, protection of customer funds, enforcement of clearing and settlement provisions and other compliance and regulatory responsibilities,

(6) The foreign board of trade has implemented and enforces rules with respect to access to the trading system and the means by which the connection is accomplished,

(7) The foreign board of trade's audit trail captures and retains sufficient order and trade-related data to allow its compliance staff to detect trading and market abuses and to reconstruct all transactions within a reasonable period of time,

(8) The foreign board of trade has implemented and enforces rules relating to prohibited trading practices (for example wash sales or trading ahead),

(9) The foreign board of trade has the capacity to detect and deter, and has implemented and enforces rules relating to, market manipulation, attempted manipulation, price distortion, and other disruptions of the market, and

(10) The foreign board of trade has and enforces rules and procedures that ensure a competitive, open and efficient market and mechanism for executing transactions.

(g) Information Sharing. An applicant for registration must demonstrate that:

(1) The regulatory authorities governing the activities of and providing supervision and oversight of the foreign board of trade and the clearing organization are signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding; if the regulatory authorities are not signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding, they must inform the Commission of the reasons why the document has not been signed, supply any additional information requested by the Commission, and ensure alternative information sharing arrangements that are satisfactory to the Commission are in place.

(2) The regulatory authorities governing the activities of and providing supervision and oversight of the foreign board of trade and the clearing organization are signatories to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations or otherwise commits to share the types of information contemplated by the International Information Sharing Memorandum of Understanding and Agreement with the Commission,

(3) The foreign board of trade has executed, or commits to execute, the International Information Sharing Memorandum of Understanding and Agreement, and

(4) Pursuant to the conditions described in section 48.8(a)(6) of this part, the foreign board of trade and

clearing organization must provide directly to the Commission information necessary to evaluate the continued eligibility of the foreign board of trade clearing organization, or their respective members or other participants for registration, to audit for and enforce compliance with the specified conditions of the registration, or to enable the Commission to carry out its duties under the Act and Commission regulations.

#### § 48.8 Conditions of registration.

Immediately upon registration, and on an ongoing basis thereafter, the foreign board of trade and the clearing organization shall comply with the conditions of registration set forth in this section and any additional conditions that the Commission may impose, in its discretion, and after appropriate notice and opportunity for a hearing. Such conditions could include, but are not limited to, the conditions set forth in section 48.8(c) of this part and, with respect to the listing of swaps contracts, any additional conditions that the Commission deems necessary. Continued registration is expressly conditioned upon satisfaction of these conditions.

(a) Specified Conditions for Maintaining Registration.

(1) Registration Requirements: The foreign board of trade and its clearing organization shall continue to satisfy all of the requirements for registration set forth in section 48.7 and the conditions for maintaining registration set forth herein.

(2) Regulatory Regime:

(i) The foreign board of trade will continue to satisfy the criteria for a regulated market pursuant to the regulatory regime described in its application and will continue to be subject to oversight by the regulatory authorities described in its application with respect to transactions effected through the foreign board of trade's trading system.

(ii) The clearing organization will continue to satisfy the criteria for a regulated clearing organization pursuant to the regulatory regime described in the application for registration; the clearing organization and its participants will continue to be subject to comprehensive supervision, regulation and oversight by the regulatory authorities as described in the application and that is comparable to the comprehensive supervision, regulation to which such entities would be subject in the United States; and the clearing organization shall continue to be in good standing with the relevant regulatory authority.

(iii) The laws, systems, rules, and compliance mechanisms of the regulatory regime applicable to the foreign board of trade will continue to require the foreign board of trade to maintain fair and orderly markets; prohibit fraud, abuse, and market manipulation; and provide that such requirements are subject to the oversight of appropriate regulatory authorities.

(3) Satisfaction of Comparable International Standards:

(i) The foreign board of trade will continue to adhere to the Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions, as updated, revised, or otherwise amended, to the extent such principles do not contravene United States law.

(ii) The clearing organization will continue to: (A) Be registered as a derivatives clearing organization and be in compliance with the laws and regulations related thereto or (B) satisfy the Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, as updated, revised or otherwise amended, or successive standards, principles and guidance for central counterparties or financial market infrastructures adopted jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions.

(4) Restrictions on Direct Access:

(i) Only the foreign board of trade's identified members or other participants will have direct access to the foreign board of trade's trading system from the United States and the foreign board of trade will not provide, and will take reasonable steps to prevent, third parties from providing direct access to the foreign board of trade to persons other than the identified members or other participants.

(ii) All orders that are transmitted through the foreign board of trade's trading system by a foreign board of trade identified member or other participant that is operating pursuant to the foreign board of trade's registration will be solely for the member's or trading participant's own account unless such member or other participant is registered with the Commission as a futures commission merchant or such member or other participant is registered with the Commission as a commodity pool operator or commodity trading advisor, or is exempt from such

registration pursuant to section 4.13 or 4.14 of this chapter, provided that a futures commission merchant or a firm exempt from such registration pursuant to Commission Rule 30.10 acts as clearing firm and guarantees, without limitation, all such trades of the commodity pool operator or commodity trading advisor effected through submission of orders on the trading system.

(5) Submission to Commission Jurisdiction:

(i) The foreign board of trade will require that each current and prospective member or other participant that is granted direct access to the foreign board of trade's trading system pursuant to the foreign board of trade's registration and that is not registered with the Commission as a futures commission merchant, a commodity trading advisor or a commodity pool operator file with the foreign board of trade a written representation, executed by a person with the authority to bind the member or other participant, stating that as long as the member or other participant grants direct access to the foreign board of trade's trading system pursuant to the foreign board of trade registration, the member or other participant agrees to and submits to the jurisdiction of the Commission with respect to activities conducted pursuant to the registration.

(ii) The foreign board of trade and its clearing organization will file with the Commission a valid and binding appointment of an agent for service of process in the United States pursuant to which the agent is authorized to accept delivery and service of communications issued by or on behalf of the Commission.

(iii) The foreign board of trade will require that each current and prospective member or other participant of the foreign board of trade that is granted direct access to the foreign board of trade's trading system pursuant to the foreign board of trade's registration with the Commission and that is not registered with the Commission as a futures commission merchant, a commodity trading advisor or a commodity pool operator file with the foreign board of trade a valid and binding appointment of a United States agent for service of process in the United States pursuant to which the agent is authorized to accept delivery and service of communications issued by or on behalf of the Commission.

(iv) The foreign board of trade, clearing organization, and each current and prospective member or other participant of either that is granted direct access to the foreign board of

trade's trading system pursuant to the foreign board of trade's registration and that is not registered with the Commission as a futures commission merchant, a commodity trading advisor, or a commodity pool operator will maintain with the foreign board of trade written representations, executed by persons with the authority to bind the entity making them, stating that as long as the foreign board of trade is registered under this regulation, the foreign board of trade, the clearing organization or member of either or other participant granted direct access pursuant to this regulation will provide, upon the request of the Commission, the United States Department of Justice and, if appropriate, the National Futures Association, prompt access to the entity's, member's, or other participant's original books and records or, at the election of the requesting agency (the Commission, the United States Department of Justice, or the National Futures Association), a copy of specified information containing such books and records, as well as access to the premises where the trading system is available in the United States.

(v) The foreign board of trade will maintain all representations required pursuant to this regulation as part of its books and records and will make them available to the Commission upon request.

(6) Information Sharing:

(i) Information-sharing arrangements satisfactory to the Commission, including but not limited to those set forth in section 48.7(g) of the registration requirements, are in effect between the Commission and the regulatory authorities that supervise both the foreign board of trade and the clearing organization.

(ii) The Commission is, in fact, able to obtain sufficient information regarding the foreign board of trade, the clearing organization, their respective members and participants and the activities related to the foreign board of trade's registration.

(iii) The foreign board of trade, and its clearing organization, as applicable, will provide directly to the Commission any information necessary to evaluate the continued eligibility of the foreign board of trade or its members or other participants for registration, the capability and determination to enforce compliance with these specified conditions of the registration or, in the event that the Commission has been unable to satisfactorily obtain necessary information from the regulatory authority, to enable the Commission to carry out its duties under the Act and Commission regulations and to provide

adequate protection to the public or United States registered entities.

(iv) In the event that the foreign board of trade and the clearing organization are separate entities, the foreign board of trade will require the clearing organization to enter into a written agreement in which the clearing organization is contractually obligated to promptly provide any and all information and documentation that may be required of the clearing organization under this regulation and such agreement shall be made available to the Commission, upon request.

(7) Monitoring for Compliance:

The foreign board of trade and the clearing organization will employ reasonable procedures for monitoring and enforcing compliance with the specified conditions of its registration.

(8) Conditions Applicable to Swaps Trading:

(i) If the foreign board of trade makes swaps contracts available by direct access, the foreign board of trade must report to the public, on a real-time basis, data relating to each swap transaction, including price and volume, as soon as technologically practicable after execution of the swap transaction.

(ii) If the foreign board of trade makes swaps contracts available by direct access, the foreign board of trade must ensure that all swap transaction data is timely reported to a swap data repository that is either A. registered with the Commission, or B. has an information sharing arrangement with, the Commission.

(iii) If the foreign board of trade makes swaps contracts available by direct access, the foreign board of trade must agree to coordinate with the Commission with respect to arrangements established to address cross market oversight issues, including surveillance, emergency actions and the monitoring of trading.

(b) Other Continuing Obligations.

(1) Foreign boards of trade registered under this part and their clearing organizations must also comply with the following regulatory obligations on an ongoing basis:

(i) The foreign board of trade will maintain the following updated information and submit such information to the Commission on at least a quarterly basis, not later than 30 days following the end of the quarter, and at any time promptly upon the request of a Commission representative, computed based upon separating buy sides and sell sides:

(A) For each contract available to be traded through the foreign board of trade's trading system,

(1) The total trade volume originating from electronic trading devices providing direct access to the trading system in the United States,

(2) The total trade volume for such products traded through the trading system worldwide, and

(3) The total trade volume for such products traded on the foreign board of trade generally; and

(B) A listing of the names, National Futures Association identification numbers (if applicable), and main business addresses in the United States of all members and other participants that have direct access to the trading system in the United States.

(i) The foreign board of trade will promptly provide to the Commission written notice of the following:

(A) Any material change in the information provided in the registration application.

(B) Any material change in the foreign board of trade's or clearing organization's rules or the laws, rules, and regulations in the home country jurisdictions of the foreign board of trade or clearing organization relevant to futures, options and swaps contracts.

(C) Any matter known to the foreign board of trade, the clearing organization or its representatives that, in the judgment of the foreign board of trade or clearing organization judgment, may affect the financial or operational viability of the foreign board of trade or its clearing organization with respect to contracts traded by direct access, including, but not limited to, any significant system failure or interruption.

(D) Any default, insolvency, or bankruptcy of any foreign board of trade member or other participant that is or should be known to the foreign board of trade or its representatives or the clearing organization or its representatives that may have a material, adverse impact upon the condition of the foreign board of trade as it relates to trading by direct access, its clearing organization or upon any United States customer or firm or any default, insolvency or bankruptcy of any member of the foreign board of trade's clearing organization.

(E) Any violation of the specified conditions of the foreign board of trade's registration or failure to satisfy the requirements for registration under this part that is known or should be known by the foreign board of trade, the clearing organization or any of their respective members or participants.

(F) Any disciplinary action by the foreign board of trade or its clearing organization with respect to any contract available to be traded by direct

access taken against any of their respective members or participants that involves any market manipulation, fraud, deceit, or conversion or that results in suspension or expulsion.

(iii) The foreign board of trade and the clearing organization, as applicable, must provide the following to the Commission on an annual basis.

(A) A certification from the foreign board of trade's regulatory authority confirming that the foreign board of trade retains its authorization, licensure or registration, as applicable, as a regulated market and/or exchange under the authorization, licensing or other registration methodology used by the foreign board of trade's regulatory authority and that the foreign board of trade is in continued good standing.

(B) A certification from the clearing organization's regulatory authority confirming that the clearing organization retains its authorization, licensure or registration, as applicable, as a clearing organization under the authorization, licensing or other registration methodology used by the clearing organization's regulatory authority and is in continued good standing.

(C) If the clearing organization is not a derivatives clearing organization, a recertification of the clearing organization's compliance with the Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, as updated, revised or otherwise amended, or successive standards, principles and guidance for central counterparties and financial market infrastructures adopted jointly by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions.

(D) A certification that affiliates of members and other participants, as defined in § 48.2(j) of this part continue to be required to comply with appropriate registration requirements, conditions for registration and the rules of the foreign board of trade and that the members or other participants to which they are affiliated remain responsible to the foreign board of trade for ensuring their affiliates' compliance.

(E) A description of any material changes to any relevant representation regarding the foreign board of trade or clearing organization made to the Commission that have not been previously disclosed, in writing, or a certification that no material changes have been made.

(F) A description of any significant disciplinary or enforcement actions that have been instituted by or against the foreign board of trade or the clearing organization or the senior officers of either in the prior year.

(G) A written description of any material changes to the regulatory regime to which the foreign board of trade or the clearing organization are subject that have not been previously disclosed, in writing, to the Commission, or a certification that no material changes have occurred.

(2) The above-referenced materials must be signed by an officer of the foreign board of trade or the clearing organization who maintains the authority to bind the foreign board of trade or clearing organization, as applicable, and be based on the officer's personal knowledge.

(c) Additional Specified Conditions for Foreign Boards of Trade with Linked Contacts. If a registered foreign board of trade grants members or other participants located in the United States direct access and makes available to them a linked contract, the following additional conditions apply:

(1) Statutory Conditions.

(i) The foreign board of trade must make public daily trading information regarding the linked contract that is comparable to the daily trading information published by the registered entity for the contract to which the foreign board of trade's contract is linked, and

(ii) The foreign board of trade (or its regulatory authority) must:

(A) Adopt position limits (including related hedge exemption provisions) applicable to all market participants for the linked contract that are comparable to the position limits (including related hedge exemption provisions) adopted by the registered entity for the contract to which it is linked;

(B) Have the authority to require or direct any market participant to limit, reduce, or liquidate any position the foreign board of trade (or its regulatory authority) determines to be necessary to prevent or reduce the threat of price manipulation, excessive speculation as described in section 4a of the Act, price distortion, or disruption of delivery on the cash settlement process;

(C) Agree to promptly notify the Commission, with regard to the linked contract, of any change regarding—

(1) The information that the foreign board of trade will make publicly available,

(2) The position limits that foreign board of trade or its regulatory authority will adopt and enforce,

(3) The position reductions required to prevent manipulation, excessive speculation as described in section 4a of the Act, price distortion, or disruption of delivery or the cash settlement process, and

(4) Any other area of interest expressed by the Commission to the foreign board of trade or its regulatory authority;

(D) Provide information to the Commission regarding large trader positions in the linked contract that is comparable to the large trader position information collected by the Commission for the contract to which it is linked; and

(E) Provide the Commission such information as is necessary to publish reports on aggregate trader positions for the linked contract that are comparable to such reports on aggregate trader positions for the contract to which it is linked, and

(iii) If the Commission establishes speculative position limits (including related hedge exemption provisions) on the aggregate number or amount of positions in a contract traded on a United States registered entity and the registered foreign board of trade lists a contract that is linked to the contract listed for trading on the registered entity, the foreign board of trade (or its regulatory authority) must adopt position limits (including related hedge exemption provisions) for the linked contract as determined by the Commission.

(2) Other Conditions on Linked Contracts:

(i) The foreign board of trade will inform the Commission in a quarterly report of any member that had positions in a linked contract above the applicable foreign board of trade position limit, whether a hedge exemption was granted, and if not, whether a disciplinary action was taken.

(ii) The foreign board of trade will provide Commission staff, either directly or through its agent, with trade execution and audit trail data for the Commission's Trade Surveillance System on a trade-date plus one basis and in a form, content and manner acceptable to the Commission for all linked contracts.

(iii) The foreign board of trade and the clearing organization will permit and cooperate with Commission on-site visits for the purpose of overseeing the foreign board of trade's ongoing compliance with registration requirements and conditions of registration. The Commission will provide notice to the foreign board of trade's regulatory authority of any requests for an on-site visit.

(iv) The foreign board of trade will provide to Commission staff, at least one day prior to the effective date thereof, except in the event of an emergency market situation, copies of, or hyperlinks to, all rules, rule amendments, circulars and other notices published by the foreign board of trade with respect to all linked contracts.

(v) The foreign board of trade will provide to Commission staff copies of all Disciplinary Notices involving the foreign board of trade's linked contracts upon closure of the action. Such Notices should include the reason the action was undertaken, the results of the investigation that led to the disciplinary action, and any sanctions imposed.

(vi) In the event that the Commission, pursuant to its emergency powers authority, directs that the United States registered entity which lists the contract to which the foreign board of trade's contract is linked take emergency action with respect to a linked contract (for example, to cease trading in the contract), the foreign board of trade, subject to information-sharing arrangements between the Commission and its regulatory authority, agrees to promptly take similar action with respect to its linked contract.

#### **§ 48.9 Revocation of registration.**

(a) Failure to Satisfy Registration Requirements or Conditions: Upon request by the Commission, a registered foreign board of trade shall file with the Commission a written demonstration, containing such supporting data, information, and documents, in such form and manner and within such timeframe as the Commission may specify, that the foreign board of trade or clearing organization is in compliance with the registration requirements or conditions for registration.

(1) If the Commission determines that a registered foreign board of trade (or the clearing organization) has failed to satisfy any of the registration requirements or conditions for registration, the Commission shall notify the foreign board of trade of such determination and afford the foreign board of trade an opportunity to make appropriate changes to bring the foreign board of trade into compliance with the registration requirements or conditions for registration.

(2) If, not later than 30 days after receiving a notification under subsection (1) of this paragraph, the foreign board of trade fails to make changes that, in the opinion of the Commission are necessary to comply with the registration requirements or conditions for registration, the

Commission may revoke the foreign board of trade's registration, after appropriate notice and an opportunity for a hearing, by issuing an Order Revoking Registration which sets forth the reasons therefor.

(3) A foreign board of trade whose registration has been revoked for failure to satisfy a registration requirement or condition of registration may apply for re-registration 360 days after the issuance of the Order Revoking Registration if the deficiency causing the revocation has been cured or relevant facts and circumstances have changed.

(b) Other Events that Could Result in Revocation. Revocation under these circumstances would not necessarily follow the procedures delineated above, but will be handled by the Commission as relevant facts or circumstances warrant.

(1) The Commission may revoke a foreign board of trade's registration, after appropriate notice and an opportunity for a hearing, if the Commission determines that a representation made in the application for registration is found to be untrue or materially misleading.

(2) The Commission may revoke a foreign board of trade's registration, after appropriate notice and an opportunity for a hearing, if there is a material change in the regulatory regime applicable to the foreign board of trade or clearing organization.

(3) The Commission may revoke a foreign board of trade's registration in the event of an emergency or in a circumstance where the Commission determines that revocation would be necessary or appropriate in the public interest. Following revocation, the Commission will provide an opportunity for a hearing.

(4) The Commission may revoke a foreign board of trade's registration in the event the foreign board of trade or the clearing organization is no longer authorized, licensed or registered, as applicable, as a regulated market and/or exchange or clearing organization or ceases to operate as a foreign board of trade or clearing organization.

#### **§ 48.10 Additional contracts.**

(a) Generally. Registered foreign boards of trade that wish to list additional futures and option and swaps contracts for trading by direct access to the foreign board of trades' electronic trading and order matching systems from the United States must submit a written request prior to offering the contracts from within the United States. Such a written request must include the terms and conditions of the additional

futures and option and swaps contracts that the foreign board of trade wishes to make available and a certification that the additional contracts meet the requirements of section 48.7(c) of this part and the foreign board of trade and the clearing organization continue to satisfy the conditions of registration. The foreign board of trade can make available for trading the additional contracts ten business days after the date of receipt by the Commission of the written request, unless the Commission notifies the foreign board of trade that additional time is needed to complete its review of policy or other issues pertinent to the additional contracts. A registered foreign board of trade may list for trading an additional futures contract on a non-narrow-based security index pursuant to the procedures set forth in Appendix D to part 30 of this chapter.

(b) Option contracts on previously approved futures contracts.

(1) If the option is on a futures contract that is not a linked contract, the option contract may be made available for trading by direct access by filing with the Commission no later than the business day preceding the initial listing of the contract:

(i) A copy of the terms and conditions of the additional contract and

(ii) A certification that the foreign board of trade and the clearing organization continue to satisfy the conditions of its registration.

(2) If the option is on a futures contract that is a linked contract, the option contract may be made available for trading by direct access by filing with the Commission no later than the business day preceding the initial listing of the contract:

(i) A copy of the terms and conditions of the additional contract and

(ii) A certification that the foreign board of trade and the clearing organization continue to satisfy the conditions of its registration, including the conditions specifically applicable to linked contracts set forth in section 48.8(c) of this part.

(3) If the option is on a non-narrow-based security index futures contract which may be offered or sold in the United States pursuant to a no-action letter issued by the Commission's Office of the General Counsel, the option contract may be listed for trading by direct access without further action by either the registered foreign board of trade or the Commission.

## Appendix—Part 48—Contents of Application

### I. General Information and Documentation

(a) General Information. A description of the following for the foreign board of trade and clearing organization: Location; history, size; ownership and corporate structure; governance and committee structure; current or anticipated presence of staff in the United States; and anticipated volume of business emanating from members and other participants that will be provided direct access to the foreign board of trade's trading system and the percentage of that volume compared to the foreign board of trade's total volume.

(b) Initial Documentation. The following documents for the foreign board of trade and clearing organization:

(1) Articles of association, constitution, or other similar organizational documents;

(2) Membership and trading participant agreements;

(3) Clearing agreements;

(4) Terms and conditions of contracts to be available from within the United States pursuant to the specified conditions of registration;

(5) The national statutes, laws and regulations governing the activities of the foreign board of trade and clearing organization and their respective participants;

(6) The current rules, regulations, guidelines and bylaws of the foreign board of trade or clearing organization;

(7) Evidence of the authorization, licensure or registration of the foreign board of trade and clearing organization pursuant to the regulatory regime in their home country jurisdiction and a representation by their respective regulators that they are in good regulatory standing in the capacity in which they are authorized, licensed or registered;

(8) A summary of any disciplinary or enforcement actions or proceedings that have been brought against the foreign board of trade and clearing organization, or the senior officers thereof, in the past five years and the resolution of those actions or proceedings;

(9) An undertaking by the chief compliance officer(s) (or functional equivalent(s)) of the foreign board of trade and the clearing organization to notify Commission staff promptly if any of the representations made in connection with or related to the foreign board of trade's application for registration cease to be true or correct, or become incomplete or misleading.

### II. Membership Criteria

The following for the foreign board of trade and the clearing organization:

(a) Membership or Participant Categories and Access.

A description of the categories of membership and participation in the foreign board of trade or clearing organization and the access, trading and clearing privileges provided by the board of trade or clearing organization, as applicable. The description should include any restrictions thereto for all entities to which the foreign board of trade intends to grant direct access to its trading system.

(b) Membership Criteria.

(1) A description of requirements for membership and participation on the trading or clearing system, as applicable, and the manner in which members and other participants must demonstrate their compliance with these requirements.

(2) Professional Standards. A description of the professional requirements, qualifications, and/or competencies required of members or other participants and/or their staff.

(c) Financial Integrity.

(1) A description of the manner in which the foreign board of trade and the clearing organization evaluate the financial resources holdings of its members or participants, including any financial requirements, standards, guides, or thresholds used to qualify members and other participants.

(2) Describe the process by which applicants demonstrate compliance with financial requirements for membership participation including:

(i) Working capital and collateral requirements,

(ii) Risk management mechanisms for members allowing customers to place orders.

(d) Authorization, Licensure or Registration Requirements. Describe any regulatory and self-regulatory authorization, licensure or registration requirements that the foreign board of trade and the clearing organization impose upon its members and other participants including, but not limited to any authorization, licensure or registration requirements imposed by the regulatory authorities in the home country jurisdiction(s) of the foreign board of trade and clearing organization. Describe the process by which the foreign board of trade and the clearing organization, as applicable, confirm compliance with those requirements.

(e) Fit and Proper. Describe how the foreign board of trade and clearing organization ensure that potential members/other participants meet fit and proper standards.

(f) Qualifications for Board and/or Committee Membership. Describe the requirements applicable to membership on the governing board and significant committees of the foreign board of trade and clearing organization, and describe how the foreign board of trade and clearing organization ensure that potential governing board and committee members/other participants meet these standards.

(g) Conflict of Interest Provisions. Describe the provisions to minimize and resolve conflicts of interest with respect to membership on the governing board and significant committees of the foreign board of trade and the clearing organization.

(h) Disclosure of Information. Describe the rules with respect to the disclosure of material non-public information obtained as a result of a member's or other participant's performance on the governing board or significant committee.

### III. The Automated Trading System

(a) A description of the following:

(1) the order matching/execution system, including a complete description of all permitted ways in which members or other participants (or their customers) may connect

to the trade matching/execution system and the related requirements (for example, authorization agreements, technical compliance verifications, identification of order routing systems and/or users,

(2) the architecture of the systems, including hardware and distribution network, as well as any pre-trade risk-management controls that are made available to system users,

(3) the security features of the systems,

(4) the length of time such systems have been operating,

(5) any significant system failures or interruptions,

(6) the nature of any technical review of the order matching/execution system performed by the home country regulator,

(7) provide a copy of any order or certification or self-certification received and any discrepancies between the standard of review and the Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions,

(8) trading hours,

(9) types and duration of orders accepted,

(10) information that must be included on orders,

(11) trade confirmation and trade error procedures,

(12) anonymity of participants,

(13) trading system connectivity with clearing system,

(14) response time,

(15) ability to determine depth of market,

(16) market continuity provisions,

(17) reporting and recordkeeping requirements, and

(18) error trade policies.

(b) A description of the manner in which the foreign board of trade assures the following with respect to the trading system:

(1) Algorithm. The trade matching algorithm matches trades fairly and timely.

(2) IOSCO Principles. The trading system's compliance with the Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions.

(3) Audit Trail.

(i) The audit trail captures all relevant data, including changes to orders.

(ii) Audit trail data is securely maintained and available for an adequate time period.

(4) Public Data. Trade data is available to users and the public.

(5) Reliability. The trading system has demonstrated reliability.

(6) Secure Access. Access to the trading system is secure and protected.

(7) Emergency Provisions. There are adequate provisions for emergency operations and disaster recovery.

(8) Data Loss Prevention. Trading data is backed up to prevent loss of data.

(9) Contracts Available. Mechanisms are available to ensure that only those futures and option contracts or swaps that have been identified to the Commission as part of the application or permitted to be made available for trading by direct access pursuant to the procedures set forth in section 48.10 of this part are made available for trading on connections in the United States.

(10) Predominance of the Centralized Market. Mechanisms are available that ensure a competitive, open and efficient market and mechanism for executing transactions.

#### **IV. The Terms and Conditions of Contracts Proposed To Be Made Available in the United States**

(a) Provide the terms and conditions of futures, option and swaps contracts intended to be made available for direct access.

(b) Demonstrate that contracts are not prohibited from being traded by United States persons.

(c) Demonstrate that contracts are cleared.

(d) Identify any contracts that are linked to a contract listed for trading on a United States-registered entity, for example, a contract that settles against any price (including the daily or final settlement price) of one or more contracts listed for trading on a United States-registered entity.

(e) Identify any contracts that share any other commonality with a contract listed for trading on a United States-registered entity, for example, both the foreign board of trade's and the United States-registered entity's contract settle to the price of the same third party-constructed index.

(f) Demonstrate that the contracts are not readily susceptible to manipulation, as follows:

(1) Generally. For contracts other than broad-based stock indexes, provide the information required in Appendix A to Part 40 (Guideline No. 1) with regard to manipulation.

(i) For delivered contracts: a demonstration that the terms and conditions of the contract will result in a deliverable supply so that the contract will not be conducive to price manipulation or distortion and that the deliverable supply reasonably can be expected to be available to short traders and salable by long traders at its market value in normal cash marketing channels.

(ii) For cash-settled contracts: a demonstration that cash settlement mechanism of the contract is at a price reflecting the underlying cash market (or the level or index if there is no underlying cash market), will not be readily subject to manipulation or distortion, and is reliable, acceptable, publicly available and timely.

(iii) To deter and detect abusive or disruptive trading behavior that could result in price distortions: A demonstration that the foreign board of trade has rules and mechanisms, for example, position limits, restrictions on size and pricing of block trades, restrictions on market on close or trade at settlement orders during the daily close and settlement, and prohibitions on, and the capacity to detect, "marking" of the trading close or important economic announcements.

(2) Broad-Based Stock Indexes. For non-narrow based stock index futures contracts, provide the information required in Appendix D to Part 30 of this chapter. A no-action letter from the Commission's Office of General Counsel is required to offer futures contracts on non-narrow-based stock index futures contracts to United States citizens.

(3) Manipulation Cases. With respect to contracts to be listed for trading by direct

access, describe each investigation, action, proceeding or case involving manipulation and involving a contract traded on the foreign board of trade in the three years preceding the application date, whether initiated by the foreign board of trade, a regulatory or self-regulatory authority or agency or another government or prosecutorial agency. For each such action, proceeding or case, describe the alleged manipulative activity and the current status re resolution thereof.

#### **V. Settlement and Clearing**

(a) Clearing System. A description of the clearing organization's clearing and settlement systems.

(b) Certification. A certification, signed by the chief executive officer (or functional equivalent) of the clearing organization, that the clearing system complies with the current Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, as updated, revised or otherwise amended, or successive standards, principles and guidance for central counterparties or financial market infrastructures adopted jointly by the Committee on Payment and Settlement Systems or the International Organization of Securities Commissions.

(c) RCCP Compliance. A detailed description of the manner in which the clearing organization complies with each of the Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, as updated, revised or amended, (or successive standards, principles and guidance for central counterparties or financial infrastructures adopted jointly by the Committee on Payment and Settlement Systems or the International Organization of Securities Commissions) and documentation supporting the representations made, including any relevant rules or written policies or procedures of the clearing organization.

#### **VI. The Regulatory Regime Governing the Foreign Board of Trade and Clearing Organization in Their Home Countries**

Provide information or documentation necessary to demonstrate that the foreign board of trade and its clearing organization are subject to comprehensive supervision and regulation by the appropriate governmental authorities in their home countries that is comparable to the comprehensive supervision and regulation to which designated contract markets, derivatives clearing organizations and market participants are subject in the United States. The information and documentation provided must be sufficient to demonstrate that the foreign board of trade and clearing organization are subject to an established regulatory regime that is based upon regulatory objectives equivalent (not necessarily identical) to those applicable to designated contract markets and derivatives

clearing organizations in the United States and that provides basic protections for customers trading on markets and for the integrity of the markets themselves:

(a) Regulatory Authority.

(1) Structure, function and powers.

Describe the regulatory authority's structure, resources, staff and scope of authority; the regulator's authorizing statutes, including the source of its authority to supervise the foreign board of trade and the clearing organization; the rules and policy statements issued by the regulator with respect to the authorization and continuing oversight of markets, electronic trading systems and clearing organizations and the financial protections afforded customer funds. Provide copies of recent public reports disclosing the regulator's oversight and enforcement activities which are, in the judgment of the regulator, relevant to the FBOT's status as a registered FBOT.

(2) Authorization and continuing oversight of the foreign board of trade and clearing organization. Describe and provide copies (with, as applicable, English translations) of the laws, rules, regulations and policies applicable to the authorization, licensure or registration of the foreign board of trade and clearing organization and the continuing oversight thereof; the regulatory authority's program for the ongoing supervision and oversight of the foreign board of trade and clearing organization and the enforcement of their respective trading and clearing rules; the financial resources requirements applicable to the authorization, licensure or registration of the foreign board of trade and clearing organization and the continued operations thereof; the extent to which the Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commissions and the current Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, as updated, revised or amended, or successive standards, principles and guidance for central counterparties or financial market infrastructures adopted jointly by the Committee on Payment and Settlement Systems or the International Organization of Securities Commissions are used or applied by the regulatory authority in its supervision and oversight of the foreign board of trade or clearing organization or are incorporated into its rules and regulations and the extent to which the regulatory authorities review the applicable trading and clearing systems for compliance therewith; the extent to which the regulatory authority reviews and/or approves the trading and clearing rules of the foreign board of trade or clearing organization prior to their implementation; the extent to which the regulatory authority reviews and/or approves exchange contracts prior to their being listed for trading; and the regulatory authority's approach to the detection and deterrence of market manipulation and other unfair trading practices.

(3) Intermediary Oversight. Describe the laws, rules, regulations and policies that

govern the authorization and ongoing supervision and oversight of market intermediaries who may deal with United States participants accessing the foreign board of trade, including:

(i) Recordkeeping requirements,

(ii) The protection of customer funds, and

(iii) Procedures for dealing with the failure of a market intermediary in order to minimize damage and loss to investors and to contain systemic risk.

(4) Enforcement. Describe the regulatory authority's inspection, investigation and surveillance powers; and the program pursuant to which the regulatory authority uses those powers to inspect, investigate, and enforce rules applicable to the foreign board of trade and the clearing organization.

(b) Demonstration of Continuing Regulatory "Good Standing."

The regulatory authorities governing the activities of the foreign board of trade and clearing organization must submit a report confirming that the foreign board of trade and clearing organization are in regulatory good standing. The report should include:

(1) Confirmation of regulatory status (including proper authorization, licensure and registration) of the foreign board of trade and clearing organization;

(2) Any recent oversight reports generated by the regulatory authority which are, in the judgment of the regulatory authority, relevant to the FBOT's status as a registered FBOT;

(3) Disclosure of any significant regulatory concerns, inquiries or investigations by the regulatory authority, including any concerns, inquiries or investigations with regard to the foreign board of trade's arrangements to monitor trading by members or other participants located in the United States, the adequacy of the risk management controls of the trading or of the clearing system; and

(4) A description of any investigations (formal or informal) or disciplinary actions initiated by the regulatory authority or any other self-regulatory, regulatory or governmental entity against the foreign board of trade, the clearing organization or any of their respective senior officers during the past year.

(c) Staff Visits with Regulatory Authorities. The regulatory authorities governing the activities of the foreign board of trade and the clearing organization must agree to cooperate with a Commission staff visit subsequent to the application period on an "as needed basis," the objective of which will be to familiarize Commission staff with oversight supervisory staff of the regulatory authority; discuss any changes to the law, rules and regulations that formed the basis of the application; discuss the cooperation and coordination between the authorities, including, without limitation, information sharing arrangements; and discuss issues of concern as they may develop from time to time (for example, linked contracts, unusual trading that may be of concern to Commission surveillance staff).

**VII. The Rules of the Foreign Board of Trade and Its Clearing Organization and Enforcement Thereof**

With respect to the foreign board of trade and the clearing organization, as applicable:

(a) Describe the regulatory or compliance department, to include size, experience level, competencies, duties and responsibilities.

(b) Describe the foreign board of trade's trade practice rules. Include in the description the following:

(1) Capacity of the foreign board of trade. Does the foreign board of trade have the capacity to detect, investigate, and sanction persons who violate foreign board of trade rules?

(2) Abusive Trading Practices Prohibited. Does the foreign board of trade implement and enforce rules that prohibit abusive trading practices (for example, wash sales or trading ahead) and other market abuses, including the ability to detect and deter insider trading?

(3) Trade Surveillance System. Does the foreign board of trade maintain a trade practice surveillance system appropriate to the foreign board of trade capable of detecting and investigating potential trade practice violations?

(4) Trade Practice/Audit Trail. Does the foreign board of trade's audit trail capture and retain sufficient order and trade-related data to allow their compliance staffs to detect trading and market abuses and to reconstruct all transactions within a reasonable period of time?

(5) Real-time Market Monitoring. Does the foreign board of trade maintain appropriate resources to conduct real-time supervision of trading?

(6) Compliance Staff and Resources. Does the foreign board of trade have sufficient compliance staff and resources, including those outsourced or delegated to third parties, to fulfill their regulatory responsibilities?

(7) Ability to Obtain Information. Do the foreign board of trade's rules authorize compliance staff to obtain, from market participants, any information and cooperation necessary to conduct effective rule enforcement and investigations?

(8) Investigations and Investigation Reports. Does the foreign board of trade's compliance staff investigate suspected rule violations and prepare reports of their finding and recommendations?

(9) Access Requirements. Does the foreign board of trade implement and enforce rules relating to the persons that may trade on the foreign board of trade, and the means by which they connect to it?

(10) Jurisdiction. Does the foreign board of trade require market participants to submit to the foreign board of trade's jurisdiction as a condition of access to the market?

(c) Describe the foreign board of trade's and, if appropriate, the clearing organization's disciplinary rules, addressing the following:

(1) Disciplinary Authority and Procedures. Do the foreign board of trade and, the clearing organization, have and enforce disciplinary procedures that empower staff to recommend and prosecute disciplinary actions for suspected rule violations? Do the procedures include the authority to fine, suspend, or expel any market participant pursuant to fair and clear standards?

(2) Warning Letters and Summary Actions. Do the foreign board of trade and the clearing



organization authorize staff to issue warning letters and/or summary fines for specified rule violations?

(3) Review of Investigation Reports. Do the compliance staffs of the foreign board of trade and the clearing organization present their findings to a disciplinary panel or other authority for issuance of charges, instruction to investigate further, or finding that insufficient basis exists to issue charges?

(4) Disciplinary Committees. Do the foreign board of trade and the clearing organization take disciplinary action via disciplinary committees and formal disciplinary processes unless the violation is subject to foreign board of trade staff's summary fining authority?

(5) Disciplinary Decisions. Do the foreign board of trade, clearing organization or their regulatory authorities articulate the rationale for their decisions?

(6) Adequacy of Sanctions. Are the sanctions commensurate with the violations committed and do they serve as effective deterrents to future violations?

(d) Describe Market Surveillance rules, addressing the following:

Does the foreign board of trade have a dedicated market surveillance department or effective delegation or outsourcing of that function? If so, provide a general description of the staff, the data collected on traders' market activity, data collected to determine whether prices are responding to supply and demand, data on the size and ownership of deliverable supplies, a description of the manner in which the foreign board of trade detects and deters market manipulation, for cash-settled contracts, methods of monitoring the settlement price or value, and any foreign board of trade large-trader or other position reporting system.

(e) Describe the Clearing Organization rules, addressing the following:

Does the clearing organization maintain rules that require that the clearing organization comply with the Recommendations for Central Counterparties that have been issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions (or successive standards) and, if so, provide copies of the rules.

#### **VIII. Information Sharing Agreements Among the Commission, the Foreign Board of Trade, the Clearing Organization and Relevant Regulatory Authorities**

With respect to the foreign board of trade, the clearing organization, and their respective regulatory authorities:

(a) Describe the arrangements among the Commission, the foreign board of trade, the clearing organization and the relevant foreign regulatory authorities that govern the sharing of information regarding the transactions that are executed pursuant to the foreign board of trade's registration and the clearing and settlement of those transactions. This discussion should include:

(1) The foreign board of trade, clearing organization and the regulatory authorities governing the activities of the foreign board of trade and clearing organization commit, in writing to provide immediately and directly to the Commission information and documentation requested by Commission staff that Commission staff determines is needed:

(i) To evaluate the continued eligibility of the foreign board of trade for registration,

(ii) To enforce compliance with the specified conditions of the registration,

(iii) To enable the Commission to carry out its duties under the Act and Commission regulations and to provide adequate protection to the public or registered entities,

(iv) To respond to potential market abuse associated with trading by direct access on the registered foreign board of trade, and

(v) Where Commission staff, in its discretion, determines that a contract traded on a registered foreign board of trade may affect the Commission's ability to carry out surveillance with respect to a United States-registered entity.

(2) Exchange International MOU. The foreign board of trade must execute, or commit to execute, the International Information Sharing Memorandum of Understanding and Agreement.

(b) Regulatory Authority and the IOSCO MOU. The regulatory authorities governing the activities of and providing supervision and oversight of the foreign board of trade and clearing organization must be signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding. If the regulator is not a signatory to the International Organization of Securities Commissions Multilateral Memorandum of Understanding, the regulator must inform the

Commission of the reasons why the document has not been signed (for example, in the process of applying, application is under consideration by the International Organization of Securities Commissions Multilateral Memorandum of Understanding Screening Group) and supply any additional information requested by the Commission. The Commission will determine, on a case-by-case basis, whether any interim information sharing arrangement will be acceptable.

(c) Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations (Boca Declaration). The regulatory authorities governing the activities of and providing supervision and oversight of the foreign board of trade and clearing organization must sign the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations or otherwise commit to share the types of information contemplated by the International Information Sharing Memorandum of Understanding and Agreement with the Commission pursuant to an existing memorandum of understanding or other arrangement with the Commission.

Issued in Washington, DC, November 10, 2010, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

#### **Statement of Chairman Gary Gensler**

##### **Notice of Proposed Rulemaking—Registration of Foreign Boards of Trade**

I support the proposed rulemaking to implement a registration system for Foreign Boards of Trade (FBOTs) seeking to offer market participants in the United States direct access to the FBOTs' trading systems. This registration system replaces the agency's current practice of issuing no-action letters to such FBOTs. Importantly, this will bring consistency and transparency to the Commission's oversight of such entities. Today's proposal also provides that FBOTs subject to comparable, comprehensive supervision and regulation in their home country and that meet conditions outlined in the proposal would be allowed to make available swaps contracts through direct access to U.S. market participants.

[FR Doc. 2010-29023 Filed 11-18-10; 8:45 am]

**BILLING CODE P**