

## COMMODITY FUTURES TRADING COMMISSION REGULATIONS IMPLEMENTING THE COMMODITY FUTURES MODERNIZATION ACT

On August 10, 2001, the Commodity Futures Trading Commission (the “CFTC”) finalized rules implementing the new regulatory framework for futures trading facilities established by amendments to the Commodity Exchange Act (“CEA”) enacted as the Commodity Futures Modernization Act of 2000 (the “CFMA”). On October 23, 2001, new rules relating to intermediaries, including futures commission merchants (“FCMs”), introducing brokers (“IBs”), commodity trading advisors (“CTAs”) and commodity pool operators (“CPOs”), were adopted. Part I of this memorandum highlights the rules relating to the trading facilities. Part II highlights the rules relating to intermediaries.<sup>1</sup>

### I. Trading Facilities

Before the enactment of the CFMA, the CEA generally required that each futures and options contract subject to CFTC jurisdiction be traded on a contract market specifically designated by the CFTC. The CFMA allows futures and options contracts to be traded on trading facilities which are subject to different degrees of regulation depending on the traded commodities and permitted participants. The CFMA defines a trading facility as any electronic or non-electronic market through which persons enter into or execute binding contracts in a forum that permits accepting bids or offers by one person that are open to multiple persons.<sup>2</sup> Facilities that provide flexibility for negotiation but not execution of bilateral contracts are generally not defined as trading facilities.<sup>3</sup> The CFMA creates two regulated trading facilities with degrees of regulation

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<sup>1</sup> The newly adopted rules for derivatives clearing organizations and those related to security futures are not included in this memorandum.

<sup>2</sup> Section 1a (33) of the CEA.

<sup>3</sup> The term “trading facility” does not include:

- (i) a person or group of persons solely because the person or group of persons constitutes, maintains, or provides an electronic facility or system that enables participants to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged by the parties and not from interaction of multiple bids and multiple offers within a predetermined, nondiscretionary automated trade matching and execution algorithm;
- (ii) a government securities dealer or government securities broker, to the extent that the dealer or broker executes or trades agreements, contracts, or transactions in government securities, or assists persons in communicating about, negotiating, entering into, executing, or trading an agreement, contract, or transaction in government securities . . . ; or
- (iii) facilities on which bids and offers, and acceptances of bids and offers effected on the facility, are not binding.

Any person, group of persons, dealer, broker or facility described in clause (i) or (ii) is excluded from the meaning of the term ‘trading facility’ without any prior specific approval, certification or other action by the CFTC.

designed to match the nature of permitted products and participants and two trading facilities exempt from regulation. The more sophisticated the participants that are permitted to trade on a trading facility and the less the underlying commodity is susceptible to manipulation, the lower the level of regulatory oversight imposed by the CFTC. As discussed below, the regulated trading facilities are designated contract markets (“DCMs”) and derivatives transaction execution facilities (“DTEFs”). The unregulated facilities are exempt boards of trade (“Exempt Boards”) and exempt commercial markets (“ECMs”).<sup>4</sup>

**A. Designated Contract Markets<sup>5</sup>**

DCMs are permitted to trade contracts on any commodity, including one with a finite supply.<sup>6</sup> Anyone can trade on a DCM. Therefore, DCMs are subject to the highest level of regulation in the form of required compliance with criteria and core principles described in Appendix A to this memorandum.

Any board of trade that was designated as a contract market on December 21, 2000 is considered to be a DCM. A trading facility may also become a DCM by application if it demonstrates to the CFTC that it can meet the applicable criteria and comply with the core principles for DCMs. A recognized DCM or a trading facility seeking recognition as a DCM may request that the CFTC approve some or all of its rules and subsequent rule amendments.

Once a trading facility is recognized by the CFTC as a DCM, CFTC approval is not required for new contracts or for rules and rule amendments prior to listing or implementation by the DCM except for the terms and conditions of existing contracts on agricultural commodities enumerated in Section 1a(4) of the CEA. A DCM, however, must certify that a rule, rule amendment or product complies with the provisions of the CEA.

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<sup>4</sup> A DCM may operate a DTEF, Exempt Board and ECM, and a DTEF may operate an Exempt Board and ECM. However, each trading facility must comply with the applicable rules. Section 4a(b)(4) of the CEA requires a DCM that operates a DTEF to provide a physical location for the DTEF that is separate from that of the DCM. In addition, if a DCM and a DTEF share the same electronic trading system, the system must identify whether a transaction takes place on the DCM or the DTEF. Section 5d(f) of the CEA provides that a DCM or DTEF may operate an Exempt Board only by establishing a separate subsidiary or other legal entity. There is no such “separate subsidiary or other legal entity” requirement for operation of an ECM by a DCM or DTEF.

<sup>5</sup> See generally Section 5 of the CEA and Part 38 of the rules.

<sup>6</sup> Security futures products are subject to dual jurisdiction by the CFTC and the Securities and Exchange Commission (“SEC”). Therefore, Section 6(g) of the Securities Exchange Act of 1934 (“Exchange Act”) requires a DCM trading security futures products to register as a national securities exchange with the SEC.

## **B. Derivatives Transaction Execution Facilities<sup>7</sup>**

DTEFs are trading facilities subject to an intermediate level of regulation by the CFTC. The CFMA creates two types of DTEFs: one available to eligible traders and the other available to eligible commercial entities. Each type has its own limitations with respect to participants and contracts.<sup>8</sup> An entity currently designated as a DCM will be recognized as a DTEF by the CFTC upon compliance with the criteria and the core principles applicable to DTEFs described in Appendix B to this memorandum, notification to the CFTC of its intent to operate as a DTEF and self-certification that the DTEF meets the applicable conditions. A trading facility may also become a DTEF by application if it can demonstrate to the CFTC that it satisfies the applicable conditions, including compliance with the criteria and core principles for DTEFs.

A board of trade seeking recognition as a DTEF may, but is not required to, request that the CFTC approve some or all of its rules and subsequent rule amendments.

### **1. DTEFs Available to Eligible Traders**

Rule 37.3(a) governs DTEFs available to eligible traders. Eligible traders include eligible contract participants (“ECPs”) and any person accessing a DTEF through an intermediary that is a registered FCM with a minimum net capital of at least \$20,000,000, a clearing member of a derivatives clearing organization and a member of the National Futures Association.<sup>9</sup>

ECPs are, generally,

- financial institutions;
- insurance companies;
- investment companies;
- commodity pools and ERISA plans with \$5,000,000 in assets;

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<sup>7</sup> See generally Section 5a of the CEA and Part 37 of the rules.

<sup>8</sup> Section 6(g) of the Exchange Act requires a DTEF trading security futures products to register as a national securities exchange with the SEC.

<sup>9</sup> Section 5a(b)(3) of the CEA and Rule 37.3(a). As described in Part II of this memorandum, a new Rule 1.17 also allows an FCM to accept orders for a DTEF from a qualified CTA on behalf of a non-ECP without having to satisfy the \$20,000,000 test. The CFTC may, with respect to transactions other than transactions in security futures products, by rule allow a broker-dealer, depository institution or institution of the Farm Credit System that meets certain requirements to act as an intermediary in transactions executed on a DTEF on behalf of their customers. The CFTC has not yet issued rules to allow such intermediation.

- entities that have either (i) \$10,000,000 in assets, (ii) a guarantee from certain other ECPs or (iii) a net worth of \$1,000,000 and enter into a transaction in connection with the conduct of their business or management of the risk associated with an asset or a present or anticipated liability in the conduct of their business;
- governmental entities;
- certain broker-dealers, FCMs, floor brokers (“FBs”) and floor traders (“FTs”); and
- individuals who have either (i) total assets in excess of \$10,000,00 or (ii) total assets in excess of \$5,000,000 and enter into a transaction in order to manage the risk associated with an asset owned or a present or anticipated liability.

A DTEF available to ECPs may trade contracts on commodities having a nearly inexhaustible deliverable supply, having a deliverable supply that is sufficiently large so that the contract is highly unlikely to be susceptible to the threat of manipulation or having no cash market.<sup>10</sup> The following commodities, referred to in the CEA as “excluded commodities,”<sup>11</sup> satisfy the above-stated requirements:

- (i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation or other macroeconomic index or measure;
- (ii) any other rate, differential, index or measure of economic or commercial risk, return, or value that is not based in substantial part on the value of a narrow group of commodities not described in the previous paragraph or based solely on one or more commodities that have no cash market;
- (iii) any economic or commercial index based on prices, rates, values or levels that are not within the control of any party to the relevant contract, agreement or transaction; or
- (iv) an occurrence, extent of an occurrence or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is beyond the control of the parties to the relevant contract, agreement or transaction and associated with a financial, commercial or economic consequence.

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<sup>10</sup> Section 5a(6)(2) of the CEA and Rule 37.3(a)(1).

<sup>11</sup> Section 1a(13) of the CEA.

## 2. DTEFs Available to Eligible Commercial Entities

Rule 37.3(b) governs DTEFs available to eligible commercial entities (“ECEs”).<sup>12</sup>

An ECE is an ECP that is

- a financial institution; insurance company; governmental entity; entity that has either (i) \$10,000,000 in assets, (ii) a guarantee of its obligations from certain ECPs or (iii) a net worth of \$1,000,000 and such entity enters into a transaction in connection with the conduct of the entity’s business or to manage the risk associated with an asset or present or anticipated business-related liability; broker-dealer or FCM that, in connection with its business:
  - (i) has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity;
  - (ii) incurs risks, in addition to price risk, related to the commodity; or
  - (iii) a dealer that regularly provides risk management or hedging services to, or engages in market-making activities with, the foregoing entities involving transactions to purchase or sell the commodity or derivative agreements, contracts or transactions in the commodity;
- an ECP, other than a natural person or an instrumentality, department, or agency of a State or local governmental entity, that (a) regularly enters into transactions to purchase or sell the commodity or derivative agreements, contracts, or transactions in the commodity and (b) either has or is one of a group of persons under common control or management having in the aggregate:
  - (i) \$1,000,000,000 in total assets in the case of a collective investment vehicle whose participants include persons other than certain qualified eligible persons, accredited investors or qualified purchasers; or
  - (ii) \$100,000,000 in total assets in the case of other persons; or
- any person the CFTC determines appropriate and designates by rule, regulation or order.<sup>13</sup>

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<sup>12</sup> Section 1a(11) of the CEA.

<sup>13</sup> For purposes of Part 37 only, a registered FB or FT whose trading obligations are guaranteed by a registered FCM is an ECE.

A DTEF available to ECEs may trade contracts in any commodity<sup>14</sup> except the agricultural commodities listed in Section 1a(4) of the CEA. The CFTC may, however, in the future allow agricultural commodities to be traded on the DTEF available to ECEs.<sup>15</sup>

### **C. Exempt Boards of Trade**

Only ECPs may trade on an Exempt Board. An Exempt Board may permit ECPs to trade in the same contracts as may be traded by ECPs on a DTEF as described above in Section I.B.1., except futures (or options on futures) on any security or securities index.

Exempt Boards do not have to comply with core principles because the CFTC has determined that ECPs, when trading permitted commodities, do not need the protections afforded to participants by DCMs and DTEFs. Nonetheless, an Exempt Board must notify the CFTC about its decision to operate as such and may be required to provide pricing information to the public if the CFTC determines that the Exempt Board serves as a significant source for the discovery of prices for an underlying commodity. As noted above, Exempt Boards remain subject to the CEA's prohibitions against fraud and market manipulation.

### **D. Exempt Commercial Markets**

Only ECEs may trade on an ECM and only on a principal-to-principal basis. Only exempt commodities,<sup>16</sup> which are defined by the CFMA as, generally, commodities other than excluded or agricultural commodities, may be traded on an ECM.<sup>17</sup> Exempt commodities include energy, metals and foreign currencies. All trades on an ECM must be executed or traded on an electronic trading facility,<sup>18</sup> defined as a trading facility that operates by means of an electronic or telecommunication network and maintains an automated audit trail of bids, offers and the matching of orders or the execution of transactions on the facility.<sup>19</sup>

ECMs do not have to comply with core principles but must notify the CFTC about the decision to operate as such and may be required to provide pricing information to the public if the CFTC determines that the ECM serves as a significant source for the discovery of prices for an underlying commodity. In addition, an ECM must provide the CFTC, initially and on an ongoing basis, with access to the facility's trading protocols and electronic access to transactions

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<sup>14</sup> Subject to registration with the SEC, if appropriate, as described in footnote 8 of this memorandum.

<sup>15</sup> Rule 37.3(b).

<sup>16</sup> Section 2(h)(3) of the CEA. Section 2(d) of the CEA provides a similar exception for trading on an electronic trading facility in excluded commodities by certain ECPs, but no CFTC notification is required for such a trading facility.

<sup>17</sup> Section 1a(14) of the CEA.

<sup>18</sup> Section 2(h)(3) of the CEA.

<sup>19</sup> Section 1a(10) of the CEA.

conducted on the ECM.<sup>20</sup> ECMs remain subject to the CEA's prohibitions against fraud and market manipulation.

## II. Rules Relating to Intermediaries<sup>21</sup>

The CFTC did not replace its rules governing intermediaries with a set of core principles.<sup>22</sup> Instead, the CFTC has amended some rules relating to intermediaries and is engaged in a CFMA-mandated study of the necessity and viability of all its rules. Significant changes to the rules relating to intermediaries are identified below.

### A. Principals

The CFTC's rules have been amended to reduce the number of persons defined as principals of a registrant. Officers who do not exercise a controlling influence over the registrant are no longer principals.<sup>23</sup> In addition, the rules governing disclosure documents for CPOs and CTAs have been amended so that background and performance information is only required concerning principals who participate in trading or operational decisions for the CPO or CTA or who supervise such persons.<sup>24</sup> Finally, the rule requiring new registration in the event of certain changes in principals has been eliminated. Instead, changes are reported by filing Forms 3-R and 8-R listing each principal not previously listed.<sup>25</sup>

### B. IB Registration Applications

An applicant for registration as an IB is no longer required to file certified financial statements with its application for registration. If such certified financial statements are not filed, the applicant will be reviewed by its designated self-regulatory organization within six months of registration.<sup>26</sup> An applicant for registration as an FCM cannot, however, use this procedure and must file certified financial statements.

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<sup>20</sup> Rule 36.3(b).

<sup>21</sup> Depending upon its functions, an intermediary may be required to be registered as an FCM, IB, CTA, CPO, associated person ("AP") of any of the foregoing and/or an FB. In addition, a person trading solely for his or her own account on a DCM or a DTEF with a trading floor must register as an FT.

<sup>22</sup> To the extent that an existing rule was not amended, the rule will apply to intermediaries transacting business on behalf of customers on DCMs and DTEFs regardless of whether the DCM or DTEF itself, or its operators, have been exempted from applicable provisions of the rule.

<sup>23</sup> Rule 3.1.

<sup>24</sup> Rule 4.24(h)(2).

<sup>25</sup> Rules 3.31(a) and (b).

<sup>26</sup> Rule 1.10.

**C. Fitness and Supervision**

The CEA requires that each AP receive ethics training within six months of registration and periodically thereafter. The CFTC has deleted its prior rule regarding ethics training in favor of a Statement of Acceptable Practices. Registrants may now determine the format, frequency and providers of ethics training programs for themselves.

**D. Non-Institutional Customers on DTEFs**

As described in Section I.B. above, non-ECPs<sup>27</sup> may access DTEFs through qualified FCMs. New Rule 4.32 permits a registered CTA to enter trades on a DTEF for a non-ECP, provided that the CTA: (i) directs such non-ECP client's commodity interest account; (ii) directs accounts containing total assets of not less than \$25,000,000 at the time the trade is entered; and (iii) discloses to the client that the CTA may enter trades on or subject to the rules of a registered DTEF on the client's behalf; and further provided that the account is carried by a registered FCM.

**E. Segregation of Funds**

New Rule 1.68 provides that ECPs may opt out of the rule requiring that an FCM segregate customers' funds if (i) such ECP's funds are being carried by the FCM for trading on or through a DTEF; (ii) the DTEF, by rule, has authorized such opting out; and (iii) the ECP and FCM enter into an agreement authorizing such opting out. The CFTC deferred action on whether customers should be permitted to opt out of the segregation requirements with respect to funds traded on DCMs.

**F. FCM Customer Account Opening**

Non-ECPs must continue to receive the risk disclosures regarding futures and options trading prior to account opening. However, such risk disclosures,<sup>28</sup> disclosures relating to electronic transmission of statements,<sup>29</sup> preauthorization of transfers of funds from a customer's segregated account to another account of that customer<sup>30</sup> and customer's preauthorizations in event of bankruptcy of commodity broker<sup>31</sup> may be provided in a single document and acknowledged with a single signature,<sup>32</sup> which may be made electronically. Disclosure concerning arbitration

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<sup>27</sup> CFTC Rule 1.3 (g) defines an "institutional customer" to mean an ECP as defined in Section 1a(12) of the CEA. The new rules relating to intermediaries refer to institutional customers rather than to ECPs.

<sup>28</sup> Rule 1.55 and 33.7.

<sup>29</sup> Rule 1.33(g).

<sup>30</sup> Rule 1.55(d)(i).

<sup>31</sup> Rule 190.06.

<sup>32</sup> Rule 1.55(d).



of disputes, however, still must be signed separately by a non-ECPs.<sup>33</sup> There are no specific disclosure requirements for opening accounts for ECPs.<sup>34</sup> The new rules also provide that an ECP and an FCM may negotiate any terms of a pre-dispute arbitration agreement.<sup>35</sup>

#### **G. Use of Customer's Information**

Part 155 of the rules requires FCMs and IBs to establish and maintain supervisory procedures to assure that neither they nor any affiliated persons use their knowledge of customer orders to the customer's disadvantage. These requirements continue to apply with respect to transactions on DCMs and are generally extended to DTEFs.<sup>36</sup>

#### **H. Large Trader Reporting**

The large trader reporting requirements apply to intermediaries with respect to DCMs because such markets potentially have greater susceptibility to price manipulation and raise greater customer protection concerns than do DTEFs. Intermediaries trading on DTEFs are subject to large trader reporting requirements only by special call.

#### **I. Electronic Reports**

In new Rule 1.33(g), the CFTC has codified its June 1997 Advisory permitting an FCM, with customer consent, to deliver required confirmations, purchase-and-sale and monthly account statements electronically in lieu of mailing a paper copy. FCMs may maintain only the daily confirmation statement as of the end of the trading session, provided that it reflects all trades made during that session. Before transmitting any statement electronically to a customer, however, the FCM is required to make certain disclosures regarding the practice. In the case of non-ECPs, the FCM is required to obtain the customer's signed consent acknowledging the disclosures.

#### **J. Close-Out of Offsetting Positions**

Former Rule 1.46 generally required an FCM to close out offsetting positions on a first-in, first-out basis across all accounts carried for the same customer. As amended, Rule 1.46 permits the customer or an account controller to instruct the FCM to deviate from this default rule for closing out positions. If a CPO or CTA directs such deviation as an account controller under Rule 1.46, such CPO or CTA must disclose this fact to the customer in its disclosure document.<sup>37</sup>

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<sup>33</sup> Rule 166.5(c).

<sup>34</sup> Rule 1.55(f).

<sup>35</sup> Rule 166.5(f).

<sup>36</sup> Rule 155.6(g).

<sup>37</sup> Rule 4.24(h); 4.34(h).

WILLKIE FARR & GALLAGHER

If you have any questions regarding the new rules described in this memorandum, please call Emily M. Zeigler at (212) 728-8284 or Rita M. Molesworth at (212) 728-8727.

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APPENDIX A

CRITERIA AND CORE PRINCIPLES FOR DESIGNATED CONTRACT MARKETS

To be designated as a DCM, a board of trade must satisfy the following criteria:<sup>38</sup>

- **In General:** Demonstrate to the CFTC that it meets the criteria specified in Section 5(b) of the CEA and Appendix A to Part 38 of the rules.
- **Prevention of Market Manipulation:** Have the capacity to prevent market manipulation.
- **Fair and Equitable Trading:** Enforce trading rules to ensure fair and equitable trading.
- **Trade Execution Facility:** Establish and enforce rules defining the manner of operation of the trade execution facility maintained by it, and demonstrate that the trade execution facility operates in accordance with its rules or specifications.
- **Financial Integrity of Transactions:** Establish and enforce rules and procedures for ensuring the financial integrity of the transactions entered into by or through the facilities of the contract market, including the clearance and settlement of the transactions with a derivatives clearing organization.
- **Disciplinary Procedures:** Establish and enforce disciplinary procedures that authorize it to discipline, suspend or expel members or market participants that violate the rules of the board of trade, or establish similar methods for performing the same functions, including delegation of the functions to third parties.
- **Public Access:** Provide the public with access to the rules, regulations and contract specifications of the board of trade.
- **Ability to Obtain Information:** Establish and enforce rules that will allow the board of trade to obtain any necessary information to perform any of the functions required by this designation criteria, including the capacity to carry out such international information-sharing agreements as the CFTC may require.

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<sup>38</sup> Section 5(b) of the CEA and Appendix A to Part 38 of the rules.

A board of trade must also comply with the following core principles:<sup>39</sup>

- **In General:** Comply with the core principles specified in Section 5(d) of the CEA and Appendix B to Part 38 of the rules.
- **Compliance With Rules:** Monitor and enforce compliance with the rules of the contract market, including the terms and conditions of any contracts to be traded and any limitations on access to the contract market.
- **Contracts Not Readily Subject to Manipulation:** List on the contract market only contracts that are not readily susceptible to manipulation.
- **Monitoring of Trading:** Monitor trading to prevent manipulation, price distortion and disruptions of the delivery or cash-settlement process.
- **Position Limitations or Accountability:** Adopt position limitations or position accountability for speculators, where necessary and appropriate in order to reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month.
- **Emergency Authority:** Adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the CFTC, where necessary and appropriate, including the authority to liquidate or transfer open positions in any contract, suspend or curtail trading in any contract and require market participants in any contract to meet special margin requirements.
- **Availability of General Information:** Make available to market authorities, market participants and the public information concerning the terms and conditions of the contracts on the contract market and the mechanisms for executing transactions on or through the facilities of the contract market.
- **Daily Publication of Trading Information:** Make public daily information on settlement prices, volume, open interest and opening and closing ranges for actively traded contracts on the contract market.
- **Execution of Transactions:** Provide a competitive, open and efficient market and mechanism for executing transactions.
- **Trade Information:** Maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market

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<sup>39</sup> Section 5(d) of the CEA and Appendix B to Part 38 of the rules.

to use the information for purposes of assisting in the prevention of customer and market abuses and providing evidence of any violations of the rules of the contract market.

- **Financial Integrity of Contracts:** Establish and enforce rules providing for the financial integrity of any contracts traded on the contract market (including the clearance and settlement of the transactions with a derivatives-clearing organization) and rules to ensure the financial integrity of any FCMs and IBs and the protection of customer funds.
- **Protection of Market Participants:** Establish and enforce rules to protect market participants from abusive practices committed by any party acting as an agent for the participants.
- **Dispute Resolution:** Establish and enforce rules regarding, and provide facilities for, alternative dispute resolution as appropriate for market participants and any market intermediaries.
- **Governance Fitness Standards:** Establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market and any other persons with direct access to the facility (including any parties affiliated with any of the persons described in this paragraph).
- **Conflicts of Interest:** Establish and enforce rules to minimize conflicts of interest in the decision-making process of the contract market and establish a process for resolving such conflicts of interest.
- **Composition of Boards of Mutually Owned Contract Markets:** In the case of a mutually owned contract market, the board of trade shall ensure that the composition of the governing board reflects market participants.
- **Recordkeeping:** Maintain records of all activities related to the business of the contract market in a form and manner acceptable to the CFTC for a period of five years.
- **Antitrust Considerations:** Unless necessary or appropriate to achieve the purposes of the CEA, the board of trade shall endeavor to avoid adopting any rules or taking any actions that result in any unreasonable restraints of trade or imposing any material anticompetitive burden on trading on the contract market.

**APPENDIX B**

**CRITERIA AND CORE PRINCIPLES FOR DERIVATIVES TRADING EXECUTION FACILITIES**

To be registered by the CFTC as a DTEF, a board of trade must demonstrate to the CFTC that it can satisfy the following criteria:<sup>40</sup>

- **In General:** Demonstrate that it meets the criteria specified in Section 5a of the CEA and Rule 37.5(b).
- **Deterrence of Abuses:** Establish and enforce trading and participation rules that will deter abuses and have the capacity to detect, investigate and enforce those rules.
- **Financial Integrity of Transactions:** Establish and enforce rules or terms and conditions providing for the financial integrity of transactions entered on or through the facilities of the board of trade, and rules or terms and conditions to ensure the financial integrity of any FCMs and IBs and the protection of customer funds.

A board of trade must also comply with the following core principles:<sup>41</sup>

- **In General:** Comply with the core principles specified in Section 5a(d) of the CEA and Appendix B to Part 37 of the rules.
- **Compliance With Rules:** Monitor and enforce the rules of the facility, including any terms and conditions of any contracts traded on or through the facility and any limitations on access to the facility.
- **Monitoring of Trading:** Monitor trading in the contracts to ensure orderly trading in the contract and to maintain an orderly market while providing any necessary trading information to the CFTC to allow the CFTC to discharge its responsibilities under the CEA.
- **Disclosure of General Information:** Disclose publicly and to the CFTC information concerning contract terms and conditions; trading conventions, mechanisms and practices; financial integrity protections and other information relevant to participation in trading on the facility. Disclosure to market participants is considered to be a public

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<sup>40</sup> Section 5a(c) of the CEA and Appendix A to Part 37 of the rules.

<sup>41</sup> Section 5a(d) of the CEA and Appendix B to Part 37 of the rules.

disclosure if there is a facility's user agreement requiring all market participants to keep such disclosed information confidential.

- **Daily Publication of Trading Information:** Make public daily information on settlement prices, volume, open interest and opening and closing ranges for contracts traded on the facility if the CFTC determines that the contracts perform a significant price-discovery function for transactions in the cash market for the commodity underlying the contracts.
- **Fitness Standards:** Establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members and any other persons with direct access to the facility, including any parties affiliated with any of the persons described in this paragraph.
- **Conflicts of Interest:** Establish and enforce rules to minimize conflicts of interest in the decision-making process of the DTEF and establish a process for resolving such conflicts of interest.
- **Recordkeeping:** Maintain records of all activities related to the business of the DTEF in a form and manner acceptable to the CFTC for a period of five years.
- **Antitrust Considerations:** Unless necessary or appropriate to achieve the purposes of the CEA, endeavor to avoid adopting any rules or taking any actions that result in any unreasonable restraint of trade or impose any material anticompetitive burden on trading on the DTEF.