calendar year and every quarter thereafter.

(A) *Who must report.* A BE–150 report is required from each U.S. company that operates networks for clearing and settling credit card transactions made by U.S. cardholders in foreign countries and by foreign cardholders in the United States. Each reporting company must complete all applicable parts of the BE–150 form before transmitting it to BEA. Issuing banks, acquiring banks, and individual cardholders are not required to report.

(B) *Covered Transactions.* The BE–150 survey collects aggregate information on the use of credit, debit, and charge cards by U.S. cardholders when traveling abroad and foreign cardholders when traveling in the United States. Data are collected by the type of transaction, by type of card, by spending category, and by country.

(ii) [Reserved]

[FR Doc. E8–21896 Filed 9–17–08; 8:45 am]

BILLING CODE 3510–06–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1 and 38

Execution of Transactions: Regulation 1.38 and Guidance on Core Principle 9

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is re-proposing a number of amendments to its rules, guidance and acceptable practices, initially proposed on July 1, 2004,[1] concerning trading off the centralized market, including the addition of guidance on contract market block trading rules and exchanges of futures for commodities or derivatives positions. The Commission is re-proposing these amendments and requesting comment as part of its continuing efforts to update its regulations in light of the Commodity Futures Modernization Act of 2000 (''CFMA'').

DATES: Comments must be received by November 17, 2008.

ADDRESSES: Comments should be sent to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, attention: Office of the Secretariat. Comments may be sent by facsimile transmission to 202–418–5521 or, by e-mail to *secretary@cftc.gov.* Reference should be made to ''Proposed Rules for Trading Off the Centralized Market.'' Comments may also be submitted by connecting to the Federal eRulemaking Portal at *http://www.regulations.gov* and following comment submission instructions.

FOR FURTHER INFORMATION CONTACT: Gabrielle A. Sudik, Special Counsel, Division of Market Oversight; Telephone 202–418–5171; e-mail *gsudik@cftc.gov;* Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

Commission Regulation 1.38 (17 CFR 1.38) sets forth a requirement that all purchases and sales of a commodity for future delivery or a commodity option on or subject to the rules of a designated contract market (''DCM'') should be executed by open and competitive methods. This ''open and competitive'' requirement is modified by a proviso that allows transactions to be executed in a ''non-competitive'' manner if the transaction is in compliance with DCM rules specifically providing for the non-competitive execution of such transactions, and such rules have been submitted to, and approved by, the Commission.

The Commodity Futures Modernization Act of 2000 (''CFMA''),[2] which was enacted after Regulation 1.38 was promulgated,[3] significantly changed the Federal regulation of commodity futures and option markets by replacing ''one-size-fits-all'' regulation with broad, flexible core principles.[4] At the same time, the CFMA modified section 3 of the Commodity Exchange Act (''Act'') (7 U.S.C. 1 *et seq.*), making a finding that transactions subject to the Act provide ''a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities,'' and providing that the purpose of the Act is now, among other things, ''to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this Act and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets. * * * ''[5] The CFMA also expanded the types of transactions that could lawfully be executed off the centralized market. Specifically, the CFMA permits DCMs to establish trading rules that: (1) Authorize the exchange of futures for swaps; or (2) allow a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of a contract market or derivatives clearing organization.[6] At the same time, exchanges must balance such rules with Core Principle 9 (7 U.S.C. 5(d)(9)) (Execution of transactions), which states ''The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions.''

In 2001, the Commission promulgated regulations implementing provisions of the CFMA that established procedures relating to trading facilities, interpreted certain of the CFMA's provisions, and provided guidance on compliance with various of its requirements.[7] Later, in 2002, the Commission promulgated amendments to those regulations in response to issues that had arisen in administering the rules, noting that the Commission would consider ''additional amendments to the rules implementing the CFMA based upon further administrative experience.''[8] Consistent with that rationale, the Commission now proposes to amend Commission Regulation 1.38 and Commission guidance and acceptable practices concerning Core Principle 9 as it relates to Commission Regulation 1.38 to include changes that the Commission has developed based upon its experience administering those provisions.

[1] 69 FR 39880.

[2] Public Law 106–554, 114 Stat. 2763 (2000). Under the CFMA, such DCM rules may be effected by the certification procedures set forth in section 5c(c) of the Commodity Exchange Act and 40.6 of the Commission's regulations.

[3] Regulation 1.38 was originally adopted in 1953 by the Commodity Exchange Authority, the predecessor of the Commission. *See* 18 FR 176 (Jan. 19, 1953). For subsequent amendments, *see* 31 FR 5054 (Mar. 29, 1966), 41 FR 3191 (Jan. 21, 1976, eff. Feb. 20, 1976), and 46 FR 54500 (Nov. 3, 1981, eff. Dec. 3, 1981).

[4] The CFMA was intended, in part, ''to promote innovation for futures and derivatives.'' § 2 of the CFMA. It was also intended ''to reduce systemic risk,'' and ''to transform the role of the [Commission] to oversight of the futures markets.'' *Id.*

[5] 7 U.S.C. § 5 (2000).

[6] *See* Section 7(b)(3) of the Act.

[7] *See* 66 FR 14262 (Mar. 9, 2001) and 66 FR 42256 (Aug. 10, 2001).

[8] *See* 67 FR 20702 (Apr. 26, 2002) and 67 FR 62873 (Oct. 9, 2002).

II. Discussion of the Proposed Rule Amendments, Guidance and Acceptable Practices

A. The Commission's July 1, 2004 Notice of Proposed Rulemaking

On July 1, 2004, the Commission published proposed amendments to Regulation 1.38 and Commission guidance concerning Core Principle 9, found in Appendix B to Part 38 of the Commission's Regulations (17 CFR Part 38) (the ''July 1, 2004 NPRM'').[9] The Commission proposed to update the language of Regulation 1.38 to more accurately identify the types of transactions that may lawfully be executed off a contract market's centralized market and to simplify the language of the Regulation. The Commission also wished to provide more detail regarding acceptable practices for how contract markets can satisfy the requirements of Core Principle 9, particularly on four general topics: Electronic trading systems, general provisions for transactions off the centralized market, block transactions, and the exchange of futures for a commodity or a derivatives position.

The Commission received seven comment letters in response to the July 1, 2004 NPRM: From the Chicago Mercantile Exchange (''CME''), the Futures Industry Association (''FIA''), the Chicago Board of Trade (''CBOT''), the U.S. Futures Exchange (''USFE'') (two letters), the DRW Trading Group (''DRW''), and Man Financial. The comments addressed eight general areas of concern: The proposed amendments to Regulation 1.38, the Commission's proposed guidance for compliance with Core Principle 9 in general, block trading in general, the minimum size of block transactions, block trade prices, the time within which parties must report block trades to the exchange, block trades between affiliated parties, and the exchange of futures for a commodity or a derivatives position. Some comments offered specific recommendations regarding the proposed amendments, while other comments were of a more general nature.

Between the publication of the July 1, 2004 NPRM and this current proposal, the Commission has continued to gain experience in administering Regulation 1.38 and Core Principle 9. Staff has also learned more about the common practices involved in transactions done off of the centralized market from the comment letters received, from informal interviews with various entities in the futures industry, from DCM rule submissions, and from informal studies of trading data related to off-centralized-market transactions. In light of this, as well as the length of time that has passed since the July 1, 2004 NPRM, the Commission has determined to re-propose amendments to Regulation 1.38 and the guidance to Core Principle 9. Commenters are invited to submit feedback on all areas of this proposal, including those areas already addressed in earlier comment letters.

B. Core Principle 9 Guidance and Acceptable Practices

This proposal contains regulations, guidance and acceptable practices. Commission regulations, such as Regulation 1.38, are requirements that all contract markets must follow. Such regulations go beyond mere illustrations of how a contract market may comply with a section of the Act; they are requirements that stand alone and that the Commission believes are necessary in order to comply with the Act. In issuing guidance, the Commission strives to offer advice about how contract markets can ensure compliance with sections of the Act. The Commission recognizes that in certain areas there is more than one possible approach that would allow a contract market to comply with a related Section of the Act. For example, as will be discussed below, there can be more than one way to determine an appropriate minimum size for block trades. The Commission offers guidance on such subjects in an effort to inform the exchanges of what it believes are some reasonable approaches to take when tackling such issues and concerns to be addressed in complying with Core Principles. The acceptable practices provide examples of how exchanges may satisfy particular requirements of the Core Principles; they do not establish mandatory means of compliance.[10] Acceptable practices are more specific than guidance. An exchange rule modeled after an acceptable practice will be presumed to comply with the related Core Principle, since the Commission has already found such practice complies with that Core Principle. The Commission wishes to emphasize that acceptable practices are intended to assist DCMs by establishing non-exclusive safe harbors.[11] The introduction to Appendix B to Part 38 makes it clear that the acceptable practices in Appendix B are not the sole means of achieving compliance with the Act:

> Acceptable practices meeting the requirements of the core principles are set forth in paragraph (b) following each core principle. Boards of trade that follow the specific practices outlined under paragraph (b) for any core principle in this appendix will meet the applicable core principle. Paragraph (b) is for illustrative purposes only, and does not state the exclusive means for satisfying a core principle.[12]

The Commission also notes that it drafted the acceptable practices based on its experience in reviewing exchange rules and in considering related matters currently facing the Commission. The acceptable practices provided in the proposal are, in large measure, modeled on exchange rules that have previously been found to satisfy the requirements of Core Principle 9. The Commission does not mean to imply that it will find other rules unacceptable. Indeed, some of the acceptable practices explicitly note that a DCM could adopt rules that differ from the acceptable practice, although any such deviation would still require the DCM and parties to trades to comply with Core Principle 9, as required by section 5(d)(1) of the Act.

The Commission believes that its proposed issuance of guidance and acceptable practices will generally ease the burden on exchanges in complying with Core Principle 9. Without the adoption of these amendments, DCMs are without any meaningful guidance as to whether their requirements for trading off the centralized market comply with Core Principle 9. These amendments provide certainty for those rules that fall under an acceptable practice, while the burden for those that fall outside of the acceptable practices is no greater than before. The Commission believes that it would not be appropriate to lessen the specificity of the acceptable practices because doing so would render the guidance meaningless.

C. General Changes to the Re-Proposed Amendments

The amendments proposed in this rulemaking are in large measure substantively similar to what was proposed in the July 1, 2004 NPRM. This proposal, like its predecessor, strives to update the language of Regulation 1.38 to more accurately

[9] 69 FR 39880 (July 1, 2004).

[10] *See* Section 5c(a) of the Act 7 U.S.C. 7a–2(a).

[11] The Commission notes that safe harbor treatment applies only to compliance with the specific aspect of the Core Principle in question. In this regard, an exchange rule that meets a safe harbor will not necessarily protect the exchange or market participants from charges of violations of other sections of the Act or other aspects of the Core Principle.

[12] *See also* A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations Proposed Rules, 66 FR 14262, 14263 (March 9, 2001).

identify the types of transactions that may lawfully be executed off of a contract market's centralized market and to simplify the language of the Regulation. The proposed language also updates Regulation 1.38 to make it clear that DCMs may self-certify (not just seek approval for) rules or rule amendments related to transactions off the centralized marketplace. This proposed amendment is consistent with section 5c(c) of the Act, which allows for the certification of any DCM rule or rule amendment.

In addition, Regulation 1.38 requires, subject to certain exceptions, that all purchases and sales of a commodity for future delivery or a commodity option on or subject to the rules of a DCM should be executed by open and competitive methods. The implicit assumption in Regulation 1.38 is that trading should take place on the centralized market unless there is a compelling reason to allow certain transactions to take place off the centralized market. Similarly, exchange rules and policies that allow such transactions should ensure that the impact on the centralized market is kept to a minimum. For example, certain types of off-centralized market transactions, such as block trades and exchanges of futures for related positions, can create new positions or reduce prior positions. If these transactions become the exclusive or predominant method of establishing or offsetting positions in a particular market, it might jeopardize the centralized market's role in price discovery and would not comply with Core Principle 9, which provides that trading be competitive, open and efficient.[13] Other types of off-centralized market transactions are bookkeeping in nature, such as transfer trades or office trades, which move existing positions between accounts. These transactions do not affect the price discovery mechanism of the centralized market because they do not establish or offset positions.

This proposed rulemaking also addresses the same four general topics under Core Principle 9 that were addressed in the July 1, 2004 NPRM: Electronic trading systems, general provisions for transactions off the centralized market, block transactions, and the exchange of futures for a commodity or a derivatives position.

The majority of changes made since the July 1, 2004 NPRM strive to do one of two things. First, the Commission has attempted to clarify any language that was ambiguous, particularly in response to questions raised in the comment letters. Second, the proposed acceptable practices under Core Principle 9 have been redrafted to more closely resemble the language of the acceptable practices for the other Core Principles. The Commission believes that in addition to harmonizing the language of the acceptable practices, these changes make the language of the acceptable practices easier to read.

The Commission has made more significant changes to the proposed amendments in three areas, based on the comment letters received, as well as the Commission's own experience in administering Regulation 1.38 and Core Principle 9. These three areas, discussed in more detail below, concern the appropriate minimum size of block trades; when block trades may be permitted between affiliated parties; and exchanges of futures for a commodity or derivatives position, including the permissibility of transitory exchanges of futures for a commodity or derivatives position (''transitory EFPs'').

D. The Minimum Size of Block Trades

In the July 1, 2004 NPRM the Commission proposed that an acceptable minimum size for block trades would be at a level larger than 90% of the transactions in a relevant market (''90% threshold'') or, for new contracts with no relevant market, 100 contracts. CME, CBOT, DRW, FIA and USFE all offered comments regarding those proposed acceptable practices. CME and CBOT disagreed with the Commission's proposed minimum sizes of the 90% threshold and 100 contracts: CME thought the numbers were arbitrary, unresponsive to market needs and inconsistent with the Commission's oversight role. Similarly, CBOT believed there may be instances where 90% or 100 contracts could be too high or not high enough. CBOT suggested that an acceptable minimum block trade size be at the point where the block would move the market or where the customer would not be able to obtain a fair price or fill the order on the centralized market.

DRW suggested that the Commission clarify its intent that the minimum block trade size should be derived from the size of trades in the entire relevant market, which should include the central market, related derivatives markets and the cash market. DRW also suggested that using the 90% threshold would result in artificially low minimums because many transactions in the central market are often broken down into smaller trades at the same price. DRW suggested tying the minimum block trade size to the size of orders instead of trades or by developing a risk-based system that would consider both outright and spread transactions.

USFE seemed to imply that the 90% threshold should be lower for options than for futures. USFE noted that options transactions, particularly combination trades, are more complex than futures trades and require more human intervention than other trades. The options market is therefore more conducive to trading off the centralized market. While USFE did not suggest a different minimum threshold for options, it indicated that more off-centralized-market trading of options was necessary until technology could accommodate complex options positions on the electronic trading screen.

In response to these comments, as well as the Commission's own increased knowledge about block trades, the Commission is changing the proposed guidance and acceptable practices on this topic. In this regard, the Commission's guidance for determining appropriate minimum sizes relies on the purpose for allowing block trades. Block trades are allowed to be transacted off the centralized market for two reasons. First, prices attendant to the execution of large transactions on the centralized market may diverge from prevailing market prices that reflect supply and demand of the commodity. This is because the centralized market may not provide sufficient liquidity to execute large transactions without a significant risk premium, so that the prices of such trades tend to reflect, to a significant degree, the cost of executing the trade. Accordingly, reporting these prices as conventional market trades would be misleading to the public. Second, block trading facilitates hedging by providing a means for commercial firms to transact large orders without the need for significant price concessions and resulting price uncertainty for parties to the transaction that would occur if transacted on the centralized market. Using these reasons as guidance, block trades should be limited to large orders, where ''large'' is the number at which there is a reasonable expectation that

[13] *See also,* section 3(a) of the Act, which finds that transactions subject to the Act provide ''a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.'' Using the example above, markets on which transactions are exclusively or predominantly carried out by blocks are not liquid markets. Furthermore, it has been questioned whether markets are fair if they do not offer viable centralized trading. This also calls into question such a market's compliance with designation criterion 3, 7 U.S.C. 7(b)(3), which requires the exchange to establish and enforce trading rules to ensure fair and equitable trading through the facilities of the contract market.

the order could not be filled in its entirety at a single price, but would need to be broken up and executed at different prices if transacted in the centralized marketplace. As such, the proposed guidance notes that minimum block trade sizes should be larger than the size at which a single buy or sell order is customarily able to be filled in its entirety at a single price (though not necessarily with a single counterparty) in that contract's centralized market, and exchanges should determine a fixed minimum number of contracts needed to meet this threshold.

The Commission now believes that its previous means of determining an appropriate minimum size—the 90% threshold—may not be appropriate for all markets because this figure does not necessarily correspond with the size of the order that would move the market price. Because the determination of what constitutes a large trade will vary between DCMs, contracts and even over time, the acceptable practices will not set forth an explicit threshold, but will instead leave it to the DCMs to determine appropriate minimum sizes, based on the above purpose.[14] This new approach should also address DRW's concern that using trade size alone to determine a threshold might result in lower-than-appropriate minimum sizes, because breaking an order into several small trades ideally should not affect the overall volume or liquidity of the centralized market. Similarly, the presence of many small trades submitted by multiple traders will also not artificially lower the appropriate minimum block trade size. The Commission also understands that, as exchange volume migrates from floor trading to electronic trading, the average size of transactions tends to decrease, resulting in artificially low 90% thresholds and minimum block trade sizes that are too low given the criteria discussed above.

One method by which DCMs could determine what number of contracts is an appropriate minimum size would be to assess the market liquidity (the number of contracts the centralized market is able to absorb at the best execution price) and market depth (which measures the potential price slippage if a large order were to be executed in the centralized market). For example, a DCM could examine a contract's market liquidity over time and determine that a certain size order in that contract could rarely, if ever, be filled in its entirety at the best price, and set a minimum block trade size based on this data. Such calculations should be re-examined periodically, as volume, liquidity and market depth change over time to ensure that a contract's minimum block trade size remains appropriate. Such an analysis would most easily be done for an electronically-traded contract, since trade data about the contract is easy to gather and analyze.

Calculating a minimum size based on market liquidity and depth is not the only possible way to determine what size order should be considered ''large.'' DCMs could employ other methods to reasonably determine what size order would move the price in the centralized market. For instance, along with a review of trade sizes and/or order sizes, DCMs could interview experienced floor brokers and floor traders to determine what size order is generally too large to fill at a single price. This method might be most appropriate for open-outcry markets because DCMs will not have the same type of trade data generated by electronic trading platforms, and will not as easily be able to determine, based on electronic data, what size order is ''large.''

For new contracts that have no trading history, a DCM should strive to set its initial minimum block trade size based on what the DCM reasonably believes will be a ''large'' order (i.e., the order size that would likely move the market price). So, for example, the DCM might base its initial minimum block trade size on sources of data other than transaction data in that particular contract such as transaction patterns in related futures or cash markets, the DCM's experience regarding other newly-launched contracts, and/or a survey of potential market users to determine how many contracts might be executed in a typical transaction. Where a DCM is unable to determine an appropriate minimum size (due, for instance, to the lack of data in other markets or other methods for estimating an appropriate minimum size), the Commission believes it would be an acceptable practice for a DCM to set the minimum block trade size at 100 contracts. In the past, the Commission has considered 100 contracts to be a reasonable figure to use as the minimum size until enough market data exist to allow that figure to be adjusted, if need be. Once there is adequate trade data to re-evaluate the minimum size, the DCM should ensure that it be adjusted to a level where a trade would move the centralized market, if traded there.

In this regard, the Commission proposes as an acceptable practice that DCMs review the minimum size thresholds for block trades no less frequently than on a quarterly basis to ensure that the minimum sizes remain appropriate for each contract. As noted in the proposed guidance, such review should take into account the sizes of trades in the centralized market and the market's volume and liquidity. This review and any necessary adjustments should be made to both new and existing contracts. In addition, quarterly reviews of minimum block trade sizes should take into account whether the minimum sizes ensure that block trades remain the exception, rather than the rule. As noted above, transactions off the centralized market should remain an exception as the expectation is that most trading will occur on the centralized market. Exchanges that established their minimum sizes for block trades long ago may find they need to adjust their minimum sizes as a result of changes in volume, liquidity, or the typical sizes of transactions in the respective market.

Finally, the Commission notes that DCMs are free to require a minimum size that is *larger* than what the guidance suggests a ''large'' trade would be. They are not obligated to set the minimum size at the smallest acceptable minimum size.

E. Block Trades Between Affiliated Parties

Based on comment letters and the Commission's growing experience with implementing Core Principle 9, the Commission has determined to revise Regulation 1.38 and the related acceptable practices regarding block trades between affiliated parties. An affiliated party is a party that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with another party. These proposed changes differ from the July 1, 2004 NPRM's treatment of block trades between affiliated parties.

Block trades between affiliated parties may be permitted by DCMs, so long as appropriate safeguards are in place to guard against the heightened possibility that transactions between two closely related parties are more susceptible to abuse, such as setting unreasonable prices, artificially boosting volume, money passing, or wash trading. It is not always clear that two related parties are motivated solely by their own separable best interests, since they often both report to or are accountable to a single person or entity, and as such they may be encouraged by those in control of both sides of the transaction to engage in trading strategies that benefit from abusive trading practices. It is for this reason that the Commission believes it

[14] In this regard, the guidance could result in different DCMs arriving at different minimum size requirements for the same or similar futures contracts, if the liquidity and volume on each DCM is different.

is appropriate that DCMs that allow block trades between affiliates also include additional safeguards to guard against the heightened possibility of abuse, and that DCMs must have rules to ensure that these safeguards are satisfied.

The Commission proposes to amend Regulation 1.38 by requiring that when block trades take place between affiliated parties: (i) The block trade price must be based on a competitive market price, either by falling within the contemporaneous bid/ask spread on the centralized market or calculated based on a contemporaneous market price in a related cash market; (ii) each party must have a separate and independent legal bona fide business purpose for engaging in the trades; and (iii) each party's decision to enter into the block trade must be made by a separate and independent decision-maker. Under the acceptable practices for Core Principle 9, a DCM could permit block trades between affiliated parties that meet these requirements and are otherwise appropriate parties to engage in block trading.[15]

The Commission believes these proposed requirements for block trades between affiliated parties strike an appropriate balance between making clear that such trades are allowable and ensuring that each party is acting independently when it agrees to enter into such a transaction. The requirement that affiliated parties who engage in a block trade meet objective criteria regarding that block trade will help guard against the possibility that such closely related parties might collude in some type of abuse.

F. Exchange of Futures for a Commodity or for a Derivatives Position

In the July 1, 2004 NPRM, the Commission proposed to include acceptable practices regarding the exchange of futures for a commodity or derivatives position (often referred to as an exchange-for-physical or EFP, although it also includes, but is not limited to, similar transactions such as exchanges-for-swaps or exchanges-for-risk). Specifically, the Commission proposed a definition of what constituted a bona fide EFP in the Core Principle 9 acceptable practices. The Commission received comments from FIA, CBOT and CME regarding these acceptable practices. Among other things, the commenters requested the Commission clarify that trades commonly known as ''transitory EFPs'' are still permitted and that third parties may effect the cash portion of an EFP transaction.

In response to these comments and other concerns that have arisen since the July 1, 2004 NPRM, the Commission is proposing to make two substantive amendments to its acceptable practices regarding exchanges of futures for a commodity or derivatives position. First, the Commission is proposing to expand the acceptable practices regarding EFPs' bona fides, pricing, reporting, and DCMs' publication of EFP transactions. Second, the Commission is proposing to make clear that transitory EFPs are permissible when each part of the transaction—the EFP itself and the related cash transaction—is a stand-alone, bona fide transaction.

The Commission is proposing to offer general acceptable practices for exchange of futures for a commodity or derivatives position, including a definition of what constitutes a bona fide EFP, the pricing of the legs, the reporting of the transaction to the exchange, and the exchange's obligation, consistent with Regulation 16.01, to publicize daily the total quantity of exchanges of futures for a commodity or derivatives position. In response to the comment letters, the Commission is proposing to clarify in the text of the acceptable practices that a DCM may permit a third party to facilitate the transfer of the cash leg of an EFP, so long as the commodity or derivatives position is passed through to the party receiving the futures position. These provisions are meant to be consistent with previous publications by the Commission, including the 1987 EFP Report prepared by the Commission's then Division of Trading and Markets and the 1998 EFP Concept Release.[16]

The essential elements of bona fide EFPs have been provided in the guidance to Core Principle 9 below. The proposed elements are found in current contract market ''exchange of futures'' rules and are based on the essential elements for bona fide EFPs detailed in the 1987 EFP Report.[17] The elements include separate but integrally related transactions, an actual transfer of ownership of the commodity or derivatives position, and both legs transacted between the same two parties. The Commission notes that the determination whether an actual transfer of ownership has occurred will depend upon the facts and circumstances of each transaction. In each instance where an exchange of futures for a commodity or for a derivatives position is linked to another offsetting transaction, the particular facts and circumstances may warrant a determination that there was not an actual ownership transfer of each leg of the commodity or derivatives position.

Further, the Commission is proposing that the acceptable practices relating to the bona fides of an EFP should apply to transitory EFPs as well. A transitory EFP involves both an EFP and an offsetting cash commodity transfer. For example, party A purchases the cash commodity from party B and then engages in an EFP whereby A sells the cash commodity back to B and receives a long futures position. As a result of these two transactions, the parties acquire futures positions but end up with the same cash market positions they had before the transaction.

To be a legitimate transitory EFP, the cash transaction must be bona fide and the EFP itself must be bona fide. As with an EFP, a primary indicator of a bona fide cash transaction is the actual transfer of ownership of the cash commodity or position. In this regard, the cash leg of the transaction must be able to stand on its own as a commercially appropriate transaction, and may not be intrinsically linked to the EFP transaction. A cash commodity transfer that cannot stand on its own may indicate that there was no actual economic risk in the cash leg of the related EFP and may raise concerns about whether the EFP involved an ''exchange'' of futures contracts for cash commodity as required by Section 4c(a) of the Act. There must be no obligation on either party that the cash transaction will require the execution of a related EFP, or vice versa.

G. Other Proposed Acceptable Practices

The rest of the proposed acceptable practices are for the most part similar to what was proposed in the July 1, 2004 NPRM. As with the acceptable practices discussed more fully above, the Commission considered the comment letters when re-drafting these acceptable practices, and strove to clarify any ambiguities and make them easier to read. And, as in the July 1, 2004 NPRM, the Commission notes that these proposed acceptable practices are based in large measure on existing DCM rules.

[15] Similarly, the proposed acceptable practices regarding the prices of block trades also include reference to Regulation 1.38 as it relates to block trades between affiliated parties.

[16] DIVISION OF TRADING AND MARKETS, REPORT ON EXCHANGES OF FUTURES FOR PHYSICALS (1987) (the 1987 EFP Report); 63 FR 3708 (Jan. 26, 1998) (the 1998 EFP Concept Release).

[17] *See generally,* the 1987 EFP Report. *See also,* CBOT Rules 331.08; CFE Rule 414; CME Rule 538; KCBT Rules 1128.00, 1128.02, 1129.00, and 1129.02; MGE Rule 719; NYBOT Rules 4.12 and 4.13; NYMEX Rules 6.21, 6.21A and 6.21E; and OCX Rule 416.

1. Block Trade Prices

In the July 1, 2004 NPRM, the Commission proposed acceptable practices regarding the prices of block trades. The most basic element of this acceptable practice is that prices be ''fair and reasonable.'' In its comment letter, CBOT noted an inconsistency between the text of the July 1, 2004 NPRM proposed guidance and the preamble and also questioned whether ''circumstances'' of the party or market could or should be relevant in determining whether a block trade price is fair and reasonable. In this proposal, the Commission intends to eliminate the ambiguity and to make clear its belief that a DCM could permit ''circumstances'' to be a factor in determining whether a block trade price was fair and reasonable. Such an approach could include, for example, the participants' legitimate trading objectives or the condition of the market. The Commission does not believe that permitting such flexibility will harm the centralized market because, regardless of how a block trade price is determined, it must still be fair and reasonable. The ability to price the trade away from the centralized market is not a *carte blanche* to set unfair or unreasonable prices.

2. Block Trade Reporting Times

In the July 1, 2004 NPRM, the Commission proposed in its acceptable practices that block trades should be reported to the contract market within a reasonable period of time. In response, DRW made two suggestions: First, that reasonable reporting times for block trades should be as close to immediately after the completion of the trade as possible, with a maximum of no more than 5 minutes; and second, that parties to a block trade should not be allowed to trade in the centralized market until information about the block trade has been made public.

The Commission will re-propose that block trades should be reported to the contract market within a reasonable period of time. The Commission declines to establish a specific length of time in order to allow exchanges to determine what an appropriate length of time should be on a contract-by-contract basis. But the Commission notes that most current DCM rules require reporting of block trades within 5 minutes.[18] A small number of DCM rules allow as many as 15 minutes, but the Commission understands these are limited to contracts that have very high block trade minimum size thresholds or where the contracts are typically traded as part of large and complex spreads, requiring more time to double check details and convey the information to the exchange.[19] When determining length of time for parties to report block trades, DCMs should consider the importance of providing information about block trades to the market as well as the potential for abuses, such as front running, and whether longer reporting periods may heighten the potential for abuse. Additionally, staff has previously noted that allowing a few minutes' delay between the time a block trade is executed and reported will allow the market price to continue to respond to prevailing supply and demand factors, and not be unduly influenced by the block itself. In other words, a reporting delay will help the centralized market avoid the momentary price and volume distortion that would occur if large trades were made on the centralized market in the first place. In regards to whether parties to a block trade may trade in the centralized market before the block trade information is published, the Commission believes that the reporting window offers parties to the block trade an opportunity to hedge or offset the trade, which in turn supplies information to the centralized market. As such, the Commission believes that compliance with the Core Principles does not require that DCMs restrict the ability of parties to a block trade from making transactions on the central marketplace before the block trade is reported. DCMs, however, are permitted to forbid such trading.

3. Publication of Transaction Details

The Commission is re-proposing that DCMs would publicize details about transactions off the centralized market immediately upon the receipt of the transaction report. The Commission wishes to clarify that it does not intend to impose new publication requirements on DCMs in regards to trades made off the centralized market beyond what is required by the Commission's regulations. So, for example, DCMs would need to publish the total number of exchanges of futures for a commodity or for a derivatives position, as required by Commission Regulation 16.01. But there would be no similar requirement to publish office trades or transfer trades.

Similarly, the proposed guidance also identifies publication of block trade details by DCMs immediately upon receipt of block trade reports as an acceptable practice.[20] The proposed acceptable practices also would require the DCM to identify block trades on its trade register.

4. Recordkeeping

Current Commission Regulation 1.38(b) provides that every person handling, executing, clearing, or carrying trades, transactions or positions that are not competitively executed, must identify and mark by appropriate symbol or designation all such transactions or contracts and all associated orders, records, and memoranda. In addition to updating the language of Regulation 1.38(b), the proposed amendments add this requirement to the guidance under Core Principle 9, in order to provide consolidated guidance regarding recordkeeping practices pertaining to transactions off the centralized market.

Similarly, acceptable block trade rules would require parties to, and members facilitating, a block trade to keep appropriate records. Appropriate block trade records would comply with the requirements of Core Principle 10 and Core Principle 17. Records kept in accordance with the requirements of Statement No. 133 (''Accounting for Derivative Instruments and Hedging Activities''), issued by the Financial Accounting Standards Board (''FASB''), would be satisfactory.[21] Acceptable block trade rules would require that block orders be recorded by the member and time-stamped with both the time the order was received by the member and the time the order was executed. When requested by the exchange, the Commission or the Department of Justice, parties to, and members facilitating, a block trade shall provide records to document that the block trade is executed in accordance with contract market rules.

5. Testing of Automated Trading Systems

The guidance for Core Principle 9 also addresses the testing and review of automated trading systems. Currently, the guidance states that acceptable testing of automated systems should be ''objective,'' and calls for the provision of ''objective'' test results to the Commission. The proposed guidance would also call for the provision to the

[18] *See, e.g.*, CBOT Rule 331.05(d); CME Rule 526(F); NYMEX Rule 6.21C.

[19] *See, e.g.*, CME Rule 526(F).

[20] This also is an element of compliance with Designation Criterion 3 (Fair and Equitable Trading) and Core Principle 8 (Daily Publication of Trading Information).

[21] FASB Statement No. 133 provides guidance on the use of accounting for corporate hedge activity involving derivative transactions. The statement includes guidance on documenting the hedging relationship.

Commission of test results of any ''non-objective'' testing carried out by or for a DCM (such as informal in-house reviews) regarding the system functioning capacity or security of any automated trading systems. Although the results of ''non-objective'' testing would be of more limited use, the Commission believes that test results of any ''non-objective'' testing carried out by or for the DCM should also be provided to the Commission.

6. Parties to a Block Trade

The Commission is proposing that block trade parties are required to be eligible contract participants (''ECPs'') as that term is defined in Section 1a(12) of the Act, although commodity trading advisors (''CTAs'') and investment advisors having over $25 million in assets under management, including foreign persons performing equivalent roles, are allowed to carry out block trades for non-ECP customers.

A majority of exchanges that permit block trading prohibit persons from effecting block trades on behalf of customers unless the person receives a customer's explicit instruction or prior consent to do so.[22] The proposed rulemaking incorporates this prohibition as an acceptable practice.

III. Request for Comment

The Commission requests comment on all aspects of this proposal.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act [23] requires federal agencies, in proposing rules, to consider the impact of those rules on small businesses. The rule amendments proposed herein will affect DCMs, FCMs, CTAs and large traders. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on small entities in accordance with the RFA.[24] The Commission has previously determined that DCMs,[25] registered FCMs,[26] and large traders [27] are not small entities for purposes of the RFA. With respect to CTAs, the Commission has determined to evaluate within the context of a particular rule proposal whether CTAs would be considered ''small entities'' for purposes of the Regulatory Flexibility Act and, if so, to analyze the economic impact on the affected entities of any such rule at that time.[28] The Commission believes that the instant proposed rules will not place any new burdens on entities that would be affected hereunder, and the Commission does not expect the proposed amendments in most cases to cause persons to change their current methods of doing business. This is because requirements under this proposal, if adopted, would be similar to most existing DCM requirements.

Accordingly, the Commission does not expect the rules, as proposed herein, to have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed amendments will not have a significant economic impact on a substantial number of small entities. The Commission invites the public to comment on this finding and on its proposed determination that the entities covered by these rules would not be small entities for purposes of the Regulatory Flexibility Act.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed rule amendments do not require a new collection of information on the part of any entities subject to these rules. Accordingly, for purposes of the Paperwork Reduction Act of 1995, the Commission certifies that these rule amendments do not impose any new reporting or recordkeeping requirements.

C. Cost-Benefit Analysis

Section 15 of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation. The Commission understands that, by its terms, Section 15 does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Nor does it require that each proposed regulation be analyzed in isolation when that regulation is a component of a larger package of regulations or of rule revisions. Rather, Section 15 simply requires the Commission to ''consider the costs and benefits'' of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: Protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could, in its discretion, give greater weight to any one of the five enumerated areas of concern and could, in its discretion, determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest, to effectuate any of the provisions, or to accomplish any of the purposes of the Act.

The proposed amendments constitute a package of amendments to Regulation 1.38 and to guidance that the Commission originally promulgated to implement the CFMA. The amendments are proposed in light of past experience with the implementation of the CFMA and are intended to facilitate increased flexibility and consistency. Some sections of the proposed amendments merely clarify or make explicit past Commission decisions concerning transactions off the centralized market.

As most provisions incorporate DCM rules previously approved by the Commission or submitted to the Commission under its self-certification procedures, the proposed amendments would not, in most cases, impose new costs on DCMs or market participants. The great majority of current DCM rules already meet the acceptable practices proposed. Furthermore, these amendments incorporate standards that the Commission has previously determined protect market participants and the public, the financial integrity or price discovery function of the markets, and sound risk management practices. Moreover, the additional clarification of acceptable practices provides a benefit to markets and market participants. In addition, the amendments are expected to benefit efficiency and competition by providing more detailed guidance as to acceptable means of meeting the applicable designation criteria and core principles, thus allowing a greater degree of legal certainty to the markets and market participants.

After considering the five factors enumerated in the Act, the Commission has determined to propose the rules and rule amendments set forth below. The Commission invites public comment on its application of the cost-benefit provision. Commenters also are invited to submit any data that they may have quantifying the costs and benefits of the

[22] *See* CME Rule 526(C), CFE Rule 415(a)(i), CBOT Rule 331.05(a), NYBOT Rule 4.31(a)(ii)(A), OCX Rule 417(a)(i), and USFE Rule 415(c).

[23] 5 U.S.C. 601 *et seq.*

[24] 47 FR 18618–21 (Apr. 30, 1982).

[25] *Id.* at 18618–19.

[26] *Id.* at 18619–20.

[27] *Id.* at 18620.

[28] *Id.* at 18620.

proposed rules with their comment letters.

List of Subjects

17 CFR Part 1

Block transactions, Commodity futures, Contract markets, Transactions off the centralized market, Reporting and recordkeeping requirements.

17 CFR Part 38

Block transactions, Commodity futures, Contract markets, Transactions off the centralized market, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission hereby proposes to amend Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. The authority citation for part 1 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 24, and 24, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub L. 106–554, 114 Stat. 2763 (2000).

2. Section 1.38 is revised to read as follows:

§ 1.38 Execution of transactions.

(a) *Transactions on the centralized market.* All purchases and sales of any commodity for future delivery, and of any commodity option, on or subject to the rules of a designated contract market, shall be executed openly and competitively by open outcry, or posting of bids and offers, or by other equally open and competitive methods, in a place or through an electronic system provided by the contract market, during the hours prescribed by the contract market for trading in such commodity or commodity option.

(b) *Transactions off the centralized market; requirements.*

(1) Notwithstanding paragraph (a) of this section, transactions may be executed off the centralized market, including by transfer trades, office trades, block trades, inter-exchange spread transactions, or trades involving the exchange of futures for commodities or for derivatives positions, if transacted in accordance with written rules of a contract market that provide for execution away from the centralized market and that have been certified to or approved by the Commission. Every person handling, executing, clearing, or carrying the trades, transactions or positions described in this paragraph shall comply with the rules of the appropriate contract market and derivatives clearing organization, including to identify and mark by appropriate symbol or designation all such transactions or contracts and all orders, records, and memoranda pertaining thereto.

(2) *Block trades between affiliated parties; requirements.* An affiliated party is a party that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with another party. In addition to the other requirements of this section, block trades between affiliated parties are permitted only in accordance with written rules of a contract market that provide that:

(i) The block trade price must be based on a competitive market price, either by falling within the contemporaneous bid/ask spread on the centralized market or calculated based on a contemporaneous market price in a related cash market,

(ii) Each party must have a separate and independent legal bona fide business purpose for engaging in the trades, and

(iii) Each party's decision to enter into the block trade must be made by a separate and independent decision-maker.

PART 38—DESIGNATED CONTRACT MARKETS

3. The authority citation for part 38 is revised to read as follows:

Authority: 7 U.S.C. 2, 5, 6, 6c, 7 and 12a, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

4. Appendix B to Part 38 is revised to read as follows:

Appendix B to Part 38—Guidance on, and Acceptable Practices in, Compliance With Core Principles

Core Principle 9 of section 5(d) of the Act: EXECUTION OF TRANSACTIONS—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions.

(a) *Guidance.*

(1) *Transactions on the centralized market.*

(i) Purchases and sales of any commodity for future delivery, and of any commodity option, on or subject to the rules of a contract market shall be executed openly and competitively by open outcry, by posting of bids and offers, or by other equally open and competitive methods, in a place or through an electronic system provided by the contract market, during the hours prescribed by the contract market for trading in such commodity or commodity option.

(ii) A competitive and open market's mechanism for executing transactions includes a contract market's methodology for entering orders and executing transactions.

(iii) Appropriate objective testing and review of a contract market's automated systems should occur initially and periodically to ensure proper system functioning, adequate capacity and security. A designated contract market's analysis of its automated system shall address compliance with appropriate principles for the oversight of automated systems, ensuring proper system functionality, adequate capacity and security.

(2) *Transactions off the centralized market.*

(i) In order to facilitate the execution of transactions, transactions may be executed off the centralized market, including by transfer trades, office trades, block trades, inter-exchange spread transactions, or trades involving the exchange of futures for a commodity or for a derivatives position, if transacted in accordance with written rules of a contract market that specifically provide for execution of such transactions away from the centralized market and that have been certified to or approved by the Commission.

(ii) Every person handling, executing, clearing, or carrying trades off the centralized market shall comply with the rules of the applicable designated contract market and derivatives clearing organization, including to identify and mark by appropriate symbol or designation all such transactions or contracts and all orders, records, and memoranda pertaining thereto.

(iii) A designated contract market that determines to allow trades off the centralized market shall ensure that such trading does not operate in a manner that compromises the integrity of price discovery on the centralized market or facilitate illegal or non-bona fide transactions.

(3) *Block trades–minimum size.*

(i) When determining the number of contracts that constitutes the appropriate minimum size for block trades, a contract market should ensure that block trades are limited to large transactions and that the minimum size is appropriate for that specific contract, by applying the principles set forth in this section. For any contract that has been trading for one calendar quarter or longer, the acceptable minimum block trade size should be a number larger than the size at which a single buy or sell order is customarily able to be filled in its entirety at a single price in that contract's centralized market. Factors to consider in determining what constitutes a large transaction could include an analysis of the market's volume, liquidity and depth; a review of typical trade sizes and/or order sizes; and input from floor brokers, floor traders and/or market users. For any contract that has been listed for trading for less than one calendar quarter, an acceptable minimum block trade size in such contract should be the size of trade the exchange reasonably anticipates will not be able to be filled in its entirety at a single price in that contract's centralized market. An appropriate minimum size could be estimated based on centralized market data in a related futures contract, the same contract traded on another exchange, or trading activity in the underlying cash market. The exchange could also consider the anticipated volume,

liquidity and depth of the contract; input from potential market users; or consider that exchange's experience with offering similar new contracts. The minimum size thresholds for block trades should be reviewed periodically to ensure that the minimum size remains appropriate for each contract. Such review should take into account the sizes of trades in the centralized market and the market's volume and liquidity.

(b) *Acceptable practices.*

(1) *General matters relating to trade execution facilities.*

(i) *General provisions.* [Reserved]

(ii) *Electronic trading systems.*

(A) The guidelines issued by the International Organization of Securities Commissions (IOSCO) in 1990 (which have been referred to as the ''Principles for Screen-Based Trading Systems''), and adopted by the Commission on November 21, 1990 (55 FR 48670), as supplemented in October 2000, are appropriate guidelines for a designated contract market to apply to electronic trading systems.

(B) Any objective testing and review of the system should be performed by a qualified independent professional. A professional that is a certified member of the Information Systems Audit and Control Association experienced in the industry is an example of an acceptable party to carry out testing and review of an electronic trading system.

(C) Information gathered by analysis, oversight, or any program of testing and review of any automated systems regarding system functioning, capacity and security must be made available to the Commission upon request.

(iii) *Pit trading.* [Reserved]

(2) *Transactions off the centralized market.*

(i) *General provisions.*

(A) Allowable trades. Acceptable transactions off the centralized market include: transfer trades, office trades, block trades, inter-exchange spread transactions or trades involving the exchange of futures for commodities or for derivatives positions, if transacted in accordance with written rules of a contract market that specifically provide for execution away from the centralized market and that have been certified to or approved by the Commission.

(B) Reporting. Transactions executed off the centralized market should be reported to the contract market within a reasonable period of time.

(C) Publication. The contract market should publicize details about block trade transactions immediately upon the receipt of the transaction report and publicize daily the total quantity of the exchange of futures for commodities or for derivatives positions and the total quantity of the block trades that are included in the total volume of trading, as required by § 16.01 of this chapter.

(D) Recordkeeping. Parties to, and members facilitating, transactions off the centralized market should keep appropriate records. Appropriate recordkeeping for transactions off the centralized market would comply with Core Principle 10 and Core Principle 17.

(E) Identification of trades. Section 1.38(b) of this chapter establishes the requirements regarding the identification of trades off the centralized market. It requires contract market rules to require every person handling, executing, clearing, or carrying trades, transactions or positions that are executed off the centralized market, including transfer trades, office trades, block trades or trades involving the exchange of futures for a commodity or for a derivatives position, to identify and mark by appropriate symbol or designation all such transactions or contracts and all orders, records, and memoranda pertaining thereto.

(F) Identification in the trade register. The contract market should identify transactions executed off the centralized market in its trade register, using separate indicators for each such type of transaction.

(ii) *Block trades.*

(A) Acceptable minimum block trade size.

(a) New contracts or contracts that have been listed for trading for less than one calendar quarter. If an exchange has no reasonable basis upon which to estimate an initial minimum size, a minimum block trade size of 100 contracts would be appropriate.

(b) Periodic review. The minimum size thresholds for block trades should be reviewed no less frequently than on a quarterly basis to ensure that the minimum size remains appropriate for each contract.

(B) Appropriate parties.

(a) Acceptable block trade parties should be limited to eligible contract participants. However, contract market rules could also allow a commodity trading advisor registered pursuant to Section 4m of the Act, or a principal thereof, including any investment advisor who satisfies the criteria of § 4.7(a)(2)(v) of this chapter, or a foreign person performing a similar role or function and subject as such to foreign regulation, to transact block trades for customers who are not eligible contract participants, if such commodity trading advisor, investment advisor or foreign person has more than $25,000,000 in total assets under management.

(b) Affiliated parties. An affiliated party is a party that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with another party. Section 1.38(b) of this chapter establishes the requirements regarding block trades between affiliated parties. Contract market rules could permit block trades between affiliated parties that meet the requirements of Regulation 1.38 and are otherwise appropriate parties.

(C) Aggregation of orders. The aggregation of orders for different accounts in order to satisfy the minimum size requirement should be prohibited except in appropriate circumstances. Aggregation would be acceptable if done by a commodity trading advisor registered pursuant to Section 4m of the Act, or a principal thereof, including any investment advisor who satisfies the criteria of § 4.7(a)(2)(v) of this chapter, or a foreign person performing a similar role or function and subject as such to foreign regulation, if such commodity trading advisor, investment advisor or foreign person has more than $25,000,000 in total assets under management.

(D) Acting for a customer. A person should transact a block trade on behalf of a customer only when the person has received an instruction or prior consent to do so from the customer.

(E) Recordkeeping. Parties to, and members facilitating, a block trade should keep appropriate records. Appropriate block trade records would comply with Core Principle 10 and Core Principle 17. Records kept in accordance with the requirements of FASB Statement No. 133 (''Accounting for Derivative Instruments and Hedging Activities'') would be acceptable records. Block trade orders must be recorded by the member and time-stamped with both the time the order was received and the time the order was reported, and must indicate when block trades are between affiliated parties. When requested by the exchange, the Commission or the Department of Justice, parties to, and members facilitating, a block trade shall provide records to document that the block trade is executed in conformance with contract market rules.

(F) Reporting. Block trades should be reported to the contract market within a reasonable period of time.

(G) Publication. The contract market should publicize details about the block trade immediately upon the receipt of the transaction report and publicize daily the total quantity of the block trades that are included in the total volume of trading, as required by § 16.01 of this chapter.

(H) Identification in the trade register. The contract market should identify block trades as such on its trade register, and should identify when block trades are between affiliated parties.

(I) Pricing. (*a*) Block trades between non-affiliated parties should be at a price that is fair and reasonable. Consideration of whether a block trade price is fair and reasonable could take into account the size of the block plus the price and size of other trades in any relevant markets at the applicable time, or the circumstances of the market or the parties to the block trade. Relevant markets could include the contract market itself, the underlying cash markets and/or other related futures or options markets. If a contract market rule requiring a fair and reasonable price includes the circumstances of the parties or of the market, a block trade participant could execute a block transaction at a price that was away from the market provided that the participant retains documentation to demonstrate that the price was indeed fair and reasonable under the participant's or market's particular circumstances.

(*b*) Block trades between affiliated parties are subject to the pricing requirements of § 1.38(b) of this chapter.

(iii) *Exchange of futures for commodities or for derivatives positions.*

(A) Bona fide exchange of futures for commodities or for derivatives positions. The exchange of futures for commodities or for derivatives positions would include separate but integrally related transactions involving the same or a related commodity, with price correlation and quantitative equivalence of the futures and cash legs. An exchange of futures for commodities or for derivatives positions would be between a buyer of futures who is the seller of the corresponding commodity or derivatives position and a

seller of futures who is the buyer of the corresponding commodity or derivatives position. A third party could be permitted to facilitate the purchase and sale of the commodity or derivatives position as long as the commodity or derivatives position is passed through to the party that receives the futures position. The transaction would have to result in an actual transfer of ownership of the commodity or derivatives position. It also would have to be between parties with different beneficial owners or under separate control, who had possession, right of possession, or right to future possession of the commodity or derivatives position prior to the trade, the ability to perform the transaction, and resulting in a transfer of title.

(B) Pricing. The price differential between the futures leg and the commodities leg or derivatives position should reflect commercial realities, and at least one leg of the transaction should be priced at the prevailing market price.

(C) Transitory exchange of futures for commodities or for derivatives positions. Parties to an exchange of futures for commodities or for derivatives positions could be permitted to engage in a separate but related cash transaction that offsets the cash leg of the exchange of futures for commodities or for derivatives positions. The related cash transaction would have to result in an actual transfer of ownership of the commodity or derivatives position and demonstrate other indicia of being a bona fide transaction as described in paragraph (a). The cash transaction must be able to stand on its own as a commercially appropriate transaction, with no obligation on either party that the cash transaction be dependent upon the execution of the related exchange of futures for commodities or for derivatives positions, or vice versa.

(D) Reporting. Exchanges of futures for commodities or for derivatives positions should be reported to the contract market within a reasonable period of time.

(E) Publication. The contract market would publicize daily the total quantity of exchanges of futures for commodities or for derivatives positions that are included in the total volume of trading, as required by § 16.01 of this chapter.

(iv) *Office trades.* [Reserved]

(v) *Transfer trades.* [Reserved]

Issued in Washington, DC on September 12, 2008 by the Commission.

David Stawick,

Secretary of the Commission.

[FR Doc. E8–21865 Filed 9–17–08; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1

[Docket No. FDA–2007–N–0465]

RIN 0910–AF61

Label Requirement for Food That Has Been Refused Admission into the United States

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a proposed rule that would require owners or consignees to label imported food that is refused entry into the United States. The label would read, ''UNITED STATES: REFUSED ENTRY.'' The proposal would describe the label's characteristics (such as its size) and processes for verifying that the label has been affixed properly. We are taking this action to prevent the reintroduction of refused food into the United States, to facilitate the examination of imported food, and to implement part of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002.

DATES: Submit written or electronic comments on the proposed rule by December 2, 2008. Submit comments on information collection issues under the Paperwork Reduction Act of 1995 October 20, 2008, (see the ''Paperwork Reduction Act of 1995'' section of this document).

ADDRESSES: You may submit comments, identified by Docket No. FDA–2007–N–0465, by any of the following methods, except that comments on information collection issues under the Paperwork Reduction Act of 1995 must be submitted to the Office of Regulatory Affairs, Office of Management and Budget (OMB) (see the ''Paperwork Reduction Act of 1995'' section of this document).

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

- *FAX:* 301–827–6870.
- *Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described previously, in the **ADDRESSES** portion of this document under *Electronic Submissions*.

Instructions: All submissions received must include the agency name and docket number and Regulatory Information Number (RIN) for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Philip L. Chao, Office of Policy and Planning (HF–23), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–0587.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. How Did the Idea of Marking Refused Food Imports Originate?

Section 801 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 381) authorizes us to examine foods, drugs, devices, and cosmetics that are imported or offered for import into the United States and to refuse admission to products that appear, from examination or otherwise, to be (among other things) adulterated or misbranded.

Our examination of food imports usually begins with an electronic prior notice and then an entry review to determine whether additional scrutiny at arrival or thereafter is warranted. We may, based on our review, permit the goods to proceed without further examination. We may take additional steps to determine whether the shipment appears to comply with the act, including: (1) Visually examining the goods; (2) taking samples of the goods for laboratory analysis; (3) verifying the registration, declarations, and certifications for the goods; and/or (4) requesting supporting documentation. If our additional