



November 3, 2023

Mr. Christopher Kirkpatrick  
Secretary  
Commodity Futures Trading Commission  
1155 21st St. NW  
Washington, DC 20581

**Re: Provisions Common to Registered Entities (RIN 3038–AF28)**

Dear Mr. Kirkpatrick,

The Futures Industry Association (“FIA”) and the International Swap Derivatives Association (“ISDA”) (together, the “Associations”) welcome the opportunity afforded by the Commodity Futures Trading Commission (“Commission” or “CFTC”) to provide comments on the Provisions Common to Registered Entities Notice of Proposed Rulemaking (the “NPR”).<sup>1</sup> Broadly, the NPR would amend the CFTC regulations governing how registered entities submit certifications of their rules, rule amendments, and new products for trading and clearing, as well as the Commission’s review and processing of such submissions.

The Associations commend the Commission for reviewing Part 40 of the Commission’s regulations and support the enhancements proposed in the NPR. We especially welcome the proposed changes that modernize the rules based on the Commission’s experience and the ever-changing clearing landscape. More specifically, we welcome the additional requirements for registered entities to provide “complete” information regarding new product’s terms and conditions under CFTC rule 40.2 and 40.3. We have observed the emergence of new asset classes over the last decade such as cryptocurrencies products supporting the evolution of digital assets or environmental and carbon products to support the green transition. It is critical that CFTC staff have access to all relevant information in its review of new product submissions.

We also appreciate the Commission’s amendments to Rule 40.1 to include “margin methodology” in the definition of “Rule.” This provides further clarity to Derivatives Clearing Organizations (“DCOs”) to submit proposed changes relating specifically to margin methodology. In addition, we are pleased to see a revised definition under Rule 40.10 that would require advance notice when a systemically important DCO (“SI-DCO”) makes material changes including to its default management plans, rules and procedures, program of risk analysis and oversight, recovery and wind-down plans, margin methodology and interoperability. This non-exhaustive list provides further useful guidance to SI-DCOs when submitting proposed changes requiring advance notice. We are generally supportive of all the clarifications, enhancements and reorganizations of the rules 40.5 and 40.6 regarding the Commission’s review and approval of new rules and amendments submitted by DCOs.

However, the NPR has a key omission. We urge the Commission to provide a public comment period under CFTC Rule 40.10 when a SI-DCO submits a rule for Commission review that the Commission believes raises novel or complex issues. This would align the CFTC Rule 40.10 rule approval process for SI-DCOs with the self-certification process for all registered entities in CFTC Rule 40.6. Just as CFTC Rule

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<sup>1</sup> Provisions Common to Registered Entities, 88 Fed. Reg. 61432 (Sept. 6, 2023).

40.6 recognizes that submissions that raise novel or complex issues would benefit from public comment, Rule 40.10 should provide for the same public input on submissions by SI-DCOs that raise novel or complex issues. We believe this would result in a more informed and deliberative rulemaking process that benefits both DCOs and market participants. We also believe a public comment process is merited for SI-DCO rule submissions that present novel or complex issues given the importance of SI-DCOs to the derivatives markets and broader financial system.<sup>2</sup>

CFTC Rule 40.6 sets forth the process for a registered entity (*e.g.*, a DCO) to self-certify that a new or amended rule complies with the Commodity Exchange Act (“CEA”). Under this rule, the Commission has 10 days to review the rule submission, after which and in the absence of agency action the rule is deemed approved. However, the Commission can issue a stay if it determines that the rule raises novel or complex issues. Upon issuance of a stay, the Commission extends its review period and must also provide a 30-day public comment period.

By contrast, if a SI-DCO’s new rule or rule amendment could materially affect the nature or level of risks presented by the SI-DCO, then the SI-DCO must follow the approval process set forth in CFTC Rule 40.10. The CFTC Rule 40.10 process provides the Commission and the Board of Governors of the Federal Reserve with a 60-day review period after which the rule is deemed approved. Although the Commission can extend the review period if the SI-DCO rule raises novel or complex issues, unlike the self-certification process in CFTC Rule 40.6, the Commission is not required to provide for public comment related to the SI-DCO rule. We believe that a public comment process is merited and indeed necessary when an SI-DCO rule could materially affect the nature or level of risks presented by the SI-DCO and the Commission believes the rule raises novel or complex issues. Like the self-certification process under CFTC Rule 40.6, the Commission’s analysis of any novel and complex issues raised in a SI-DCO submission would benefit from public comment, and, accordingly, CFTC Rule 40.10(f) should incorporate a public comment period.<sup>3</sup>

We appreciate the opportunity to submit these comments on the Commission’s Consultation. Please contact Jacqueline Mesa or Ulrich Karl should you have any questions.

Sincerely,



**Jacqueline Mesa**  
COO and Senior Vice President, Global Policy  
[jmesa@fia.org](mailto:jmesa@fia.org)  
+1 202 772 3040



**Ulrich Karl**  
Head of Clearing Services  
[ukarl@isda.org](mailto:ukarl@isda.org)  
+44 20 3808 9720

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<sup>2</sup> FIA recommended this alignment of Rules 40.6 and 40.10 in its the CFTC’s “Project KISS” initiative in 2017. See Letter from Walt L. Lukken, President and Chief Executive Officer, FIA, to Christopher Kirkpatrick, Secretary, CFTC (Sept. 28, 2017) available [here](#).

<sup>3</sup> We understand that the 30-day review period for novel or complex issues under Rule 40.6 is derived from [CEA Section 5c-2](#). That section explicitly provides for a 30-day public comment period when the CFTC stays a rule submission that raises novel or complex issues. By comparison, Rule 40.10 has its source in [Dodd-Frank Act Section 806](#), which does not have specific reference to a public comment period. We do not see this as an impediment to the CFTC choosing to align 40.6 and 40.10’s review processes to both include a 30-day comment period as a matter of consistency in rules and sound policy.



**About FIA**

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. Our membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers. Our mission: To support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct. Information about FIA and its activities is available on the Association's website: [www.fia.org](http://www.fia.org).

**Future Industry Association**

2001 K Street, NW, Suite 725, North Tower,  
Washington, DC 20006 WASHINGTON, DC  
Tel +1 202.466.5460  
[www.fia.org](http://www.fia.org)

WASHINGTON  
LONDON  
SINGAPORE  
BRUSSELS

**About ISDA**

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 77 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: [www.isda.org](http://www.isda.org). Follow us on Twitter, LinkedIn, Facebook and YouTube.

**International Swaps and Derivatives Association, Inc.**

600 13<sup>th</sup> Street, NW  
Suite 320  
Washington, DC 20004  
P 202 638 9330 F 202 683 9329  
[www.isda.org](http://www.isda.org)

NEW YORK WASHINGTON  
LONDON BRUSSELS  
HONG KONG SINGAPORE  
TOKYO