55 WATER STREET
NEW YORK, NY 10041-0099

TEL: 212-855-3240
lthompson@dtcc.com

January 8, 2013

Ms. Sauntia S. Warfield
Assistant Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments in Response to The Chicago Mercantile Exchange Inc.'s Amended Submission #12-391R: Adoption of New Chapter 10 (Regulatory Reporting of Swap Data) and Rule 1001 (Regulatory Reporting of Swap Data)

Dear Ms. Warfield:

The Depository Trust & Clearing Corporation ("DTCC"),[1] in conjunction with its provisionally registered swap data repository ("SDR"), DTCC Data Repository (U.S.) LLC ("DDR"), submits this letter to the Commodity Futures Trading Commission ("CFTC" or "Commission") in response to The Chicago Mercantile Exchange Inc.'s ("CME") Amended Submission #12-391R dated December 6, 2012,[2] which requests that the CFTC review and approve a new Chapter 10 and Rule 1001 ("Regulatory Reporting of Swap Data") of CME's derivatives clearing organization's ("DCO") Rulebook ("Rule 1001") through the CFTC's formal

[1] The Depository Trust & Clearing Corporation ("DTCC") provides critical infrastructure to serve all participants in the financial industry, including investors, commercial end-users, broker-dealers, banks, insurance carriers, and mutual funds. DTCC operates as a cooperative that is owned collectively by its users and governed by a diverse Board of Directors. DTCC's governance structure includes 344 shareholders.

[2] The Chicago Mercantile Exchange Inc. ("CME") submitted an amended request to its original submission dated November 9, 2012 [hereinafter CME Amended Request]. The amended request is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul120612cme001.pdf.
CME's original submission is *available at* http://www.cftc.govistellent/groups/publici@rulesandproducts/documents/ifdocs/ru1110912cme005.pdf.
CME also submitted a "corrected" Rule 1001 dated December 14, 2012, "to correct a typographical error per CFTC staff's request." The December 14, 2012 submission was not posted to the CFTC's Rule 1001 public comment page until December 28, 2012, at the earliest. The corrected request is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul121412cme001.pdf.

approval process under CFTC Rule 40.5.[3] DTCC incorporates by reference its prior comments submitted to the Commission in connection with CME's proposed Rule 1001.[4]

Introduction

The Commission must reject proposed Rule 1001. At stake are the integrity of the Dodd-Frank Wall Street Reform and Consumer Protection Act's ("Dodd-Frank Act")[5] primary objectives of competition in the swap markets and ensuring that the execution, clearing, and reporting of swap trades are transparent and subject to robust and effective oversight. The Commission's approval of CME's Rule 1001 would decrease transparency for investors and regulators, increase risk in the financial system, and undermine the core principles of the Dodd-Frank Act. CME's Rule 1001 not only significantly diminishes the ability of regulators and investors to rely on the integrity and accuracy of market data, but it also ignores the Dodd-Frank Act's Congressional mandate against anticompetitive behavior.

December 31, 2012 marked the successful launch of swap dealer ("SD") reporting for interest rate and credit default swap transactions. In the months leading up to the implementation of reporting, market participants, including SDs, major swap participants ("MSPs"), and SDR providers, such as DDR, invested hundreds of millions of dollars in connections to allow compliance with the reporting framework set forth under Part 45.

Based on reporting to date, and as evidenced in recent no-action relief requests, many major market participants have chosen to direct reporting of all of their U.S. trades to particular SDRs.[6] Approval of the proposed CME Rule 1001 would

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[3] *See* 17 C.F.R. § 40.5 (2012). CME requests that proposed Rule 1001 become effective on the business day following the date of the Commodity Futures Trading Commission's ("CFTC" or "Commission") approval.

[4] *See* Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Nov. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58974&SearchTex; Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 5, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58975&SearchText; Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 7, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58976&SearchText; Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59009&SearchText=; Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Jan. 3, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59025&SearchText=.

[5] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111–203, 124 Stat. 1376 (2010).

[6] *See* CFTC No-Action Letter No. 12-55 (Dec. 17, 2012).

seriously disrupt, if not undo, the reporting process already successfully implemented, resulting in a reporting process that is less reliable and less able to support effective market and risk oversight. The structure that has attracted these participants is the creation of a single reporting infrastructure that allows market participants to meet their reporting obligations, while managing internal risk by operating consistently across their swap portfolios. Such a structure allows market participants to avoid the operationally complex and risky process of maintaining separate reporting across international jurisdictions and for distinct financial market infrastructures within jurisdictions, thereby promoting global market oversight and reducing systemic risk in a way that will no longer be possible if the CFTC approves CME Rule 1001.

CME proposes to illegally tie CME's SDR and DCO services by requiring its clearing customers *as a condition to using its clearing services* to have CME direct their cleared trades to CME's own captive SDR. This proposed tying of services is contrary to the fair and open access core principle set forth for DCOs in the Dodd-Frank Act—the Dodd-Frank Act's prohibition of market infrastructures from engaging in anti-competitive practices—and the U.S. antitrust laws.

The Commission correctly and consistently embraced these principles – until November of 2012.

- It did so in adopting the final Swap Data Recordkeeping and Reporting Requirements ("Part 45") on swap data reporting, concluding that "requiring that all cleared swaps be reported only to DCOs registered as SDRs or to SDRs chosen by a DCO would create a non-level playing field for competition between DCO-SDRs and non-DCO SDRs."[7]

- It did so in promulgating regulations regarding Swap Data Repositories: Registration Standards, Duties and Core Principles ("Part 49"), which prohibit SDRs from tying or bundling SDR essential core services with other services ancillary to trade reporting.[8]

- It did so in an October 2011 Commission open meeting, where the Commission left no doubt that the anti-bundling provisions of Part 49 would apply to "bundling . . . between an SDR and a DCO."[9]

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[7] Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136, 2,149 (Jan. 13, 2012).

[8] *See* 17 C.F.R. § 49.27.

[9] CFTC, *Open Meeting to Discuss a Final Rule on Derivatives Clearing Organization General Provisions and Core Principles; a Final Rule on Position Limits for Futures and Swaps; and a Notice of Proposed Amendment to Effective Date for Swap Regulation* (Oct. 18, 2011) (colloquy between the Honorable Bart Chilton and Mr. Ananda Radhakrishnan). Commissioner Chilton specifically confirmed with CFTC staff that, as written, such bundling would be "caught" by the SDR anti-bundling rules and concluded the exchange stating: "[O]kay. It would be anti-competitive if it was allowed."

- It did so in Chairman Gensler's on the record response to a question from Senate Agriculture Chairman Stabenow (D-MI) about the Commission's treatment of "bundling" DCO and SDR services.[10]

The Commission should not reverse course and permit DCOs to tie and bundle their clearing and SDR services. Such a reversal could provide CME with monopoly power and market control through regulatory fiat, which it has so far failed to achieve competitively on a level playing field. The Commission would be doing just what Congress sought to avoid – disrupting the market place and picking a winner, contrary to the direction of the market.

During the Dodd-Frank Act legislative process, Congress considered: (1) whether all trades, both cleared and uncleared, should be reported to SDRs; and (2) whether there should be a single SDR for each asset class (*e.g.*, credit, interest rate, etc.) to promote the consolidation of market data. Ultimately, Congress mandated that all trades – both cleared and uncleared – be reported to SDRs. In considering whether there should be a single SDR for each asset class, Congress determined that the decision should be made by market forces, rather than dictated by statute or regulation. DTCC accepted Congress's mandate and has since been working within the confines of the statute, allowing competitive market forces to shape the reporting of swap transaction data.

In contrast, CME has pursued a campaign to undermine competition in the swap markets, with the attendant reductions in market safety and soundness. CME's advancement of Rule 1001 is the latest link in a chain of events initiated by CME to cause the Commission to unilaterally change rules and policies that had been relied on by market participants since they were finalized in early 2011.[11] Until November 2012, the Commission resisted CME's entreaties, but now there is good reason to be fearful that the Commission's commitment to transparency for swap trades and a level competitive playing field – an objective prescribed by Congress – has evaporated.

As the Commission envisioned, in accordance with market forces, a wide range of market participants have chosen the SDR they want to use to meet their reporting obligations and, in many instances, that SDR is not CME's SDR. In response, CME, in the 11th hour, pushed to change the CFTC's rules to empower them to take control over trade reporting for trades they clear. CME's efforts culminated in a lawsuit against the CFTC filed on November 8, 2012.[12] The lawsuit, though never

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[10] In connection with a December 1, 2011 hearing of the Senate Committee on Agriculture, Nutrition, and Forestry, Chairman Gary Gensler responded to a question from Chairman Stabenow regarding the CFTC's treatment of SDRs and DCOs on "bundling." In a written response provided on May 1, 2012, Chairman Gensler stated that, "[f]or DCOs that also choose to register and serve as SDRs, the anti-bundling provisions in the SDR final rule will apply." *Continuing Oversight of the Wall Street Reform and Consumer Protection Act: Hearing Before the S. Comm. on Agric., Nutrition, and Forestry*, 112th Cong. 74 (2011).

[11] A detailed timeline of relevant events is attached hereto as Appendix I.

[12] DTCC filed to intervene in this lawsuit in support of the CFTC.

actually litigated in court, was demonstrably effective. In the two weeks following the filing of this lawsuit by CME, the CFTC unilaterally, and without public notice and comment, changed staff interpretations in a set of Frequently Asked Questions ("FAQs") that had been issued on October 11, 2012. Although those FAQs were consistent with all earlier clarifications and interpretations, on November 28, 2012, the CFTC changed them in order to address claims made by CME in their lawsuit against the Commission. That same day the CFTC approved CME's provisional SDR registration and posted proposed Rule 1001 on its website for public comment. The very next day CME dropped its lawsuit.

The implications of Rule 1001 are far-reaching and certainly have not been carefully and properly considered in CME's proposed rule filing. The Commission is considering a proposal that would change its established Part 45 rules through the guise of the CME Rule 1001 review process. That process falls far short of the requirements for Administrative Procedure Act ("APA") notice and rulemaking and the Commodity Exchange Act's ("CEA") requirement of a cost-benefit analysis.

In attempting to reconstruct the established reporting framework, Rule 1001 violates the core principles of the Dodd-Frank Act that protect against anti-competitive behavior by DCOs. Further, Rule 1001 undermines efforts to detect and address systemic risk both within the U.S. and globally. CME's Rule 1001 should be rejected as inconsistent with the CEA and the Commission's regulations.[13]

I. Rule 1001 Violates U.S. Antitrust Laws and Similar Anticompetitive Principles Established by the CEA and CFTC Rules and Allows for the Improper Commercialization of Data

A central part of the CFTC's duty in considering an internal rule change proposed by a DCO, particularly by a systemically important DCO ("SIDCO"),[14] is to assess whether the rule would create antitrust problems. Therefore, when CME, a known market power in the business of clearing derivative trades,[15] proposed to require that all of its transactional data be forwarded to a captive SDR, the CFTC should have seen the antitrust red flags. Instead, the CFTC appears to have ignored such concerns, including the obvious conflicts of interest related to commercialization of data. These antitrust concerns are serious, and the risks that the CME rule poses to a fair and competitive marketplace for SDR services are evident.

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[13] *See* 17 C.F.R. 40.5(b).

[14] A more detailed discussion of the import of the systemically important DCO ("SIDCO") designation is included in Section III.

[15] *See* CME website, *available at* http://www.cmegroup.com/company/. According to an April 30, 2012 letter submitted to the Federal Reserve by CME Group, CME Clearing is among the largest central counterparty clearing services in the world, processing and clearing approximately 3.4 billion exchange-traded and OTC contracts in 2011, averaging 13.4 million contracts per day. Letter from Phupinder Gill, CME Group, to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, (Apr. 30, 2012), *available at* www.federalreserve.gov/SECRS/2012/May/20120509/R-1438/R-1438_043012_107221_587030190198_1.pdf.

A. Rule 1001 Violates the Clear Language of the CEA and CFTC Rules Restricting Anticompetitive Behavior

i. The CEA and CFTC Rules Prohibit Anticompetitive Conduct

The CEA expressly preserves a competitive marketplace and forbids anticompetitive conduct. The CEA states that the CFTC "shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means" of achieving its goals.[16] The law also mandates fair and open access to clearing services under Section 5b(c)(2)(C)(iii). More pointedly, the DCO core principles set forth in the Dodd-Frank Act specify that a DCO may not (i) "adopt any rule or take any action that results in any unreasonable restraint of trade;" or (ii) "impose any material anticompetitive burden on the trading, clearing, or reporting of transactions."[17]

Congress had clear concerns about the potential for a new regulatory regime to create an anti-competitive market structure. The CFTC properly considered these principles, which Rule 1001 threatens, when it adopted its final Part 45 rules and expressly noted concerns about the risks to competition posed by DCO-affiliated SDRs:

> The Commission believes that requiring that all cleared swaps be reported only to DCOs registered as SDRs or to SDRs chosen by a DCO would create a non-level playing field for competition between DCO–SDRs and non-DCO SDRs. The Commission also believes that it would make DCOs collectively, and could in time make a single DCO–SDR, the sole recipient of data reported concerning cleared swaps. On the other hand, the Commission believes that giving the choice of the SDR to the reporting counterparty in all cases could in practice give an SDR substantially owned by SDs a dominant market position with respect to swap data reporting within an asset class or even with respect to all swaps. The Commission believes that the rule as proposed favors market competition, avoids injecting the Commission into a market decision, and leaves the choice of SDR to be influenced by market forces and possible market innovations.[18]

The CFTC also recognized the general CEA prohibition against anticompetitive conduct when it adopted Section 49.27 of its regulations, which prohibits SDRs from tying or bundling[19] mandatory regulatory services with other ancillary

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[16] Commodity Exchange Act ("CEA") § 15(b).

[17] *Id.* § 5b(c)(2)(N), as amended by the Dodd-Frank Act (emphasis added) (the SDR core principles contain similar language at Section 21(f)(1)).

[18] Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2149.

[19] A dominant market player may unfairly seek market share and limit competition by bundling secondary services with "core" services that customers want and may not be able to obtain elsewhere at a bundled price that competitors in the market for the secondary products cannot match.

services.[20] Any swap cleared by CME's DCO and reported to the CME SDR will undoubtedly undergo some "ancillary" services regulated under DCO rules, such as confirming terms of the trade,[21] effecting settlement of cleared swaps,[22] netting,[23] maintaining adequate arrangements and resources for the resolution of disputes,[24] and imposing position limits.[25] As a result, CME, with its DCO and SDR within the same corporate entity—sharing employees, technology, management, and commercial motives—will tie or bundle mandatory regulatory services with ancillary services.

Commission staff discussed the "issue of bundling" and DCO-SDRs during a CFTC open meeting on October 18, 2011. In response to an inquiry by Commissioner Bart Chilton, the Commission staff affirmed that "a registered SDR, consistent with the principles of open access, shall not tie or bundle the offering of mandated regulatory services with other ancillary services that an SDR may provide to market participants."[26] Commissioner Chilton then noted that bundling is not permitted for DCO-SDRs because "it would be anti-competitive if it was allowed."[27] Subsequently, in connection with a December 1, 2011 hearing of the Senate Committee on Agriculture, Nutrition, and Forestry, Chairman Gary Gensler responded to a question from Chairman Stabenow regarding the CFTC's treatment of SDRs and DCOs on "bundling." In a written response provided on May 1, 2012, Chairman Gensler stated that, "[f]or DCOs that also choose to register and serve as SDRs, the anti-bundling provisions in the SDR final rule will apply."[28]

The fact that Members of Congress and certain Commissioners have expressed concerns regarding DCO bundling, which can lead to vertical integration, should be given due consideration as the Commission implements a new regulatory regime for the over-the-counter derivatives markets. The Department of Justice has previously commented on the winner take all nature of the futures markets, where the control exercised by futures exchanges (like CME) over clearing services is very close to

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[20] *See* 17 C.F.R. § 49.27(a). The Commission identifies certain services that it "understands" to be ancillary to repository services, including confirmation services, settlement, netting, position limits management, and dispute resolution. *See* Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. 54,538, 54,570 n.307 (Sept. 1, 2011).

[21] 17 C.F.R. § 39.12(b)(8).

[22] *Id.* § 39.14.

[23] *Id.* § 39.14(f).

[24] *Id.* § 39.17(a).

[25] *Id.* § 39.19(h)(6)(iii).

[26] CFTC, *Open Meeting to Discuss a Final Rule on Derivatives Clearing Organization General Provisions and Core Principles; a Final Rule on Position Limits for Futures and Swaps; and a Notice of Proposed Amendment to Effective Date for Swap Regulation* (Oct. 18, 2011) (colloquy between the Honorable Bart Chilton and Mr. Ananda Radhakrishnan).

[27] *Id.*

[28] *Continuing Oversight of the Wall Street Reform and Consumer Protection Act: Hearing Before the S. Comm. on Agric., Nutrition, and Forestry*, 112th Cong. 74 (2011).

bundling.[29] These concerns, among others, led Congress to ensure that the regulatory structure implemented pursuant to the Dodd-Frank Act would not mimic the vertical integration model of the futures markets. As Senate Agriculture Committee Chairwoman Debbie Stabenow noted, "Congress was clear about its support for competition in the swaps marketplace."[30] Approval of Rule 1001 could add to CME's existing vertical integration in the trade execution and trade servicing space, further increasing the barriers to entry for exchanges and clearinghouses, and creating barriers to entry for independent SDRs.

The CEA, the guidance the Commission issued when it promulgated its own rules, and the Commission's foregoing comments cannot be squared with CME's interpretation of the Commission's rules and cannot be read to condone a marketplace in which CME is the only reporting party for swap transactions or the only party that can select which SDR will receive data associated with trades cleared through CME's DCO. Rule 1001 is, therefore, precisely the kind of anticompetitive restraint of trade forbidden by the CEA and directly conflicts with the Commission's clear intent to avoid a "non-level playing field for competition" between DCO-affiliated and independent SDRs.

ii. Rule 1001 Violates the CEA and CFTC Rules' Prohibition Against Anticompetitive Conduct

In evaluating CME's proposed Rule 1001, the CFTC must consider whether CME's proposal to self-report all cleared trades to its self-owned SDR imposes the kind of material competitive burdens barred by the CEA, and whether this proposed rule conflicts with the clear interpretive guidance the Commission already provided regarding its intent to enforce a fair and competitive environment among providers of SDR services.

DTCC submits that Rule 1001 promises to immediately, irreparably, and illegally interfere with and tilt the competitive balance in the market for swap data reporting of cleared swaps in favor of CME and other dominant DCOs. The proposed rule is a form of tying. Tying or bundling limits consumer choice by requiring them to not only buy the "tying" product, the dominant product, but forcing them to buy a secondary "tied" product that may not be as desirable. Such tying arrangements can violate U.S. antitrust laws like Section 2 of the Sherman Act, which makes it illegal to monopolize or attempt to monopolize.[31]

CME and other large entities with market power in a particular segment of an industry (*i.e.*, clearing) are trying to tie SDR services to their dominant position as DCOs. These efforts will stifle competitors, like DDR, from obtaining SDR

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[29] Comments from the Antitrust Division of Department of Justice to the Department of Treasury (Jan. 31, 2008), *available at* http://www.justice.gov/atr/public/comments/229911.htm (regarding the Regulatory Structure Associated with Financial Institutions).

[30] *Continuing Oversight of the Wall Street Reform and Consumer Protection Act: Hearing Before the S. Comm. on Agric., Nutrition, and Forestry*, 112th Cong. 74 (2011).

[31] 15 U.S.C. § 2.

business, regardless of what market participants might decide is the most desirable and beneficial way to comply with their obligations to report swap transaction data to a SDR or to conduct risk management by directing transaction data to a single SDR, regardless of which DCO is involved in a particular transaction.

Under Rule 1001, counterparties that prefer reporting to an independent SDR, like DDR, will risk losing necessary access to CME's dominant clearing services, effectively losing a true choice in selecting an SDR. Compounding this, under the Commission's regulations in Part 23, a non-SD/MSP counterparty has the sole right to select the DCO at which the swap will be cleared.[32] In these instances, if the non-SD/MSP counterparty chooses a DCO that is affiliated with an SDR and that DCO is permitted to tie or bundle SDR services with clearing services, the non-SD/MSP counterparty's choice of a captive DCO would remove from the SD or MSP any choice as to the SDR in contradiction to Part 45's reporting hierarchy.

The comments accompanying CME's proposed Rule 1001 on December 6, 2012 make clear that its internal rule is an anticompetitive action designed to tie CME's captive SDR cleared trade reporting services with trade clearing services provided by CME's dominant DCO. In the second paragraph of its letter, CME states that "[t]he rule provides that all swaps cleared by CME's Clearing Division ("CME Clearing") *shall* be reported by CME Clearing to CME's swap data repository."[33] Although CME suggests that a sentence in the preamble to the CFTC's Part 49 rules *authorizes* its anticompetitive proposal, the rule has to be understood as mandatory and cannot be interpreted in a manner that is so facially inconsistent with the CEA's prohibition of anticompetitive behavior, with similar constraints in the Sherman Act, and with the Commission's own comments when it promulgated its Part 45 and 49 rules.[34]

CME's efforts to suggest that the tying arrangement proposed in Rule 1001 will not burden (or somehow benefit) market participants are nothing more than transparent excuses. Though CME claims that it will honor a counterparty's choice by directing

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[32] *See* 17 C.F.R. § 23.432.

[33] CME Amended Request, *supra* note 2, at 1 (emphasis added).

[34] Not only does CME's interpretation of this singular preamble sentence blatantly ignore the broader statutory and regulatory framework, CME takes the sentence out of context within the Part 49 preamble itself. CME suggests that Rule 1001 is permissible under the preamble to Part 49, which provides "the rules and regulations of a particular SEF, DCM or DCO may provide for the reporting to a particular SDR." Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. at 54,569. Reliance on this preamble language is at best misguided, as Part 49 is not directly related to the reporting regime outlined in Part 45, and this sentence, taken out of context, directly conflicts with the reporting requirements of Part 45. CME also fails to acknowledge the immediately preceding sentence, which states "[a]lthough the Commission largely shares DTCC's views regarding the authority of the reporting counterparty to choose or select the particular SDR for the reporting of swaps, the Commission submits that this authority to select a particular SDR may be *contractually delegated* to other parties." *Id.* (emphasis added). The Commission reinforced this position in discussing Part 49's prohibition on the commercialization of data, noting that, "with respect to the selection of the SDR by the reporting counterparty, the Commission notes that the reporting counterparty may contractually delegate its decision to *an agent such as a SEF, DCO*, confirmation facility or other service provider." *Id.* at 54,556 (emphasis added).

copies of transaction data to a distinct SDR, CME has already made clear by its actions that it will make that choice operationally difficult and expensive.[35] Prior to the original October 12, 2012, deadline for reporting, DCOs should have established connections to all appropriate SDRs,[36] not just their own DCO-SDRs and, since that date, DCOs should have been operating in accordance with counterparty instruction as to the official SDR where data is reported. However, to date, even though CME has known for months that October 12, 2012 and, subsequently, December 31, 2012 were key deadlines for the reporting of transaction data to SDRs, CME has not built or tested any operational connection between CME and DDR to transmit reports of transaction data.

Given the role of SDRs in the regulatory process, it is not sufficient for CME to simply offer to send a duplicative unofficial data report to a second SDR at the request of a counterparty to the swap.[37] Market participants should have the ability to manage access to their own data that may be reportable to regulatory regimes upon request. As CME claims to have "exclusive" proprietary rights to the data generated by their customers, it is also unclear whether the SDR receiving the duplicative report would even have the ability to do anything with the duplicative report without CME's approval, rendering the additional reporting even less effective.[38]

Further, *even if* providing a duplicative report to additional SDRs was sufficient, CME has provided no guarantees that the service will remain free going forward. Given the requirement in Section 45.10 that all swap data be reported to the same SDR, once CME is sent the original swap data, CME would be able to charge whatever it pleases for reporting swap data to its affiliated SDR – or for reporting duplicative data to an unaffiliated SDR – and market participants will be forced to comply. In essence, by approving Rule 1001, the CFTC would be granting CME a

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[35] CME repeatedly contends that CME Clearing "should be the only entity with reporting obligations" regarding swap transactions it clears, suggesting that there is no counterparty choice. CME Amended Request, *supra* note 2, at 1.

[36] As the Commission has explained, "[f]or an off-facility, cleared swap with respect to which the reporting counterparty makes the initial PET data report, the DCO would incur incremental costs if the reporting counterparty chooses to report to an SDR other than the DCO–SDR. In this circumstance the DCO would be required to report confirmation data and continuation data to the SDR receiving the initial report, and thus to assume the costs necessary to establish connectivity to that SDR and transmit data to it." Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,185. Part 45 does not require each cleared swap to be reported to an SDR affiliated with the DCO that clears the swap and, in constructing the reporting framework under Part 45, the Commission was cognizant of the costs placed on all market participants, not simply the cost incurred by DCOs in reporting data for cleared swaps.

[37] CME Amended Request, *supra* note 2, at 3.

[38] In order to use CME's clearing services, users must acknowledge and agree that "all information and content (including, without limitation, bids and offers, price and other trade-related data, whether generated by [CME Clearport]," the user or the user's agents are the "exclusive proprietary property" of CME Clearport or the other CME exchanges. The agreement also states that the user will have "no other rights with respect to . . . the proprietary property" of CME Clearport. CME Clearport Exchange User License Agreement, dated May 24, 2012, *available at* http://www.cmegroup.com/info_forms/registration/print-clearport-eula.html.

substantial market position, which would ultimately subject users to higher prices than they would have to pay with competition.

Likewise, CME's contention that its SDR is the cheapest and most economical solution for SDR reporting lacks substance. CME's proposed Rule 1001 strongly suggests that the tying arrangement codified in the proposed rule may not necessarily result in the most cost-effective solution for market participants. The Commission should consider not only the costs associated with data transmission and storage associated with a DCO-affiliated SDR, but also the additional compliance and other costs to market participants that otherwise might choose an independent SDR, especially if and when CME starts charging them for access to SDR data and reporting to an independent SDR. Other costs that should be considered relate to the potential for increased costs to monitor systemic risk and market oversight including the costs of forced fragmentation and duplication of data.

Moreover, CME, in describing itself as the only reporting party and claiming to have exclusive proprietary rights to the user's information and content, would have the right to grant *itself* permission to commercialize the SDR data.[39] As outlined below, commercialization of data is a serious concern that should make the Commission wary of CME's promises to make reporting easier and less expensive.

B. Rule 1001 Allows for the Improper Commercialization of Data

The unreasonable restraints of trade and anticompetitive burdens associated with Rule 1001 become more evident when the commercial incentives for tying and bundling are considered. CME's proposal, if approved, would ensure maximum revenue for DCO data without limitations imposed on SDRs related to the commercialization of data. In fact, the only way these restrictions can be avoided is through a scheme like Rule 1001.

The Commission's Part 49 rules require that "[s]wap data accepted and maintained by the swap data repository generally may not be used for commercial or business purposes by the swap data repository or any of its affiliated entities."[40] The Commission, however, provides an exception, stating that "[t]he swap dealer, counterparty or any other registered entity that submits the swap data maintained by the registered swap data repository may permit the commercial or business use of that data by express written consent."[41]

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[39] *Id.*

[40] 17 C.F.R. § 49.17(g). As a general matter, DTCC has supported this principle throughout the legislative and regulatory process. For example, in its February 22, 2011 comment letter to the Commission on SDRs, DTCC stated, "[a]s an aggregator and collector of swap data supporting regulatory oversight and supervisory functions, as well as regulator-mandated public reporting, it is critical that an SDR's public utility function is separated from potential commercial uses of the received data." *See* Letter from Larry Thompson, General Counsel, DTCC, to the David Stawick, CFTC, RIN 3038-AD20 (Feb. 22, 2011), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27938&SearchText=.

[41] *Id.* § 49.17(g)(2)(A).

CME's proposed Rule 1001 will subvert the Commission's prohibition on the commercialization of data by allowing CME, the entity that desires to commercialize the data, to provide the required consent for commercialization to its own captive SDR.[42] This concern, characterized as "far-fetched"[43] by CME, is based on CME's interpretation of Commission rules and its longstanding practice of commercializing its data by selling real-time data feeds to subscribers.[44]

To illustrate how the Part 49 exemption, in concert with CME's proposed Rule 1001, will subvert the SDR prohibition on commercializing data, consider a swap executed between Party A and Party B (swap 1). Prior to clearing, the two counterparties must comply with specific SDR reporting obligations. Pursuant to CME's proposed Rule 1001, after clearing, according to CME, the DCO serves as counterparty to each of the original parties. Resulting swap 2 would be between CME and Party A and resulting swap 3 would be between CME and Party B. CME, as the self-anointed "reporting counterparty," will report the swap data to its captive SDR and, as a result, will be in a position to provide itself consent to the commercial or business use of the swap transaction data by its registered SDR. Further, if CME requires swap data reporting to its captive SDR as a condition precedent for access to its dominant clearing facility, a market participant which is not willing to permit commercialization of its data will be limited in its choice of DCO and may face discrimination in the form of higher clearing fees, slower processing, or other obstacles to clearing.[45]

CME discounts the inconsistency between its proposed Rule 1001 and Commission regulations as a "misunderstanding of Rule 1001."[46] If this is the case, DTCC urges CME to provide clarification on this point to the Commission, its customers, and market participants who share DTCC's concern that CME will use its dominant position as a clearinghouse to commercialize swap transaction data. Rule 1001 would require a *de facto* waiver by CME clearing customers, the source of market data, to direct swaps to the SDR of their choice while, at the same time, providing CME permission to authorize itself to commercialize the transaction data reported to its own captive SDR. The Commission prohibited this scenario when it determined

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[42] *See* Letter from Larry Thompson General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Nov. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58974&SearchText.

[43] CME Amended Request, *supra* note 2, at 7.

[44] CME Group, Market Data Distributors, *available at* http://www.cmegroup.com/market-data/licensed-quote-vendors.

[45] Other than an indication that reporting services would be free of charge until September 2013, no detail with respect to pricing is provided in connection with CME's proposed Rule 1001. Still, pricing is made virtually irrelevant in the CME's case because Rule 1001 would, in effect, require CME's clearing customers to use CME's captive SDR services as a condition precedent to the use of the CME's more dominant clearing services. Therefore, while CME's predatory pricing tendencies could be explored, such pricing tendencies present less of a problem than CME forcing its clearing customers to use CME's captive SDR, ignoring customer preference.

[46] CME Amended Request, *supra* note 2, at 5.

that an SDR may not "as a condition of the reporting of swap transaction data require a reporting party to consent to the use of any reported data for commercial or business purposes."[47] Unless specifically refuted, CME's past practices and public statements, coupled with Rule 1001, indicate intent to require reporting counterparty consent to commercialization of data as a condition of reporting of swap transaction data, in direct contravention of the Commission's rules. Further, CME requires parties to grant it rights to the data as a condition to clearing.[48] If CME is authorized to link its DCO to its SDR, it follows that CME would in essence be requiring parties to grant it rights to the data as the SDR, in direct violation of the SDR core principles.[49]

II. CME's Proposed Reporting Framework is Inconsistent with CFTC's Reporting Framework

In the last few months, long after the CFTC issued its final Part 45 rules, but prior to the submission of Rule 1001, CME publicly asserted its intent to contravene the Part 45 rules by directing swaps cleared by its DCO to its captive SDR. First, the transmission letter accompanying the CME's application for provisional SDR registration, dated June 7, 2012, stated that "[CME] assume[s] that the DCO that accepts a swap for clearing will select the SDR to which the reports on the two new swaps resulting from clearing will be made. We believe this approach will make the reporting system operate more efficiently and better serve the CFTC's needs."[50] Additionally, on July 25, 2012, before the House Agriculture Committee, CME Group, Inc. Executive Chairman and President, Terrance Duffy told legislators that "[w]ith respect to the reporting of cleared swaps data, the Commission should allow for implementation of a clearing regime that permits clearing houses to choose the Swap Data Repository to which it must report, including their own affiliated SDR."[51]

Both statements evidence CME's acknowledgment that what it seeks to accomplish through its proposed Rule 1001 is not permissible under Part 45. The position outlined in the SDR transmittal letter and by Mr. Duffy before the House

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[47] 17 C.F.R. § 49.17(g)(2)(B).

[48] *See supra* note 38.

[49] CME Clearport Exchange User License Agreement sets out the terms on which CME "will provide the User with access to the Web site located at http://www.cmegroup.com/clearport or such other addresses or uniform resource locators as may be specified by [CME Clearport]," and "the services provided therein by [CME Clearport] on its own behalf and on behalf of other CME exchanges." *See supra* note 38. As CME's SDR will be tied to CME Clearport and the other CME exchanges, this same restriction would also apply to SDR users in violation of SDR core principles enumerated in Section 21(f)(1) of the CEA.

[50] Letter from Kim Taylor, President, CME Clearing, to the CFTC Office of the Secretariat (Application of Chicago Mercantile Exchange Inc. for Provisional Registration as a SDR) (June 7, 2012), *available at* http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/cmesdrletter060712.pdf.

[51] *Oversight of Swaps and Futures Markets: Recent Events and Impending Regulatory Reforms: Hearing Before the H. Comm. on Agric.*, 112th Cong. (2012) (statement by Terrence Duffy, Executive Chairman and President, CME).

Agriculture Committee was offered by CME during the public notice and comment period on the Commission's SDR rulemakings. However, the Commission declined to pursue this approach. Still, CME continued to voice opposition to the reporting framework established by the Commission. The submission of Rule 1001 was the next step for CME to attempt, yet again, to amend the substance and alter the goals of the Part 45 rules.

A. Because Rule 1001 Would Amend the Substance and Goals of Part 45, It Cannot Be Adopted Absent Proper Consideration under the APA

Approval of CME's Rule 1001, which conflicts with portions of Part 45, would effectively amend the CFTC's regulations.[52] The CFTC simultaneously withdrew its own guidance regarding Part 45 in connection with the Commission's consideration of the CME's proposed Rule 1001. However, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."[53]

The Commission should do everything within its authority to gather the industry's views regarding CME's proposed Rule 1001 and should consider the costs and benefits of approving CME's proposed Rule 1001.[54] The current rulemaking fails to do so. The CFTC's very brief solicitation of comments regarding CME's Rule 1001 does not mention any cost-benefit considerations or solicit comments relevant to the costs and benefits of Rule 1001.

In contrast, prior to finalizing the Part 45 rules, the Commission spent months collecting comments.[55] It held phone conferences with interested industry participants and multiple roundtable meetings, each of which included CME's participation. It evaluated more than 75 formal written comments in the 13 months between the proposed Part 45 rule's publication and adoption of the final Part 45 rules, including a reopening of the public comment folder for 30 days in June 2011

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[52] *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005); *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Am. Mining Congress v. MSHA*, 995 F.2d 1106, 1109, 1112 (D.C. Cir. 1993).

[53] *See, e.g.*, *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999); *see also United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005); *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Am. Mining Congress v. MSHA*, 995 F.2d 1106, 1109, 1112 (D.C. Cir. 1993).

[54] The CEA requires that the CFTC "consider the costs and benefits" of its actions and mandates that the Commission evaluate five factors in its analysis: (1) protection of market participants and the public; (2) the efficiency, competiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) any other public interest considerations. 7 U.S.C. § 19(a)(2).

[55] When the CFTC proposed the Part 45 rules, it set forth a clear request for comment on cost-benefit implications, requesting commenters provide "any data or other information that they may have quantifying or qualifying the costs and benefits of the [proposed rule]." Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,177.

in order for additional comments to be received that reflected subsequent proposed rulemakings. The resulting product in the adopting release is a 17-page analysis of the costs and benefits of each of the aspects of the Part 45 rules, including a general statement, and then a discussion of costs and benefits associated with swap recordkeeping, swap data reporting, and unique identifiers.[56]

The Commission had sound reasons to act in a deliberate, careful way in promulgating the Part 45 rules. The swap data reporting rules implement a complex, costly and important new regulatory regime. Once the rules were finalized, market participants responsible for meeting these recordkeeping and reporting requirements engaged in extensive efforts to prepare for compliance. For almost a year, market participants, in reliance upon the reporting structure codified in the Part 45 rules, have worked closely with DDR to establish detailed reporting templates and protocols, testing reconciliations with SDR data output formats, real-time messaging of submissions (to all parties), and scheduled full portfolio reports, ensuring full audit trails exist on transactions, including all necessary updates to reports on the acceptance of a swap in clearing.

Further, market participants have focused on harmonization and standardization on a cross-jurisdictional basis, working to establish open standards for reporting and commonality – an effort aimed at aiding market participants in fulfilling reporting obligations and assisting regulators globally in analyzing data. Fragmenting the data among various SDRs creates major challenges for market participants with regulatory responsibilities across jurisdictions and could impinge on foreign regulator access.

A last-minute change to the reporting mechanisms, as requested by CME, risks erasing those efforts and jeopardizing the firms' ability to report in compliance with the established framework. Moreover, market participants will be forced to invest significant additional time and resources in order to report to CME and need to apply for no action relief in the interim.[57] The CFTC should devote the same careful consideration to a proposed internal rule that would have the effect of changing the costs and benefits of the properly approved reporting regime, especially a proposed internal rule regarding a novel and critically important reporting system.

B. Part 45 SDR Reporting Is Not Redundant of Part 39 DCO Reporting

CME asserts that the Part 45 rules require DCOs to report to SDRs the same data that DCOs are required to maintain under the Commission's 39.19 and 39.20 rules. CME argues that "the Part 45 rules are duplicative because DCOs already have an obligation to store all of a DCO's cleared swap data and provide such data to the CFTC upon request."[58] However, this assertion mischaracterizes the reporting

[56] *See id.* at 2,176-93.

[57] To some extent, the CFTC has already been forced to provide such no-action relief and delay reporting. *See* CFTC No-Action Letter No. 12-55 (Dec. 17, 2012).

[58] CME Amended Request, *supra* note 2, at 1.

requirements under Part 45's SDR reporting framework, which are not merely duplicative of the Part 39 DCO reporting framework.

The Commission has the authority to prescribe data collection and maintenance standards specific to SDRs under Section 21(b)(2) of the CEA.[59] While such standards must be comparable to the data standards imposed on DCOs (and thus may have overlapping requirements), the DCO standards do not supplant the separate data standards mandated for registered SDRs, and DCOs may not stand-in for registered SDRs as repositories of data.[60]

The Commission's decision not to permit reporting under Part 39 to constitute compliance with Part 45 was by design; Part 39 and Part 45 serve different purposes, just as DCOs and SDRs serve different purposes. The value of SDR reporting would not be realized by collecting and maintaining data in accordance with the Part 39 framework. Reporting a purely Part 39 framework fails to achieve the complete audit trail benefit of reporting over the life of a swap to an SDR, as envisioned by Part 45. By suggesting that Part 39's reporting obligation can serve as a substitute for Part 45, CME wrongly fixates on the responsibility of the DCO regarding maintaining data to properly perform its clearing functions, ignoring the further rights and responsibilities to create a complete audit trail under Part 45.

Unlike DCOs, SDRs must possess the ability to provide swap transaction data to regulators on a broad scale to assist in identifying and mitigating systemic risk. Under Section 5b(k)(1) of the CEA, a DCO is required to "provide to the Commission all information that is determined by the Commission to be necessary to perform each responsibility of the Commission under this Act." Section 5b(k)(4) authorizes the Commission, upon request, to share information collected from registered DCOs with the Federal Reserve Board, the Securities and Exchange Commission, each appropriate prudential regulator, the Financial Stability Oversight Council, the Department of Justice, and any other person that the Commission determines to be appropriate, including foreign financial supervisors (*e.g.*, foreign futures authorities), foreign central banks, and foreign ministries (collectively, "regulatory authorities"). There is a critical distinction in the role of an SDR, as compared to a DCO, in identifying and mitigating systemic risk. The SDR, as a source of timely swap transaction data, is able to provide direct data to regulatory authorities, upon request, without the additional step of seeking Commission authorization or approval.

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[59] CEA § 21(b)(2).

[60] *See id.* § 21(b)(3). "The standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on derivatives clearing organizations in connection with their clearing of swaps." Further, were Part 39 data allowed to serve the role of Part 45 data, the Commission could have simply cross-referenced Part 45's swap data reporting requirements in its DCO reporting rules, as it expressly chose to do in connection with Part 39's DCO swap data recordkeeping requirements. In its Part 39 recordkeeping requirements, the Commission provides, "[e]ach derivatives clearing organization that clears swaps must maintain swap data in accordance with the requirements of part 45 of this chapter." 17 C.F.R. § 39.20(b)(2). No similar Part 45 cross-reference exists in the Commission's Part 39 data reporting requirements. *See id.* § 39.19.

CME's attempt to mischaracterize Part 45's reporting requirements undermines the importance of the established swap data reporting framework and frustrates the goal of providing market transparency to both regulators and the public. The Dodd-Frank Act requires SDRs, as a condition to maintaining their registration, to comply with core principles and regulations aimed at improving accountability and transparency in the overall financial system.[61] These core principles are reflected in SDRs' duties under the Dodd-Frank Act to, among other requirements, "confirm with both counterparties to the swap the accuracy of the data [submitted]" and "establish automated systems for monitoring, screening, and analyzing swap data."[62] By proposing to self-report all trades by claiming to be a "party" to the trade to its self-owned and controlled SDR, CME's proposed Rule 1001 perverts the intended function of SDRs to maintain information related to swaps entered into by third parties.[63]

Moreover, if CME's proposed Rule 1001 were approved, and CME was allowed to characterize itself as the only relevant reporting party, CME would be confirming the accuracy of its own data. Because such a reporting framework would result in the absence of independent checks on the SDR's functions, overall accountability and transparency would be threatened. Put simply, CME's proposed Rule 1001 would seriously risk the safeguards constructed by Dodd-Frank and the Commission's regulations.

C. Rule 1001 Does Not Comply with the Part 45 Reporting Framework

Despite asserting that the Part 45 rules are merely duplicative of existing Part 39 DCO reporting requirements, CME states that Rule 1001 is "[n]evertheless . . . designed to implement the Part 45 rules."[64] CME further asserts that "Rule 1001 requires CME Clearing to comply with its Part 45 cleared swap reporting duties by reporting to CME's SDR."[65] However, in reality, the approval of CME's Rule 1001 would contort the swap data reporting framework constructed under Part 45 and, through reduced transparency, introduce to the swaps market the very systemic risk sought to be mitigated through the creation of SDRs.[66]

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[61] *See* the Dodd-Frank Act, *supra* note 5, § 728; *see also* Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. at 54,538 (noting that the rule falls within the Dodd-Frank Act framework, which "was enacted to reduce risk, increase transparency and promote market integrity within the financial system").

[62] CEA § 20, as amended by the Dodd-Frank Act.

[63] *See id.* § 1(a)(48). CME's construct of self-reporting does damage to the very principles embodied in the Dodd-Frank Act's mandate to create SDRs, as "[t]he term 'swap data repository' means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, *swaps entered into by third parties* for the purpose of providing a centralized recordkeeping facility for swaps." *Id.* (emphasis added).

[64] CME Amended Request, *supra* note 2, at 1.

[65] *Id*.

[66] As a corollary matter, DTCC has already expressed its concern that the actions taken by the CFTC in conjunction with approval of CME's SDR application and publication of CME's proposed rule

i. The Part 45 Framework Honors User Choice

With respect to swap data reporting, Part 45 establishes a framework intended to increase the transparency of swap transactions and enhance the data readily available to regulators for purposes of industry oversight and risk assessment. Pursuant to CEA, the counterparties to a trade bear the reporting responsibility for swap transactions.[67]

Part 45 calls for the reporting to an SDR swap data from each of two relevant stages of the existence of a swap: (1) the creation of the swap; and (2) the continuation of the swap over its existence until its final termination or expiration.[68] Swap data reported at the creation of the swap includes both (1) the primary economic terms ("PET") and (2) confirmation data.[69] The counterparty with the reporting obligation is determined pursuant to rules 45.8 and 45.10.[70]

For off-facility swaps subject to clearing, the reporting SD/MSP counterparty reports all PET data within certain reporting deadlines. In reporting the PET data within the required timeframes, the reporting SD/MSP counterparty (not the DCO) selects the SDR to which the first report of required swap creation data is made.[71] Pursuant to rule 45.10, the first report of required swap creation data dictates the SDR to which all swap data for a given swap must be reported.[72] Only where the SD/MSP submits the swap for clearing and *fails to submit* the first report of required swap creation data prior to the submission of such data by the DCO can the DCO make the initial report of required swap creation data in accordance with § 45.3(b).[73]

For cleared swaps, where the SD/MSP reporting counterparty makes the first report of required swap creation data in the applicable timeframe, the SD/MSP reporting counterparty selects the SDR and notifies the DCO of the SDR to which the report was made.[74] Thereafter, the DCO reports all confirmation data for the swap, including the internal identifiers assigned by the DCO for the two transactions

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change tear at the fabric of the swap data reporting framework. A copy of this more technical discussion is appended to this letter as Appendix II.

[67] The CEA requires the parties to each swap (whether cleared or uncleared) to report certain information to an SDR. *See* CEA § 2(a)(13)(G) (stating, "[e]ach swap (whether cleared or uncleared) shall be reported to a registered swap data repository"); *see also id.* § 2(a)(13)(F) (noting, "[p]arties to a swap (including agents of the parties to a swap) shall be responsible for reporting swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission").

[68] Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,138.

[69] *Id*.

[70] *See* 17 C.F.R. §§ 45.8 and 45.10.

[71] *See id.* § 45.3.

[72] *See id.* § 45.10.

[73] *See id.* § 45.3(b).

[74] *See id*. § 45.10(b)(iii).

resulting from novation to the clearing house.[75] Pursuant to Section 45.4, the DCO reports all continuation data, including life cycle event data, for the cleared swap.[76] Along this continuum, such continuation data must be reported to the same SDR that received the original swap data report in accordance with Section 45.10.[77]

In practice, Part 45 requires the following reporting of a swap cleared by CME Clearing or any other DCO:[78]

1. Party A (a SD/MSP) and Party B (a commercial end user) enter into an original OTC swap.

2. Party A, as the reporting counterparty, must report all PET data for the swap within the applicable reporting deadlines set forth in Part 45 for the swap to an SDR of its choosing, unless:[79]

    a. The swap is voluntarily submitted for clearing and accepted for clearing by a DCO before the applicable deadline, including necessary data elements for reporting by Party A; and
    b. before the reporting counterparty has reported any PET data to the SDR of its choosing;

    If a and b are satisfied and the DCO reports the PET data prior to the reporting counterparty reporting the PET data, then the DCO's reporting will relieve the reporting counterparty of its duty to report.[80] Assuming a and b above are *not* satisfied and the reporting counterparty reports the PET data first, the reporting counterparty will transmit to the DCO and the other

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[75] *See id.* § 45.3(b)(2). For off-facility cleared swaps, DCOs report all confirmation data for a swap. The acceptance of a swap for clearing by a DCO constitutes confirmation of all of the terms of the swap. Further, as defined under Part 45, "[c]onfirmation means all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap. For cleared swaps, confirmation data also includes the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house." *Id.* § 45.1.

[76] *See id.* § 45.4.

[77] *See id*. § 45.10. DCOs, such as the Intercontinental Exchange, Inc. ("ICE"), have even recognized this requirement in their SDR rulebooks. For example, ICE TradeVault's rulebook states, "participants and DCOs must report all continuation data for swaps previously reported to the ICE SDR Service as soon as technologically practicable." The rule continues by stating that continuation data "is the set of data generated in connection with life cycle events that occur prior to a swap's termination data and the data elements necessary to determine the current market value of a swap . . . [including] trade cancellations (busted trades), modifications, novations, and early terminations." ICE TradeVault Rule 4.2.3.3, Continuation Data, *available at* https://www.theice.com/publicdocs/Trade_Vault_Rulebook.pdf.

[78] For simplicity, while still important (particularly when considering the costs and benefits of Rule 1001), real-time public reporting requirements have been removed from this example.

[79] 17 C.F.R. § 45.3(b)(1).

[80] *Id*.

counterparty the identity of the SDR to which PET data has been reported and the USI for the swap.[81]

3. Thereafter, all required swap creation data and all required swap continuation data, including all life cycle data such as novations, that must be reported in relation to the swap shall be reported to the SDR that received the original swap data.[82]

ii. Rule 1001 Would Dismantle the Established Part 45 Framework, Fragmenting Data and Increasing Systemic Risk

In its description of how Rule 1001 will operate, CME attempts to reinvent the Part 45 reporting framework to eliminate any element of counterparty choice in the SDR selected to satisfy Part 45's regulatory reporting requirements. CME injects, instead, DCOs as the unilateral decision-maker in the selection of the SDR to house the official record of swap data for the swaps resulting from clearing. CME's false premise is that, through the clearing process, the original trade is terminated resulting in a new swap that resets the original reporting obligations, whereby the DCO inserts itself as the counterparty with the right to select the official SDR.

CME's premise is wrong. Part 45 treats for reporting purposes novation to the DCO that occurs upon clearing as an event relating to the original swap. In particular, the rule clarifies that novations are considered life cycle events and provides that in performing the clearing function for swap transactions, DCOs must report life cycle event data, such as compression events and novations, as well as valuation data, for all swaps cleared at the DCO.[83] This approach is consistent with Part 45's goal of creating a complete audit trail of the swap from creation through complete termination.[84]

Further, upon clearing, Part 45 requires additional internal identifiers to identify each resultant swap to be added to the unique swap identifier, thereby maintaining a unique reference in the same SDR that received the original swap data.[85] This

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[81] *Id.* § 45.10(b)(1)(ii), (iii). If the reporting counterparty is excused from reporting the PET data as discussed in number 2 above, then the DCO shall report all required swap creation data for the swap to a single SDR in accordance with 17 C.F.R. § 45.10(b)(2)(iii).

[82] *Id.* § 45.10(b)(3).

[83] *Id.* § 45.4. Section 45.1 defines life cycle events to include counterparty changes resulting from novations, as well as a host of other events that would occur both before and after clearing. *Id.* § 45.1.

[84] A single trade can be comprised of a series of legal transactions or novations that are distinguishable from one another because they involve separate parties. However, the goal of the Part 45 framework is to create a reporting regime that allows the Commission and other regulators to follow the entire economic history and audit trail of each affected swap, necessitating that swaps that result from novation map back to the original swap. While a trade can be comprised of a series of legal transactions throughout its life, such legal transactions must be reported as life cycle events. *See* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,159.

[85] 17 C.F.R. § 45.3(d)(2).

treatment achieves the objectives of Section 45.10 and reduces the reporting burden, particularly for non- SDs/MSPs, by not creating two reporting parties to two resultant swaps. Because clearing does not result in the termination of the swap from a reporting perspective, it ensures that such continuation data is reported to the same SDR which received the original report for the swap.[86]

In suggesting that clearing constitutes the termination of the swap for reporting, cleaving the pre-clearing trade from the post-clearing trade and requiring the "new" trade to be reported to CME's own SDR, rather than the SDR selected by the original reporting counterparty to the trade, CME not only distorts the reporting framework established under Part 45, but also subverts Section 45.10, requiring that all swap data for a given swap be reported to a single SDR. The Commission has explained that the "important regulatory purposes of the Dodd-Frank Act would be frustrated" and "regulators' ability to see necessary information concerning swaps could be impeded, if data concerning a given swap were spread over multiple SDRs."[87] Such data fragmentation would inhibit the ability of the SDR to create a full audit trail for the swap, impairing regulators' ability to supervise swap markets and detect abuses.[88]

The Commission has noted that swap data reporting is intended to provide regulatory agencies with "comprehensive data" that is "available in a unified format, greatly enhancing the ability of regulators in their oversight and enforcement functions."[89] Beyond assisting the regulators, consolidated SDR reporting was intended to negate the potential harm resulting from double reporting of trades and ensure accurate netting of exposures across multiple reporting entities. If the Commission approves CME's proposed Rule 1001, it would be impossible to realize these systemic risk benefits, as market participants would no longer be required to create the comprehensive data set envisioned by the final regulations. Because netting of outstanding exposures will not be realized, public reporting benefits would also be stymied, and the market would lose the benefit of accurate, timely reporting regarding market size and aggregate exposures.

iii. Rule 1001 Attempts to Unilaterally Extinguish the Reporting Obligations of Other Market Participants, Established for the Purpose of Monitoring Systemic Risk

In accordance with its incorrect assertion that the original swap is terminated for reporting purposes upon clearing, CME also incorrectly outlines the remaining reporting obligations for the "new" swap, claiming that *its* DCO "should be the only entity with reporting obligations for the resulting swaps and related positions."[90] CME's proposed rule cannot unilaterally extinguish SD/MSP ongoing valuation

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[86] *Id.* § 45.10.

[87] Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,168.

[88] *Id.* at 2,147.

[89] *Id.* at 2,188.

[90] CME Amended Request, *supra* note 2, at 2.

data reporting obligations under Part 45. These were carefully considered and clearly mandated in the Part 45 final rule. Nor can CME engage in activity on behalf of SD/MSPs in violation of Part 45.

In support of this new reporting construct, CME asserts that its DCO will have the "easiest, fastest and cheapest access to data for the resulting swaps and related positions."[91] This assertion, which was repeatedly made by CME during the comment process on the Part 45 rules, was previously publicly rejected by the CFTC because the Commission believed that "a competitive marketplace for SDR services presents the opportunity for significant reductions to the cost of swap data reporting."[92] Final Part 45 never considered a DCO as a reporting party, but rather allowed them the ability to report on behalf of reporting parties to create a more cost-effective reporting requirement for reporting parties.[93] Moreover, CME's assertion completely ignores the ongoing obligation of SDs and MSPs to report valuation data. Such reporting is an essential and critically important component of the Congressional and regulatory goal of enhancing systemic risk oversight in the derivatives markets.

Pursuant to Commission rules 45.4(b)(2)(i) and (ii), swap valuation data must be reported to the SDR by both (i) the DCO that clears the swap and (ii) the reporting counterparty to the cleared swap if the reporting counterparty is a SD/MSP. The obligation of the DCO to provide valuation data for the cleared swap under regulation 45.4(b)(2)(i) is independent of the obligation of the SD/MSP to provide valuation data for the same cleared swap under regulation 45.4(b)(2)(ii). This requirement for independent market participant reporting was included in Part 45 despite public comments arguing that all valuation data reporting for cleared swaps

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[91] *Id*.

[92] *See* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,185-86. "The Commission also anticipates that, because the final rule does not require each cleared swap to be reported to an SDR affiliated with the DCO that clears the swap, in some circumstances reporting counterparties may incur some increased costs, but also some increased benefits, relative to an environment in which all cleared swaps must be reported to a DCO–SDR . . . The Commission believes that a competitive marketplace for SDR services presents the opportunity for significant reductions to the cost of swap data reporting."

[93] *See id.* at 2,188. "Furthermore, allowing the clearing of a swap on a DCO to satisfy the continuation data reporting obligations of non-SD/MSP reporting counterparties represents a lowered overall cost. This approach . . . capitalizes on the transmission pipeline from the DCO to the SDR, and will allow for more cost-effective reporting than a regime in which reporting parties entering into a cleared swap would always be responsible for reporting regulatory data, as the DCO will likely realize economies of scale in the reporting process." *See also* 17 C.F.R. § 45.8. The Commission established a hierarchy of counterparty types for reporting obligation purposes, in which DCOs are not accounted for as reporting counterparties. For example, the determination process of which counterparty is the reporting counterparty includes the following: (1) if only one counterparty is a SD, the SD is the reporting counterparty; (2) if neither counterparty is a SD, and only one counterparty is a MSP, the MSP is the reporting counterparty; and (3) if both counterparties are non-SD/MSPs, and only one counterparty is a financial entity as defined in the CEA, the financial entity is the reporting counterparty.

should be done by the relevant DCO.[94] The Commission explained the reason for its inclusion in the final rule: "[b]ecause prudential regulators have informed the Commission that counterparty valuations are useful for systemic risk monitoring even where valuations differ, the final rule requires SD and MSP reporting counterparties to report the daily mark for each of their swaps, on a daily basis."[95]

In its attempt to restrict the obligation to report valuation data to DCOs, CME's Rule 1001 directly violates rule 45.4(b)(2)(ii)'s requirement that SD/MSP reporting counterparties report ongoing valuation data, wholly independent of the DCO's obligation to report valuation data under rule 45.4(b)(2)(i).[96] Because SDs and MSPs must report all swap data for a given swap to a single SDR, CME's proposed rule would (1) cause SDs and MSPs to violate the requirements of 45.4(b)(2)(ii); or (2) lead to a situation where duplicate reports are spread across multiple SDRs. The Commission stated if this occurs, "the important regulatory purposes of the Dodd-Frank Act would be frustrated" and "regulators' ability to see necessary information concerning swaps could be impeded."[97]

As is evident, CME's Rule 1001, contrary to what CME suggests, does not just relate to the "the manner by which CME Clearing meets *its* regulatory reporting obligations." Rather, Rule 1001 would directly impact the ability of other market participants, specifically SD/MSPs, to meet their reporting obligations under Part 45.

III. Rule 1001 Is Procedurally Defective

As detailed above, the proposed amendments to CME's Rule 1001 conflict with the CEA's core principles for DCOs and would effectively repudiate the Commission's Part 45 rules. CME is a SIDCO that has proposed material changes to critical access to clearing and important compliance reporting functions under the CEA necessitating elevated procedural safeguards. Despite the potential for CME's Rule 1001 to cause significant disruption to the financial markets, the Commission has not followed basic procedural safeguards in considering the adoption of CME's proposed rule. Instead, the Commission has cut procedural corners in what appears

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[94] The preamble to Part 45 notes, "[a] number of commenters, including ICE, WGCEF, EEI, EPSA, and Chris Barnard, recommended that all valuation data reporting for cleared swaps should be done by the DCO." Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,152.

[95] *Id.* at 2,154.

[96] CME suggests that the Commission "could give further effect to this policy by applying its Part 45 rules so that neither Party A nor Party B would have any reporting obligations for resulting swaps and related positions. If the DCO reports the cleared swap data Part 45 requires to an SDR, any further reporting by Party A or Party B would be duplicative and potentially confusing. Moreover, imposing a duplicative reporting requirement would unduly increase costs for SDs, which could be passed on to other market participants in the form of higher fees." CME Amended Request, *supra* note 2, at n.5. (In CME's example, Party A is a swap dealer, and Party B is a commercial end user.) In making this argument, not only does CME acknowledge that its proposed valuations data reporting framework contradict Part 45, it summarily rejects the Commission's systemic risk considerations, which specifically took into account that valuations may differ.

[97] *See* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,168.

to be an effort to clear to the path to approve CME's Rule 1001 as expeditiously as possible, seemingly turning a blind eye to the detriments that will be imposed on market participants other than CME.

CME filed its proposed amended Rule 1001 on December 6, 2012. In response, the Commission established a thirty-day comment period that ends on January 7, 2013. This limited period for comments is deficient, failing to acknowledge both the inconsistencies between Rule 1001 and the final CFTC rules and the significance of CME's request for the derivative markets. The Commission should establish a longer comment period and hold a public roundtable to gather the full range of views from the industry. Similarly, the Commission should have sought comments prior to revising its guidance in the FAQs. The CFTC's summary changes to the FAQs effectively amended the Commission's prior interpretation of Part 45, at the same time that the Commission sought comments on proposed Rule 1001.[98]

As discussed above, the significant nature of the changes presented by CME's proposed Rule 1001 also requires the Commission to follow APA rulemaking procedures and to conduct a cost-benefit analysis as required by the CEA. The Commission has not done so, and its current review of the CME rule is inadequate and legally deficient.

A. Ordinary Procedures Require an Extended Public Comment Period

Failing to set a longer period for comments to accommodate significant national holidays inexplicably downplays the importance of CME's request and imposes unfair and unwise limits on interested parties' ability to submit comments. The short time period does not give market participants, who are already overwhelmed with numerous swap data reporting regime implementation issues,[99] sufficient time to develop comments and garner information regarding the relative costs and benefits of adopting the CME rule amendment.[100] For this reason alone, the CFTC should have extended the comment period.[101]

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[98] *See* CFTC, Frequently Asked Questions (FAQ) on the Reporting of Cleared Swaps (Nov. 28, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/clearedswapreportingredline_fa.pdf.

[99] Since December 6, 2012, the CFTC has released 30 no-action relief letters and other staff guidance.

[100] Even DTCC, for whom this issue is a high priority, has not had the time to identify all of the different costs and benefits of Rule 1001, much less provide the Commission with any hard data regarding the relevant costs and benefits of Rule 1001. The Commission may further extend the review period for an additional 45 days, if the proposed rule raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete or the requestor does not respond completely to Commission questions in a timely manner. In this instance, as evidenced by the public comments received to date and questions posed by market participants about implementing Rule 1001, the Commission must further extend the review period to resolve these important questions and analyze the novel and complex issues associated with Rule 1001. *See* 17 C.F.R. § 40.5(d)(1).

[101] DTCC formally requested that the CFTC extend the comment period on December 20, 2012. The CFTC did not respond to DTCC's request. *See* Letter from Larry Thompson, General Counsel,

B. CME's December 14 "Corrected" Submission Should Extend Public Comment Period

Recently, CME submitted a "corrected" Rule 1001 dated December 14, 2012, "to correct a typographical error per CFTC staff's request."[102] The December 14, 2012 submission was not posted to the CFTC's Rule 1001 public comment page until December 28, 2012, at the earliest. The Commission did not provide market participants notice of the corrected submission, as it did of CME's first amended Rule 1001 submission on December 6, 2012.

The change is clearly not a "typographical error" and goes beyond correcting an errant comma or missing punctuation. Although, late yesterday, the Commission extended the comment period to January 14, 2013, the CFTC should restart the already abbreviated 30-day public comment period from the December 28, 2012, publication date of the corrected Rule 1001 submission. Additional time will allow for more fulsome analysis in public comments by DTCC and other interested parties, including those market participants who have not yet been made aware of this submission.

C. CME's SIDCO Status Requires Heightened Procedural Safeguards

Additionally, the CME rule amendment was not submitted with the required amount of advance notice or a sufficient comment period due to CME's status as a SIDCO.[103] A SIDCO that proposes a material change to its rules, procedures, or operations must provide at least sixty days advance notice to the CFTC.[104] The same Section of the Commission's regulations requires CME, as a SIDCO, to submit a copy of the proposed changes to the Board of Governors of the Federal Reserve System. Additionally, rule changes by SIDCOs that raise novel or complex issues are subject to an extended 60-day review period.[105]

Despite the clear application of these rules to CME's proposed Rule 1001, the Commission chose to ignore its own regulations and established a highly

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DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59009&SearchText.

[102] Submission #12-391R, *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul121412cme001.pdf.

[103] A DCO registered with the CFTC that has been designated as a systemically important financial market utility ("SIFMU") by the Financial Stability Oversight Council must follow specialized procedures to submit material changes to its internal rules. *See* the Dodd-Frank Act § 805(a)(2)*; see also* 17 C.F.R. § 40.10.

[104] *See* 17 C.F.R. § 40.10(a). Under the Commission's own rules, a change in a SIDCO's internal rules is material if there exists a reasonable possibility that the proposed change could affect the overall nature or level of risk presented by the SIDCO.

[105] *See id*. § 40.10(f).

abbreviated notice and comment process. The CFTC failed to require CME to observe the 60-day advance notice provisions and the additional 60-days required for SIDCO rule changes that present novel and complex issues.

The Commission's "rush to judgment" defies common sense and, more importantly, the undisputed facts surrounding CME's proposed Rule 1001, namely:

- CME was designated as a SIFMU on July 18, 2012 and is clearly a SIDCO for purposes of the swap markets.

- There is no serious dispute about the material, novel, and complex nature of CME's proposal. The entire SDR reporting regime is novel and complex, with a brand new set of requirements imposed by the CEA, as implemented by the CFTC, to enhance the transparency and risk management of the derivatives markets. The SDR reporting system goes to the very heart of the overall nature of risk presented by a SIDCO. Further, the proposed rule change itself presents a host of novel and complex issues that are inconsistent with CFTC regulations and guidance.

- The reaction of the industry to CME's Proposed Rule 1001 also establishes the material, novel, and complex nature of what CME has proposed. CME has participated in multiple conference calls with the Commission and the International Swaps and Derivatives Association ("ISDA") during which ISDA members, who are counterparties to trades cleared by CME, debated at length and disagreed with the perspective of DCOs on the very issues addressed in CME's Rule 1001 – discriminatory access to the DCOs and the choice of which SDR would receive required disclosures. Proposed Rule 1001 created so much uncertainty in the swap markets that market participants requested and received relief from certain aspects of SDR reporting requirements due to CME's proposed rule, as well as the CFTC's parallel and poorly-explained withdrawal of guidance in the FAQ, previously published to the industry on October 12, 2012.

- CME's own December 6 comments and supporting comments from another DCO, ICE, dispel any potential doubt regarding the material, novel, and complex nature of CME's proposed Rule 1001. Both CME and ICE have suggested that CME's proposed Rule 1001 requires the Commission to revisit its Part 45 rulemaking to resolve conflicts between the CME rule and the regulations that the CFTC took months to publish, evaluate, and finalize.

- CME's proposed Rule 1001 is material to the overall nature of the risk presented by CME as it attempts to fundamentally restructure both access to clearing and a crucial Dodd-Frank requirement that is designed to increase transparency and decrease risk in the swap markets. CME repeatedly states in the letter accompanying its Rule 1001 that the proposed rule stands for the proposition that CME is the only entity with reporting obligations for cleared swaps and related positions. However, the Commission's Part 45 rules require SD/MSP

reporting counterparties to report valuation data for swaps.[106] In promulgating its final Part 45, the Commission clearly noted the risk in relying solely on valuation information available at the DCO's in connection with the clearing process.[107] In short, CME's proposed rule would dilute the SDR reporting requirements and continue to obscure key data from regulators, contrary to the CEA and the CFTC's implementing regulations.

For all of the foregoing reasons, the CFTC should reject CME's proposed Rule 1001 as written.

* * *

DTCC appreciates the opportunity to comment on CME's proposed Rule 1001. Should the Commissions wish to discuss these comments further, please contact me at 212-855-3240 or lthompson@dtcc.com.

Sincerely yours,

Larry E. Thompson

Larry E. Thompson
General Counsel

[106] *See id*. § 45.4(b)(ii).

[107] In the Part 45 preamble discussion, the Commission explained that "[b]ecause prudential regulators have informed the Commission that counterparty valuations are useful for systemic risk monitoring even where valuations differ, the final rule requires SD and MSP reporting counterparties to report the daily mark for each of their swaps, on a daily basis." Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,154.

Appendix I - Timeline

Date	Event
December 8, 2010	CFTC publishes Part 45 for comment in the Federal Register.
September 14, 2010	CFTC hosts Public Roundtable to Discuss Swap and Security-Based Swap Data, Swap and Security-Based Swap Data Repositories and Real Time Reporting.
December 23, 2010	CFTC publishes Part 49 for comment in the Federal Register.
February 7, 2011	Initial public comment period closes for Part 45.
February 22, 2011	Initial public comment period closes for Part 49.
April 27, 2011	The comment periods for most proposed rulemakings implementing the Dodd-Frank Act, including Part 45 and Part 49, are reopened for 30 days from April 27 through June 2, 2011.
June 8, 2011	The CFTC holds a public roundtable to discuss issues related Part 45.
September 1, 2011	The CFTC publishes in the Federal Register the final Part 49 rules.
October 18, 2011	At a CFTC open meeting, the Commission staff indicates to Commissioner Bart Chilton that "a registered SDR, consistent with the principles of open access, shall not tie or bundle the offering of mandated regulatory services with other ancillary services that an SDR may provide to market participants."
October 31, 2011	Part 49 Effective Date.
October 31, 2011	DDR submits an application for SDR registration with the CFTC.
November 7, 2011	ICE submits an application to register its ICE Trade Vault LLC service as a SDR with the CFTC.
December 1, 2011	Senate Agriculture Committee holds a hearing titled "Continuing Oversight of the Wall Street Reform and Consumer Protection Act."
December 19, 2011	In connection with the December 1 Senate Agriculture Committee hearing, Chairwoman Debbie Stabenow (D-MI) sends CFTC Chairman Gary Gensler a written question for the record: "The CFTC's final rule for SDRs prohibited SDRs from bundling mandated services with ancillary services. Congress was clear about its support for competition in the swaps marketplace, and I applaud any efforts to that end. I have heard concerns that the rules for Derivatives Clearing Organizations (DCOs) may not incorporate this same dedication to competition particularly as it pertains to bundling. Does the CFTC intend to treat SDRs and DCOs differently on the bundling issue? If so, is there a reason for this?"
January 12, 2012	The CFTC publishes in the Federal Register the final Part 45 rules.
May 1, 2012	CFTC Chairman Gary Gensler responds to Senate Agriculture Committee Chairwoman Stabenow's question posed on December 19, 2011. His response: "[f]or DCOs that also choose to register and serve as SDRs, the anti-bundling provisions in the SDR final rule will apply."
June 7, 2012	The CME submits an application for registration of its SDR. The CME SDR application includes a written assumption that "the DCO that accepts a swap for clearing will select the SDR to which the reports on the two new swaps resulting from clearing will be made."
June 27, 2012	The CFTC approves the application of ICE Trade Vault, LLC for provisional registration as a SDR.
July 18, 2012	The Financial Stability Oversight Council votes unanimously to designate the Chicago Mercantile Exchange, Inc. as a SIFMU under Title VIII of the Dodd-Frank Act. Among other prudential regulations, SIFMUs must

	provide advance notice of rule filings and follow specific procedural rules.
July 25, 2012	Mr. Terrence Duffy of CME testifies before the House Committee on Agriculture in a hearing titled, "Oversight of Swaps and Futures Markets: Recent Events and Impending Regulatory Reforms." Mr. Duffy testifies that "[w]ith respect to the reporting of cleared swaps data, the Commission should allow for implementation of a clearing regime that permits clearing houses to choose the Swap Data Repository to which it must report, including their own affiliated SDR."
September 19, 2012	The CFTC approves the application of DDR for provisional registration as a SDR.
October 11, 2012	The CFTC publishes the FAQs on the Reporting of Cleared Swaps, indicating that ▪ "[m]arket participants may choose to use a DCM's, SEF's or DCO's SDR for reporting swap transactions, but a DCM, SEF or DCO as part of its offering of trading or clearing services cannot require that market participants use its affiliated or 'captive' SDR for reporting. Such a result would be inconsistent with the intent of sections 21 and 49.27(a) of the Commission's Regulations relating to the reporting of transactions"; and ▪ "(unless otherwise agreed to by the counterparties and the DCO) the selection of the particular SDR to which the swap data is reported for the resulting swaps due to clearing is to be determined by the counterparties to the original swap."
October 12, 2012	Part 45 Effective Date. The CFTC begins requiring compliance with the Part 45 rules for credit swaps and interest rate swaps. Provisionally-registered SDRs began receiving swaps transaction reports, providing a centralized location for trades to aid in regulatory market surveillance and systemic risk oversight. DDR receives no submissions from ICE and CME. To date, CME has not done any connectivity testing with DDR, while ICE has participated in testing.
October 15, 2012	The CFTC grants CME no-action relief, which provided that CME did not have to comply with the Part 45 rules until October 26, 2012.
October 26, 2012	The CFTC extends CME no-action relief from compliance with the Part 45 rules until November 13, 2012.
November 8, 2012	The CME files a lawsuit challenging the Part 45 rules before its no-action relief was set to expire on November 13.
November 9, 2012	The CME submits Rule 1001 to the CFTC.
November 11, 2012	DTCC delivers a letter to the CFTC raising concerns with CME lawsuit and potential negative consequences of a judicial challenge or Commission action to remove the necessity for a legal dispute.
November 12, 2012	The CME submits a letter to the CFTC in response to the DTCC November 11 letter.
November 13, 2012	The CFTC extends the CME's no-action relief which provided that CME did not have to comply with the Part 45 rules until the earlier of: (i) the date the CME is granted provisional registration as an SDR; or (ii) December 4, 2012.
November 20, 2012	DTCC submits comments to the CFTC on Rule 1001, raising (i) procedural violations for systemically important derivative clearing organization rule filings; (ii) substantive inconsistencies between Rule 1001 and CFTC regulations; and (iii) APA concerns related to changing a

	definitive rule and interpretation without appropriate public notice, comment and cost-benefit analysis.
November 21, 2012	The CFTC approves the application of CME for provisional registration as a SDR.
November 28, 2012	The CFTC withdraws parts of its FAQs on certain cleared swaps reporting requirements.
November 28, 2012	The CFTC seeks public comment, until December 21, on CME's Proposed Rule 1001.
November 29, 2012	The CME withdraws its lawsuit challenging the Part 45 rules.
December 4, 2012	DTCC delivers a letter requesting an extension of the public comment period and requests that the CFTC hold a roundtable on Rule 1001.
December 6, 2012	The CME submits amended Rule 1001 to the CFTC. The CFTC opens a 30 day public comment period for Rule 1001.
December 6, 2012	DTCC delivers a letter to the CFTC seeking an extension of the Rule 1001 public comment period to allow for the full 120 days required under the Commission's review standards applicable to the sound regulation of SIDCOs.
December 10, 2012	The CFTC provides no-action letter relief for SDs and MSPs from the obligation to report valuation data for cleared swaps under the Part 45 Rules.
December 10, 2012	The CFTC extends public comment for the amended request from CME for approval of Rule 1001 until January 7, 2013.
December 19, 2012	CFTC issues no action relief for SDs and MSPs from the Reporting Provisions of Part 45 for CDS Clearing-Related Swaps.
December 20, 2012	DTCC requests that CFTC allows for at least sixty additional days of public review and comment for Rule 1001 from the date of publication on the CFTC website.
December 20, 2012	DTCC submits comments to the CFTC on its amended FAQs.
December 28, 2012	The CFTC posts to its website a "corrected" submission of Rule 1001 from CME dated December 14, 2012 to "correct a typographical error per CFTC staff's request."
December 31, 2012	At 12:01 am Eastern Daylight Time, SDs begin reporting swap transactions to registered SDRs. The DDR receives over 2.5 million reports from SDs and registered DCOs. CME and ICE do not report any cleared swaps to DDR.
January 3, 2013	DTCC requests an extension of the Rule 1001 public comment period to adequately review and formulate comments on the December 14, 2012 CME Rule 1001 submission.
January 7, 2013	CFTC extends public comment period until January 14, 2013.

Appendix II

55 WATER STREET
NEW YORK, NY 10041-0099

TEL: 212-855-3240
lthompson@dtcc.com

December 20, 2012

The Honorable Gary Gensler
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Frequently Asked Questions on the Reporting of Cleared Swaps

Dear Chairman Gensler:

We write in relation to the Frequently Asked Questions on the Reporting of Cleared Swaps ("FAQs") promulgated by the Commodity Futures Trading Commission (the "CFTC"). Specifically, we are writing to relay certain technical concerns related to the November 28, 2012 amendment (the "Amendment") to the FAQs.[1] The Amendment withdrew several answers (the "Withdrawn Answers") which addressed questions concerning the choice of swap data repository ("SDR") by a party that is required to report swap data pursuant to Part 45 of the CFTC's Regulations ("Part 45").

Prior to the Amendment, the direction given in the FAQs mostly accorded with Part 45. The one principle difference, and therefore inconsistency, is the statement therein that once an uncleared swap is accepted for clearing by a derivatives clearing organization ("DCO"), the "DCO should assign new unique swap identifiers ("USIs") to the new swaps resulting from the novation of the original swap to the clearing house," as opposed to internal leg identifiers.

Besides this inconsistency, the Amendment has led to much more uncertainty as to the requirements and operational build-out relating to reporting swap data for a cleared swap, which we understand has been highlighted to the CFTC by market participants. The withdrawal of the Withdrawn Answers may lead market participants and infrastructure providers to infer that the CFTC's position has changed with respect to those issues discussed therein, which can only legally be done through reproposing the affected rules and subjecting the reproposed rules to notice and comment in accordance with the Administrative Procedure Act ("APA"). Notably and as further described below, such conflicts would arise between Parts 45.3 (*Swap data reporting: creation data*), 45.10 (*Reporting to a single data repository*), 45.8 (*Determination of which counterparty must report*) and 45.5

[1] By raising these concerns in this context, DTCC notes that there are other serious issues implicated by the withdrawal answers, including the Withdrawn Answer to the bundling question, which will be discussed more fully in the context of DTCC's response to The Chicago Mercantile Exchange Inc.'s Amended Submission #12-391R: Adoption of New Chapter 10 (Regulatory Reporting of Swap Data) and Rule 1001 (Regulatory Reporting of Swap Data).

(*Unique swap identifiers*) on the one hand, and the FAQs and therefore market practice on the other.

Additionally, the Commission's no action letter relief addressing the operational and systemic challenges are further perpetuating market confusion and emboldening certain market players that argued for a different reporting structure under Part 45.[2] The Commission's no action letters are a clear indication of the seriousness of the problem and also reflect an inadequate solution.

We are concerned that the Commission's actions in withdrawing the Withdrawn Answers and issuing ad hoc no action relief have degraded the integrity of the Part 45 rules. We write this letter to articulate and reinforce the principles contained within Part 45 to ensure that going forward, market participants recognize and abide by these principles that were promulgated after a lengthy and thoughtful notice and comment process. Further, DTCC's provisionally registered SDR, DTCC Data Repository (U.S.) LLC ("DDR"), is operating under these rules and expect other market participants to do so as well.

Description of Potential Inconsistencies between FAQs and Part 45

1. Appropriate SDR for resulting swaps created through the clearing process

Part 45.3 provides that for an off-facility swap, the reporting counterparty is required to report primary economic terms ("PET") data to an SDR within the applicable reporting deadline.[3] This report establishes the applicable SDR to which all confirmation data and continuation data relating to the swap must be reported, in accordance with Part 45.10.[4] Prior to the Amendment, the FAQs helpfully clarified that, consistent with Part 45.10, the resulting swaps created through the clearing process must be reported "to the SDR to which the first report of required swap creation data is made."[5] Pursuant to the Amendment, this language was withdrawn, thus creating uncertainty for market participants and possibly creating an inference that practices inconsistent with the provisions of Part 45 may be permitted.

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[2] Since December 6, 2012, the CFTC has released 19 no-action relief letters and other staff guidance.

[3] 17 CFR § 45.3. In accordance with § 45.10, the reporting swap dealer or major swap participant counterparty must report all PET data within certain reporting deadlines. In reporting the PET data within the required timeframes, the reporting swap dealer or major swap participant counterparty selects the SDR to which the first report of required swap creation data is made. Only in the instance where the swap dealer or major swap participant fails to submit the first report of required swap creation data prior to the submission of such data by the DCO can the DCO make the initial report of required swap creation data in accordance with § 45.3(b).

[4] 17 CFR § 45.10.

[5] Commodity Futures Trading Commission (CFTC), Frequently Asked Questions (FAQ) on the Reporting of Cleared Swaps (Oct. 12, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/clearedswapreporting_faq_final.pdf.

Under Part 39 of the CFTC's Regulations ("Part 39"), the acceptance of a swap for clearing constitutes the termination of the swap and the creation of two new swaps.[6] However, Part 45 treats a swap accepted for clearing in a different way for reporting purposes. Part 45 distinguishes between required swap creation data and confirmation data. Part 45 does not require that creation data be reported for the two new swaps. Instead, Part 45.3 requires only that confirmation data be reported by the DCO.[7] This is consistent with Part 39, which provides that acceptance of the swap for clearing by a DCO constitutes confirmation of all of the terms of the swap. It is therefore clear that, for purposes of Part 45, acceptance for clearing constitutes a continuum of the original swap and accordingly the SDR to which the confirmation data and continuation data for the new swaps must be reported must be the SDR to which the PET data for the original swap was reported.[8] Further, confirmation data, as defined at Part 45.1, for cleared swaps, expressly includes the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house."[9] This language makes clear that for swaps accepted for clearing, confirmation data (and subsequent continuation data) must be reported to the same SDR to which the original PET data report for the original swap was made, and recognized that clearing acceptance would include novation, consistent with the Part 39 treatment.

This proposition is further supported by the fact that novations fall squarely within the definition of a "life cycle event" under Part 45.1.[10] Life cycle events, which constitute continuation data for purposes of Part 45, must be reported to the same SDR to which the original PET data were reported and do not constitute creation data, which might be reportable to a different SDR. [11]

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[6] 17 CFR § 39.12(b)(8),

[7] 17 CFR § 45.3.

[8] For off-facility cleared swaps, DCOs report all confirmation data for the swaps. The acceptance of a swap for clearing by a DCO constitutes confirmation of all of the terms of the swap. Further, as defined under Part 45, "[c]onfirmation means all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap. For cleared swaps, confirmation data also includes the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house." The novation to the DCO that occurs upon clearing does not constitute a new swap that terminates the original trade. Rather, through the clearing process, the DCO creates two separately cleared swaps, with the DCO standing on both sides of (1) the cleared swap with the reporting counterparty; and (2) the cleared swap with the non-reporting counterparty. *See* 17 CFR §§ 39.12(b)(8), 45.1, and 45.3.

[9] 17 CFR § 45.1.

[10] *Id.*

[11] Section 45.4 states that "for all swaps cleared by a derivatives clearing organization, required continuation data must be reported as provided in this section." The Section goes on to state that DCOs must report both life cycle event data and valuation data. Section 45.1 defines life cycle events to include counterparty changes resulting from novations, as well as a host of other events that would occur both before and after clearing. Such events must be reported to the SDR which received the original report for the swap. *See* 17 CFR §§ 45.1, 45.4, and 45.10.

There are good reasons why novation should be treated this way when reporting. Novation into clearing is not price forming and not perceived generally as a swap creation event. Even though the output of novation is separate legal swaps, the execution event itself is multi-lateral and conditioned on the full execution of several simultaneous events, which are not independent, and reflect that this is a continuation event. Similarly, in the bilateral world, participants refer to assignment of a swap, as a transfer of obligations to another party. Legally this results in a novation contract between the parties (not as assignment) requiring a multi-party execution event rather than several contractual events. In both clearing novation and bilateral novation from at least one party's perspective there is full continuity of an existing swap. Hence, for reporting, the treatment of continuation is appropriate as it provides for an accurate audit trail as well as an accurate position outcome.

This treatment is also consistent with that in foreign reporting regimes. In Europe, for example, the soon-to-be enacted reporting regime states that where an existing contract is subsequently cleared by a CCP, clearing should be reported as a modification of the existing contract.

2. The Assignment of USIs by the DCO

The FAQs state that the DCO assigns new USIs to each side of the original trade upon novation. This is inconsistent with Part 45, which provides that either the reporting counterparty or the SEF or DCM has responsibility for assigning a USI; but not the DCO, which never has responsibility to create USIs.[12] Instead, Part 45.3 requires that confirmation data reported by a DCO include "the internal identifiers assigned by the automated systems of the derivatives clearing organization to the two transactions resulting from novation to the clearing house."[13] Consistent with the analysis set out in Section 1 above, the legal creation of a new swap should not, and therefore pursuant to Part 45.3 does not, always necessitate the creation of a new USI for reporting purposes. This is true for both cleared and uncleared transactions. For example, while the novation of a swap may entail the termination of one swap and the creation of another, this does not give rise to a new USI. On the other hand, where a trade is allocated by an investment manager to a number of counterparties subsequent to its creation, a new USI is assigned to each allocated swap, notwithstanding that as a matter of law a new swap may not actually arise.

While we note that there were requests from market participants to have more flexibility to change the USI on acceptance for clearing by the DCO, we understand that the parties making these requests remain strongly supportive of reporting all data to a single SDR in accordance with Part 45.10. We understand that such requests reflect market participants' desire, rather than using a USI and two internal identifiers as attributes to describe the three legal swaps (namely the original swap by using the USI only, each of the resultant swaps by using a USI and leg identifier combination), instead to use three USIs. This approach is not intended to advocate

[12] *See* CFTC FAQ, *supra* note 5.

[13] 17 CFR § 45.3.

for change to Parts 45.3, 45.5, 45.8 and 45.10 but instead is intended to improve operational structures and help parties more easily identify their own continuing reporting obligations, in a manner it is also consistent with the reporting structure envisaged under Part 45.8(g) for situations where a new reporting party is allocated to each swap, such as when a reporting party closes its position in a cleared swap with full netting.[14]

We note that this mechanism could result in the reporting counterparty for the cleared swap reporting valuation data to an SDR that would not be its choice. However, non-registered reporting parties are shielded from any undue burden by the requirement to have the DCOs execute this activity on their behalf, as it was perceived in the rules that it will offer a lower cost in aggregate for the DCOs to connect in automated fashion to SDRs, than for all users connecting to multiple SDRs.

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For the reasons detailed above, DTCC would like to ensure that the Commission's actions in withdrawing the Withdrawn Answers and issuing no action relief do not leave market participants mistaken as to the continuing efficacy of the Part 45 rules. As DDR will continue to abide by these rules as promulgated, it expects that the Commission will ensure that other participants do the same.

Sincerely yours,

Larry E. Thompson
General Counsel

Cc: The Honorable Jill Sommers
The Honorable Scott O'Malia
The Honorable Bart Chilton
The Honorable Mark Wetjen
Dan Berkovitz
Richard Shilts
Jonathan Marcus
Susan Nathan
Eric Juzenas
Nancy Markowitz

[14] 17 CFR § 45.8(g).