IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DTCC DATA REPOSITORY (U.S.) LLC, and THE DEPOSITORY TRUST & CLEARING CORPORATION, Plaintiffs, v. UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Defendant.	No. 1:13-cv-00624-ABJ

DEFENDANT UNITED STATES COMMODITY FUTURES TRADING COMMISSION'S REPLY MEMORANDUM OF LAW IN IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN FURTHER OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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REPLY MEMORANDUM OF LAW

The dispute in this case is largely about one question: Was the CFTC's approval of Chicago Mercantile Exchange Rule 1001 ("CME Rule 1001") unlawful because the CFTC utilized the normal statutory procedures for approving a registered entity's self-regulatory rule, 7 U.S.C. § 7a-2(c), rather than APA notice-and-comment rulemaking procedures applicable to CFTC regulations? DTCC's summary judgment position rests almost entirely on the false premise that approval of CME Rule 1001 required APA rulemaking procedures. But because that is not so, this Court should award judgment to the CFTC. CME Rule 1001 is not an agency rule, but a self-regulatory rule of an entity registered with the CFTC. The CFTC was required to approve CME Rule 1001 unless it found that the rule was "inconsistent with" the Commodity Exchange Act ("CEA") or the CFTC's regulations. 7 U.S.C. § 7a-2(c)(5)(A). Because CME Rule 1001 is not "inconsistent with" the statutory and regulatory framework, the CFTC's approval of the rule was perfectly legitimate under the APA in the absence of formal notice-and-comment rulemaking procedures required for agency regulations. The procedures under 7 U.S.C. § 7a-2(c), not 5 U.S.C. § 553, apply here, and mandated the CFTC's approval of CME Rule 1001.

A subsidiary dispute in this case involves whether the CFTC's approval of CME Rule 1001 was unlawful in view of certain "pro-competitive" provisions in the CEA. But the CEA provision that requires the CFTC to consider "the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the [CEA]" does not apply to CME Rule 1001. 7 U.S.C. § 19(b). DTCC's briefs fail to address this argument, tacitly conceding the point. Moreover, the CFTC was not arbitrary and capricious in concluding that CME Rule 1001 is not "inconsistent with" a provision of the CEA that prohibits

a registered entity like CME from adopting any rule that results in an "unreasonable restraint of trade," or imposing any "material anticompetitive burden" unless "necessary or appropriate to achieve the purposes of [the CEA]." 7 U.S.C. § 7a-1(c)(2)(N). Information presented to the CFTC in the administrative record indicated that DTCC, not CME, had the lion's share of swap data reporting at the time. Unable to refute that conclusion, DTCC attempts to introduce *post hoc*, extra-record material to demonstrate its "injury." But that material is irrelevant and its submission is impermissible. This Court should award summary judgment to the CFTC.

ARGUMENT

As explained in greater detail below, none of DTCC's cited reasons for requiring APA rulemaking applies here. First, by approving CME Rule 1001, the CFTC did not "amend" its Part 45 Rules. Although DTCC posits an interpretation of the Part 45 Rules that would give DTCC's members (many of whom are swap dealers) a "right" to choose the swap data repository ("SDR") that will receive the data for swaps cleared by derivatives clearing organizations ("DCO"s), the regulations simply do not go so far as DTCC would stretch them. Second, the CFTC's approval of CME Rule 1001 did not require APA rulemaking notwithstanding a nonbinding staff interpretation (the Staff FAQ). The Staff FAQ is not in the league of "definitive agency interpretations" discussed in DTCC's cited case law, and thus the CFTC was not required to engage in notice-and-comment rulemaking before reaching conclusions that differed from statements in the Staff FAQ. Third, DTCC's claims indicate at most that the CFTC's regulations can be read in more than one way, but the CFTC's fair and considered choice between competing interpretations is entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997). Fourth, the CFTC appropriately addressed pro-competitive provisions in the CEA

when approving CME Rule 1001, and DTCC may not rely on extra-record evidence in support of its arguments to the contrary.

I. The CFTC's Statement Approving CME Rule 1001 Was Not a Regulation, and Hence the APA's Rulemaking Procedures Are Inapplicable.

DTCC asserts that this Court should declare CME Rule 1001 void because the CFTC was required to engage in APA rulemaking before approving it. To support this faulty argument, DTCC offers two theories: (1) the CFTC's approval of CME Rule 1001 "effectively amended" the CFTC's regulations; and (2) approval of CME Rule 1001 "significantly revised" certain questions and answers in a Staff FAQ, which, according to DTCC, was a "definitive interpretation" by the agency. DTCC Reply Br. at 3-10, 24-28. Because both theories lack merit, the CFTC is entitled to summary judgment.

A. Approval of CME Rule 1001 Did Not "Effectively Amend" the CFTC's Regulations, and Hence Did Not Require APA Rulemaking.

To support its "effective amendment" argument, DTCC misplaces reliance on *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 374 (D.C. Cir. 2003) ("substantive changes in prior regulations are subject to the APA's procedures"), and *American Min. Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (an agency interpretation is actually a legislative rule if it "effectively amends a prior legislative rule"). DTCC Reply Br. at 4-6. These cases stand for the proposition that, when an agency's action effectively changes or amends prior regulations, APA rulemaking procedures are required. But in this case, there was no amendment of agency regulations, and APA rulemaking was never required.

DTCC's argument fails because it rests on the incorrect premise that the CFTC's Part 45 Rules grant various entities a right to select the SDR that receives swap data, and therefore the CFTC's regulations unambiguously prohibit CME Rule 1001. DTCC Reply Br. at 4. To the

contrary, Part 45 does not grant *any entity* the right to select the SDR that receives swap data, so approval of CME Rule 1001 did not alter a "right to select" the SDR. It is true, as DTCC points out, that various provisions of the Part 45 Rules place on various registered entities an obligation to report swap data. But an obligation to report is not synonymous with a regulatory "right to select" the SDR, and the CFTC deliberately declined to create a "right to select SDR" in its regulations. The CFTC did not write the rules to "giv[e] the choice of the SDR to the reporting counterparty" because such a rule "could in practice give an SDR substantially owned by [swap dealer]s" — like DTCC's SDR — "a dominant market position with respect to swap data reporting within an asset class or even with respect to all swaps." AR 387 (77 Fed. Reg. 2136, 2149 (Jan. 13, 2012)). By similar token, the CFTC declined to require "that all cleared swaps be reported only to DCOs registered as SDRs or to SDRs chosen by a DCO," like CME's SDR, because of the potential impact that such a restriction could have on "competition between DCO–SDRs," like CME, and "non-DCO SDRs," like DTCC. *Id.* Thus, the regulations provide no right to select the SDR, as the CFTC instead decided to "leave[] the choice of SDR to be influenced by market forces and possible market innovations." *Id.* Moreover, because all SDRs are registered with the CFTC and subject to the same requirements, the CFTC does not have a stake in *which* SDR receives the swap data, merely that the data *is reported* to an SDR.

Well before the CFTC approved CME Rule 1001, the CFTC announced that self-regulatory rules like CME Rule 1001 are permitted under (*i.e.*, are not "inconsistent with") the CFTC's swap regulations. In its consideration of costs and benefits of the Part 45 Rules, the CFTC observed that "section 21(a)(1)(B) [of the CEA] allows DCOs to register as SDRs, and [] the final rules do not preclude counterparties or registered entities from reporting swap data to existing DCOs registered as SDRs, or to SDRs chosen by DCOs, if they so choose for business

or cost-benefit reasons." AR 422 (77 Fed. Reg. 2136, 2184 (Jan. 13, 2012)). Similarly, in the preamble to the CFTC's Part 49 Regulations (concerning standards, duties and core principles of SDRs), the CFTC stated, "the rules and regulations of a particular SEF, DCM or DCO may provide for the reporting to a particular SDR." AR 494 (76 Fed. Reg. 54538, 54569 (Sep. 1, 2011)). The CFTC considered these prior statements when approving CME Rule 1001. AR 42.

DTCC is not correct when it claims that the CFTC's approval of CME Rule 1001 required APA rulemaking because the rule allegedly "ha[s] no basis in the Commission's regulations," or that nothing in the "actual Part 45" regulations "compels or justifies" approval of CME Rule 1001. DTCC Reply Br. at 5, 9 (citing *Cent. Tex. Phone Coop. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005)). Although DTCC cites various provisions of the Part 45 Rules that indicate when certain registered entities are required to report swap data, DTCC Reply Br. at 4-5, the CFTC's regulations do not address the precise question presented by CME Rule 1001, *i.e.*, whether a DCO that is also an SDR may report swap data for the swaps it clears to its own SDR. No agency is required to write rules that account for every possible circumstance. Otherwise, agencies would be so tightly confined by the APA that they could act only in a manner that "parrot[s] the rule[s]," without elaboration. *Am. Min. Congress*, 995 F.2d at 1112.

The *Central Texas* case that DTCC cites actually supports the CFTC on this point. There, the D.C. Circuit relied on well-established precedents holding that an agency is not required to undertake APA rulemaking even where the agency does more than simply "parrot statutory or regulatory language," and instead "alter[s] primary conduct," or even "'creat[es] new duties.'" *Cent. Tex.*, 402 F.3d at 214 (quoting *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994); *Am. Min. Congress*, 995 F.2d at 1107-08); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991)). Agencies may even "transform 'a vague statutory duty or right

into a sharply delineated duty or right'" without using notice-and-comment rulemaking. *Id.* (quoting *Health Ins. Ass'n*, 23 F.3d at 423). Moreover, "the mere fact" that an agency's action "may have a substantial impact" or an "adverse financial impact" on regulated entities does not "transform" the agency's action "into a legislative rule." *Id.* (quoting *Am. Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *Am. Postal Workers Union v. USPS*, 707 F.2d 548, 560 (D.C. Cir. 1983)). Indeed, the court in *Central Texas* held that an agency was not required to conduct APA rulemaking even where the plaintiff claimed that the agency "expanded or altered" existing obligations. *Id.*

In this case, CME Rule 1001 did not create new rights or alter existing obligations under the CFTC's regulations because the regulations do not mandate the choice of SDR. That is, because the regulations do not grant any entity a "right to select" the SDR, approval of CME Rule 1001 did not "change[] the rules of the game," or "effectively amend" the CFTC's regulations. *See* DTCC Reply Br. at 4-5 (citing *Sprint Corp.*, 315 F.3d at 374 and *Am. Min. Congress*, 995 F.2d at 1112). The CFTC was not required to engage in rulemaking before approving CME Rule 1001 because permitting a DCO to report swap data to its own SDR is not "inconsistent with" regulations that impose no choice-of-SDR requirement. And, in view of the CFTC's previous statements that its swap regulations allow self-regulatory rules like CME Rule 1001, AR 422, 494, DTCC's claim that it had "no notice that the Commission's regulations would potentially be interpreted to allow a DCO to direct swap data reporting for all swaps cleared by it to an SDR chosen by the DCO," DTCC Reply Br. at 23, appears to be nothing more than willful blindness. Approval of CME Rule 1001 was not a regulation requiring APA rulemaking under the authorities that DTCC cites, or any other authorities.

On a similar theme, DTCC argues that, to be legitimate without APA rulemaking, the CFTC's approval of CME Rule 1001 must fit within the APA exemptions for interpretive rules or policy statements. *See* 5 U.S.C. § 553(b). DTCC Reply Br. at 7. But again, DTCC's premise is wrong. The approval process for registered entities' self-regulatory rules like CME Rule 1001 is *sui generis* and outside the ambit of 5 U.S.C. § 553(b). In 7 U.S.C. § 7a-2(c), Congress made clear that the approval process for regulated entities' rules follows a different path than notice-and-comment agency rules, and the CFTC properly approved CME Rule 1001 using the procedures that Congress required. APA rulemaking procedures simply do not apply here.[1]

B. The CFTC's Approval of CME Rule 1001 Did Not Require APA Rulemaking Even if It Differed from Statements in the Staff FAQ.

DTCC also argues that the CFTC was required to conduct APA rulemaking because approval of CME Rule 1001 differed substantively from certain withdrawn questions and answers in a Staff FAQ that briefly appeared on the CFTC's website. DTCC Reply Br. at 24-28. DTCC relies upon cases holding that an agency's "significant revision" of its "definitive interpretation" of a regulation may be achieved only by APA rulemaking. DTCC Reply Br. at 24-28 (citing *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)). These cases

[1] DTCC's citation of *Lindahl v. OPM*, 470 U.S. 768, 779-80 (1985) for the proposition that "Congress uses 'unambiguous and comprehensive language' where it intends to bar application of the APA" mischaracterizes that case. DTCC Reply Br. at 7-8. Instead, the Court stated that "when Congress intends to *bar judicial review* . . . it typically employs language far more unambiguous and comprehensive than that set forth in [the cited statute]"). *Lindahl*, 470 U.S. at 779-80 (emphasis added). Here, the CFTC does not argue that judicial review is unavailable, only that notice-and-comment rulemaking was not required.

do not indicate that rulemaking was required here, because the Staff FAQ was neither "definitive" nor "agency" action.[2]

Alaska Hunters and *Paralyzed Veterans* discuss agency interpretations that are so "definitive" that to change the *interpretation* is to "in effect amend[] [the] rule, something [the agency] may not accomplish without notice and comment." *Alaska Prof'l Hunters*, 177 F.3d at 1034. In *Alaska Hunters*, the FAA changed a "definitive interpretation" that its Alaska Region had given consistently for almost *thirty years*, and that the National Transportation Safety Board characterized as "FAA policy." *Id.* at 1035. By contrast, in *Paralyzed Veterans*, the "speech of a mid-level official of an agency" was not considered to be a "definitive agency interpretation," because more is required than just the fleeting views of an agency's staff. *Paralyzed Veterans*, 117 F.3d at 587. A "definitive agency interpretation" must be an "authoritative [agency] position" of the sort that is eligible for *Auer* deference, that binds the agency as a whole, and that was "authoritatively adopted" by the agency. *Id.*

The Staff FAQ that DTCC claims to have relied on here is less like the "authoritative," "definitive" agency statements in *Alaska Hunters* and more like the fleeting advice by agency staff noted in *Paralyzed Veterans*. The Staff FAQ stated that it did not represent the views of the agency, but instead the views of Staff. AR 369-70 ("Staff believes . . ."). The withdrawn portions of the Staff FAQ appeared on the agency's website for only a brief period, from October 11, 2012 to November 28, 2012. AR 358, 365. *Cf. Adirondack Med. Ctr. v. Sebelius*, 935 F. Supp. 2d 121, 136-37 (D.D.C. 2013) (finding that the agency was not required to engage in rulemaking to correct informal instructions for hospital-specific Medicare rates in effect for

[2] DTCC also argues that an agency's interpretation of its own regulations is not required to be "final agency action" to qualify as a "definitive agency interpretation." DTCC Reply Br. at 24. But this Court need not decide that question to rule in the CFTC's favor, because the Staff FAQ on which DTCC relies was neither "definitive" nor "agency" action.

six weeks). The Staff FAQ was inconsistent with previous Commission statements indicating that the CFTC's swap regulations permit rules like CME Rule 1001. *See, e.g.*, AR 422 (77 Fed. Reg. 2136, 2184 (Jan. 13, 2012)); AR 494 (76 Fed. Reg. 54538, 54569 (Sep. 1, 2011)). Indeed, in light of the CFTC's previous statements foreshadowing self-regulatory rules like CME Rule 1001, DTCC's asserted reliance on the withdrawn Staff FAQ is dubious.[3] DTCC Reply Br. at 26-27. This Court should accordingly reject DTCC's claim that the brief existence of the withdrawn portions of the Staff FAQ constituted a "definitive" or "authoritative" agency interpretation, the alteration of which required APA rulemaking.

Likewise, this Court should reject DTCC's claim that the CFTC's public notice concerning CME Rule 1001 failed to alert the reader that approval of that rule could "significantly change" the Staff FAQ. DTCC Reply Br. at 30 (referring to "a prior definitive interpretation"). Portions of the Staff FAQ were withdrawn precisely because CME Rule 1001 was before the Commission for consideration, AR 365, and a plain reading of CME Rule 1001 indicated the issue was whether to allow CME to report cleared swap data to its own SDR for all swaps cleared at CME, AR 281-84.

Finally, this Court should reject DTCC's continued insistence that the CFTC was required to conduct a cost-benefit analysis before approving CME Rule 1001. The CEA provision that requires cost-benefit analysis, 7 U.S.C. § 19(a), applies when the CFTC "promulgate[s] a regulation," but not when the CFTC considers a registered entity's self-

[3] DTCC cites *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013) for the proposition that reliance can function as a "proxy" for "definitive" agency action. DTCC Reply Br. at 26-27. But the role of reliance is not so clear-cut under *Mortgage Bankers*, as the court there held that reliance must be assessed on a "case-by-case basis." *Id.* at 970. In this case, no matter how greatly DTCC claims to have relied on the withdrawn portion of the Staff FAQ, it should not be elevated to a "definitive interpretation" where it never constituted "agency" action. In any event, the validity of the *Paralyzed Veterans* / *Alaska Hunters* doctrine is presently before the Supreme Court, which granted *certiorari* in *Mortgage Bankers*, 134 S. Ct. 2820 (2014).

regulatory rule. *See* CFTC Opening Br. at 31-32. DTCC's *ipse dixit* assertion that the CFTC was required to consider costs and benefits before approving CME Rule 1001 finds no support in the CEA or otherwise. DTCC Reply Br. at 28-29. DTCC fails to cite a single case to support its novel legal theory — where the CFTC, or any agency, was required to consider costs and benefits outside of notice-and-comment rulemaking. This Court should reject DTCC's attempt to create a new procedural requirement out of whole cloth.

II. The CFTC Properly Approved CME Rule 1001 under 7 U.S.C. § 7a-2(c).

The CFTC was required to approve CME Rule 1001 under the applicable statutory standard for self-regulatory rule approvals, 7 U.S.C. § 7a-2(c)(5)(A), because CME Rule 1001 is not "inconsistent with" the CFTC's regulations.

Although this Court should not accept DTCC's argument that the CFTC misapplied the "inconsistent with" standard in 7 U.S.C. § 7a-2(c)(5)(A), the Court need not choose among various dictionary meanings of "inconsistent with" to rule in the CFTC's favor. DTCC Reply Br. at 11-14. Whether "not inconsistent with" means "not precluded by," or "not lacking agreement with" or "not incompatible with" the CFTC's regulations, the outcome here is the same. *Id.* The CFTC's twenty-one page statement approving CME Rule 1001 comprehensively analyzed whether CME Rule 1001 was "inconsistent with" the CEA and the CFTC's regulations, and properly concluded that it was not "inconsistent with" either. AR 28-48. When it approved CME Rule 1001, the CFTC considered the same arguments that DTCC now raises, and rejected those perspectives. The CFTC was not arbitrary and capricious in doing so, and indeed, is entitled to controlling deference in the interpretation of its own regulations.

Moreover, DTCC's reliance on 17 C.F.R. § 40.5(a)(9) is misplaced. DTCC Reply Br. at 6-7, 10. That regulation requires that a registered entity's request for approval of a new or

amended self-regulatory rule contain certain items, including "[i]dentif[ication of] any Commission regulation that the Commission may need to amend . . . in order to approve the new rule or rule amendment . . . [and] a reasoned analysis supporting the amendment to the Commission's regulation." Contrary to DTCC's suggestion, Rule 40.5 imposes no obligation on the CFTC to amend its regulations in the context of a self-regulatory rule approval. When, as in this case, the proposed self-regulatory rule is not "inconsistent with" the CFTC's regulations, no amendment of the regulations is necessary. Indeed, when the self-regulatory rule is not "inconsistent with" the CFTC's regulations, 7 U.S.C. § 7a-2(c) requires the CFTC to approve the industry rule. As discussed below, that was the case here.

A. The CFTC Was Not Arbitrary and Capricious for Rejecting DTCC's Claim that CME Rule 1001 Is "Inconsistent With" the CFTC's Part 45 Rules.

DTCC asserts that CME Rule 1001 is inconsistent with CFTC Rule 45.10, the "single SDR rule," which requires that all swap data for a "given swap" be submitted to a single SDR. 17 C.F.R. § 45.10. DTCC Reply Br. at 14-16. The CFTC rejected DTCC's argument because a cleared swap is actually three transactions, the original *alpha* swap, plus two, equal-but-opposite *beta* and *gamma* swaps that result from novation at clearing. AR 33-36. Consistent with the CFTC's regulatory framework for clearing swaps and reporting swap data using unique swap identifiers for each component of a cleared swap, the CFTC found no inconsistency between the CFTC's regulations and CME Rule 1001, which allows CME to report *beta* and *gamma* swap data to its SDR, even if swap data for the *alpha* swap had been reported to a different SDR. *Id.*

DTCC disputes the CFTC's conclusion, claiming that the term "given swap" in the single-SDR rule means only one swap that comprises the three distinct *alpha*, *beta*, and *gamma* swaps that the CFTC recognizes for cleared-swap reporting purposes. DTCC Reply Br. at 14-16. DTCC thus claims that all data from a cleared swap — particularly the data concerning the *beta*

and *gamma* swaps that result from clearing — must be reported to the SDR chosen by the reporting counterparties (frequently DTCC's swap-dealer members) to receive data for the original, *alpha* swap. *Id.* But DTCC's argument fails to show that the CFTC was arbitrary and capricious for rejecting this position. To the contrary, DTCC's argument ignores that the CFTC adopted a position that is consistent with prior determinations of the CFTC and longstanding concepts of the "novation" that occurs at clearing. AR 33-36 (explaining that the CFTC was choosing a position that "fits within the legal framework established for the clearing of swaps").

As part of the overall framework for regulating swaps mandated by the Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank"), the CFTC promulgated certain rules (the Part 39 Rules) to govern the clearing of swaps, and certain rules (the Part 45) to govern SDRs. The CFTC released the Part 39 Rules three months before the Part 45 Rules governing SDRs. AR 523 (76 Fed. Reg. 69334 (Nov. 8, 2011)); AR 374 (77 Fed. Reg. 2136 (Jan. 13, 2012)). In the Part 39 Rules, the CFTC determined that cleared swaps transactions comprise three different swaps. 17 C.F.R. § 39.12(b)(6)(i)-(ii). These are commonly called the *alpha*, *beta* and *gamma* swaps. When a swap is cleared at a DCO like CME, "the original swap is extinguished" and is "replaced by an equal and opposite swap between the [DCO] and each clearing member acting" on behalf of each of the swap counterparties. *Id.* In other words, at clearing, the *alpha* swap yields resulting *beta* and *gamma* swaps, whereby the clearinghouse is the "central counterparty" to each of the *beta* and *gamma* swaps, *i.e.*, the "seller to every buyer and the buyer to every seller." AR 34. This is consistent with longstanding concepts of clearing for other kinds of derivatives. *Id.* (discussing longstanding concepts of central-counterparty clearing).

The CFTC promulgated the Part 45 Rules against this regulatory backdrop, which included the concept that a cleared swap transaction involves three distinct *alpha*, *beta* and *gamma* swaps. Consistent with this longstanding concept of clearing that had been expressly adopted in the Part 39 Rules, the CFTC stated when it adopted the Part 45 Rules that new "unique swap identifiers" should be assigned where "full novation" of a swap has occurred. AR 397 (77 Fed. Reg. 2136, 2159). Because full novation occurs at clearing when the *alpha* swap yields equal-but-opposite *beta* and *gamma* swaps, the CFTC concluded that resulting *beta* and *gamma* swaps are "treated as separate and distinct from the original swap for reporting purposes." AR 35.

Accordingly, because each cleared swap consists of three unique swaps (*alpha*, *beta* and *gamma*), CME Rule 1001 is not "inconsistent with" the Part 45 provisions that DTCC cites as giving entities other than DCOs a so-called "right to select" the SDR for swap creation data. DTCC Reply Br. at 15. The DCO, as central counterparty to the new *beta* and *gamma* swaps that result from novation at clearing, may report creation swap data for the *beta* and *gamma* swaps to its affiliated SDR, even if data for the *alpha* swap was reported to a different SDR. CME Rule 1001 is not "inconsistent with" the single-SDR rule of 17 C.F.R. § 45.10, because each of the *alpha*, *beta* and *gamma* swaps that make up a cleared swap transaction is a distinct "given swap" under the single-SDR rule.

Because the CFTC adopted a position that is entirely consistent with the CFTC's overall framework for the regulation of swaps, AR 35, this Court should conclude that the CFTC was not arbitrary and capricious for rejecting DTCC's argument.

B. DTCC's *Expressio Unius, Exclusio Alterius* Argument Is Misplaced Because Nothing in the CFTC's Regulations Establishes an Exclusive Method for Reporting Swap Data.

DTCC also argues that CME Rule 1001 is "inconsistent with" 17 C.F.R. § 45.3(b)(1), which, in its view, establishes the "only" circumstance in which a DCO like CME may choose the SDR to which swap data is reported. DTCC Reply Br. at 19. For this argument, DTCC relies on the canon *expressio unius est exclusio alterius*. *Id.* at 17-18. The D.C. Circuit has cautioned, however, that this "maxim's force in particular situations depends entirely on context." *Fulani v. Fed. Election Com'n*, 147 F.3d 924, 928 (D.C. Cir. 1998) (quoting *Shook v. D.C. Fin. Responsibility & Mgt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998)). Moreover, under the authorities that DTCC cites, the *expressio unius* canon applies when a statute or regulation has established the "particular mode" or "exclusive method" for achieving something. DTCC Reply Br. at 17-18; *see Christensen v. Harris Cnty.*, 529 U.S. 576, 583 (2000). The CFTC's regulations do not meet this qualification, because, as discussed, they do not assign any party a right to select the SDR that will receive swap data, leaving that choice instead to be "influenced by market forces" and "market innovations." AR 387 (77 Fed. Reg. 2136, 2149 (Jan. 13, 2012)).

DTCC's argument is also irreconcilable with the CFTC's statements, discussed above, in the preambles to the Part 45 and Part 49 Rules. The CFTC expressly contemplated that self-regulatory rules like CME Rule 1001 — allowing a DCO to report *beta* and *gamma* swap data to its own SDR for all swaps cleared at that DCO — are consistent with the CFTC's regulations. AR 422 (77 Fed. Reg. 2136, 2184 (Jan. 13, 2012)); AR 494 (76 Fed. Reg. 54538, 54569 (Sep. 1, 2011)). Thus, this Court should reject DTCC's claim that CME Rule 1001 is "inconsistent with"

17 C.F.R. § 45.3(b)(1), because the CFTC had previously stated that rules like CME Rule 1001 are indeed permissible under the Part 45 Rules.

In a related argument, DTCC claims that "a DCO is never the reporting counterparty under 17 C.F.R. § 45.8 *for purposes of choosing the single SDR*." DTCC Reply Br. at 18 (emphasis added). But contrary to DTCC's assumption, Rule 45.8 does not grant the "reporting counterparty" a right to choose the SDR. Even if, under Rule 45.8, a DCO is not the reporting counterparty, that does not mean the regulations prohibit a DCO from choosing where data is reported. Because the CFTC's regulations do not mandate the choice of SDR, it is not "inconsistent with" the CFTC's regulations to permit a party other than the reporting counterparty to choose the SDR, and not "inconsistent with" the regulations to allow a DCO to choose the SDR, as provided in CME Rule 1001.

C. Even if DTCC's Contentions Were Plausible, They Establish, at Most, that the CFTC's Regulations Are Subject to More than One Interpretation, in Which Case, the CFTC Is Entitled to Controlling *Auer* Deference.

DTCC contends that the CFTC "ignore[d] plainly controlling language in Part 45" and, according to DTCC, "there is only one permissible" reading of the regulations — the opposite reading than that adopted in the CFTC's approval of CME Rule 1001. DTCC Reply Br. at 20. Rather than establishing that the CFTC was arbitrary and capricious, however, DTCC establishes, at most, that the CFTC's regulations might be ambiguous. That is, while DTCC points to a number of specific sections of the Part 45 Rules that indicate one entity or another is responsible for reporting swap data, or that there is only one swap rather than three in a cleared-swap transaction, the CFTC is entitled to controlling deference with respect to any ambiguity in its regulations. *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

The reason is simple. As the Supreme Court has explained, the agency that promulgates and enforces regulations is "in a better position" to "reconstruct the purpose of the regulations," and has the "expertise relevant to assessing the effect of a particular regulatory interpretation." *Martin v. Occupational Safety & Health Review Com'n*, 499 U.S. 144, 152-53 (1991). The agency "is free to write the regulations as broadly as [it] wishes, subject only to the limits imposed by the statute," and thus the agency has the "power to resolve ambiguities," if any, in those regulations. *Auer*, 519 U.S. at 463. The agency's interpretation of its own regulations receives controlling deference in all but the most unreasonable of circumstances, not present here. *Id.* at 461-62. Unless "plainly erroneous or inconsistent with the regulation," the agency's "fair and considered judgment" is entitled to "controlling" weight. *Id*. Moreover, "*Auer* does not require an agency to demonstrate affirmatively that its interpretation represents its fair and considered judgment." *Bigelow v. Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000). "[S]o long as there is no basis to suspect that the agency's position represents anything less than its considered opinion, deference is appropriate." *Id*. Here, DTCC has not shown that the CFTC's opinion was so off-base as to fall outside the wide swath of deference afforded under *Auer*.

On this point, DTCC's reliance on *Drake v. FAA*, 291 F.3d 59 (D.C. Cir. 2002), is unavailing. *See* DTCC Reply Br. at 22. In fact, *Drake* supports application of *Auer* deference here. There, the D.C. Circuit noted that it would consider whether the agency had "ever adopted a different interpretation of the regulation," because "[w]here the agency's litigation position is consistent with its past statements and actions, there is good reason for the court to defer." *Drake*, 291 F.3d at 69. In this case, the CFTC's past statements were consistent with approval of CME Rule 1001. *See* AR 422 (77 Fed. Reg. 2136, 2184 (Jan. 13, 2012)) ("[S]ection 21(a)(1)(B) [of the CEA] allows DCOs to register as SDRs, and [] the final rules do not preclude

counterparties or registered entities from reporting swap data to existing DCOs registered as SDRs, or to SDRs chosen by DCOs, if they so choose for business or cost-benefit reasons."); AR 494 (76 Fed. Reg. 54538, 54569 (Sep. 1, 2011)) ("the rules and regulations of a particular SEF, DCM or DCO may provide for the reporting to a particular SDR"). And, although DTCC claims that the CFTC reversed itself by refuting the withdrawn portions of the Staff FAQ, the Staff FAQ was an interpretation by staff, not the agency, as discussed above.

Under the cases that DTCC cites, "strong reasons" existed "for withholding the deference that *Auer* generally requires." *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2167 (2012). *See* DTCC Reply Br. at 22-23. In *Christopher*, the agency's interpretation of ambiguous regulations would have "impose[d] potentially massive liability on respondent for conduct that occurred well before that interpretation was announced"; hence, deferring to the agency would "seriously undermine" the principle that agencies must provide fair warning of prohibited conduct, as the agency had never suggested that the industry's "decades-long practice" was unlawful. *Id*. at 2167-68. In this case, the CFTC's approval of CME Rule 1001 did not impose any retrospective liability, nor did it denounce a "decades-long" industry practice. Rather, the Part 45 Rules had been finalized less than a year earlier. Thus, the facts here are not comparable to those in *Christopher*, and controlling *Auer* deference is due.

III. Approval of CME Rule 1001 Was Not Arbitrary and Capricious under the CEA's Pro-Competitive Mandates.

This Court should also reject DTCC's claim that the CFTC was arbitrary and capricious for approving CME Rule 1001 notwithstanding DTCC's arguments about anticompetitive effects. Evidence in the administrative record indicated that CME's share of cleared swaps appeared to be too small for CME Rule 1001 to impose an anticompetitive burden. AR 39.

DTCC's contrary arguments are based improperly on extra-record material that was not before the CFTC.

A. The CFTC Was Not Required to Undertake an Antitrust Analysis Under 7 U.S.C. § 19(b) Before Approving CME Rule 1001.

DTCC argues that the CFTC failed to "conduct essential steps in a cursory review" of CME Rule 1001's allegedly anticompetitive effects. DTCC Reply Br. at 31. Yet DTCC relies on a statutory section of the CEA that does not apply to the CFTC's consideration of DCO rules like CME Rule 1001, 7 U.S.C. § 19(b). As discussed in the CFTC's opening brief and not contradicted by DTCC, 7 U.S.C. § 19(b) applies only to rules of a contract market or registered futures association. CFTC Opening Br. at 38-39. CME Rule 1001 is a rule of CME Clearing, a registered DCO, which is neither a contract market nor a futures association. Because Section 19(b) does not apply to the CFTC's consideration of rules adopted by DCOs, the CFTC was not required to consider "the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of [the CEA]" when reviewing CME Rule 1001. 7 U.S.C. § 19(b). On this score, DTCC has no response at all. *See* DTCC Reply at 31-36. The Court therefore should disregard DTCC's claims of error regarding Section 19(b).

B. The CFTC's Analysis Regarding Alleged Anticompetitive Effects of CME Rule 1001 Was Not Arbitrary and Capricious.

Although the CFTC was not required to conduct an antitrust analysis under 7 U.S.C. § 19(b), the agency did consider the substantive points that DTCC raised related to that section, along with Core Principle N, a provision of the CEA that forbids a DCO from adopting any rule that results in an "unreasonable restraint of trade," or imposing any "material anticompetitive burden," "unless necessary or appropriate to achieve the purposes of [the CEA]." 7 U.S.C. § 7a-

1(c)(2)(N).[4] *See* AR 36-39 & n.62, 45-46. DTCC's assertion that the CFTC failed to adequately "define or analyze the relevant market," both mischaracterizes the record and misrepresents the level of analysis required of the CFTC.[5] DTCC Reply Br. at 31-33. The CFTC stated that the relevant market could be either (a) "clearing services for swaps by CFTC-registered DCOs" or (b) the clearing of both swaps and futures, and concluded that "it is not clear that CME would possess the requisite market power" in either market. AR 39. Evidence before the Commission indicated that CME "clears less than one percent of interest rate swaps and approximately three percent of credit swaps." AR 39. The record also indicated that, in contrast to CME, DTCC receives swap data from a DCO called LCH.Clearnet, which clears approximately sixty percent of all cleared interest rate swaps, AR 8 & n.1, 13, 18 & n.1, 23; AR 39 n.66. DTCC also represented to the CFTC that its swaps database contained global data on "98% of all credit default swaps." AR 37 & n.55; *see* AR 717.

The record before the agency therefore indicated that DTCC, not CME, received the lion's share of cleared swap data reporting, which DTCC does not deny. Instead, DTCC attempts to downplay its dominance in swaps data reporting — claiming that its SDR "does not contain swap data for 98% of credit default swaps" (even though DTCC itself reported that

[4] DTCC asserts "[i]t is not surprising that no court has yet invalidated a DCO self-regulatory rule" on the basis of 7 U.S.C. § 7a-1(c)(2)(N) "because this provision was only recently enacted as part of the Dodd-Frank Act." DTCC Reply Br. at 36. This is incorrect. Section 7a-1(c)(2)(N) (DCO Core Principle N) was enacted by the Commodity Futures Modernization Act in 2000. Pub L. 106-554, § 1(a)(5), Dec. 21, 2000, 114 Stat 2763, 2763A-396. Nevertheless, DTCC has not cited a single case where a registered entity's rule was held to be anticompetitive.

[5] 7 U.S.C. § 19(b) has been in existence since 1974, and was specifically written to discourage "excessive litigation." S. Rep. No. 1131, 93d Cong., 2d Sess. 23 (1974). Courts have repeatedly upheld the CFTC's actions against claims of insufficient antitrust analysis. CFTC Opening Br. at 41 n.22 (collecting cases). DTCC fails to cite a single case in the statute's 40-year history where the CFTC failed to satisfy the low statutory bar set by Section 19(b). Even if 19(b) analysis were required, and DTCC has not established that it is, the CFTC's consideration of anticompetitive issues was sufficient, and was neither arbitrary nor capricious.

number to the CFTC and to eight other agencies in the Financial Stability Oversight Council, AR 717). DTCC Reply Br. at 33. DTCC also argues that the CFTC is "irrational" to focus on the market for a particular asset class only for DTCC and not CME, DTCC Reply Br. at 33, but that is incorrect. The CFTC considered market power in individual asset classes for CME, and concluded that CME did not have market power in either interest rate swaps or credit swaps, or "in the provision of clearing services for swaps by CFTC-registered DCOs." AR 39.

DTCC additionally argues that, with the passage of time, CME's market share of cleared swaps has grown. DTCC Reply Br. at 32. But whether that is true or not, it is not properly before this Court because it was not in the administrative record when the CFTC was considering CME Rule 1001. *E.g., Multimax, Inc. v. FAA*, 231 F.3d 882, 888 (D.C. Cir. 2000) (the court's role in an APA case is "to review the agency's handling of the objections put before it, not to provide a forum for new arguments based upon different facts that the petitioner . . . did not bring out below") (quoting *Sprint Comm. Co., v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996)).

Indeed, a number of DTCC's arguments fail because they concern assertions of injury that post-date the CFTC's review of CME Rule 1001, and therefore could not have been considered by the agency. Specifically, DTCC's claim of injury from ICE Rule 211, which operates similarly to CME Rule 1001 for swaps cleared at another DCO, is immaterial to DTCC's claims about CME Rule 1001 because ICE Rule 211 was not before the CFTC when it approved CME Rule 1001. Moreover, this Court already dismissed DTCC's claims about ICE Rule 211. Dkt. 32 at pp. 9-14.

Likewise, DTCC complains that its SDR has not yet received the voluntary provision of secondary data reports from CME, as contemplated by CME Rule 1001. DTCC Reply Br. at 35. But even if true, facts developed after the rule approval are inapposite to the inquiry before this

Court, and a summary judgment brief in an APA case is not the appropriate vehicle to test new facts. CFTC Opening Br. at 44-45. If indeed CME is refusing to comply with its own rule, DTCC's complaint appears to be with CME, not the CFTC. The only issue before this Court is whether the CFTC was arbitrary and capricious for approving CME Rule 1001 based on the facts and circumstances presented in the administrative record.

Ironically, although DTCC relies heavily on new facts not presented to the CFTC, DTCC falsely accuses the CFTC of making "*post hoc* rationalizations." DTCC Reply Br. at 34, 35. For instance, DTCC claims that the CFTC engages in "*post hoc* rationalization" in asserting that Core Principle N, 7 U.S.C. § 7a-1(c)(2)(N), allows DCOs to adopt rules that may hinder competition so long as the rule is "necessary or appropriate to achieve the purposes of the [CEA]." DTCC Reply Br. at 35. Yet the statute plainly states as much, as the CFTC observed in its statement approving CME Rule 1001. AR 36-37. The CFTC noted that "Core Principle N contemplates that a DCO may adopt a practice that could have anticompetitive effects provided that the practice is necessary or appropriate to achieve the purposes of the Act. The Commission believes that the language and structure of the core principle reflects a determination by Congress that the dictates of antitrust law would not be dispositive in evaluating the legitimacy of the practices and rules of regulated entities under the Act." AR 38. Far from being a *post hoc* rationale, the permissiveness of Core Principle N informed the CFTC's decision, as the text of the approving document makes clear.

Similarly, DTCC accuses the CFTC of making a "*post hoc* suggestion" that DTCC can compete for SDR services such as data compression and analysis in light of the provision in CME Rule 1001 that requires secondary reports to be issued to any other SDR selected by a counterparty. DTCC Reply Br. at 34. DTCC erroneously claims that this "*post hoc* suggestion

was never mentioned in the Commission's approval of Rule 1001." *Id*. But the CFTC's statement approving CME Rule 1001 did in fact note the availability of secondary reports under CME Rule 1001, observing that it "may mitigate concerns regarding the effect on competition." AR 39 n.68.

Finally, by continuing to analogize this case to *Clement v. SEC*, 674 F.2d 641 (7th Cir. 1982), DTCC misreads the statutory language and ignores the key facts that distinguish this case from *Clement.* In *Clement*, the statute at issue required the SEC to make certain findings before approving exchange rules. *Id.* at 646 (quoting 15 U.S.C. § 78s(b)(2)). Here, by contrast, 7 U.S.C. § 7a-2(c) does not require the CFTC to make any findings before approving a rule. Indeed, if the CFTC does nothing, the rule is automatically deemed approved. 7 U.S.C. § 7a-2(c); 17 C.F.R. § 40.5(b), (c). In addition, the statute governing SEC-registered exchanges required that exchange rules "not impose *any burden on competition* not necessary or appropriate in furtherance of the purposes of this chapter." *Clement*, 674 F.2d at 646 (quoting 15 U.S.C. § 78f(b)(8)) (emphasis added). The CEA's 7 U.S.C. § 19(b) does not impose the same requirement, instead directing the CFTC merely to "*take into consideration* the public interest to be protected by the antitrust laws and *endeavor* to take the least anticompetitive means of achieving the objectives" of the CEA. 7 U.S.C. § 19(b) (emphasis added). Moreover, rather than prohibiting "*any* burden on competition" like the statute in *Clement*, Core Principle N prohibits only "*unreasonable* restraint[s] of trade" and "*material* anticompetitive burden[s]." 7 U.S.C. § 7a-1(c)(2)(N) (emphasis added).

Just as importantly, in *Clement* the SEC order approving the rule at issue made no attempt to define the relevant market, gave no consideration to anticompetitive issues, and never considered the anticompetitive impact of the alternative, 674 F.2d at 644, 646, leading the court

to conclude that the SEC did not "evidence any balancing between the goals of maintaining competitiveness and insuring price continuity," *id*. at 647. Here, by contrast, the CFTC undertook an analysis of anticompetitive effects, and considered the relevant market, including CME's lack of: market power in each of the asset classes it clears, market power in all swaps combined, and market power in swaps and futures as applied to swap clearing. AR 39. Moreover, the CFTC considered the anticompetitive impact of the alternative (not approving the rule), AR 37, and the availability of secondary reports under CME Rule 1001, which "may mitigate concerns regarding the effect on competition," AR 39 n.68. Thus, neither the statutory requirements nor the factual circumstances of *Clement* are analogous to this case.

Accordingly, the CFTC's rejection of DTCC's competition arguments was not arbitrary and capricious.

IV. None of DTCC's Arguments Justifies Its Voluminous, Extra-Record Submissions, and this Court Should Disregard Those Materials Because They Were Not Before the CFTC.

DTCC also presents no valid reason for the Court to take the unusual step of considering the voluminous extra-record affidavits and factual assertions that DTCC appended to its summary judgment briefs.

First, DTCC's claim to need the extra-record material to establish its standing in this case is belied by the fact that its standing has never been at issue. DTCC Reply Br. at 36-37. In each of the cases cited by DTCC, the plaintiff's standing was challenged. *Ams. For Safe Access v. DEA*, 706 F.3d 438, 440 (D.C. Cir. 2013); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002); *Tozzi v. HHS*, 271 F.3d 301, 307 (D.C. Cir. 2001). As the D.C. Circuit explained in *Sierra Club*, a party alleging injury supplements the record "to the extent necessary to explain

and substantiate its entitlement to judicial review" only "[w]hen the petitioner's standing is not self-evident." *Sierra Club*, 292 F.3d at 900. That rule has no application here.

Moreover, this is not a case in which there is a "serious question" about the completeness of the administrative record. *See* DTCC Reply Br. at 37-38 (citing *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)). Even in *Hill*, which DTCC cites, the court reiterated the "black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill*, 709 F.3d at 47 (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). There are only a "narrow set of exceptions" which "at most [] may be invoked to challenge gross procedural deficiencies — such as where the administrative record itself is so deficient as to preclude effective review." *Id.* (citation omitted). Despite DTCC's claims that the CFTC committed grievous errors, the administrative record contains the materials that were before the CFTC when it considered CME Rule 1001. This is not a case involving "gross procedural deficiencies" or a record so bare that this Court cannot review the agency's actions. Under *Hill*, the extra-record material should not be considered.

DTCC's reliance on *Jackson* is also misplaced. DTCC Reply at 38-39 (citing *Nat'l Min. Ass'n v. Jackson*, 856 F. Supp. 2d 150 (D.D.C. 2012)). The court in *Jackson* stated that, to admit extra-record evidence under one of four narrow exceptions, "a party seeking a court to review extra-record evidence must first establish that the agency acted in bad faith or otherwise behaved improperly, or that the record is so bare that it prevents effective judicial review." 856 F. Supp. 2d at 157 (collecting cases). But DTCC has not established any of these factors, and DTCC had ample opportunity to comment when this matter was before the CFTC. *See, e.g., Peterson*

Farms I v. Espy, 15 F.3d 1160 (Table), 1994 WL 26331, *3 (D.C. Cir. Jan. 25, 1994) (per curiam) (holding that APA petitioners "cannot now seek to introduce new facts and then argue that the agency acted capriciously in not considering them" when petitioners "had ample opportunity to present evidence" to the agency). Moreover, in *Jackson*, the plaintiffs moved to supplement the administrative record with additional information, *id*. at 152, which DTCC has not done here. This Court should disregard DTCC's extra-record material and render judgment for the CFTC based on the administrative record.

CONCLUSION

For all of the foregoing reasons, and such others as this Court finds just and reasonable, this Court should deny DTCC's Motion for Summary Judgment, and instead grant summary judgment to the CFTC on Counts II and III of the Amended Complaint.

Dated: August 28, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 28, 2014, I served the foregoing Reply Memorandum of Law in Support of the CFTC's Cross-Motion for Summary Judgment and in Further Opposition to Plaintiff's Motion for Summary Judgment on counsel of record using this Court's CM/ECF system.

/s/ Anne W. Stukes