Statement of Tyler Gellasch, President and CEO of the Healthy Markets Association

U.S. Senate Committee on Agriculture, Nutrition, and Forestry

Legislative Hearing to Review the Digital Commodities Consumer Protection Act (S.4760)

September 15, 2022

Dear Chairwoman Stabenow and Ranking Member Boozman,

On behalf of the Healthy Markets Association (HMA), I write to offer this Written Statement in connection with the Senate Agriculture Committee's September 15, 2022 hearing on S.4760, the Digital Commodities Consumer Protection Act ("DCCPA" or "bill.").

Healthy Markets Association members include large public pensions, asset managers, brokers, exchanges, and data providers that operate across diverse asset classes around the world.[1] We engage market participants, policymakers, and regulators to increase capital markets transparency and reduce conflicts of interest, risks, and costs for investors.

HMA Supports Your Effort To Close Known Regulatory Loopholes for Digital Assets

HMA supports efforts to promote a comprehensive, robust, and effective regulatory regime to ensure fair, orderly, and efficient digital asset commodity markets. Presently, a regulatory gap exists regarding spot trading in Bitcoin, and we applaud your bipartisan work on the Committee to close that gap.

As presently contemplated, S. 4760 has the potential to reshape the way the U.S. oversees major swaths of its capital markets. The impacts of decisions Congress takes in this respect will not only be felt today - but determine the direction and character of these speculative markets as they evolve and mature for decades to come. As such, we urge the Committee to continue to prioritize robust stakeholder consultation and engagement, and refrain from advancing legislation so long as key questions remain unexamined and unaddressed.

HMA Strongly Urges the Committee to Address Two Areas of Significant Concern

HMA wishes to highlight two key concerns with the existing legislation:[2]

1. The bill would cement and expand the ability of trading venues to abuse their market position to extract, and frankly to extort, economic "rent" from market participants (including HMA members).

[1] To learn about HMA or our members, please see our website at http://healthymarkets.org.
[2] HMA also has concerns regarding the definition of a "digital asset commodity," as well as the proposed statutory authorities for the CFTC to adopt appropriate issuer disclosures, intermediary sales practice rules, intermediary disclosures and customer obligations (including for "best execution"), and trading and clearing regulations.

2. The bill risks that securities and other well-regulated investment products may be erroneously pulled into the new regime.

As I will discuss in more detail, the solution to both concerns is the same: The Committee should amend the DCCPA to direct the CFTC to establish a transparent, consistent, and effective process for the CFTC to better ensure that Designated Contract Market (DCM) rules comply with the law.[3]

The Legislation Fails to Adequately Prevent DCMs From Abusing Their Positions Over Essential Market Data

In recent years, registered securities exchanges and DCMs alike have increasingly flaunted and even abused the process for approving their rules changes to inflate fees for access to essential market data, often without any material basis or justification.

Of course, market participants (including HMA members) often have to pay for these new products. These rules changes are increasingly contested and litigated both before the Securities and Exchange Commission and in the DC Circuit Court.[4]

The SEC has spent years attempting to block and reverse some of these abuses,[5] although it has been met with limited success.[6] Importantly, Congress has itself taken

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[3] The current "self-certification" process is already ineffective at ensuring DCM rules are consistent with the Commodity Exchange Act (CEA). Further, the Commission's existing practices also subject the agency's actions and DCM rules to significant uncertainty and legal challenge.

[4] See, e.g., *Citadel Securities LLC v. SEC*, No. 20-1424 (D.C. Cir. 2022), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/4E680EDE202B152E8525888E0051AE8C/$file/20-1424-1956972.pdf (regarding SEC approval of an exchange rule); see also, *Bloomberg LP v. SEC*, No. 21-1088, (D.C. Cir. 2022), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/A1390C785B2A244B852588A000517586/$file/21-1088-1959474.pdf (regarding SEC approval of a FINRA rule). Notably, despite repeated suspensions and denials of exchange and FINRA rules that would otherwise be deemed effective upon filing, exchanges have not, to date, directly challenged the SEC's suspensions or denials. However, this process is not without its weaknesses. For example, some exchanges have sought to avoid SEC suspensions and disapprovals by repeatedly filing, withdrawing, and refiling rules changes. *See, e.g.*, Letter from Chris Nagy, HMA, to Vanessa Countryman, SEC, Sept. 20, 2022, *available at* https://healthymarkets.org/wp-content/uploads/2022/09/9-20-22-MEMX-Connectivity-Filing-SR-MEMX-2022-26-1.pdf.

[5] *See, e.g.*, *In re Applications of SIFMA and Bloomberg, LP*, Exch. Act Rel. No. 84433, 2018 WL 5023230 (Oct. 16, 2018), available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf; *see also*, *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

[6] In 2018, for example, the SEC attempted to retroactively remanded over 400 filings, some of which had been implemented years earlier. However, the DC Circuit vacated the SEC's remand order, noting that the SEC's statutory authority didn't provide for this type of broad, retroactive remand. However, importantly, the DC Circuit didn't restrict the ability of the SEC to prospectively review and block exchange rule changes that didn't comply with the law. *NASDAQ Stock Mkt., LLC v. SEC*, 961 F.3d 421 (D.C. Cir. 2020).

notice of abuses by exchanges. On March 30, 2022, a House subcommittee held hearings on two draft bills that sought to provide the SEC with tools and incentives to clamp down on price-gouging by securities exchanges. Further, in July 2022, the Senate Appropriations Committee noted "concern" with absence of "effective regulatory controls" over the fee increases imposed by exchanges.[7]

Unfortunately, and as we explore in more detail in the attached **Addendum**, DCMs are now following some of their registered securities exchange peers by revising their rules to implement new significant fees for market data.

Having a clear, robust process (and accountability for that process) is essential to protecting market participants from potential abuses. Any legislation addressing the CFTC's regulatory authorities in a manner as broadly as appears to be the case under S. 4760, must also take steps to guarantee the establishment by the CFTC of a rigorous process to review DCM rules changes and ensure such changes are consistent with the law.

The Legislation Fails to Adequately Prevent DCMs From Abusing Their Positions to Assert Jurisdiction (and Profits) From Trading Products Outside the Scope of Their Authority

The legislation would establish a new CFTC-based regulatory regime for a subset of digital assets. The disclosure standards that will be applicable to digital assets that qualify for this treatment will in turn be exempted from ambiguities about their status under the securities laws, and subject to a disclosure standard enforced by the CFTC and self-consciously less rigorous than that which investors enjoy under the securities laws.

This is a classic recipe for regulatory arbitrage, and we are already seeing that arbitrage happen in this arena now.

Even before any legislation is enacted, DCMs have been listing financial products tied to digital assets. These DCMs are incentivized to determine that the underlying assets are commodities, even if they may not be.

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[7] *FY 2023 Financial Services and General Government Appropriations, Chairman's Mark*, Cmte Rep. at 91, July 28, 2022 ("Registered Securities Exchanges.—The Committee notes the SEC is statutorily obligated to ensure that rules adopted by registered securities exchanges comply with the terms of the Securities Exchange Act of 1934. The Committee is concerned that the SEC's current review process of proposed rule changes may allow registered securities exchanges to circumvent regulatory controls. The Committee encourages the SEC to consider revising its review process to ensure compliance with the Securities Exchange Act of 1934."), *available at* (https://www.appropriations.senate.gov/imo/media/doc/FSGGFY23RPT.pdf).

Unless regulatory "shopping" is firmly kept in check, the bill will exacerbate incentives for both DCMs and the CFTC that will result in a net decrease in the overall accurate information disclosed to the marketplace, as well as significant legal and regulatory uncertainty.

Just a few years ago, we recall when Cboe and CME essentially forced the CFTC's hand by self-certifying and attempting to list Bitcoin futures products.[8] More recently, we have seen Ether-linked products listed for trading,[9] despite significant divergences of opinion on whether Ether is a security.[10] What is to prevent this process from being replicated hundreds, or even thousands of times, for different products tied to other digital assets, many, if not all of which are securities?[11]

Who has legal standing to challenge the determinations? What would be the impact on the investors who may begin trading in the newly-listed products, for example, if the SEC were to determine that a product traded is, in fact, a security? This could lead to scenarios where simply enforcing existing laws could perversely lead to unnecessary investor losses and harm.

The DCCPA Should Be Amended to Better Ensure that DCM Rules Comply With the Law

As outlined in this letter and explained in greater detail in the attached **Addendum**, the Committee should amend the DCCPA to instruct the CFTC to modernize the process through which rules changes by Designated Contract Markets (DCMs) become effective.[12]

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[8] *CFTC Backgrounder on Self-Certified Contracts for Bitcoin Products*, CFTC, Dec. 1, 2017, *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/bitcoin_factsheet120117.pdf.

[9] *See, e.g.*, Press Release, *CME Group Announces Launch of Ether Options*, CME Group, Sept. 12, 2022, *available at* https://www.cmegroup.com/media-room/press-releases/2022/9/12/cme_group_announceslaunchofetheroptions.html (announcing launch of options for Ether futures).

[10] *See, e.g.*, Frederick Munawa,*What's at Stake: Will the Merge Turn Ether Into a Security?*, Coindesk, Aug. 10, 2022, *available at* https://www.coindesk.com/tech/2022/08/10/whats-at-stake-will-the-merge-turn-ether-into-a-security/.

[11] See, Remarks of Hon. Gary Gensler before the Practising Law Institute, Sept. 8, 2022, *available at* https://www.sec.gov/news/speech/gensler-sec-speaks-090822 ("Of the nearly 10,000 tokens in the crypto market,[2] I believe the vast majority are securities.").

[12] The current "self-certification" process is already ineffective at ensuring DCM rules are consistent with the Commodity Exchange Act (CEA). Further, the Commission's existing practices also subject the agency's actions and DCM rules to significant uncertainty and legal challenge.

Without a more robust, transparent, and accountable process for reviewing and approving DCM rules, the CFTC would be unlikely to intervene to protect investors from excessive market data costs and abuses.

Further, it appears as though the CFTC would be put in the awkward position of having to affirmatively determine that products are linked to securities – an area well-outside the scope of the CFTC's expertise and jurisdiction. In practice, this process could essentially enable a DCM to make a determination that would, at a minimum, create significant regulatory uncertainty for both the product and investors, and potentially lead to the inappropriate transfer of supervision and jurisdictional authority from the SEC to the CFTC. Worse, the CFTC would be incentivized to not intervene to block the listing of products, as the determination would directly limit its own authority, jurisdiction, and budget. We also note that the importance of this reform is amplified by the rapidly growing abuses of existing DCMs, as well as the potential expansion of the CEA to include digital asset markets.

Given that the Commodities Exchange Act (CEA) does not statutorily detail a process for review and consideration of DCM rules,[13] the CFTC has broad discretion for how it may fulfill this duty. However, given the significance of the changes proposed by S. 4670 and the added responsibilities the bill would assign to the CFTC, HMA believes specific statutory direction from Congress is both necessary and appropriate. If the CFTC is indeed "the right regulator for the digital asset commodity market," then the agency should stop ignoring its responsibility to review and determine that all DCM rules are consistent with the law.

HMA appreciates the opportunity to submit this Written Statement to the Committee in connection with its consideration on S. 4760.

Please do not hesitate to contact me if HMA may be of additional assistance.

[13] This is in contrast with the Securities Exchange Act of 1934.

ADDENDUM

Background

Generally, when a DCM wants to change a rule or impose a fee, it provides notice to its customers, self-certifies that it is compliant with the CEA and the Commission's regulations,[14] and begins to implement the change.[15] Of course, the Commission is obligated to ensure that these changes do, in fact, comply with the CEA and Commission Rules.

The Commission has adopted Commission Rule 40.6 to outline how DCM rule changes may be implemented. Rule 40.6 breaks DCM rules changes into three categories:

1. rules for which self-certification, notice and comments, and other processes apply,
2. rules for which simply a "notice" to the Commission, but for which other processes do not apply, and
3. rules for which the Commission declines to even require receipt of timely notice of the change.[16]

For example, under Commission Rule 40.6, for some fee changes, a DCM need only to provide notice to the Commission in a "Weekly Notification of Rule Amendments."[17] Further, a DCM need not make a self-certification nor provide the weekly notice to the Commission for fees or fee changes that are not associated with market making or trading incentive programs, and "(1) are less than $1.00; or (2) relate to matters such as dues, badges, telecommunication services, booth space, real time quotations, historical information, publications, software licenses or other matters that are administrative in nature."[18] We understand that the Commission has essentially relieved itself of the burdens of collecting and reviewing any specific regulatory filings, in part, because it has generally viewed such failings to be "non-substantive."[19]

DCM rules that are adopted through the self-certification process of Rule 40.6(a) may be subject to subsequent Commission action, including a stay or disapproval.[20]

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[14] See generally, https://sirt.cftc.gov/sirt/sirt.aspx?Topic=TradingOrganizationRules.
[15] We also note DCMs often seek confidential treatment under the Freedom of Information Act (FOIA) regarding relevant information from the public regarding the changes, further frustrating the goals of promoting transparency and public interest. How can we know if a filing complies with the CEA if the justification is kept secret?
[16] 17 C.F.R. § 40.6(d)(1).
[17] 17 C.F.R. § 40.6(d)(1).
[18] 17 C.F.R. § 40.6(d)(3)(E).
[19] *Provisions Common to Registered Entities*, CFTC, 76 Fed. Reg. 44776, 44783 (July 27, 2011), *available at* https://www.govinfo.gov/content/pkg/FR-2011-07-27/pdf/FR-2011-07-27.pdf ("2011 CFTC Process Changes").
[20] 17 C.F.R. § 40.6(b) and (c).

However, the provisions outlining the Commission's authority to stay the implementation of DCM rules do not appear to cover rules for which self-certification is deemed unnecessary (those adopted using Rule 40.6(d).[21]

Divergent Processes to Permit SRO Rule Changes

While the CFTC's process for allowing DCMs to implement rule changes is conceptually similar to the Securities and Exchange Commission (SEC), the two systems are extremely different.

The CFTC and SEC are each obligated to review self-regulatory organization rule changes and determine that those changes are consistent with the applicable law.[22] The CFTC and SEC processes for reviewing SRO rules changes vary based on the perceived significance of the rule change. And, if either the CFTC or SEC declines to act within a prescribed timeline, the SRO rules will generally be deemed effective.

That is where the similarities generally end.

Unlike the CFTC, the SEC requires all SRO rule changes to be filed with the agency, which ensures that the agency is aware of all SRO rules changes.

Unlike the CFTC, the SEC requires all SRO rule changes to be filed before they may be implemented, which protects the markets and regulators from being blind-sided by changes.[23]

Unlike the CFTC, the SEC publishes all SRO rule changes for public comment, which provides both public transparency and accountability, but also elicits feedback from impacted market participants, experts, and the public.

Unlike the CFTC, the SEC substantively reviews all SRO rule changes to ensure compliance with the applicable law and agency rules, which ensures that the agency is attempting to fulfill its statutory obligation.[24]

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[21] 17 C.F.R. § 40.6(c) ("The Commission may stay the certification of a new rule or rule amendment submitted pursuant to paragraph (a) of this section by issuing a notification informing the registered entity that the Commission is staying the certification of the rule or rule amendment…").

[22] See *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017).

[23] Notably, the SEC does permit some rules to be effective upon filing, whereas others may require an affirmative approval by the Commission (or staff, by delegated authority) before they may be implemented.

[24] We note that the SEC's determinations on SRO filings are often contested in court. See, e.g., *Citadel Securities LLC v. SEC*, No. 20-1424 (D.C. Cir. 2022), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/4E680EDE202B152E8525888E0051AE8C/$file/20-1424-1956972.pdf (upholding SEC's approval of an exchange rule change to adopt a new order type).

Unlike the CFTC, the SEC routinely intervenes to suspend and disapprove SRO rule changes.[25]

It should be obvious that for-profit market participants have incentives to "push the envelope" on their rules, which may directly impact their revenues. CFTC Commission Rule 40.6, however, effectively flips the burden from the DCM seeking to implement changes to its rules to the Commission. Rather than ensuring that the DCM's rules comply with the law, the agency is instead essentially only intervening if it can establish that they don't. The pragmatic distance between these two standards is enormous.

For example, just one rule implemented last year that appears to be facially contrary to the CEA has already directly led to millions of dollars in extra costs to market participants, and yet was not disapproved by the CFTC. While historical market data had always been free, in January 2021, the CME family of venues began charging nearly $135,000 per year for it.[26] This new fee was implemented despite the requirement in the CFTC's DCM Core Principle 8 that a DCM "shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market."[27] In fact, under Rule 16.01, "DCMs should ensure that such information can be accessed by visitors to the Web site without the need to register, log in, provide a user name or obtain a password."[28]

If the CFTC received filings related to the CME's rule change to institute the new fees, we aren't aware of it, as the CFTC does not publish any of this important information. Further, the CFTC never solicited public input on the dramatic change. The CFTC didn't

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[25] See, *e.g., Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Establish a Retail Midpoint Liquidity Program*, SEC, Exch. Act Rel. No. 34-94866, May 6, 2022, *available at* https://www.sec.gov/rules/sro/memx/2022/34-94866.pdf; see also, *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-94332, Feb. 28, 2022, *available at* https://www.sec.gov/rules/sro/memx/2022/34-94332.pdf.

[26] See, *CME Group Market Data Fee List--Effective Jan. 2021*, CME Group, *available at* https://www.cmegroup.com/files/download/cme-market-data-fee-list-jan-2021.pdf (last viewed Dec. 3, 2020); *CME Group Market Data Fee List--Effective Apr. 2021*, CME Group, *available at* https://www.cmegroup.com/files/download/cme-market-data-fee-list-apr-2021.pdf (last viewed Dec. 3, 2020); *CME Group Data Licensing Policy Guidelines Historical Information Distribution*, CME Group, *available at* https://www.cmegroup.com/market-data/distributor/files/cme-group-data-licensing-policy-guidelines-historical-information-distribution.pdf, (last viewed Dec. 3, 2020); *CME Group Data Licensing Policy Guidelines Non-Display Use*, CME Group, *available at* https://www.cmegroup.com/market-data/distributor/files/cme-group-data-licensing-policy-guidelines-and-non-display-licensing-faq.pdf, (last viewed Dec. 3, 2020); Email from CME Group to Customers, Sept. 30, 2020.

[27] 7 U.S.C. § 7(d)(8).

[28] 17 C.F.R. § 16.01; see also, *Core Principles and Other Requirements for Designated Contract Markets*, CFTC, 77 Fed. Reg. 36612, at 36642 (June 19, 2012), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2012-12746a.pdf.

review or stay the rule changes, pursuant to Rule 40.6 (b) or (c), and it's not entirely clear that it could have, based on how Rule 40.6(d) is structured.[29] Despite receiving (unsolicited) objections highlighting the inconsistency of the new DCM rule with the law, [30] and our meeting with CFTC staff to discuss the issue, the CFTC did nothing.

Many of the differences between the CFTC's approach to SRO rule changes and the SEC's arise from statutory differences.

For example, Section 19(b) of the Securities Exchange Act, demands:

> Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, as soon as practicable after the date of the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.[31]

The Securities and Exchange Act then details the specific process through which different types of filings may be approved, suspended, or denied.[32] There is no such statutory specificity in the CEA.

There are also significant substantive differences between the two regulatory regimes.

The Securities and Exchange Act statutorily requires SRO rules to, among other things,

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[29] These procedures facially apply to rules adopted using the process outlined in Rule 40.6(a), but are silent as to rules adopted pursuant to Rule 40.6(d).

[30] Letter from Tyler Gellasch, HMA, to Hon. Heath Tarbert, CFTC, Dec. 11, 2020, *available at* https://healthymarkets.org/wp-content/uploads/2020/12/CME-Historical-Data-12-11-2020-4.pdf.

[31] 15 U.S.C. § 78s(b)(1).

[32] 15 U.S.C. § 78s(b)(2) and (b)(3).

- "provide for the equitable allocation of reasonable dues, fees, and other charges;"[33]
- not be "designed to permit unfair discrimination";[34]
- be designed "to protect investors and the public interest"; and[35]
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.[36]

Thereafter, the SEC's Rules of Practice place the "burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder" on the SRO proposing a rule change.[37] In addition

> [t]he description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative [SEC] finding, and any failure of an SRO to provide this information may result in the [SEC] not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[38]

The SRO rule implementation process is nearly the opposite under the CEA.

Specifically, the CEA is silent as to the general process of how the CFTC may fulfill its obligation to ensure DCM rules comply with the law. Further, while the CEA details the "Core Principles" for DCM rules, it also expressly provides that a DCM shall have "reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection."[39]

Thus, in practice, once a DCM has "self-certified" its rule (if the Commission even requires that under Rule 40.6), then the CFTC has effectively limited itself to intervening only if it could demonstrate that the DCM's change does not comply with the CEA. As a practical matter, this would seem to be extremely unlikely if the CFTC doesn't even know the rule exists, or only has summary information about it.

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[33] 15 U.S.C. § 78o-3(b)(5) (for filings by FINRA).
[34] 15 U.S.C. § 78o-3(b)(6).
[35] 15 U.S.C. § 78o-3(b)(6).
[36] 15 U.S.C. § 78o-3(b)(9).
[37] Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).
[38] *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 86236, at 7, June 28, 2019, *available at* https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf.
[39] 7 U.S.C. § 7(d)(1)(B).

Again, both the CFTC and the SEC are tasked with ensuring that rules implemented by the self-regulatory organizations they oversee comply with their applicable statutes. At a minimum, both must pragmatically be obligated to be aware of the rules, review them, and concur with the SRO seeking to implement a rule that the proposed rule does, in fact, comply with the applicable law.

In undertaking that review, the DC Circuit has clearly explained that the Administrative Procedures Act:

> requires us to hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "unsupported by substantial evidence." To satisfy the "arbitrary and capricious" standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'[40]

In *Susquehanna*, the SEC approved an application by a clearinghouse to increase the capital requirements, and clearing members who would be impacted challenged the SEC's decision. In reversing the SEC's order approving the SRO's rule change, the court held that "the SEC's Order reflects little or no evidence of the basis for the [SRO]'s own determinations—and few indications that the SEC even knew what that evidence was"[41] and and it "'may [not] . . . delegate its responsibility to the regulated party.'"[42]

While it may be appropriate to allow DCM's "reasonable" discretion on how they interpret and comply with their obligations under the CEA, their self-interested determinations cannot and should not stand as a replacement to the CFTC's reasoned judgment on compliance with the law.

[40] *Susquehanna*, at 445 (internal citations omitted).
[41] Id., at 446.
[42] *Id*. at 446 (quoting *Gerber v. Norton*, 294 F.3d 173, 185-86 (D.C. Cir. 2002)).