

10 times a month, and arrives more than 30 minutes late (including cancelled flights) more than 50 percent of the time during that month.

(3) For purposes of this paragraph, the Department considers all of a carrier's flights that are operated in a given city-pair market whose scheduled departure times are within 30 minutes of the most frequently occurring scheduled departure time to be one single flight.

(4) The holding out of a chronically delayed flight for more than four consecutive one-month periods represents one form of unrealistic scheduling and is an unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712.

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038-AB87

Electronic Filing of Financial Reports and Notices

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is amending certain of its regulations in connection with electronic filing of financial reports and related notices. The amendments broaden the language in the Commission's regulations applicable to electronic filings of financial reports to clarify that, to the extent a futures commission merchant ("FCM") submits a Form 1-FR to the Commission electronically, it may do so using any user authentication procedures established or approved by the Commission. The amendments also permit registrants to electronically submit filings in addition to financial reports, including an election to use a non-calendar fiscal year, requests for extensions of time to file uncertified financial reports and "early warning" notices required under Commission regulations. In connection with the filing of financial reports, the amendments specify, consistent with other requirements and existing practice, that a statement of income and loss is included as a required part of the non-certified 1-FR filings for FCMs and introducing brokers ("IBs"). The amendments also require more

immediate, but less prescriptive, documentation regarding a firm's capital condition when a firm falls below its required minimum adjusted net capital. Finally, the final regulations include several other minor amendments to correct certain outdated references and to make other clarifications to existing regulations.

DATES: Effective Date: January 4, 2010.

FOR FURTHER INFORMATION CONTACT: Thelma Diaz, Associate Director, Division of Clearing and Intermediary Oversight, 1155 21st Street, NW., Washington, DC 20581. Telephone number: 202-418-5137; facsimile number: 202-418-5547; and electronic mail: tdiaz@cftc.gov, or Lawrence T. Eckert, Special Counsel, Division of Clearing and Intermediary Oversight, 140 Broadway, New York, New York 10005. Telephone number (646) 746-9704; and electronic mail: leckert@cftc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On October 13, 2009, the Commission published for comment in the **Federal Register** proposed amendments to Regulations 1.10 and 1.12 (the "Proposals").¹ Commission Regulation 1.10 sets forth the financial reporting requirements for FCMs and IBs² and Regulation 1.12 requires FCMs, IBs and applicants for registration thereof to provide notice of a variety of predefined events as or before they occur.³

The Proposals consisted of several amendments regarding electronic filing of financial reports and notices by FCMs and IBs as well as amendments to certain other financial reporting requirements. Specifically, the Commission proposed amendments to: (1) Broaden language in the Commission's regulations concerning authentication procedures applicable to electronic filing of financial reports in order to enable internet-based filing of such reports in anticipation of expected

¹ 74 FR 52434 (Oct 13, 2009). The Commission's regulations cited in this rulemaking may be found at 17 CFR Ch. 1 (2009).

² For simplicity, references in this **Federal Register** release to IBs in connection with financial reporting and notice requirements are intended to refer to IBs that are not operating pursuant to a guarantee agreement.

³ For example, Regulation 1.12(a) requires immediate telephonic notice, to be confirmed in writing by facsimile, when a registrant's (or applicant's) adjusted net capital falls below that required by Regulation 1.17. Other provisions of Regulation 1.12 require notification to the Commission for certain "early warning" events. Regulation 1.12(b), for example, requires notification by a registrant or applicant if such entity's adjusted net capital drops below a specified threshold.

changes to "WinJammer™," an application used by FCMs that file their non-certified financial reports electronically with the Commission; (2) expand the types of filings that FCMs and IBs may submit electronically to include required "early warning" notices and certain other notices and filings under Regulations 1.10 and 1.12; (3) provide for less prescriptive, but more immediate, documentation to be filed regarding a firm's undercapitalized condition; (4) expressly include an income statement in the required periodic unaudited financial reports of FCMs and IBs; and (5) make several other minor amendments to correct certain outdated references and to make other clarifications to existing regulations.

The 30-day public comment period on the Proposals expired on November 12, 2009. The Commission received one written comment on the Proposals, submitted by the National Futures Association ("NFA"). NFA noted its agreement and support of the Commission's Proposals and commended the Commission for its review of its electronic filing requirements and proposal of changes to reflect technological advances and current practices. As discussed below, NFA also encouraged the Commission to consider certain additional amendments to further expand the use of electronic filing in certain circumstances. NFA did not suggest delaying the implementation of the Proposals while these additional suggestions made by NFA are under consideration by the Commission. The Commission further notes that certain provisions included in the additional amendments offered by NFA for consideration may require publication in the **Federal Register** for prior notice and comment before they may be adopted. For the reasons set forth below, the Commission has therefore determined to adopt the amendments as proposed.

II. Rule Amendments

A. Electronic Filing Issues

1. Amendments to Regulation 1.10

Commission Regulation 1.10(c) generally sets forth the provisions governing where and how financial reports required to be filed by FCMs and IBs under Regulation 1.10 must be filed. Regulation 1.10(c)(1) indicates with whom reports should be filed and Regulation 1.10(c)(2) addresses the method for submitting such reports. Electronic submission of certified financial reports currently is addressed separately in Regulation 1.10(b)(2)(iii).

This section provides that FCMs must file certified financial reports in paper form and IBs must file such reports electronically in accordance with electronic filing procedures established by NFA.

For clarification and ease of reading, the Commission is moving Regulation 1.10(b)(2)(iii) into a new subparagraph of Regulation 1.10(c)(2). Regulation 1.10(c)(2) is being amended as discussed below and divided into 2 new subparagraphs: New subparagraph (c)(2)(i) addresses electronic filing by FCMs with the Commission and new subparagraph (c)(2)(ii) addresses electronic filings with NFA by IBs and by applicants for registration as IBs and FCMs.

Regulation 1.10(c)(2) currently provides that non-certified financial reports may be submitted to the Commission "in electronic form using a Commission assigned Personal Identification Number, and otherwise in accordance with instructions issued by the Commission * * *." The adopted amendments to Regulation 1.10(c)(2) broaden the language in the regulation relating to user authentication by no longer limiting user authentication to the use of a personal identification number ("PIN"). As described in the proposing release, the use of such a PIN is no longer consistent with the internet-based enhancements under development for Winjammer. The revisions to Regulation 1.10(c)(2) also permit any filing or other notice submitted under the regulation to be transmitted electronically, rather than limiting such submission to financial reports as under the current regulation. Such other notices would include, for example, an election to use a fiscal year other than a calendar year under Regulation 1.10(e) and a request for an extension of time to file uncertified financial reports under Regulation 1.10(f). Regulation 1.10(d)(4)(iii), which deals with electronic filing of Form 1-FR, is being amended by deleting references to the use of a PIN.

As amended, Regulation 1.10(c)(2)(i) provides that all filings or other notices or applications prepared by a futures commission merchant "[except with respect to the filing of certified financial reports which must be filed in paper form], and pursuant to [Regulation 1.10] may be submitted to the Commission in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instruction issued by or approved by the Commission, if the futures commission merchant or a designated self-regulatory

organization has provided the Commission with the means necessary to read and to process the information contained in such report."

Amended Regulation 1.10(c)(2)(ii) provides that "[except with respect to the filing of certified FOCUS reports by a registered broker or dealer with the SEC], all filings or other notices or applications prepared by an introducing broker or applicant for registration as an introducing broker or futures commission merchant * * * must be filed electronically in accordance with electronic filing procedures established by the National Futures Association * * *."

In its comment letter, NFA indicated that it would support the Commission further broadening the permitted use of electronic filing to include FCM certified financial statements. The current requirement in Regulation 1.10 for FCM certified financial statements to be filed in paper form is due in part to the fact that such statements are not prepared in a standard format that lends itself easily to electronic input. NFA suggested that notwithstanding this lack of standardization, the Commission could consider permitting the submission of such statements in portable document format ("pdf"). The Commission notes, however, that this suggestion requires further review because the pdf format is not conducive to the application of automated review of the data by the Commission. Further review would also be beneficial in light of continuing developments in technology that may at a later date result in increased benefits of electronic filing of certified financial statements for the filers, the Commission and the DSRO recipients. The adoption of the amendments as proposed will not impede such further review, and will make available to these same parties other recognized enhancements to the current requirements for electronic filing.

2. Amendments to Regulation 1.12

Commission Regulation 1.12 requires FCMs, IBs and applicants for registration thereof to provide notice of a variety of predefined events as or before they occur.⁴ The Commission proposed to amend Regulation 1.12(i), which sets forth the procedures for filing notices under Regulation 1.12, to allow FCMs and IBs to submit electronically filings otherwise required to be submitted in writing via facsimile.⁵ In its comment letter, NFA

supported this change, but suggested that the Commission consider requiring, rather than simply permitting, registrants to electronically file such notices. Although the Commission strongly encourages, and believes that most registrants will choose to utilize, electronic filing as a more efficient and expeditious means to file notices, the Commission nonetheless appreciates that there may be times when a registrant would prefer, or is otherwise unable, to file electronically. For example, a registrant may have a regulatory deadline under the Commission's regulations but be unable to satisfy such deadline through electronic means due to temporary technological issues with WinJammer™, NFA's EasyFile system or the registrants' own systems. Moreover, moving from a permissive to mandatory filing requirement may require publication in the **Federal Register** in order to obtain public comment on such a proposal. In light of these concerns, the Commission has determined to adopt the amendment as proposed.

The amendment adopted adds a new subparagraph 1.12(i)(3) to the Commission's regulations which provides that "[e]very notice or report required to be provided in writing under [Regulation 1.12] may, in lieu of facsimile, be filed via electronic transmission using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission." An electronic submission is required to clearly indicate the registrant or applicant on whose behalf such filing is made and the use of such user authentication in submitting such filing would constitute and become a substitute for the manual signature of the authorized signer.

B. Income Statement Filing Requirement

Commission Regulation 1.10(d) sets forth the content requirements for financial reports filed with the Commission: The Commission proposed to amend Regulation 1.10(d)(1) to require "statements of income (loss)" to be included as part of FCM and IB non-certified financial report filings. The Commission noted that this amendment is consistent with Regulation 1.10(d)(2)(ii), which requires FCMs and

intends to make changes to the EasyFile system and/or NFA rules, as may be necessary to facilitate the electronic filing by IBs of notices or other information permitted to be submitted electronically by the Proposal but currently filed with NFA in paper form.

⁴ See footnote 3, above.

⁵ IBs file notices under Regulation 1.12 with NFA pursuant to NFA rules. NFA has indicated that it

IBs to include an income statement as part of their certified financial reports, and is a practice currently followed by most registrants. NFA voiced its support of this amendment in its comment letter noting its agreement that the income statement provides the Commission with important information for monitoring the financial condition of firms. The Commission is adopting the amendment as proposed.

As noted in the Proposals, this amendment does not affect the ability of a broker-dealer to file with the Commission in accordance with Regulation 1.10(h) the FOCUS report under the Securities and Exchange Act of 1934, including the income statement currently provided in that report.⁶

C. Net Capital Undercapitalization Documentation

Regulation 1.12(a) requires a registrant or applicant for registration as an FCM or IB that knows or should have known that its adjusted net capital is less than the minimum required by the Commission or by its designated self-regulatory organization (“DSRO”) to provide notice of such event immediately by telephone and confirm such telephonic notice in writing by facsimile. Regulations 1.12(a)(2) (applicable to FCMs) and 1.12(a)(3) (applicable to IBs) further require that, within 24 hours thereafter, the registrant (or applicant) must file certain specific financial records with the Commission.⁷

The Commission also is amending Regulations 1.12(a)(2) and (a)(3) to require more immediate, but less prescriptive, reporting to the Commission when a registrant or applicant falls below its minimum net

capital requirement. NFA supported this amendment, stating its agreement with the Commission that it is more beneficial for the Commission to receive prompt information concerning a firm’s capital condition than to receive such information in a specific prescribed format. Under the amended regulation, a firm must continue to provide immediate telephonic notice, confirmed in writing, in the event that its adjusted net capital falls below its required minimum. Amended Regulation 1.12(a)(2) requires that together with such initial telephonic notice and written confirmation, a firm must provide “documentation in such form as necessary to adequately reflect the firm’s capital condition as of any date such person’s adjusted net capital is less than the minimum required.”⁸ The Commission envisions that such adequate documentation would at a minimum specify the firm’s adjusted net capital requirement and actual adjusted net capital for any date during which the firm fell below its regulatory requirement. The amended regulation also requires a firm to provide similar documentation to that initially provided for any other days the Commission may request.⁹ By requiring documentation as of “any” date that adjusted net capital is less than the required minimum, the amended regulation makes clear that where a firm is undercapitalized on more than one day, documentation related to all such time must be provided.

Regulation 1.12(a)(3), which provides documentation requirements for IBs that provide the Commission with notice of their undercapitalized condition, has been deleted because Regulation 1.12(a)(2) as amended applies to IBs as well as to FCMs. Regulation 1.12(i)(1) also is being amended by deleting certain language related to the method of filing documentation that is no longer required to be submitted to the Commission in light of the amendments to Regulation 1.12(a)(2) discussed above.

D. Miscellaneous Amendments to Regulations

The Commission proposed a number of minor amendments to Regulations 1.10 and 1.12 to correct certain outdated

references and to otherwise clarify existing regulations. NFA noted their support of certain of these amendments that eliminated requirements that provided for duplicative filing with NFA and the Commission (enumerated as items (1) and (2), below). The Commission received no comments on the other amendments. The Commission is, therefore, adopting each of the amendments as proposed and, as outlined below:

(1) Regulation 1.10(c)(1) is amended to clarify that FCM and IB applicants for registration need file financial reports required as part of the application process only with NFA and not also with a regional office of the Commission;

(2) Regulation 1.12(i)(1) is amended to clarify that an applicant for registration as an FCM need file any notices required under Regulation 1.12 only with NFA and not also with the Commission. The amended regulation makes clear that any notice or report filed with NFA will be deemed to be filed with, and to be the official record of, the Commission;

(3) The following minor wording amendments are being made to Regulation 1.10(c)(1) for the purposes of consistency with other provisions of the regulations and/or general clarification:

(A) The reference to “[a] report filed by an [IB] pursuant to paragraph (b)(2)(i) or (b)(2)(ii)” is amended to clarify that “a report” in this context is meant to refer to Form 1-FR;

(B) The reference to subparagraphs (b)(2)(i) and (b)(2)(ii) is being amended for simplicity to refer only to paragraph (b)(2) in general; and

(C) The language of paragraph 1.10(c)(1) is being amended to clarify that it is intended to cover not only “reports” but all reports and other “information;”

(4) Regulations 1.10(b)(2)(i) and 1.10(b)(2)(ii) are being amended to delete language referring to an option to file financial statements on a calendar-year basis which is no longer contained in the Commission’s regulations;

(5) Regulation 1.10(b)(3), which permits an FCM or IB to satisfy the Commission’s Form 1-FR filing requirements if it satisfies certain financial reporting standards and reporting requirements of its DSRO, is being amended to delete outdated language referring to DSRO regulations applicable “after the effective date of these regulations by the Commission”; and

(6) Language within regulation 1.10(h) that references “NFA” is amended for consistency purposes by spelling out “National Futures Association.”

⁶ Under SEC Regulation 17a-5 and rules of applicable self-regulatory organizations, certain securities brokers or dealers may include as part of their quarterly FOCUS report filings a consolidated Statement of Income (Loss) for the relevant quarter rather than a Statement of Income (Loss) for the month for which the report is being filed (i.e., March, June, September or December). Such broker-dealers that also are registered as FCMs would file these same reports with the Commission. The Commission wishes to make clear that an otherwise complete FOCUS report filing made with the Commission that includes such a consolidated Statement of Income (Loss) will be deemed an acceptable filing in accordance with Commission Regulation 1.10(h).

⁷ Specifically, Regulation 1.12(a)(2) requires an FCM (or applicant) to file with the Commission: (1) A statement of financial condition; (2) a statement of the computation of its minimum capital requirements; (3) the statements of segregation requirements and funds in segregation for customers trading on U.S. commodity exchanges and for customers’ dealer options accounts; and (4) the statement of secured amounts and funds held in separate accounts for foreign futures and foreign options customers. Regulation 1.12(a)(3) requires an IB (or applicant) to file a statement of financial condition and a statement of the computation of its minimum capital requirements.

⁸ This amendment is consistent with SEC Regulation 17a-11 which requires a broker or dealer whose net capital falls below its required minimum to give notice of the deficiency that same day, specifying the broker or dealer’s net capital requirement and its current amount of net capital.

⁹ Regulation 1.10(b)(4) already provides that representatives of the Commission may upon written notice require Form 1-FR or other financial information at such times as specified by the representative.

III. Related Matters

A. Administrative Procedure Act

The Administrative Procedure Act (“APA”) provides that the required publication of a substantive rule shall be made not less than 30 days before its effective date, unless the agency is permitted to implement an earlier effective date under one of the exceptions recognized by the APA.¹⁰ The exceptions set forth in the APA are as follows: (1) A substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.¹¹

The amendments being made to Rules 1.10 and 1.12 will “grant or recognize an exemption or relieve a restriction” in that they generally serve to permit and enable registrants to file notices and reports electronically that previously were required to be filed in paper form. In addition, the amendments include a number of non-substantive amendments to correct certain outdated references and to otherwise clarify existing regulations.

With regard to the amendments relating to the timing of documentation required by firms that become undercapitalized, the Commission has a clear interest in receiving such information immediately and believes, therefore, that there is “good cause” to make such requirement effective in fewer than 30 days. With respect to the amendments requiring an income statement, the Commission believes that there is also “good cause” to make this provision effective on January 4, 2010, consistent with the other rule amendments. It would not be logical for the income statement requirement to be implemented at a time later than the effective date of the remaining rules, as the information in the income statement is an integral part of a registrant’s financial statements. Further, as the SEC and several self-regulatory organizations already require dual registrants and other FCMs to include the income statement in their financial statements, the income statement is already formatted as part of the Form 1–FR reports that registrants currently file with the Commission, and the data required to complete it is generally already available from other parts of the form. In fact, substantially all FCMs and IBs already complete the income statement as part of their required

periodic non-certified financial report filings.

Accordingly, the Commission has determined to make these amendments effective on January 4, 2010, consistent with the anticipated availability of the updated WinJammer™ system.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”), 5 U.S.C. 601 et seq., requires that agencies, in rulemaking, consider the impact of those regulations on small businesses. This rulemaking would affect FCMs and IBs. The Commission has previously determined that, based upon the fiduciary nature of FCM/customer relationships, as well as the requirement that FCMs meet minimum financial requirements, FCMs should be excluded from the definition of small entity.

With respect to IBs, the Commission stated that it is appropriate to evaluate within the context of a particular rule proposal whether some or all IBs should be considered to be small entities and, if so, to analyze the economic impact on such entities at that time.¹² These amendments will not place any additional burdens on IBs that are small businesses because all such parties, if any, already are subject to the financial reporting and notice requirements under Regulations 1.10 and 1.12 and already file financial reports through NFA’s electronic filing system. Additionally, although the Commission is amending its regulations to add a requirement to include statements of income and loss as part of non-certified financial report filings, substantially all IBs already are filing this data in practice and, in any event, must compute the relevant income and loss data (although not currently required to be provided in a separate income statement) in order to complete Commission Form 1–FR or the SEC FOCUS report, as applicable, under the Commission’s regulations.¹³ The Commission’s Proposals solicited public comment on this analysis.¹⁴ No comments were received. Accordingly, pursuant to Section 3(a) of the RFA, 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that the action taken herein will not have a significant economic impact on a substantial number of small entities.

¹² See 48 FR 35248, 35275–78 (Aug. 3, 1983).

¹³ See Commission Regulations 1.10(b)(2) and 1.10(h) (requiring IBs to file with the Commission Form 1–FR–FCM or, as an alternative in the case of a registered broker or dealer with the SEC, the FOCUS report).

¹⁴ 74 FR at 52438.

C. Paperwork Reduction Act

This rulemaking provides an alternative method of collection for a required collection of information under Part 1 of the Commission’s rules, but is not anticipated to change the burden under such collection as the actual financial reporting requirements have not changed significantly. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Commission submitted a copy of this section to the Office of Management and Budget (“OMB”) for its review. No comments were received in response to the Commission’s invitation in its notice of proposed rulemaking to comment on any change in the potential paperwork burden associated with these rule amendments.¹⁵

D. Cost-Benefit Analysis

Section 15(a) of the Act, as amended by Section 119 of the Commodity Futures Modernization Act, requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, Section 15(a) as amended does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, Section 15(a) simply requires the Commission to “consider the costs and benefits” of its action.

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

The Commission’s proposal contained an analysis of its consideration of these costs and benefits and solicited public comment thereon.¹⁶ No comments were received with respect to this analysis. Therefore, pursuant to such consideration, the Commission has decided to adopt these amendments as discussed above.

¹⁵ Id.

¹⁶ 74 FR at 52439.

¹⁰ 5 U.S.C. 553(b) and (d).

¹¹ 5 U.S.C. 553–(d).

List of Subjects in 17 CFR Part 1

Brokers, Commodity futures, Reporting and recordkeeping requirements.

■ In consideration of the foregoing and pursuant to the authority contained in the Commodity Exchange Act and, in particular, Sections 4f, 4g and 8a(5) thereof, 7 U.S.C. 6f, 6g and 12a(5), the Commission hereby amends 17 CFR part 1 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23 and 24, as amended by the Commodity Futures Modernization Act of 2000, appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

■ 2. Section 1.10 is amended by removing paragraph (b)(2)(iii) and revising paragraphs (b)(2)(i), (b)(2)(ii)(A), (b)(3), (c)(1) and (c)(2), (d)(1)(ii), (d)(4)(iii), and (h) as follows:

§ 1.10 Minimum financial requirements for futures commission merchants and introducing brokers.

* * * * *

(b) * * *

(2)(i) Except as provided in paragraphs (b)(3) and (h) of this section, and except for an introducing broker operating pursuant to a guarantee agreement which is not also a securities broker or dealer, each person registered as an introducing broker must file a Form 1–FR–IB semiannually as of the middle and the close of each fiscal year. Each Form 1–FR–IB must be filed no later than 17 business days after the date for which the report is made.

(ii)(A) In addition to the financial reports required by paragraph (b)(2)(i) of this section, each person registered as an introducing broker must file a Form 1–FR–IB as of the close of its fiscal year which must be certified by an independent public accountant in accordance with § 1.16 no later than 90 days after the close of each introducing broker’s fiscal year: *Provided, however*, that a registrant which is registered with the Securities and Exchange Commission as a securities broker or dealer must file this report not later than the time permitted for filing an annual audit report under § 240.17a–5(d)(5) of this title.

* * * * *

(3) The provisions of paragraphs (b)(1) and (b)(2) of this section may be met by

any person registered as a futures commission merchant or as an introducing broker who is a member of a designated self-regulatory organization and conforms to minimum financial standards and related reporting requirements set by such designated self-regulatory organization in its bylaws, rules, regulations, or resolutions and approved by the Commission pursuant to Section 4f(b) of the Act and § 1.52: *Provided, however*, That each such registrant shall promptly file with the Commission a true and exact copy of each financial report which it files with such designated self-regulatory organization.

* * * * *

(c) *Where to file reports.* (1) Form 1–FR filed by an introducing broker pursuant to paragraph (b)(2) of this section need be filed only with, and will be considered filed when received by, the National Futures Association. Other reports or information provided for in this section will be considered filed when received by the regional office of the Commission with jurisdiction over the state in which the registrant’s principal place of business is located and by the designated self-regulatory organization, if any; and reports or other information required to be filed by this section by an applicant for registration will be considered filed when received by the National Futures Association. Any report or information filed with the National Futures Association pursuant to this paragraph shall be deemed for all purposes to be filed with, and to be the official record of, the Commission.

(2)(i) Except as provided in the last sentence of this subparagraph, all filings or other notices prepared by a futures commission merchant pursuant to this section may be submitted to the Commission in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission, if the futures commission merchant or a designated self-regulatory organization has provided the Commission with the means necessary to read and to process the information contained in such report. A Form 1–FR required to be certified by an independent public accountant in accordance with § 1.16 which is filed by a futures commission merchant must be filed in paper form and may not be filed electronically.

(ii) Except as provided in paragraph (h) of this section, all filings or other notices or applications prepared by an introducing broker or applicant for

registration as an introducing broker or futures commission merchant pursuant to this section must be filed electronically in accordance with electronic filing procedures established by the National Futures Association. In the case of a Form 1–FR–IB that is required to be certified by an independent public accountant in accordance with § 1.16, a paper copy of any such filing with the original manually signed certification must be maintained by the introducing broker or applicant for registration as an introducing broker in accordance with § 1.31.

* * * * *

(d)(1) * * *

(ii) Statements of income (loss) and a statement of changes in ownership equity for the period between the date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

* * * * *

(4) * * *

(iii) In the case of a Form 1–FR filed via electronic transmission in accordance with procedures established by or approved by the Commission, such transmission must be accompanied by the user authentication assigned to the authorized signer under such procedures, and the use of such user authentication will constitute and become a substitute for the manual signature of the authorized signer for the purpose of making the oath or affirmation referred to in this paragraph.

* * * * *

(h) *Filing option available to a futures commission merchant or an introducing broker that is also a securities broker or dealer.* Any applicant or registrant which is registered with the Securities and Exchange Commission as a securities broker or dealer may comply with the requirements of this section by filing (in accordance with paragraphs (a), (b), (c), and (j) of this section) a copy of its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE (FOCUS Report), in lieu of Form 1–FR; *Provided, however*, That all information which is required to be furnished on and submitted with Form 1–FR is provided with such FOCUS Report; and *Provided, further*, That a certified FOCUS Report filed by an introducing broker or applicant for registration as an introducing broker in lieu of a certified Form 1–FR–IB must be filed according to National Futures Association rules, either in paper form or electronically, in accordance with procedures established

by the National Futures Association, and if filed electronically, a paper copy of such filing with the original manually signed certification must be maintained by such introducing broker or applicant in accordance with § 1.31.

* * * * *

- 3. Section 1.12 is amended by:
 - a. Revising paragraphs (a)(2) and (i)(1);
 - b. Removing paragraph (a)(3); and
 - c. Adding paragraph (i)(3) as follows:

§ 1.12 Maintenance of minimum financial requirements by futures commission merchants and introducing brokers.

(a) * * *

(2) Provide together with such notice documentation in such form as necessary to adequately reflect the applicant's or registrant's capital condition as of any date such person's adjusted net capital is less than the minimum required. The applicant or registrant must provide similar documentation for other days as the Commission may request.

* * * * *

(i)(1) Every notice and written report required to be given or filed by this section (except for notices required by paragraph (f) of this section) by a futures commission merchant or a self-regulatory organization must be filed with the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located, with the principal office of the Commission in Washington, DC, with the designated self-regulatory organization, if any; and with the Securities and Exchange Commission, if such registrant is a securities broker or dealer. Every notice and written report required to be given or filed by this section by an applicant for registration as a futures commission merchant must be filed with the National Futures Association (on behalf of the Commission), with the designated self-regulatory organization, if any, and with the Securities and Exchange Commission, if such applicant is a securities broker or dealer. Any notice or report filed with the National Futures Association pursuant to this paragraph shall be deemed for all purposes to be filed with, and to be the official record of, the Commission.

* * * * *

(3) Every notice or report required to be provided in writing to the Commission under this section may, in lieu of facsimile, be filed via electronic transmission using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and

otherwise in accordance with instructions issued by or approved by the Commission. Any such electronic submission must clearly indicate the registrant or applicant on whose behalf such filing is made and the use of such user authentication in submitting such filing will constitute and become a substitute for the manual signature of the authorized signer.

Issued in Washington, DC, on December 24, 2009, by the Commission.

David A. Stawick,
Secretary of the Commission.
 [FR Doc. E9-31032 Filed 12-29-09; 8:45 am]
BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA-2965; File No. S7-23-07]

RIN 3235-AJ96

Temporary Rule Regarding Principal Trades With Certain Advisory Clients

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting as final Rule 206(3)-3T under the Investment Advisers Act of 1940, the interim final temporary rule that establishes an alternative means for investment advisers who are registered with the Commission as broker-dealers to meet the requirements of Section 206(3) of the Investment Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients. As adopted, the only change to the rule is the expiration date. Rule 206(3)-3T will sunset on December 31, 2010.

DATES: *Effective Date:* December 30, 2009.

FOR FURTHER INFORMATION CONTACT: Sarah A. Bessin, Assistant Director, Daniel S. Kahl, Branch Chief, or Matthew N. Goldin, Senior Counsel, at (202) 551-6787 or *IArules@sec.gov*, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is adopting as final temporary Rule 206(3)-3T [17 CFR 275.206(3)-3T] under the Investment Advisers Act of 1940 [15 U.S.C. 80b].

I. Background

On September 24, 2007, we adopted, on an interim final basis, Rule 206(3)-3T, a temporary rule under the Investment Advisers Act of 1940 (the "Advisers Act") that provides an alternative means for investment advisers who are registered with us as broker-dealers to meet the requirements of Section 206(3) of the Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients.¹ The purpose of the rule was to permit broker-dealers to sell to their advisory clients, in the wake of *Financial Planning Association v. SEC* (the "FPA Decision"),² certain securities held in the proprietary accounts of their firms that might not be available on an agency basis—or might be available on an agency basis only on less attractive terms³—while protecting clients from conflicts of interest as a result of such transactions.⁴

The rule vacated in the FPA Decision had allowed broker-dealers to offer fee-based accounts without complying with the Advisers Act, including the requirements of Section 206(3). Section 206(3) makes it unlawful for any investment adviser, directly or indirectly, "acting as a principal for his own account, knowingly to sell any security to or to purchase any security from a client * * *, without disclosing to such client *in writing* before the completion of such transaction the

¹ Rule 206(3)-3T [17 CFR 275.206(3)-3T]. All references to Rule 206(3)-3T and the various sections thereof in this Release are to 17 CFR 275.206(3)-3T and its corresponding sections. *See also Temporary Rule Regarding Principal Trades with Certain Advisory Clients*, Investment Advisers Act Release No. 2653 (Sep. 24, 2007) [72 FR 55022 (Sep. 28, 2007)] ("2007 Principal Trade Rule Release").

² 482 F.3d 481 (D.C. Cir. 2007). In the FPA Decision, handed down on March 30, 2007, the Court of Appeals for the District of Columbia Circuit vacated (subject to a subsequent stay until October 1, 2007) Rule 202(a)(11)-1 under the Advisers Act. Rule 202(a)(11)-1 provided, among other things, that fee-based brokerage accounts were not advisory accounts and were thus not subject to the Advisers Act. For further discussion of fee-based brokerage accounts, see 2007 Principal Trade Rule Release, Section I.

³ *See* 2007 Principal Trade Rule Release at nn.19-20 and Section VI.C.

⁴ As a consequence of the FPA Decision, broker-dealers offering fee-based brokerage accounts became subject to the Advisers Act with respect to those accounts, and the client relationship became fully subject to the Advisers Act. These broker-dealers—to the extent they wanted to continue to offer fee-based accounts and met the requirements for registration—had to register as investment advisers, if they had not done so already, act as fiduciaries with respect to those clients, disclose all material conflicts of interest, and otherwise fully comply with the Advisers Act, including the restrictions on principal trading contained in Section 206(3) of the Act. *See* 2007 Principal Trade Rule Release, Section I.