

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Part 3**

**RIN 3038-AE16**

**Alternative to Fingerprinting Requirement for Foreign Natural Persons**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is proposing to amend existing Commission regulations to establish an alternative to fingerprinting to evaluate the fitness of natural persons who are required to submit fingerprints under part 3 of the Commission’s regulations and who have not resided in the United States since reaching 18 years of age (“Proposal”).

**DATES:** Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by RIN 3038-AE16, by any of the following methods:

- Agency website: Via its Comments Online process: <http://comments.cftc.gov>.

Follow the instructions on the website for submitting comments.

- Mail: Send to Christopher Kirkpatrick, Secretary, Commodity Futures Trading Commission, 1155 21st Street NW., Washington, DC 20581.
- Hand delivery/Courier: Same as Mail above.
- Federal eRulemaking Portal: at <http://www.regulations.gov/>. Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act,<sup>1</sup> a petition for confidential treatment of the exempt information may be submitted according to the procedures set forth in § 145.9 of the Commission's regulations.<sup>2</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Katherine Driscoll, Associate Chief Counsel, 202-418-5544, [kdriscoll@cftc.gov](mailto:kdriscoll@cftc.gov); Jacob Chachkin, Special Counsel, 202-418-5496, [jchachkin@cftc.gov](mailto:jchachkin@cftc.gov); or Adam Kezsbom, Special Counsel, 202-418-5372, [akezsbom@cftc.gov](mailto:akezsbom@cftc.gov), Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:**

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<sup>1</sup> 5 U.S.C. 552.

<sup>2</sup> Commission regulations referred to herein are found at 17 CFR chapter. 1. Commission regulations are accessible on the Commission's website, <http://www.cftc.gov>.

## I. Background

Subject to certain exceptions and exclusions, persons engaging in specified activities involving commodity interests<sup>3</sup> are required pursuant to the Commodity Exchange Act (“CEA” or “Act”) and/or Commission regulations<sup>4</sup> to register with the Commission in certain registration categories. These include registration as a futures commission merchant (“FCM”), retail foreign exchange dealer (“RFED”), introducing broker (“IB”), commodity pool operator (“CPO”), commodity trading advisor (“CTA”), swap dealer (“SD”), major swap participant (“MSP”), leverage transaction merchant (“LTM”), floor broker (“FB”), and floor trader (“FT”).<sup>5</sup> One of the critically important functions of registration is to allow the Commission to ensure that all futures and swaps industry professionals who deal with the public meet minimum standards of fitness and competency.<sup>6</sup> The fitness investigations that are part of the registration process permit the Commission and/or its delegates to (a) uncover past misconduct that may disqualify an individual or entity from registration and (b) help determine if such persons have disclosed all matters required to be disclosed in their applications to become registered with the Commission.<sup>7</sup>

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<sup>3</sup> A commodity interest is (1) any contract for the purchase or sale of a commodity for future delivery; (2) any contract, agreement or transaction subject to a Commission regulation under section 4c or 19 of the Commodity Exchange Act; (3) any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of such Act; and (4) Any swap as defined in such Act, by the Commission, or jointly by the Commission and the Securities and Exchange Commission. 17 CFR 1.3(yy).

<sup>4</sup> See, e.g., Commission regulation 3.4(a). 17 CFR 3.4(a).

<sup>5</sup> For the definitions of these registration categories (other than RFED), see Section 1a of the CEA and Commission regulation 1.3. 7 U.S.C. 1a and 17 CFR 1.3. For the definition of RFED, see Commission regulation 5.1(h). 17 CFR 5.1(h).

<sup>6</sup> See, e.g., Commodity Futures Trading Comm’n, Division of Clearing and Intermediary Oversight, Public Report on the Registration Program of the National Futures Association, June 2010, at 1 (citing H.R. REP. NO. 97-565(I), at 48 (1982), reprinted in 1982 U.S.C.A.N. 3871, 3897–3899).

<sup>7</sup> See <http://www.nfa.futures.org/NFA-registration/index.HTML> (last visited Dec. 22, 2015), stating that “[t]he primary purposes of registration are to screen an applicant's fitness to engage in business as a futures

Pursuant to the registration process for determining a registrant’s fitness in part 3 of the Commission’s regulations, natural persons<sup>8</sup> that wish to be principals<sup>9</sup> or associated persons<sup>10</sup> of Commission registrants, or who are responsible for entry of orders from an FB’s or FT’s own account, are required to submit their fingerprints<sup>11</sup> (the “Fingerprinting Requirement”).<sup>12</sup>

The Commission has delegated to National Futures Association (“NFA”), a registered futures association under Section 17 of the CEA, the registration functions set forth in subparts A, B, and C of part 3 of the Commission’s regulations, including the collection and review of a completed Form 8-R<sup>13</sup> and related fingerprint submissions from each natural person completing a Form 8-R.<sup>14</sup> NFA, working with law enforcement

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professional and to identify those individuals and organizations whose activities are subject to federal regulation.”

Pursuant to Commission regulation 3.60, the Commission may, subject to some limitations, deny, grant with conditions, suspend, revoke, or restrict registration to an applicant if the Commission alleges and is prepared to prove that the registrant or applicant is subject to one or more of the statutory disqualifications set forth in section 8a(2), 8a(3) or 8a(4) of the Act. 17 CFR 3.60. Sections 8a(2) and 8a(3) of the Act contain an extensive list of matters that provide grounds for refusing or conditioning an applicant’s registration, including, without limitation, felony convictions, commodities or securities law violations, bars or other adverse actions taken by financial regulators, and willfully omitting to state any material fact in an application. See 7 U.S.C. 12a(2) and (3). See also Interpretative Statement With Respect to Section 8a(2)(C) and (E) and Section 8a(3)(J) and (M) of the Commodity Exchange Act, Appendix A to part 3 of the Commission’s regulations.

<sup>8</sup> As used herein, the terms “natural person” and “individual” have the same meaning.

<sup>9</sup> See the definition of principal in Commission regulation 3.1(a). 17 CFR 3.1(a).

<sup>10</sup> An “associated person” is any natural person who is associated in certain capacities with an FCM, RFED, IB, CPO, CTA, SD, MSP, or LTM. 17 CFR 1.3(aa).

<sup>11</sup> Currently, the Commission may, directly or indirectly, require fingerprinting pursuant to Commission regulations 3.10(a)(2); 3.11(a)(1); 3.12(c)(3), d(2), f(3), or (i)(3); 3.40(a)(1), (a)(2), or (b); 3.44(a)(5) or (c); or 3.46(a)(3). 17 CFR 3.10(a)(2); 3.11(a)(1); 3.12(c)(3), d(2), f(3), and (i)(3); 3.40(a)(1), (a)(2), and (b); 3.44(a)(5) and (c); and 3.46(a)(3).

<sup>12</sup> In support of its initial promulgation of the fingerprinting requirements, the Commission stated that these requirements “are necessary to permit improvements in the Commission’s background checking of applicants for registration, to permit positive identification of certain individuals with common names, to reduce the number of applications filed by individuals who are unfit for registration, and to facilitate fitness reviews of registrants on a spot and periodic basis.” See Revision of Registration Regulations; Final Rules; Designation of New Part, 45 FR 80485, 80485 (Dec. 5, 1980).

<sup>13</sup> Generally, Form 8–R is the Commission’s application for natural persons that are associated persons or principals of a registrant.

<sup>14</sup> See 17 CFR 3.2(a).

agencies, uses these fingerprints to conduct background checks on these natural persons to assist in determining their fitness.

In December 2012, the Commission's Division of Swap Dealer and Intermediary Oversight ("DSIO"), in response to concerns raised by industry participants that the Fingerprinting Requirement was unduly burdensome to foreign natural persons and after considering those concerns in light of the continued need to evaluate the fitness of those persons, issued a no-action letter, CFTC Staff Letter No. 12-49.<sup>15</sup> CFTC Staff Letter No. 12-49 provides an alternative to complying with the Fingerprinting Requirement for principals of LTMFs, FCMs, RFEDs, IBs, CPOs, CTAs, SDs, and MSPs that have not resided in the United States since reaching 18 years of age. Subject to certain conditions specified in the letter, DSIO staff stated that it would not recommend that the Commission commence an enforcement action against any such firm based solely upon that firm's failure to submit with its registration application a fingerprint card for each such principal.

To rely on the relief provided in CFTC Staff Letter No. 12-49, DSIO staff required that any such firm submit, for each principal, either a fingerprint card (as required under Commission regulation 3.10(a)(2)) or a certification, signed by a person with authority to bind such firm, stating that: (1) a reasonable criminal history background check using a reputable commercial service had been conducted; (2) such criminal history background check did not reveal any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the CEA,<sup>16</sup> other than those disclosed;

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<sup>15</sup> CFTC Staff Letter No. 12-49 (Dec. 11, 2012), available at <http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/12-49.pdf>.

<sup>16</sup> 7 U.S.C. 12a(2) and (3).

and (3) such firm would maintain, in accordance with Commission regulation 1.31, records documenting that such criminal history background check was performed and the results of such background check.<sup>17</sup>

After issuing CFTC Staff Letter No. 12-49, DSIO staff issued similar no-action relief from the Fingerprinting Requirement for associated persons of FCMs, RFEDs, IBs, CTAs, CPOs, and LTMs that have not resided in the United States since reaching 18 years of age in CFTC Staff Letter No. 13-29<sup>18</sup> (CFTC Staff Letter No. 13-29, together with CFTC Staff Letter No. 12-49, are the “DSIO No-Action Letters” and the relief provided by such letters is the “DSIO No-Action Relief”).

## **II. Proposal**

The Commission is proposing to amend the Fingerprinting Requirement by adding a new sub-section (e) to the existing list of exemptions from the Fingerprinting Requirement in § 3.21<sup>19</sup> to codify and clarify the DSIO No-Action Relief.

This Proposal differs from the DSIO No-Action Relief. First, this Proposal would extend the relief to certain natural persons connected to FBs and FTs. Second, the Proposal would include all requirements to provide a fingerprint card under Part 3 of the Commission’s regulations, whereas the DSIO No-Action Relief is more limited.<sup>20</sup> As a result, this Proposal broadens the availability of the alternative to fingerprinting provided

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<sup>17</sup> CFTC Staff Letter No. 12-49, at 2.

<sup>18</sup> CFTC Staff Letter No. 13-29 (Jun. 21, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-29.pdf>.

<sup>19</sup> Commission regulation 3.21 provides exemptions to the Fingerprinting Requirement, subject to certain conditions, for persons whose fingerprints have recently been identified and processed by the Federal Bureau of Investigation, for persons whose application for initial registration with the Commission in any capacity was recently granted, for persons that have a current Form 8-R on file with the Commission or NFA, and for principals that are outside directors. 17 CFR 3.21.

<sup>20</sup> The DSIO No-Action Letters provide an alternative solely to the requirements of Commission regulations 3.10(a)(2) and 3.12(c)(3). See DSIO No-Action Letters.

in the DSIO No-Action Letters; however, the Commission believes that the rationale for providing the alternative to fingerprinting described above is equally applicable to natural persons connected to FBs and FTs and to all other requirements to provide a fingerprint card under Part 3 of the Commission's regulations, as explained further below.

Proposed sub-section (e)(2) of § 3.21 would provide that the obligation to provide a fingerprint card for a Foreign Natural Person under part 3 of the Commission's regulations would be deemed satisfied for a Certifying Firm (each, as defined below) if:

(a) such Certifying Firm causes a criminal history background check of such Foreign Natural Person to be performed; (b) such criminal history background check does not reveal any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the CEA,<sup>21</sup> other than those disclosed to NFA; and (c) a person authorized by such Certifying Firm submits, in reliance on such criminal history background check, a certification by such Certifying Firm to NFA.

The certification must: (i) state that the conditions described above have been satisfied; and (ii) be signed by a person authorized by such Certifying Firm to make such certification. In addition, each criminal history background check must: (a) be of a type that would reveal all matters listed under Sections 8a(2)(D) or 8a(3)(D), (E), or (H) of the CEA<sup>22</sup> relating to the Foreign Natural Person and (b) be completed not more than one calendar year prior to the date that such Certifying Firm submits the certification to NFA described in the proposed rule.

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<sup>21</sup> 7 U.S.C. 12a(2) and (3).

<sup>22</sup> 7 U.S.C. 12a(2)(D) and 12a(3)(D), (E), and (H). These provisions of Sections 8a(2) and (3) of the CEA generally relate to criminal convictions.

In terms of definitions, proposed paragraph 3.21(e)(1)(i) would define Foreign Natural Person, solely for purposes of paragraph (e), as any natural person who has not resided in the United States since reaching the age of 18 years. Also, proposed paragraph 3.21(e)(1)(ii) would define Certifying Firm, also solely for purposes of paragraph (e), with respect to natural persons acting in certain specified capacities in relation to the firm.

By way of recordkeeping, proposed paragraph 3.21(e)(3) would require that the Certifying Firm maintain, in accordance with Commission regulation 1.31, records documenting each criminal history background check and the results thereof.

The Commission believes the proposal, in providing certainty to market participants by way of Commission regulation, will make the commodity interest markets it oversees more liquid, competitive, and accessible by enabling Foreign Natural Persons to demonstrate that they meet the minimum standards for fitness and competency without undue burden. The alternative to fingerprinting proposed will remove an impediment to participation in United States' markets by persons located outside of the United States while also ensuring the continued protection of market participants and the public. Further, the Commission believes that, by providing an alternative for persons outside the United States, this Proposal is consistent with the principles of international comity.

As discussed above, in an attempt to provide greater clarity to market participants, this Proposal is slightly different than the DSIO No-Action Letters. In particular, where the No-Action Relief required that “a reasonable criminal history background check using a reputable commercial service” be performed, this Proposal does not include the terms “reasonable” or “reputable.” Instead, this Proposal requires that the background

check meet the objective standard described above, which relies on the clearly-stated matters under Sections 8a(2)(D) and 8a(3)(D), (E), and (H) of the CEA. The Commission believes that using such an objective standard (one that does not require a market participant to make a subjective determination of what is “reasonable” or “reputable” for purposes of the alternative) furthers its goal of providing certainty to market participants while allowing the Commission to continue to ensure the fitness of its registrants.

If adopted, the proposed rule would supersede the DSIO No-Action Letters without prejudice to those who are relying on either of the DSIO No-Action Letters and have satisfied the requirements thereof prior to the date hereof.

### **III. Request for Comments**

The Commission requests comment generally on all aspects of this Proposal. In particular, the Commission requests comment on the following:

1. Should the Commission promulgate a final rule in relation to this Proposal to provide an alternative to the Fingerprinting Requirement for Foreign Natural Persons?
2. Please describe the burdens that Foreign Natural Persons face in complying with the Fingerprinting Requirement. How are these burdens different from those faced by natural persons that are not Foreign Natural Persons?
3. Is the criminal history background check as set forth in the Proposal sufficient to reveal the existence of all matters listed under Sections 8a(2)(D) or 8a(3)(D), (E), or (H) of the CEA, if any such matter existed? If not, please provide specific additional or alternative requirements for the criminal history background check.

4. This Proposal is limited to Foreign Natural Persons (i.e., individuals who have not resided in the United States since reaching 18 years of age). Should the Commission use another measure to determine whether an individual should be eligible for the proposed alternative to the Fingerprinting Requirement?

5. This Proposal requires that a background check be completed not more than one calendar year prior to the date of a Certifying Firm's related certification. Should the Commission require that the background check be completed within a different period?

6. Are persons eligible for the DSIO No-Action Relief currently availing themselves of that alternative to the Fingerprinting Requirement? To the extent that such persons are not, please provide reasons as to why they are not.

7. Are there any other matters that the Commission should consider in determining whether to adopt this Proposal?

#### **IV. Related Matters**

##### A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")<sup>23</sup> requires Federal agencies, in promulgating regulations, to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. This Proposal would affect certain FCMs, RFEDs, IBs, CPOs, CTAs, SDs, MSPs, LTM, FBs, and FTs that wish to take advantage of the alternative to fingerprinting to evaluate the fitness of their Foreign Natural Persons for which fingerprints must be submitted to

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<sup>23</sup> 5 U.S.C. 601 et seq.

NFA.<sup>24</sup> The Commission has previously determined that FCMs, RFEDs, CPOs, SDs, MSPs, and LTMs are not small entities for purposes of the RFA.<sup>25</sup> Therefore, the requirements of the RFA do not apply to those entities. With respect to CTAs, FBs, FTs, and IBs, the Commission has found it appropriate to consider whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular Commission regulation at issue.<sup>26</sup> As certain of these registrants may be small entities for purposes of the RFA, the Commission considered whether this rulemaking would have a significant economic impact on such registrants. This Proposal will solely provide an optional alternative to complying with the Fingerprinting Requirement, which already applies to such registrants, and would, therefore, not impose any new regulatory obligations on affected registrants. This Proposal is not expected to impose any new burdens on market participants. Rather, to the extent that this Proposal provides an alternative means to comply with the Fingerprinting Requirement and is elected by a market participant, the Commission believes it is reasonable to infer that the alternative is less burdensome to such participant. The Commission does not, therefore, expect small entities to incur any additional costs as a result of this Proposal.

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<sup>24</sup> This Proposal will also directly affect certain of such individuals; however, the Commission has noted that the RFA, by its terms, does not apply to individuals. See 48 FR 14933, 14954 n.115 (Apr. 6, 1983). Therefore, no analysis on the economic impact of this rule on individuals is provided.

<sup>25</sup> See Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982) (FCMs and CPOs); Leverage Transactions, 54 FR 41068 (Oct. 5, 1989) (LTMs); Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 55410, 55416 (Sept. 10, 2010) (RFEDs); and Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs).

<sup>26</sup> See 47 FR at 18620 (CTAs and FBs); Registration of Floor Traders; Mandatory Ethics Training for Registrants; Suspension of Registrants Charged With Felonies, 58 FR 19575, 19588 (Apr. 15, 1993) (FTs); and Introducing Brokers and Associated Persons of Introducing Brokers, Commodity Trading Advisors and Commodity Pool Operators; Registration and Other Regulatory Requirements, 48 FR 35248, 35276 (Aug. 3, 1983) (IBs).

Consequently, the Commission finds that no significant economic impact on small entities will result from this Proposal.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Proposal will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

1. Background

The Paperwork Reduction Act of 1995 (“PRA”)<sup>27</sup> imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. This Proposal would result in a collection of information within the meaning of the PRA, as discussed below. The Commission therefore is submitting this Proposal to the Office of Management and Budget (“OMB”) for review.

This Proposal contains collections of information for which the Commission has previously received control numbers from OMB. The titles for these collections of information are “Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, OMB control number 3038-0023”<sup>28</sup> and “Registration of Swap Dealers and Major Swap Participants, OMB control number 3038-0072.”<sup>29</sup>

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<sup>27</sup> 44 U.S.C. 3501 *et seq.*

<sup>28</sup> See OMB Control No. 3038-0023, <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0023#> (last visited Dec. 22, 2015). The collection is being retitled “Registration Under the Commodity Exchange Act.”

<sup>29</sup> See OMB Control No. 3038-0072, <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0072#> (last visited Dec. 22, 2015).

The responses to these collections of information are mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by OMB.

The collection of information in this Proposal would provide an optional alternative to complying with the Fingerprinting Requirement (as described above). Eligible persons would have the option to elect the certification process, but no obligation to do so. For this reason, except to the extent that the Commission is amending the subject OMB control numbers for PRA purposes to reflect the alternative certification process, this Proposal is not expected to impose any new burdens on market participants. Rather, to the extent that this Proposal provides an alternative means to comply with the Fingerprinting Requirement and is elected by market participants, it is reasonable for the Commission to infer that the alternative is less burdensome to such participants.

## 2. Revisions to Collections 3038-0023 and 3038-0072

Collections 3038-0023 and 3038-0072 are currently in force with their control numbers having been provided by OMB.

As discussed above, this Proposal would add a new exemption that would incorporate an alternative to fingerprinting to evaluate the fitness of certain Foreign Natural Persons. In order to qualify for this alternative, the Certifying Firm must take the steps required pursuant to this Proposal, including submitting the required certification to NFA and maintaining records of the criminal history background check and the results thereof. Requiring such actions would result in revisions to collections 3038-0023 and 3038-0072. Therefore, the Commission proposes to revise each of collections 3038-0023 and 3038-0072.

The Commission understands that NFA has received approximately 110 requests in each of 2014 and 2015 from market participants asking to avail themselves of the DSIO No-Action Relief. However, as discussed above, the relief provided by this Proposal is broader than the DSIO No-Action relief in that it extends the relief to certain natural persons connected to FBs and FTs. Therefore, the Commission estimates that Certifying Firms will submit 200 certifications per year to take advantage of the alternative provided in this Proposal.

As of November 23, 2015, there were (i) 9,259 Commission-registered FCMs, RFEDs, IBs, CPOs, CTAs, LTMs, FBs, and FTs and (ii) 103 Commission-registered SDs and MSPs, making an aggregate total of 9,362 registrants.<sup>30</sup> Of these registrants, SDs and MSPs make up approximately 1% and the other registrants make up approximately 99%. Based on the assumption that there is an equal distribution of certifications among the Certifying Firms eligible to provide them, the Commission estimates that approximately 198<sup>31</sup> FCMs, RFEDs, IBs, CPOs, CTAs, LTMs, FBs, and FTs and 2<sup>32</sup> SDs and MSPs will submit the required certification.

a. Estimated Additional Hour Burden for Collection 3038-0023

Collection 3038-0023 relates to collections of information from FCMs, RFEDs, IBs, CPOs, CTAs, LTMs, FBs, and FTs. Based on the above, the estimated additional hour burden for collection 3038-0023 of 495 hours is calculated as follows:

Number of registrants: 198.

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<sup>30</sup> These numbers are slightly overstated, as certain registrants are registered as SDs or MSPs and as an FCM, RFED, IB, CPO, CTA, LTM, FB, or FT.

<sup>31</sup> 198 was calculated by multiplying the number of estimated requests per year (200) by the proportion of registrants discussed above that are FCMs, RFEDs, IBs, CPOs, CTAs, LTMs, FBs, or FTs (approximately 99%).

<sup>32</sup> 2 was calculated by multiplying the number of estimated requests per year (200) by the proportion of registrants discussed above that are SDs or MSPs (approximately 1%).

Frequency of collection: As needed.

Estimated annual responses per registrant: 1.

Estimated aggregate number of annual responses: 198.

Estimated annual hour burden per registrant: 2.5.<sup>33</sup>

Estimated aggregate annual hour burden: 495 (198 registrants x 2.5 hours per registrant).

b. Estimated Additional Hour Burden for Collection 3038-0072

Collection 3038-0072 relates to collections of information from SDs and MSPs.

Based on the above, the estimated additional hour burden for collection 3038-0072 of 5 hours is calculated as follows:

Number of registrants: 2.

Frequency of collection: As needed.

Estimated annual responses per registrant: 1.

Estimated aggregate number of annual responses: 2.

Estimated annual hour burden per registrant: 2.5.<sup>34</sup>

Estimated aggregate annual hour burden: 5 (2 registrants x 2.5 hours per registrant).

3. Information Collection Comments

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<sup>33</sup> This collection's burdens are restricted to (i) registrants providing necessary information to commercial service provider(s) to conduct a criminal history background check for a Foreign Natural Person; (ii) registrants preparing and submitting the certification described herein; and (iii) registrants maintaining, in accordance with Commission regulation 1.31, records documenting that the criminal history background check was completed and the results thereof. To the extent that a market participant instead elects to conduct the background check internally, it is reasonable for the Commission to infer that doing so is less burdensome to such participant.

<sup>34</sup> See n.33, supra.

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566, or by e-mail at [OIRAsubmissions@omb.eop.gov](mailto:OIRAsubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collection of information discussed above may be obtained by visiting <http://RegInfo.gov>. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

### C. Cost-Benefit Considerations

Section 15(a) of the Act<sup>35</sup> requires the Commission to consider the costs and benefits of its actions before issuing a regulation under the Act. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (i) protection of market participants and the public; (ii) efficiency, competitiveness and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) considerations.

1. Costs

a. Costs to FCMs, RFEDs, IBs, CPOs, CTAs, SDs, MSPs, LTMs, FBs, FTs, Associated Persons, and other Foreign Natural Persons

Because this Proposal will solely provide an optional alternative to complying with the Fingerprinting Requirement, which alternative no FCM, RFED, IB, CPO, CTA, SD, MSP, LTM, FB, FT, associated person, or other Foreign Natural Person is required to elect, the Commission believes that this Proposal will not impose any costs on such persons.

b. Other Costs

Because the amendment to Commission regulation will allow FCMs, RFEDs, IBs, CPOs, CTAs, SDs, MSPs, LTMs, FBs, and FTs to submit, subject to the terms and conditions herein, a certification in lieu of a fingerprint card for Foreign Natural Persons, NFA will need to develop a process to review and retain such certifications and consider amending its applications and/or other forms to reflect the availability of this exception

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<sup>35</sup> 7 U.S.C. 19(a).

from the Fingerprinting Requirement. The Commission expects that the costs of such activities will not be significant.

## 2. Benefits

The Commission believes that, by establishing an alternative method for evaluating the fitness of Foreign Natural Persons for whom a fingerprint card must currently be submitted, this Proposal would help keep the United States' commodity interest markets accessible and competitive with other markets around the world by removing an impediment to participation in United States' markets by persons located outside of the United States while also ensuring the continued protection of market participants and the public. Further, the Commission believes that, by providing an alternative for persons outside the United States, this Proposal is consistent with the principles of international comity.

## 3. Section 15(a) Factors

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. CEA Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (i) protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations.

### i. Protection of Market Participants and the Public

This Proposal will continue to protect the public by ensuring that persons who are currently subject to the Fingerprinting Requirement, whether or not they reside in the

United States, must have their fitness reviewed through the completion of a background check.

ii. Efficiency, Competitiveness, and Financial Integrity of Markets

This Proposal may increase the efficiency and competitiveness of the markets by encouraging more participation in United States markets by persons located outside of the United States. The Commission does not believe that the integrity of financial markets would be harmed, because this proposal requires that the background check meet the objective standards which rely on the clearly-stated matters under Sections 8a(2)(D) and 8a(3)(D), (E), and (H) of the CEA.

iii. Price Discovery

The Commission generally believes that providing an alternative means of ensuring the fitness of a person who resides outside the United States for purposes of Commission registration, by reducing the burden that the Fingerprinting Requirement could impose on such persons, could reduce impediments to transact on a cross-border basis.

iv. Sound Risk Management Practices

As explained above, one of the critically important functions of registration is to allow the Commission to ensure that all futures and swaps industry professionals who deal with the public meet minimum standards of fitness and competency.<sup>36</sup> The fitness investigations that are part of the registration process permit the Commission and/or its delegates to (a) uncover past misconduct that may disqualify an individual or entity from registration and (b) help determine if such persons have disclosed all matters

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<sup>36</sup> See n.6, *supra*.

required to be disclosed in their applications to become registered with the Commission.<sup>37</sup> Having futures and swaps market participants that are not subject to any of the matters that would lead to a disqualification of registration under Sections 8a(2) or (3) of the CEA is one way to help ensure that a Commission registrant will not be a risk to its customers or to the market in general.

v. Other Public Interest Considerations

The Commission believes that, by providing an alternative for persons outside the United States, this Proposal is consistent with the principles of international comity.

vi. Request for Comments

The Commission invites public comment on its cost-benefit considerations, including the Section 15(a) factors described above. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of this Proposal with their comment letters.

List of Subjects

17 CFR Part 3

Associated persons, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Customer protection, Fingerprinting, Foreign exchange, Futures commission merchants, Introducing brokers, Leverage transaction merchants, Leverage transactions, Major swap participants, Principals, Registration, Reporting and recordkeeping requirements, Retail foreign exchange dealers, Swap dealers, Swaps.

For the reasons set forth in the preamble, the Commodity Futures Trading Commission proposes to amend part 3 as follows:

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<sup>37</sup> See n.7, *supra*.

## **PART 3—REGISTRATION**

1. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 552, 552b; 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 6p, 6s, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, 23.

2. In § 3.21, add paragraph (e) to read as follows:

### § 3.21 Exemption from fingerprinting requirement in certain cases.

\* \* \* \* \*

- (e) Foreign Natural Persons. (1) For purposes of this paragraph (e):

- (i) The term foreign natural person means any natural person who has not resided in the United States since reaching the age of 18 years.

- (ii) The term certifying firm means:

- (A) for any natural person that is a principal or associated person of a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, leverage transaction merchant, floor broker, or floor trader, such futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, leverage transaction merchant, floor broker, or floor trader; and

- (B) for any natural person that is responsible for, or directs, the entry of orders from a floor broker's or floor trader's own account, such floor broker or floor trader.

- (2) Any obligation in this part to provide a fingerprint card for a foreign natural person shall be deemed satisfied with respect to a certifying firm if:

- (i) such certifying firm causes a criminal history background check of such foreign natural person to be performed; and

(ii) the criminal history background check:

(A) is of a type that would reveal all matters listed under Sections 8a(2)(D) or 8a(3)(D), (E), or (H) of the Act relating to such foreign natural person;

(B) does not reveal any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the Act, other than those disclosed to the National Futures Association; and

(C) is completed not more than one calendar year prior to the date that such certifying firm submits the certification described in paragraph (e)(2)(iii) of this section;

(iii) a person authorized by such certifying firm submits, in reliance on such criminal history background check, a certification by such certifying firm to the National Futures Association, that:

(A) states that the conditions of paragraphs (e)(2)(i) and (ii) of this section have been satisfied; and

(B) is signed by a person authorized by such certifying firm to make such certification.

(3) The certifying firm shall maintain, in accordance with § 1.31 of this chapter, records documenting that the criminal history background check performed pursuant to paragraph (e)(2)(i) of this section was completed and the results thereof.

\* \* \* \* \*

Issued in Washington, DC, on January 4, 2016, by the Commission.

Robert N. Sidman,

Deputy Secretary of the Commission.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

**Appendix to Alternative to Fingerprinting Requirement for Foreign Natural  
Persons – Commission Voting Summary**

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo  
voted in the affirmative. No Commissioner voted in the negative.