

COMMODITY FUTURES TRADING COMMISSION**17 CFR Part 170**

RIN 3038-AC29

Membership in a Registered Futures Association**AGENCY:** Commodity Futures Trading Commission.**ACTION:** Proposed rule.

SUMMARY: The Commodity Futures Trading Commission (“Commission” or “CFTC”) is proposing to amend its regulations in order to require, subject to the existing exception for certain notice registered securities brokers or dealers (“BDs”), that all persons registered with the Commission as futures commission merchants (“FCMs”) must become and remain members of at least one registered futures association (“RFA”). This action (“Proposed Amendment”) is consistent with the regulatory philosophy underlying the Commodity Futures Modernization Act of 2000 (“CFMA”).

DATES: Comments must be received on or before December 1, 2006.

ADDRESSES: Comments on the Proposed Amendment should be sent to Eileen Donovan, Acting Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments may be sent by facsimile transmission to (202) 418-5521, or by e-mail to secretary@cftc.gov. Reference should be made to “Proposed Regulation Regarding Membership in a Registered Futures Association.” Comments also may be submitted by connecting to the Federal eRulemaking Portal at <http://www.regulations.gov> and following the comment submission instructions.

FOR FURTHER INFORMATION CONTACT: Helene D. Schroeder, Special Counsel, Compliance and Registration Section, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, telephone number: (202) 418-5450; facsimile number: (202) 418-5528; and electronic mail: hschroeder@cftc.gov.

SUPPLEMENTARY INFORMATION:**I. Background****A. Commission Regulation 170.15**

Commission Regulation 170.15¹ (“Regulation”) provides in general that

¹ 17 CFR 170.15. The Commission’s regulations can be accessed at http://www.access.gpo.gov/nara/cfr/waisidx_06/17cfrv1_06.html.

all persons who are required to register as FCMs must become and remain members of at least one RFA. The Regulation was adopted in 1983 pursuant to the Commission’s general rulemaking authority in Section 8a(5) of the Commodity Exchange Act (“Act” or “CEA”),² as well as the authority in Sections 17(m), (p) and (q) of the Act,³ which govern the registration of futures associations. Currently, the National Futures Association (“NFA”) is the sole RFA under Section 17(a) of the Act, and it is also a self-regulatory organization (“SRO”).

Section 8a(5) of the Act authorizes the Commission to promulgate such regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act. Section 17(m) of the Act permits the CFTC to require membership in an RFA if the CFTC determines that mandatory membership is “necessary or appropriate” to the purposes and objectives of the Act. Section 17(p) of the Act requires each RFA to have a comprehensive program to audit the financial and sales practices of its members and their associated persons. Section 17(q) of the Act requires each RFA to establish such programs “as soon as practicable but not later than September 30, 1985.”

When it proposed Regulation 170.15, the Commission received 50 comment letters, from a wide range of futures professionals and industry representatives. In adopting the Regulation, the Commission addressed concerns raised by two commenters⁴ and determined, in accordance with Section 8a(5) of the Act, that adoption of the Regulation was reasonably necessary to effectuate the purposes of the Act and, in particular, to provide a means for assuring that the purposes of Sections 17(m), (p) and (q) of the Act

² 7 U.S.C. 12a(5). The Act can be accessed at http://www.access.gpo.gov/uscode/title7/chapter1_.html.

³ 7 U.S.C. 21(m), (p) and (q).

⁴ Only two commenters opposed adoption of the Regulation, the Antitrust Division of the United States Department of Justice (“Antitrust Division”), and an individual engaged in the business of financial consulting, whose views were somewhat similar to those of the Antitrust Division. The Antitrust Division set forth three basic objections to the Regulation: (1) that the proposed regulation was of questionable constitutionality; (2) that the Commission lacked authority under the Act to adopt the proposed regulation; and (3) that the Commission was compelled to employ other less anticompetitive regulatory alternatives pursuant to Section 15 of the Act, because, in the view of the Antitrust Division, the proposed regulation would have serious anticompetitive consequences.

would be achieved.⁵ Specifically, the Commission found that comprehensive and effective self-regulation, and the avoidance of duplicative regulation, which are the underlying goals of Sections 17(m), (p) and (q) of the Act, would be enhanced by adoption of a Regulation mandating membership in an RFA by each person required to be registered as an FCM.

The Commission further noted that, in the absence of a mandatory membership requirement, the Commission would be required under relevant provisions of the Act to maintain costly and extensive direct regulation over those Commission registrants that would not be subject to any self-regulatory jurisdiction.⁶ In particular, the Commission would have had to continue to conduct financial, compliance and sales practice examinations of those FCMs, commodity pool operators (“CPOs”), commodity trading advisors (“CTAs”) and introducing brokers (“IBs”) that did not join NFA.⁷ Further, the Commission found that the need to maintain these extensive programs for the comparatively small number of persons likely to remain subject solely to the Commission’s direct regulation would be inefficient and duplicative of the self-regulatory functions for which NFA would be responsible.⁸

In proposing the Regulation, the Commission requested comment on whether the Regulation should be expanded to apply to all registered FCMs, regardless of whether such persons are required to be registered.⁹

⁵ See 48 FR 26304 (Jun. 7, 1983), which contains a detailed discussion of the Commission’s response to the commenters’ concerns.

⁶ See, e.g., 7 U.S.C. 21(e), which specifies that any person registered under the Act, who is not a member of an RFA, “shall be subject to such other rules and regulations as the Commission may find necessary to protect the public interest and promote just and equitable principles of trade.”

⁷ In this regard, the Commission found that the Regulation, which would operate in conjunction with NFA’s Bylaw 1101, would assure essentially complete NFA membership from the universe of commodity professionals: FCMs, CPOs, CTAs and IBs. This is because Bylaw 1101 prohibits members from carrying an account, accepting an order or handling a transaction in commodity futures contracts for or on behalf of any non-NFA member that is required to be registered with the CFTC as an FCM, IB, CPO or CTA.

⁸ It should be noted that, since the adoption of the Regulation, the Commission has been reauthorized four times, specifically, in 1986, 1992, 1995 and 2000. The Act also was amended by the Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, 108 Stat. 1545 (1994). At no time during reauthorization of the Commission or in connection with amending the CEA was the viability of the Regulation challenged or questioned.

⁹ 47 FR 53031, 53031-32 (Nov. 24, 1982). Pursuant to Sections 1a(20) and 4d(a)(1) of the Act, a person must register with the Commission as an

Ultimately, the Commission found that expansion was not necessary to ensure the effectiveness of NFA's self-regulatory program. The Commission noted, however, that it might consider expanding the Regulation in the future in light of new circumstances or experiences with the Regulation.¹⁰ As discussed below, in light of the new oversight philosophy advanced by the CFMA, the Commission believes that the Regulation now should be expanded.

B. The Commodity Futures Modernization Act of 2000

In December 2000, the CFMA was enacted into law. The CFMA extensively revised the Act and the regulatory landscape by adding a more flexible regulatory structure based on core principles for registered entities (designated contract markets, derivatives transaction execution facilities and derivatives clearing organizations).

Another relevant change made by the CFMA relates to the supervisory function of the Commission. Specifically, the CFMA transformed the role of the CFTC from a front-line regulator, with responsibility for direct supervision of the commodity futures markets and their participants and professionals, to an oversight agency.¹¹ In light of this new oversight role and the policies and purposes of the Act, including the goals of effective self-regulation and the avoidance of duplicative regulation, the Commission is of the view that all registered FCMs, regardless of whether any such FCM is required to be registered as such, must become and remain members of an RFA.

II. Proposed Amendment

Paragraph (a) of the Regulation currently provides that, except as

FCM if it solicits or accepts orders from customers for the purchase or sale of commodity futures contracts on or subject to the rules of a contract market or derivatives transaction execution facility and accepts customer funds related thereto. Some persons register with the Commission as FCMs even though they are not required to be registered. For example, a person may not currently handle exchange-traded customer business but may nonetheless register as an FCM or maintain its registration as an FCM if it anticipates handling exchange-traded futures business at a later date. Additionally, a person may be or become fully registered as a BD and wish to act as counterparty to off-exchange foreign currency futures or option transactions with retail customers. See 7 U.S.C. 2(c)(2)(B). The person may fully register as an FCM, although it engages in no other futures or options business and is not required to register as an FCM or become a member of NFA to act as a counterparty in these types of off-exchange foreign currency transactions.

¹⁰ 48 FR 26304, 26310.

¹¹ See 7 U.S.C. 5(b).

specified in paragraph (b) of the Regulation, each person required to register as an FCM must become and remain a member of at least one RFA. As proposed to be revised, the Regulation would require that each person registered as an FCM—*regardless* of whether any such person is required to be so registered—would need to become and remain a member of at least one RFA. This would ensure that all FCMs come under direct supervision of at least one SRO.

Paragraph (b) of the Regulation currently provides an exception for persons registered as FCMs pursuant to the notice registration provisions set forth in Regulation 3.10(a)(3). The Commission is not proposing to amend paragraph (b) of the Regulation, which was added following enactment of the CFMA. The CFMA established a joint regulatory framework for persons trading security futures products that included a notice registration procedure for FCMs and BDs that are fully registered, respectively, with the CFTC or the Securities and Exchange Commission. In this regard, the CFMA amended the CEA to specify that any BD that is notice registered with the Commission as an FCM is not required to become a member of an RFA.¹² Paragraph (b) was added in recognition of this joint regulatory framework and the need to avoid duplicative regulation and, further, to make clear that BDs who notice register as FCMs (in contrast to persons fully registered as FCMs) are not subject to the mandatory provisions and thus need not become members of an RFA.¹³

As members of NFA, persons registered as FCMs will be subject to the minimum financial requirements of NFA. NFA recently raised its minimum dollar amount of adjusted net capital for member FCMs to \$500,000. FCM members acting as counterparties of retail off-exchange foreign currency futures or option transactions are subject to even higher requirements (at least \$1 million, \$5 million if engaged in option transactions and \$7.5 million if seeking to qualify certain affiliates as counterparties).¹⁴

The Commission also notes that RFAs, like the other SROs, function as frontline regulators of their members subject to Commission oversight. Adverse registration or disciplinary actions of an RFA are subject to Commission review in accordance with

¹² See 7 U.S.C. 6f(a)(4)(C)(i).

¹³ See 66 FR 43080 (Aug. 17, 2001).

¹⁴ See NFA Financial Requirements Sections 1(a) and 11(a), which can be accessed at: <http://www.nfa.futures.org/nfaManual/financialRequirements.asp>.

Sections 17(h) and (i) of the Act and Part 171 of the regulations promulgated thereunder. RFA rules must be submitted to the Commission in accordance with Section 17(j) of the Act, and Sections 17(b)(8) and (9) outline the procedures an RFA must follow in proceeding against members and applicants for membership.¹⁵

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act¹⁶ requires that agencies, in proposing regulations, consider the impact of those regulations on small businesses. The Proposed Amendment would affect persons that are registered as FCMs, even if they are not required to be so registered. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on such entities in accordance with the Regulatory Flexibility Act.¹⁷ The Commission previously determined that registered FCMs are not small entities for the purpose of the Regulatory Flexibility Act.¹⁸

B. Cost-Benefit Analysis

Section 15(a) of the Act¹⁹ 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) 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: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission, in its discretion, can

¹⁵ Members of an RFA should not be concerned that they will have no right of appeal from an adverse action or that mandatory membership in an RFA will somehow deprive them of their due process rights under the Fifth Amendment to the United States Constitution. This issue was raised by the Antitrust Division in connection with the adoption of the Regulation, and the Commission addressed this concern when it announced adoption of the Regulation. See 48 FR 26304, 26307-08.

¹⁶ 5 U.S.C. 601 *et seq.*

¹⁷ 47 FR 18618 (Apr. 30, 1982).

¹⁸ 47 FR 18618, 18619.

¹⁹ 7 U.S.C. 19(a).

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 Proposed Amendment will result in efficiency enhancements for the Commission and should have no effect on the following three enumerated areas: (1) Efficiency, competitiveness or the financial integrity of futures markets; (2) price discovery; and (3) sound risk management practices. Specifically, the Proposed Amendment, if adopted, will require all fully-registered FCMs, even those that are not required to be registered as FCMs, to become members of an RFA. This will make such FCMs subject to the self-regulatory jurisdiction and oversight programs of NFA.

After considering these factors, the Commission has determined to propose the amendment to Regulation 170.15 discussed above. The Commission invites public comment on its application of the cost-benefit provision. Commenters also are invited to submit any data that they may have quantifying the costs and benefits of the Proposed Amendment with their comment letters.

List of Subjects in 17 CFR Part 170

Authority delegations (Government agencies), commodity futures, reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Commission proposes to amend 17 CFR part 170 as follows:

PART 170—REGISTERED FUTURES ASSOCIATIONS

1. The authority citation for part 170 continues to read as follows:

Authority: 7 U.S.C. 6p, 12a and 21, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106-554, 114 Stat. 2763 (2000).

Subpart C—Membership in a Registered Futures Association

2. Section 170.15 is amended by revising paragraph (a) to read as follows:

§ 170.15 Futures commission merchants.

(a) Except as provided in paragraph (b) of this section, each person registered as a futures commission merchant must become and remain a member of at least one futures association that is registered under section 17 of the Act and that provides for the membership therein of such

futures commission merchant, unless no such futures association is so registered.

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Issued in Washington, DC, on October 25, 2006, by the Commission.

Catherine D. Daniels,

Assistant Secretary of the Commission.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 630

[FHWA Docket No. FHWA-2006-25203]

RIN 2125-AF10

Temporary Traffic Control Devices

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The FHWA proposes to supplement its regulation that governs work zone safety and mobility in highway and street work zones to include conditions for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations. The proposed changes are intended to decrease the likelihood of fatalities and injuries to workers who are exposed to motorized traffic (vehicles using the highway for purposes of travel) while working on Federal-aid highway projects. This proposal is in response to section 1110 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1227.

DATES: Comments must be received on or before January 2, 2007.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590, or submit electronically at <http://dmses.dot.gov/submit> or fax comments to (202) 493-2251. Alternatively, comments may be submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination at the

above address from 9 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or print the acknowledgement page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Persons making comments may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477-78) or may visit <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Chung Eng, Office of Transportation Operations, (202) 366-8043; or Mr. Raymond W. Cuprill, Office of the Chief Counsel, (202) 366-0791, U.S. Department of Transportation, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Document Management System (DMS) at: <http://dmses.dot.gov/submit>. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's Web page at: <http://www.access.gpo.gov/nara>.

Background

Increasingly, maintenance and reconstruction of the nation's highways are taking place while traffic is maintained on the facility under repair. This has resulted in an increase in the exposure of workers to high-speed traffic and a corresponding increase in the risk of injury or death for highway workers, adding to worker safety concerns within an industry where the fatality rate for highway construction workers is already more than double that of other construction workers.¹

¹ Road Construction Hazards Fact Sheet—Laborers' Health and Safety Fund of North America, Continued