

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Part 160**

**RIN 3038-AE80**

**Privacy of Consumer Financial Information - Amendment to Conform Regulations to the Fixing America's Surface Transportation Act**

**AGENCY:** Commodity Futures Trading Commission

**ACTION:** Proposed rule.

**SUMMARY:** The Commodity Futures Trading Commission (“CFTC” or “Commission”) is proposing to revise its regulations requiring covered persons to provide annual privacy notices to customers. The proposed revisions implement the Fixing America’s Surface Transportation Act’s (“FAST Act”) December 2015 statutory amendment to the Gramm-Leach-Bliley Act (“GLB Act”) by providing an exception to the annual notice requirement under certain conditions.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN 3038-AE80, by any of the following methods:

- CFTC Comments Portal: <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.

- Mail: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW, Washington, DC 20581.

- Hand Delivery/Courier: Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

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

**FOR FURTHER INFORMATION CONTACT:** Matthew Kulkin, Director, (202) 418-5213, [mkulkin@cftc.gov](mailto:mkulkin@cftc.gov); Frank Fisanich, Chief Counsel, (202) 418-5949,

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<sup>1</sup> 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR Chapter I.

[ffisanich@cftc.gov](mailto:ffisanich@cftc.gov); or Jacob Chachkin, Special Counsel, (202) 418-5496,  
[jchachkin@cftc.gov](mailto:jchachkin@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:**

### **I. Background**

Title V, Subtitle A of the GLB Act<sup>2</sup> (“Title V”) mandates that financial institutions provide their consumers with whom they have customer relationships (“customers”) with annual notices regarding those institutions’ privacy policies and practices.<sup>3</sup> Further, subject to certain exceptions, if financial institutions share nonpublic personal information with particular types of third parties, the financial institutions must also provide their consumers with an opportunity to opt out of the sharing.<sup>4</sup> The Commission and entities subject to its jurisdiction were originally excluded from Title V’s coverage.<sup>5</sup> However, section 124 of the Commodity Futures Modernization Act of 2000<sup>6</sup> amended the Commodity Exchange Act (“CEA”) to add section 5g,<sup>7</sup> providing that futures commission merchants (“FCMs”), commodity trading advisors (“CTAs”), commodity pool operators (“CPOs”), and introducing brokers (“IBs”)<sup>8</sup> fall under the requirements of Title V and requiring the Commission to prescribe regulations in

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<sup>2</sup> Title V, Subtitle A, Pub.L. 106–102, 113 Stat. 1338 (1999), as codified at 15 U.S.C. 6801-6809.

<sup>3</sup> See 15 U.S.C. 6803.

<sup>4</sup> See 15 U.S.C. 6802(b). See also 15 U.S.C. 6809(4)(A) (defining “nonpublic personal information”).

<sup>5</sup> 15 U.S.C. 6809(3)(B).

<sup>6</sup> Section 124, Appendix E of Pub. L. 106-554, 114 Stat. 2763 (2000).

<sup>7</sup> 7 U.S.C. 7b-2.

<sup>8</sup> For the definitions of these intermediary categories, see section 1a of the CEA and § 1.3 of the Commission’s regulations. 7 U.S.C. 1a and 17 CFR 1.3.

furtherance of Title V. Thus, in 2001, the Commission promulgated part 160 of its regulations to establish standards relating to Title V.<sup>9</sup>

Consistent with Title V, part 160 requires that, generally, all FCMs, RFEDs, CTAs, CPOs, IBs, MSPs, and SDs that are subject to the jurisdiction of the Commission, regardless of whether they are required to register with the Commission (“Covered Persons”), provide a clear and conspicuous notice to customers that accurately reflects their privacy policies and practices not less than annually during the life of the customer relationship.<sup>10</sup>

On December 4, 2015, Congress amended Title V as part of the FAST Act.<sup>11</sup> This amendment, titled “Eliminate Privacy Notice Confusion,” added section 503(f) to the GLB Act to limit the circumstances under which a financial institution must provide a privacy notice to its customers on an annual basis.<sup>12</sup> In particular, under section 503(f), a financial institution is excepted from the requirement to send privacy notices on an annual basis if that financial institution (1) does not share nonpublic personal information except as described in certain specified exceptions; and (2) has not changed its policies and practices with regard to disclosing nonpublic personal information from those

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<sup>9</sup> Privacy of Customer Information, 66 FR 21235 (April 27, 2001). The Commission later modified its part 160 regulations to apply them to retail foreign exchange dealers (“RFEDs”), swap dealers (“SDs”), and major swap participants (“MSPs”). Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 55409 (Sept. 10, 2010) for RFEDs, and Privacy of Consumer Financial Information; Conforming Amendments Under Dodd-Frank Act, 76 FR 43874 (July 22, 2011) for SDs and MSPs. For the definition of RFED, *see* § 5.1(h). 17 CFR 5.1(h). For the definitions of SD and MSP, *see* section 1a of the CEA and § 1.3 of the Commission’s regulations. 7 U.S.C. 1a and 17 CFR 1.3.

<sup>10</sup> 17 CFR 160.1 and 160.5. Part 160 does not apply to foreign (non-resident) FCMs, RFEDs, CTAs, CPOs, IBs, MSPs, and SDs that are not registered with the Commission. 17 CFR 160.1. Therefore, they are not “Covered Persons” as defined in this release.

<sup>11</sup> Section 75001, Pub.L. 114-94, 129 Stat. 1312 (2015), available at [http://transportation.house.gov/uploadedfiles/fastact\\_xml.pdf](http://transportation.house.gov/uploadedfiles/fastact_xml.pdf) (last visited Nov. 30, 2018).

<sup>12</sup> *Id.*

policies and practices that the institution disclosed in the most recent disclosure it sent to consumers in accordance with section 503.<sup>13</sup> This amendment to the GLB Act became effective upon enactment of the FAST Act in December 2015. The Commission is now proposing to amend § 160.5 of the Commission’s regulations (the “Proposal”) to implement the FAST Act amendments to the GLB Act with respect to Covered Persons, as described below.<sup>14</sup>

## **II. Proposal**

The Proposal would amend § 160.5 to modify the first sentence of paragraph (a) and add a new paragraph (d). The modification to § 160.5(a) would add a reference to the exception, contained in new paragraph (d), to the requirement that a Covered Person annually provide a clear and conspicuous notice to customers that reflects the Covered Person’s privacy policies and practices (“annual privacy notice”) during the life of the customer relationship. Section 160.5(d)(1) would describe that exception by stating that a Covered Person is not required to deliver an annual privacy notice to customers pursuant to § 160.5(a) if it: (1) provides nonpublic personal information to nonaffiliated third parties only in accordance with the provisions of §§ 160.13, 160.14, 160.15 and any other exceptions adopted by the Commission pursuant to section 504(b) of the GLB

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<sup>13</sup> See 15 U.S.C. 6803(f).

<sup>14</sup> In developing the Proposal, pursuant to Section 6804(a)(2) of the GLB Act, the Commission consulted and coordinated with the Bureau of Consumer Financial Protection (“BCFP”), the Securities and Exchange Commission, the Federal Trade Commission, and the National Association of Insurance Commissioners, including regarding consistency and comparability with the regulations prescribed by such agencies. See 15 U.S.C. 6804(a)(2). In addition, the Proposal is consistent with rules recently finalized by the BCFP (“BCFP Final Rule”). See Amendment to the Annual Privacy Notice Requirement Under the Gramm-Leach-Bliley Act (Regulation P), 83 FR 40945 (Aug. 2018).

Act;<sup>15</sup> and (2) has not changed its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under §§ 160.6(a)(2) through (5) and § 160.6(a)(9) in the most recent privacy notice provided to such customer pursuant to part 160 of the Commission's regulations.

Paragraphs (1) through (9) of § 160.6(a) set forth the specific types of information that a Covered Person must include in its privacy notices.<sup>16</sup> The information required by § 160.6(a)(2) through (5) and § 160.6(a)(9), which § 160.5(d)(1)(ii) references, specifically relate to the policies and practices connected to disclosing nonpublic personal information. The Commission believes that other types of information required by § 160.6(a), such as the information under § 160.6(a)(1) (information collection) and § 160.6(a)(8) (confidentiality and security), do not relate to disclosure of nonpublic

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<sup>15</sup> Section 503(f)(1) of the GLB Act permits a financial institution to share nonpublic personal information in accordance with the provisions of sections 502(b)(2) or (e) of the GLB Act or regulations prescribed under section 504(b) of the GLB Act. *See* 15 U.S.C. 6802 and 6803. Sharing by a financial institution, as described in sections 502(b)(2) or (e), does not trigger the consumer's statutory right to opt out of such sharing. These exceptions are incorporated into existing Commission regulations at 17 CFR §§ 160.13 (Exception to opt out requirements for service providers and joint marketing), 160.14 (Exceptions to notice and opt out requirements for processing and servicing transactions), and 160.15 (Other exceptions to notice and opt out requirements). Section 504(b) of the GLB Act gives the Commission and other relevant agencies authority to include additional exceptions to certain regulations promulgated under Title V as are deemed consistent with Title V's purposes. *See* 15 U.S.C. 6804(b).

<sup>16</sup> 17 CFR 160.6 (a)(1)-(9). Section 160.6(a) provides that a Covered Person must include the following information in annual privacy notices sent to customers: (1) the categories of nonpublic personal information it collects; (2) the categories of nonpublic personal information it discloses; (3) subject to limited exception, the categories of affiliates and nonaffiliated third parties to whom it discloses nonpublic personal information; (4) subject to limited exception, the categories of nonpublic personal information about its former customers that it discloses and the categories of affiliates and nonaffiliated third parties to whom it discloses nonpublic personal information about its former customers; (5) if it discloses nonpublic personal information to a nonaffiliated third party under § 160.13 (and no other exception applies to that disclosure), a separate statement of the categories of information it discloses and the categories of third parties with whom it has contracted; (6) an explanation of the customer's rights under § 160.10(a) to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the method(s) by which the customer may exercise that right at that time; (7) any disclosures that it makes under section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act ("FCRA") (15 U.S.C. 1681a(d)(2)(A)(iii)) (that is, notices regarding the ability to opt out of disclosures of information among affiliates); (8) its policies and practices with respect to protecting the confidentiality and security of nonpublic personal information; and (9) any disclosure that it makes under § 160.6(b).

personal information.<sup>17</sup> Thus, since new GLB Act section 503(f)(2) states that a condition for the annual privacy notice exception is that a financial institution must not have changed its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed in the most recent notice sent to consumers, the Commission is proposing to frame the scope of the exception to reference only the types of information listed in §§ 160.6(a)(2) through (5) and § 160.6(a)(9).

GLB Act section 503(f) states that a financial institution that meets the requirements for the annual notice exception will not be required to provide annual notices “until such time” as that financial institution fails to comply with the criteria described in section 503(f)(1) and 503(f)(2), which would be implemented in proposed § 160.5(d)(1).<sup>18</sup> Covered Persons that no longer meet the conditions for the exception must provide customers with annual privacy notices. However, because the GLB Act is silent as to when a financial institution that has relied on and no longer meets the requirements of the exception must next provide an annual privacy notice, the Commission is proposing a framework for these circumstances. Specifically, § 160.5(d)(2) states that a Covered Person who has been excepted from delivering an annual privacy notice pursuant to § 160.5(d)(1) and who changes its policies or practices in such a way that it no longer meets the requirements for that exception, would, if such a

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<sup>17</sup> Id. The Commission notes that § 160.6(a)(7) requires that annual privacy notices incorporate opt-out disclosures provided under FCRA section 603(d)(2)(A)(iii) (that is, notices regarding the ability to opt out of disclosures of information among affiliates). GLB Act section 503(f)(1) does not mention these FCRA affiliate opt-out disclosures. The Commission believes that changes to these FCRA disclosures do not affect whether GLB Act section 503(f)(1) is satisfied and therefore should not affect whether a Covered Person satisfies proposed § 160.5(d)(1). The proposed rule is also consistent in this respect with the BCFP Final Rule.

<sup>18</sup> 15 U.S.C. 6803(f).

change required a revised privacy notice pursuant to § 160.8,<sup>19</sup> be required to provide an annual privacy notice in accordance with the timing requirements in § 160.5(a), treating the revised privacy notice as an initial privacy notice. Further, if the change in policies or practices did not require a revised privacy notice pursuant to § 160.8 to be sent, a Covered Person who has been previously excepted from delivering an annual privacy notice would be required to provide an annual privacy notice to customers within 100 days of the change in their policies or practices.<sup>20</sup>

The Commission is proposing a 100-day period for providing the annual privacy notice under these circumstances because, as affected customers would not receive a revised notice from the Covered Person prior to the Covered Person's change in policies or practices, the Commission believes the annual privacy notice should be delivered within a relatively short time so that customers are informed of the change in a timely manner. Further, the Commission preliminarily believes that 100 days would allow a Covered Person to meet the notice requirement without imposing additional costs on Covered Persons. Particularly, a 100-day delivery period would accommodate the inclusion of the notice with their quarterly statements.<sup>21</sup> In addition, this 100-day

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<sup>19</sup> 17 CFR 160.8 (Revised privacy notices).

<sup>20</sup> In developing this framework, the Commission looked to § 160.8 because that provision already addresses circumstances in which a Covered Person might change its privacy policies or practices in a way that affects the content of the notices. Specifically, § 160.8 requires that a Covered Person provide a revised notice to consumers before implementing certain types of changes. In other cases, part 160 currently contemplates that a change in policy or practice that affects the content of the notices would simply be reflected on the next regular annual notice provided to customers pursuant to § 160.5. The Commission is therefore proposing different timing requirements for resumption of delivery of annual notices, depending on whether the change at issue would trigger the requirement for a revised notice under § 160.8 prior to the change taking effect.

<sup>21</sup> The Commission also notes that a delivery requirement resulting from a change in policies and practices described under proposed Commission regulation 160.5(d)(1)(ii) is effectively a one-time burden for a Covered Person absent additional changes to its policies and practices. Specifically, after providing the one annual privacy notice, the Covered Person would once again meet both of the conditions for the

delivery period is required under the BCFP Final Rule and proposing the same delivery requirement as the BCFP furthers the Commission’s goal of having its regulations be consistent with those of other regulators, where appropriate.

To ensure that the Proposal, if adopted, achieves its stated purpose, the Commission requests comment generally on all aspects of the Proposal and this release.

### **III. Related Matters**

#### **A. Regulatory Flexibility Act**

The Regulatory Flexibility Act<sup>22</sup> (“RFA”) requires federal agencies 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. The Proposal would add an exception to § 160.5’s requirement that Covered Persons deliver annual privacy notices, as discussed above.

The Proposal would affect Covered Persons (i.e., certain FCMs, RFEDs, CTAs, CPOs, IBs, MSPs, and SDs). To the extent that the Proposal would impact Covered Persons that may be small entities for purposes of the RFA,<sup>23</sup> the Commission considered

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exception—it would not be sharing other than as described under Commission regulation 160.5(d)(1)(i) and its policies and practices would not have changed since it provided the annual privacy notice. Because the Covered Person would once again meet the conditions for the exception, it would not be required to provide future annual privacy notices.

<sup>22</sup> 5 U.S.C. 601 *et seq.*

<sup>23</sup> The Commission has previously determined that certain entities are not “small entities” for purposes of the RFA. *See, e.g.*, 47 FR 18618, 18619 (Apr. 30, 1982) (registered FCMs); 75 FR 55410, 55416 (Sept. 10, 2010) (RFEDs); 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs). However, the Commission has determined that CPOs exempt pursuant to 17 CFR 4.13(a) are small entities. *See* 46 FR 26004 (May 8, 1981); 47 FR at 18619. The definitions of IB and CTA are also broad enough to potentially encompass “small entities.” *See* 48 FR 35248, 35276 (Aug. 3, 1983) (recognizing that the IB definition “undoubtedly encompasses many business enterprises of variable size”); 47 FR at 18620 (the category of CTAs is “too broad” for a general determination regarding their small entity status).

whether the Proposal would have a significant economic impact on such Covered Persons.

As a Covered Person may continue to provide annual privacy notices and not avail itself of the proposed exception to the annual privacy notice requirement in § 160.5, the Proposal would not impose any new regulatory obligations on Covered Persons, including Covered Persons that may be small entities for purposes of the RFA. Rather, to the extent that a Covered person relies on the proposed exception, it would simply avoid providing a privacy notice annually until such time as it is no longer eligible for the exception. The Proposal's clarification that, once it is no longer eligible for the exception, the Covered Person would need to provide a privacy notice either in accordance with existing § 160.8 or within 100 days would also not result in any new burdens. Sections 160.5 and 160.8 are existing requirements to deliver annual privacy notices and revised privacy notices under certain circumstances. Further, the Commission endeavored to reduce any burdens for those Covered Persons utilizing the exception by allowing the proposed 100-day period following loss of the exception to resume delivery of an annual privacy notice where a notice is not already required pursuant to § 160.8, as discussed above. The Commission does not, therefore, expect that any small entities that may be impacted by the rule to incur any additional costs as a result of the Proposal.

Therefore, the Commission believes that the Proposal will not have a significant economic impact on a substantial number of small entities, as defined in the RFA.

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

on a substantial number of small entities. The Commission invites comment on the impact of the Proposal on small entities.

## **B. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (“PRA”)<sup>24</sup> imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (“OMB”) control number.

The Commission believes that the Proposal would not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of OMB under the PRA. However, by providing the exception to the requirement to provide annual privacy notices to customers discussed above, the Proposal would modify a collection of information for which the Commission has previously received a control number from OMB. The title for this collection of information is “Privacy of Consumer Financial Information, OMB control number 3038-0055”.<sup>25</sup> Collection 3038-0055 is currently in force with its control number having been provided by OMB. Accordingly, the Commission will submit to OMB revisions to OMB control number 3038-0055 to reflect the proposed addition of this exception and the resulting reduction of burden. In particular, the Commission estimates that the

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<sup>24</sup> 44 U.S.C. 3501 *et seq.*

<sup>25</sup> *See* OMB Control No. 3038-0055, <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0055#> (last visited Nov. 30, 2018).

availability of the exception in Commission regulation 160.5(d) will reduce the current number of annual privacy notices by approximately 30%. Accordingly, in accordance with its previous estimates, the Commission estimates that the Proposal would reduce the total number of responses by 113,620 responses annually and reduce the time burden by approximately 1,136 hours annually. The Commission believes that the one-time cost of adopting the annual privacy notice exception for Covered Persons that adopt it is de minimis.

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 USC 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 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 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 CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. 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: (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 considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) considerations.

As discussed above, the Commission is proposing to implement the FAST Act's amendments to the GLB Act by amending § 160.5 to incorporate an exception to a Covered Person's obligation to provide an annual privacy notice under certain specified circumstances, consistent with section 503(f) of the GLB Act and address when a Covered Person that has relied on and no longer meets the requirements of that exception must next provide an annual privacy notice.

Below, the Commission discusses the costs and benefits of the Proposal.<sup>26</sup> The baseline against which the costs and benefits are considered is the current status quo for

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<sup>26</sup> The Commission endeavors to assess the expected costs and benefits of its proposed rule in quantitative terms where possible. Where estimation or quantification is not feasible, the Commission provides its

Covered Persons with respect to their obligation to provide annual privacy notices. The Commission recognizes that there are inherent costs and benefits to Covered Persons and their customers associated with providing an exception to the annual privacy notice requirement, which Congress took into account in amending the GLB Act under the FAST Act. The Commission further recognizes that there are costs and benefits due to discretionary actions taken by the Commission in implementing the exception. In formulating the Proposal, the Commission was mindful of the policy goals that drove Congress to create this exception and endeavored not to impose unnecessary burdens on Covered Persons in proposing when a Covered Person would next need to provide an annual privacy notice after loss of the exception.<sup>27</sup>

The Commission anticipates that some Covered Persons may avail themselves of the exception in the Proposal and not provide annual privacy notices. The Proposal would benefit these Covered Persons that are opting out of providing annual privacy notices by reducing their costs associated with sending such notices. Further, because no Covered Person is required to avail themselves of the exception in the Proposal, as discussed above, the Commission believes that it is reasonable to conclude that only

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discussion in qualitative terms. Given a general lack of relevant data, the Commission's assessment is generally provided in qualitative terms.

<sup>27</sup> The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving United States firms taking place across international boundaries; with some commission registrants being organized outside of the United States; with some leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of this proposal on all activity subject to the proposed and amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on United States commerce under CEA section 2(i). In particular, the Commission notes that some Covered Persons are located outside of the United States.

those Covered Persons that expect a net benefit from the Proposal will stop providing annual privacy notices under the proposed exception.

The Commission recognizes that, as a result of the Proposal, certain customers of Covered Persons may no longer receive privacy notices annually and therefore would not be made aware of the Covered Persons' policies and procedures as frequently. However, the scope of the exception is tailored such that customers of Covered Persons could only not receive an annual privacy notice to the extent that the Covered Person: (1) provides nonpublic personal information to nonaffiliated third parties only in accordance with the provisions of §§ 160.13, 160.14, 160.15 and any other exceptions adopted by the Commission pursuant to section 504(b) of the GLB Act; and (2) has not changed its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under §§ 160.6(a)(2) through (5) and § 160.6(a)(9) in the most recent privacy notice provided to such customer pursuant to part 160 of the Commission's regulations. Thus, the Proposal may reduce confusion among customers by providing them with disclosures when they would be most relevant, i.e., when disclosure policies change after the customer relationship begins and to the extent an institution shares sensitive personal information with third parties for marketing purposes.

In proposing when to require the resumption of annual privacy notices following the loss of the proposed exception, the Commission endeavored to propose requirements consistent with existing timing requirements for privacy notices under current

regulations, as discussed above, and to provide clarity to Covered Persons.<sup>28</sup>

Specifically, in proposing to require the resumption of annual privacy notices within 100 days of the loss of the exception where a revised privacy notice is not required under § 160.8, the Commission has tried not to impose unnecessary burdens on Covered Persons while taking into account the potential impact on a Covered Person's customers of not receiving such notices in a timely manner. The Commission considered different requirements for the resumption of annual privacy notices in these circumstances (e.g., requiring a notice before the change in the policy or practice causing the loss of the availability of the exception or immediately following such change, or within 60 or 90 days of such change). The Commission is proposing the 100 day period because it believes the proposal to be consistent with the revisions of the GLB Act in the FAST Act and current regulations while allowing Covered Persons some flexibility in resuming annual privacy notices. This flexibility would allow, for example, these notices to be included with quarterly statements to reduce any costs from resuming providing such notices. In proposing timing requirements for the resumption of annual privacy notices where a revised notice is required under § 160.8, the Commission is proposing to clarify the effect of such a revised notice on the requirement that a Covered Person provide an annual privacy notice and on the eligibility for the proposed exception to this requirement. Specifically, the Commission is clarifying that a Covered Person should provide the notice currently required by § 160.8 and treat such notice as an initial privacy notice.

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<sup>28</sup> In addition, as discussed above, the Commission notes that a Covered Person's obligation to resume providing annual privacy notices may be effectively a one-time burden absent additional changes to their policies and practices.

### **3. Section 15(a) Considerations**

In light of the foregoing, the CFTC has evaluated the costs and benefits of the Proposal pursuant to the five considerations identified in section 15(a) of the CEA as follows:

#### **(1) Protection of Market Participants and the Public**

The requirements of § 160.5 protect market participants by ensuring that customers of Covered Persons are informed about such Covered Persons' practices and policies with respect to nonpublic personal information and certain other information described in § 160.6. As discussed above, the Commission recognizes that, as a result of the Proposal, some customers of Covered Persons may no longer receive privacy notices annually and therefore would not be made aware of the Covered Persons' policies and procedures as frequently. However, the scope of the exception is tailored such that customers of Covered Persons could only not receive an annual privacy notice to the extent that the Covered Person: (1) provides nonpublic personal information to nonaffiliated third parties only in accordance with the provisions of §§ 160.13, 160.14, 160.15 and any other exceptions adopted by the Commission pursuant to section 504(b) of the GLB Act; and (2) has not changed its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under §§ 160.6(a)(2) through (5) and § 160.6(a)(9) in the most recent privacy notice provided to such customer pursuant to part 160 of the Commission's regulations. Further, as discussed above, the Proposal may reduce confusion among customers by providing them with disclosures when they would be most relevant. In addition, the Commission preliminarily believes that the proposed

requirements for the resumption of annual privacy notices following the loss of the exception in the Proposal will allow customers of Covered Persons to receive annual privacy notices in a timely manner while not causing Covered Persons to incur any additional costs.

(2) Efficiency, Competitiveness, and Financial Integrity of Markets

The Commission believes that the Proposal may improve competition by reducing costs for Covered Persons that meet the requirements of the exception in proposed § 160.5(d) to not deliver an annual privacy notice and elect to not deliver such notices. Specifically, the Commission expects that the Proposal would likely result in fewer substantially similar annual privacy notices being delivered, which would reduce costs associated with producing and delivering such privacy notices. Further, to the extent that a Covered Person is no longer able to take advantage of the exception to providing annual privacy notices and is required to resume providing them, the Commission preliminary believes that a Covered Person will not incur any additional costs in doing so, as the Covered Person would simply need to resume sending annual privacy notices as currently required.

(3) Price Discovery

The Commission has not identified an impact on price discovery as a result of the Proposal.

(4) Sound Risk Management

The Commission has not identified an impact on sound risk management as a result of the Proposal.

#### (5) Other Public Interest Considerations

The Commission has not identified an impact on other public interest considerations as a result of the Proposal.

#### **4. Request for Comments on Cost-Benefit Considerations**

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 the Proposal with their comment letters.

#### **D. Antitrust Considerations**

Section 15(b) of the CEA requires the Commission to “take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of [the CEA], in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of [the CEA].”<sup>29</sup>

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the Proposal implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered the Proposal to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The

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<sup>29</sup> 7 U.S.C. 19(b).

Commission requests comment on whether the Proposal is anticompetitive and, if it is, what the anticompetitive effects are.

Because the Commission has preliminarily determined that the Proposal is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the Proposal.

#### **List of Subjects in 17 CFR Part 160**

Brokers, Consumer protection, Privacy, Reporting and recordkeeping requirements.

#### **17 CFR Part 160**

For the reasons stated above, the Commodity Futures Trading Commission proposes to amend part 160 of Title 17 of the Code of Federal Regulations as set forth below:

#### **PART 160 PRIVACY OF CONSUMER FINANCIAL INFORMATION**

- Revise the first sentence of paragraph (a)(1) and add subsection (d) to section 160.5 to read as follows:

(a)(1) Except as provided by paragraph (d) of this section, you must provide a clear and conspicuous notice to customers that accurately reflects your privacy policies and practices not less than annually during the life of the customer relationship. \*\*\*\*\*

(d) *Exception to annual privacy notice requirement.* (1) You are not required to deliver an annual privacy notice if you:

(i) Provide nonpublic personal information to nonaffiliated third parties only in accordance with the provisions of §§ 160.13, 160.14, and § 160.15 of this part and any

other exceptions adopted by the Commission pursuant to section 504(b) of the GLB Act;  
and

(ii) Have not changed your policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under §§ 160.6(a)(2) through (5) and § 160.6(a)(9) of this part in the most recent privacy notice sent to the customer pursuant to this part.

*(2) Delivery of annual privacy notice after you no longer meet requirements for exception.* If you have been excepted from delivering an annual privacy notice pursuant to paragraph (d)(1) of this section and change your policies or practices in such a way that you no longer meet the requirements for that exception, you must comply with paragraph (d)(2)(i) or (d)(2)(ii) of this section, as applicable.

*(i) Changes preceded by a revised privacy notice.* If you no longer meet the requirements of paragraph (d)(1) of this section because you change your policies or practices in such a way that § 160.8 of this part requires you to provide a revised privacy notice, you must provide an annual privacy notice in accordance with the timing requirements in paragraph (a) of this section, treating the revised privacy notice as an initial privacy notice.

*(ii) Changes not preceded by a revised privacy notice.* If you no longer meet the requirements of paragraph (d)(1) of this section because you change your policies or practices in such a way that § 160.8 of this part does not require you to provide a revised privacy notice, you must provide an annual privacy notice within 100 days of the change in your policies or practices that causes you to no longer meet the requirements of paragraph (d)(1).

Issued in Washington, DC on November 30, 2018, by the Commission.

Christopher Kirkpatrick,

*Secretary of the Commission.*

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

**Appendices to Privacy of Consumer Financial Information - Amendment to Conform Regulations to the Fixing America's Surface Transportation Act – Commission Voting Summary and Chairman's Statement**

**Appendix 1 – Commission Voting Summary**

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2 – Statement of Chairman J. Christopher Giancarlo**

This proposal will revise Commission regulation 160.5's privacy notice requirements to implement the Fixing America's Surface Transportation (FAST) Act's December 2015 statutory amendment to the Gramm-Leach-Bliley Act (GLBA). In proposing to implement what is now almost a three-year-old statutory requirement, this proposal is a good demonstration of this Commission's commitment to supporting good governance.