The Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") are adopting a new rule and amending the rule under the Commodity Exchange Act ("CEA") and adopting two new rules under the Securities Exchange Act of 1934 ("Exchange Act"). The rules will modify the applicable statutory listing standards requirements to permit security futures to be based on individual debt securities or a narrow-based security index composed of such securities. In addition, these rules and rule amendment will exclude from the definition of "narrow-based security index" debt securities indexes that satisfy specified criteria. A future on a debt securities index that is excluded from the definition of narrow-based security index will not be a security futures contract subject to the exclusive jurisdiction of the CFTC.

**Supplementary Information:**

**I. Introduction**

**A. Background**

Futures contracts on single securities and on narrow-based security indexes (collectively, "security futures") are jointly regulated by the CFTC and the SEC. The definition of narrow-based security index under both the CEA and the Exchange Act sets forth the criteria for such joint regulatory jurisdiction. Futures on indexes that are not narrow-based security indexes are subject to the exclusive jurisdiction of the CFTC. Under the CEA and the Exchange Act, an index is a narrow-based security index if it meets any one of four criteria. Further, the CEA and Exchange Act provide that, notwithstanding the statutory criteria, an index is not a narrow-based security index if a contract of sale for future delivery on the index is traded on or subject to the rules of a board of trade and meets such requirements as are jointly established by rule, regulation, or order of the Commissions.

The statutory definition of narrow-based security index was designed primarily for indexes composed of equity securities, not debt securities. For example, while three criteria in the statutory definition of narrow-based security index, most indexes composed of debt securities, regardless of the number or amount of underlying component securities in the index, would fall within the statutory definition of narrow-based security index.

On April 10, 2006, the Commissions proposed rules that would exclude debt securities indexes that satisfied certain criteria from the statutory definition of narrow-based security index. Futures on debt securities indexes that satisfy the criteria of the proposed rules would not be security futures and thus would be subject to the exclusive jurisdiction of the CFTC. In addition, the proposed rules and rule amendment would modify the statutory listing standards to permit the trading of security futures on single debt securities and narrow-based security indexes composed of debt securities.

The Commissions received comment letters on the proposed rules from two futures exchanges, the Chicago Mercantile Exchange ("CME") and the Board of Trade of the City of Chicago ("CBOT"), and from the Futures Industry Association ("FIA"). All of the commenters generally supported the Commissions' proposal. The CME and the CBOT requested the opportunity for public comment on the listing standards.

**FOR FURTHER INFORMATION CONTACT:**

**CFTC:** Elizabeth L. Ritter, Deputy General Counsel, at 202/418-5052, or Julian E. Hammar, Counsel, at 202/418-5118, Office of General Counsel; or Thomas M. Leahy, Jr., Associate Director, Product Review, at 202/418-5278, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
that would apply to security futures on debt securities and indexes composed of debt securities.¹⁰ In addition, the CBOT suggested that the Commissions reduce the minimum remaining outstanding principal amount requirement from $250,000,000 to $100,000,000.¹¹

The FIA asked the Commissions to confirm that: (1) A debt security index that meets the criteria in the rules would be broad-based even if the index included products or instruments that are not securities; and (2) in a debt securities index that includes both exempted securities and securities that are not exempted securities, it would be necessary to take into account only securities that are not exempted securities in determining compliance with the criteria in the rules.¹² These comments are discussed more fully below.

B. Overview of Adopted Rules

After careful consideration, the Commissions have determined to adopt the rules and rule amendment largely as proposed, with changes to address certain issues raised by the commenters. The Commissions believe it is appropriate to exclude certain debt securities indexes from the statutory definition of narrow-based security index using criteria that differ in certain respects from the criteria applicable to indexes composed of equity securities. The Commissions believe that such modified criteria for debt securities indexes are necessary or appropriate in the public interest and consistent with the protection of investors because the criteria recognize the differences between equity and debt and would permit security futures to be based on debt securities indexes.¹³ In particular, the Commissions believe that the modified criteria addressing diversification and public information about, and market familiarity with, the issuers of the securities underlying a debt securities index will reduce the likelihood that a future on such an index would be readily susceptible to manipulation and thus are more appropriate criteria for debt securities indexes.

1. CEA Rule 41.21 and Exchange Act Rule 6h–2

The Commissions are amending CEA Rule 41.21 and adopting Exchange Act Rule 6h–2 to modify the statutory listing standards for security futures to permit the trading of security futures based on debt securities that are notes, bonds, debentures, or evidences of indebtedness and indexes composed of such securities.

2. CEA Rule 41.15 and Exchange Act Rule 3a55–4

The Commissions are adopting CEA Rule 41.15 and Exchange Act Rule 3a55–4, which exclude from the definition of narrow-based security index any debt securities index that satisfies certain criteria. Specifically, CEA Rule 41.15 and Exchange Act Rule 3a55–4 provide that a debt securities index will not be considered a narrow-based security index for purposes of Section 3(a)(55) of the Exchange Act and Section 1a(25) of the CEA if: (1) Each index component is a security that is a note, bond, debenture, or evidence of indebtedness; (2) the index is comprised of more than nine securities issued by more than nine non-affiliated issuers; (3) the securities of any issuer included in the index do not comprise more than 30% of the index’s weighting; (4) the securities of five non-affiliated issuers included in the index do not comprise more than 60% of the index’s weighting; and (5) the issuer of a security included in an index satisfies certain requirements.

For securities that are not exempted securities, CEA Rule 41.15 and Exchange Act Rule 3a55–4 require that the issuer of a component security: (1) Be required to file reports pursuant to section 13 or 15(d) of the Exchange Act; (2) have worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more; (3) have outstanding securities that are notes, bonds, debentures, or evidences of indebtedness with a total remaining principal amount of at least $1 billion; or (4) be a government of a foreign country or a political subdivision of a foreign country.

In addition, CEA Rule 41.15 and Exchange Act Rule 3a55–4 require each security of an issuer included in an index to have a total remaining principal amount outstanding of at least $250,000,000. Alternatively, to respond to the CBOT’s comment, the final rule permits a municipal security in the index to have only $200,000,000 total remaining principal amount outstanding if the issuer of such municipal security has outstanding debt securities with a total remaining principal amount of at least $1 billion.

CEA Rule 41.15 and Exchange Act Rule 3a55–4 provide a de minimis exception from the issuer eligibility and minimum outstanding principal balance criteria if a predominant percentage of the securities comprising the index’s weighting satisfy all of the applicable criteria.

In addition, in response to the FIA’s comments, the Commissions are adding an alternative provision that would permit exempted securities that are debt securities (other than municipal securities) to be excluded from an index in determining whether such index is not a narrow-based security index under the rules.

Finally, CEA Rule 41.15 and Exchange Act Rule 3a55–4 contain a definition of “control” solely to assess affiliation among issuers for purposes of determining satisfaction of the criteria established in the rules.

II. Discussion of Final Rules

A. Modification of the Statutory Listing Standards Requirements for Security Futures Products

The Commodity Futures Modernization Act of 2000 amended the Exchange Act, and the CEA by, among other things, establishing the criteria and requirements for listing standards for securities on which security futures products can be based. The Exchange Act¹⁴ provides that it is unlawful for any person to effect transactions in security futures products that are not listed on a national securities exchange or a national securities association registered pursuant to Sections 6(a) or 15A(a), respectively, of the Exchange Act.¹⁵ The Exchange Act¹⁶ further provides that such exchange or association is permitted to trade only security futures products that conform with listing standards filed with the SEC and that meet the criteria specified in Section 2(a)(1)(D)(i) of the CEA.¹⁷ The CEA¹⁸ states that no board of trade shall be designated as a contract market with respect to, or registered as a derivatives transaction execution facility (“DTEF”) for, any contracts of sale for future delivery of a security futures product unless the board of trade and the applicable contract met the criteria specified in that section. Similarly, the Exchange Act¹⁹ requires that the listing standards filed with the SEC by an

¹⁰ See CME Letter, supra note 8, at 2; CBOT Letter, supra note 8, at 3–4.
¹¹ See CBOT Letter, supra note 8; at 2–3.
¹² See FIA Letter, supra note 9, at 2.
¹⁶ 15 U.S.C. 78f(a) and 76o–3(a).
exchange or association meet specified requirements.

In particular, the Exchange Act \(^{21}\) and the CEA \(^{22}\) require that, except as otherwise provided in a rule, regulation, or order, a security future must be based upon common stock and such other equity securities as the Commissions jointly determine appropriate. A security future on a debt security or a debt securities index currently would not satisfy this requirement.

The Exchange Act and the CEA, however, provide the Commissions with the authority to jointly modify this requirement to the extent that the modification fosters the development of fair and orderly markets in security futures products, is necessary or appropriate in the public interest, and is consistent with the protection of investors.\(^{23}\) Pursuant to this authority, the Commissions have determined that it is appropriate in the public interest and consistent with the protection of investors to amend CEA Rule 41.21 and adopt CEA Rule 6h–2 to permit the trading of security futures based on debt securities that are notes, bonds, debentures, or evidences of indebtedness and indexes composed of such securities. This modification is necessary to allow the listing and trading of new and potentially useful financial products.

Security futures on debt securities or indexes composed of debt securities must also conform with the listing standards of the national securities exchange or national securities association on which they trade. The Exchange Act requires, among other things, that such listing standards be no less restrictive than comparable listing standards for options traded on a national securities exchange or national securities association.\(^{24}\) In addition, the issuer of any security underlying the security future, including each component security of a narrow-based security index, would have to be subject to the reporting requirements of the Exchange Act due to the requirement that the security be registered under Section 12 of the Exchange Act.\(^{25}\) The listing standards for a security future also must require that trading in the security future not be readily susceptible to manipulation of the price of such security future, nor to causing or being used in the manipulation of the price of an underlying security, option on such security, or option on a group or index including such securities.\(^{26}\) Because these listing standards will continue to provide important investor protections and safeguards against such products being readily susceptible to manipulation or causing or being used in the manipulation of any underlying security or option on such underlying security or securities, the Commissions believe that new Exchange Act Rule 6h–2 and the amendments to CEA Rule 41.21 will foster the development of fair and orderly markets in security futures products, are appropriate in the public interest, and are consistent with the protection of investors.

**B. Rules Excluding Certain Debt Securities Indexes From the Definition of Narrow-Based Security Index**

The Commissions are adopting new CEA Rule 41.15 and Exchange Act Rule 3a55–4, which exclude from the statutory definition of narrow-based security index any debt securities index that satisfies certain criteria. A futures contract on such an index would not be a security future and thus would be subject to the exclusive jurisdiction of the CFTC. The Commissions believe that the criteria in the rules, including the requirements relating to the maximum weighting and concentration of securities of an issuer in an index, the eligibility conditions for issuers, and the minimum remaining outstanding principal amount requirement should reduce the likelihood that a future on such an index would be readily susceptible to manipulation or could be used to manipulate the market for the underlying debt securities.\(^{27}\)

1. Index Composed Solely of Debt Securities

The new rules require that, for an index to qualify for the exclusion from the definition of “narrow-based security index,” each component security of the index must be a security\(^ {28}\) that is a note, bond, debenture, or evidence of indebtedness.\(^ {29}\) Further, none of the securities of an issuer included in the index may be an equity security, as defined in Section 3(a)(11) of the Exchange Act and the rules adopted thereunder.\(^ {30}\) Thus, any security index that includes an equity security will not qualify for the exclusion for indexes composed of debt securities.\(^ {31}\)

The FIA asked the Commissions to confirm that a debt security index that meets the criteria in the rules would be broad-based even if the index included products or instruments that are not securities.\(^ {32}\) The Commissions’ proposed rules required that each component security of an index be a security that is a note, bond, debenture, or evidence of indebtedness. The Commissions did not propose or solicit comment on whether, and to what extent, indexes that include instruments that are not securities should be excluded from the definition of narrow-based security index and have not, to date, considered the regulatory implications of so excluding futures on indexes composed of different product classes. Accordingly, the Commissions are adopting these requirements as proposed without permitting indexes under the criteria to include products or instruments that are not securities.

2. Number and Weighting of Index Components

The exclusion also includes conditions relating to the minimum number of securities of non-affiliated issuers that must be included in an index and the maximum permissible weighting of securities in the index. The new rules provide that, for an index to qualify for the exclusion:

- The index must be composed of more than nine securities issued by more than nine non-affiliated issuers;\(^ {33}\)


\(^{27}\) Although broad-based debt securities indexes that meet the criteria in the rules should have a reduced likelihood of being readily susceptible to manipulation, such indexes also must be determined to be not readily susceptible to manipulation in accordance with Section 2(a)(1)(D)(ii)(I) of the CEA, 7 U.S.C. 2(a)(1)(D)(ii)(I).


\(^{29}\) See Exchange Act Rule 3a55–4(a)(1); CEA Rule 41.15(a)(1). The federal securities laws do not contain a single definition of “debt security.” The Commissions, therefore, are using the terms found in the Trust Indenture Act of 1939, 15 U.S.C. 77aa–bbb (which governs debt securities of all types), to define the debt securities for purposes of these rules and rule amendment.


\(^{31}\) Indexes that include both equity and debt securities would be subject to the criteria for narrow-based security indexes enumerated in Section 1(a)(5) of the CEA and Section 3(a)(55) of the Exchange Act.

\(^{32}\) See FIA Letter, supra note 9, at 2. The FIA letter did not elaborate on what these other products or instruments might be.

\(^{33}\) See Exchange Act Rule 3a55–4(a)(3); CEA Rule 41.15(a)(3).
The securities of any issuer cannot comprise more than 30% of the index’s weighting; 34 and

The securities of any five non-affiliated issuers cannot comprise more than 60% of the index’s weighting. 35

The foregoing conditions are virtually identical to the criteria contained in the Exchange Act and the CEA that apply in determining if a security index would not be a narrow-based security index. 36

In addition, the new rules provide that the term “issuer” includes a single issuer or group of affiliated issuers. 37 An issuer would be affiliated with another issuer for purposes of the exclusion if it controls, is controlled by, or is under common control with, that other issuer. The rules define control, solely for purposes of the exclusion, to mean ownership of 20% or more of an issuer’s equity or the ability to direct the voting of 20% or more of an issuer’s voting equity. 38 The definition of control will apply solely to CEA Rule 41.15 and Exchange Act Rule 3a55–4 and is designed to provide a clear standard for determining control and affiliation for purposes of the exclusion. Determining whether issuers are affiliated is important in assessing whether an index satisfies the conditions in the rules adopted today because the debt securities of all affiliated issuers included in an index must be aggregated.

The number and weighting criteria require that an index meet minimum diversification conditions with regard to both issuers and the underlying securities. These criteria provide that for purposes of weighting, all debt securities of all affiliated issuers included in the index are aggregated so that the indexes are not concentrated in the securities of a small number of issuers and their affiliates. These criteria are important elements of the Commissions’ determination that the rules are consistent with the protection of investors because they reduce the likelihood that a future on such a debt securities index would be overly dependent on the price behavior of a component single security, small group of securities or issuers, or group of securities issued by affiliated parties.

3. Issuer or Security Eligibility Criteria

New CEA Rule 41.15 and Exchange Act Rule 3a55–4 require that, for an index to qualify for the exclusion from the definition of narrow-based security index, the issuer of each component security that is not an exempted security under the Exchange Act and the rules thereunder must satisfy one of the following:

- The issuer is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act; 39
- The issuer has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more; or
- The issuer has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion.

These issuer eligibility criteria are aimed at conditioning the exclusion for a debt securities index from the definition of narrow-based security index on the public availability of information about the issuers of the securities included in the index. For example, an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act 40 makes regular and public disclosure through its Exchange Act filings. For issuers that are not required to file reports with the SEC under the Exchange Act, the Commissions similarly believe that issuers having worldwide equity market capitalization of $700 million or $1 billion in outstanding debt are likely to have public information available about them. 41 Accordingly, the issuer eligibility criteria are designed to provide that, other than with respect to exempted securities in the index, the debt securities index includes debt securities of issuers for which public information is available, thereby reducing the likelihood that an index qualifying for the exclusion would be readily susceptible to manipulation.

Under the rules adopted by the Commissions today, the issuer eligibility criteria do not apply to index components that are exempted securities, as defined in the Exchange Act. 42 or to an issuer that is a government of a foreign country or a political subdivision of a foreign country. The Commissions believe that it is appropriate to allow indexes qualifying for the exclusion to include exempted securities and the debt obligations of foreign countries and their political subdivisions. Current law permits futures on individual exempted debt securities, other than municipal securities, and on certain foreign sovereign debt obligations. 43 Because a future may be based on one of these exempted debt securities, the Commissions believe that it is reasonable and consistent with the purposes of the CEA and the Exchange Act to allow futures to be based on indexes composed of such debt securities.

4. Minimum Principal Amount Outstanding

The rules require that, for a securities index to qualify for the exclusion, each index component, other than a municipal security in certain cases, must have a total remaining principal amount of at least $250,000,000. Although trading in most debt securities is limited, trading volume is generally larger for debt securities with $250,000,000 or more in total remaining principal amount outstanding. 44 The new rules do not require that the securities included in the index have an investment grade rating. Nor do the rules require particular trading volume, due to the generally lower trading activity in the debt markets compared to the equity markets. Trading activity in a debt security generally increases as the principal amount of the debt security increases. However, non-investment-grade debt securities generally trade more frequently than investment-grade debt securities. As a result of the type of trading activity that occurs in the

35 See Exchange Act Rule 3a55–4(a)(5); CEA Rule 41.15(a)(5).
36 See supra note 4.
37 See Exchange Act Rule 3a55–4(b); CEA Rule 41.15(b).
41 These thresholds are similar to ones the SEC recently adopted in its Securities Offering Reform rules. See Securities Act Release No. 8591 (July 19, 2005), 70 FR 44722 (August 3, 2005).
42 See 15 U.S.C. 78c(a)(12). While issuers of exempted securities are not subject to the same issuer eligibility conditions, other existing rules and regulatory regimes applicable to most of such issuers provide for ongoing public information about such issuers. See, e.g., Exchange Act Rule 15c2–12, 17 CFR 240.15c2–12.
44 This is based on data obtained from the Trace Reporting and Compliance Engine (TRACE) database supplied by NASD.
designed to reduce the likelihood that
the index would be readily susceptible to
manipulation.

The Commission is addressing the
CBOT’s comment in the final rules by
adopting an alternate test for municipal
securities. A municipal security could
either: (1) Meet the original
$250,000,000 threshold; or (2) meet the
following two-part test: (a) The security
has a remaining principal amount
outstanding of $200,000,000; and (b) the
issuer of the security has outstanding
securities that are notes, bonds,
debentures, or evidences of
indebtedness having a total remaining
principal amount of at least $1 billion.\(^{46}\)

As discussed above, the Commission
believe that issuers with $1 billion or
more in outstanding debt are likely to be
followed in the market, and that
information about such issuers is more
likely to be publicly available.\(^{47}\)

Providing an alternate lower threshold
for principal amount outstanding
should provide some flexibility in
constructing indexes that include
municipal securities by expanding the
number of municipal securities issues
that could be eligible. At the same time,
the alternate $200,000,000 threshold is
designed to reduce the likelihood that
the market for a security is not highly
illiquid and thus more readily
susceptible to manipulation.\(^{48}\)

Furthermore, the requirement that
the issuer of the security have total debt
outstanding of at least $1 billion
increases the likelihood that
information about the issuer and its
securities will be publicly available.
The availability of such information
should reduce the likelihood that the issuer’s
securities—including those with a
minimum principal amount outstanding
of $200,000,000—would be readily
susceptible to manipulation.

5. De Minimis Exception

As the Commission proposed, the
final rules exclude an index from the
definition of “narrow-based security
index” even if certain of the issuers of
the underlying securities do not meet
the issuer eligibility and the securities
do not meet the minimum outstanding
principal balance requirements.

Specifically, an index will still qualify
for the exclusion even if an issuer does
not satisfy the eligibility criteria
described above\(^{49}\) or the securities
do not have $250,000,000, or, for municipal
securities of issuers with at least $1
billion in outstanding principal amount of
debt, $200,000,000 in remaining
principal amount, as applicable, if:

- All securities of such issuer
  included in the index represent less
  than 5% of the index’s weighting;\(^{50}\)
- Securities comprising at least 80%
of the index’s weighting satisfy the
  issuer eligibility and minimum
  outstanding principal balance criteria.\(^{51}\)

The Commission believe that an
index that includes a very small
proportion of securities and issuers that
do not satisfy certain of the above
criteria should nevertheless be excluded
from the definition of narrow-based
security index. To satisfy the exclusion,
both the 5% and the 80% weighting
thresholds must be met at the time of
the assessment. The 5% weighting
threshold is designed to provide that
issuers and securities not satisfying
certain of the criteria will comprise only
a very small portion of the index. The
80% weighting threshold is designed to
provide that a predominant percentage
of the securities and the issuers in the
debt securities index satisfy the criteria.

By allowing debt securities indexes that
do include debt securities of a small
number of issuers and securities that
do not satisfy certain of the criteria to
qualify for the exclusion, the de minimis
exception provides some flexibility in
constructing an index or determining
whether a debt securities index satisfies
the exclusion. The Commission believe
that the de minimis exemption is
appropriate for indexes that are
predominantly composed of securities
that satisfy the specified criteria, and
that providing such flexibility is
consistent with the protection of
investors and is not likely to increase
the possibility that an index that
qualifies for the exclusion would be
readily susceptible to manipulation.

\(^{46}\) CEA Rule 41.15(a)(1)(vii)(B); Exchange Act Rule

\(^{47}\) See supra note 41 and accompanying text.

\(^{48}\) In a 2004 study of the municipal securities
market, the SEC staff found that, over a 10.5-month
period, one-third of municipal issuers had no trades
in their debt securities and two-thirds of municipal
issuers had 25 or fewer trades in their securities.

\(^{49}\) Specifically, an index will still qualify
for the exclusion even if an issuer does
not satisfy the eligibility criteria
described above or the securities
do not have $250,000,000, or, for municipal
securities of issuers with at least $1
billion in outstanding principal amount of
debt, $200,000,000 in remaining
principal amount, as applicable, if:

- All securities of such issuer
  included in the index represent less
  than 5% of the index’s weighting;
- Securities comprising at least 80% of
  the index’s weighting satisfy the
  issuer eligibility and minimum
  outstanding principal balance criteria.

In determining whether the 5% threshold is
met, all securities of an issuer and its affiliates
would be aggregated because of the potential for
concentrated risk of the index in a limited group of
issuers.

\(^{51}\) The 80% calculation is based on the entire
index’s weighting without subtracting issuers that
are not required to satisfy the issuer eligibility
criteria and minimum outstanding principal
amount criteria. This is important to ensure that a
predominant percentage of the index satisfies the
required criteria.

\(^{49}\) See supra notes 28–46 and accompanying text.

\(^{50}\) In a 2004 study of the municipal securities
market, the SEC staff found that, over a 10.5-month
period, one-third of municipal issuers had no trades
in their debt securities and two-thirds of municipal
issuers had 25 or fewer trades in their securities.

\(^{51}\) The 80% calculation is based on the entire
index’s weighting without subtracting issuers that
are not required to satisfy the issuer eligibility
criteria and minimum outstanding principal
amount criteria. This is important to ensure that a
predominant percentage of the index satisfies the
required criteria.
6. Indexes That Include Exempted Securities

The FIA asked the Commissions to confirm that, in an index that includes exempted securities and securities that are not exempted securities, only securities that are not exempted securities must be taken into account in determining compliance with the rules’ criteria.52 To address the FIA’s comment and to clarify the treatment of an index that includes both exempted debt securities and debt securities that are not exempted securities, the final rules permit, but do not require, certain of the index’s exempted debt securities (other than municipal securities) to be excluded from the index in determining whether the index is not a narrow-based security index. Persons making the determination regarding the appropriate treatment under the rules of a debt security index that includes both exempted and non-exempted debt securities may use either test for determining whether the debt security index is not narrow-based. Under the alternative method for determining whether a debt security index is not narrow-based, exempted debt securities (other than municipal securities) may be excluded from the application of the rules.53

In addition, current CEA Rule 41.12 and Exchange Act Rule 3a55–2 address the circumstance when a broad-based security index underlying a future becomes narrow-based during the first 30 days of trading. In such case, the future does not meet the requirement of having traded for at least 30 days to qualify for the tolerance period granted by Section 1a(25)(B)(iii) of the CEA and Section 3(a)(55)(C)(iii) of the Exchange Act.54 These rules, however, provide that the index will nevertheless be excluded from the definition of narrow-based security index throughout that first 30 days, if the index would not have been a narrow-based security index had it been in existence for an uninterrupted period of six months prior to the first day of trading.

III. Listing Standards for Security Futures on Debt Securities

The listing standards requirements for security futures are set forth in Section 2(a)(1)(D)(i) of the CEA and Section 6(h)(3) of the Exchange Act. Among other things, the listing standards for security futures products must be no less restrictive than comparable listing standards for traded security futures products.55 The requirements of the Exchange Act and the procedural requirements of Section 19 of the Exchange Act must be satisfied.60 These rules, however, recently published for comment a proposed rule change by the Chicago Board Options Exchange to list options on certain corporate debt securities.68 The SEC would welcome comments from the CME and others on the CBOE’s proposal, particularly as it relates to comparable listing standards for security futures on debt securities.

IV. Paperwork Reduction Act

CFTC: The Paperwork Reduction Act of 1995 (‘‘PRA’’),69 imposes certain requirements on federal agencies (including the CFTC) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The rule and rule amendment do not require a new collection of information on the part of any entities.

SEC: The PRA does not apply because new Exchange Act Rules 3a55–4 and 6h–2 do not impose any new ‘‘collection of information’’ requirements within the meaning under the PRA.

52 See FIA Letter, supra note 9, at 2.
53 See CEA Rule 41.15(a)(2); Exchange Act Rule 3a55–4(a)(2).
56 If the index becomes narrow-based for more than 45 days over three consecutive calendar months, the statute then provides an additional grace period of three months during which the index is excluded from the definition of narrow-based security index. See Section 1a(25)(D) of the CEA, 7 U.S.C. 1a(25)(D); Section 3(a)(55)(E) of the Exchange Act, 15 U.S.C. 78c(a)(55)(E).
57 17 CFR 41.12.
58 17 CFR 240.3a55–2.
63 See supra note 63.
65 See CME Letter, supra note 8, at 2; CBOE Letter, supra note 8, at 3–4.
66 See supra note 63.
67 A proposed rule change must, among other things, satisfy the substantive requirements of Section 6 of the Exchange Act and the procedural requirements of Section 19 of the Exchange Act.
68 See CBOE Rule 21.1 et seq.
70 U.S.C. 3501 et seq.
V. Costs and Benefits of Final Rules

CFTC: Section 15(a) of the CEA requires the CFTC to consider the costs and benefits of its actions before issuing new regulations under the CEA. By its terms, Section 15(a) does not require the CFTC to quantify the costs and benefits of new regulations or to determine whether the benefits of the regulations outweigh their costs. Rather, Section 15(a) requires the CFTC to “consider the cost and benefits” of the subject rules 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 CFTC may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule 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 CEA.

The rule and rule amendment will foster the protection of market participants and the public by establishing criteria for futures on broad-based debt securities indexes that will reduce the likelihood that these products would be readily susceptible to manipulation. The statutory listing standards for security futures provide for similar protection of market participants with regard to security futures on narrow-based debt securities indexes and individual debt securities that will be made available for listing and trading pursuant to the final rules.

In addition, the rule and rule amendment will encourage the efficiency and competitiveness of futures markets by permitting the listing for trading of new and potentially useful products on debt securities and security indexes. In the absence of the rule and rule amendment, futures on debt securities indexes that meet the proposed criteria for non-narrow-based security index treatment, as well as security futures on narrow-based debt securities indexes and individual debt securities, would be prohibited. Efficiencies will also be achieved because the rule and rule amendment, in establishing criteria for broad-based debt securities indexes, take into consideration the characteristics of such indexes and the issuers of the underlying debt securities that render joint SEC and CFTC regulation unnecessary. By not subjecting futures on debt securities indexes that meet the criteria to joint SEC and CFTC regulation, the costs for listing such products will be minimized.

The rule and rule amendment will have no material impact from the standpoint of imposing costs or creating benefits, on price discovery, sound risk management practices, or any other public interest considerations. Although exchanges may incur costs in order to determine whether a debt securities index meets the criteria to be considered broad-based established by the rules, the CFTC believes that these costs are outweighed in light of the factors and benefits discussed above.

SEC: New Exchange Act Rule 6h–2 permits a national securities exchange to list and trade security futures based on a security that is a note, bond, debenture, or evidence of indebtedness or on a narrow-based index composed of such securities. New Exchange Act Rule 3a55–4 excludes from the definition of “narrow-based security index” those debt securities indexes that satisfy certain criteria.

A. Benefits

The benefits of new Exchange Act Rules 6h–2 and 3a55–4 are related to the benefits that will accrue as a result of expanding the range of securities on which security futures and other index futures may be based. By permitting the trading of security futures based on debt securities or debt securities indexes and excluding certain indexes based on debt securities from the definition of narrow-based security index, new Exchange Act Rule 6h–2 permits a greater variety of financial products to be listed and traded that potentially could facilitate price discovery and the ability to hedge. New Exchange Act Rule 3a55–4 provides clear, objective criteria for excluding from the jurisdiction of the SEC futures contracts on certain debt securities indexes. By providing an objective rule to determine when a debt securities index is not a narrow-based securities index for purposes of the Exchange Act Section 3[a][55], new Exchange Act Rule 3a55–4 alleviates any additional regulatory costs of dual CFTC and SEC jurisdiction where it is appropriate to do so. Futures contracts on debt securities indexes that do not meet the criteria in Exchange Act Rule 3a55–4 for the exclusion from the definition of narrow-based debt security index will be subject to the joint jurisdiction of the SEC and CFTC. Futures on debt securities indexes that do meet the criteria for the exclusion, however, will be subject to the exclusive jurisdiction of the CFTC and may be traded only on designated contract markets and registered DTEFs. Investors generally will benefit from the new rules by having a wider choice of financial products to buy and sell. The amount of the benefit will likely be correlated to the volume of trading in these new instruments.

B. Costs

In complying with the new rules, a national securities exchange, national securities association, designated contract market, registered DTEF, or foreign board of trade (each a “listing market”) that wishes to list and trade futures contracts based on debt securities indexes will incur certain costs. A listing market that wishes to list and trade such a futures contract will be required to ascertain whether the underlying debt securities index is or is not a narrow-based debt security index, according to the criteria set forth in Rule 3a55–4, and thus whether a future on such debt security index is subject to the exclusive jurisdiction of the CFTC or to the joint jurisdiction of the SEC and CFTC. This analysis will have to be performed at the initial listing and monitored periodically to ensure continued compliance under new Exchange Act Rule 3a55–4. The SEC notes, however, that in the absence of new Exchange Act Rule 3a55–4, a listing market desiring to list futures on a debt securities index would still have to bear the costs associated with performing a similar analysis under the statutory definition of narrow-based security index. The costs associated with new Exchange Act Rule 3a55–4 would largely replace the costs of performing an analysis under the statutory definition of narrow-based security index for debt securities indexes and, therefore, there is little or no cost increase.

The determination of whether a debt securities index is excluded from the definition of narrow-based debt security index will require listing markets to make certain calculations based on the type of issuer and concentration of the security in the index, including calculations, as appropriate, relating to the issuer eligibility provisions.

total outstanding principal of each of the underlying securities, and calculations related to the weighting of each of the securities in the index. A listing market may incur costs if it contracts with an outside party to perform these calculations. In addition, a listing market may incur costs associated with obtaining and accessing appropriate data from an independent third-party vendor. For example, a listing market may be required to pay certain fees to a vendor to acquire the necessary information. Furthermore, if these calculations require data that are not readily available, particularly if foreign data are needed, a listing market may possibly incur additional costs to obtain such data.

Market participants that elect to create debt securities indexes for trading futures thereon will also incur non-regulatory costs associated with constructing these products. Such costs will be the ordinary costs of doing business.

VI. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

SEC: Section 3(t) of the Exchange Act requires the SEC, when engaged in a rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act requires the SEC, in adopting rules under the Exchange Act, to consider the impact of any rule will have on competition. In particular, Section 23(a)(2) of the Exchange Act prohibits the SEC from adopting any rule that will impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In the Proposing Release, the SEC requested comment on these statutory considerations and received none that addressed them specifically.

New Exchange Act Rule 6h–2 will permit the listing and trading of security futures based on debt securities and narrow-based debt securities indexes. New Exchange Act Rule 3a55–4 sets forth clear methods and guidelines for a listing market to distinguish futures contracts on debt securities indexes that are subject to the exclusive jurisdiction of the CFTC. The SEC believes that the new rules, by allowing listing markets to list and trade new financial products, will promote efficiency and competition. The new rules will create opportunities for listing markets to compete in the market for such new products and perhaps to create new products that will compete with existing products. The resulting increased competition and more efficient markets should not have an adverse impact on capital formation.

VII. Regulatory Flexibility Act Certifications

CFTC: The Regulatory Flexibility Act ("RFA") requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The rules herein will affect contract markets and registered DTEFs. The CFTC previously established certain definitions of its small entities It to be used by the CFTC in evaluating the impact of its rules on small entities in accordance with the RFA. In its previous determinations, the CFTC has concluded that contract markets and DTEFs are not small entities for the purpose of the RFA.

SEC: In the Proposing Release, the Commission certified, pursuant to Section 605(b) of the RFA that new Exchange Act Rules 3a55–4 and 6h–2 would not have a significant economic impact on a substantial number of small entities. The Commission solicited comment as to the nature of any impact on small entities, including empirical data to support the extent of such impact costs and benefits associated with the proposed amendment, and no comments were received.

VIII. Statutory Authority

Pursuant to the CEA and the Exchange Act, and, particularly, Sections 1a(25)(B)(vi) and 2(a)(1)(D) of the CEA and Sections 3(a)(55)(C)(vi), 3(b), 6(h), 23(a), and 36 of the Exchange Act, the Commissions are adopting Rule 41.15 and amendments to Rule 41.21 under the CEA, and Rules 3a55–4 and 6h–2 under the Exchange Act. 

IX. Text of Adopted Rules

List of Subjects

17 CFR Part 41

Security futures products.

17 CFR Part 240

Securities.

Commodity Futures Trading Commission

In accordance with the foregoing, Title 17, chapter I, part 41 of the Code of Federal Regulations is amended as follows:

PART 41—SECURITY FUTURES PRODUCTS

§ 41.11 Exclusion from definition of narrow-based security index for indexes composed of debt securities.

(a) An index is not a narrow-based security index if:

(i) Each of the securities of an issuer included in the index is a security, as defined in section 2(a)(1) of the Securities Act of 1933 and section 3(a)(10) of the Securities Exchange Act of 1934 and the respective rules promulgated thereunder, that is a note, bond, debenture, or evidence of indebtedness;

(ii) None of the securities of an issuer included in the index is an equity security, as defined in section 3(a)(11) of the Securities Exchange Act of 1934 and the rules promulgated thereunder;

(iii) The index is comprised of more than nine securities that are issued by more than nine non-affiliated issuers;

(iv) The securities of any issuer included in the index do not comprise more than 30 percent of the index's weighting;

(v) The securities of any five non-affiliated issuers included in the index do not comprise more than 60 percent of the index's weighting;

(vi) Except as provided in paragraph (a)(vii) of this section, for each security of an issuer included in the index one of the following criteria is satisfied:

(A) The issuer of the security is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934;
(B) The issuer of the security has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(C) The issuer of the security has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion;

(D) The security is an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 and the rules promulgated thereunder; or

(E) The issuer of the security is a government of a foreign country or a political subdivision of a foreign country; and

(vii) Except as provided in paragraph (a)(1)(viii) of this section, for each security of an issuer included in the index one of the following criteria is satisfied:

(A) The security has a total remaining principal amount of at least $250,000,000; or

(B) The security is a municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 and the rules promulgated thereunder; that has a total remaining principal amount of at least $200,000,000 and the issuer of such municipal security has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion; and

(viii) Paragraphs (a)(1)(vi) and (a)(1)(vii) of this section will not apply to securities of an issuer included in the index if:

(A) All securities of such issuer included in the index represent less than five percent of the index’s weighting; and

(B) Securities comprising at least 80 percent of the index’s weighting satisfy the provisions of paragraphs (a)(1)(vi) and (a)(1)(vii) of this section.

(2)(i) The index includes exempted securities, other than municipal securities as defined in section 3(a)(29) of the Securities Exchange Act of 1934 and the rules promulgated thereunder, that are:

(A) Notes, bonds, debentures, or evidences of indebtedness; and

(B) Not equity securities, as defined in section 3(a)(11) of the Securities Exchange Act of 1934 and the rules promulgated thereunder; and

(ii) Without taking into account any portion of the index composed of such exempted securities, other than municipal securities, the remaining portion of the index would not be a narrow-based security index meeting all the conditions under paragraph (a)(1) of this section.

(b) For purposes of this section:

(1) An issuer is affiliated with another issuer if it controls, is controlled by, or is under common control with, that issuer.

(2) For purposes of this section, “control” means ownership of 20 percent or more of an issuer’s equity, or the ability to direct the voting of 20 percent or more of the issuer’s voting equity.

(3) The term “issuer” includes a single issuer or group of affiliated issuers.

Subpart C—Requirements and Standards for Listing Security Futures Products

§ 41.21 Requirements for underlying securities.

(a) * * *

(b) * * *

(iii) A note, bond, debenture, or evidence of indebtedness; and

* * * * * *

(b) * * *

(iii) A note, bond, debenture, or evidence of indebtedness; and

* * * * * *

Securities and Exchange Commission

In accordance with the foregoing, Title 17, chapter II, part 240 of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77mm, 77ss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78u, 78v–5, 78w, 78x, 78ll, 78mm, 79q, 79, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * * *

2. Section 240.3a55–4 is added to read as follows:

§ 240.3a55–4 Exclusion from definition of narrow-based security index for indexes composed of debt securities.

(a) An index is not a narrow-based security index if:

(i) Each of the securities of an issuer included in the index is a security, as defined in section 2(a)(1) of the Securities Act of 1933(15 U.S.C. 77a(1)) and section 3(a)(10) of the Act (15 U.S.C. 78c(a)(10)) and the respective rules promulgated thereunder, that is a note, bond, debenture, or evidence of indebtedness;

(ii) None of the securities of an issuer included in the index is an equity security, as defined in section 3(a)(11) of the Act (15 U.S.C. 78c(a)(11)) and the rules promulgated thereunder;

(iii) The index is comprised of more than nine securities that are issued by more than nine non-affiliated issuers;

(iv) The securities of any issuer included in the index do not comprise more than 30 percent of the index’s weighting;

(v) The securities of any five non-affiliated issuers included in the index do not comprise more than 60 percent of the index’s weighting;

(vi) Except as provided in paragraph (a)(1)(viii) of this section, for each security of an issuer included in the index one of the following criteria is satisfied:

(A) The issuer of the security is required to file reports pursuant to section 13 or section 15(d) of the Act (15 U.S.C. 78m and 78o(d));

(B) The issuer of the security has a [Worldwide market value of its outstanding common equity held by non-affiliates of $71 million or more; or

(C) The issuer of the security has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion; and

(D) The security is an exempted security as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)) and the rules promulgated thereunder; or

(E) The issuer of the security is a government of a foreign country or a political subdivision of a foreign country;

(vii) Except as provided in paragraph (a)(1)(viii) of this section, for each security of an issuer included in the index one of the following criteria is satisfied:

(A) The security has a total remaining principal amount of at least $250,000,000; or

(B) The security is a municipal security, as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29)) and the rules promulgated thereunder that has a total remaining principal amount of at
least $200,000,000 and the issuer of such municipal security has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion; and

(viii) Paragraphs (a)(1)(vi) and (a)(1)(vii) of this section will not apply to securities of an issuer included in the index if:

(A) All securities of such issuer included in the index represent less than 5 percent of the index’s weighting; and

(B) Securities comprising at least 80 percent of the index’s weighting satisfy the provisions of paragraphs (a)(1)(vi) and (a)(1)(vii) of this section; or

(2) The index includes exempted securities, other than municipal securities, as defined in section 3(a)(29) of the Act and the rules promulgated thereunder; and

(ii) Without taking into account any portion of the index composed of such exempted securities, other than municipal securities, the remaining portion of the index would not be a narrow-based security index: meeting all the conditions under paragraph (a)(1) of this section.

For purposes of this section:

(1) An issuer is affiliated with another issuer if it controls, is controlled by, or is under common control with, that issuer.

(2) For purposes of this section, control means ownership of 20 percent or more of an issuer’s equity, or the ability to direct the voting of 20 percent or more of the issuer’s voting equity.

(3) The term issuer includes a single issuer or group of affiliated issuers.

3. Section 240.6h–2 is added to read as follows:

§ 240.6h–2 Security future based on note, bond, debenture, or evidence of indebtedness.

A security future may be based upon a security that is a note, bond, debenture, or evidence of indebtedness or a narrow-based security index composed of such securities.

By the Commodity Futures Trading Commission.

Eileen A. Donovan,
Acting Secretary.

By the Securities and Exchange Commission.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Clindamycin Liquid

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental abbreviated new animal drug application (ANADA) filed by Virbac AH, Inc. The supplemental ANADA provides for an expanded dose range and revised wording of indications for the oral use of clindamycin hydrochloride liquid in dogs and cats for the treatment of certain bacterial diseases.

DATES: This rule is effective July 13, 2006.

FOR FURTHER INFORMATION CONTACT: Daniel A. Benz, Center for Veterinary Medicine (HFV–104), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0223, e-mail: daniel.benz @fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Virbac AH, Inc., 3200 Meacham Blvd., Ft. Worth, TX 76137, filed a supplement to ANADA 200–291 for CLINSON (clindamycin hydrochloride) Liquid. The supplement provides for an expanded dose range and revised wording of indications for the oral use of clindamycin hydrochloride liquid in dogs and cats for the treatment of certain bacterial diseases. The supplemental ANADA is approved as of June 12, 2006, and the regulations are amended in § 520.447 (21 CFR 520.447) to reflect the approval and a current format.

In addition, FDA has found that a 2003 change of sponsorship for CLINSON Liquid (68 FR 55823, September 29, 2003) is not reflected in the Code of Federal Regulations. Accordingly, § 520.447 is being revised to reflect the correct sponsor drug labeler code. This action is being taken to improve the accuracy of the regulations.

Approval of this supplemental ANADA did not require review of additional safety or effectiveness data or information. Therefore, a freedom of information summary is not required.

FDA has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of “rule” in 5 U.S.C. 804(3)(A) because it is a rule of “particular applicability.” Therefore, it is not subject to congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 520 continues to read as follows:


2. In § 520.447, revise the section heading and paragraphs (b), (d)(1)(i), (d)(1)(ii), (d)(2)(i), and (d)(2)(ii) to read as follows:

§ 520.447 Clindamycin solution.

* * * * *

(b) Sponsors. See Nos. 000009, 051313, and 059130 in § 510.600(c) of this chapter.

* * * * *

(d) * * *

(1) * * *

(i) Amount. Wounds, abscesses, and other infections due to susceptible strains of coagulase-positive staphylococci (Staphylococcus aureus or S. intermedius), deep wounds and abscesses due to susceptible strains of Bacteroides fragilis, Prevotella melaninogenicus, Fusobacterium necrophorum, and Clostridium perfringens; dental infections due to susceptible strains of S. aureus, B. fragilis, P. melaninogenicus, F.