

(1) Is not a “significant regulatory action” under Executive Order 12866,

(2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

#### The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

#### PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

##### § 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**McDonnell Douglas Corporation:** Docket No. FAA–2010–0228; Directorate Identifier 2009–NM–252–AD.

#### Comments Due Date

(a) We must receive comments by December 13, 2010.

#### Affected ADs

(b) None.

#### Applicability

(c) This AD applies to McDonnell Douglas Corporation Model MD–11 and MD–11F airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

#### Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 28: Fuel.

#### Unsafe Condition

(e) This AD was prompted by fuel system reviews conducted by the manufacturer. We are issuing this AD to detect and correct a potential of ignition sources inside fuel tanks, which, in combination with flammable vapors, could result in a fuel tank fire or explosion, and consequent loss of the airplane.

#### Compliance

(f) Comply with this AD within the compliance times specified, unless already done.

#### Action

(g) For airplanes in Group 1, Configuration 1; and Group 2, Configuration 1: Within 60 months after the effective date of this AD, perform a general visual inspection to detect damage of wire assemblies of the tail tank fuel system, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(1) For airplanes in Group 1, Configuration 1: If no damage is found, before further flight, apply self-adhering high-temperature electrical insulation tape on the wire assemblies, install wire assembly support brackets, route wire assemblies, install extruded channel wire supports, and install a wire protection bracket, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(2) For airplanes in Group 1, Configuration 1: If damage is found, before further flight, repair or replace the wire assemblies, apply self-adhering high-temperature electrical insulation tape on the wire assemblies, install wire assembly support brackets, route wire assemblies, install extruded channel wire supports, and install a wire protection bracket, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(3) For airplanes in Group 2, Configuration 1: If no damage is found, before further flight, install wire assembly support brackets, route wire assemblies, install extruded channel wire supports, and install a wire protection bracket, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(4) For airplanes in Group 2, Configuration 1: If damage is found, before further flight, repair or replace wire assembly, install wire assembly support brackets, route wire assemblies, install extruded channel wire supports, and install a wire protection bracket, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(h) For airplanes in Group 1, Configuration 2: Within 60 months after the effective date of this AD, do a general visual inspection for correct installation of the self-adhering high-temperature electrical insulation tape, and change the wire supports, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010. If the self-adhering high-temperature electrical insulation tape is installed incorrectly, before further flight, adjust the tape installation to achieve the correct dimensions, in accordance with Figure 1 of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

(i) For airplanes in Group 2, Configuration 2: Within 60 months after the effective date of this AD, change the wire supports, in accordance with Figure 2 of Boeing Alert Service Bulletin MD11–28A124, Revision 1, dated August 24, 2010.

#### Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

#### Related Information

(k) For more information about this AD, contact Serj Harutunian, Aerospace Engineer, Propulsion Branch, ANM–140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5254; fax (562) 627–5210; e-mail: [Serj.Harutunian@faa.gov](mailto:Serj.Harutunian@faa.gov).

(l) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail [dse.boecom@boeing.com](mailto:dse.boecom@boeing.com); Internet <https://www.myboeingfleet.com>. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 5, 2010.

#### Jeffrey E. Duven,

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–28937 Filed 11–16–10; 8:45 am]

**BILLING CODE 4910–13–P**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 1

RIN 3038–AC96

### Implementation of Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is proposing rules to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street

Reform and Consumer Protection Act (Dodd-Frank Act). The proposed regulations establish conflicts of interest requirements for futures commission merchants (FCMs) and introducing brokers (IBs) for the purpose of ensuring that such persons implement adequate policies and procedures in compliance with the Commodity Exchange Act (CEA), as amended by the Dodd-Frank Act.

**DATES:** Comments must be received on or before January 18, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number 3038-AC96 and FCM-IB Conflicts of Interest, by any of the following methods:

- Agency Web site, via its Comments Online process: <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in CFTC Regulation 145.9, 17 CFR 145.9.

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

**FOR FURTHER INFORMATION CONTACT:** Sarah E. Josephson, Associate Director, Division of Clearing and Intermediary Oversight, (202) 418-5684,

[sjosephson@cftc.gov](mailto:sjosephson@cftc.gov), or Ward P. Griffin, Counsel, Office of General Counsel, (202) 418-5425, [wgriffin@cftc.gov](mailto:wgriffin@cftc.gov), Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act.<sup>1</sup> Title VII of the Dodd-Frank Act<sup>2</sup> amended the CEA<sup>3</sup> to establish a comprehensive regulatory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commission with respect to all registered entities and intermediaries subject to the Commission's oversight.

This proposed rulemaking relates to the conflicts of interest provisions set forth in section 732 of the Dodd-Frank Act. In relevant part, section 732 of the Dodd-Frank Act amends section 4d of the CEA to direct each FCM and IB to implement conflicts of interest systems and procedures that establish safeguards within the firm to ensure that any persons researching or analyzing the price or market for any commodity are separated by "appropriate informational partitions" within the firm from review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons. Section 732 also requires that such conflicts of interest systems and procedures "address such other issues as the Commission determines to be appropriate."

Section 754 of the Dodd-Frank Act establishes that "[u]nless otherwise provided in this title, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule

<sup>1</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov>.

<sup>2</sup> Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

<sup>3</sup> 7 U.S.C. 1 *et seq.*

or regulation implementing such provision of this subtitle." Consequently, the Commission will seek to promulgate rules—by July 15, 2011—implementing the conflicts of interest provisions of section 732 of the Dodd-Frank Act.

Accordingly, pursuant to authority granted under sections 4d(c) and 8a(5) of the CEA, as amended by the Dodd-Frank Act, the Commission is proposing to adopt Regulation 1.71 to address potential conflicts of interest in the preparation and release of research reports by FCMs and IBs, and the establishment of "appropriate informational partitions" within such firms, as required by the Dodd-Frank Act. The proposed rule also will address other issues, such as enhanced disclosure requirements, in order to minimize the potential that conflicts of interest will arise within FCMs and IBs.

The proposed rules reflect consultation with staff of the following agencies: (i) The Securities and Exchange Commission; (ii) the Board of Governors of the Federal Reserve System; (iii) the Office of the Comptroller of the Currency; and (iv) the Federal Deposit Insurance Corporation. Staff from each of these agencies has had the opportunity to provide oral and/or written comments to the proposal, and the proposed rules incorporate elements of the comments provided.

The Commission requests comment on all aspects of the proposed rules, as well as comment on the specific provisions and issues highlighted in the discussion below.

##### II. Proposed Regulations

###### A. Conflicts of Interest in Research or Analysis

Section 732 of the Dodd-Frank Act requires, in relevant part, that FCMs and IBs implement conflicts of interest systems and procedures that "establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons."

The language in section 732 of the Dodd-Frank Act is similar to certain language contained in section 501(a) of the Sarbanes-Oxley Act of 2002,<sup>4</sup> which

<sup>4</sup> Public Law 107-204, 116 Stat. 745 (2002) (codified at 15 U.S.C. 780-6).

amended the Securities Exchange Act of 1934 by creating a new section 15D. In relevant part, section 15D(a) mandates that the Securities and Exchange Commission, or a registered securities association or national securities exchange, adopt “rules reasonably designed to address conflicts of interest that can arise when securities analysts recommend equity securities in research reports and public appearances, in order to improve the objectivity of research and provide investors with more useful and reliable information, including rules designed \* \* \* to establish structural and institutional safeguards within registered brokers or dealers to assure that securities analysts are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of those whose involvement in investment banking activities might potentially bias their judgment or supervision \* \* \*.”

Unlike section 15D of the Securities Exchange Act of 1934, section 732 of the Dodd-Frank Act does not expressly limit the requirement for informational partitions to only those persons who are responsible for the preparation of the substance of research reports; rather, section 732 could be read to require informational partitions between persons involved in trading or clearing activities and any person within a FCM or IB who engages in “research or analysis of the price or market for any commodity,” whether or not such research or analysis is to be made part of a research report that may be publicly disseminated.

However, the Commission believes that an untenable outcome could result from implementing informational partitions between persons involved in trading or clearing activities and all persons who may be engaged in “research or analysis of the price or market for any commodity,” given that persons involved in trading or clearing activities are routinely—or even primarily—engaged in “research or analysis of the price or market for” commodities. Sound trading and/or clearing activities necessarily require some form of pre-decisional research or analysis of the facts supporting such trading or clearing determinations.

Therefore, given the untenable alternative, the proposed rules reflect the Commission’s belief that the Congressional intent underlying section 732 with respect to “research and analysis of the price or market of any commodity” is primarily intended to prevent undue influence by persons involved in trading or clearing activities over the substance of research reports that may be publicly disseminated, and

to prevent pre-public dissemination of any material information in the possession of a person engaged in research and analysis, or of the research reports, to traders.

Many elements of the proposed rule, particularly those provisions relating to potential conflicts of interest surrounding research and analysis, have been adapted from National Association of Securities Dealers (NASD) Rule 2711. To construct the “structural and institutional safeguards” mandated by Congress under section 732 of the Dodd-Frank Act, the proposed rule establishes specific restrictions on the interaction and communications between persons within a FCM or IB involved in research or analysis of the price or market for any derivative<sup>5</sup> and persons involved in trading or clearing activities. The proposed rules also impose duties and constraints on persons involved in the research or analysis of the price or market for any derivative. For instance, such persons will be required to disclose conspicuously during public appearances any relevant personal financial interests relating to any derivative of a type that the person follows. FCMs and IBs similarly will be obligated to make certain disclosures clearly and prominently in research reports, including third-party research reports that are distributed or made available by the FCM or IB. Further, FCMs and IBs, as well as employees involved in trading or clearing activities, will be prohibited from retaliating against any person involved in the research or analysis of the price or market for any derivative who produces, in good faith, a research report that adversely impacts the current or prospective trading or clearing activities of the FCM or IB.

Although section 732 of the Dodd-Frank Act requires that appropriate informational partitions be constructed within FCMs and IBs, the Commission recognizes that the appropriateness of such partitions may be affected by the size of the FCM or IB and the scope of its operations. The Commission invites comment on how these rules should apply to FCMs and IBs, considering the varying size and scope of the operations of such firms. For instance, NASD Rule 2711(k) provides an exception from certain requirements for “small firms,” defined to include those firms that over the past three years have participated in ten or fewer “investment banking services transactions” and “generated \$5

<sup>5</sup> Use of the term “derivative” is based upon the products listed in the definitions of futures commission merchant and introducing broker in sections 1a(28) and 1a(29) of the CEA.

million or less in gross investment banking services revenues from those transactions.” The Commission solicits comment on whether a similar approach should be adopted for small FCMs and IBs. Moreover, the exceptions to the definition of “research report” are designed to address issues typically found in smaller firms where individuals in the trading unit perform their own research to advise their clients or potential clients. These exceptions do not in any way impact or lessen the restrictions placed on firms that prepare research reports and release them for public consumption. Any attempt by such firms to move research personnel into a trading unit to attempt to avail themselves of the exception will result in insufficient “structural and institutional safeguards” and will be a violation of Section 732 of the Dodd-Frank Act and these Regulations.

To address the possibility that the proposed rules could be evaded by employing research analysts in an affiliate of a FCM or IB, the proposed rules also will restrict communications with research analysts employed by an affiliate. An affiliate will be defined as an entity controlling, controlled by, or under common control with, a FCM or IB.

#### *B. Other Issues*

In addition to mandating the establishment of “appropriate informational partitions” within FCMs and IBs that focus on the activities of persons involved in the “research or analysis of the price or market for any commodity,” section 732 of the Dodd-Frank Act also requires FCMs and IBs to “implement conflict-of-interest systems and procedures that \* \* \* address such other issues as the Commission determines to be appropriate.” Having considered the potential conflicts of interest that may arise in a FCM or IB, the Commission is proposing rules that will address two general topics: (1) Clearing activities; and (2) the potential for undue influence on customers. The intended cumulative effect of the proposed rules is to fulfill Congress’s objective that FCMs and IBs construct “structural and institutional safeguards” to minimize the potential conflicts of interest that could arise within such firms.

With respect to the proposed language relating to clearing activities, although the Commission is exercising its statutory authority under section 4d(c)(2) of the CEA, as amended by the Dodd-Frank Act, the impetus underlying the proposed language originates in the Dodd-Frank Act: Section 731. Section 731 creates a new

section 4s of the CEA, which provides for the registration and regulation of swap dealers (SDs) and major swap participants (MSPs). New section 4s contains a conflicts of interest provision that is similar—though not identical—to the conflicts of interest provision in section 732 of the Dodd-Frank Act. New section 4s(j)(5) requires the establishment of “structural and institutional safeguards” surrounding the activities of any person “providing clearing activities or making determinations as to accepting clearing customers”—specifically that the activities of such persons be separated from the review, pressure, or oversight of persons involved in pricing, trading, or clearing. Although the quoted language is not contained in section 4d(c) of the CEA, as amended by section 732 of the Dodd-Frank Act, the Commission believes that to effectuate fully the intent of section 4s(j)(5) of the CEA, these issues should be addressed with regard to FCMs.

The Dodd-Frank Act stipulates that only a person registered as a FCM may accept money, securities or property to clear a swap through a derivatives clearing organization on behalf of another person, though the restriction does not prohibit a SD or MSP from clearing its own swap transaction.<sup>6</sup> New section 4s(j)(5) of the CEA requires that certain determinations be made relating to the provision of clearing activities or the acceptance of clearing customers, such as (1) whether to enter into a cleared or uncleared trade, (2) whether to refer a counterparty to a particular FCM for clearing, or (3) whether to send a cleared trade to a particular derivatives clearing organization. Although the ultimate determination as to whether to accept a customer for clearing would be made at a FCM, an affiliated SD or MSP could have incentives to try to influence that decision improperly. Such influence may be motivated by conflicts of interest that could have a direct impact on the clearing treatment of transactions. Moreover, in any situation where a person is dually registered as a FCM and as a SD or MSP, the restrictions on clearing activities set forth in the proposed regulations are intended to apply to the relationship between the clearing unit of the FCM and the business trading unit of the SD or MSP, even though the business trading unit and clearing unit reside within the same entity. The proposed rules, set forth at

subsection (d), have been adapted from NASD Rule 2711(b).

The Commission specifically requests comment regarding whether there are alternative approaches that could be taken to address the potential conflicts of interest that may arise between a FCM providing clearing services to customers and the business trading unit personnel of an affiliated swap dealer or major swap participant. For example, what approach would address an attempt by a swap dealer’s trading desk personnel to interfere with an affiliated FCM’s decision to offer clearing services to a particular customer because of a perceived competitive threat?

As an additional safeguard, the Commission is proposing to require that each affected FCM and IB implement policies and procedures mandating the disclosure to its customers of any material conflicts of interest that relate to a customer’s decision on the execution or clearing of a transaction.

### III. Related Matters

#### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)<sup>7</sup> requires that agencies, in proposing rules, consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis addressing the impact. The proposed rules would impact FCMs and IBs, each of which is addressed separately in the following paragraphs.

The Commission previously has established certain definitions of “small entities” to be used in evaluating the impact of the Commission’s rules on such small entities in accordance with the RFA. In the Commission’s “Policy Statement and Establishment of Definitions of ‘Small Entities’ for Purposes of the Regulatory Flexibility Act,”<sup>8</sup> the Commission concluded that registered FCMs should not be considered to be small entities for purposes of the RFA. The Commission’s determination in this regard was based, in part, upon the obligation of registered FCMs to meet the capital requirements established by the Commission. Likewise, the Commission determined “that, for the basic purpose of protection of the financial integrity of futures trading, Commission regulations can make no size distinction among registered FCMs.”<sup>9</sup> Thus, with respect to registered FCMs, the Commission believes that the proposed regulations will not have a significant economic

impact on a substantial number of small entities.

The Commission previously has determined that, for purposes of the RFA, the Commission should “evaluate within the context of a particular rule proposal whether all or some [IBs] should be considered to be small entities and, if so, to analyze the economic impact on [IBs] of any such rule at that time. Specifically, the Commission recognizes that the [IB] definition, even as narrowed to exclude certain persons, undoubtedly encompasses many business enterprises of variable size.”<sup>10</sup> At present, IBs are subject to various existing rules that govern and impose minimum requirements on their internal compliance operations, based on the nature of their business. The proposed amendments would merely augment the existing compliance requirements of such persons to address potential conflicts of interest within such firms. To the extent that certain IBs may be considered to be small entities, the Commission believes that the proposed regulations will not have a significant economic impact.

Accordingly, pursuant to Section 605(b) of the RFA, 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that these proposed rule amendments will not have a significant economic impact on a substantial number of small entities. However, the Commission invites the public to comment on this finding.

#### B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA),<sup>11</sup> imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of this proposed rulemaking would result in new collection of information within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3597(d) and 5 CFR 1320.11. The title for this collection is “Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers.” An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. OMB has not yet assigned a control number to the new collection.

<sup>6</sup> See section 4d(f)(1) of the CEA, as amended by section 724(a) of the Dodd-Frank Act.

<sup>7</sup> 5 U.S.C. 601 *et seq.*

<sup>8</sup> 47 FR 18618, Apr. 30, 1982.

<sup>9</sup> *Id.* at 18619.

<sup>10</sup> 48 FR 35248, 35276, Aug. 3, 1983.

<sup>11</sup> 44 U.S.C. 3501 *et seq.*

The collection of information under these proposed rules is necessary to implement certain provisions of the CEA, as amended by the Dodd-Frank Act. Specifically, it is essential to ensuring that FCMs and IBs develop and maintain the required conflicts of interest systems and procedures. The Commission's staff would use the information collected when conducting examination and oversight to evaluate the completeness and effectiveness of the conflicts of interest procedures and disclosures of FCMs and IBs.

If the proposed regulations are adopted, responses to this new collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974.<sup>12</sup>

#### 1. Information Provided by Reporting Entities/Persons

The proposed rules will require FCMs and IBs to adopt conflicts of interest policies and procedures that may impose PRA burdens, particularly through the implementation of certain recordkeeping requirements. For purposes of the PRA, the term "burden" means the "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency."<sup>13</sup> This burden will result from the recordkeeping obligations related to an FCM and IB's obligations to adopt and implement written policies and procedures reasonably designed to ensure compliance with the proposed regulation, document certain communications between non-research personnel and research department personnel, and provide certain disclosures. The burden relates solely to recordkeeping requirements; the proposed regulation does not contain any reporting requirements.

The burden for compliance per respondent is expected to be 44.5 hours, at a cost annually of \$4,450 for each respondent. This estimate includes the

time needed to review applicable laws and regulations; develop and update conflicts of interest policies and procedures and to maintain records of certain communications and disclosures periodically required by the proposed regulation. The Commission does not expect respondents to incur any start-up costs in connection with this proposed regulation as it anticipates that respondents already maintain personnel and systems for regulatory recordkeeping.

There are currently 159 registered FCMs and 1,645 registered IBs that will be required to comply with the proposed conflicts of interest provisions (or a total of 1,804 registrants). It is expected that the compliance officers of those firms will be the employees charged with fulfilling the regulatory obligations imposed by the proposed regulations. According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 13-1041, "Compliance Officers, Except Agriculture, Construction, Health and Safety, and Transportation," that is employed by the "Securities and Commodity Contracts Intermediation and Brokerage" industry is \$38.77.<sup>14</sup> Because FCMs and IBs include financial institutions whose compliance employees' salaries may exceed the mean wage, the Commission has taken a conservative approach and estimated the cost burden of these proposed regulations based upon an average salary of \$100 per hour. Accordingly, the estimated burden was calculated as follows:

##### *Recordkeeping Related to Maintenance of Conflicts of Interest Policies and Procedures*

*Number of registrants:* 1,804.  
*Average number of annual responses by each registrant:* 1.  
*Estimated average hours per response:*

2.  
*Frequency of collection:* Annually.  
*Aggregate annual burden:* 1,804 registrants × 1 response × 2 hours = 3,608 burden hours.

##### *Recordkeeping Related to Communications Between Certain Personnel*

*Number of registrants:* 1,804.  
*Average number of annual responses by each registrant:* 20.  
*Estimated average hours per response:*

0.5.  
*Frequency of collection:* As needed.  
*Aggregate annual burden:* 1,804 registrants × 20 responses × 0.5 hours = 18,040 burden hours.

##### *Recordkeeping Related to Disclosure Requirements*

*Number of registrants:* 1,804.  
*Average number of annual responses by each registrant:* 65.  
*Estimated average hours per response:*

0.5.  
*Frequency of collection:* As needed.  
*Aggregate annual burden:* 1,804 registrants × 65 responses × 0.5 hours = 58,630 burden hours.

Based upon the above, the aggregate cost for all registrants is 80,278 burden hours and \$8,027,800 [80,278 burden hours × \$100 per hour].

#### 2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) 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; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) 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 they can be summarized and addressed in the final rule. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting <http://www.RegInfo.gov>. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

#### C. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>15</sup> requires the Commission to consider the costs

<sup>12</sup> 5 U.S.C. 552a.

<sup>13</sup> 44 U.S.C. 3502(2).

<sup>14</sup> <http://www.bls.gov/oes/current/oes131041.htm>.

<sup>15</sup> 7 U.S.C. 19(a).

and benefits of its actions before issuing a rulemaking under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of the rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its actions.

Section 15(a) further specifies that the costs and benefits of a proposed rulemaking shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas and could, 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 accomplish any of the purposes of the Act.

#### 1. Summary of Proposed Requirements

The proposed regulations would implement section 732 of the Act, which amends section 4d of the CEA<sup>16</sup> to direct each FCM and IB to implement conflicts of interest systems and procedures to ensure that any persons researching or analyzing the price or market for any commodity are separated by “appropriate informational partitions” within the firm from review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons. Such conflicts of interest systems and procedures also must address any other issues that the Commission determines to be appropriate.

#### 2. Costs

With respect to costs, the Commission has determined that costs to FCMs and IBs would be minimal because the anticipated implementation of the proposed rules would require little additional resources beyond internal organizational changes to prevent compliance violations.

#### 3. Benefits

With respect to benefits, the Commission has determined that formal conflicts of interest rules will enhance transparency, bolster confidence in markets, reduce risk and allow

regulators to better monitor and manage risks to our financial system.

#### 4. Public Comment

The Commission invites public comment on its cost-benefit considerations. Commenters also are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed regulations with their comment letters.

#### List of Subjects in 17 CFR Part 1

Brokers, Commodity futures, Conflicts of interest, Reporting and recordkeeping requirements.

For the reasons stated in this release, the Commission proposes to amend 17 CFR part 1 as follows:

#### PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. The authority citation for part 1 is revised to read as follows:

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

2. Section 1.71 is added to read as follows:

#### § 1.71 Implementation of conflicts of interest policies and procedures by futures commission merchants and introducing brokers.

(a) *Definitions.* For purposes of this section, the following terms shall be defined as provided.

(1) *Affiliate.* This term means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

(2) *Business trading unit.* This term means any department, division, group, or personnel of a futures commission merchant or introducing broker or any of its affiliates, whether or not identified as such, that performs or is involved in any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a futures commission merchant or introducing broker.

(3) *Clearing unit.* This term means any department, division, group, or personnel of a futures commission merchant or any of its affiliates, whether or not identified as such, that performs or is involved in any proprietary or customer clearing activities on behalf of a futures commission merchant.

(4) *Derivative.* This term means (i) a contract for the purchase or sale of a commodity for future delivery; (ii) a security futures product; (iii) a swap; (iv) any agreement, contract, or transaction described in section

2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; (v) any commodity option authorized under section 4c of the Act; and (vi) any leverage transaction authorized under section 19 of the Act.

(5) *Non-research personnel.* This term means any employee of the business trading unit or clearing unit, or any other employee of the futures commission merchant or introducing broker who is not directly responsible for, or otherwise involved with, research concerning a derivative, other than legal or compliance personnel.

(6) *Public appearance.* This term means any participation in a conference call, seminar, forum (including an interactive electronic forum) or other public speaking activity before 15 or more persons, or interview or appearance before one or more representatives of the media, radio, television or print media, or the writing of a print media article, in which a research analyst makes a recommendation or offers an opinion concerning a derivatives transaction. This term does not include a password-protected Webcast, conference call or similar event with 15 or more existing customers, provided that all of the event participants previously received the most current research report or other documentation that contains the required applicable disclosures, and that the research analyst appearing at the event corrects and updates during the public appearance any disclosures in the research report that are inaccurate, misleading, or no longer applicable.

(7) *Research analyst.* This term means the employee of a futures commission merchant or introducing broker who is primarily responsible for, and any employee who reports directly or indirectly to such research analyst in connection with, preparation of the substance of a research report relating to any derivative, whether or not any such person has the job title of “research analyst.”

(8) *Research department.* This term means any department or division that is principally responsible for preparing the substance of a research report relating to any derivative on behalf of a futures commission merchant or introducing broker, including a department or division contained in an affiliate of a futures commission merchant or introducing broker.

(9) *Research report.* This term means any written communication (including electronic) that includes an analysis of the price or market for any derivative, and that provides information reasonably sufficient upon which to base a decision to enter into a

<sup>16</sup> 7 U.S.C. 6d.

derivatives transaction. This term does not include:

(i) Communications distributed to fewer than 15 persons;

(ii) periodic reports or other communications prepared for investment company shareholders or commodity pool participants that discuss individual derivatives positions in the context of a fund's past performance or the basis for previously-made discretionary decisions;

(iii) any communication generated by an employee of the business trading unit that is conveyed as a solicitation for entering into a derivatives transaction, and is conspicuously identified as such; and

(iv) internal communications that are not given to current or prospective customers.

(b) *Policies and Procedures.* Each futures commission merchant and introducing broker subject to this rule must adopt and implement written policies and procedures reasonably designed to ensure that the futures commission merchant or introducing broker and its employees comply with the provisions of this rule.

(c) *Research Analysts and Research Reports.*

(1) *Restrictions on Relationship with Research Department.*

(i) Non-research personnel shall not influence the content of a research report of the futures commission merchant or the introducing broker.

(ii) No research analyst may be subject to the supervision or control of any employee of the futures commission merchant's or introducing broker's business trading unit or clearing unit, and no personnel engaged in trading or clearing activities may have any influence or control over the evaluation or compensation of a research analyst.

(iii) Except as provided in paragraph (c)(1)(iv) of this section, non-research personnel, other than the board of directors and any committee thereof, shall not review or approve a research report of the futures commission merchant or introducing broker before its publication.

(iv) Non-research personnel may review a research report before its publication as necessary only to verify the factual accuracy of information in the research report, to provide for non-substantive editing, to format the layout or style of the research report, or to identify any potential conflicts of interest, provided that:

(A) Any written communication between non-research personnel and research department personnel concerning the content of a research report must be made either through

authorized legal or compliance personnel of the futures commission merchant or introducing broker or in a transmission copied to such personnel; and

(B) Any oral communication between non-research personnel and research department personnel concerning the content of a research report must be documented and made either through authorized legal or compliance personnel acting as an intermediary or in a conversation conducted in the presence of such personnel.

(2) *Restrictions on Communications.* Any written or oral communication by a research analyst to a current or prospective customer, or to any employee of the futures commission merchant or introducing broker, relating to any derivative must not omit any material fact or qualification that would cause the communication to be misleading to a reasonable person.

(3) *Restrictions on Research Analyst Compensation.* A futures commission merchant or introducing broker may not consider as a factor in reviewing or approving a research analyst's compensation his or her contributions to the futures commission merchant's or introducing broker's trading or clearing business. No employee of the business trading unit or clearing unit of the futures commission merchant or introducing broker may influence the review or approval of a research analyst's compensation.

(4) *Prohibition of Promise of Favorable Research.* No futures commission merchant or introducing broker may directly or indirectly offer favorable research, or threaten to change research, to an existing or prospective customer as consideration or inducement for the receipt of business or compensation.

(5) *Disclosure Requirements.*

(i) *Ownership and Material Conflicts of Interest.* A futures commission merchant or introducing broker must disclose in research reports and a research analyst must disclose in public appearances whether the research analyst maintains, from time to time, a financial interest in any derivative of a type that the research analyst follows, and the general nature of the financial interest.

(ii) *Prominence of Disclosure.* Disclosures and references to disclosures must be clear, comprehensive, and prominent. With respect to public appearances by research analysts, the disclosures required by paragraph (c)(5) of this section must be conspicuous.

(iii) *Records of Public Appearances.* Each futures commission merchant and

introducing broker must maintain records of public appearances by research analysts sufficient to demonstrate compliance by those research analysts with the applicable disclosure requirements under paragraph (c)(5) of this section.

(iv) *Third-Party Research Reports.*

(A) For the purposes of paragraph (c)(5)(iv) of this section, "independent third-party research report" shall mean a research report, in respect of which the person or entity producing the report:

(1) Has no affiliation or business or contractual relationship with the distributing futures commission merchant or introducing broker, or that futures commission merchant's or introducing broker's affiliates, that is reasonably likely to inform the content of its research reports; and

(2) makes content determinations without any input from the distributing futures commission merchant or introducing broker or from the futures commission merchant's or introducing broker's affiliates.

(B) Subject to paragraph (c)(5)(iv)(C) of this section, if a futures commission merchant or introducing broker distributes or makes available any independent third-party research report, the futures commission merchant or introducing broker must accompany the research report with, or provide a web address that directs the recipient to, the current applicable disclosures, as they pertain to the futures commission merchant or introducing broker, required by this section. Each futures commission merchant and introducing broker must establish written policies and procedures reasonably designed to ensure the completeness and accuracy of all applicable disclosures.

(C) The requirements of paragraph (c)(5)(iv)(B) of this section shall not apply to independent third-party research reports made available by a futures commission merchant or introducing broker to its customers:

(1) Upon request; or

(2) through a website maintained by the futures commission merchant or introducing broker.

(6) *Prohibition of Retaliation Against Research Analysts.* No futures commission merchant or introducing broker, and no employee of a futures commission merchant or introducing broker who is involved with the futures commission merchant's or introducing broker's trading or clearing activities, may, directly or indirectly, retaliate against or threaten to retaliate against any research analyst employed by the futures commission merchant or introducing broker or its affiliates as a



result of an adverse, negative, or otherwise unfavorable research report or public appearance written or made, in good faith, by the research analyst that may adversely affect the futures commission merchant's or introducing broker's present or prospective trading or clearing activities.

(d) *Clearing activities.*

(1) No futures commission merchant shall permit any affiliated swap dealer or major swap participant to directly or indirectly interfere with, or attempt to influence, the decision of the clearing unit personnel of the futures commission merchant with regard to the provision of clearing services and activities, including but not limited to:

(i) Whether to offer clearing services and activities to customers;

(ii) Whether to accept a particular customer for the purposes of clearing derivatives;

(iii) Whether to submit a transaction to a particular derivatives clearing organization;

(iv) Setting risk tolerance levels for particular customers;

(v) Determining acceptable forms of collateral from particular customers; or

(vi) Setting fees for clearing services.

(2) Each futures commission merchant shall create and maintain an appropriate informational partition between business trading units of an affiliated swap dealer or major swap participant and clearing unit personnel of the futures commission merchant. At a minimum, such informational partitions shall require that:

(i) No employee of a business trading unit of an affiliated swap dealer or major swap participant may review or approve the provision of clearing services and activities by clearing unit personnel of the futures commission merchant, make any determination regarding whether the futures commission merchant accepts clearing customers, or participate in any way with the provision of clearing services and activities by the futures commission merchant;

(ii) No employee of a business trading unit of an affiliated swap dealer or major swap participant shall supervise, control, or influence any employee of a clearing unit of the futures commission merchant; and

(iii) No employee of the business trading unit of an affiliated swap dealer or major swap participant shall influence or control compensation or evaluation of any employee of the clearing unit of the futures commission merchant.

(e) *Undue Influence on Customers.* Each futures commission merchant and introducing broker must adopt and

implement written policies and procedures that mandate the disclosure to its customers of any material incentives and any material conflicts of interest regarding the decision of a customer as to the trade execution and/or clearing of the derivatives transaction.

(f) All records that a futures commission merchant or introducing broker is required to maintain pursuant to this regulation shall be maintained in accordance with Commission Regulation § 1.31 and shall be made available promptly upon request to representatives of the Commission.

Issued in Washington, DC, on November 10, 2010, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

**Statement of Chairman Gary Gensler**

*Implementation of Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers*

I support the proposed rulemakings that establish firewalls to ensure a separation between the research arm, the trading arm and the clearing activities of swap dealers, major swap participants, futures commission merchants and introducing brokers. This rule proposal relates to the conflicts-of-interest provisions of the Dodd-Frank Act that direct swap dealers and major swap participants to have appropriate informational partitions. The proposal builds upon similar protections in the securities markets as mandated in the Sarbanes-Oxley Act. The proposed rules will protect market participants and the public while also promoting the financial integrity of the marketplace.

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**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 54**

[REG-118412-10]

RIN 1545-BJ50

**Group Health Plans and Health Insurance Coverage Rules Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** In the Rules and Regulations section of this issue in the **Federal Register**, the IRS is issuing temporary regulations regarding status as a grandfathered health plan under the provisions of the Patient Protection and Affordable Care Act (the Affordable Care Act) in connection with changes in policies, certificates, or contracts of insurance. The temporary regulations provide guidance to employers, group health plans, and health insurance issuers providing group health insurance coverage. The IRS is issuing the temporary regulations at the same time that the Employee Benefits Security Administration of the U.S. Department of Labor and the Office of Consumer Information and Insurance Oversight of the U.S. Department of Health and Human Services are issuing substantially similar interim final regulations with respect to group health plans and health insurance coverage offered in connection with a group health plan under the Employee Retirement Income Security Act of 1974 and the Public Health Service Act. The text of the temporary regulations being issued by the IRS serves as the text of these proposed regulations.

**DATES:** Written or electronic comments and requests for a public hearing must be received by December 17, 2010.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-118412-10), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered to: CC:PA:LPD:PR (REG-118412-10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-118412-10).

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, Karen Levin at 202-622-6080; concerning submissions of comments or to request a hearing, Regina Johnson at 202-622-7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Background**

The temporary regulations published elsewhere in this issue of the **Federal Register** amend § 54.9815-1251T of the Miscellaneous Excise Tax Regulations. The proposed and temporary regulations are being published as part of a joint rulemaking with the