Appendix A. Major Final Rules Published During FY 2012 (October 2011 – September 2012)

According to the Government Accountability Office's (GAO) rules database,[1] independent regulatory agencies published a total of 22 major final rules in the *Federal Register* during fiscal year (FY) 2012 (October 1, 2011, through September 30, 2012). The Commodity Futures Trading Commission (CFTC) published 10 of the 22 rules, the Securities and Exchange Commission (SEC) published 4 rules, and the CFTC and the SEC jointly published 3 other rules. Together, the two agencies accounted for 17 of the 22 major final rules published by independent regulatory agencies during the fiscal year. The Bureau of Consumer Financial Protection published two major rules during the period, and the Nuclear Regulatory Commission and the Consumer Product Safety Commission each published one rule. The Office of the Comptroller of the Currency, the Federal Reserve System, and the Federal Deposit Insurance Corporation jointly published one rule.

The following descriptions of these 22 major rules were drawn from the GAO major rules reports, supplemented with information from the preambles to the rules themselves. For each rule, the appendix notes the agency (or agencies) that issued the rule; the date it was published in the *Federal Register*; the effective date(s); the Regulation Identifier Number (RIN);[2] and the *Federal Register* citation. Each section also provides information from the preamble about (1) the nature of the rule; (2) costs and benefits; (3) compliance with the Paperwork Reduction Act (PRA); and (4) compliance with the Regulatory Flexibility Act (RFA).

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1. DERIVATIVES CLEARING ORGANIZATION GENERAL PROVISIONS AND CORE PRINCIPLES

Agency: Commodity Futures Trading Commission
Published: November 8, 2011
Effective: January 9, 2011 (with some elements as late as November 8, 2012)
RIN: 3038-AC98
76 *Federal Register* 69334

Nature of Rule: The final rule implemented certain provisions of Title VII and Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) governing derivatives clearing organization (DCO) activities. More specifically, the rule

[1] Available at http://gao.gov/legal/congressact/fedrule.html.

[2] In a few cases, the rules did not have RINs, so other control numbers are provided.

established the regulatory standards for 15 DCO Core Principles: compliance, financial resources, participant and product eligibility, risk management, settlement procedures, treatment of funds, default rules and procedures, rule enforcement, system safeguards, reporting, recordkeeping, public information, information sharing, antitrust considerations, and legal risk. The rule also updated and added related definitions; adopts implementing rules for DCO chief compliance officers; revises procedures for DCO applications, including the required use of a new Form DCO; adopts procedural rules applicable to the transfer of a DCO registration; and adds requirements for approval of DCO rules establishing a portfolio margining program for customer accounts carried by a futures commission merchant that is also registered as a securities broker-dealer. In addition, the rule made certain technical amendments and adopted certain delegation provisions.

Cost-Benefit Information: In a "Considerations of Costs and Benefits" section of the preamble, the Commission evaluated each of eight portions of this rule in light of five factors: (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 discussed—primarily in qualitative terms—the costs and benefits associated with each of these five areas for all eight portions of the rule. In some cases, CFTC provided monetized estimates of costs – primarily in relation to its paperwork requirements. For example, the agency estimated that completion of Form DCO would cost $100,000. Benefits were typically described in qualitative terms (e.g., protection of market participants, and providing financial integrity to the markets).

In several instances the Commission found that quantification or estimation of costs and benefits was not readily feasible. For example, the agency said "because of the range of circumstances of different DCOs, it is not feasible to estimate or quantify the costs of the safeguards imposed by the Commission's financial resource rules." [3] In nine places in the preamble, the agency said that certain effects, circumstances, consequences, or conditions were "too speculative and uncertain" to quantify or estimate costs or benefits with any precision. In other instances the Commission did not identify any new costs associated with the specific portion of the rule in question.

CFTC noted that some of the regulations in the rule "merely codify the requirements" of the underlying statute. It also said "As these requirements are imposed by the Dodd-Frank Act, any associated costs and benefits are the result of statutory directives, as previously determined by the Congress, that govern DCO activities independent of the Commission's regulations. By its terms, [Commodity Exchange Act, or CEA, 7 U.S.C. 1 et seq.] Section 15(a) requires the Commission to consider and evaluate the prospective costs and benefits of regulations and orders of the Commission prior to their issuance; it does not require the Commission to evaluate the costs and benefits of the actions or mandates of the Congress."[4]

[3] 76 Federal Register 69414

[4] 77 Federal Register 69410.

PRA Information: CFTC submitted the rule's information collection requirements to OMB for review. They are entitled "Financial Resources Requirements for Derivatives Clearing Organizations" (OMB control number 3038–0066; 480 burden hours, and $1,840 in other costs), "Information Management Requirements for Derivatives Clearing Organizations" (OMB control number 3038–0069; 33,041 burden hours and $5.8 million in other costs), "General Regulations and Derivatives Clearing Organizations" (OMB control number 3038–0081; 960 hours and $97,000 in other costs), and "Risk Management Requirements for Derivatives Clearing Organizations" (OMB control number 3038–0076; 602 burden hours and $1,206 in other costs). The agency provided the OMB control numbers, but did not provide the burden estimates in the preamble. [5]

RFA Information: Because the rule would only affect DCOs (which are not small entities), CFTC certified that it would not have a significant economic impact on a substantial number of small entities.

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2. TESTING AND LABELING PERTAINING TO PRODUCT CERTIFICATION

Agency: Consumer Product Safety Commission
Published: November 8, 2011
Effective: February 8, 2013
RIN: (Control #169374)
76 *Federal Register* 69482

Nature of the Rule: The final rule established protocols and standards with respect to certification and continued testing for children's products, with a goal of reducing the incidents of deaths and injuries associated with those products. The final rule also established requirements for labeling of consumer products to show that the product complies with the certification requirements under Section 14(a) of the Consumer Product Safety Act (CPSA). The rule implemented Section 14(a)(2) and (i) of the CPSA, as amended by Section 102(b) of the Consumer Product Safety Improvement Act of 2008 (CPSIA).

Cost-Benefit Information: In response to a comment asking the agency to prepare a full cost-benefit analysis, the agency said the rule was being promulgated under the Administrative Procedure Act and Section 3 of the CPSA, and that "neither authority requires us to conduct a cost-benefit analysis. Moreover, by allowing in CPSIA expedited rulemaking, Congress made it clear that it did not want the Commission engaging in any unnecessary delay in promulgating this rule." The agency also said "in recognition of Congress's view as reflected in CPSIA, we decline to conduct a cost-benefit analysis for the final rule…."[6] The agency went on to say that it had "changed the final rule to address

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[5] CFTC staff said the burden estimate had been provided in the notice of proposed rulemaking, and the information management burden was noted in a footnote to the final rule.

[6] 76 *Federal Register* 69484.

some of the economic burden on manufacturers," including: "(1) reserving the subpart B requirements regarding a reasonable testing program; (2) eliminating certain requirements of the proposed rule for children's products such as the remedial action plan; (3) reducing the recordkeeping requirements in several respects; and (4) allowing the use of in-house ISO/IEC 17025:2005 laboratories to reduce the frequency of third party periodic testing."

The final rule did contain a lengthy RFA analysis, which included a (primarily qualitative) discussion of the need for and objectives of the rule; number of small firms affected (manufacturers, wholesalers, retailers); compliance, reporting and recordkeeping requirements; the cost of third party testing; alternatives that could further reduce the impact of the rule on small businesses; and other issues. Costs for testing were provided per product. For example, the cost of testing one bicycle was estimated to range from $700 in China to about $1,100 in the United States. Two laboratories estimated the cost of testing a bicycle helmet at between $600 and $830. Costs of the physical and mechanical tests for toys were estimated to range from about $50 to $245. CPSC also provided total testing costs (in both dollars and as a percent of revenue) for three hypothetical manufacturers.

PRA Information: CPSC applied to OMB for a control number for the information collection and planned to publish a notice providing the number once it received approval from OMB. The Commission estimated that approximately 300,000 non-apparel children's products would be covered by the rule and that an average of 5 hours would be needed for the recordkeeping associated with these products. The Commission also estimated that there are approximately 1.3 million children's apparel and footwear products that will require an average of 3 hours for the recordkeeping. Thus, the total hour burden of the recordkeeping associated with the final rule was estimated to be 5.4 million hours. The total cost of the recordkeeping associated with the testing and certification rule was estimated to be approximately $197 million (5.4 million hours x $36.43 per hour). CPSC also mentioned "some limitations to the above estimates" (e.g., that the estimates of the number of products were "not based on a well-designed survey or comprehensive database").[7]

RFA Information: The Commission determined that the final rule would have a significant adverse impact on a substantial number of small businesses and prepared a regulatory flexibility analysis in conjunction with the final rule. The Commission stated that the impact is expected to be disproportionate to small and low-volume manufacturers because testing costs are relatively fixed. The Commission incorporated some provisions into the final rule intended to lessen the impact on small businesses, including provisions allowing for longer maximum intervals between periodic testing if the manufacturer conducts certain other testing; allowing manufacturers to use component part testing; and permitting manufacturers and importers to rely upon the certifications issued by other parties as a basis for issuing their own finished product certificates. The Commission also

[7] 76 *Federal Register* 69540.

considered other alternatives to reduce the impact on small businesses that were not adopted in the final rule.

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3. REPORTING BY INVESTMENT ADVISERS TO PRIVATE FUNDS AND CERTAIN COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS ON FORM PF

Agencies: Commodity Futures Trading Commission and Securities and Exchange Commission
Published: November 16, 2011
Effective: March 31, 2012; compliance by June 15, 2012
RINs: 3038-AD03; 3235-AK92
76 *Federal Register* 71128

Nature of the Rule: The final rules adopted new rules under the CEA and the Investment Advisers Act of 1940 to implement provisions of Title IV of the Dodd-Frank Act. The new SEC rule requires investment advisers registered with the SEC that advise one or more private funds and have at least $150 million in private fund assets under management to file Form PF with the SEC. The new CFTC rule requires commodity pool operators (CPOs) and commodity trading advisors (CTAs) registered with the CFTC to satisfy certain CFTC filing requirements with respect to private funds by filing Form PF with the SEC, but only if those CPOs and CTAs are also registered with the SEC as investment advisers and are required to file Form PF under the Advisers Act. The new CFTC rule also allows such CPOs and CTAs to satisfy certain CFTC filing requirements with respect to commodity pools that are not private funds by filing Form PF with the SEC. Advisers must file Form PF electronically, on a confidential basis. The information contained in Form PF is designed, among other things, to assist the Financial Stability Oversight Council in its assessment of systemic risk in the U.S. financial system.

Cost-Benefit Information: The Commissions identified two classes of qualitative benefits. First, the information collected will facilitate the Financial Stability Oversight Council's (FSOC's) understanding and monitoring of systemic risk in the private fund industry and assist FSOC in determining whether and how to deploy its regulatory tools with respect to nonbank financial companies. Second, the information will enhance the Commissions' ability to evaluate and develop regulatory policies and improve the efficiency and effectiveness of efforts to protect investors and maintain fair, orderly, and efficient markets. The costs associated with the final rule are, for the most part, discussed in the PRA section below.

PRA Information: The Commissions estimated that Form PF would result in an aggregate burden of 258,000 hours per year for all private fund advisers for each of the first 3 years, or 72 burden hours per year on average for each private fund adviser over

the same period. In addition, firms required to file Form PF must also pay filing fees of $150 per annual filing and $150 per quarterly filing, which the Commissions estimated would result in advisers paying aggregate filing fees of approximately $684,000 per year. Overall, the Commissions estimated that "the aggregate annual costs of Form PF, other than for hardware costs, are approximately $108,000,000 in the first year and $60,500,000 in subsequent years. In addition, we estimate that hardware costs will add between $0 and $25,000,000 in the first year."[8] They also said there may be indirect costs that are difficult to quantify (e.g., risk of disclosure of proprietary information).

The Commissions said these costs are scaled to the adviser's size, the size of funds, and the types of private funds each adviser manages. They said the costs imposed by Form PF would be most significant for the first report, and would require more attention from senior personnel than subsequent reports. Some advisors may automate some portion of the filing process, which would increase initial costs, but decrease subsequent costs. According to CFTC staff, the agency determined that its portion of the final rule would not impose any additional burdens on registered CPOs and CTAs that are dually registered as investment advisers with the SEC because such entities are only required to file Form PF with the SEC.

RFA Information: SEC performed a regulatory flexibility analysis in conjunction with the final rule. SEC estimated that no more than 50 small entities are likely to become subject to Form PF reporting obligations under the final rule. SEC estimated that completing, reviewing, and filing Form PF would cost approximately $13,600 for each small adviser in its first year of reporting and $4,200 per year for each subsequent year, in addition to a filing fee of $150 per annual filing. To minimize the impact on small entities, SEC adopted a minimum reporting threshold of $150 million as well as reporting requirements and timetables that differ for smaller entities. In addition, the information that a small entity subject to the rule must provide under section 1 of Form PF is much simpler than the information required of large hedge fund or large liquidity fund advisers and is consolidated in one section of the form.

CFTC determined that its portion of the final rule would not impose any additional burdens on registered CPOs and CTAs that are dually registered as investment advisers with the SEC because such entities are only required to file Form PF with the SEC. Therefore, CFTC certified that the final rule will not have a significant impact on a substantial number of small entities.

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4. POSITION LIMITS FOR FUTURES AND SWAPS

Agency: Commodity Futures Trading Commission
Published: November 18, 2011

[8] 76 *Federal Register* 71169.

Effective: January 17, 2012
RIN: 3038-AD17
76 *Federal Register* 71626

Nature of the Rule: The final rule established a position limits regime for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. The rule also imposed aggregate position limits across different trading venues to contracts based on the same underlying commodity. In addition to developing position limits for these contracts, the rule implemented a new statutory definition of bona fide hedging transactions, revised the standards for aggregation of positions, and established position visibility reporting requirements. The rule required designated contract markets and swap execution facilities that are trading facilities to set position limits for exempt and agricultural commodity contracts subject to federal limits and established acceptable practices for position limits and position accountability rules in other commodities. The rule was issued pursuant to authority in the CEA, as amended by Title VII of the Dodd-Frank Act.

Cost-Benefit Information: The Commission evaluated the three portions of this rule in light of the five areas covered in Section 15(a) of the CEA: (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. In many instances, the Commission determined that it was not feasible to estimate or quantify the costs with reliable precision, primarily because the final rules apply to heretofore unregulated swaps markets and because the Commission does not have the resources or information to determine how market participants may adjust their trading strategies in response to the rules. In particular, the agency said "Quantifying the consequences or costs of market participation or trading strategies would necessitate having access to and understanding of an entity's business model, operating model, and hedging strategies, including an evaluation of the potential alternative hedging or business strategies that would be adopted if such limits were imposed. Because the economic consequences to any particular firm will vary depending on that firm's business model and strategy, the Commission believes it is impractical to develop any type of generic or representative calculation of these economic consequences."[9] CFTC also said "public comment letters provided little quantitative data regarding the costs and benefits associated with the Proposed Rules." In the proposal, the Commission said the proposed position limits and limitations on trading activity "could impose certain general but significant costs."

PRA Information: The Commission determined that this final rule contained information collection requirements under the Act and submitted them to OMB for review. The title for the collection of information is "Part 151—Position Limit Framework for Referenced Contracts." The Commission estimated the information collection burdens separately for each of the three portions of the rule because the burdens imposed affected a varying number of entities to varying degrees. The

[9] 76 Federal Register 71665.

Commission ultimately estimated that the entire information collection would result in an industry-wide burden of 331,460 annual labor hours for annual labor costs of $37.7 million in addition to $61.3 million in annualized capital, start-up, total operating, and maintenance costs.

RFA Information: The Commission determined that the rule would not have a significant economic impact on a substantial number of small entities.

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5. INVESTMENT OF CUSTOMER FUNDS AND FUNDS HELD IN AN ACCOUNT FOR FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

Agency: Commodity Futures Trading Commission
Published: December 19, 2011
Effective: February 17, 2012; compliance by June 18, 2012
RIN: 3038-AC79
76 *Federal Register* 78776

Nature of the Rule: The final rule amended the Commission's regulations regarding the investment by futures commission merchants (FCMs) and derivatives clearing organizations (DCOs) of customer segregated funds subject to Commission Regulation 1.25 and funds held in an account subject to Commission Regulation 30.7. The amendments addressed: certain changes to the list of permitted investments (including the elimination of in-house transactions), a clarification of the liquidity requirement, the removal of rating requirements, and an expansion of concentration limits including asset-based, issuer-based, and counterparty concentration restrictions.

Cost-Benefit Information: The Commission prepared an analysis of the costs and benefits of the final rule. "Where quantification has not been reasonably estimable due to lack of necessary underlying information, the Commission has considered the costs and benefits of the final rules in qualitative terms."[10] (The agency said it requested quantitative information on costs and benefits but received none.) Generally, the Commission believes that the restrictions on segregated customer funds and Regulation 30.7 fund investments promote important benefits. These include greater security for customer funds and enhanced stability for the financial system as a whole.

The Commission discussed costs and benefits in the context of the five Section 15(a) factors (protection of market participants and the public; efficiency, competitiveness and financial integrity of the markets; price discovery; sound risk management practices; and other public interest considerations) for (1) municipal securities, (2) U.S. agency obligations, (3) certificates of deposit, (4) commercial paper and corporate debt, (5)

[10] 76 *Federal Register* 78792.

foreign sovereign debt, (6) money market mutual funds, (7) other investment limitations, and (8) Regulation 30.7.

Section 4d of the CEA limits the investment of customer segregated funds to obligations of the United States and obligations fully guaranteed as to principal and interest by the United States (U.S. government securities), and general obligations of any state or of any political subdivision thereof (municipal securities). The Commission has authority to grant exempt relief under Section 4(c) to permit additional investments beyond those prescribed in Section 4d, and the list of permissible investments is set out in Regulation 1.25. The final rule narrows the scope of investment choices in order to reduce risk and to increase the safety of Regulation 1.25 investments.

FCMs currently hold over $170 billion in segregated customer funds and $40 billion in funds held subject to Regulation 30.7. In the final rule, the Commission determined that certain investments are no longer permitted, as they may not adequately meet the statute's paramount goal of protecting customer funds. The Commission recognized that restricting the type and form of permitted investments could result in certain FCMs and DCOs earning less income from their investments of customer funds. However, the Commission was unable to determine the magnitude of such income reduction, if any, because information was not provided to allow the Commission to estimate any such income reduction. No commenter provided information about the composition of the portfolio in which customer segregated funds are invested. The Commission stated that the list of permitted investments under the rules still represents a significantly wider selection of investment options than those permitted by the Act. Further, in most cases, the amended rules allow for investment in many of the same instruments as previously permitted, subject to asset-based and issuer-based concentration limits.

PRA Information: The Commission said the rule did not impose any new reporting or recordkeeping requirements.

RFA Information: The Commission determined that the rule would not have a significant economic impact on a substantial number of small entities.

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6. FAIR CREDIT REPORTING (REGULATION V)

Agency: Bureau of Consumer Financial Protection
Published: December 21, 2011
Effective: December 30, 2011
RIN: 3170-AA06
76 *Federal Register* 79308

Nature of the Rule: Section 1061 of the Dodd-Frank Act transferred to the Bureau the rulemaking and certain other authorities of the Board of Governors of the Federal

Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Federal Trade Commission (FTC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS). Section 1088 of the Dodd-Frank Act made conforming amendments to the Fair Credit Reporting Act (FCRA). This interim final rule with request for public comment establishes a new Regulation V (Fair Credit Reporting). The rule does not impose any new substantive obligations on persons subject to the existing FCRA regulations. The interim final rule substantially duplicates the interagency regulations promulgated under the FCRA by the Board of Governors of the Federal Reserve System, the FDIC, the FTC, NCUA, OCC, and OTS. In addition, the rule substantially duplicates the following FTC regulations: 16 C.F.R. parts 603, 610, 611, 613, 614, and 642, and associated model forms and disclosures. The rule reproduces the above regulations and associated model forms and interpretations with only certain nonsubstantive, technical, formatting, and stylistic changes. The Bureau believes that recodifying the above agencies' regulations to reflect the transfer of authority to the Bureau will facilitate compliance with the FCRA and its implementing regulations.

Cost-Benefit Information: Pursuant to Section 1022(b)(2) of the Dodd-Frank Act, the Bureau conducted an analysis of potential benefits, costs, and impacts of this interim final rule.[11] The Bureau said that the rule would benefit consumers and covered persons by updating and recodifying Regulation V to reflect the transfer of authority to the Bureau and certain other changes mandated by the Dodd-Frank Act. Although the interim final rule would require the modification of forms to reflect the transfer of authority to the Bureau, the Bureau determined that the final rule would not impose any new substantive obligations on consumers or covered persons and did not expect the rule to have any impact on consumers' access to consumer financial products and services.

However, the Bureau said "covered entities may need to make one-time revisions to their disclosures. The Bureau estimates that these changes will take two hours per form, per firm; the precise number of form changes varies with the type of affected firm. The Bureau thus estimates that these changes will impose a total cost of roughly $98,271,000 spread across approximately 214,000 firms. These costs may be overstated to the extent that multiple firms use the same software vendors, who are able to spread any costs over all of their affected clients. These estimates may also be overstated because the Bureau is giving affected firms one year to effect the changes, thus allowing affected firms to include the changes in routine, scheduled systems updates during the next year. These one-time changes to the affected disclosures ultimately will provide ongoing benefits to consumers by providing them with accurate information on whom to contact for additional information."[12]

[11] Citing this requirement, the Bureau said "The manner and extent to which these provisions apply to interim final rules and to benefits, costs and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations."

[12] 76 Federal Register 79311.

PRA Information: Although the Bureau determined that this rule contains information collection requirements under the Act, OMB has previously approved all of them, and the burden imposed by these requirements is unchanged by this rule. The OMB control number for these information collections is 3170–0002.

RFA Information: The Bureau determined that the rule would not have a significant economic impact on a substantial number of small entities.

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7. NET WORTH STANDARD FOR ACCREDITED INVESTORS

Agency: Securities and Exchange Commission
Published: December 29, 2011
Effective: February 27, 2011
RIN: 3235-AK90
76 *Federal Register* 81793

Nature of the Rule: The rule amended the accredited investor standards in the Commission's rules under the Securities Act of 1933 to implement the requirements of the Dodd-Frank Act. The Act requires the definitions of "accredited investor" in the Securities Act rules to exclude the value of a person's primary residence for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of $1 million. This change to the net worth standard was effective upon enactment by operation of the Dodd-Frank Act, but it also required the Commission to revise its current Securities Act rules to conform to the new standard. The Commission also adopted technical amendments to Form D and a number of rules to conform them to the requirements of the Act and to correct cross-references to former Section 4(6) of the Securities Act, which was renumbered Section 4(5) by Section 944 of the Dodd-Frank Act.

Cost-Benefit Information: The Commission stated that its cost-benefit analysis focuses on the costs and benefits to the economy of including the specific amendments described below, rather than on the costs and benefits of the new accredited investor net worth standard itself. The Commission said the rules provide the most appropriate method to implement Section 413(a), and will result in the following benefits compared to other possible methods to implement Section 413(a). The Commission said investors and issuers will benefit from implementing rules that are easy to understand and consistent with conventional net worth calculation concepts through reduced transaction costs relative to other alternatives, and investors who have ceased to qualify as accredited investors because of the change in net worth standard will be able to exercise pre-existing rights even if the issuer is unable or unwilling to permit exercise by non-accredited investors and at lower cost than if the individuals did not qualify as accredited investors. Additionally, the Commission stated that the look back period will reduce incentives to manipulate net worth calculations which should make investors whose net worth reaches

the accredited investor threshold only if the value of available home equity is included as part of a net worth calculation less susceptible to high-pressure sales tactics, and generally will provide investor protection benefits to households which, under the criteria of Section 413(a), are less able to bear the economic risk of an investment in unregistered securities. The Commission also stated that to the extent that exempt offerings to accredited investors are less costly for issuers to complete than registered offerings, a larger pool of accredited investors that may participate in these offerings could result in cost savings for issuers conducting these offerings.

The Commission stated that, like its analysis of the benefits, its analysis of the costs focuses on the costs attributable to its adopted language on how to treat the primary residence and debt secured by the primary residence in the calculation of net worth, including the treatment of debt incurred in the 60 days before the net worth calculation is performed, and on the costs attributable to the transition provision included in the final rules. The Commission stated that the transition provision would, in limited circumstances, permit investors who do not qualify as accredited investors under the new net worth standard, but who do qualify under the previous standard, to acquire securities pursuant to pre-existing rights without the protections afforded to non-accredited investors. The Commission said this would impose costs to the extent that such investors would have benefited from such protections. According to the Commission, the transition provision applies only in limited circumstances, which may prevent some investors from participating in some offerings and may cause issuers to incur the cost of seeking out other investors. Additionally, the Commission explained that the treatment of indebtedness secured by the primary residence that is incurred within 60 days before the accredited investor determination may result in some individuals failing to meet the $1 million net worth threshold for 60 days after entering into new financing or refinancing arrangements, who would have met such threshold if no look-back provision applied, if the proceeds of such refinancing are invested in the primary residence or are otherwise disposed of without acquiring an asset that is included in the net worth calculation. The Commission stated that such individuals might lose investment opportunities if issuers are not willing or able to allow them to participate in offerings conducted during the period in which they do not qualify as accredited investors. The Commission noted that the amendments may require investors to estimate the fair market value of the investor's primary residence to determine whether it exceeds the amount of indebtedness secured by the primary residence and believes this to be a manageable cost because investors had to estimate the fair market of their primary residence to calculate net worth under the net worth standard for accredited investor that applied before enactment of the Dodd-Frank Act. The Commission said it was not aware that market participants found the need for such an estimate to be problematic.

The Commission also stated: "While the Commission acknowledges these potential costs, there are no available data tracking Regulation D investment by household, so we cannot develop quantitative estimates of the economic impact of eliminating from the pool of accredited investors the households that no longer qualify based on the new net worth standard, or of providing exemptive or other relief from the new standard, which would keep such households in the accredited investor pool. This impact arises

principally as a result of the enactment of Section 413(a) of the Dodd-Frank Act and only to a limited extent from our exercise of rulemaking discretion."[13]

PRA Information: The Commission stated that the amendments it adopted did not contain a "collection of information" requirement within the meaning of the PRA.

RFA Information: The Commission stated that a final regulatory flexibility analysis had been prepared, and related to amendments to its accredited investor rules under the Securities Act to implement the requirements of Section 413(a) of the Dodd-Frank Act. According to the Commission, the amendments would affect issuers that are small entities, because issuers that are small entities must believe or have a reasonable basis to believe that prospective investors are accredited investors at the time of the sale of securities if they are relying on the definition of "accredited investor" for an exemption under Regulation D or Section 4(5). The Commission explained that, an issuer is a "small business" or "small organization" if it has total assets of $5 million or less as of the end of its most recent fiscal year and an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. The Commission also stated that the amendments apply to all issuers that rely on the accredited investor net worth standards in the exemptions to Securities Act registration in Regulation D and Section 4(5).

With respect to exempting small entities from coverage of these amendments, the Commission said such a provision would have no impact on the regulatory burdens on small entities, since Section 413(a) became effective upon enactment. The Commission said its amendments are designed to minimize confusion among issuers and investors and to provide for the protection of investors without unduly burdening both issuers and investors, including small entities and their investors. The Commission said exempting small entities could potentially increase their regulatory burdens and confusion, and said it has endeavored to minimize the regulatory burden on all issuers, including small entities, while meeting its regulatory objectives.

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8. REAL-TIME PUBLIC REPORTING OF SWAP TRANSACTION DATA

Agency: Commodity Futures Trading Commission
Published: January 9, 2012
Effective: March 9, 2012
RIN: 3038-AD08
77 *Federal Register* 1182

[13] 76 Federal Register 81803.

Nature of Rule: Section 727 of the Dodd-Frank Act added a new Section 2(a)(13) to the CEA, establishing standards and requirements related to real-time reporting and the public availability of swap transaction and pricing data. Section 727 directs the Commission to promulgate rules providing for the public availability of such data in real-time, in such form and at such times as the Commission deems appropriate to enhance price discovery. This rule implements that requirement, and describes transaction reporting as "a fundamental component of the legislation's objective to reduce risk, increase transparency, and promote market integrity within the financial system generally, and the swaps market in particular."[14]

Cost-Benefit Information: CFTC said "To the extent that these new rules reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those mandated by Congress in passing the legislation. However, the rules may generate costs and benefits attributable to the Commission's determinations regarding implementation of the Dodd-Frank Act's statutory requirements."[15] In a nine-page discussion separately covering the reporting and public dissemination provisions and the recordkeeping and timestamp requirements, the Commission separately discussed the benefits, costs, and consideration of alternatives, as well as the five factors that have to be considered pursuant to Section 15(a) of the CEA (i.e., protection of market participants and the public; efficiency, competitiveness, and financial integrity of markets; price discovery; sound risk management practices; and other public interest considerations). According to the Commission, because this is a reporting and recordkeeping rule, many of the costs of the rule are associated with collections of information. Therefore, the Commission said that the estimated burden and support for the collections of information in this rule are discussed in the PRA section of the rule and the information collection requests filed with OMB as required by that statute.

CFTC said the rule's reporting and public dissemination requirements would "generate several overarching, if presently unquantifiable, benefits to swaps market participants and the public generally. These include: Improvements in market quality; price discovery; improved risk management; economies of scale and greater efficiencies; and improved regulatory oversight."[16] The Commission said the timestamp was necessary because it (1) establishes an audit rail for enforcement, and (2) enhances price discovery by allowing market participants and the public to recreate the trading day.

PRA Information: In a three and one-half page discussion in the preamble, the Commission noted that OMB issued a notice of action providing that the Commission should examine the comments received and submit a revised supporting statement. According to the Commission, OMB assigned OMB control number 3038–0070 to this collection of information, but OMB was withholding its approval of this collection of information pending the submission of the revised supporting statement. The Commission revised some of its assumptions and estimates as a result of changes in the requirements imposed by part 43 and after considering the comments received from two

[14] 77 Federal Register 1232.

[15] 77 Federal Register 1233.

[16] 77 *Federal Register* 1234.

interested parties who were invited to comment on any aspect of the information collection requirements discussed in the Proposing Release. The Commission stated that its revised estimates were being submitted to OMB and could be found in the updated form 83–I and supporting statement, which can be found in the PRA database at http://www.reginfo.gov/public/do/PRAMain.

The closest associated information collection request under control number 3038-0070 is one submitted on January 6, 2012, three days before the final rule was published in the *Federal Register* (although the *Federal Register* citation identified for the collection was a rule published on December 7, 2010, 75 *Federal Register* 76140). The PRA database indicates that the information collection would impose 677,140 burden hours through an estimated 1,198 responses per year, and that the annual financial burden on respondents would be slightly more than $150 million ($148 million of which was attributed to "agency discretion"). OIRA reportedly approved the collection request on April 18, 2012. [17]

RFA Information: The Commission provided in its RFA statement that the proposed rule would have a direct effect on numerous entities, specifically designated contract markets, swap data repository (SDRs), swap execution facilities (SEFs), swap dealers (SDs), major swap participants (MSPs), and certain single end-users. In the Proposing Release, the Commission then provided that it previously had established that certain entities subject to its jurisdiction were not small entities for purposes of the RFA. The Commission also provided that certain entities that would be subject to the proposed rule—namely SDRs, SEFs, SDs, and MSPs—are entities for which the Commission had not previously made a size determination for RFA purposes. The Commission proposed that these entities should not be considered to be small entities based upon their size and other characteristics. The Commission recognized that the proposed rule could have an economic effect on certain single end users, in particular those end users that enter into swap transactions with another end-user. According to the Commission, unlike the other parties to which the proposed rulemaking would apply, these end users are not subject to designation or registration with or to comprehensive regulation by the Commission. The Commission recognized that some of these end users might be small entities. Accordingly, for the reasons stated in the proposal and foregoing discussion in response to the comments received from the association, the Commission continued to believe that the rule would not have a significant impact on a substantial number of small entities. Therefore, the Commission ultimately certified the real-time reporting requirements being adopted would not have a significant economic impact on a substantial number of small entities.

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9. SWAP DATA RECORDKEEPING AND REPORTING REQUIREMENTS

Agency: Commodity Futures Trading Commission

[17] See http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201201-3038-001.

Published: January 13, 2012
Effective: March 13, 2012
RIN: 3038-AD19
77 *Federal Register* 2136

Nature of Rule: Section 727 of the Dodd-Frank Act added to the CEA new Section 2(a)(13)(G), which requires all swaps to be reported to swap data repositories (SDRs), which are new registered entities created by Section 728 of the Dodd-Frank Act to collect and maintain data related to swap transactions as prescribed by the Commission, and to make such data electronically available to regulators. Section 728 of the act added a new Section 21(b) of the CEA, which directs the Commission to prescribe standards for swap data recordkeeping and reporting. The final rule implements these new CEA sections, and applies to swap data repositories, derivatives clearing organizations, designated contract markets, swap execution facilities, swap dealers, major swap participants, and swap counterparties who are neither swap dealers nor major swap participants. The recordkeeping and reporting requirements of this rule reportedly further the goals of the Dodd-Frank Act to reduce systemic risk, increase transparency, and promote market integrity within the financial system.

Cost-Benefit Information: The Commission stated that, because this rule contains numerous reporting and recordkeeping requirements, many of the costs of the rulemaking are associated with collections of information. In the notice of proposed rulemaking, the Commission stated that the proposed reporting and recordkeeping requirements could impose significant compliance costs on some SDRs, swap execution facilities (SEFs), designated contract markets (DCMs), derivatives clearing organizations (DCOs), swap dealers (SDs), major swap participants (MSPs), and non-SD/MSP counterparties. In particular, the Commission noted that the proposed recordkeeping and reporting requirements could require capital expenditures for some such entities that could affect their ability to compete in the global marketplace because of reductions in available resources.

The Commission anticipated that the rule would generate "several overarching, if presently unquantifiable, benefits to swap market participants and the general public."[18] These include (a) increased transparency; (b) improved regulatory understanding of concentrations of risk within the market; (c) more effective monitoring of risk profiles by regulators and by regulated entities themselves through the use of unique identifiers; (d) improved regulatory oversight; and (e) more robust data management systems. The Commission said it believes these benefits, made possible by the timely reporting of comprehensive swap transaction data, consistent data standards for recordkeeping, and identification of products, entities and transactions through unique identifiers, will accrue to market participants in a number of ways (e.g., increased transparency of derivatives markets and improved risk management). In 17 pages of the preamble, the Commission separately discussed the recordkeeping, swap data reporting, and unique identifiers requirements, and for each discussed anticipated benefits, cost, and how the Section 15(a)

[18] 77 *Federal Register* 2176.

factors were considered. CFTC noted that commenters to the NPRM did not provide quantitative information on costs or benefits.

PRA Information: The Commission requested that OMB approve, and assign a new control number for, the collections of information covered by the NPRM. The Commission stated that the title for the proposed collection of information under part 45 is "Swap Data Recordkeeping and Reporting Requirements." To the extent that the recordkeeping and reporting requirements in this rulemaking overlap with the requirements of other rulemakings for which the Commission prepared and submitted an information collection request to OMB, the Commission explains that the burdens associated with the requirements are not being accounted for in the information collection request for this rulemaking, to avoid unnecessary duplication of information collection burdens.

The PRA database indicates that the "Swap Data Repositories, Registration and Regulatory Requirements" collection (OMB control number 3038-0086) would involve 15 responses, with a total of 448,853 burden hours, and a separate financial cost of more than $182 million. However, the collection identifies a different final rule (76 *Federal Register* 54538, September 1, 2011) as the associated rulemaking. No collections were associated with the rule's RIN.

RFA Information: The Commission stated that this part would have a direct effect on SDRs, DCOs, SEFs, DCMs, SDs, MSPs, and non-SD/ MSP counterparties who are counterparties to one or more swaps and subject to the Commission's jurisdiction. Ultimately, after making some adjustments to the rule, the Commission certified that it would not have a significant economic impact on a substantial number of small entities.

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10. ELECTRONIC FUND TRANSFERS (REGULATION E)

Agency: Consumer Financial Protection Bureau
Published: February 7, 2012
Effective: February 7, 2013
RIN: 3170-AA15
77 *Federal Register* 6194

Nature of Rule: The final rule amends Regulation E, which implements the Electronic Fund Transfer Act, and the official interpretation to the regulation. The rule modifies a final rule published in February 2012 implementing section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding remittance transfers. The final rule adopts a safe harbor with respect to the phrase "normal course of business" in the definition of "remittance transfer provider," which determines whether a person is covered by the rule. The final rule also revises several aspects of the February 2012 final rule regarding remittance transfers that are scheduled before the date of transfer, including preauthorized remittance transfers.

Cost-Benefit Information: CFPB did an analysis under Section 1022(b)(2)(A) of the Dodd-Frank Act, which requires the agency to consider the potential costs, benefits, and impacts of its regulations. The Bureau said there was a limited amount of public data regarding the full universe or population of remittance transfers, or on the current provision, accuracy, and completeness of pre-payment disclosures and receipts across the remittance transfer market, and as a result most of the Bureau's analysis provided a qualitative discussion of the benefits, costs, and impacts of the final rule. As a result, the agency said the analysis "generally proves a qualitative discussion of the benefits, costs, and impacts of the final rule."[19]

In terms of benefits, CFPB stated that consumers who have reliable information about how much they must spend in order to deliver a specific amount of foreign currency to a recipient are better able to manage all of their household income than are consumers who lack this information. In addition, the Bureau said the final rule enables consumers to engage in competitive shopping, may make consumers less susceptible to unfair and deceptive practices, and finally place competitive pressure on providers.

For closed network providers, CFPB estimated that the disclosure requirements would impose some costs, to the extent that such institutions need to update systems, revise contracts, change communication protocols and business practices in order to receive the necessary information and comply with the disclosure requirements. Furthermore, closed network providers that currently offer ''floating rate'' products will need to adjust their business processes and relationships for setting exchange rates, and change the way they manage foreign exchange rate risk.

For open network providers, the Bureau stated that providers are required to disclose information about fees or taxes, and they may find it difficult to obtain information that must be provided in the disclosures. These considerations are relevant for all open network providers, but the final rule provides insured depositories and credit unions with an exception to the requirements to provide accurate disclosures under certain circumstances until July 21, 2015.

PRA Information: The Bureau estimated that the total annual burden to comply with the final rule is 7,684,000 hours. The Bureau estimated that the total one-time annual burden of the final rule is 3,431,000 hours, including 31,000 hours for large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau and 600,000 hours for money transmitters supervised by the Bureau. The Bureau estimated that the total ongoing burden of the rule is 4,253,000 hours, including 61,000 hours for large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau and 1,407,000 hours for money transmitters supervised by the Bureau.

RFA Information: The Bureau prepared a final regulatory flexibility analysis in conjunction with the final rule. The Bureau stated that the total number of small entities

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[19] 77 *Federal Register* 6272.

that could be affected by the rule is approximately 74,000, based on the assumption that nearly 211 of the estimated 67,000 money transmitters and agents are small entities and adding that to the total number of depository institutions and credit unions that are small entities and that may engage in wire transfers.

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11. PROTECTION OF CLEARED SWAPS CUSTOMER CONTRACTS AND COLLATERAL; CONFORMING AMENDMENTS TO THE COMMODITY BROKER BANKRUPTCY PROVISIONS

Agency: Commodity Futures Trading Commission
Published: February 7, 2012
Effective: April 9, 2012
RIN: 3038-AC99
77 *Federal Register* 6336

Nature of Rule: The final rule imposes requirements on futures commission merchants (FCMs) and derivatives clearing organizations (DCOs) regarding the treatment of cleared swaps customer contracts (and related collateral), and makes conforming amendments to bankruptcy provisions applicable to commodity brokers under the CEA. Section 724 of the Dodd-Frank Act prescribes the manner in which cleared swaps must be treated prior to and after bankruptcy.

Cost-Benefit Information: After seven pages of qualitative discussion, the Commission stated that it carefully considered the available evidence regarding the costs and benefits of the "Complete Segregation Model" adopted in the final rule, and concluded that it best accomplishes the statutory objective of protecting swaps customer money, securities and other property. In terms of benefits, the agency said swaps customers have greater protection against "Fellow-Customer Risk" under the Complete Legal Segregation Model than under the model used in the futures markets that in a DCO may not use the value of the collateral posted by a non-defaulting swaps customer to cover the losses of a defaulting swaps customer. In addition, Complete Legal Segregation will reportedly facilitate, in double defaulting situations, the transfer of swaps positions and associated collateral to an FCM in good standing rather than liquidation of such positions. This would result in associated benefits to customers and, where a major FCM has defaulted, reduced the risk of disruption on prices and market conditions that might well result from the liquidation of large volumes of customer positions. The Commission also found that the Complete Legal Segregation model would increase incentives for DCOs to monitor risky behavior by member FCMs. Moreover, the agency said the model adopted in the final rule would "impose some operational costs but such costs are small enough to be a minor consideration relative to the other aspects of cost; e.g., the potential increases in margins and guaranty funds."[20]

[20] 77 *Federal Register* 6370.

CFTC stated: "To the extent that these new rules reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those mandated by Congress in passing the legislation. However, the rules may generate costs and benefits attributable to the Commission's determinations regarding implementation of the Dodd-Frank Act's statutory requirements. The costs and benefits of the Commission's determinations are considered in light of the five factors set forth in CEA section 15(a)."[21]

PRA Information: The final rule contained new information disclosure and recordkeeping requirements, and was assigned OMB Control Number 3038-0091. However, OMB had not approved this collection of information at the time the rule was issued. The review was completed August 3, 2012, and the collection was cleared just until the end of September 2012, when OMB said that CFTC would resubmit the collection after addressing whether any recordkeeping requirements are accounted for in the burden and supporting statement. The annual burden was estimated at 36,500 hours, with costs of just over $1,200.[22]

RFA Information: The Chairman certified on behalf of the Commission that these final rules would not have a significant economic impact on a substantial number of small entities.

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12. BUSINESS CONDUCT STANDARDS FOR SWAP DEALERS AND MAJOR SWAP PARTICIPANTS WITH COUNTERPARTIES

Agency: Commodity Futures Trading Commission
Published: February 17, 2012
Effective: April 17, 2012
RIN: 3038-AD25
77 *Federal Register* 9734

Nature of Rule: The final rule implements Section 4s(h) of the CEA as amended by Section 731 of the Dodd-Frank Act. These rules prescribe external business conduct standards for swap dealers and major swap participants. Section 4s(h) provides the Commission with both mandatory and discretionary rulemaking authority to impose business conduct standards on swap dealers and major swap participants in their dealings

[21] 77 *Federal Register* 6362.

[22] The CFTC was granted an extension of time by OMB. On September 28, 2012, the Office of Management and Budget granted an emergency extension of the expiration date for the collection of information associated with these rules (OMB Control Number 3038-0091) until March 31, 2013. Subsequently, the CFTC initiated the process of obtaining OMB approval for a further continuation of the information collection for the usual three year period by publishing, on October 2, 2012 notice of the information collection (77 *Federal Register* 60115) and providing the opportunity for 60 days further public comment on the information collection.

with counterparties, including Special Entities. CFTC said that, "in many cases, the Commission's final regulations adhere closely to the enabling language of the statute," and provided several examples. However, the agency also recognized that some of the rules were adopted using its "broad discretionary authority, " and provided examples.

Cost-Benefit Information: In addition to its RFA and PRA determinations, CFTC provided an extended (17 page) discussion of benefits, costs and each of the five Section 15(a) considerations for each of the eight major sections of the rule. The identified benefits include: (1) enhanced transparency and reduced information asymmetries among market participants resulting from required disclosures and communications standards; (2) principles based duties that are sufficiently flexible to address emerging compliance issues; (3) Special Entity provisions to protect taxpayers, pensioners and charitable institutions from abusive practices; (4) a compliance framework and mechanisms, including safe harbors, that facilitate information flow and market access, mitigate costs and enhance legal certainty, while raising business conduct standards consistent with legislative intent; and (5) regulatory harmonization of existing business conduct standards and best practices in related market sectors and among dealers, including consideration of SRO guidance for comparable principles based rules.

The identified costs include assertions that: (1) required disclosures are costly both in resources and possible delays, and could create potential liability unless disclosure can be standardized with appropriate safe harbors; (2) requiring swap dealers and major swap participants to make suitability evaluations of counterparties for specific trades will increase transaction costs and may create execution delays (both when a counterparty with an established relationship with a given swap dealer elects to begin trading a product outside of that relationship and a counterparty with no such relationship looks to begin trading with a given dealer); (3) principles based rules may expose swap dealers and major swap participants to potential compliance risk in both enforcement and private rights of actions; as a result, swap dealers and major swap participants will pass the costs of added risk to their counterparties or there will be fewer possible swap dealer trading relationships, which could reduce liquidity; (4) execution delay and the chilling of trading activity may result as the rules will interfere with the flow of information between swap dealers or major swap participants and counterparties and impose barriers to efficient execution of transactions and possibly create moral hazard; and (5) the cost and risks to Special Entities may increase if dealers avoid such counterparties, and sophisticated Special Entities may not need the protections provided by the rules.

CFTC also said the following: "With respect to quantification of the costs and benefits of the final business conduct standards rules, the Commission notes that, because the Dodd-Frank Act establishes a new regulatory regime for the swaps market, there is little or no reliable quantitative data upon which the Commission can evaluate, in verifiable numeric terms, the economic effects of the final business conduct standards rules. No commenters presented the Commission with verifiable data pertinent to any of the proposed rules, stated whether such verifiable data exists, or explained how such cost data or any empirical analysis of that data would inform the choice of implementation pursuant to a specific provision of the Dodd-Frank Act or whether such data and resultant empirical

analysis is ascertainable with a degree of certainty that could inform Commission deliberations."[23]

In a footnote, CFTC explained more fully: "For example, with respect to potential costs associated with restrictions on information flows from dealers to their counterparties and increased reliance by counterparties on dealers, there is no clear means of quantification because of the difficulty in designing metrics for these potential costs. In addition, because there is no historical period in which similar rules were in effect, there remains the formidable (and costly) challenge of comparing the current environment to the post-rule environment. This challenge is compounded by the likelihood that the effect of the rule will differ across dealers and across counterparties. Quantification of the potential delays in swap execution and higher associated fees faces similar challenges, including lack of available data over which to measure the effect (if any) of such delays. The combination of these factors makes it impractical to determine reliable estimates of these types of costs. Moreover, no commenters provided verifiable estimates. As a consequence, the discussion of these potential costs is undertaken in qualitative terms."[24]

PRA Information: The Commission determined that, while the final rule contains collections of information, these collections overlap with collections proposed by the Commission in the Business Conduct Standards—Internal rulemakings and with collections under the proposed rules adapting the recordkeeping, reporting and daily trading records requirements to account for swap transactions. Thus, the Commission did not submit the proposing release to OMB for approval or for assignment of an OMB control number.

RFA Information: The Commission determined that this final rule would not have a significant economic impact on a substantial number of small entities.

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13. INVESTMENT ADVISER PERFORMANCE COMPENSATION

Agency: Securities and Exchange Commission
Published: February 22, 2012
Effective: May 22, 2012
RIN: 3235-AK71
77 *Federal Register* 10358

Nature of the Rule: The rule amended the requirement under the Investment Advisers Act of 1940 that permits investment advisers to charge performance-based compensation to "qualified clients," also known as rule 205-3. The amendments revise the dollar amount thresholds of the rule's tests that are used to determine whether an individual or

[23] 77 *Federal Register* 9806.

[24] Ibid.

company is a qualified client. These rule amendments codify revisions that the Commission recently issued by order that adjust the dollar amount thresholds to account for the effects of inflation. In addition, the rule amendments: provide that the Commission will issue an order every 5 years in the future adjusting the dollar amount thresholds for inflation; exclude the value of a person's primary residence and certain associated debt from the test of whether a person has sufficient net worth to be considered a qualified client; and add certain transition provisions to the rule. The changes were made pursuant to requirements in the Dodd-Frank Act.

Cost-Benefit Information: The Commission noted that the final rule's exclusion of the value of an individual's primary residence would benefit certain investors. The Commission concluded that the value of an individual's primary residence might bear little or no relationship to that person's financial experience or ability to bear the risks of performance fee arrangements. The Commission stated that because of the generally illiquid nature of residential assets, the value of an individual's home equity may not help the investor to bear the risks of loss that are inherent in performance fee arrangements. Therefore, according to the Commission, some of the clients who do not meet the net worth test of rule 205–3 without including the value of their primary residence may not possess the financial experience or ability to bear the risks of performance fee arrangements. The Commission estimated that the exclusion of the value of an individual's primary residence will result in up to 1.3 million households that no longer qualify as "qualified clients" under the revised net worth test and, therefore, will now be protected by the performance fee restrictions in Section 205 of the Advisers Act.[25] Additionally, the Commission believed the amendments would promote regulatory consistency in the treatment of primary residences between this rule and other rules that the Commission has adopted that distinguish high net worth individuals from less wealthy individuals. According to the Commission, the amendments to the rule's transition provisions will allow advisory clients and investment advisers to avoid certain costs resulting from the statutory mandate to adjust for inflation and the Commission's resultant July 2011 Order. Finally, the Commission believed that the amendments would allow an investment adviser and its clients to maintain existing performance fee arrangements that were permissible when the advisory contract was entered into, even if performance fees would not be permissible under the contract if it were entered into at a later date.

The Commission said the amendments are unlikely to impose a significant net cost on most advisers and clients. The Commission noted the costs such as excluding the value of the primary residence (and debt secured by the property up to the current market value of the residence) means that 1.3 million households that would have met the net worth threshold if the value of the residence were included, as is currently permitted, will no longer be "qualified clients" under the revised net worth test and, therefore, will be unable to enter into performance fee contracts unless they meet another test of rule 205–3. For purposes of this cost-benefit, the Commission estimated that 40% of households would separately meet the "qualified clients" definition under the assets-under-

[25] 77 *Federal Register* 10365.

management test, and, therefore, will be able to enter into performance fee arrangements, while 60% (195,000 households) will have access only to those investment advisers (directly or through the private investment companies they manage) that charge advisory fees other than performance fees. Of that latter percentage, the Commission estimated that 80% (156,000 households) would enter into non-performance fee arrangements, while the minority will decide not to invest their assets with an adviser. For those households in non-performance fee arrangements, a client might end up paying higher overall fees than if he had paid performance fees, depending on the adviser's performance. The Commission recognized that the exclusion of the value of a person's primary residence from the calculation of a person's net worth would reduce the pool of potential qualified clients for advisers that, in turn, might result in a reduction in the total fees collected by investment advisers. In order to replace those clients and lost revenue, the Commission believes some advisers may choose to market their services to more potential clients, which may result in increased marketing and administrative costs.

SEC said only two commenters addressed the cost-benefit information in the proposed rule, and they did not provide empirical data.

PRA Information: The amendments to rule 205–3 do not contain a "collection of information" as defined by the PRA. Therefore, the Commission stated that the PRA was not applicable and it received no comments on any PRA issues.

RFA Information: The Commission certified that the proposed rule amendments would not have a significant economic impact on a substantial number of small entities. The Commission reiterated that certification in the final rule.

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14. SWAP DEALER AND MAJOR SWAP PARTICIPANT RECORDKEEPING, REPORTING, AND DUTIES RULES; FUTURES COMMISSION MERCHANT AND INTRODUCING BROKER CONFLICTS OF INTEREST RULES; AND CHIEF COMPLIANCE OFFICER RULES FOR SWAP DEALERS, MAJOR SWAP PARTICIPANTS, AND FUTURES COMMISSION MERCHANTS

Agency: Commodity Futures Trading Commission
Published: April 3, 2012
Effective: June 4, 2012
RIN: 3038-AC96
77 *Federal Register* 20128

Nature of Rule: The final rule implemented provisions of Section 731 of the Dodd-Frank Act (adding Sections 4s(f) and 4s(g) of the CEA), and set forth reporting and recordkeeping requirements and daily trading records requirements for swap dealers (SDs) and major swap participants (MSPs). These regulations also set forth certain duties imposed upon SDs and MSPs registered with the Commission with regard to: risk

management procedures, monitoring of trading to prevent violations of applicable position limits, diligent supervision, business continuity and disaster recovery, disclosure and the ability of regulators to obtain general information, and antitrust considerations.

In addition, Section 732 of the Dodd-Frank Act amends Section 4d of the CEA to add conflict of interest requirements and a chief compliance officer requirement. Therefore, this rule also establishes conflicts-of-interest requirements for SDs, MSPs, futures commission merchants (FCMs), and introducing brokers (IBs) with regard to firewalls between research and trading and between clearing and trading. Finally, these regulations also require each FCM, SD, and MSP to designate a chief compliance officer, prescribe qualifications and duties of the chief compliance officer, and require that the chief compliance officer prepare, certify, and furnish to the Commission an annual report containing an assessment of the registrant's compliance activities.

Cost-Benefit Information: Notwithstanding finding a "paucity of available quantitative information," the Commission reportedly endeavored to estimate quantifiable costs and benefits of the final rule when possible. Where the Commission was not able to estimate or quantify costs and benefits, the Commission provided a qualitative assessment of the relevant costs and benefits. In a 27-page "Cost Benefit Considerations" section of the preamble, the Commission addressed comments regarding the effects of these final rules in terms of their material costs and benefits, considered the material cost and benefit implications of the final rule in comparison to baseline costs imposed by the statutory requirements, discussed cost mitigation undertaken in modifying the rules as proposed, and considered the material costs and benefits of the final rules in light of the five broad areas of market and public concern. The Commission specifically discussed the cost-benefit considerations for recordkeeping, duties and risk management, conflicts-of-interest policies and procedures, and designation of a chief compliance officer. It noted that one commenter provided a study by National Economic Research Associates, Inc. stating that (1) compliance by certain entities with the proposed requirement that SDs and MSPs retain instant messages and tie them to transaction identifiers would entail average initial retention costs of $464,000 and average incremental ongoing annual costs of $228,000; (2) that the retention of phone calls would entail an average initial investment of $649,000 with additional annual costs of $382,000; and (3) that the requirement to time stamp transactions and use unique identifiers for transactions would entail average initial setup costs of $2,800,000 and average annual costs of $302,000. CFTC noted that the unique identifiers issue was addressed in a different rule.

CFTC said "To the extent that these new regulations reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those resulting from Congress's statutory mandates in the Dodd-Frank Act. However, to the extent that the new regulations reflect the Commission's own determinations regarding implementation of the Dodd-Frank Act's provisions, such Commission determinations may result in other costs and benefits. It is these other costs and benefits resulting from the Commission's own determinations pursuant to and in accordance with the Dodd-Frank Act that the Commission considers with respect to the section 15(a) factors." Commission also noted

that the costs and benefits of the rule "in large part, are attributable to the baseline statutory mandate.*"*[26]

Other than paperwork costs, the costs and benefits were almost never quantified or monetized. CFTC said it could not estimate the costs associated with several requirements because of the lack of data provided by commenters or available in the relevant academic literature.

In a written minority dissent to the rule, which was attached as an appendix in the *Federal Register*, CFTC Commissioner Scott O'Malia said "While we set the bar low here at the Commission for our cost-benefit analyses, and accept what is 'reasonably feasible,' this rulemaking is nothing but unreasonably feeble."[27] He said he could "no longer tolerate the application of such weak standards to analyzing the costs and benefits of our rulemakings. Our inability to develop a quantitative analysis, or to develop a reasonable comparative analysis of legitimate options, hurts the credibility of this Commission and undermines the quality of our rules." In particular, he noted that under CFTC staff guidance, the agency "need not quantify the costs or benefits of our rules unless we need to do so in order to respond to comments, and that we can do so with whatever resources are immediately at our fingertips."[28] He also said that the "Commission will ignore comments related to required rulemaking provisions that mirror statutory language in spite of the fact that the Commission always has some level of discretion in determining the means to achieve such mandates."[29] In response, Chairman Gensler and Commissioners Chilton and Wetjen discussed the Commission's efforts to assess costs and benefits, and concluded that the agency "has adequately addressed comments and considered the costs and benefits of its actions as required by section 15(a) of the CEA."[30]

PRA Information: The Commission determined that this final rule imposed new information collection requirements under the Act and submitted them to OMB for review. The titles of and burden estimates for the information collection requirements are as follows:

- "Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants" (OMB Control Number 3038–0087); 2,096 burden hours per respondent, with an aggregate of 262,000 burden hours (monetized at $100 per hour). Also, startup costs estimated at $19,200 per respondent, or $2.4 million in the aggregate.

- "Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants" (OMB Control Number 3038–0084); 1,148.5 hours

[26] 77 *Federal Register* 20168.

[27] 77 *Federal Register* 20212.

[28] 77 *Federal Register* 20213.

[29] Ibid.

[30] 77 Federal Register 20215.

per year per respondent, with an aggregate of 143,562.5 burden hours (monetized at $100 per hour).

- "Conflicts of Interest Policies and Procedures by Swap Dealers and Major Swap Participants" (OMB Control Number 3038–0079); 44.5 burden hours per year per respondent, with an aggregate of 80,278 burden hours (monetized at $100 per hour).

- "Annual Report for Chief Compliance Officer of Registrants" (OMB Control Number 3038–0080); 1,006 burden hour annually per respondent, with 285,704 aggregate burden hours (monetized at $100 per hour).

- "Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers" (OMB Control Number 3038–0078); aggregate of 80,278 burden hours, with costs of just over $8 million.

RFA Information: The Commission determined that the rule would not have a significant economic impact on a substantial number of small entities.

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15. CUSTOMER CLEARING DOCUMENTATION, TIMING OF ACCEPTANCE FOR CLEARING, AND CLEARING MEMBER RISK MANAGEMENT

Agency: Commodity Futures Trading Commission
Published: April 9, 2012
Effective: October 1, 2012
RIN: 3038-0092, -0094
77 *Federal Register* 21278

Nature of Rule: The final rule implements new statutory provisions enacted by Title VII of the Dodd-Frank Act, which amended the CEA. These rules address: the documentation between a customer and a futures commission merchant that clears on behalf of the customer; the timing of acceptance or rejection of trades for clearing by derivatives clearing organizations and clearing members; and the risk management procedures of futures commission merchants, swap dealers, and major swap participants that are clearing members. The rules are designed to increase customer access to clearing, to facilitate the timely processing of trades, and to strengthen risk management at the clearing member level.

Cost-Benefit Information: The Commission considered the costs and benefits of the rule in light of the five considerations in Section 15(a) of the CEA for three groups of rules – Customer Clearing Documentation, Timing of Acceptance of Trades for Clearing, and Clearing Member Risk Management. The Commission stated that to the extent that

the regulations repeat the statutory requirements of the Dodd-Frank Act, they would not create costs and benefits beyond those resulting from Congress's statutory mandates in the Dodd-Frank Act. However, to the extent that the regulations reflect the Commission's own determinations regarding implementation of the Dodd-Frank Act's provisions, such Commission determinations may result in other costs and benefits. It is these other costs and benefits resulting from the Commission's determinations pursuant to and in accordance with the Dodd-Frank Act that the Commission considers with respect to the Section 15(a) factors.[31] The Commission stated further that it endeavored in its analysis to quantify the costs and benefits, where possible. The Commission noted, however, that the costs and benefits are either "indirect, highly variable, or both and therefore are not subject to reliable quantification at this time."[32]

PRA Information: The Commission stated that the final rules relating to Customer Clearing Documentation and Clearing Member Risk Management would result in new collection of information requirements within the meaning of the PRA. Accordingly, the Commission requested control numbers for the required collection of information. According to the Commission, the final rules relating to the Time Frames for Acceptance into Clearing will not impose any new information collection requirements that require approval of OMB under the PRA.

According to the PRA database, CFTC submitted the Customer Clearing Documentation information collection request to OMB on April 18, 2012 (OMB control number 3038-0092). The agency estimated the collection would require 4,704 burden hours annually, and would cost about $470,000 per year. The database indicates that the Clearing Member Risk Management collection was submitted the same day (OMB control number 3038-0094), and was estimated to require 135,716 burden hours per year, and an annual cost of more than $13.5 million.

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16. FURTHER DEFINITION OF "SWAP DEALER," "SECURITY-BASED SWAP DEALER," "MAJOR SWAP PARTICIPANT," "MAJOR SECURITY-BASED SWAP PARTICIPANT" AND "ELIGIBLE CONTRACT PARTICIPANT"

Agencies: Commodity Futures Trading Commission and Securities and Exchange Commission
Published: May 23, 2012
Effective: July 23, 2012

[31] Under the heading "Consideration of Costs and Benefits," the agency said: "To the extent that these final regulations repeat the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those resulting from Congress's statutory mandates in the Dodd-Frank Act. However, to the extent that the regulations reflect the Commission's own determinations regarding implementation of the Dodd-Frank Act's provisions, such Commission determinations may result in other costs and benefits. It is these other costs and benefits resulting from the Commission's determinations pursuant to and in accordance with the Dodd-Frank Act that the Commission considers with respect to the Section 15(a) factors." 77 *Federal Register* 21291.

[32] 77 *Federal Register* 21292.

RIN: 3038-AD06
77 *Federal Register* 30596

Nature of Rule: The final rule adopts new rules and interpretive guidance under the CEA and the Securities Exchange Act of 1934 to further define the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant” in accordance with requirements in Section 712(d)(1) of the Dodd-Frank Act.

Cost-Benefit Information: CFTC determined that the costs and benefits would fall in two categories: those an entity will experience in determining whether it is a “swap dealer” or “major swap participant” as defined in the final rule; and those attributable to the fact that a greater or fewer number of entities at the boundaries of the statutory definitions may be deemed within them. CFTC estimated that approximately 450 persons would be sufficiently uncertain about the application of the definition of the term “swap dealer” that they would incur significant costs to do so, and that the total initial direct cost for all entities to apply the definition (including the de minimis exception (involving approximately 625 additional persons) and the possibility of a limited purpose registration) would be approximately $32 million, and the total recurring direct costs of applying the definition for all entities would be approximately $6 million per year. CFTC estimated that approximately 20 persons that are not swap dealers will initially be engaged in swap activity to such an extent that they would be required to apply the calculations in the final rule in determining whether they are covered by the definition of major swap participant, resulting in an initial aggregate direct cost of approximately $5.2 million, and total recurring costs of $1.7 million per year. CFTC estimated that approximately 1,200 entities would apply the safe harbor provisions of the final rule defining major swap participant, resulting in an aggregate direct initial cost of approximately $3.5 million and aggregate annual costs of approximately $1.2 million. CFTC determined that it was not possible to quantify the impact of the final rule on the direct and indirect costs and benefits that result from changing the status of an entity that is on the boundaries of the Dodd-Frank Act’s definitions of the terms “swap dealer” or “major swap participant,” because CFTC does not have adequate information about market participants’ swap activities to determine which entities will change their activities in response to the definitions, which would be necessary in order to determine the significance of the impact on costs and benefits of including or excluding those entities from the regulations pertaining to swap dealers and major swap participants.[33]

SEC also performed an analysis, in which it looked at the costs and benefits associated with the regulations of security-based swap dealers and major security-based swap participants, which SEC refers to as “programmatic” costs and benefits. The programmatic costs include costs of complying with requirements related to: registration; reporting, recordkeeping, confirmation, and documentation; sales practices; margin, capital, and segregation of customer collateral; and maintaining a chief compliance officer. SEC determined that the programmatic benefits would be significant, though they

[33] 77 *Federal Register* 30704.

"will not be entirely measurable, as it is not possible to quantify the benefits of mitigating or avoiding a future financial crisis, or the benefits of avoiding an unsuitable security-based swap transaction."[34] The benefits are expected to manifest themselves over the long-term and be distributed over the market as a whole.

SEC also considered the direct costs that persons would incur to assess whether they fall within the dealer or major participant definitions or to assess the potential availability of limited registration as a dealer or major participant, which SEC refers to as "assessment" costs. SEC estimates the total industry-wide assessment costs associated with the major participant definition, assuming that 12 entities will need to engage in this analysis, is $183,216 for annual costs and $164,304 for annual one-time costs.[35] SEC estimated that no more than 12 entities have security-based swap positions that they would face enough of a possibility of being a major participant that they would need to engage in legal analysis, and estimated that the total legal costs associated with evaluating the various elements of the major participant definition may approach $360,000.

PRA Information: CFTC and SEC determined that the final rule would not impose any new information collection requirements that required the approval of OMB under the Paperwork Reduction Act.

RFA Information: CFTC and SEC determined that the rule would not have a significant economic impact on a substantial number of small entities.

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17. REVISIONS OF FEE SCHEDULES; FEE RECOVERY FOR FISCAL YEAR 2012

Agency: Nuclear Regulatory Commission
Published: June 15, 2012
Effective: August 14, 2012
RIN: 3150-AJ03
77 *Federal Register* 35809

Nature of the Rule: The final rule amends the licensing, inspection, and annual fees NRC charges to its applicants and licensees. The Omnibus Budget Reconciliation Act of 1990, as amended, and the Atomic Energy Act of 1954, as amended, require NRC to recover through fees approximately 90% of its budget authority in fiscal year 2012, not including amounts appropriated for Waste Incidental to Reprocessing, and amounts appropriated for general homeland security activities.

[34] 77 *Federal Register* 30724.

[35] 77 *Federal Register* 30735.

Cost-Benefit Information: NRC did not prepare a cost-benefit analysis or identify alternatives because of the above-mentioned fee recovery requirements. NRC said it "established fee methodology guidelines for 10 CFR part 170 in 1978 and more fee methodology guidelines through the establishment of 10 CFR part 171 in 1986. In subsequent rulemakings, the NRC has adjusted its fees without changing the underlying principles of its fee policy in order to ensure that the NRC continues to comply with the statutory requirements for cost recovery in OBRA-90 and the AEA."[36] Based on the appropriations for fiscal year 2012, NRC's required fee recovery amount is approximately $1,038.1 million for the year. After accounting for billing adjustments, the total amount to be billed as fees to licensees is about $901 million.

PRA Information: NRC said that the final rule did not contain information collection requirements and, therefore, was not subject to the requirements of the PRA.

RFA Information: NRC determined that the licensees affected by the annual fee increases and decreases include those that qualify as small entities. For this final fee rule, small entity fees remain unchanged at $2,300 for the maximum upper-tier small entity fee and $500 for the lower-tier small entity to ease the financial burden for small entities. NRC prepared a regulatory flexibility analysis in conjunction with the final rule, and NRC also prepared a written small entity compliance guide.

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18. CORE PRINCIPLES AND OTHER REQUIREMENTS FOR DESIGNATED CONTRACT MARKETS

Agency: Commodity Futures Trading Commission
Published: June 19, 2012
Effective: August 20, 2012
RIN: 3038-AD09
77 *Federal Register* 36612

Nature of Rule: The final rule applies to the designation and operation of contract markets, and implements a number of the DCM core principles, as amended by the Dodd-Frank Act. For example, Section 735 of the act amends Section 5 of the CEA concerning designation and operation of contract markets, and Section 723(a)(3) of the act adds a new CEA Section 2(h)(8) to mandate the listing, trading, and execution of certain swaps on designated contract markets.

Cost-Benefit Information: The Commission organized its analysis by looking individually at each of the 23 core principles in the final rule. The Commission determined that in most instances, quantification of costs was "not reasonably feasible" because costs depend on the size and structure of designated contract markets (DCMs),

[36] 77 *Federal Register* 35825.

which vary markedly, or because quantification required information or data in the possession of the DCMs to which the Commission does not have access, and which was not provided in response to the notice of proposed rulemaking.[37] The Commission stated that to the extent that the regulations adopted in the final rule will result in additional costs, those costs would be realized by DCMs in order to protect market participants and the public. Benefits were also described in qualitative terms. For example, the new application form was expected to provide applicants with "greater specificity and transparency" regarding the type of information required,[38] and the prohibition on abusive trading practices was expected to provide market participants and the public with "greater confidence in markets," which "may enhance liquidity, competition, and price discovery."[39]

CFTC said that it provided only a qualitative description of costs and benefits because the commenters did not provide data in response to the Commission's request, and because of the lack of publicly available data. ("Given the lack of quantitative data provided in the comments or publicly available, the Commission has provided a qualitative description of the costs that would be incurred by DCMs.")[40]

Also, CFTC said the following in a footnote: "Moreover, for each core principle, the first section of the regulation is a codification of the statutory language of the core principle as a rule—and accordingly, the Commission did not consider the costs and benefits of these rules because they do not reflect the exercise of discretion by the Commission. Where the Commission includes additional regulations for a core principle, the Commission considered the costs and benefits."[41]

PRA Information: The final rule contains information collection requirements that have been submitted to OMB for approval. The Commission stated that it expects that with respect to all but financial resources compliance, a 10% estimated increase from the previously approved collection would result in an additional 30 hours per respondent and 540 hours annually for all respondents for designation and compliance. The Commission stated that it expects with regards to Core Principle 21, each of the 18 anticipated respondents may expend up to 10 hours quarterly for filings required under the final rule, totaling 40 hours annually for each respondent and 720 hours across all respondents. The Commission stated that this would result in each respondent expending up to an additional $3,640 annually and an aggregated total of $65,520 annually across all 18 respondents.[42]

RFA Information: The Commission certified that the rule would not have a significant economic impact on a substantial number of small entities.

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[37] 77 *Federal Register* 36666.

[38] 77 *Federal Register* 36668.

[39] 77 *Federal Register* 36673.

[40] 77 Federal Register 36665.

[41] 77 *Federal Register* 36666.

[42] 77 *Federal Register* 36665.

19. CONSOLIDATED AUDIT TRAIL

Agency: Securities and Exchange Commission
Published: August 1, 2012
Effective: October 1, 2012
Identifier: 3235-AK51
77 *Federal Register* 45722

Nature of the Rule: The final rule (issued pursuant to the Securities and Exchange Act of 1934) requires national securities exchanges and national securities associations ("self-regulatory organizations" or "SROs") to submit a national market system ("NMS") plan to create, implement, and maintain a consolidated order tracking system, or consolidated audit trail, with respect to the trading of NMS securities, that would capture customer and order event information for orders in NMS securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution. The SEC said the rule was needed because "the regulatory data infrastructure on which the SROs and the Commission currently must rely generally is outdated and inadequate to effectively oversee a complex, dispersed, and highly automated national market system."[43]

Cost-Benefit Information: The Commission estimated that the aggregate one-time cost for creating and filing an NMS plan would be approximately $718,000 per SRO, or approximately $12.2 million in the aggregate. The Commission described the benefits of the final rule as the following: improved market surveillance and investigations, improved analysis and reconstruction of broad-based market events and improved market analysis. The Commission stated that the final rule also has the potential to result in a reduction in disparate reporting requirements and data requests.

The Commission also concluded the action will promote efficiency, competition, and capital formation as required by Section 3(f) of the Securities Exchange Act of 1934, as amended. The Commission determined that the final rule would have minimal, if any, impact on efficiency, competition, and capital formation.

The Commission said it focused its economic analysis in this rule on the actions the SROs were required to take immediately because a "robust economic analysis of the next step—the actual creation and implementation of a consolidated audit trail itself—requires information on the plan's detailed features (and their associated cost estimates) that will not be known until the SROs submit their NMS plan to the Commission for its consideration. Accordingly, the Commission is deferring this analysis until such time as it may approve any NMS plan—that is, after the NMS plan, together with its detailed information and analysis, has been submitted by the SROs and there has been an opportunity for public comment."[44]

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[43] 77 Federal Register 45723.

[44] 77 *Federal Register* 45725.

PRA Information: The Commission submitted the information collection requirements to OMB for review, and received OMB Control Number 3235-0671 for the collection entitled "Creation of a Consolidated Audit Trail Pursuant to Section 11A of the Securities Exchange Act of 1934 and Rules thereunder." The Commission estimated that the aggregate one-time burden hour amount for preparing and filing an NMS plan would be approximately 2,760 burden hours, with $20,000 in external costs per SRO, or approximately 46,920 burden hours and $340,000 in external costs in the aggregate.

RFA Information: The Commission certified that the rule would not have a significant economic impact on a substantial number of small entities.

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20. FURTHER DEFINITION OF "SWAP," "SECURITY-BASED SWAP," AND "SECURITY-BASED SWAP AGREEMENT;" MIXED SWAPS; SECURITY-BASED SWAP AGREEMENT RECORDKEEPING

Agencies: Commodity Futures Trading Commission and Securities and Exchange Commission
Published: August 13, 2012
Effective: October 12, 2012
RINs: 3038-AD46 and 3235-AK65
77 *Federal Register* 48208.

Nature of the Rule: The joint final rule was adopted pursuant to various statutory authorities. CFTC adopted rules 1.3(xxx) through 1.3(bbbb) and 1.6 through 1.9 pursuant to the CEA, as amended by Title VII of the Dodd-Frank Act, and Sections 712(a)(8), 712(d), 721(a), 721(b), 721(c), 722(d), and 725(g) of the Dodd-Frank Act. SEC adopted rule 194 under the Securities Act and rules 3a68–1a through 3a68–5 and 3a69–1 through 3a69–3 pursuant to the Securities Act, 15 U.S.C. §§ 77a et seq., and particularly, Sections 19 and 28 thereof, and the Exchange Act, 15 U.S.C. §§ 78a et seq., and particularly, Sections 3 and 23 thereof, and Sections 712(a)(8), 712(d), 721(a), 761(a) of the Dodd-Frank Act.

The rule adopts new rules and interpretations under the CEA and the Securities Exchange Act of 1934 ("Exchange Act'") to further define the terms "swap," "security-based swap," and "security-based swap agreement" (collectively, "Product Definitions"); regarding "mixed swaps;" and governing books and records with respect to "security-based swap agreements" in accordance with Section 712(a)(8), Section 712(d)(1), Sections 712(d)(2)(B) and (C), Sections 721(b) and (c), and Section 761(b) of the Dodd-Frank. The Commissions, in consultation with the Board of Governors of the Federal Reserve System ("Board"), jointly adopted the final rule. The CFTC requested comment on its interpretation concerning forwards with embedded volumetric optionality.

Cost-Benefit Information: The two agencies separately discussed costs and benefits. CFTC noted the requirements in Section 15(a) of the CEA, and said that it considered the "costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors."[45] The agency also said that it "also considers, qualitatively, costs and benefits relative to the status quo, that is, the pre-Dodd Frank Act regulatory regime, for historical context to help inform the reader."[46]

CFTC provided 19 pages of cost-benefit discussion, both overall and for 12 particular program elements (e.g., definitions, insurance, energy exemptions, residential exchange program, and foreign exchange products), as well as two pages of discussion regarding the five CEA Section 15(a) factors (e.g., "protection of public markets," and "efficiency, competitiveness, and the financial integrity of markets"). Overall, CFTC discussions of costs and benefits were primarily qualitative in nature. For example, with regard to the costs of the product definitions, CFTC said the definitions "increase legal certainty and thereby reduce assessment costs by clarifying that certain products that meet the requirements of the applicable rules and interpretations, such as traditional insurance products, are not swaps."[47] The agency said the benefits of these definitions are "difficult to quantify and measure," but included "risk reduction, increasing transparency, and promoting market integrity." The agency also said that because of "data limitations and other uncertainty, the CFTC cannot perform a meaningful quantitative analysis, yet. The CFTC considers in this rulemaking the costs and benefits of how the Commissions are exercising their discretion in further defining the Product Definitions because Congress included in the Dodd-Frank Act statutory definitions of these terms, over which the CFTC has no discretion."[48]

With regard to provisions related to insurance, CFTC said it expected that the costs associated with any uncertainty "would be greater without the Insurance Safe Harbor than the cost of the analysis under the final rule herein," but the agency did not provide estimates of either cost. CFTC said "assessment costs should be minimal or non-existent for traditional insurance products, but for a new and novel insurance product that is more complex, the costs of analysis may be greater." With regard to benefits, the agency said the rule "will aid sound risk management practices because it will be easier for market participants to decide whether a particular agreement, contract, or transaction is insurance or a swap."[49]

CFTC did, however, provide some monetized cost estimates. For example, the agency estimated that the cost of submitting a request for a joint interpretation pursuant to rule 1.8 would be about $7,700 for an internal company or individual time and associated costs of $12,000 for the services of outside professionals."[50] The agency estimated the cost of submitting a request for a joint order under rule 1.9 at about $31,000.

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[45] 77 Federal Register 48307.

[46] Ibid.

[47] 77 Federal Register 48309.

[48] 77 Federal Register 48310.

[49] 77 Federal Register 48313.

[50] 77 Federal Register 48324.

SEC's 17-page "economic analysis" section of the rule also contained primarily qualitative descriptions of costs and benefits. For example, with regard to registration of entities involved in security-based swaps, the agency said that it "expects that registrants will incur costs in gathering information, accurately completing forms and filing these forms with the SEC," but provided no estimates of those costs. Regarding benefits, the agency said that registration was expected to "provide the SEC with information regarding registrants which will enable the SEC to oversee the SEC's security-based swap registrants." Other provisions relating to reporting, recordkeeping, and disclosure requirements were expected to "enhance the volume and quality of information available in the market and facilitate effective oversight by the SEC." The SEC said that it believed that assessment costs under the insurance safe harbor and grandfather for insurance products provisions would be "minimal," but did not estimate those costs in the aggregate or for a typical firm.

The SEC did provide some monetary cost estimates, but the ranges of those estimates were sometimes very wide. For example, if market participants seek legal counsel for interpretations of various aspects of the rule (which the SEC said was "likely" for at least some), the agency estimated those costs would range "from $378 to $27,000."[51] Similarly, the SEC said that "costs associated with undertaking the determination of whether an agreement, contract or transaction based on an index is a swap or security-based swap will range from $378 to $20,000." Other estimates were more specific. For example, the agency estimated that the total cost of preparing and submitting a party's first-time request to the Commissions pursuant to rule 3a68-4c under the Exchange Act would be $31,000 per request for mixed swaps.

PRA Information: With the exception of the new "book-out" confirmation requirement, CFTC believed that the burdens imposed on market participants under rules 1.8 and 1.9 already had been accounted for within the SEC's calculations regarding the impact of this collection of information under the PRA and the request for a control number submitted by the SEC to the Office of Management and Budget (OMB) for rule 3a68–2 ("Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps") and rule 3a68–4 ("Regulation of Mixed Swaps: Process for Determining Regulatory Treatment for Mixed Swaps"). In response to this submission, OMB issued control number 3235–0685. Rules 3a68–2 and 3a68–4(c) under the Exchange Act contain new "collection of information" requirements within the meaning of the PRA. On the day the rule was published (August 13, 2012), SEC submitted this information collection request to OMB for review. The agency expected that 33 respondents would incur 673 hours of paperwork, with additional costs estimated at $424,000. The agency indicated that the statute drove the entire burden, and none was due to agency discretion.

RFA Information: Although the CFTC provided an RFA statement that the proposed rule would have a direct effect on numerous entities, the Commission certified that the rule would not have a significant economic effect on a substantial number of small

[51] 77 Federal Register 48334.

entities, and sought comments on that certification. The CFTC continues to believe that is the case. For purposes of SEC rulemaking in connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less and (2) a broker dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to rule 17a–5(d) under the Exchange Act, or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small entity. The SEC continues to believe that the types of entities that would participate in the swap markets—which generally would be swap market dealers and major participants—would not be "small entities" for purposes of the RFA. The final rules and interpretive guidance do not themselves impose any compliance obligations. Instead they describe the categories of agreements, contracts, and transactions that are outside the scope of the Product Definitions and delineate the jurisdictional divide between the SEC's and the CFTC's regulatory regime. Accordingly, the SEC certified that the final rules and interpretive guidance would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

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21. RISK-BASED CAPITAL GUIDELINES: MARKET RISK

Agencies: Office of the Comptroller of the Currency, Federal Reserve System, and Federal Deposit Insurance Corporation
Published: August 30, 2012
Effective: January 13, 2012
RINs: 1557-AC99; 7100-AD61; 3064-AD70
77 *Federal Register* 53060

Nature of the Rule: The rule revises OCC's, the Board's, and FDIC's market risk capital rules to better capture positions for which the market risk capital rules are appropriate; reduce procyclicality; enhance the rules' sensitivity to risks that are not adequately captured under current methodologies; and increase transparency through enhanced disclosures. The final rule does not include all of the methodologies adopted by the Basel Committee on Banking Supervision for calculating the standardized specific risk capital requirements for debt and securitization positions due to their reliance on credit ratings, which is impermissible under the Dodd-Frank Act. Instead, the final rule includes alternative methodologies for calculating standardized specific risk capital requirements for debt and securitization positions.

Cost-Benefit Information: OCC conducted an Unfunded Mandates Reform Act (UMRA) analysis that included an assessment of the need for regulatory action and a

cost-benefit analysis of the final rule.[52] The determination also examined a comparison between the final rule and baseline, comparison between final rule and alternatives, and an examination of the overall impact of the final rule, baseline, and alternatives. Overall, OCC estimated that the cost of the additional capital to the 14 national banks affected by the rule would be approximately $178 million per year. The overall estimate of the cost of the final market risk rule was $179.5 million, which reflected capital costs and compliance costs associated with implementing the alternative measures of creditworthiness.

The key qualitative benefits of the final rule were described as: "(1) Makes required regulatory capital more sensitive to market risk, (2) Enhances modeling requirements consistent with advances in risk management, (3) Better captures trading positions for which market risk capital treatment is appropriate, (4) Increases transparency through enhanced market disclosures, (5) Increased market risk capital should lower the probability of catastrophic losses to the bank occurring because of market risk, and (6) Modified requirements should reduce the procyclicality of market risk capital."

PRA Information: In the January 2011 proposed rule, OCC and FDIC submitted the information collection requirements contained in the rule to OMB for review. OMB filed comments with the agencies, withholding PRA approval. In that proposal, OCC estimated that the rule would require 29,460 burden hours; the Board estimated it would require 51,064 burden hours; and FDIC estimated it would require 3,928 burden hours. OCC and FDIC have submitted the information collection requirements in the final rule to OMB for review. The Federal Reserve Board reviewed the rule under its delegated PRA authority.

RFA Information: Under regulations issued by the Small Business Administration, a small entity includes a commercial bank or bank holding company with assets of $175 million or less (a small banking organization). As of December 31, 2011, the agencies stated that there were approximately 2,385 small bank holding companies, 607 small national banks, 386 small state member banks, and 2,466 small state nonmember banks. According to the agencies, no comments on the effect of small entities were received in response to the notice of proposed rulemaking. The agencies noted that the final rule applies only if a bank holding company or bank has aggregated trading assets and trading liabilities equal to 10 percent or more of quarter-end total assets or $1 billion or more. The agencies stated that no small bank holding companies or banks satisfy these criteria. Therefore, according to the agencies, no small entities would be subject to this rule.

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[52] OCC did the cost-benefit analysis under UMRA, even though it was no longer a covered agency. Section 315 of the Dodd-Frank Act amended the PRA (44 U.S.C. §3502(5)) to designate OCC as an independent regulatory agency. Previously, OCC had been part of the Department of the Treasury, and therefore was subject to Executive Order 12866 and OMB Circular A-4, as well as UMRA. As an independent regulatory agency, however, OCC is not subject to those requirements.

22. DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS

Agency: Securities and Exchange Commission
Published: September 12, 2012
Effective: November 13, 2012
Identifier: 3235-AK85
77 *Federal Register* 56365

Nature of the Rule: The final rule and amendment to a new form is adopted pursuant to Section 1504 of the Dodd-Frank Act relating to disclosure of payments by resource extraction issuers. Section 1504 added Section 13(q) to the Securities Exchange Act of 1934 ("Exchange Act"), which requires the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to a foreign government or the federal government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires a resource extraction issuer to provide information about the type and total amount of such payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide information regarding those payments in an interactive data format.

Cost-Benefit Information: The Commission considered the costs and benefits imposed by the rule and form amendments it adopted, as well as their effects on efficiency, competition, and capital formation. The Commission stated that many of the economic effects of the rules stemmed from the statutorily mandated reporting requirement, while others were affected by the discretion it exercised in implementing the congressional mandates. The Commission addressed the costs and benefits resulting from both the statute and its exercise of discretion, and the comments it received about these matters, in separate sections of the preamble. In addition, the Commission recognized that the rules would impose a burden on competition, but said it believed that any such burden that may result was necessary in furtherance of the purposes of Exchange Act Section 13(q). Benefits of the reporting requirement included increased transparency and accountability of governments to the citizens of those countries, and improved investment decision-making. Benefits of the agency's discretionary decisions (e.g., defining a "project" and what is considered a "not de minimis" payment) were also primarily qualitative, "because reliable, empirical evidence regarding the effects is not readily available to the Commission." Costs were discussed in both qualitative and monetary terms. Overall, the SEC said, "…we believe it is likely that the total initial cost of compliance for all issuers is approximately $1 billion and the ongoing cost of compliance is between $200 million and $400 million."[53] The Commission provided a detailed description of how those costs were estimated.

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[53] 77 *Federal Register* 56398.

PRA Information: The Commission stated that certain provisions of the final rules contain "collection of information" requirements within the meaning of the PRA. According to the Commission, the total estimated compliance cost for PRA purposes is $234,829,000 ([332,164 hrs x $400/hr] + $101,963,400). The Commission stated that compliance costs for PRA purposes was encompassed in the total estimated compliance costs for issuers. The Commission's PRA estimate included costs related to tracking and collecting information about different types of payments across projects, governments, countries, subsidiaries, and other controlled entities.

RFA Information: The Commission prepared a final regulatory flexibility analysis for the rules. The agency said the rules affect small entities that are required to file an annual report with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, and are engaged in the commercial development of oil, natural gas, or minerals. Exchange Act Rule 0–10(a) defines an issuer to be a "small business" or "small organization" for purposes of the RFA if it had total assets of $5 million or less on the last day of its most recent fiscal year. The Commission believed that the final rules would affect some small entities that meet the definition of resource extraction issuer under Section 13(q). Based on a review of total assets for Exchange Act registrants filing under certain Standard Industry Classification codes, the Commission estimated that approximately 196 oil, natural gas, and mining companies are resource extraction issuers and that could be considered small entities.