Rules and Regulations

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR PART 748

Report of Crime or Catastrophic Act and Bank Secrecy Act Compliance

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final amendment.

SUMMARY: The Board is amending §748.1 in order to conform NCUA's regulations to the new procedures for completion and submission of the uniform criminal referral form. This action is intended to improve reporting of crimes relating to financial institutions and to establish a standardized form which can be entered into the new interagency computer data base.

EFFECTIVE DATE: May 5, 1993.

ADDRESSES: National Credit Union Administration, 1776 G Street NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: John Ianno or Jon Canerday, Office of General Counsel, at the above address, or telephone: (202) 682–9630.

SUPPLEMENTARY INFORMATION: Currently, under §748.1(c) of NCUA's Regulations, all federally insured credit unions must file a criminal referral whenever a crime or suspected crime occurs at their offices. The report must be filed within seven business days of discovery of the event. The regulation requires that the credit unions follow the filing and reporting instructions on the form.

An Interagency Bank Fraud Working Group ("Working Group") was formed in 1984 to address problems and to promote cooperation toward the goal of improving the federal government's response to white collar crime in financial institutions. The Working Group now consists of representatives from twelve federal agencies, including NCUA, the other federal financial institution regulatory agencies, the Federal Bureau of Investigation, the Secret Service, the Department of Justice, and the Treasury Department.

A subcommittee of the Working Group studied the criminal referral process and developed a single, uniform criminal referral form. The new criminal referral form will standardize criminal referral data and facilitate its automation. It will replace the existing NCUA Form 2362, but, in substance, will require the same information.

NCUA and the other federal financial regulatory agencies have adopted uniform reporting and filing requirements for suspected criminal activity. The new uniform criminal referral form will be used for making these reports. It has been designed so that the information collected can be readily entered into the new criminal referral data base. This system will enhance the regulatory and law enforcement agencies' ability to investigate and track information pertaining to criminal referrals made to law enforcement agencies, as well as administrative actions taken by the federal financial regulatory agencies. Credit unions will be notified when the new form becomes available. Copies will be distributed to all federally insured credit unions. Until the new form becomes available, credit unions may comply with their filing requirements by using NCUA's current Criminal Referral Form. This form is designated NCUA Form #2362 and is available through NCUA's Regional Offices.

The final rule lengthens the time federally insured credit unions have to file a criminal referral from seven (7) business days, under the present regulation, to thirty (30) calendar days. The regulation requires retention of a copy of the referral form and any original attachments to the referral for a period of ten (10) years from the date the form is filed, unless the credit union is informed in writing by a representative of the National Credit Union Administration that the materials may be discarded sooner. It is anticipated that notification will occur only in the exceptional case where the Office of General Counsel receives notice from the Department of Justice that prosecution has been declined. The retention period is necessary because the statute of limitations for banking-related offenses has been increased to ten (10) years. In order to prosecute these offenses, criminal investigatory agencies must have the documents supporting the offenses available to them.

The regulation has been modified to expressly state that failure to comply with its requirements could result in an administrative action by the NCUA. This codifies the current state of the law.

Fifteen letters were received in response to the request for comments in the proposed amendment. Eleven were from credit unions, two from national credit union organizations, and two from state credit union leagues. All of the comments, except one, were generally in favor of the amendments.

One credit union expressed concern that the thirty-day period to report suspected criminal activity is insufficient. We believe that the increased filing time will permit thorough documentation and reporting by the credit union. Credit unions are encouraged to file as soon as possible after discovery of reportable activity. However, a credit union need only provide what evidence it has to support the suspected offense within the thirty-day period. If additional relevant evidence becomes available, the credit union should provide that information to the appropriate investigatory authority. If additional related losses are discovered, the credit union should file a supplemental or new criminal referral form. In the event of ongoing activity, they should contact appropriate law enforcement agencies by telephone and then file a timely referral form.

One credit union objected to the use of the language "suspected crime." The use of this language does not represent a change from the current regulation. The decision regarding whether certain activities constitute criminal activity which should be prosecuted is one which will be made by the U.S. Attorney after thorough investigation. The credit union is responsible for reporting situations which are believed, in good faith, to represent violations of applicable criminal laws. This is why the language "suspected crime" is used. Credit unions making such reports, in good faith, are shielded from liability. See 31 U.S.C. 5318(g).

One commenter asked that the agencies develop a computer format to facilitate easy filing. This project is currently underway. It is expected to be available in the near future. One credit union asked whether there is a mechanism for removing a person's name from the system. The data base will permit the entry of subsequent information regarding the disposition of a referral.

It was suggested that credit unions be permitted to discard materials in advance of the ten-year period in the event a decision is made not to prosecute the individual involved. NCUA has decided to modify the language in § 748.1(c)(2) to permit this when appropriate and authorized by NCUA.

It was suggested that the credit unions be required to mail the form to NCUA for distribution. The distribution as set forth in the proposed amendment is considered to be the most efficient and will be retained for several reasons. It is important that the form go to criminal investigatory authorities as soon as possible. Forwarding to NCUA for remailing will slow this process. Similarly, if NCUA is required to open, copy, and then remail the original to FinCEN, this could degrade the quality of the original and affect the scanning process. The Board believes it is more cost efficient for all concerned if each institution handles its own distribution rather than having NCUA process and distribute the hundreds of forms which are filed each year.

One national organization asked about the use of the data base and one state league indicated that the proposal was unclear regarding the principal use of the information. The primary purpose of a criminal referral is to alert appropriate agencies to begin a criminal investigation of the circumstances described in the report. The information is also placed in a data base, accessible only to NCUA and appropriate agencies, for statistical and tracking purposes. It will be used by NCUA to assist in review of applications submitted by candidates for senior positions in "troubled" credit unions.

Regulatory Flexibility Act

The NCUA Board certifies that this final amendment will not have a significant financial impact on a substantial number of small credit unions or other small entities. The proposed regulation simply repeats, in slightly modified form, the preexisting requirement of federally insured credit unions to file criminal referrals pertaining to known and suspected crimes. It also extends the period of time for filing a referral. Accordingly, the NCUA Board has determined that a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The NCUA Board has determined that the final amendment does not significantly increase the burden of the reporting institutions. The estimated average burden associated with the collection of information contained in a criminal referral form is approximately .6 hour per respondent. The burden per respondent will vary depending on the nature of the criminal activity being reported.

Comments concerning the accuracy of this burden estimate should be forwarded directly to the OMB Desk Officer at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20530, ATTN: Jerry Waxman.

Executive Order 12612

This final amendment applies to all federally insured credit unions. However, it makes no substantive changes and imposes no significant additional burdens on federally insured credit unions than those under the present rule. It lengthens the time federally insured credit unions have to file a criminal referral form from seven (7) business days, under the present regulation, to thirty (30) calendar days. The regulation requires retention of a copy of the referral form and any original attachments to the referral for a period of ten (10) years from the date the form is filed. The NCUA Board has determined that this amendment is not likely to have any direct effect on states, on the relationship between the states, or on the distribution of power and responsibilities among the various levels of government because federally insured credit unions are currently required to report crimes or suspected crimes which occur at their offices.

List of Subjects in 12 CFR Part 748

Security program, Filing of reports, Bank Secrecy Act compliance programs and procedure.

By the National Credit Union Administration Board on March 25, 1993.

Becky Baker,

Secretary of the Board.

Accordingly, NCUA amends its Regulations as follows:

PART 748—[AMENDED]

1. The authority citation for part 748 continues to read as follows:

Authority: 12 U.S.C. 1766 (a); 12 U.S.C. 1786 (q); 31 U.S.C. 5311.

2. Section 748.1(c) is revised to read as follows:

§ 748.1 Filing of reports.

* * * * *

(c) *Criminal Referral Form.* (1) Each federally insured credit union will report any crime or suspected crime that occurs at its office(s), utilizing NCUA Form 2362, Interagency Criminal Referral Form, within thirty calendar days after discovery. Each federally insured credit union must follow the instructions and reporting requirements accompanying the Interagency Criminal Referral Form. Copies of the Interagency Criminal Referral Form may be obtained from the appropriate NCUA Regional Office.

(2) Each federally insured credit union shall maintain a copy of any Interagency Criminal Referral Form that it files and the original of all attachments to the form for a period of ten years from the date of the report, unless the credit union is informed in writing by a representative of the National Credit Union Administration that the materials may be discarded sooner.

(3) Failure to file Interagency Criminal Referral Forms in accordance with the instructions accompanying the Form may subject the federally insured credit union, its officers, directors, agents, or other institution-affiliated parties to the assessment of civil money penalties or other administrative actions.

(4) Filing of Interagency Criminal Referral Forms will ensure that law enforcement agencies and NCUA are promptly notified of actual or suspected crimes. Information contained in Interagency Criminal Referral Forms will be entered into an interagency data base and will assist the federal government in taking appropriate action.

[FR Doc. 93-7773 Filed 4-2-93; 8:45 am]

BILLING CODE 7535-01-U

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12 CFR Part 791

Rules of Board Procedure; Promulgation of NCUA Rules and Regulations; Public Observation of NCUA Board Meetings

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board is amending its Regulation implementing the Sunshine Act to modify the procedure for determining whether items heard at a closed Board meeting should continue to be withheld after the meeting.

The proposed amendments are intended to better achieve the goals of the Sunshine Act and to provide for a simpler, more effective, and more consistent method of decisionmaking.

EFFECTIVE DATE: May 5, 1993.

ADDRESSES: National Credit Union Administration, 1776 G Street NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Margaret R. Suuberg, Staff Attorney, Office of General Counsel, at the above address, or telephone (202) 682–9630.

SUPPLEMENTARY INFORMATION: Section 791.18(c) of the NCUA Rules and Regulations implements Section 552b(f)(2) of the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. 552b(f)(2). Section 552b(f)(2) provides, in part that the agency shall make promptly available to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c).

Section 552b(f)(2) requires an agency to determine whether matters heard at a closed meeting should be withheld after the meeting rather than made available to the public. However, it does not require the specific procedure currently in use by the NCUA Board.

The Sunshine Act does not require that any specific procedures be followed in making the determination under section 552b(f)(2). The Board is, therefore, free to prescribe its own procedures. The determination to withhold portions of the record from the public does not require a recorded vote of the Board members, and need not be made by the Board members at all. Most agencies have delegated the determination responsibility to either the general counsel, the secretary, or the director of public information. An agency's review and determination need not occur at the meeting, and, in most cases, are carried out after the meeting.

Under the current procedure pursuant to § 791.18(c), at the end of the meeting, the Board decides whether items discussed at the meeting should be withheld from public disclosure under § 791.12(a) of NCUA's Regulations (which contains the same exemptions as section 552b(c) of the Sunshine Act, 12 U.S.C. 552b(c)). Having the Board make such determinations at the end of the meeting has proven time consuming, and at times confusing, particularly in those cases where a determination could better be made after review of the record. Current § 791.18(c) provides that if the Board does not make the necessary determination with regard to any item or items, the Board Secretary must make the determination after consultation with the General Counsel and the Board members. This approach as well has proven time consuming and impracticable.

On September 9, 1992, the NCUA Board issued a proposed amendment to § 791.18(c) (see, 57 FR 42532, 9/15/92). The proposal and this final rule require the General Counsel, or his designee, to make the necessary determination after consultation with the Board Secretary. Since the determination whether to withhold is essentially a legal one, the General Counsel should have the primary responsibility for making that determination. The Board believes that the practice will better achieve the goals of the Sunshine Act than does the method now in use. The new procedure will be simpler and more effective, as well as provide for a consistent method of decisionmaking.

The rule also contains one technical amendment. The current version of the regulation incorrectly cites the Privacy Act as 5 U.S.C. 522a. The correct citation for the Privacy Act is 5 U.S.C. 552a. The rule corrects that error.

Four comment letters were received: One from a natural person federal credit union, one from a corporate credit union, one from a state credit union league, and one from a national credit union trade association. All of the commenters fully supported the proposed rule. They agreed that the determination whether a closed meeting item should be made public is a legal one and best made by the General Counsel. The commenters believed that the proposed amendment would make for a more effective decision-making process and would better accomplish the goals of the Sunshine Act.

This final amendment is identical to the proposed rule.

Paperwork Reduction Act

The amendment imposes no paperwork requirements on the public. It relates solely to internal Board procedure.

Regulatory Flexibility Act

The NCUA Board certifies that this amendment will not have a significant impact on a substantial number of small credit unions (those under $1 million in assets) because the amendment relates solely to internal Board procedures. Accordingly, the NCUA Board has determined that a Regulatory Flexibility Analysis is not required.

Executive Order 12612

Executive Order 12612 requires NCUA to consider the effect of its actions on state interests. The amendment relates solely to internal Board procedures, and will have no effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government.

List of Subjects in 12 CFR Part 791

Administrative practice and procedure, NCUA Board, Promulgation of rules and regulations, Public observation of meetings, Sunshine Act.

By the National Credit Union Administration Board on March 25, 1993.

Becky Baker,

Secretary of the Board.

Accordingly, NCUA hereby amends 12 CFR part 791 as follows:

PART 791—RULES OF BOARD PROCEDURE; PROMULGATION OF NCUA RULES AND REGULATIONS; PUBLIC OBSERVATION OF NCUA BOARD MEETINGS

1. The authority citation for part 791 continues to read as follows:

Authority: 12 U.S.C. 1766; 12 U.S.C. 1789; and 5 U.S.C. 552b.

2. Section 791.18(c) is revised as follows:

§ 791.18 Public availability of meeting records and other documents.

* * * * *

(c) Following each meeting or any portion of a meeting closed pursuant to § 791.12(a), the General Counsel or his designee, after consultation with the Secretary of the Board, shall determine which, if any, portions of the meeting transcript, electronic recording or minutes not otherwise available under 5 U.S.C. 552a (the Privacy Act) contain information which should be withheld pursuant to § 791.12(a). If, at a later time, the Board determines that there is no further justification for withholding any meeting record or other item of information from the public which has previously been withheld, then such information shall be made available to the public.

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[FR Doc. 93–7772 Filed 4–2–93; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. 93-AWA-4]

Amendment to the Atlantic Low and Pacific Low Additional Control Areas

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; temporary amendment.

SUMMARY: The Offshore Airspace Reconfiguration final rule published in the Federal Register on March 2, 1993, amended the Federal Aviation Regulations (FAR), in part, by designating additional control areas as offshore airspace areas or en route domestic airspace areas, as appropriate, and implemented, to the extent practicable, a uniform base altitude of 5,500 feet mean sea level (MSL) for offshore airspace areas. Further, the offshore airspace areas were divided into "high" and "low" areas. This action temporarily amends certain offshore airspace low areas from April 1, 1993 through July 22, 1993, because the FAA has discovered that by raising the base altitude, certain air traffic services to major coastal airports might be adversely affected.

EFFECTIVE DATES: This amendment is effective April 1, 1993 through July 22, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. William M. Mosley, ATP-230, Air Traffic Rules Branch, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-9251.

SUPPLEMENTARY INFORMATION:

Background

The Offshore Airspace Reconfiguration Final Rule published March 2, 1993, amended the Federal Aviation Regulations (FAR), in pertinent part, by designating additional control areas as offshore airspace areas or en route domestic airspace areas, as appropriate. Further, the offshore airspace areas were divided into high and low areas. In addition to combining and simplifying the offshore airspace areas, an effort was made to establish a uniform floor of 5,500 feet MSL, to the extent practicable. It was recently discovered that certain air traffic control operations require additional controlled airspace. Therefore, the FAA has decided to reduce the floor of the Atlantic Low and Pacific Low offshore airspace areas back to the floors previously specified for the Brunswick, North Atlantic, Barnegat, NJ, Newport, OR, San Francisco, CA, and Santa Barbara, CA additional control areas. This will enable the FAA to conduct a micro-review of the air traffic control operations conducted within these airspace areas to determine the amount of controlled airspace necessary to contain certain air traffic control operations. The Atlantic Low and Pacific Low additional control areas were published in FAA Order 7400.7A–Supplement dated February 24, 1993, and effective April 1, 1993, which is incorporated by reference in 14 CFR 71.1. The additional control areas listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the FAR temporarily changes the base altitudes of the Atlantic Low and Pacific Low additional control areas from 5,500 feet MSL to 2,000 feet and 5,000 feet respectively. It reinstates the base altitudes that previously existed in these offshore airspace areas. This action enables air traffic control to continue to provide services with the requisite flexibility, such as descending and off-airway radar vectors, as necessary to sequence arrivals into major coastal areas such as Boston and New York. Because the public needs to be made immediately aware of the reinstatement of these altitudes, notice and public procedure under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this action: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. In consideration of the safety need to lower the base of controlled airspace, the FAA finds that good cause exists, pursuant to 5 U.S.C. 553(d), for making the amendment effective in less than 30 days to promote the safe and efficient handling of air traffic in these offshore airspace areas.

List of Subjects in 14 CFR Part 71

Airspace, Airways, Incorporation by reference.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7A—Supplement dated February 24, 1993, and effective April 1, 1993, is temporarily amended effective April 1, 1993, through July 22, 1993, as follows:

Section 71.163 Designation of Additional Control Areas

* * * * *

Atlantic Low [temporarily revised April 1, 1993, through July 22, 1993]

That airspace extending upward from 2,000 feet MSL bounded on the east by the Moncton FIR and the New York Oceanic CTA/FIR, on the south by lat 28°00′00″ N., on the west and north by a line 12 miles from and parallel to the U.S. shoreline.

* * * * *

Pacific Low [temporarily revised April 1, 1993, through July 22, 1993]

That airspace extending upward from 5,000 feet MSL bounded on the north by the Vancouver FIR boundary, on the east by a line 12 miles from and parallel to the U.S. shoreline, on the south by the northwest boundary of Warning Area W-291, and on the west by the Oakland Oceanic CTA/FIR boundary excluding that airspace with Federal Airways.

* * * * *

Issued in Washington, DC, on March 31, 1993.

Willis C. Nelson,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 93-7844 Filed 3-31-93; 12:10 pm]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 92-ASW-29]

Establishment of Transition Area: Walnut Springs, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes a transition area located at Walnut Springs, TX. The development of a new special instrument approach procedure (SIAP) to the Flat Top Ranch Airport has made this action necessary. The intended effect of this action is to provide adequate controlled airspace for aircraft executing the very high frequency omnidirectional range/ distance measuring equipment (VOR/ DME) runway (RWY) 18 SIAP. Additionally, this action changes the

status of the Flat Top Ranch Airport from visual flight rules (VFR) operations only, to include operations under instrument flight rules (IFR).

EFFECTIVE DATE: 0901 U.T.C., May 27, 1993.

FOR FURTHER INFORMATION CONTACT: Alvin E. DeVane, Systems Management Branch, Air Traffic Division, Southwest Region, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193–0530, telephone (817) 624–5535.

SUPPLEMENTARY INFORMATION:

History

On June 9, 1992, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish a transition area at Walnut Springs, TX (57 FR 24412).

Interested persons were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received; however, one comment was received from the United States Air Force (USAF). The USAF expressed concern with the close proximity between the new SIAP into the Flat Top Ranch Airport and several military training routes in the area. They recommended that the user be alerted to the location and scope of these routes. We concur with the recommendation made by the USAF. If the user of this SIAP is not aware of the military flight activity in the vicinity of the Flat Top Ranch Airport, they should be given this information. The USAF concerns have been delivered to the FAA Flight Procedures Branch, who works directly with the proponent in the development of this SIAP. Except for editorial changes, this amendment is the same as that proposed in the notice. The coordinates in the proposal were North American Datum 27; however, these coordinates have been updated to North American Datum 83. Transition areas were published in § 71.181 of FAA Order 7400.7A dated November 2, 1992, and effective November 27, 1992, which is incorporated by reference in 14 CFR 71.1. The transition area listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations establishes a transition area located at Walnut Springs, TX. The development of a new VOR/DME RWY 18 SIAP to the Flat Top Ranch Airport has made this action necessary. The intended effect of this action is to provide adequate controlled airspace to aircraft executing the VOR/DME RWY 18 SIAP. This action changes the status of the Flat Top Ranch Airport from VFR operations only to include IFR operations.

The FAA has determined that this regulation only involves an established body of technical regulations that needs frequent and routine amendments to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporation by reference, Transition areas.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7A, Compilation of Regulations, dated November 2, 1992, and effective November 27, 1992, is amended as follows:

Section 71.181 Designation of Transition Areas

* * * * *

ASW TX TA Walnut Springs, TX [New]

Flat Top Ranch Airport, TX
(latitude 32°03′36″ N., longitude 097°47′41″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Flat Top Ranch Airport.

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Issued in Forth Worth, TX, on March 16, 1993.

Larry L. Craig,
Manager, Air Traffic Division, Southwest Region.

[FR Doc. 93–7852 Filed 4–2–93; 8:45 am]

BILLING CODE 4910–13–M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 30, 33, 180 and 190

Protection of Commodity Customers; Risk Disclosure by Futures Commission Merchants and Introducing Brokers to Customers; Bankruptcy Disclosure

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: On October 7, 1992, the Commodity Futures Trading Commission ("Commission") published for comment proposed amendments to Sections 1.55, 30.6, 33.7, 180.3, 190.06 and 190.10 of its regulations (the "Proposal") [1] to simplify and enhance the effectiveness of the risk disclosure process. Based upon its review of the comments received and reconsideration of the proposed amendments, the Commission has determined to adopt the amendments with certain modifications, as discussed herein. Most notably, as adopted, the amendments extend the availability of the proposed simplified account opening procedure to all categories of customers, except with respect to the separate endorsements required under Rule 180.3 concerning dispute resolution agreements, and further reduce account redocumentation requirements in the context of bulk transfers of customer accounts.

EFFECTIVE DATE: July 1, 1993.

FOR FURTHER INFORMATION CONTACT: Susan C. Ervin, Deputy Director/Chief Counsel, or Lawrence B. Patent, Associate Chief Counsel, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581; telephone: (202) 254–8955.

SUPPLEMENTARY INFORMATION

I. Background

In proposing the disclosure amendments discussed herein, the Commission sought to assure that the risk disclosure process remains effective

[1] 57 FR 46101. A sixty-day period for public comment was provided. Commission rules are found in Title 17 of the Code of Federal Regulations, unless otherwise noted.

notwithstanding market trends such as growing cross-border trading activity and development of electronic trading systems, which have increased the complexity of the risk disclosure process. The Commission also proposed rule amendments designed to refine and simplify the risk disclosure process generally to eliminate unnecessary administrative burdens on customers and market professionals while assuring that the objectives of risk disclosure requirements continue to be achieved and to clarify disclosure and notice requirements applicable in the context of bulk transfers of customer accounts.

Currently, at the time of opening an account, commodity futures and options customers are provided with, and must separately acknowledge receipt and understanding of, risk disclosure statements required by Commission Rules 1.55, 30.6, 33.7 and 190.10. Rule 1.55(a) requires a futures commission merchant ("FCM") or, in the case of an introduced account, an introducing broker ("IB"), to provide each new customer with a risk disclosure statement containing the language set forth in Rule 1.55(b) and to receive an acknowledgment, signed and dated by the customer, confirming that he received and understood the disclosure statement before a commodity futures account may be opened for the customer. [2] Rule 33.7 imposes comparable disclosure and acknowledgment requirements where an FCM (or IB) opens a commodity option account. Rule 30.6(a)(1) requires that a separate disclosure statement be provided to each new foreign futures or option customer prior to opening a foreign futures or foreign option account for such customer but separate acknowledgment thereof by the customer is required only if the FCM or IB has received general discretionary authority to engage in foreign futures or foreign option trading on behalf of the customer. [3] Rule 190.10 prohibits FCMs [4] from accepting property other than cash for the account of a customer to margin, guarantee, or secure futures contracts without first furnishing the customer with the disclosure statement prescribed in Rule 190.10(c)(2) and receiving a signed acknowledgment from the customer that he received and understood the contents of such statements. [5] In addition, pursuant to Rule 190.06(d), a customer must also be provided with the opportunity, when first entering into a hedging contract, to specify whether in the event of bankruptcy such customer prefers that open contracts in a hedge account be liquidated by the trustee without seeking customer instructions.[6]

In addition, self-regulatory organizations ("SROs") have adopted rules establishing risk disclosure requirements applicable to foreign futures and options in connection with the establishment of trading linkages between domestic and foreign futures exchanges and to certain electronic trading systems.[7]

The rule amendments proposed by the Commission were designed to reduce the number of required risk disclosure statements and customer acknowledgments, permit simpler account opening procedures, and address the special disclosure and notice requirements applicable in the context of bulk transfers of customer accounts by: (1) Providing a consolidated risk disclosure statement applicable to domestic futures transactions as well as foreign futures and option transactions, thereby eliminating the necessity for separate disclosure statements under Rules 1.55 and 30.6; (2) eliminating the requirement that the Rule 190.10 disclosure concerning treatment of non-cash margin be acknowledged by the customer; (3) clarifying that the Rule 1.55 risk disclosure statement may be included in a booklet of account opening documents, provided it appears on the cover page or first page of such booklet; (4) providing that the Commission may approve a risk disclosure statement that has been approved by a foreign jurisdiction or foreign SRO for use in lieu of the Commission-required risk disclosure statement; (5) permitting, for specified categories of customers, use of a single acknowledgment format in lieu of the multiple acknowledgments and elections currently required; and (6) clarifying and simplifying the requirement of notice to the Commission of bulk transfers and account opening procedures to be followed by a firm receiving a bulk transfer.

The Commission received nine comment letters on the proposed amendments. The commenters included one person registered as an FCM, one trade association and one law firm representing Commission registrants, two domestic commodity exchanges, two foreign SROs, one foreign commodity exchange and one domestic SRO. All commenters strongly supported the Proposal but many advocated expansion of various aspects of the relief provided.

Based upon its review of the comments received and reconsideration of the proposed amendments, the Commission has determined to adopt the proposed amendments with certain modifications discussed below. The Commission believes that the amendments to Commission Rules 1.55, 30.6, 33.7, 180.3, 190.06 and 190.10 as adopted are responsive to the concerns of the commenters and further the regulatory objectives of this rulemaking. The following discussion focuses principally on the changes or clarifications to the proposed amendments made in the final rule amendments. Additional background on these rule amendments may be found in the **Federal Register** release setting forth the Proposal.

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[2] Rule 1.55(c) requires the FCM or, in the case of an introduced account, the IB, to retain the acknowledgment in accordance with Rule 1.31. Because of the other amendments to Rule 1.55 discussed herein, that paragraph will be redesignated as paragraph (e) but is otherwise unchanged.

[3] Rule 166.2 requires that discretionary authority to effect foreign futures or foreign options transactions must be specifically authorized in writing and expressly documented. This requirement remains unchanged.

[4] The requirement applies to FCMs and other "commodity brokers," except for clearing organizations, within the meaning of Rule 190.01(f), which defines "commodity broker" to include, in addition to FCMs and clearing organizations, commodity option dealers as defined in Section 761(b) of the Bankruptcy Code, foreign FCMs as defined in Section 761(12) of the Bankruptcy Code, and leverage transaction merchants as defined in Section 761(14) of the Bankruptcy Code.

[5] If the statement is contained in the customer agreement, the customer must separately endorse the page on which the disclosure statement appears. This disclosure statement is designed to assure that customers depositing property other than cash for margin purposes understand that the return of such property is subject to the pro rata distribution provisions of the Bankruptcy Code and therefore may not be returnable even if identified as property deposited by a specific customer.

[6] Further, a customer opening an account to trade commodity futures or options may be requested to enter into an arbitration or other dispute resolution agreement, which must be separately endorsed pursuant to Rule 180.3 in order to be effective. Rule 180.3 provides, among other things, that if an arbitration or other customer dispute settlement agreement between a commodity professional and its customer is contained as a clause or clauses within a broader agreement, the customer cannot be bound by such an agreement unless he separately endorses the clause or clauses constituting the arbitration or dispute settlement agreement and the cautionary language specified in the rule.

[7] *See* National Futures Association ("NFA") Compliance Rule 2-28, the Chicago Mercantile Exchange ("CME") Rule 874 and Commodity Exchange, Inc. Rule 5.14 which address risk disclosure requirements applicable to foreign futures and options as a result of trading linkages between domestic and foreign futures exchanges. *See also* CME Rule 577 and Chicago Board of Trade ("CBOT") Rule 9A.20 which address the risk disclosure requirements applicable to the users of the GLOBEX electronic trading system and New York Mercantile Exchange Rule 6.22 which addresses the risk disclosure requirements applicable to the users of the ACCESS electronic trading system.

II. Discussion

A. Risk Disclosure Enhancement

1. Consolidation of 1.55 and 30.6 Disclosure Statements

Most commenters strongly supported the Commission's general objective of simplifying the disclosure process without reducing its efficacy and, in particular, the proposed consolidation of the risk disclosure statement currently required by Rule 1.55 for domestic futures transactions with the statement required by Rule 30.6 for foreign futures and foreign options transactions. In addition, some commenters recommended that the Commission shorten the Rule 33.7 options disclosure statement and consolidate it with the new combined domestic futures and foreign futures and options disclosure statement. In the latter connection, the Commission notes that certain international regulators are endeavoring to develop a single risk disclosure statement that could be used in multiple jurisdictions for domestic and cross-border transactions in futures and options. The Commission is monitoring developments in this area and anticipates that if a universal statement of this nature is developed, it will consider permitting the use of such a statement in lieu of the new consolidated Rule 1.55 risk disclosure statement as well as the options disclosure statement required by Rule 33.7. Option disclosure issues are more fully discussed *infra*.

One commenter expressed concern that the amended Rule 1.55 statement, by omitting domestic options but including foreign options, may leave customers with the impression that domestic options entail greater risk than foreign options. However, the Commission believes that the consolidated statement as adopted is designed to recognize, in paragraphs (7) and (8) thereof, the particular risks of foreign transactions, as compared to domestic transactions. Although the Commission believes that the benefits of consolidation of the Rule 1.55 and 30.6 statements warrant adoption of the proposed amendment at this time, this action does not preclude later refinements of the domestic options disclosure statement as indicated above in response to international developments, among other things.

The Commission has determined to adopt the proposed revisions of Rules 1.55 and 30.6 creating a consolidated domestic futures and foreign futures and options risk disclosure statement generally as proposed. The consolidated risk disclosure statement is designed to contain the substance of the separate risk disclosure statements currently prescribed by Rules 1.55 and 30.6 and is consistent with the purposes of those rules, *i.e.*, to provide customers with a clear, succinct and prominent disclosure of relevant risks. Further, the revised risk disclosure statement may obviate the need for special linked market disclosures currently required by some SROs.[8]

The Commission has made one addition to the consolidated statement, which addresses one of the issues on which the Commission sought comment in the Proposal. The Commission generally requested comment as to the relative costs and benefits of requiring additional disclosures concerning the scope of protections afforded by segregation of customer funds, the financial status of the FCM holding such funds and the absence of commodity account insurance. Most commenters on this issue questioned the desirability of additional disclosures in these areas in light of the Commission's express goal of simplifying the disclosure process and argued that additional disclosures would be contrary to the purpose of the amendments the Commission has proposed. However, one commenter stated that an "informational document" on these topics should be available to FCMs and IBs for distribution to interested customers and another commenter strongly recommended requiring additional disclosures in these areas, contending that the trading public does not understand that segregation of funds does not provide a complete safeguard against loss of customer funds or that commodity futures and option accounts are not protected by account insurance.

The Commission recognizes that disclosure requirements specifically addressing the scope of the protections afforded futures customers' funds could be difficult to formulate in a manner sufficiently comprehensive to not be misleading. However, the Commission has determined to incorporate in the one-page Rule 1.55 risk disclosure statement, as amended herein, a statement recommending that the customer consult with his broker concerning the protections available to safeguard funds or property deposited in connection with futures transactions. This amendment reflects the fact that no brief statement can assure that customers understand the nature and limitations of applicable funds protections. However, this statement should highlight the importance of this subject and encourage customers to inquire as to matters such as the availability of insurance and the disposition of customer funds in bankruptcy. Other issue relating to the Commission's request for comment concerning customer funds protections are discussed *infra*.

As noted in the preamble to the proposed rules,[9] the Commission intends that the consolidated risk disclosure statement may be presented to a non-English speaking customer in the foreign language that such customer understands rather than in English, provided that the disclosure statement provided is an accurate translation of the English version and that the English text is provided upon request. Delivery of the consolidated risk disclosure statement to a foreign customer would not preclude delivery to that customer of any additional disclosure documents required by a foreign regulator.

The Commission emphasizes that delivery of the consolidated risk disclosure statement, like delivery of the current Rule 1.55 risk disclosure statement, would remain subject to the proviso that Rule 1.55 "does not relieve a futures commission merchant or introducing broker from any other disclosure obligation it may have under applicable law."[10] Differences among products may warrant such additional disclosure. For example, the Commission has required additional disclosure with respect to foreign options offered on exchanges that employ futures-style margining, due to the fact, among others, that such margin systems affect options pricing. See, *e.g.*, 54 FR 50348, Exhibit B (December 6, 1989); 54 FR 50356, Exhibit B (December 6, 1989).

The Commission intends that the new consolidated Rule 1.55 statement may be used in place of the currently separate Rule 1.55 and 30.6 statements but will permit the existing separate statements to be used until FCMs and IBs wish to print new account forms. However, forms not in compliance with the revised rule may not be used beyond July 1, 1994. In light of the consolidation of the Rule 30.6 and 1.55 statements, the Commission has determined to eliminate Rule 30.6(a)(2), which requires separate

[8] *See* note 7, *supra*.

[9] *See* Proposal at 46103.

[10] This proviso is currently contained in paragraph (d) of Rule 1.55. Because of the other amendments to Rule 1.55 discussed herein, that paragraph would be redesignated as paragraph (f) but is otherwise unchanged. Similarly, Rule 30.6 (e) of the Commission's foreign futures rules states that Rule 30.6 does not relieve an FCM, IB, commodity pool operator ("CPO") or commodity trading advisor ("CTA") "from any other disclosure obligation it may have under applicable law or regulation."

acknowledgment of the Rule 30.6 statement where discretionary authority to engage in foreign futures or foreign options transactions has been granted. However, the requirement of Rule 166.2(b) of express written authorization to effect transactions in foreign futures or foreign options on a discretionary basis remains unchanged. The Commission further notes that if an FCM or IB uses the Rule 1.55 and Rule 30.6 separate statements between July 1, 1993 and July 1, 1994, it must continue to obtain a separate acknowledgment of the Rule 30.6 disclosure statement where discretionary authority to engage in foreign futures or foreign options transactions has been granted.

2. Use of Foreign Risk Disclosure Statement to Satisfy Rule 1.55

The Commission also proposed a new provision, new paragraph (c) of Rule 1.55, to recognize that the Commission may approve for use in lieu of the prescribed Rule 1.55 statement a risk disclosure statement approved by one or more foreign regulatory agencies or SROs if the Commission determines that such statement is reasonably calculated to provide the disclosures specified in Rule 1.55. By providing a mechanism for the substitution of a foreign risk disclosure statement or an internationally recognized risk disclosure statement for the Rule 1.55 statement, where the Commission and the applicable foreign jurisdiction have previously approved the use of the statement for such purposes, this provision could simplify the risk disclosure process for firms conducting cross-border business. As noted in the Proposal, the Commission believes that it is desirable to reduce duplicative disclosure requirements resulting from cross-border futures transactions, provided that any special risks of foreign trading are disclosed. The three commenters who addressed this aspect of the Commission's proposals commented favorably upon it. The Commission is adopting new paragraph (c) of Rule 1.55 as proposed.

3. Elimination of 190.10(c) Acknowledgment

Also in the interest of simplifying the risk disclosure process, the Commission proposed to eliminate the requirement of Rule 190.10(c)(1)(ii) that customers acknowledge receipt and understanding of the prescribed disclosure concerning the treatment of non-cash margin in FCM bankruptcies. As the Commission noted in the Proposal, the commodity broker provisions of the Bankruptcy Code, which mandate pro rata distribution of cash and non-cash customer property, including property specifically identifiable to a customer, have been in effect for approximately fifteen years and the Commission's bankruptcy rules for ten years. The Commission therefore suggested that although disclosure concerning this aspect of the treatment of customer property for purposes of distribution in FCM bankruptcies continues to be appropriate, the required acknowledgment can be eliminated without materially reducing customer protection. The Commission received two comments, both favoring adoption of the proposed amendment.

The Commission has determined to adopt the proposed revision of Rule 190.10(c) to eliminate the acknowledgement requirement of Rule 190.10(c)(1)(ii).[11] As noted in the Proposal, however, elimination of the separate acknowledgment requirement would not apply to the extent that a Rule 190.10(c)(2) disclosure statement incorporates a subordination agreement for a customer depositing margin in foreign depositories.[12] Separate acknowledgment of the 190.10(c)(2) disclosure statement in this context is a substitute for execution of a separate subordination agreement. A separate acknowledgment also would continue to be necessary where subordination is required for certain purposes, such as for participation in cross-margining programs, because such subordination is a contractual undertaking that must be executed by the customer. See Financial and Segregation Interpretation No. 12. *supra* note 12.

4. Single Signature Acknowledgment Format

The Commission proposed to codify in proposed Rule 1.55(d) "no-action" relief previously granted by the Division of Trading and Markets ("Division") permitting FCMs opening accounts for certain categories of institutional and highly accredited customers to obtain a single signature of the customer at the end of the customer agreement or on a separate check-off page in lieu of the multiple separate acknowledgments of the various disclosures and elections required by Commission rules. As proposed, use of the single signature acknowledgment format would have been limited to customers who are "qualified eligible participants" ("QEPs") as defined in Rule 4.7(a)(1)(ii)[13] and persons or entities constituting eligible persons under Rule 4.5(a).[14]

All four commenters who addressed this aspect of the Proposal supported the single signature procedure for required disclosure statements and elections. Three of the four commenters, however, urged the Commission to extend the availability of this procedure to all customers. These commenters noted, among other things, that since when an account is opened customers generally receive and must acknowledge all prescribed disclosures at the same time, it is reasonable to permit the customer to acknowledge all such statements by means of a single signature. Such commenters contend that separate signatures do not convey the required disclosures more clearly and compellingly. One commenter also suggested that the single signature format be useable for certain other customer consents, in particular, those

[11] Elimination of Rule 190.10(c)(1)(ii) has allowed the text of paragraph (c)(1)(i) of Rule 190.10 to be incorporated into existing paragraph (c)(1).

[12] *See* Financial and Segregation Interpretation No. 12—"Deposit of Customer Funds in Foreign Depositories," 53 FR 46911 (November 21, 1988). The Commission stated that the subordination agreement discussed in Financial and Segregation Interpretation No. 12 may be incorporated into the Rule 190.10(c) bankruptcy disclosure document or separately executed. *Id.* at 46913–46914. The Commission's staff is separately reviewing Financial and Segregation Interpretation No. 12 based upon its experience, the increase in foreign currency transactions and recent changes in U.S. banking regulations.

[13] Generally, under Rule 4.7, the term QEP includes the following categories of customers: (1) brokers or dealers registered under the Securities Exchange Act, FCMs and certain CPOs and CTAs registered under the Commodity Exchange Act ("Act"), as amended by the Futures Trading Practices Act of 1992, Pub. L. No. 102–546, 106 Stat. 3590 (October 28, 1992). To be QEPs, CPOs and CTAs must have been registered and active as such for two years. Alternatively, CPOs must operate pools which contain in the aggregate total assets in excess of $5,000,000 and CTAs must provide commodity interest trading advice to commodity accounts which contain in the aggregate total assets in excess of $5,000,000 deposited at one or more FCMs. QEPs also include: (1) natural persons and entities, including certain corporations, partnerships or similar entities, commodity pools, banks, savings and loan associations, insurance companies, registered investment companies and employee benefit plans, which meet a portfolio requirement and in certain instances other requirements with respect to total assets, net worth or annual income; (2) certain non-United States persons; and (3) entities in which all the equity owners are QEPs. With respect to category (1) above, to qualify as a QEP the person or entity must satisfy a portfolio requirement which requires: (i) ownership of in excess of $2 million in securities of unaffiliated issuers or other investment property; (ii) having had on deposit at an FCM at any time during the preceding six months in excess of $200,000 in exchange-specified initial margin and option premiums for commodity interest trading; or (iii) ownership of a portfolio comprised of a combination of (i) and (ii). See 57 FR 34853 (August 7, 1992).

[14] Persons or entities constituting eligible persons under Rule 4.5(a) are: (1) registered investment companies; (2) state regulated insurance companies; (3) state or federally regulated financial depository institutions; and (4) certain pension plans subject to regulation under the Employee Retirement Income Security Act of 1974.

required under Rule 155.3 to authorize an FCM to knowingly take the other side of a customer's order and to authorize an FCM to transfer funds from a customer's segregated account to another account.

The Commission has reviewed the proposed amendments in light of the comments received and has determined to expand the relief granted so as to permit FCMs and IBs to employ a single signature acknowledgment format for all categories of customers for various disclosures required by Commission rules. The Commission believes that a single signature acknowledgment of such disclosures in the form specified in Rule 1.55(d) provides a mechanism for meaningful confirmation of the customer's review of the relevant disclosures. As in the Proposal, Rule 1.55(d) will permit the FCM or IB to provide a list of required disclosure statements and the election under Rule 190.06(d) on a separate page or a page incorporated in the customer agreement. The customer must acknowledge receipt and understanding of each specified disclosure document and make the election required by 190.06(d) by checking a box next to the description of the appropriate disclosure statement or election. Thus, by signing a single signature line at the bottom of the page such customer acknowledges receipt and understanding of all the disclosure statements checked and indicated its applicable election. The required wording of the various risk disclosure statements, except as set forth elsewhere in this release, and of the election is unchanged.

As adopted, this amendment permits use of the "single signature" format only for the acknowledgements required by Rules 1.55(a) [15] and 33.7(a) and the election required by Rule 190.06(d) and may *not* be used for the endorsements required by Rule 180.3 with respect to arbitration and other dispute resolution agreements except with respect to QEPs as defined in Rule 4.7(a)(1)(ii) and for certain persons or entities within the purview of Rule 4.5(a).[16] The Commission does not believe that use of such a format for endorsement by public customers of the arbitration agreement and cautionary language specified in Rule 180.3 is appropriate, given the very specific mandate and the underlying objectives of that rule. Rule 180.3 was intended to ensure that a customer entering into an agreement for arbitration or other dispute resolution procedures does so on an informed, voluntary basis. To this end, the rule prescribes cautionary disclosures and requires that "[i]f the agreement is contained as a clause or clauses of a broader agreement" the customer must "separately endorse the clause or clauses containing the cautionary language and other provisions specified in this section." Rule 180.3(b)(2). Given these specific requirements of Rule 180.3(b)(2) as well as the fact that the rule 180.3 endorsement is designed to highlight the customer's assent to a dispute resolution methodology ancillary to the opening of a futures account, the Commission believes that except for customers satisfying the Rule 4.7 or Rule 4.5 criteria the Rule 180.3 requirements should not be the subject of the simplified "single signature" requirement. All other customers must separately endorse the clause or clauses relevant to arbitration as specified in Rule 180.3.

For similar reasons, the Commission has determined not to modify the requirements necessary to permit an FCM to knowingly take the other side of a customer's order [17] or to transfer funds from a customer's segregated account to an account that is not segregated. In each case, specific customer consent is required to ensure that the customer has actually authorized specific transactions that may result in a loss of important statutory protections.[18]

Finally, one commenter questioned the need for providing the prescribed disclosures to persons or entities constituting eligible persons under Rule 4.5(a) (1)–(4) and QEPs as defined in Rule 4.7(a)(1)(ii)(A) (1)–(4).[19] The commenter argued that such persons have investment expertise and experience necessary to understand the risks involved in trading futures or commodity options. The Commission believes that the new single signature format and other rule revisions discussed herein should significantly simplify the distribution and acknowledgment of required disclosures and that it would be inappropriate to create wholesale exemptions from the basic risk disclosure requirements based upon provisions of other rules designed to address different concerns. For example, in Rule 4.7 the Commission addressed the specific disclosure requirements applicable in the context of managed futures interest, *i.e.*, commodity pools and accounts guided or directed by a CTA, offered to QEPs and did not address disclosure requirements applicable where customers direct their own trading, which may be the case when the disclosures specified under Rules 1.55, 33.7 and 190.06 are applicable. The Commission also did not relieve CPOs and CTAs from all disclosure duties to QEPs but, rather, exempted them from the specific disclosure requirements of part 4.

5. Clarification of the Separate Statement Requirement of Rule 1.55

The Commission's proposals also included an amendment of Rule 1.55 to clarify its holding in *Batra* v. *E.F. Hutton & Company, Inc.*, [1986–1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,937 at 34,283 (CFTC September 30, 1987) [20] concerning the requirement that "a separate written disclosure statement containing only the

[15] The separate acknowledgement required under Rule 30.6(a)(2) is necessary only when an FCM or, in the case of an introduced account, an IB, has received general discretionary trading authority to engage in foreign futures or foreign option trading on behalf of a foreign futures or foreign option customer. With consolidation of the Rule 1.55 and 30.6 disclosure statements, acknowledgement of the consolidated Rule 1.55 risk disclosure statement will satisfy the acknowledgement requirement of current Rule 30.6(a)(2), and thus Rule 30.6(a)(2) has been deleted. However, as discussed *supra*, to the extent that firms continue to use inventories of the separate Rule 1.55 and Rule 30.6 risk disclosure statements between the effective date of these rules and July 1, 1994, they must continue to obtain separate acknowledgement of the Rule 30.6 disclosure statement where discretionary authority to engage in foreign futures and options transactions has been granted.

[16] The Commission has clarified the application of this aspect of the rule to Rule 4.5 entities by listing in Rule 180.3(b)(2) the entities to whom the rule is intended to apply, rather than cross-referencing Rule 4.5.

[17] Rule 155.3(b)(2) provides that an FCM shall not "knowingly take, directly or indirectly, the other side of any order of another person revealed to the futures commission merchant * * * by reason of their relationship to such other person" without first obtaining the consent of such person and only in conformity with contract market rules approved by the Commission.

[18] Rule 155.3(b)(2) implements the specific prohibition of section 4b(a)(2)(C)(iv) of the Act with respect to taking the opposite side of a customer order only with such customer's consent and addresses the inherent conflict of interest that arises when an FCM is the opposite party to a transaction with its own customer.

A separate writing clearly evidencing the customer's authorization for a removal of funds from a customer's segregated account and transfer of such funds to another appropriate account such as a securities account or return of such funds be treated as the property of the depositing customer pursuant to section 4d(2) of the Act, 7 U.S.C. § 6d, and to protect such funds against loss or misappropriation. The commission has consistently declined to permit FCMs to include the requisite authorization to transfer funds from a customer's segregated commodity account to any other account of that customer carried by the FCM in customer account agreements. *See* CFTC Interpretative Letter No. 77–19 [1977–1980 Transfer Binder] Comm. Fut. L. Rep. (CCH), ¶ 20,528, (December 28, 1977); CFTC Interpretative Letter No. 83–13 [1982–1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,966 (May 6, 1983); and Division of Trading and Markets Interpretative Letter No. 86–2 [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,933 (February 18, 1986).

[19] *See* notes 13 and 14 *supra*.

[20] For a more detailed discussion of the *Batra* case, *see* Proposal at 46105.

language set forth in paragraph (b)" of Rule 1.55 be provided to each customer. The proposed amendment was designed to make clear that the prescribed risk disclosure statement may be provided as a physically separate document or in a booklet containing other commodity interest account materials, provided that the Rule 1.55 risk disclosure statement appears as the cover page or the first page, and is the only material on such page, of the booklet.

The Commission has determined to adopt this amendment as proposed. The Commission received four comments concerning this proposal, all supporting the proposal. One commenter asked that the Commission confirm that the "first page" of a booklet is the first page that contains substantive text and that a table of contents or customer application could therefore precede the "first" page. The Commission intends, however, that the risk disclosure statement appear on the cover page or the first page of the booklet, by which it means the page immediately following the cover page. Consequently, there may be no intervening table of contents or other material between the cover page and the disclosure statement.

B. Account Transfers

1. Disclosure to Customers

The Commission proposed several rule amendments designed to simplify and clarify the procedures for bulk transfers of customer account, *i.e.*, account transfers made other than at the request of the customer. The Commission's proposals related to two aspects of the transfer process: required disclosure to customers and notice to the Commission. With respect to disclosure duties, the Commission noted as a threshold matter that a customer's consent must be obtained prior to a transfer of that customer's account from one FCM (or IB) to another. Consequently, unless the customer account agreement validly evidences the customer's prospective consent to the transfer of his account to another FCM or IB, specific affirmative consent by the customer to the proposed transfer in advance of the transfer would be required. Where the account agreement contains a valid "assignment" clause in which the customer generally authorizes transfer of its account to an assignee firm, the Division has generally considered 'implied" or "negative" consent of the customer, as evidenced by the customer's lack of objection to the proposed transfer within a reasonable time after receipt of written notice of the proposed transfer, sufficient.[21]

The Proposal addressed the application of the risk disclosure rules in the bulk transfer context, a subject of frequent requests for relief by FCMs and IBs involved in the bulk transfer process, by providing that accounts could be opened at the transferee firm accepting a bulk transfer without immediate compliance by the firm with the risk disclosure and acknowledgment requirements of Rules 1.55, 33.7 and 190.10(c). As proposed, the amendments would have codified the "no-action" relief generally given in this context to permit transfers of accounts to be made rapidly by allowing new disclosure statements to be given, and acknowledgments thereof received from customers, a short period after the transfer. The Commission proposed to establish by rule that compliance with the risk disclosure requirements of Rules 1.55, 33.7 and 190.10 could be completed within sixty days following a bulk transfer. Therefore, in the event of a bulk transfer of accounts from one FCM or IB to another, the Commission registrant to whom such accounts were transferred would be required to deliver to the holders of such accounts the risk disclosure statements required by Rules 1.55, 33.7 and 190.10 and receive from such customers the signed acknowledgments required by Rules 1.55 and 33.7 within sixty days of the transfer.[22]

The Commission received only one comment on its proposals relating to bulk transfers and that comment supported the proposals as "in the best interest of retail customers, FCMs, IBs, DSROs as well as the CFTC."[23] However, upon reconsideration, the Commission has determined that modification of the proposal to provide more meaningful relief and greater clarity as to applicable procedures is warranted. First, the Commission has determined to revise the Proposal to eliminate the requirement, as set forth in proposed Rules 1.55(a)(2), 33.7(a)(3) and 190.10(c)(1)(ii), that in all cases FCMs and IBs receiving bulk transfers of customer accounts provide each customer whose account is transferred new risk disclosure statements pursuant to those rules and obtain acknowledgments thereof from the customer within sixty days of the transfer of such accounts. The Commission believes that where such customers have been provided the requisite risk disclosures by the transferor firm, the customer has duly signed the required acknowledgments of his receipt and understanding of such statements, and the transferee firm has adequate evidence of the customer's receipt and acknowledgment of such statements, such as photocopies of the signed and dated customer acknowledgments, it is unnecessary to require that the transferee firm duplicate the disclosure and acknowledgment process as to those accounts.[24] The Commission continues to believe that prudent business practice may call for complete "repapering," including execution of new account agreements and appropriate disclosures, of accounts that have been transferred but does not consider a general regulatory requirement to this effect to be necessary where the transferee firm can establish that the customer has received and acknowledged receipt and understanding of required disclosures.

The Commission has made several changes in the rule amendments as proposed to reflect this modification. First, the amendments have been redrafted such that the requirements relating to distribution and acknowledgment of the risk disclosure statements in the bulk transfer context, rather than being separately addressed in new provisions in Rule 1.55 and the various other disclosure provisions affected, are now consolidated into one provision in new Rule 1.65, which as adopted addresses both disclosure to customers and notice to the Commission concerning bulk transfers. This should make the rules applicable to bulk transfers more accessible as well as eliminate unnecessarily duplicative text. Technical amendments to modify the individual risk disclosure provisions, which prohibit opening of an account unless the specified disclosures are given and acknowledged, to reflect that these provisions do not obtain in the context

[21] *See* Proposal at 46106.

[22] The amendment to Rule 190.10 set forth herein eliminates the requirement that an FCM obtain a separate acknowledgment of the disclosure required by the rule. Consolidation of the Rule 30.6 disclosure statement with the Rule 1.55 risk disclosure statement obviates separate treatment of the Rule 30.6 statement in this context.

[23] *See* Letter from Mary Beth Rooney, Associate Director Regulatory Reporting and Research, Office of Investigations and Audits, CBOT to Jean Webb, Secretary, CFTC, dated December 8, 1992.

[24] However, if, for example, a transferee firm wished to engage in the trading of domestic exchange-traded options on behalf of a customer whose account had been transferred and the transferee firm is unable to obtain from the transferor firm adequate evidence of the customer's receipt and acknowledgment of the risk disclosure statement required by Rule 33.7, the transferee firm must then provide such risk disclosure statement and obtain such acknowledgment from the affected customer prior to engaging in any domestic exchange-traded options trading on behalf of that customer.

of bulk transfers of accounts pursuant to Rule 1.65 are necessary, however. Rule 1.55, for example, is modified to state that "[e]*xcept as provided in § 1.65 of this chapter*, no futures commission merchant or, in the case of an introduced account, no introducing broker may open a commodity futures account for a customer unless the futures commission merchant or introducing broker first" furnishes the separate written disclosure requirement and receives the acknowledgment required by the rule.

With respect to the distribution of risk disclosure statements and acknowledgment thereof, Rule 1.65 as adopted provides that a transferee firm accepting a bulk transfer of customer accounts must provide the risk disclosure statements and obtain the acknowledgments required under Commission rules as to each transferred account within sixty days of the transfer *unless* the transferee firm has clear written evidence that the customer holding such account has received and, as applicable, acknowledged the relevant disclosure document in accordance with the requirements of Rules 1.55, 33.7 and 190.10(c).

With respect to disclosure to customers, Rule 1.65 will reflect the requirement that the customer's consent must be obtained prior to the transfer of the customer's account from one FCM to another. Absent a provision in the customer account agreement that evidences the customer's prospective consent to the transfer of his account to another FCM, there must be express consent by the customer to movement of the account. As discussed in the Proposal, the Division of Trading and Markets has previously stated that where the transferor firm's agreement with the customer authorizes prospective assignments of customer accounts, a "negative consent" letter may be used to secure the customer's consent to a proposed transfer. As adopted, Rule 1.65(a)(2) will specify the notice that must be given to the customer where such a general authorization has been given in the account agreement and the transferor firm provides notice to the customer whose account it proposes to transfer in order to obtain the customer's "negative consent" to the transfer. The required contents of the notice, which were discussed generally in the Proposal,[25] must apprise the customer: (i) Of the material facts concerning the proposed transfer, including the reasons for the transfer and the identity of the proposed transferee firm;[26] (ii) that they need not accept the proposed transferee firm but instead may direct the transferor firm either to liquidate the account or transfer it to a different firm of the customer's choice; (iii) that failure to respond to the letter by a specified deadline, which must afford the customer a reasonable time period for objection,[27] may be construed as consent to the transfer; and (iv) of the name, telephone number and address of a contact person at the transferor firm and a clear statement as to the means by which the customer may object or respond to the notice of the proposed transfer. The Commission also recommends as a matter of prudent business practice that the information noted above be provided to customers whose specific consent must be obtained prior to the transfer of his account.

2. Notice of Commission

The Commission also proposed to clarify and refine its existing requirement that transferor firms give advance notice to the Commission of transfers outside the ordinary course of business. The Commission has adopted these amendments, also contained in new Rule 1.65, as proposed. As noted in the release, although Rule 190.06(b) requires notice to the Commission when an FCM intends to make any transfer of customer accounts that is not at the customer's request or "in the ordinary course of business," some firms apparently are unaware that this notice requirement applies outside of the bankruptcy context as well as subsequent to a bankruptcy filing. The proposed amendment was designed to clarify the notice requirement by establishing a separate notice provision outside of Part 190, which contains the Commission's bankruptcy rules, and to simplify the notice requirement by providing a quantitative standard for determining when notice is required that limits the requirement to bulk transfers representing a substantial portion of the accounts introduced or carried by the transferor firm and a clear statement of the content of the required notice.

As proposed, notice to the Commission would be required of all transfers made other than at the customer's instance that involve twenty-five percent or more of the total number of customer accounts carried or introduced by the transferor FCM or IB. If twenty-five percent of the firm's total customer accounts constitute fewer than one hundred accounts, notice will be required for transfers involving fifty percent of the firm's total customer accounts. Computation of the number and percentage of accounts would be based on the number of accounts of the transferor firm, without regard to whether such accounts are transferred to a single transferee or multiple firms. The notice is required to be filed with the Commission five business days prior to the transfer, or where such notice is impracticable, as soon as possible and in any event no later than the day of the transfer.

The Commission has determined to adopt this notice requirement as proposed. As noted in the release accompanying the proposal, the notice requirement is intended to provide the Commission with early notice of substantial bulk transfers which may signal financial difficulties at a registrant or other changes in its business that may have customer protection implications. The notice thus is designed to provide the Commission with information useful to it in discharging its oversight responsibilities but does not imply Commission approval or acquiescence in the transfer. Conforming changes have been made to the Rule 190.06(b) notice requirement such that that requirement applies only to transfers made after the filing of a bankruptcy petition and notice pursuant to that provision is not required if notice pursuant to Rule 1.65(b) has been filed. This requirement is necessary because the Commission must receive notice of all bulk transfers effected post-bankruptcy in order to preserve its ability to disapprove of such transfers.

C. Other Disclosure Issues

The Commission's release also requested comment concerning a number of other disclosure issues raised by industry participants.

[25] Proposal at 46106, note 27.

[26] Material facts in this context, for example, might include the fact that the transferor firm was ceasing business due to pending law enforcement or disciplinary proceedings against the firm or that certain affiliations between the transferee firm and the transferor firm, such as common principals, exist. *See CFTC* v. *Commodity Fluctuation Systems, Inc.*, [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,654 (S.D.N.Y., July 2, 1985), *aff'd in unpublished opinion*, 788 F.2d 4 (2d Cir. Feb. 28, 1986).

[27] What will constitute a reasonable period may be affected by the particular context of the transfer, including such factors as the number of customer accounts, customer location, reason for and extent of advance knowledge of the need to transfer, and the time required for delivery of the transfer notice and the response thereto. Commission staff has generally required at least ten business days for customer responses when the transfer was not occasioned by a financial emergency. *See* Proposal at 46106, note 27.

1. Disclosure Concerning Electronic Trading Systems

Recognizing that disclosure documents specific to particular electronic trading systems have been developed by various SROs to supplement the Rule 1.55 disclosure statement, the Commission requested comment in the Proposal as to the desirability of a uniform electronic trading system disclosure document or modification of the Rule 1.55 statement to address electronic trading systems and enable market participants to avoid the use of multiple disclosure documents and addressing specific trading systems. The Commission received four comments in response to this request. Although there was no evident consensus as to the appropriate regulatory approach in this area, three commenters, including one exchange that currently operates an electronic trading system, an industry trade association, and NFA, all questioned whether, at this juncture, development of a Commission-prescribed disclosure statement in this area is necessary. The NFA commented, for example, that in light of "the relative infancy of and the limited experience with electronic trading systems * * * the development of specialized disclosure documents currently best remains with the exchanges utilizing these systems." [28] The CME recommended that the need for disclosure of automated order entry and matching systems be reviewed, including whether general statements concerning such systems can be consolidated into the Rule 1.55 statement and that each exchange developing such a system should continue to determine the appropriate level of disclosure.[29] The Futures Industry Association questioned the need for any prescribed disclosure with respect to electronic trading systems but concluded that if the Commission determines that such disclosure is necessary, it would support development of a uniform disclosure document for all such systems.[30] The fourth commenter, the CBOT, cautioned that significant differences among electronic trading systems make it "difficult, though not impossible, to consolidate existing disclosure documents into one electronic trading disclosure document." [31]

In light of the comments received, the Commission has determined to give further consideration to the issues raised concerning disclosure about electronic trading systems, including whether a standardized statement is desirable and feasible.

2. Simplified Options Disclosure

In the Proposal, the Commission stated that it was considering development of a "plain language" options disclosure statement and requested comment concerning the desirability of developing a simpler options disclosure format and other possible improvements in options disclosure. Generally, the commenters who addressed this issue supported the development of a plain language options disclosure statement but also encouraged the Commission to consider incorporating the required options disclosure into the revised Rule 1.55 disclosure statement. As noted *supra*, appears that a consolidated futures and options disclosure statement designed to be useable for domestic and cross-border transactions may be developed for use internationally. If these efforts come to fruition, such a proposal may provide a basis for revisiting Commission requirements for options disclosure. The Commission intends to defer other initiatives to refine options disclosure requirements pending the outcome of these international efforts.

3. Disclosure Concerning Protection of Customer Funds

As noted above, the Commission has included in the new consolidated Rule 1.55 risk disclosure statement a statement advising the customer to familiarize himself with the protections available to safeguard his funds or property by consulting with his broker. The Commission believes that this statement is responsive to the comments received on the subject of whether additional disclosure should be required as to the scope of the protection of customer funds under the Act and Commission regulations. Pursuant to comment, the Commission may also consider developing, with the help of the SROs, an informational booklet which would explain the functions of segregation and other customer protections, and making such a booklet available to FCMs and IBs for distribution to customers on a request basis.

[28] See Letter from Daniel J. Roth, General Counsel, NFA to Jean A. Webb, Secretary, CFTC, dated January 5, 1992.

[29] See Letter from William J. Brodsky, President and Chief Executive officer, CME to Jean A. Webb, Secretary, CFTC, dated December 14, 1992.

[30] See Letter from John M. Damgard, President, Futures Industry Association to Jean A. Webb, Secretariat, CFTC, dated December 7, 1992.

[31] See letter from Mary Beth Rooney, Associate Director Regulatory Reporting and Research, Office of Investigations and Audits, CBOT to Jean A. Webb, Secretary, CFTC, dated December 8, 1992.

III. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. 3501 *et seq.*, imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the Paperwork Reduction Act. In compliance with the PRA, the Commission has submitted the proposed rule amendments and the proposed rule and their associated information collection requirements to the Office of Management and Budget. The amendments to Rules 30.6, 33.7, 190.06 and 190.10 do not change the burdens associated with those rules. The groups of rules of which they are a part have the following burdens:

Rule 30.6–(3038–0035)

Average Burden Hours per Response	18.50
Number of Respondents	420
Frequency of Response	occasionally

Rule 33.7–(3038–0007)

Average Burden Hours per Response	50.59
Number of Respondents	190,370
Frequency of Response	occasionally

Rules 190.06 and 190.10–(3038–0021)

Average Burden Hours per Response	.30
Number of Respondents	402
Frequency of Response	occasionally

The burden associated with the group of rules which encompasses Rules 1.55, 180.3 and Rule 1.65 is:

Rules 1.55, 180.3 and 1.65–(3038–0022)

Average Burden Hours per Response	81.83
Number of Respondents	1342
Frequency of Response	occasionally

No additional burden is associated with the amendments to Rule 1.55. The burden associated with Rule 1.65 (3038–0024) is borne by FCMs and IBs and is as follows:

Average Burden Hours per Response	1.0
Number of Respondents	20
Frequency of Response	occasionally

Copies of the OMB approved information collection package associated with these amendments to the rules and the new rule may be obtained from Gary Waxman, Office of Management and Budget, room 3228, NEOB, Washington, DC 20503, (202) 395–7340.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, requires that agencies, in proposing rules, consider the impact of these rules on small businesses. In this connection, the Commission previously has determined that FCMs should not be considered small entities for purposes of the RFA.[32] With respect to IBs, the Commission has stated that it would evaluate within the context of a particular rule proposal whether all or some IBs should be considered small entities, and if so, that it would analyze the economic impact on them of any rule.[33] Because the amendment to the Commission's rules discussed herein will not result in any significant additional burdens to the above-mentioned registrants and may in practice result in a reduction of certain existing burdens, the Commission believes that the rule amendment will not have a significant economic impact on such entities. No comments were received on this issue.

List of Subjects

17 CFR Part 1

Customer protection, Risk disclosure statements.

17 CFR Part 30

Foreign futures and option transactions, Customer protection, Risk disclosure statements.

17 CFR Part 33

Commodity futures, Domestic exchange-traded commodity option transactions.

17 CFR part 180

Arbitration or other dispute settlement procedures, Consumer protection.

17 CFR Part 190

Bankruptcy

In consideration of the foregoing and pursuant to the authority contained in the Commodity Exchange Act, and in particular, sections 2(a)(1), 4b, 4d, 4f and 8a of the Act, as amended, 7 U.S.C. 2, 6b, 6d, 6f and 12a, the Commission hereby amends Chapter I of title 17 of the Code of Federal Regulations as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: Sections 1a, 2(a)(1), 4, 4a, 4b, 4c, 4d, 4e, 4f, 4g, 4h, 4i, 4j, 4k, 41, 4m, 4n, 4o, 5 5a, 6(a), 6(b), 6b, 6c, 8, 8a, 8c, 12, 15, 17, and 20 of the Commodity Exchange Act, 7 U.S.C. §§ 2, 2a, 4, 4a, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 7, 7a, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 19, 21 and 24.

[32] 47 FR 18618–18620 (April 30, 1982).

[33] 47 FR 18618–18620 (April 30, 1982) (commodity trading advisors and floor brokers); 48 FR 35248, 35276 (August 3, 1983) (introducing brokers).

2. Section 1.55 is amended by revising paragraphs (a) and (b), by redesignating paragraphs (c) and (d) as paragraphs (e) and (f) and by adding new paragraphs (c) and (d) to read as follows:

§ 1.55 Distribution of "Risk Disclosure Statement" by futures commission merchants and introducing brokers.

(a) (1) Except as provided in § 1.65, no futures commission merchant, or in the case of an introduced account no introducing broker, may open a commodity futures account for a customer unless the futures commission merchant or introducing broker first:

(i) Furnishes the customer with a separate written disclosure statement containing only the language set forth in paragraph (b) of this section (except for nonsubstantive additions such as captions) or as otherwise approved under paragraph (c) of this section; *Provided, however*, that the disclosure statement may be attached to other documents as the cover page or the first page of such documents and as the only material on such page; and

(ii) Receives from the customer an acknowledgment signed and dated by the customer that he received and understood the disclosure statement.

(b) The language set forth in the written disclosure document required by paragraph (a) of this section shall be as follows:

Risk Disclosure Statement

The risk of loss in trading commodity futures contracts can be substantial. You should, therefore, carefully consider whether such trading is suitable for you in light of your circumstances and financial resources. You should be aware of the following points:

(1) You may sustain a total loss of the funds that you deposit with your broker to establish or maintain a position in the commodity futures market, and you may incur losses beyond these amounts. If the market moves against your position, you may be called upon by your broker to deposit a substantial amount of additional margin funds, on short notice, in order to maintain your position. If you do not provide the required funds within the time required by your broker, your position may be liquidated at a loss, and you will be liable for any resulting deficit in your account.

(2) Under certain market conditions, you may find it difficult or impossible to liquidate a position. This can occur, for example, when the market reaches a daily price fluctuation limit ("limit move").

(3) Placing contingent orders, such as "stop-loss" or "stop-limit" orders, will not necessarily limit your losses to the intended amounts, since market conditions on the exchange where the order is placed may make it impossible to execute such orders.

(4) All futures positions involve risk, and a "spread" position may not be less risky than an outright "long" or "short" position.

(5) The high degree of leverage (gearing) that is often obtainable in futures trading because of the small margin requirements can work against you as well as for you. Leverage (gearing) can lead to large losses as well as gains.

(6) You should consult your broker concerning the nature of the protections available to safeguard funds or property deposited for your account.

All of the points noted above apply to all futures trading whether foreign or domestic. In addition, if you are contemplating trading foreign futures or options contracts, you should be aware of the following additional risks:

(7) Foreign futures transactions involve executing and clearing trades on a foreign exchange. This is the case even if the foreign exchange is formally "linked" to a domestic exchange, whereby a trade executed on one exchange liquidates or establishes a position on the other exchange. No domestic organization regulates the activities of a foreign exchange, including the execution, delivery, and clearing of transactions on such an exchange, and no domestic regulator has the power to compel enforcement of the rules of the foreign exchange or the laws of the foreign country. Moreover, such laws or regulations will vary depending on the foreign country in which the transaction occurs. For these reasons, customers who trade on foreign exchanges may not be afforded certain of the protections which apply to domestic transactions, including the right to use domestic alternative dispute resolution procedures. In particular, funds received from customers to margin foreign futures transactions may not be provided the same protections as funds received to margin futures transactions on domestic exchanges. Before you trade, you should familiarize yourself with the foreign rules which will apply to your particular transaction.

(8) Finally, you should be aware that the price of any foreign futures or option contract and, therefore, the potential profit and loss resulting therefrom, may be affected by any fluctuation in the foreign exchange rate between the time the order is placed and the foreign futures contract is liquidated or the foreign option contract is liquidated or exercised.

This Brief Statement Cannot, of Course, Disclose all the Risks and Other Aspects of the Commodity Markets

I hereby acknowledge that I have received and understood this risk disclosure statement.

Date

Signature of Customer

(c) The Commission may approve for use in lieu of the risk disclosure document required by paragraph (b) of this section a risk disclosure statement approved by one or more foreign regulatory agencies or self-regulatory organizations if the Commission determines that such risk disclosure statement is reasonably calculated to provide the disclosure required by paragraph (b) of this section. Notice of foreign jurisdiction risk disclosure statement approvals will be published in the **Federal Register**.

(d) Any futures commission merchant, or in the case of an introduced account any introducing broker, may open a commodity futures account for a customer without obtaining the separate acknowledgments of disclosure and elections required by this section and by §§ 33.7 and 190.06 of this chapter, provided that:

(1) Prior to the opening of such account, the futures commission merchant or introducing broker obtains an acknowledgment from the customer, which may consist of a single signature at the end of the futures commission merchant's or introducing broker's customer account agreement, or on a separate page, of the disclosure statements and elections specified in § 1.55 and §§ 33.7 and 190.06 of this chapter, as listed directly above the signature line, provided the customer has acknowledged by check or other indication next to a description of each specified disclosure statement or election that the customer has received and understood such disclosure statement or made such election;

(2) The acknowledgment referred to in subparagraph (d)(1) of this section must be accompanied by and executed contemporaneously with delivery of the disclosures and elective provisions required by § 1.55 and §§ 33.7 and 190.06 of this chapter;

* * * * *

3. Section 1.65 is added to read as follows:

§ 1.65 Notice of bulk transfers and disclosure obligations to customers.

(a) *Notice and Disclosure to Customers.* (1) Prior to transferring a customer account to another futures commission merchant or introducing broker other than at the request of the customer, a futures commission merchant or introducing broker must obtain the customer's specific consent to the transfer.

(2) If the customer account agreement contains a valid consent by the customer to prospective transfers of the account, the transferor futures commission merchant or introducing broker may transfer the account if the customer is provided with written notice of, and a reasonable opportunity to object to, the transfer and the customer has not asserted an objection to the transfer or given other instructions as to the disposition of the account. The notice to the customer must include:

(i) A clear statement of the reason(s) for the transfer, the name, address and telephone number of the proposed transferee firm and other information material to the transfer;

(ii) A statement that the customer is not required to accept the proposed transfer and may direct the transfer or firm to liquidate the account or transfer the account to a firm of the customer's selection;

(iii) The name, telephone number and address of a contact person at the transferor firm to whom the customer may give instructions as to the disposition of the account;

(iv) Notice that a failure to respond to the letter within a specified time period, which must be a reasonable period in the circumstances, will be deemed consent to the transfer; and

(v) A clear statement as to the means by which the customer may object to or otherwise respond to the notice of proposed transfer.

(3) Where customer accounts are transferred to a futures commission merchant or introducing broker, other than at the customer's request, the transferee introducing broker or futures commission merchant must provide each customer whose account is transferred with the risk disclosure statements and acknowledgments required by § 1.55 (domestic futures and foreign futures and options trading), and §§ 33.7 (domestic exchange-traded commodity options) and 190.10(c) (non-cash margin—to be furnished by futures commission merchants only) of this chapter and receive the required acknowledgments within sixty days of the transfer of accounts. This requirement shall not apply:

(i) As to customers owning transferred accounts for which the transferee futures commission merchant or introducing broker has clear written evidence that the customer has received and acknowledged the required disclosure documents; or

(ii) If the transfer of accounts is made from one introducing broker to another introducing broker guaranteed by the same futures commission merchant pursuant to a guarantee agreement in accordance with the requirements of § 1.10(j) and such futures commission merchant maintains the relevant acknowledgments required by § 1.55(a)(1)(ii) and § 33.7(a)(1)(ii) of this chapter and can establish compliance with § 190.10(c) of this chapter.

(b) *Notice to the Commission.* Each futures commission merchant or introducing broker shall file with the Commission, at least five business days in advance of the transfer, notice of any transfer of customer accounts carried or introduced by such futures commission merchant or introducing broker that is not initiated at the request of the customer, where the transfer involves the lesser of:

(1) 25 percent of the total number of customer accounts carried or introduced by such firm if that percentage represents at least 100 accounts; or

(2) 50 percent or more of the total number of customer accounts carried or introduced by such firm. The computation of the percentage and number of accounts must be based on the total number of accounts carried by the transferor futures commission merchant or introduced by the introducing broker, irrespective of whether such accounts are transferred to a single or multiple transferees.

(c) The notice required by paragraph (b) of this section shall include:

(1) The name, principal business address and telephone number of the transferor futures commission merchant or introducing broker;

(2) The name, principal business address and telephone number of each transferee futures commission merchant or introducing broker;

(3) The designated self-regulatory organization for the transferor and transferee firms;

(4) A brief statement as to the reasons for the transfer;

(5) A copy of the notice to customers informing them of the proposed transfer and providing an opportunity to object to such transfer; and

(6) A statement of the number of accounts to be transferred and the estimated liquidating equity of the accounts to be transferred.

(d) The notice required by paragraph (b) of this section shall be filed with the Chief Counsel, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581; the National Futures Association Attn: Vice President-Compliance; and the designated self-regulatory organization for the transferor firm.

(e) In the event that the notice required by paragraph (b) of this section cannot be filed with the Commission at least five days prior to the account transfer, the transferee futures commission merchant or introducing broker shall file such notice as soon as practicable and no later than the day of the transfer. Such notice shall include a brief statement explaining the circumstances necessitating the delay in filing.

(f) The requirements of this section shall not affect the obligations of a futures commission merchant or introducing broker under the rules of a self-regulatory organization or applicable customer account agreement with respect to transfer of accounts.

(g) If a proposed transfer is not completed in accordance with the notice required to be filed by paragraph (b) of this section, a corrective notice shall be filed within five business days of the date such proposed transfer was to occur explaining why the proposed transfer was not completed.

PART 30—FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

4. The authority citation for part 30 continues to read as follows:

Authority: Sections 2(a)(1)(A), 4, 4c, and 8a of the Commodity Exchange Act, 7 U.S.C. 2, 4, 6, 6c, and 12(a).

5. Section 30.6 is amended by revising paragraph (a) to read as follows:

§ 30.6 Disclosure.

(a) *Futures commission merchants and introducing brokers.* Except as provided in § 1.65 of this chapter, no futures commission merchant, or in the case of an introduced account no introducing broker, may open a foreign futures of option account for a foreign futures or option customer unless the futures commission merchant or introducing broker first furnishes the customer with a separate written disclosure statement containing only the language set forth in § 1.55(b) of this chapter or as otherwise approved under § 1.55(c) of this chapter (except for nonsubstantive additions such as captions), which has been acknowledged in accordance with § 1.55 of this chapter; *Provided, however,* that the risk disclosure statement may be attached to other documents as the cover page or the first page of such documents and as the only material on such page.

* * * * *

PART 33—REGULATION OF DOMESTIC EXCHANGE-TRADED COMMODITY OPTION TRANSACTIONS

6. The authority citation for part 33 continues to read as follows:

Authority: 7 U.S.C. 2, 2a, 4, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 7, 7a, 7b, 8, 9, 11, 12a, 12c, 13a, 13a-1, 13b, 19, and 21, unless otherwise noted.

7. Section 33.7 is amended by revising paragraph (a) to read as follows:

§ 33.7 Disclosure.

(a) (1) Except as provided in § 1.65 of this chapter, no futures commission merchant, or in the case of an introduced account no introducing broker, may open or cause the opening of a commodity option account for an option customer unless the futures commission merchant or introducing broker first:

(i) Furnishes the option customer with a separate written disclosure statement as set forth in this section or includes such statement in a booklet containing the customer account agreement and other disclosure statements required by Commission rules; and

(ii) Subject to the provisions of § 1.55(d) of this chapter, receives from the option customer an acknowledgment signed and dated by the option customer that he received and understood the disclosure statement.

(2) The disclosure statement and the acknowledgment shall be retained by the futures commission merchant or the introducing broker in accordance with § 1.31 of this chapter. The disclosure statement must be as set forth in paragraph (b) of this section, typed or printed in type of not less than 10-point size, and, where indicated, in all capital letters.

* * * * *

PART 180—ARBITRATION OR OTHER DISPUTE SETTLEMENT PROCEDURES

8. The authority citation for part 180 continues to read as follows:

Authority: 7 U.S.C. 6c, 6d, 6k, 7a, 12a, and 21 unless otherwise noted.

9. Section 180.3 is amended by revising paragraph (b)(2) to read as follows:

§ 180.3 Voluntary procedure and compulsory payments.

* * * * *

(b) * *

(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and provisions specified in this section. Such futures commission merchant or introducing broker may obtain such endorsement as provided in § 1.55(d) of this chapter for the following classes of customers only:

(i) An investment company registered under the Investment Company Act of 1940;

(ii) An insurance company subject to regulation by any State;

(iii) A bank, trust company or any other such financial depository institution subject to regulation by any State or the United States;

(iv) A pension plan subject to Title I of the Employee Retirement Income Security Act of 1974, an employee welfare benefit plan subject to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, and a plan defined as a government plan in section 3(32) of title I of the Employee Retirement Income Security Act of 1974;

(v) A foreign entity that is regulated in a manner comparable to the entities specified in paragraphs (b)(2)(i)–(iv) of this section; or

(vi) A person who is a "qualified eligible participant" as defined in § 4.7(a)(1)(ii) of this chapter.

* * * * *

PART 190—BANKRUPTCY RULES

10. The authority citation for part 190 continues to read as follows:

Authority: 7 U.S.C. 2, 4a, 6c, 6g, 7, 7a, 12, 19, 23, and 24 and 11 U.S.C. 362, 546, 548, 556 and 761–766.

11. Section 190.06 is amended by revising paragraphs (b) and (d)(1) to read as follows:

§ 190.06 Transfers.

* * * * *

(b) *Notice.* Unless notice has been filed pursuant to § 1.65(b) of this chapter, if a futures commission merchant, or a person required to be registered as a futures commission merchant, intends to transfer commodity contracts held by or for a commodity broker from or for the account of a customer to another person registered as a futures commission merchant after a petition in bankruptcy has been filed by or against such commodity broker, the transferor must notify the Commission no later than is required under § 190.02(a)(2).

* * * * *

(d) *Customer instructions.*—(1) *Customer instructions.* A commodity broker must provide an opportunity for each customer to specify when undertaking its first hedging contract whether, in the event of bankruptcy, such customer prefers that open commodity contracts held in a hedging account be liquidated by the trustee without seeking customer instructions. Such commodity broker may obtain evidence of the customer instructions as provided in § 1.55(d) of this chapter.

* * * * *

12. Section 190.10 is amended by revising paragraph (c)(1) to read as follows:

§ 190.10 General.

* * * * *

(c) *Disclosure statement for non-cash margin.* (1) Except as provided in § 1.65 of this chapter, no commodity broker (other than a clearing organization) may accept property other than cash from or for the account of a customer to margin, guarantee, or secure a commodity contract unless, the commodity broker first furnishes the customer with the disclosure statement set forth in paragraph (c)(2) of this section in boldfaced print in at least ten point type, which may be provided as either a separate, written document or incorporated into the customer agreement.

* * * * *

Issued in Washington, DC, on March 30, 1993, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 93-7727 Filed 4-2-93; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 73

[Docket No. 89C-0203]

Listing of Color Additives for Coloring Contact Lenses; 1,4-Bis[4-(2-Methacryloxyethyl) Phenylamino]Anthraquinone Copolymers

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the color additive regulations to provide for the safe use of the colored reaction product formed by copolymerizing 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone (C.I. Reactive Blue 246) with hydroxyethyl methacrylate and *N*-vinyl pyrrolidone to form contact lenses and to identify clearly the color additive as the reaction product of 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone copolymerized with other monomers. This action is in response to a petition filed by Bausch & Lomb, Inc.

DATES: Effective May 6, 1993, except as to any provisions that may be stayed by the filing of proper objections; written objections and requests for a hearing by May 5, 1993.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Helen R. Thorsheim, Center for Food Safety and Applied Nutrition (HFS-216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-254-9511.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a notice published in the **Federal Register** of December 19, 1990 (55 FR 52099), FDA announced that a color additive petition (CAP 1C0229) had been filed by Bausch & Lomb, Inc., 1400 North Goodman St., Rochester, NY 14692-0450. The petition proposed to amend § 73.3106 (21 CFR 73.3106) of the color additive regulations to provide for the safe use of 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone copolymerized with hydroxyethyl methacrylate/*N*-vinyl pyrrolidone copolymer to color contact lenses. The petition was filed under section 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 376).

In a notice published in the **Federal Register** of August 11, 1992 (57 FR 35832), FDA announced that Bausch & Lomb, Inc., had also requested that § 73.3106 be amended to list the color additive as the copolymer formed as the reaction product of 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone copolymerized with the contact lens monomers, either hydroxyethyl methacrylate or a blend of hydroxyethyl methacrylate and *N*-vinyl pyrrolidone.

II. Applicability of the Act

With the passage of the Medical Device Amendments of 1976 (Pub. L. 94-295), Congress mandated the listing of color additives for use in medical devices when the color additive comes in direct contact with the body for a significant period of time (21 U.S.C. 376(a)). The use of the reaction product of 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone copolymerized with hydroxyethyl methacrylate and *N*-vinyl pyrrolidone as a color additive in manufacturing contact lenses is subject to this listing requirement. The color additive is formed into contact lenses in such a way that at least some of the color additive will come in contact with the eyes when lenses are worn. In addition, the lenses are intended to be placed on the eyes for several hours a day, each day, for 1 year or more. Thus, the color additive will be in direct contact with the body for a significant period of time. Consequently, the use of the color additive currently before the agency is subject to the statutory listing requirement.

III. Identity

The color additive is produced by copolymerizing 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone (CAS Reg. No. 121888-69-5) with hydroxyethyl methacrylate and *N*-vinyl pyrrolidone monomers. The resulting copolymeric product is formed into a contact lens.

IV. Safety Evaluation

The agency believes that because 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone has a significantly lower molecular weight than the subject copolymer, it would be more readily absorbed into the body than the subject copolymer and would thus be expected to show a greater toxic effect. Therefore, the safety evaluation of the subject color additive focused primarily on 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone.

FDA concludes from the data submitted in the petition and from other relevant information that the average daily exposure to 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone from this petitioned use in contact lenses would be no greater than 0.04 micrograms (μg) per person per day. The agency-calculated upper limit was based on two factors. First, the maximum use level anticipated by the petitioner is 100 parts per million of the lens material or 8 μg per lens of 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone in a contact lens (Ref. 1). Second, the agency made two worst-case assumptions: (1) The user will replace these lenses once each year with a new pair of identical lenses, and (2) 100 percent of the 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone will migrate from the lenses into the eyes over the 1-year period. Because these assumptions are worst-case estimates, exposure to 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone from this use is likely to be far less than 0.04 μg per person per day (Ref. 1).

To establish the safety of the subject additive, the petitioner conducted toxicity studies with 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone, colored lenses, and colored lens extracts. The studies included six in vitro cytotoxicity studies, four by the agar overlay method (with 1,4-bis[4-(2-methacryloxyethyl) phenylamino]anthraquinone, lens, and lens extract), and two by the direct-contact method (with 1,4-bis[4-(2-methacryloxyethyl)