by the National Futures Association, and if filed electronically, a paper copy of such filing with the original manually signed certification must be maintained by such introducing broker or applicant in accordance with § 1.31.

* * * * *

■ 3. Section 1.12 is amended by:
■ a. Revising paragraphs (a)(2) and (i)(1);
■ b. Removing paragraph (a)(3); and
■ c. Adding paragraph (i)(3) as follows:

§ 1.12 Maintenance of minimum financial requirements by futures commission merchants and introducing brokers.

(a) * * *

(2) Provide together with such notice documentation in such form as necessary to adequately reflect the applicant's or registrant's capital condition as of any date such person's adjusted net capital is less than the minimum required. The applicant or registrant must provide similar documentation for other days as the Commission may request.

* * * * *

(i)(1) Every notice and written report required to be given or filed by this section (except for notices required by paragraph (f) of this section) by a futures commission merchant or a self-regulatory organization must be filed with the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located, with the principal office of the Commission in Washington, DC, with the designated self-regulatory organization, if any; and with the Securities and Exchange Commission, if such registrant is a securities broker or dealer. Every notice and written report required to be given or filed by this section by an applicant for registration as a futures commission merchant must be filed with the National Futures Association (on behalf of the Commission), with the designated self-regulatory organization, if any, and with the Securities and Exchange Commission, if such applicant is a securities broker or dealer. Any notice or report filed with the National Futures Association pursuant to this paragraph shall be deemed for all purposes to be filed with, and to be the official record of, the Commission.

* * * * *

(3) Every notice or report required to be provided in writing to the Commission under this section may, in lieu of facsimile, be filed via electronic transmission using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission. Any such electronic submission must clearly indicate the registrant or applicant on whose behalf such filing is made and the use of such user authentication in submitting such filing will constitute and become a substitute for the manual signature of the authorized signer.

Issued in Washington, DC, on December 24, 2009, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E9–31032 Filed 12–29–09; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA–2965; File No. S7–23–07]

RIN 3235–AJ96

Temporary Rule Regarding Principal Trades With Certain Advisory Clients

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting as final Rule 206(3)–3T under the Investment Advisers Act of 1940, the interim final temporary rule that establishes an alternative means for investment advisers who are registered with the Commission as broker-dealers to meet the requirements of Section 206(3) of the Investment Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients. As adopted, the only change to the rule is the expiration date. Rule 206(3)–3T will sunset on December 31, 2010.

DATES: *Effective Date:* December 30, 2009.

FOR FURTHER INFORMATION CONTACT: Sarah A. Bessin, Assistant Director, Daniel S. Kahl, Branch Chief, or Matthew N. Goldin, Senior Counsel, at (202) 551–6787 or *IArules@sec.gov,* Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is adopting as final temporary Rule 206(3)–3T [17 CFR 275.206(3)–3T] under the Investment Advisers Act of 1940 [15 U.S.C. 80b].

I. Background

On September 24, 2007, we adopted, on an interim final basis, Rule 206(3)–3T, a temporary rule under the Investment Advisers Act of 1940 (the ''Advisers Act'') that provides an alternative means for investment advisers who are registered with us as broker-dealers to meet the requirements of Section 206(3) of the Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients.[1] The purpose of the rule was to permit broker-dealers to sell to their advisory clients, in the wake of *Financial Planning Association* v. *SEC* (the ''FPA Decision''),[2] certain securities held in the proprietary accounts of their firms that might not be available on an agency basis—or might be available on an agency basis only on less attractive terms[3]—while protecting clients from conflicts of interest as a result of such transactions.[4]

The rule vacated in the FPA Decision had allowed broker-dealers to offer fee-based accounts without complying with the Advisers Act, including the requirements of Section 206(3). Section 206(3) makes is unlawful for any investment adviser, directly or indirectly, ''acting as a principal for his own account, knowingly to sell any security to or to purchase any security from a client * * *, without disclosing to such client *in writing* before the completion of such transaction the

[1] Rule 206(3)–3T [17 CFR 275.206(3)–3T]. All references to Rule 206(3)–3T and the various sections thereof in this Release are to 17 CFR 275.206(3)–3T and its corresponding sections. *See also Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 2653 (Sep. 24, 2007) [72 FR 55022 (Sep. 28, 2007)] (''2007 Principal Trade Rule Release'').

[2] 482 F.3d 481 (D.C. Cir. 2007). In the FPA Decision, handed down on March 30, 2007, the Court of Appeals for the District of Columbia Circuit vacated (subject to a subsequent stay until October 1, 2007) Rule 202(a)(11)–1 under the Advisers Act. Rule 202(a)(11)–1 provided, among other things, that fee-based brokerage accounts were not advisory accounts and were thus not subject to the Advisers Act. For further discussion of fee-based brokerage accounts, see 2007 Principal Trade Rule Release, Section I.

[3] *See* 2007 Principal Trade Rule Release at nn.19–20 and Section VI.C.

[4] As a consequence of the FPA Decision, broker-dealers offering fee-based brokerage accounts became subject to the Advisers Act with respect to those accounts, and the client relationship became fully subject to the Advisers Act. These broker-dealers—to the extent they wanted to continue to offer fee-based accounts and met the requirements for registration—had to register as investment advisers, if they had not done so already, act as fiduciaries with respect to those clients, disclose all material conflicts of interest, and otherwise fully comply with the Advisers Act, including the restrictions on principal trading contained in Section 206(3) of the Act. *See* 2007 Principal Trade Rule Release, Section I.

capacity in which he is acting and obtaining the consent of the client to such transaction.'' [5] Prior to our adoption of Rule 206(3)–3T, several firms that had offered fee-based brokerage accounts informed our staff that the written disclosure and the client consent requirements of Section 206(3) act as an operational barrier to their ability to engage in principal trades with their clients. Most informed us that they planned to discontinue fee-based brokerage accounts as a result of the FPA decision. They explained that they planned to do so because of the application of the Advisers Act and that, unless they were provided an exemption from (or an alternative means of complying with) Section 206(3), they would be unable to provide the same range of services to those fee-based brokerage customers who elected to become advisory clients and would expect few to elect to do so.

Rule 206(3)–3T was designed to continue to provide the protection of transaction-by-transaction disclosure and consent [6] to advisory clients when investment advisers seek to trade with them on a principal basis, subject to several conditions.[7] Specifically, Rule 206(3)–3(T) permits an adviser, with respect to non-discretionary advisory accounts,[8] to comply with Section 206(3) of the Advisers Act by, among other things, meeting the following conditions:

(i) Providing written, prospective disclosure regarding the conflicts arising from principal trades; [9]

(ii) Obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal transactions; [10]

(iii) Making certain disclosures, either *orally or in writing,* and obtaining the client's consent before each principal transaction; [11]

(iv) Sending to the client confirmation statements disclosing the capacity in which the adviser has acted and disclosing that the adviser informed the client that it may act in a principal capacity and that the client authorized the transaction; [12] and

(v) Delivering to the client an annual report itemizing the principal transactions made during the year.[13]

The rule also requires that the investment adviser be registered as a broker-dealer under Section 15 of the Securities Exchange Act of 1934 (the ''Exchange Act'') [15 U.S.C. 78o] and that each account for which the adviser relies on the rule be a brokerage account subject to the Exchange Act, and the rules thereunder, and the rules of the self-regulatory organization(s) (''SRO'') of which it is a member.[14] The rule is not available for principal trades of securities if the investment adviser or a person who controls, is controlled by, or is under common control with the adviser (''control person'') is the issuer or is an underwriter of the security.[15] The rule includes one exception—an adviser may rely on the rule for trades in which the adviser or a control person is an underwriter of non-convertible investment-grade debt securities.[16] Rule 206(3)–3T(b) clarifies that the rule does not relieve in any way an investment adviser from its obligation to act in the best interests of each of its advisory clients, including fulfilling the duty with respect to the best price and execution for a particular transaction for the advisory client.[17] Rule 206(3)–3T was set to expire on December 31, 2009, approximately 27 months after its adoption.[18]

II. Discussion

We are adopting Rule 206(3)–3T in the same form in which we adopted it on an interim final basis in 2007, except that the sunset period of the rule will end one year later (on December 31, 2010). Absent further action by the Commission, Rule 206(3)–3T will expire on December 31, 2010. As we continue to assess the operation of the rule along with intervening developments, we believe that the substantive provisions of Rule 206(3)–3T as it was adopted on an interim final basis provide sufficient protections to advisory clients to warrant its continued operation for an additional limited period of time. We will use that time to consider whether to propose to continue the rule beyond the revised sunset date and, if so, what if any modifications should be made to the rule.

a. Comments on the Scope and Conditions of the Rule

We received comment letters from eight commenters on the interim final rule.[19] Several favored narrowing the scope of the exemption provided by the rule or opposed its expansion.[20] Others, however, urged us to expand the rule's exemption to cover additional securities.[21] Some commenters suggested that an adviser be prohibited from relying on the rule when trading any securities underwritten or issued by the adviser or any of its affiliates (*i.e.,* that we exclude underwritten non-convertible investment grade debt securities).[22] Others asked that we allow advisers, in reliance on the rule, to engage in principal trades with clients in various types of securities the adviser or an affiliate underwrote that are highly liquid and for which ascertainable prices are readily available.[23]

Some commenters generally viewed the protections afforded to clients under the rule as inadequate,[24] while others urged us to modify the rule to make it easier for advisers to effect principal

[5] 15 U.S.C. 80b–6(3) (emphasis added). *See also* 2007 Principal Trade Rule Release, Section II.A.

[6] Rule 206(3)–3T(a)(4). *See also* 2007 Principal Trade Rule Release, Section II.B.4.

[7] For a discussion of Section 206(3) of the Advisers Act, its legislative history and our past interpretations of it, see the 2007 Principal Trade Rule Release, Section II.A.

[8] For purposes of the rule, the term ''investment discretion'' has the same meaning as in Section 3(a)(35) of the Exchange Act [15 U.S.C. 78c(a)(35)], except that it excludes investment discretion granted by a customer on a temporary or limited basis. Rule 206(3)–3T(a)(1). *See also* 2007 Principal Trade Rule Release at n. 31.

[9] Rule 206(3)–3T(a)(3). *See also* 2007 Principal Trade Rule Release, Section II.B.3.

[10] Rule 206(3)–3T(a)(3). Rule 206(3)–3T also requires an adviser seeking to rely on the rule to include with each written disclosure required by the rule a conspicuous, plain English statement that the client may revoke the prospective, written consent without penalty at any time by written notice to the investment adviser. Rule 206(3)–3T(a)(8). *See also* 2007 Principal Trade Rule Release, Section II.B.3.

[11] Rule 206(3)–3T(a)(4). *See also* 2007 Principal Trade Rule Release, Section II.B.4.

[12] Rule 206(3)–3T(a)(5). *See also* 2007 Principal Trade Rule Release, Section II.B.5.

[13] Rule 206(3)–3T(a)(6). *See also* 2007 Principal Trade Rule Release, Section II.B.6.

[14] Rule 206(3)–3T(a)(7). *See also* 2007 Principal Trade Rule Release, Section II.B.7.

[15] Rule 206(3)–3T(a)(2). *See also* 2007 Principal Trade Rule Release, Section II.B.2.

[16] Rule 206(3)–3T(a)(2). *See also* 2007 Principal Trade Rule Release, Section II.B.2. A separate Commission rulemaking may have an impact on the rule's definition of ''non-convertible investment grade debt securities.'' *See* note 34 below.

[17] Rule 206(3)–3T(b). *See also* 2007 Principal Trade Rule Release, Section II.B.8.

[18] Rule 206(3)–3T(d). *See also* 2007 Principal Trade Rule Release, Section II.B.9.

[19] The comment letters are available at *http://www.sec.gov/comments/s7-23-07/s72307.shtml.* However, one additional comment letter was submitted in connection with our proposed *Interpretive Rule under the Advisers Act Affecting Broker-Dealers,* Investment Advisers Act Release No. 2652 (Sep. 24, 2007). International Association of Small Broker Dealers and Advisers (Oct. 25, 2007) (''IASBDA Letter.'') The IASBDA Letter addresses one particular aspect of the rule, as noted below, and is available at *http://www.sec.gov/comments/s7-22-07/s72207-3.pdf.*

[20] *See, e.g.,* Comment Letter of the Financial Planning Association (Nov. 30, 2007) (''FPA Letter I''); Comment Letter of the National Association of Personal Financial Advisors (Nov. 30, 2007) (''NAPFA Letter'').

[21] *See, e.g.,* Comment Letter of the Securities Industry and Financial Markets Association (Nov. 30, 2007) (''SIFMA Letter I''); Comment Letter of Davis Polk & Wardwell (Dec. 4, 2007) (''DPW Letter'').

[22] *See, e.g.,* Comment Letter of Fund Democracy and the Consumer Federation of America (Nov. 30, 2007) (''FD/CFA Letter'').

[23] *See, e.g.,* SIFMA Letter I.

[24] *See, e.g.,* NAPFA Letter.

transactions with their clients.[25] For example, one commenter urged us to limit the rule's relief to principal transactions with sophisticated or wealthy investors who are in a position to protect themselves.[26] Another suggested the rule expressly require firms to develop policies and procedures that are specifically designed to detect, deter and prevent disadvantageous principal transactions.[27] And others suggested that we require that the disclosure supporting the initial client authorization for principal trades be in a separately executed, stand-alone document and not permit it to be incorporated directly into an account opening agreement.[28] Some commenters asserted, however, that the disclosure requirements—in particular, requiring transaction-by-transaction disclosures for principal trades with sophisticated investors—were too restrictive,[29] while others argued that they did not go far enough.[30] Some commenters suggested we impose additional disclosures or disclosure-related requirements.[31] One commenter questioned the rule's overall focus on disclosure and urged us to consider instead requiring affirmative measures designed to prevent principal trading abuses.[32]

Commenters who addressed the issue generally agreed with our view that principal trades in securities issued or underwritten by an adviser or its control persons should not be permitted under the rule.[33] However, these commenters expressed differing views with respect to the rule's exception from the general prohibition for trades in which the adviser or control person is an underwriter of non-convertible investment grade debt securities.[34] We also received mixed comments on the rule's limitation of relief to investment advisers that are registered with the Commission as broker-dealers. Some commenters, generally those representing financial institutions that act as both advisers and broker-dealers, supported the limitation [35] while others opposed it.[36]

Several commenters agreed with our decision to limit the rule to non-discretionary accounts.[37] In contrast, one commenter urged us to expand the rule to be available to all advisory accounts, not just non-discretionary ones.[38] One commenter urged us to limit the scope of the rule so that advisers may only rely on it when they are conducting a principal trade with a ''qualified client,'' as defined under Rule 205–3 [17 CFR 275.205–3] under the Advisers Act,[39] while another argued that the rule should not be restricted to particular clients.[40]

b. Comments on Sunset Provision

Five commenters addressed the duration of Rule 206(3)–3T.[41] Three expressed support for the temporary duration of the rule, arguing that, in light of the substantial risks associated with principal trading facilitated by the rule, a temporary effectiveness period would be important for the Commission to assess whether the scope of relief provided by the rule is appropriate.[42] Two commenters supported making the rule permanent at the end of the sunset provision with broadened relief.[43]

We received two subsequent letters from market participants. The Securities Industry and Financial Markets Association (SIFMA) urged us to extend

[25] *See, e.g.,* DPW Letter.

[26] FPA Letter I.

[27] FD/CFA Letter.

[28] *See, e.g.,* FD/CFA Letter; NAPFA Letter; FPA Letter I.

[29] *See, e.g.,* DPW Letter (although supporting the rule, commenting that the Commission should provide more relief from the restrictions of Section 206(3) to permit affirmative waiver of the transaction-by-transaction disclosure and consent requirements with respect to transactions with financially sophisticated investors involving certain ''readily marketable'' securities).

[30] *See, e.g.,* Comment Letter of the Investment Advisers Association (Nov. 30, 2007) (''IAA Letter'') (expressing strong opposition to any expansion of the relief provided in the rule, or relaxation of the rule's conditions, and emphasizing the importance of monitoring the rule in practice before making further changes); FPA Letter I (expressing concern about the risks attendant to principal trades); NAPFA Letter (arguing that any expansion of the scope of the rule would be inappropriate because of the potential risks associated with principal trades).

[31] *See, e.g.,* FD/CFA Letter; FPA Letter I (expressing concern that the transaction-specific disclosures required by the rule may not provide investors with enough information regarding conflicts of interest and suggested additional disclosures that should be required by the rule).

[32] *See* note 27 above and accompanying text.

[33] *See, e.g.,* FD/CFA Letter; FPA Letter I; SIFMA Letter I.

[34] *Compare* SIFMA Letter I (arguing that we should expand the exception to underwritten preferred stock, convertible debt, and certificates of deposit (among others)) *with* FPA Letter I (specifically urging us not to extend the exception to debt instruments other than investment grade municipal debt and corporate debt and expressing concern with price transparency of debt instruments, generally) and FD/CFA Letter (arguing that the exception should not be further expanded or that it should be eliminated altogether because of concerns regarding the price transparency of debt instruments).

One commenter supporting a broadening of the exception also urged us to modify our definition of ''investment grade debt security'' to require that a qualifying security receive ratings from only one nationally recognized statistical rating organization (''NRSRO'') instead of two. SIFMA Letter I. We are considering more globally, and in a separate rulemaking, whether our inclusion of requirements related to credit ratings in our rules and forms as an indication of investment grade quality has, in effect, placed an ''official seal of approval'' on ratings and has adversely affected the quality of due diligence and investment analysis. *See References to Ratings of Nationally Recognized Statistical Rating Organizations in Rules Under the Investment Company Act and Investment Advisers Act,* Investment Company Act Release No. 28327 (Jul. 1, 2008) [73 FR 40124 (July 11, 2008)]. In conjunction with recently reopening the comment period for the proposal with respect to Rule 206(3)–3T, the Commission requested comment on whether it should substitute an approach that uses credit ratings as a minimum standard along with additional criteria that must be met with regard to evaluating securities. The re-opened comment period closed on December 8, 2009. *See References to Ratings of Nationally Recognized Statistical Rating Organizations,* Investment Company Act Release No. 28939 (Oct. 5, 2009) [74 FR 52358 (Oct. 9, 2009)].

[35] *See, e.g.,* SIFMA Letter I (arguing that the dual registration condition preserves important investor protections that were available to former fee-based brokerage customers who elected after the FPA Decision to convert their accounts to advisory accounts).

[36] *See, e.g.,* FPA Letter I (urging us to eliminate the limitation because investors would already receive the protections of both the Advisers Act and the Exchange Act whether the adviser is itself also registered as a broker-dealer or whether it is simply affiliated with a broker-dealer, and further arguing that that the condition may have anticompetitive effects, providing an advantage to investment advisers that are also registered as broker-dealers); Comment Letter of the American Bar Association, section of Business Law's Committee on Federal Regulation of Securities (Apr. 18, 2008) (''ABA Committee Letter'') (arguing that the substantial regulatory burdens of applying two regulatory regimes is not offset by additional investor protection benefits).

[37] *See, e.g.,* FD/CFA Letter (arguing that discretionary accounts present a ''greater risk of abuse as a general matter'' and expressed appreciation for the protections provided by this limitation); IAA Letter; SIFMA Letter I (agreeing that the rule should apply to all non-discretionary accounts, but specifically noting that the rule should not be further limited in application to former fee-based brokerage accounts only); FPA Letter I (supporting the limitation as providing a critical investor protection, but arguing that we should consider further narrowing the non-discretionary account limitation to include only those accounts that were formerly fee-based brokerage accounts).

[38] ABA Committee Letter (arguing that the specific exclusion in the rule for adviser-underwritten securities, together with an adviser's best execution obligations, provides investors with sufficient investor protections and therefore clients in discretionary accounts should not be precluded from the benefits of the relief provided by the rule).

[39] FPA Letter I (further arguing that institutional clients or natural persons who are deemed to be ''qualified clients'' for purposes of Rule 205–3 are better positioned to understand the nature of principal transactions and the potential conflicts and, therefore, are better able to protect themselves against potential abuses than are other investors). Another commenter also expressed general objections to the placing of any principal trades by investment advisers. NAPFA Letter.

[40] SIFMA Letter I (noting that all investors should be able to benefit from the greater investment choices, potentially enhanced executions and additional liquidity provided by the rule).

[41] FPA Letter I; Comment Letter of the Financial Planning Association (Sep. 16, 2008) (''FPA Letter II''); IAA Letter; SIFMA Letter I; Comment Letter of the Securities Industry and Financial Markets Association (Aug. 21, 2009) (''SIFMA Letter II''); DPW Letter; NAPFA Letter.

[42] FPA Letter I; IAA Letter; NAPFA Letter.

[43] DPW Letter; SIFMA Letter I.

the temporary rule for two years in light of pending legislation that could address principal trading by investment advisers.[44] The Financial Planning Association (FPA) also wrote recommending allowing the rule to expire or extending it for no more than an additional year while the Commission conducts a study that either substantiates a clear basis for adopting a permanent exemption under Section 206(3) or disproves the view of firms that it affords unique benefits to the public.[45]

c. Limited Extension of Temporary Rule

When we adopted Rule 206(3)–3(T) on a temporary basis in September 2007, we anticipated the two-year period would provide us with adequate time to evaluate the operation of the rule in the marketplace and determine, in conjunction with consideration of all comments received, whether the rule should be made permanent, modified or allowed to expire. At the time we adopted the interim final rule, we explained that we would need to take action no later than the end of the original duration of the temporary rule if we intended to continue the same or similar relief.[46]

We need additional time to understand how, and in what situations, advisers are using the rule. Fewer firms than we anticipated at the time we adopted the rule on an interim final basis immediately determined to rely on it and those that did were slower than expected to implement the rule. We take seriously the investor protection concerns raised by commenters. Consequently, we have determined to limit the duration of the extension to one year while we continue to evaluate the operation of the rule. As our staff continues to gather information, we will assess whether the rule is operating, and firms are applying it, in a manner consistent with protecting investors.

Given the limited nature of the extension, we believe that making other changes to the temporary rule could cause firms relying on the rule to need to make adjustments to their disclosure documents, client agreements, procedures, or systems that, depending on whether we determine to propose and adopt a permanent rule in the future, may be applicable for only a year.

Further evaluation will help inform our decision whether to propose to make the rule permanent in its current or an amended form or to allow it to expire.[47] We will consider, among other things, the comments we received on the interim final rule in deciding whether to propose a permanent rule or to let the rule expire. If we decide to propose a permanent rule, we will also consider the comments we received in determining how such a rule might differ from Rule 206(3)–T.

In addition, there are currently pending before both houses of Congress bills that may address, or otherwise have an impact on, principal trading activities by investment advisers and broker-dealers, as well as broader issues under the Advisers Act.[48] Waiting some additional time for Congress to act will permit us to consider the impact that any of those proposals, if enacted, will have on such activities prior to taking further action with respect to the temporary rule.

For the reasons discussed in this release, we have determined that it is necessary or appropriate in the public interest and consistent with the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the Advisers Act to adopt Rule 206(3)–T as a final temporary rule. We are adopting Rule 206(3)–3T in the same form in which we originally adopted it on an interim final basis, except that it will expire on December 31, 2010, one year after its original expiration date.

III. Certain Administrative Law Matters

The amendment to Rule 206(3)–3T is effective on December 30, 2009. The Administrative Procedure Act generally requires that an agency publish a final rule in the **Federal Register** not less than 30 days before its effective date.[49] However, this requirement does not apply if the rule is a substantive rule which grants or recognizes an exemption or relieves a restriction, or if the rule is interpretive.[50] Rule 206(3)–3T in part has interpretive aspects and is a rule that recognizes an exemption and relieves a restriction.

IV. Paperwork Reduction Act

Rule 206(3)–3T contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[51] The Office of Management and Budget (''OMB'') approved the burden estimates presented in the 2007 Principal Trade Rule Release,[52] first on an emergency basis and subsequently on a regular basis. OMB approved the collection of information with an expiration date of March 31, 2011. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The title for the collection of information is: ''Temporary rule for principal trades with certain advisory clients, rule 206(3)–3T'' and the OMB control number for the collection of information is 3235–0630.

The 2007 Principal Trade Rule Release explains that, under Rule 206(3)–3T, there are four distinct collection burdens. Our estimate of the burden of each of the collections reflects the fact that the alternative means of compliance provided by the rule is substantially similar to the approach advisers currently employ to comply with the disclosure and consent obligations of Section 206(3) of the Advisers Act and the approach that broker-dealers employ to comply with the confirmation requirements of Rule 10b–10 under the Exchange Act. The 2007 Principal Trade Rule Release solicited comments on our PRA estimates,[53] but we did not receive comment on them. The amendment to the rule we are adopting today—to extend the rule for twelve months—does not affect the burden estimates contained in the 2007 Principal Trade Rule Release.[54]

V. Cost-Benefit Analysis

We are adopting, as a final temporary rule, Rule 206(3)–3T under the Advisers Act, which provides an alternative means for investment advisers that are registered with us as broker-dealers to meet the requirements of Section 206(3)

[44] SIFMA Letter II.

[45] FPA Letter II.

[46] *See* 2007 Principal Trade Rule Release, Section II.B.9.

[47] Subsequent to adopting Rule 206(3)–3T, the study prepared by RAND Corporation was completed. *See* Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, *http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.* The study addressed two primary questions: (1) What are the current business practices of broker-dealers and investment advisers; and (2) do investors understand the differences between and relationships among broker-dealers and investment advisers? Several of the bills currently pending before Congress are designed to harmonize the separate regulatory regimes for investment advisers and broker-dealers.

[48] *See, e.g., Investor Protection Act of 2009,* H.R. 3817, 111th Cong. (2009); *Restoring American Financial Stability Act of 2009,* S. __ 111th Cong. (2009).

[49] 5 U.S.C. 553(d).

[50] 5 U.S.C. 553(d)(1) and (2).

[51] 44 U.S.C. 3501 *et seq.*

[52] *See* 2007 Principal Trade Rule Release, Section V.B&C.

[53] *See id.,* Section V.D.

[54] As discussed above, fewer firms than we anticipated at the time we adopted the rule on an interim final basis immediately determined to rely on it and those that did were slower than expected in implementing it. We received no comments on our estimate of the number of advisers or accounts and, for purposes of this release, are retaining those estimates.

when they act in a principal capacity with respect to transactions with certain of their advisory clients. Other than extending the sunset period of the temporary rule for one year, we are not otherwise modifying the rule from the form in which we initially adopted it on an interim final basis in September 2007.

In summary, as explained in the 2007 Principal Trade Rule Release,[55] we believe the principal benefit of Rule 206(3)–3T is that it maintains investor choice and protects the interests of investors who held an estimated $300 billion in one million fee-based brokerage accounts. A resulting second benefit of the rule is that non-discretionary advisory clients of advisory firms that are also registered as broker-dealers have easier access to a wider range of securities which, in turn, should lead to increased liquidity in the markets for these securities and promote capital formation in these areas. A third benefit of the rule is that it provides the protections of the sales practice rules of the Exchange Act and the relevant self-regulatory organizations because an adviser relying on the rule must also be a registered broker-dealer. Another benefit of Rule 206(3)–3T is that it provides a lower cost alternative for an adviser to engage in principal transactions.

We believe there are some benefits associated with extension of the rule for one year. By extending the rule for one year, non-discretionary advisory clients who have had access to certain securities because of their advisers' reliance on the rule to trade on a principal basis will continue to have access to those securities without disruption. Firms relying on the rule will continue to be able to offer clients and prospective clients access to certain securities on a principal basis as well and will not need during this one-year period to incur the cost of adjusting to a new set of rules or abandoning the systems established to comply with the current rule. In other words, extension will avoid disruption to clients and firms during the period while we consider whether to make the rule permanent in its current form or in a modified form or to let it expire.

As discussed in the 2007 Principal Trade Rule Release,[56] we presented estimates of the costs of each of the rule's disclosure elements, including: the prospective disclosure and consent; transaction-by transaction disclosure and consent; transaction-by-transaction confirmations; and the annual report of principal transactions. We also provided estimates for the following related costs of compliance with Rule 206(3)–3T: (i) The initial distribution of prospective disclosure and collection of consents; (ii) systems programming costs to ensure that trade confirmations contain all of the information required by the rule; and (iii) systems programming costs to aggregate already-collected information to generate compliant principal transactions reports.[57] Finally, we solicited comment on, and requested data to assist us in further developing, our cost and benefit estimates.[58]

We did not receive comments directly addressing with supporting data the cost-benefit analysis we presented in the 2007 Principal Trade Rule Release and we continue to believe that our estimates reflect the likely costs an adviser would incur to rely on the rule.[59] Several of the comments described above, however, relating to the utility of specific disclosure provisions, along with an additional comment regarding the potential effect of the rule on small firms, do have bearing on our cost-benefit analysis of the rule. In particular, one commenter argued that the costs of transaction-by-transaction notice and consent for sophisticated investors may outweigh the benefits.[60] This commenter suggested that the rule expressly permit negative consent for principal trading because the costs for certain clients who must locate and contact an authorized person to sign an affirmative consent on behalf of the client on a timely basis may outweigh the benefits.[61] Another commenter expressed doubt that the benefit of the transaction-by-transaction confirmation requirement would outweigh the costs of revising and further burdening the standard confirmation form, especially given the rule's other disclosure and consent requirements.[62] Another commenter argued that limiting the availability of the rule to advisers that also are registered as broker-dealers imposes substantial regulatory burdens that are not justified by corresponding investor protection benefits.[63] We recognize these commenters' concerns and will consider them, as well as all the other comments we have received, if we determine to propose to make the rule permanent in its current or a modified form. For purposes of the limited extension at issue here, however, we believe the costs of adjustments to practices and systems that may or may not be continued or necessary under a potential, future permanent rule would not be justified at this time.[64]

We acknowledge that firms relying on the rule would incur operational costs associated with complying with the rule for one year. We believe that the estimates of the costs we outlined were reasonable, and no commenter provided specific, alternative estimates. We believe that the benefits were appropriately identified. We believe that all the costs and benefits associated with the rule—which, as noted above, the purpose of which was to permit broker-dealers to sell to their non-discretionary advisory clients certain securities held in the proprietary accounts of their firms that might not be available on an agency basis (or might be available on an agency basis only on less attractive terms) should be considered in aggregate. The particular array of disclosure requirements and limitations contained in the rule was tailored to safeguard investor protection and counterbalance investor protection concerns that might stem from the rule's allowance for transaction-by-transaction notice and consent to principal trades to be delivered orally or in written form, instead of just in written form. We believe that, for purposes of this one-year extension of the rule, these overall benefits justify the costs associated with the rule.

VI. Promotion of Efficiency, Competition, and Capital Formation

Section 202(c) of the Advisers Act mandates that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, consider, in addition to the protection of investors, whether the

[55] For a complete discussion of the benefits for Rule 206(3)–3T, see 2007 Principal Trade Rule Release, Section VI.

[56] *See* 2007 Principal Trade Rule Release, Section VI.D.

[57] We note that the rule provides an *alternative* means of compliance with Section 206(3) of the Advisers Act. Therefore, there is no requirement that any adviser rely on it. We believe that it is reasonable to assume that only those advisers that conclude that the benefits in aggregate outweigh the aggregate costs of relying on the rule would choose to do so.

[58] *See* 2007 Principal Trade Rule Release, Section VI.

[59] As discussed above, fewer firms than we anticipated at the time we adopted the rule on an interim final basis immediately determined to rely on it. We received no comments on our estimate of the number of advisers or accounts and, for purposes of this release, are retaining our original estimates.

[60] DPW Letter.

[61] *Id.*

[62] FD/CFA Letter.

[63] ABA Committee Letter.

[64] *See* Section II.C. of this Release.

action will promote efficiency, competition, and capital formation.[65]

As we explained in the 2007 Principal Trade Rule Release, Rule 206(3)–3T may increase efficiency by providing an alternative means of compliance with Section 206(3) of the Advisers Act that we believe will be less costly and less burdensome.[66] By permitting oral transaction-by-transaction disclosure, advisers may be more willing to engage in principal trades with advisory clients leading advisers to provide access to certain securities the adviser or its affiliate has in inventory. As we noted in the 2007 Principal Trade Rule Release, firms have argued that making securities available to clients through principal trades could lead to faster or less expensive execution, advantages a client may deem to outweigh the risks presented by principal trading with an adviser.[67]

We further explained our expectation that Rule 206(3)–3T will promote competition because it preserves investor choice for different types of advisory accounts and that, if Rule 206(3)–3T has any effect on capital formation, it is likely to be positive, although indirect.[68] We also described our understanding that providing an alternative to the traditional requirements of transaction-by-transaction written disclosure might serve to broaden the potential universe of purchasers of securities, in particular investment grade debt securities, for the reasons described in the 2007 Principal Trade Rule Release, opening the door to greater investor participation in the securities markets with a potential positive effect on capital formation.[69]

Some commenters, while expressing support for the goal of affording investors engaged in principal transactions the protections of both the investment adviser regulatory regime (*i.e.,* the Advisers Act and rules thereunder) and the broker-dealer regulatory regime (*i.e.,* the Exchange Act and rules thereunder and the rules of applicable SROs), opposed the limitation of the temporary rule not only to investment advisers that are also registered as broker-dealers, but also to accounts that are subject to both the Advisers Act and Exchange Act.[70] One of these commenters specifically argued that these limitations are unnecessary, contending they provide no additional protection for investors engaging in principal transactions because any principal trades conducted for an advisory account would be subject to the Exchange Act and SRO rules anyway.[71] This commenter concluded that the limitation instead merely provides a competitive advantage to investment advisers that are also registered broker-dealers.[72]

We intend to continue to evaluate the effects of the rule on efficiency, competition and capital formation as we consider whether to propose to extend or modify the rule or allow it to expire. As discussed above, we have no reason to believe, based on our experience with the rule to date, that small broker-dealers (or affiliated but separate investment advisers and broker-dealers) are put at a competitive disadvantage to larger advisers that are themselves also registered as broker-dealers. We believe that the effects on efficiency, competition and capital formation of Rule 206(3)–3T as it was adopted on an interim final basis warrant its continued operation for the additional limited period of time. We anticipate no new effects on efficiency, competition and capital formation as a result of the one-year extension. During that time, we will continue to assess the rule's operation and impact along with intervening developments.

VII. Final Regulatory Flexibility Act Analysis

A final regulatory flexibility analysis (''FRFA'') was prepared in accordance with 5 U.S.C. 603 when Rule 206(3)–3T was adopted in September 2007. In the 2007 Principal Trade Rule Release, we analyzed: (i) The need for and objectives of the rule; (ii) an estimate of small entities subject to the rule; (iii) the rule's projected reporting, recordkeeping and other compliance requirements; (iv) agency action to minimize the effect on small entities; (v) duplicative, overlapping or conflicting Federal rules; and (vi) significant alternatives. We sought comment on each of these aspects of our FRFA.

As discussed above, several commenters objected to the condition that advisers seeking to rely on the rule must also be registered as broker-dealers and that each account must be subject to both the Advisers Act and the Exchange Act (and applicable SRO rules). Some contended that the burdens of requiring application of both regulatory regimes do not outweigh the benefits.[73] Others essentially argued that limiting the availability of the relief under the rule to advisers also registered as broker-dealers might be anti-competitive.[74] With respect to small entities in particular, one commenter suggested that the alternative means of compliance with the Advisers Act's principal trading restrictions made available by Rule 206(3)–3T (in particular, when considered in conjunction with the interpretive rule proposed on the same day),[75] would disadvantage small broker-dealers because they are less likely to also be registered as an investment adviser, and as a result would have to form an adviser to take advantage of the benefits of the rule.[76]

We specifically considered and discussed these issues in the final regulatory flexibility analysis in the 2007 Principal Trade Rule Release and believe that it is appropriate to continue this condition of the rule for the limited extension. As explained above, however, we expect to continue to consider these comments in conjunction with data our staff gathers on the operation of the rule in the marketplace, no later than the end of the rule's revised termination date if the Commission intends to propose to continue the same or similar relief.

VIII. Statutory Authority

The Commission is adopting Rule 206(3)–3T pursuant to Sections 206A and 211(a) of the Advisers Act.

Text of Rule

List of Subjects in 17 CFR Part 275

Investment advisers, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, Title 17, Chapter II of the

[65] 15 U.S.C. 80b–2(c).

[66] 2007 Principal Trade Rule Release, Section VII.

[67] *Id.*

[68] *Id.*

[69] *Id.,* Section II.B.2.

[70] *See, e.g.,* FPA Letter I; ABA Committee Letter; SIFMA Letter I. Another commenter commented upon potential anti-competitive aspects of the rule, in particular as it relates to a proposed (but not adopted) interpretive rule that was proposed on the same day Rule 206(3)–3T was adopted on an interim final basis. IASBDA Letter. *See also* note 19 above. Because those comments relate more directly to the proposed interpretive rule, they will be considered in conjunction with that interpretive rulemaking.

[71] FPA Letter I (arguing that a client engaging in a principal trade enjoys the benefits of two regulatory regimes regardless of whether the client's adviser is itself both an investment adviser and a broker-dealer for purposes of the Federal securities laws or instead affiliated with a separate broker-dealer with which the client engages in the trade on a principal basis because, in the first instance, a single firm is responsible for meeting all regulatory requirements (including those of the Commission and the relevant SRO) and in the second, one firm holds the broad fiduciary duties of an adviser (and is subject to Commission oversight), while the affiliated broker-dealer must still comply with the Commission's and relevant SRO's sales practice and best execution requirements).

[72] *Id.*

[73] *See* notes 35–36 and accompanying text above

[74] *See* notes 70–72 and accompanying text above.

[75] *See* note 19 above.

[76] IASBDA Letter.

Code of Federal Regulations is amended as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The general authority citation for Part 275 continues to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

■ 2. Section 275.206(3)–3T(d) is revised to read as follows:

§ 275.206(3)–3T Temporary rule for principal trades with certain advisory clients.

(d) This section will expire and no longer be effective on December 31, 2010.

Dated: December 23, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–30877 Filed 12–29–09; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 111, 113, 141, 142 and 143

[CBP Dec. 09–47; USCBP–2006–0001]

RIN 1505–AB20

Remote Location Filing

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with changes, the proposed amendments to title 19 of the Code of Federal Regulations (19 CFR) regarding Remote Location Filing (RLF). RLF is a planned component of the National Customs Automation Program (NCAP), authorized by section 414 of the Tariff Act of 1930, as added by section 631 within the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act. RLF allows a participating NCAP filer to electronically file with CBP those consumption entries and related information that CBP can process in a completely electronic data interchange system from a location other than where the goods will arrive in the United States.

DATES: *Effective Date:* January 29, 2010.

FOR FURTHER INFORMATION CONTACT: For systems or automation issues: Tony Casucci, Office of Information Technology, at (703) 650–3053. For operational or policy issues: Cynthia Whittenburg, Trade Policy and Programs, Office of International Trade, at (202) 863–6512 or via e-mail at *remote.filing@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

On March 23, 2007, CBP published in the **Federal Register** (72 FR 13714) a proposal to implement Remote Location Filing (RLF) regulations in a new subpart E to part 143 within title 19 of the Code of Federal Regulations (19 CFR part 143, subpart E).

RLF, which currently operates as a National Customs Automation Program (NCAP) prototype test pursuant to section 414 of the Tariff Act of 1930, as added by section 631 within the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act, allows an RLF filer to electronically file with U.S. Customs and Border Protection (CBP) those consumption entries and related information that CBP can process in a completely electronic data interchange system from a location other than where the goods will arrive in the United States.

As noted in 72 FR 13714, the RLF prototype will terminate upon the effective date of this final rule. RLF prototype participants may continue to participate in the NCAP test program until this date.

CBP solicited comments on the proposed rulemaking.

Discussion of Comments

Fourteen commenters responded to the solicitation of public comment in the proposed rule. A description of the comments received, together with CBP's analyses, is set forth below.

Comment: Proposed § 143.44(c) describes RLF automation requirements as encompassing only those entries and entry summaries that CBP processes completely in an electronic data interchange system. Three commenters requested that, in the final rule, CBP either specifically list the RLF-eligible entry types or cite to a source for such information.

CBP Response: Currently, only electronically transmitted consumption entries—entry types 01 and 11—may be filed using RLF. CBP is presently working to expand the entry types that may be processed via RLF. It is anticipated that upon the total integration of the major cargo and entry summary functionalities into Automated Commercial Environment (ACE), the expansion of RLF will be fully realized and will incorporate most entry types.

As the entry types currently permitted under RLF are expanded in the future, CBP will not list them in the regulatory text; rather, CBP will include a reference in the regulatory text, at § 143.44(c), to the Web site located at *http://www.cbp.gov/xp/cgov/trade/trade_programs/remote_location_filing/* that provides a current listing of permissible RLF entry types.

Comment: Four commenters requested that RLF permit the filing of all entry types (including anti-dumping, countervailing duty, and quota entries), and not be limited to type 01 and 11 consumption entries. One of the commenters also suggested that CBP create a special class of National Permit to allow a broker to file any type of entry in RLF.

CBP Response: As noted in the response to the previous comment, it is anticipated that most entry types will be permitted under RLF at such time as the major cargo and entry summary functionalities are totally integrated into ACE. For this reason, the creation of a special class of National Permit is unnecessary.

Comment: One commenter requested that all brokers meeting the criteria set forth in proposed § 143.43 should have their filer codes centrally ''turned on'' automatically in the Automated Commercial System (ACS) for all eligible RLF ports instead of having their Automated Broker Interface (ABI) Client Representatives enter them as needed.

CBP Response: The current ACS environment does not provide this capability. Coordination with the ABI Client Representative is required to enable a broker to file remotely at a specific port.

Comment: Two commenters requested additional clarification regarding the specific criteria used by CBP in establishing RLF-operational locations.

CBP Response: CBP continually reviews and makes determinations concerning the addition of new ports to the list of RLF-approved processing locations. A prospective port must, at a minimum, have appropriate electronic entry processing capabilities. In determining whether to make a port RLF-operational, CBP may take into consideration factors such as trade interest and whether CBP personnel