

Proposed Rules

Federal Register

Vol. 67, No. 88

Tuesday, May 7, 2002

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-45854; File No. S7-14-02]

RIN 3235-A149

Assessments on Security Futures Transactions and Fees on Sales of Securities Resulting From Physical Settlement of Security Futures Pursuant to Section 31 of the Exchange Act

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing to clarify how to calculate assessments that are required to be paid by national securities exchanges and national securities associations pursuant to Section 31(d) of the Securities Exchange Act of 1934 ("Exchange Act") for security futures transactions. In addition, the Commission is proposing guidance on how to calculate fees that are required to be paid by national securities exchanges and national securities associations pursuant to Sections 31(b) and (c) of the Exchange Act, respectively, for sales of securities that result from the physical settlement of security futures.

DATES: Comments should be submitted on or before June 6, 2002.

ADDRESSES: All comments should be submitted in triplicate and addressed to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington DC 20549-0609. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-14-02; this file number should be included on the subject line if E-mail is used. Comment letters will be available for inspection and copying in the Commission's Public Reference Room at the same address. Electronically submitted comment

letters will be posted on the Commission's Internet web site (<http://www.sec.gov>). Personal identifying information, such as names or e-mail addresses, will not be edited from electronic submissions. Submit only information you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT:

Kelly Riley, Senior Special Counsel, at (202) 942-0752, Susie Cho, Special Counsel, at (202) 942-0748, and Geoffrey Pemble, Attorney, at (202) 942-0757, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street NW, Washington DC 20549-1001.

SUPPLEMENTARY INFORMATION:

I. Background

Section 31 of the Exchange Act¹ requires each national securities exchange and each national securities association to pay assessments and fees based on transactions in or sales of certain securities. The Commission proposes to amend Rule 31-1² to clarify how national securities exchanges and national securities associations should calculate: (1) Assessments for security futures transactions required to be paid pursuant to Section 31(d) of the Exchange Act³ and (2) fees for sales of securities resulting from physical settlement of security futures required to be paid pursuant to either Section 31(b) or (c) of the Exchange Act.

II. Proposal and Discussion

A. Assessments Under Section 31(d) of the Exchange Act

Section 31(d) of the Exchange Act provides that each national securities exchange and each national securities association shall pay an assessment "for each round turn transaction (treated as including one purchase and one sale of a contract of sale for future delivery) on a security future traded on such national securities exchange or by or through a member of such association otherwise than on a national securities

exchange."⁴ The Commission believes that there are two issues that need to be clarified with regard to the application of Section 31(d): (1) the meaning of "round turn" and (2) the unit of a "transaction" on which the assessment is based. These issues are discussed below.

1. Meaning of "Round Turn"

Section 31(d) clarifies that a "round turn" transaction on a security future is "treated as including one purchase and one sale" of a contract for future delivery. This language can be interpreted to mean that a round turn transaction is a completed trade involving the simultaneous purchase and sale of a contract for future delivery by the two parties to the trade. From the perspective of an exchange or association, there is, in fact, one purchase and one sale of a contract for future delivery in such a trade. As such, this interpretation is consistent with the fact that it is the obligation of an exchange or association to pay an assessment on a round turn transaction.

An alternative interpretation would treat a round turn transaction as a purchase and subsequent liquidating sale, or a sale followed by a subsequent covering purchase, of a contract for future delivery by a single market participant. If this market participant-based interpretation of "round turn" were used to determine when an assessment is to be paid by an exchange or association under Section 31(d), the exchange or association would need to track buy and sell transactions by individual market participants. Such tracking could be very difficult. For example, a market participant could open a large position on one day and then liquidate that position over several subsequent days.

The ability to track the opening and closing of positions by individual market participants could be further complicated if, as is expected, some security futures trade on more than one market. That is, a round turn transaction under the alternative interpretation could involve *two* markets, if the purchase and sale were effected in different markets, and it would not be

¹ 15 U.S.C. 78ee.

² 17 CFR 240.31-1.

³ Earlier this year, the Commission exempted futures on narrow-based security indexes from the assessment and fee requirements of Section 31 of the Exchange Act. See Securities Exchange Act Release No. 45371 (January 31, 2002), 67 FR 5199 (February 5, 2002). Accordingly, assessments under Section 31(d) of the Exchange Act are required only for transactions in security futures on single securities.

⁴ 15 U.S.C. 78ee(d). For fiscal year 2002, the assessment is \$0.009 for each round turn transaction on a security future. For fiscal year 2007 and each succeeding fiscal year, such assessment shall be equal to \$0.0042 for each round turn transaction.

clear if either or both were responsible for paying a Section 31(d) assessment on the transaction. The alternative interpretation of “round turn,” therefore, could create difficulties under Section 31(d) because that section appears to require only *one* market (an exchange or association) to pay the assessment on a round turn transaction.

The Commission believes that it is consistent with the intent and language of the Section 31(d) to view a round turn transaction as a completed trade involving the simultaneous purchase and sale of a contract for future delivery by the two parties to the trade. This interpretation is consistent with the fact that it is the obligation of an exchange or association to pay the assessment on the round turn transaction, and the fact that the section appears to impose an obligation on only one market. Interpreting the term “round turn” in this manner for purposes of Section 31(d) also simplifies the calculation of assessments on such transactions.

The Commission expects that the total assessments paid under this interpretation would be virtually identical to the total assessments paid under the alternative interpretation because most market participants are expected to enter into offsetting transactions before a security future settles. In any event, the Commission seeks comment on this interpretation of the term “round turn” for purposes of Section 31(d).

2. Meaning of “Transaction”

Exchanges and associations must pay Section 31(d) assessments for each “round turn transaction (treated as including one purchase and one sale of a contract of sale for future delivery).” The parenthetical makes clear that the assessment is applied on each purchase and sale of each *contract* for future delivery. Thus, the total Section 31 assessment an exchange or association must pay to the Commission will be the amount of the assessment—which is currently \$0.009—multiplied by the number of contracts traded on such exchange or by or through a member of such association otherwise than on an exchange. The Commission proposes to amend the Preliminary Note to Rule 31–1 to establish this method of calculating the Section 31(d) assessment. The Commission seeks comment, however, on the meaning of “transaction” and the appropriate method for calculating the Section 31(d) assessment on such transaction.

B. Fees Under Sections 31(b) and (c) of the Exchange Act

In addition to the assessments paid by exchanges and associations pursuant to Section 31(d) of the Exchange Act, Section 31(b) of the Exchange Act requires each national securities exchange to pay a fee based on the aggregate dollar amount of sales of securities transacted on such exchange. Similarly, Section 31(c) of the Exchange Act requires each national securities association to pay a fee based on the aggregate dollar amount of sales transacted by or through any member of such association otherwise than on a national securities exchange.⁵ Because at physical settlement of a security future a sale of the underlying security or securities occurs, each national securities exchange or national securities association is required to pay a fee to the Commission based on the dollar amount of such sale. Thus, as in the exercise of an option,⁶ the fees that are required pursuant to either Section 31(b) or Section 31(c) of the Exchange Act are only payable to the Commission if a security future is held until settlement and settlement results in the physical delivery of the underlying security or securities. Such physical delivery occurs because a holder of the short position in a security future is required pursuant to the terms of the contract to sell the underlying security or securities to the holder of the long position in the security future. Security futures that are cash-settled do not result in the sale of the underlying security or securities and, therefore, do not result in a fee being owed by an exchange or association to the Commission pursuant to Sections (b) or (c) 31 of the Exchange Act.

The Commission proposes to amend the Preliminary Note to Rule 31–1 to clarify that the aggregate dollar amount of sales of securities resulting from the physical settlement of a security future should be calculated based on the price at which the security future was sold by the market participant effecting delivery of the underlying security upon

settlement. The Commission, however, seeks comment on whether this is the appropriate price for determining the aggregate dollar amount of sale.

The Commission also proposes to amend the Preliminary Note to Rule 31–1 to clarify that the obligation to pay a Section 31(b) or (c) fee on a sale of a security underlying a physically-settled security future does not accrue until the time that physical settlement occurs. Because, however, one way to view a future is a sale of the underlying instrument at the time of the future transaction with a delayed settlement, the Commission requests comment on whether the obligation to pay a Section 31(b) or (c) fee should accrue at any time other than the actual settlement date.

Finally, the Commission proposes to amend the Preliminary Note to Rule 31–1 to provide that The Options Clearing Corporation (“OCC”) may pay Section 31 assessments on round turn transactions on security futures and fees for sales of securities that result from the physical settlement of security futures on behalf of national securities exchanges and national securities associations. This provision would permit the OCC to serve the same role it currently does in paying Section 31 fees on options transactions on behalf of the options exchanges. The Commission seeks comment on whether any other registered entity should be permitted to pay the Section 31 assessments and fees due to the Commission on behalf of any national securities exchange or national securities association.

The Commission reminds national securities exchanges and national securities associations that the obligation to pay the Section 31(d) assessment on a security futures transaction rests with such exchanges and associations. If a national securities exchange or national securities association intends to levy charges upon its members to cover the Section 31(d) assessments for security futures transactions, such exchange or association would need to adopt rules requiring its members to pay such assessments.⁷ The national securities exchanges and national securities associations also may want to amend their rules that charge their members fees to cover the fees owed by them under Sections 31(b) and (c) of the Exchange Act to clarify the application

⁵ Sections 31(b) and (c) of the Exchange Act set forth initial rates of \$15 per \$1,000,000. The Commission, however, is required to make adjustments to these fee rates pursuant to Section 31(j) of the Exchange Act. See Securities Exchange Act Release No. 45842 (April 29, 2002) Order making fiscal 2003 annual adjustments to the fee rates applicable under Section 6(b) of the Securities Act of 1933, and Sections 13(e), 14(g), 31(b) and 31(c) of the Exchange Act.

⁶ Section 31 fees that are paid upon an options exercise are paid only on options that are physically-settled, not options that are cash-settled, because, upon exercise, physically-settled options result in the actual sale and delivery of the underlying securities.

⁷ Currently, national securities exchanges and the National Association of Securities Dealers (“NASD”) charge their members fees to cover the fees owed by them to the Commission under Sections 31(b) and (c) of the Exchange Act. See e.g., Schedule A to the NASD By-Laws, Section 8; New York Stock Exchange Rule 440H.

of such fees to sales of securities resulting from the physical settlement of security futures. Of course, new exchanges would need to adopt rules to impose assessments and fees on their members to cover their obligations under Section 31.⁸

III. Paperwork Reduction Act

The Paperwork Reduction Act is not applicable to the proposed amendments because they do not impose any collection of information requirements that would require the approval of the Office of Management and Budget.

IV. Costs and Benefits of Proposed Amendments to Rule 31–1

The Commission is considering the costs and benefits of its amendments to Rule 31–1 and requests comment on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of the proposed amendments to Rule 31–1. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data concerning the costs and benefits of the proposed rule.

A. Costs

The proposed amendments to Rule 31–1 are for the purpose of providing guidance on how Section 31 assessments and fees are to be calculated for transactions in security futures and sales of securities resulting from physical settlement of security futures. Specifically, the amendments are intended to clarify: (1) the method by which assessments required pursuant to Section 31(d) of the Exchange Act are calculated for round turn transactions on security futures traded on national securities exchanges or by members of national securities associations; and (2) the manner in which fees required pursuant to Sections 31(b) and (c) of the Exchange Act are calculated for sales of securities resulting from physical settlement of security futures. Accordingly, because the proposed amendments to Rule 31–1 do not give rise to additional obligations on national securities exchanges, associations, or other market participants, but rather merely provide guidance on complying with existing statutory obligations, the Commission preliminarily believes that there would be no costs imposed on market participants by the proposed amendment to the rule.

⁸ National securities exchanges registered under Section 6(g) of the Exchange Act would not be required to file such rules with the Commission. See Exchange Act Section 6(g)(4)(B), 15 U.S.C. 78f(g)(4)(B).

B. Benefits

The Commission preliminarily believes that its proposed amendments to Rule 31–1 would benefit exchanges and associations by providing clarification on the assessments and fees payable under Sections 31(b), (c) and (d) of the Exchange Act. Although these sections of the Exchange Act set forth generally the obligations of national securities exchanges and national securities associations to pay assessments and fees on security futures transactions and sales of securities resulting from physical settlement of such futures, the Commission has concluded that guidance is necessary to clarify the mechanics of the assessment and fee calculation and collection process for security futures. The Commission's guidance in the proposed amendments to Rule 31–1 would remove any potential ambiguity in the statute about, for example, the meaning of "round turn transaction" and the price on which fees for sales of securities that result from the physical settlement of security futures will be based.

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

Section 23(a)(2) of the Exchange Act requires the Commission, when adopting rules under the Exchange Act, to consider the impact of such rules on competition.⁹ In addition, Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.¹⁰

The Commission has considered the proposed rule in light of these standards and preliminarily believes that the proposed rule will not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As noted above, in amending Rule 31–1 the Commission is merely providing guidance in the rule to clarify recent amendments to Section 31 of the Exchange Act. Likewise, the Commission preliminarily believes that the proposed rule will not have an impact on capital formation. To the extent the proposed rule reduces any ambiguity regarding the application of Section 31 to security futures transactions and the physical settlement

of security futures, the proposed rule promotes efficiency. The Commission requests comment on the effects of the proposed rules on competition, efficiency, and capital formation.

VI. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act¹¹ requires the Commission to undertake an initial regulatory flexibility analysis of the proposed rule's impact on small entities unless the Chairman certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.¹² The proposed amendments to Rule 31–1 under the Exchange Act would apply to national securities exchanges and national securities associations that are required under the Exchange Act to pay fees and assessments on sales of securities and security futures transactions. The Commission believes that there could be seven national securities exchanges and one national securities association that would be subject to the proposed rule, none of which is a small entity.¹³ The Chairman has certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. A copy of the certification is attached as Appendix A.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission also is requesting information regarding the potential impact of the proposed rule on the economy on an annual basis. Commentators should provide empirical data to support their views.

VII. Statutory Authority

The Commission is proposing amendments to Rule 31–1 under the Exchange Act pursuant to its authority under Exchange Act Sections 3(b), 23(a), and 31.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Proposed Rule

For the reasons set out in the preamble, the Commission proposes to

¹¹ 5 U.S.C. 603(a).

¹² 5 U.S.C. 605(b).

¹³ Paragraph (e) of Exchange Act Rule 0–10 provides that the term "small entity," when referring to an exchange, means any exchange that has been exempted from the reporting requirements of 17 CFR 240.11Aa3–1 and is not affiliated with any person that is not a small entity. Under this standard, none of the exchanges affected by the proposed rule is a small entity. Similarly, the national securities associations affected by the proposed rule are not small entities as defined by 13 CFR 121.201.

⁹ 15 U.S.C. 78w(a)(2).

¹⁰ 15 U.S.C. 78c(f).

amend Part 240 of Chapter II, Title 17 of the Code of Federal Regulations as follows.

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

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

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

* * * * *

2. Section 240.31-1 is proposed to be amended by removing the Preliminary Note and adding Preliminary Notes 1 and 2 and introductory text to read as follows:

§ 240.31-1 Securities transactions exempt from transaction fees.

Preliminary Notes

1. The section 31 fee for options transactions occurring on a national securities exchange, or transactions in options subject to prompt last sale reporting occurring otherwise than on an exchange (with the exception of sales of options on securities indexes) is to be paid by the exchange or the national securities association itself, respectively, or by The Options Clearing Corporation on behalf of the exchange or association, and such fee is to be computed on the basis of the option premium (market price) for the sale of the option. In the event of the exercise of an option, whether such option is traded on an exchange or otherwise, a section 31 fee is to be paid by the exchange or the national securities association itself, or The Options Clearing Corporation on behalf of the exchange or association, and such fee is to be computed on the basis of the exercise price of the option.

2. The section 31(d) assessment on a round turn transaction on a security future traded on a national securities exchange, or by or through a member of a national securities association otherwise than on a national securities exchange, is to be paid by the exchange or the national securities association itself, respectively, or by The Options Clearing Corporation on behalf of the exchange or association, and such assessment is to be computed on the basis of the number of contracts of sale for future delivery traded on such exchange or by or through a member of such association otherwise than on an exchange. In the event of the physical settlement of a security future, a section

31 fee is to be paid by the exchange on which the round turn transaction on the security future was traded, or, if the round turn transaction on the security future was traded by or through a member of a national securities association otherwise than on a national securities exchange, by the association, or by The Options Clearing Corporation on behalf of such exchange or association. Such fee, whether paid under section 31(b) or section 31(c), is to be computed on the basis of the sale price of the security future, although the obligation to pay such fee does not accrue until the time that physical delivery occurs.

The following shall be exempt from section 31 of the Act:

* * * * *

By the Commission.

Dated: May 1, 2002.

Jill M. Peterson,

Assistant Secretary.

Note: This Appendix A to the Preamble will not appear in the Code of Federal Regulations.

Appendix A

Regulatory Flexibility Act Certification

I, Harvey L. Pitt, Chairman of the Securities and Exchange Commission ("SEC"), on information and belief, hereby certify, pursuant to 5 U.S.C. § 605(b), that the proposed amendment to Rule 31-1 under the Securities Exchange Act of 1934 ("Exchange Act") would not, if adopted, have a significant economic impact on a substantial number of small entities. Section 31 of the Exchange Act requires each national securities exchange and each national securities association to pay fees and assessments to the Commission based on sales of or transactions in certain securities. Section 31 of the Exchange Act was amended by the Commodity Futures Modernization Act of 2000 ("CFMA") to impose assessments on transactions in security futures.

The proposed amendment to Rule 31-1 would clarify the method by which assessments are to be calculated for transactions in security futures and fees are to be calculated for sales of securities resulting from the physical settlement of security futures. Only national securities exchanges and national securities associations are required to pay Section 31 assessments for security futures transactions and fees for sales of securities resulting from the physical settlement of security futures. None of these exchanges or associations is a small entity for purposes of the Regulatory Flexibility Act. Accordingly, the proposed amendment to Rule 31-1 would not have a significant economic impact on a substantial number of small entities.

Dated: April 30, 2002.

Harvey L. Pitt,
Chairman.

[FR Doc. 02-11267 Filed 5-6-02; 8:45 am]

BILLING CODE 8010-01-P

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 203

Registration of U.S. Private Voluntary Organizations for Foreign Aid Programs

AGENCY: Agency for International Development (USAID).

ACTION: Proposed rule.

SUMMARY: USAID proposes to amend its regulations by creating a less cumbersome and more streamlined registration process for private voluntary organizations (PVOs).

DATES: Please submit comments on or before July 8, 2002.

ADDRESSES: You may mail written comments concerning the proposed changes to Mary Newton, Registrar, USAID, Office of Private and Voluntary Cooperation, 1300 Pennsylvania Avenue, NW, Washington, DC, 20523-7600. You may submit comments electronically to mnewton@usaid.gov.

FOR FURTHER INFORMATION CONTACT: Mary Newton, Registrar, Office of Private and Voluntary Cooperation, telephone 202-712-4747; telefax (202) 216-3041; e-mail mnewton@usaid.gov.

SUPPLEMENTARY INFORMATION:

A. Explanation of Proposed Changes

Following an extensive review of the registration process of U.S. private voluntary organizations (PVOs), we propose to amend the regulations to make the registration process less cumbersome and more streamlined for both applicants and the Agency. The major changes are as follows:

1. Defined the term "U.S. PVO" in section 203.2 so that an organization can determine if it needs to be registered. An organization that meets the definition must be registered to be eligible for a subvention or to receive a USAID grant or cooperative agreement. If an organization does not meet the definition, it is not considered a PVO for purposes of registration.

2. Combined two conditions regarding tax exemption and voluntary nature into one condition.

3. Deleted references to other types of nonprofit organizations. Only 501(c)(3) organizations are considered PVOs. Organizations registered before these