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## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 3

RIN 3038-AC96

#### Registration of Intermediaries

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (Commission) is adopting regulations to further implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) regarding registration of intermediaries. Specifically, the Commission is adopting certain conforming amendments to the Commission's regulations regarding the registration of intermediaries, consistent with other Commission rulemakings issued pursuant to the Dodd-Frank Act, and other non-substantive, technical amendments to its regulations.

**DATES:** Effective October 29, 2012.

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#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

On July 21, 2010, President Obama signed the Dodd-Frank Act.<sup>1</sup> Title VII of the Dodd-Frank Act amended the Commodity Exchange Act (CEA)<sup>2</sup> to establish a comprehensive new regulatory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers (SDs) and major swap participants (MSPs); (2) imposing

<sup>1</sup> See Dodd-Frank Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at: [http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173\\_enrolledbill.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf).

<sup>2</sup> 7 U.S.C. 1 et seq.

clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commission's oversight.

As discussed below, the regulations the Commission is adopting today concern conforming and technical amendments to part 3 governing the registration of intermediaries. These final regulations are based in large part on the Commission's proposed regulations regarding part 3 (Proposal).<sup>3</sup> The conforming amendments largely consist of adding references, where appropriate, to SDs, MSPs and swap execution facilities (SEFs). In addition, the adopted regulations contain modernizing and technical amendments to part 3 in anticipation of an influx of new registrants. Further, the adopted regulations clarify or update definitions, outdated cross-references to other regulations, and other typographical errors.

## II. Comments<sup>4</sup> and Responses

### A. In General

In response to the Proposal, the Commission received four comments from the Futures Industry Association (FIA), the National Futures Association (NFA), and two individuals, Chris Barnard and Bill Nolan. In addition, the Commission also received comments relevant to the Proposal in a global comment letter submitted by a U.S. investor and a petition for exemption submitted pursuant to Section 4(c) of the CEA<sup>5</sup> by a group of trade industry associations.<sup>6</sup> The commenters generally supported the Commission's efforts to update and modernize part 3 consistent with the regulatory developments set forth in the Dodd-

<sup>3</sup> 76 FR 12888, Mar. 9, 2011.

<sup>4</sup> The comments the Commission received on the Proposal are currently available on the Commission's Web site.

<sup>5</sup> 7 U.S.C. 6(c).

<sup>6</sup> The Commission determined that the issues raised in the global comment letter with respect to addressing the types of activities that would cause a market participant to be deemed an introducing broker engaged in swap-related activities were outside of the scope of the Proposal, and therefore is not addressing them in this final rule. Likewise, the petition submitted by the trade industry associations cited the Proposal as an example of amendments that would likely not be effective in time for a July 16, 2011 compliance deadline. Those concerns were addressed when the Commission granted related relief and extended the effective and/or compliance date applicable to many Dodd-Frank requirements. See the second amended version of the effective date order at 77 FR 41260, July 13, 2012.

Frank Act. In consideration of the comments received,<sup>7</sup> and unless specifically addressed below in the section-by-section analysis, the Commission adopts the final regulations as proposed.

### B. Section 3.1—Definitions

Section 3.1 proposed alterations to the scope of persons who, by reason of their ownership of securities of a registrant, must be listed as a principal. The Commission proposed to narrow the current category of persons in § 3.1(a)(2)(i) to only those individuals who are the owners or are entitled to vote or have the power to sell or direct the sale of 10 percent or more of the outstanding shares of any class of equity securities, other than non-voting securities. The Commission intended to narrow the scope of the provision because the existing provision was over-inclusive, in that it captured individuals without the ability to influence a company's actions, such as owners of 10% of a class of preferred stock. However, upon further reflection, the Commission is concerned that the Proposal might, in other ways, be under-inclusive, in that it would fail to capture an owner who might indirectly have the power—such as through a membership agreement—to dictate upfront the entity's activities that are subject to regulation by the Commission. Consequently, in order to strike the right balance between the over-inclusive existing provision and the under-inclusive proposed language, the Commission is modifying § 3.1(a)(2)(i) to include individuals who have the power to exercise a controlling influence over the entity's activities that are subject to regulation by the Commission.<sup>8</sup>

<sup>7</sup> NFA requested that the Commission specifically list the chief compliance officer of a registered foreign exchange dealer in the definition of principal. The Commission addressed this request in another rulemaking, wherein chief compliance officer is listed as an example of a principal of a registrant. See 77 FR 20200, Apr. 3, 2012.

<sup>8</sup> In comparison, broker-dealers regulated by the Securities and Exchange Commission are required to disclose on Form BD that is filed with the Financial Industry Regulatory Authority any person not otherwise named on Schedule A as a direct owner or Schedule B as an indirect owner who nonetheless controls the management or policies of the applicant through agreement or otherwise. See <http://www.sec.gov/about/forms/formbd.pdf>.

*C. Section 3.10—Registration of Futures Commission Merchants, Retail Foreign Exchange Dealers, Introducing Brokers, Commodity Trading Advisors, Commodity Pool Operators, Swap Dealers, Major Swap Participants, and Leverage Transaction Merchants. Section 3.11—Registration of Floor Brokers and Floor Traders. Section 3.12—Registration of Associated Persons of Futures Commission Merchants, Retail Foreign Exchange Dealers, Introducing Brokers, Commodity Trading Advisors, Commodity Pool Operators and Leverage Transaction Merchants*

Section 3.10 generally sets forth the registration requirements for various Commission registrants. Section 3.11 generally sets forth the registration requirements for floor brokers and floor traders. Section 3.12 generally sets forth the registration requirements for natural persons associated with a Commission registrant in certain capacities, referred to as associated persons (APs).

With respect to APs, the Commission proposed to amend § 3.10 to add a new paragraph (c)(5) to clarify that a person employed by either an SD or a MSP and acting as its AP is not required to separately register as an SD or MSP, respectively, solely arising out of the person's activities as an AP. The Commission sought public comment as to whether this exemption is necessary to clarify the registration responsibilities of employees, in light of the current absence of a registration requirement as an AP of an SD or an MSP, and in light of the definition requiring persons who engage in certain swap activities to register as an SD or an MSP.<sup>9</sup> FIA and Chris Barnard were supportive of this clarification on the grounds that it provided regulatory certainty. The Commission is adopting the language in new paragraph (c)(5) with a change in the language to reflect that it is not appropriate to consider the AP's activities as an AP of an SD for the purpose of determining whether the person is an SD.

With respect to intermediaries, current § 3.10(c)(2) and (3) provides exemptions from registration as a futures commission merchant (FCM) for foreign brokers and other foreign intermediaries conducting activities in commodity interest transactions on designated contract markets (DCMs) solely on behalf of customers located outside the U.S. The Commission proposed to amend this section to expand these registration exemptions to foreign brokers and foreign

intermediaries engaged in commodity interest transactions solely on behalf of non-U.S. customers executed on a SEF and cleared on a designated clearing organization through the customer omnibus account maintained with a registered FCM. FIA supported the Commission's proposal to align registration exemptions for foreign intermediaries across DCMs and SEFs. The Commission also sought comment as to whether it should expand such exemption to swap transactions executed bilaterally, and FIA supported this suggestion as well. Finally, the Commission sought comment as to whether any expansion should distinguish between bilateral swap transactions that occur within the U.S. and those that occur abroad. The Commission did not receive any comments regarding such a distinction. Therefore, the Commission is amending § 3.10(c)(2) and (3) to extend the registration exemption to commodity interest transactions executed bilaterally, on or subject to the rules of a DCM, or on or subject to the rules of a SEF, that are submitted for clearing on an omnibus basis through a registered FCM.

As proposed, § 3.11 pertaining to registration of floor brokers and floor traders contained a series of technical changes, such as consolidating an exemption found in § 3.4 and removing references to DTEFs. Subsequently, the Commission has promulgated the further definition of the term "swap dealer"<sup>10</sup> which, among other things, excludes certain swaps entered into by registered floor traders from the SD determination. Specifically, § 1.3(ggg)(6)(iv) states that "[i]n determining whether a person is a swap dealer, each swap that the person enters into *in its capacity as a floor trader* as defined by section 1a(23) of the Act or on or subject to the rules of a swap execution facility shall not be considered for the purpose of determining whether the person is a swap dealer," provided that the person is registered as a floor trader pursuant to § 3.11 and otherwise satisfies other conditions with respect to its trading, including certain requirements as if it were an SD.<sup>11</sup>

Given that legal entities, in addition to natural persons, may seek to avail themselves of the exclusion set forth above, the Commission therefore is adding a reference to Form 7-R in

§ 3.11. Form 7-R, as the application for registration as an intermediary, is the appropriate form for NFA to process an entity's application for registration as a floor trader engaged in swaps activities. Additionally, references to SEFs are being added throughout § 3.11 as one of the two categories of facilities for which floor traders in swaps will be granted trading privileges. Although these additions were omitted in the Proposal, the Commission believes that insertion of the appropriate reference to the type of registration form, and the type of facility, that would allow the NFA to properly process applications for registration of floor traders engaged in swaps activities are conforming changes to the registration rule that are necessary to implement the SD definition.

Consequently, the Commission is adopting additional technical modifications in § 3.21 to address the processing of fingerprints for principals of a floor trader that is a non-natural person, as well as in § 3.33 to reflect the use of Form 7-W for a request for withdrawal from a floor trader that is a non-natural person. The Commission is also adopting other technical modifications in §§ 3.30 and 3.40 to reflect the registration of legal entities as floor traders,<sup>12</sup> and in §§ 3.2, 3.4, 3.42, 3.56, 3.60 and 3.64 to add references to SEFs.

The Commission proposed to amend § 3.12(h)(1) to provide that a person is not required to register as an AP in any capacity if such person is registered in one of the other enumerated categories, including an SD or MSP. FIA agreed with the Commission that it is highly improbable that an individual, rather than an entity, would register as an SD and MSP, but supported the Commission's proposal in light of the regulatory certainty that it provides. Accordingly, the Commission is adopting § 3.12(h)(1) as proposed.

#### *D. Section 3.31—Deficiencies, Inaccuracies, and Changes To Be Reported. Section 3.33—Withdrawal From Registration*

Section 3.31 sets forth procedural requirements for a registrant to update and/or correct information previously provided to the Commission and the NFA. The NFA is a registered futures association (RFA) to which the Commission has delegated certain registration functions.<sup>13</sup> Currently, NFA

<sup>12</sup> In § 3.40, the provision for temporary licenses is limited to individual floor traders because this provision is applicable only to natural persons (such as APs addressed in § 3.40(a)).

<sup>13</sup> Section 17(o)(1) of the CEA, 7 U.S.C. 21(o)(1), provides that the Commission may require an RFA

<sup>9</sup> See 77 FR 30596, May 23, 2012.

<sup>10</sup> 77 FR 30596, May 23, 2012.

<sup>11</sup> 17 CFR 1.3(ggg)(6)(iv) (emphasis added). Section 1a(23) of the CEA restricts floor traders to the offer and sale of contracts "solely for such person's own account." 7 U.S.C. 1a(23).

exercises discretion in determining whether changes to the information originally filed on the registrant's Form 7-R or 8-R,<sup>14</sup> including its legal name, form of organization, and list of principals, would require a registrant to withdraw and re-register or, in the alternative, amend its Form 7-R or 8-R. The NFA's discretion is subject only to the requirement to withdraw and re-register set forth in § 3.31(a)(1) where a registrant is reporting a change in the form of organization from or to a sole proprietorship, and the safe-harbor from re-registration set forth in § 3.31(a)(3).

Among other changes set forth in the Proposal, the Commission proposed: (1) To adopt § 3.31(a)(5) to require re-registration in the event of a change in name or form of organization and a change in principal, while preserving the existing safe harbor in § 3.31(a)(3) in the event that there is no change in principal and the registrant will be liable for its predecessor organization. The Commission specifically requested comment on whether the additional transparency under the new provisions of § 3.31 is beneficial and necessary to fulfill the Commission's mandate to protect customers, and whether the existing safe harbors from re-registration should be maintained. In response to the Commission's request, NFA and FIA opposed the proposed re-registration requirements as unnecessary, while Bill Nolan supported the proposed re-registration requirements as necessary to ensure that the existing process is not abused by registrants to the detriment of customers.

In particular, the NFA challenged the proposed amendments to § 3.31 on the following grounds: (1) It will be more difficult for members of the public to uncover a "new" firm's true disciplinary information; (2) the change in the legal name or form of a business organization and the addition of a principal does not necessarily trigger a regulatory need for re-registration; and (3) the proposed changes do not adequately address the timing of events sufficient to require re-registration. FIA similarly opposed the proposed changes on the grounds that re-registration should not be required for concurrent changes to the name or form of an organization, or the addition of a

to perform certain Commission registration functions, in accordance with the CEA and the rules of the RFA.

<sup>14</sup> Form 7-R is the Commission's application for registration as an intermediary or floor broker that is a non-natural person and application for NFA membership, while Form 8-R is the Commission's application for registration as an AP, floor broker, or individual floor trader, as well as the application for listing as a principal of a registrant.

principal because re-registration is not required separately for each of these occurrences. FIA also stated that, upon implementation of the Dodd-Frank Act, the prospective mergers of affiliated companies will be negatively impacted by the proposed requirements.

After carefully considering the foregoing comments, the Commission has determined not to adopt the amendment in § 3.31(a)(3) and (5) as proposed.<sup>15</sup> The Commission intends to promptly consider alternatives to the Proposal's re-registration requirements<sup>16</sup> in order to address customer protection issues raised by the current rules. In the meantime, a prospective customer will continue to be able to obtain disciplinary history of any associated organizations by reviewing the list of principals shared by both the currently and formerly registered organizations, which is already contained in a publicly available database maintained by the NFA.

In its comment letter, the NFA also suggested a few technical edits to the language in proposed § 3.31 to clarify that: (1) It is not the electronic update reporting a change on a Form 7-R that creates any deficiency or inaccuracy; and (2) an applicant or registrant no longer lists its principals who are individuals on its application for registration, as only holding companies are listed. The Commission believes that these comments improve upon the proposed language and is adopting these suggested changes in the final regulation. Finally, as previously mentioned, the Commission is also adopting additional technical modifications in § 3.31 to reflect the use of Form 7-R for floor traders that are non-natural persons.

#### E. Corrections

In the Proposal, the Commission noted that it would be necessary to

<sup>15</sup> In its comment letter, the NFA also suggested a few technical edits to the language in proposed § 3.31(a)(2) and (4) to reflect the current filing requirements associated with the filing of Form 7-R. The Commission agrees with these comments and is adopting these technical edits in the final rule. Additionally, as a technical change, the Commission is deleting § 3.31(b)(2) because it duplicates some of the language in § 3.31(a)(1) with respect to the obligations of applicants for registration as SDs or MSPs, and is combining the reference to principals of SDs or MSPs found in current § 3.31(b)(2) with the reference to principals of other registrants in current § 3.31(b)(1).

<sup>16</sup> In comparison, consider that broker-dealers regulated by the Securities and Exchange Commission are required to provide on Form BD, which is filed with the Financial Industry Regulatory Authority, any information about business predecessors, including the date of succession, name of predecessor, and the registration number for any predecessor.

harmonize any distinctions between the Proposal and other rulemakings as they become final. On January 19, 2012, the Commission published in the **Federal Register** a final rulemaking regarding the registration of SDs and MSPs.<sup>17</sup> In that final rulemaking, the Commission adopted new registration requirements for SDs and MSPs that were not contained in the rule language on which the Proposal was based. In order to integrate the new rule language from the above final rulemaking with the proposed language to be finalized in this release, the Commission is incorporating, where relevant, the amended rule language referencing SDs and MSPs into this release.<sup>18</sup>

### III. Related Matters

#### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (Reg Flex Act) requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>19</sup> A regulatory flexibility analysis or certification is required for "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to" the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b) or any other law.<sup>20</sup> The final rules promulgated today amend existing rules in part 3 regarding the registration of intermediaries consistent with other Commission rulemakings issued pursuant to the Dodd-Frank Act, and also make other technical, non-substantive amendments to part 3.

As set forth in the Proposal,<sup>21</sup> the final rules shall affect registered FCMs, IBs, commodity trading advisors, commodity pool operators, SDs, and MSPs. The Commission has previously determined that FCMs, commodity pool operators, SDs, and MSPs are not small entities for purposes of the Reg Flex Act.<sup>22</sup> The Commission has previously made a determination with respect to IBs and commodity trading advisors to evaluate within the context of a

<sup>17</sup> 77 FR 2613, Jan. 19, 2012. The Commission subsequently published a correction regarding certain language set forth in the January 19, 2012 release. See 77 FR 3590, Jan. 25, 2012.

<sup>18</sup> See, e.g., § 3.12.

<sup>19</sup> 5 U.S.C. 601 *et seq.*

<sup>20</sup> See 5 U.S.C. 601(2), 603, 604 and 605.

<sup>21</sup> The Commission did not receive any comments regarding the Reg Flex Act and the Proposal.

<sup>22</sup> See 47 FR 18618, 18619-20, Apr. 30, 1982 (FCMs and commodity pool operators); 77 FR 30596, 30701 (finding that MSPs are not small entities and that the number of SDs that are small entities, if any, is not significant).

particular rule proposal whether all or some IBs or commodity trading advisors should be considered to be small entities and, if so, to analyze the economic impact on them of any such rule.<sup>23</sup> The final rules will also affect floor traders. The Commission has not previously made a determination regarding floor traders, since currently all registered floor traders are individuals, and individuals are not included in the small entity analysis under the Reg Flex Act.

Since there could be some small entities that register as IBs, commodity trading advisors, or floor traders, the Commission considered whether this rulemaking would have a significant economic impact on these registrants. The final rules would clarify the mechanics of registration by updating cross-references, consolidating exemptions, and deleting obsolete forms. The Commission does not expect registrants to incur additional expenses as a result of these clarifications. Consequently, the Commission finds that there is no significant economic impact on IBs or commodity trading advisors resulting from this rulemaking. The final rules also provide clarity to floor traders regarding existing registration requirements (for example, the revisions to § 3.11 clarify that an entity that wishes to register as a floor trader shall do so by filing Form 7-R), rather than imposing any new registration requirement. Consequently, the Commission finds that there is no significant economic impact on floor traders resulting from this rulemaking.

Accordingly, for the reasons stated in the Proposal and the additional rationale provided above, the Commission believes that the conforming and other technical amendments in this rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the regulations being published today by this **Federal Register** release will not have a significant economic impact on a substantial number of small entities.

#### B. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.<sup>24</sup> In the

<sup>23</sup> See, with respect to commodity trading advisors, 47 FR 18620, Apr. 30, 1982, and see, with respect to IBs, 48 FR 35276, Aug. 3, 1983.

<sup>24</sup> 44 U.S.C. 3501 *et seq.*

Proposal, the Commission indicated that the proposed rules would not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the PRA. The Commission invited public comment on the accuracy of its estimate that no additional information collection requirements or changes to existing collection requirements would result from the rules proposed herein. In response, the Commission received no comments.

The currently approved rule collection covering the regulatory filings discussed in this final rule (3038-0023, which covers Forms 3-R, 7-R, 8-R and 8-T) has a burden of 78,109 respondents and 7,030 annual hours.<sup>25</sup> The Commission believes that the number of entities filing Form 7-R will increase slightly, since that form may now be used by an entity to register as a floor trader, and the number of persons filing Form 8-R and 8-T will also increase slightly, when individuals who are principals of entities that are registered as floor traders use those forms to list themselves.

Therefore, the Commission has determined to revise the burden for this information collection as follows. The burden associated with the use of Form 7-R for the registration of entities as floor traders is estimated to be 60 hours, assuming 60 respondents,<sup>26</sup> which will result from: (1) Application for registration by entities as floor traders and submission of required information on behalf of their respective principals; (2) initially, no withdrawals from registration by floor traders and a relatively small decrease in the number of their respective principals; and (3) initially, no reported corrections. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a federal agency.

The respondent burden for this collection is estimated to average 1 hour per response for the Form 7-R; 0.8 hours per response for the Form 8-R; and 0.2 hours per response for the Form 8-T.<sup>27</sup> These estimates include the time needed to review instructions; to

<sup>25</sup> See currently approved information collection, available at [http://www.reginfo.gov/public/do/PRAICList?ref\\_nbr=201203-3038-004](http://www.reginfo.gov/public/do/PRAICList?ref_nbr=201203-3038-004).

<sup>26</sup> The Commission has previously estimated that approximately 120 entities will register as SDs. See 77 FR 2613, 2622 (January 19, 2012). The Commission believes it is reasonable to estimate that half as many entities will register as floor traders.

<sup>27</sup> See *id.* at 2643.

prepare technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to adjust the existing ways to comply with any previously applicable instructions and requirements; to train personnel to be able to respond to a collection of information; and to transmit or otherwise disclose the information.

#### Form 7-R

*Respondents/Affected Entities:* 60.  
*Estimated number of responses:* 60.  
*Estimated total annual burden on respondents:* 1 hour.

*Frequency of collection:* On occasion and annually.

*Burden Statement:* 60 respondents × 1 hour = 60 Burden Hours.

#### Form 8-R

*Respondents/Affected Entities:* 5 principals per each of 60 floor traders.  
*Estimated number of responses:* 300.  
*Estimated total annual burden on respondents:* 0.8 hours.

*Frequency of collection:* On occasion.

*Burden Statement:* 300 respondents × 0.8 hours = 240 Burden Hours.

#### Form 8-T

*Respondents/Affected Entities:* 1 principal per each of 10 floor traders.  
*Estimated number of responses:* 10.  
*Estimated total annual burden on respondents:* 0.2 hours.

*Frequency of collection:* On occasion.

*Burden Statement:* 10 respondents × 0.2 hours = 2 Burden Hours.

#### C. Cost-Benefit Considerations

Section 15(a) of the CEA<sup>28</sup> requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing an order. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors.

The regulations being adopted today conform, modernize, and make technical amendments to part 3 governing the regulation of intermediaries. Their purpose is to

<sup>28</sup> 7 U.S.C. 19(a).

ensure that the Commission's current rules are consistent with other Commission rulemakings issued pursuant to the Dodd-Frank Act. Before adopting these regulations, the Commission sought public comment on the Proposal, including comment on the costs and benefits of the Proposal. While inviting public comments on its cost-benefit considerations, the Proposal clarified that the substantive proposed rulemakings with which this rulemaking is associated have addressed the costs and benefits of the proposals as required by section 15(a) of the CEA.<sup>29</sup>

The Commission received few specific comments concerning the Proposal's consideration of costs and benefits beyond general comments that the costs associated with particular rule amendments would outweigh the benefits. Those it did receive are addressed in the discussion below. None of the comments received provided a basis to quantify estimated costs or benefits.

The Commission's baseline for consideration of the costs and benefits of this rulemaking are the costs and benefits that the public and market participants would experience in the absence of this proposed regulatory action. In other words, the proposed baseline is an alternative situation in which the Commission takes no action to conform, modernize, and make technical adjustments to its existing rules as described above in light of the Dodd-Frank Act amendments to the CEA.

#### 1. Costs and Benefits of the Conforming Amendments—In General

As set forth in the Proposal, the regulations the Commission is adopting concern conforming and technical amendments to part 3 governing the registration of intermediaries. Although the conforming amendments do not involve substantive changes to existing regulations, and hence no significant changes to the costs or benefits of the same, the final rules do benefit market participants by adding specificity to the mechanics of registration, which also benefits customers in the form of increased transparency. For example, the conforming amendments will add references to SEFs in § 3.42 to clarify that a temporary license would immediately terminate upon failure to comply with an award in an arbitration proceeding conducted pursuant to the rules of a SEF.

#### 2. Costs and Benefits of the Definitions

Current § 3.1(a) sets forth the definition of "principal," and § 3.1(a)(3) carves out from that definition certain persons that have made capital contributions in the form of subordinated debt to a registrant, including unaffiliated banks operating in the U.S. and U.S. branches of foreign banks. The Commission is adopting amendments to expand the carve-out to accommodate the likelihood that persons with capital contributions from foreign banks might register as SDs and thus be included within the definition of principal. This expanded definitional carve-out makes the foreign bank registration process consistent with that for domestic banks. This consistency promotes market efficiency by avoiding additional costs that foreign banks would otherwise incur to comply with listing and qualification requirements.

No comments were received with respect to any cost or benefit implications of this definitional amendment, notwithstanding that the Commission specifically sought comments concerning it.<sup>30</sup>

#### 3. Costs and Benefits of Section 3.10—Registration of Futures Commission Merchants, Retail Foreign Exchange Dealers, Introducing Brokers, Commodity Trading Advisors, Commodity Pool Operators, Swap Dealers, Major Swap Participants, and Leverage Transaction Merchants. Section 3.11—Registration of Floor Brokers and Floor Traders. Section 3.12—Registration of Associated Persons of Futures Commission Merchants, Retail Foreign Exchange Dealers, Introducing Brokers, Commodity Trading Advisors, Commodity Pool Operators and Leverage Transaction Merchants

Section 3.10 generally sets forth the registration requirements for various Commission registrants. The Commission has decided to implement the expansion of the existing exemption in § 3.10(c)(2) and (3), which will introduce parity between registration obligations of foreign brokers and foreign intermediaries conducting commodity interest transactions bilaterally, on DCMs, and on SEFs. The Commission expects such expansion of the exemption to reduce compliance costs without affecting customer

<sup>30</sup> The Commission requested comments on whether the provision is warranted to ensure uniform listing of principals by domestic and foreign-domiciled registrants, and whether the expansion would ensure that the list of principals remains a meaningful reflection of the persons who actually exercise control over the registrant's regulated activities.

protection. The Commission has also decided to implement the proposed new paragraph § 3.10(c)(5), which will provide regulatory certainty that the activities engaged in solely as an associated person of an SD would not require such person to register as an SD. The Commission believes that this amendment is beneficial by reducing the costs to market participants of approaching the Commission for clarifications.

Section 3.11 is being amended to reflect the further definition of the term "swap dealer" which, among, other things, excludes certain swaps entered into by registered floor traders from the SD determination. Traditionally, natural persons have registered as floor traders. However, following promulgation of rules further defining the term "swap dealer," the Commission foresees that firms will register as floor traders, making the previous rule requiring fingerprinting for all floor traders impractical without clarification. The new rules clarify that principals of a firm registering as a floor trader, and each individual responsible for entry of orders from that floor trader's own account, will be subject to the fingerprinting requirement. The Commission believes that this amendment is beneficial by obviating the need for potentially impacted market participants to incur costs to approach the Commission for clarifications. The other amendments extending the scope of § 3.11 to SEFs, while mainly technical in nature, will improve operational efficiency by allowing NFA to properly process applications for registration for floor traders engaged in swap activities.

Section 3.12 generally sets forth the registration requirement for APs. The Commission is adopting an amendment to § 3.12(h)(1)(i) to provide that a person is not required to register as an AP in any capacity if he or she is registered in one of the other enumerated categories, including an SD or MSP. FIA agreed with the Commission that it is highly improbable that an individual, rather than an entity, would register as an SD and MSP, but supported the Commission's proposal in light of the clarity it provides. As the change clarifies and extends the exemptions to activities of an SD or MSP, it will not create additional costs, and will benefit the markets by promoting efficiency by eliminating the need for multiple registrations by a single individual.

#### 4. Costs and benefits—DTEF

The rules amendments adopted today delete the term DTEF from §§ 3.2(c), 3.2(c)(2), 3.10(a)(3)(i)(A), 3.10(c)(2)(i),

<sup>29</sup> 76 FR at 12891.

3.10(c)(3)(i), 3.10(c)(4)(ii) and (iv), 3.11(a)(2) and (3), 3.11(b), 3.31(d), 3.40(a)(2)(iv), 3.42(a)(6), and 3.46(a)(8). This will implement the abolishment of DTEF as a market category by the Dodd-Frank Act.

As this change is mandated by statute, it will not create costs and benefits relative to the baseline. No comments were received on the costs and benefits of this aspect of the Proposal.

#### 5. Cost and Benefits of Modernization and Technical Amendments to Part 3—Definitions

Section 3.1(a)(2) defines a principal to include persons who exceed a threshold for equity ownership. As a technical matter, the Commission is adopting amendments to harmonize the references to outstanding classes of securities in § 3.1(a)(2)(i) and (ii) by referring throughout to “outstanding shares of any class of equity securities, other than non-voting securities.” The primary benefit from these amended regulations is that they provide specificity for calculations involving authorized but unissued securities, or debt securities.

Also, the Commission is amending its regulations to move the concept of indirect owners found in the definition of beneficial ownership in § 3.1(d) to § 3.1(a)(4) to serve as a backstop to the requirement to list indirect owners in § 3.1(a)(2). The Commission received no comments with respect to the costs and benefits of this amendment. The Commission does not believe that this amendment will have a material impact on costs and benefits relative to the baseline.

The rules incorporate revised language further defining the definition of principal to include any person who has the power to exercise a controlling influence over an entity’s activities that are subject to regulation by the Commission. As described earlier, the proposed amendments were designed to reduce the scope of persons who might potentially be covered by the definition. Under certain circumstances, the revised § 3.1(a)(2)(i) language referencing those with power to exercise a controlling influence could potentially increase the scope of persons covered by the definition. But, given that this amendment is similar to an existing requirement in Form BD covering broker-dealers, the Commission believes that any additional costs will be limited to the subset of firms that are not already registered with the SEC and within this subset, those firms which have individuals who are not subject to the existing equity ownership threshold, or the existing director or officer

function threshold, but nonetheless who possess the power to exercise control. Given the nature of the control structure being addressed, while it is not feasible for the Commission to estimate the number of firms likely to be impacted by this rule, it believes that costs of complying with the rule are likely to be minimal because information on which owners of an entity exercise control is generally known to officers of that entity. Furthermore, the minimal costs are justified by the benefits to the market and market participants from ensuring that individuals cannot circumvent the fitness qualifications presently in place for principals by structuring their holdings into non-voting securities, and then exercising control through a separate agreement.

#### 6. Costs and Benefits of Section 3.31—Deficiencies, Inaccuracies, and Changes To Be Reported, and Section 3.33—Withdrawal From Registration

Current § 3.31 sets forth procedural requirements for a registrant to update and/or correct information previously provided to the Commission and the NFA. Section 3.33 addresses the procedural requirements for the withdrawal of registration. The Commission is adopting amendments to § 3.31(a) to reference the requirement in amended § 3.33 to withdraw registration upon certain events of dissolution, and in § 3.31(b), (c) and (d) to make technical corrections.

The adopted amendments in § 3.31 are technical and are not expected to involve costs, but will provide greater clarity by correcting references to outdated forms and by deleting duplicate instructions. The amendments to § 3.33 clarify the requirement to withdraw under certain circumstances involving dissolution of a company, and would improve the predictability of withdrawal requirements to the benefit of market participants. There were no comments on the costs and benefits of the proposed withdrawal requirements under § 3.33.

#### 7. Costs and Benefits of Registration Forms

The Commission is adopting amendments to the regulations addressing the forms used during the registration process. These changes are technical in nature—for example, the changes would delete references to an obsolete form and obsolete cross-references. The Commission does not believe that increased costs to market participants or the public will result from these changes. That said, the Commission believes they do provide a benefit by addressing gaps in the current

information collected through the various forms, particularly those forms cross-referencing other data.

There were no comments on the costs and benefits of the proposed technical amendments to the forms.

#### 8. Section 15(a) Factors

##### • *Protection of market participants and the public.*

The Commission believes that the amendments to § 3.33 will improve the protection of market participants and the public by requiring withdrawal of registration in the event of dissolution of a registrant, thus improving the protection of the public.

##### • *Efficiency, competitiveness, and financial integrity.*

The amendments to § 3.1 clarify the calculations used to determine who meets the definition of principal, reducing uncertainty surrounding compliance by intermediaries. The amendments to the regulations addressing the forms used during the registration process will update the description of information collection and make it more accurate, which improves the overall efficiency of our markets.

• *Price discovery.* The Commission has not identified any impact to the price discovery process from these rules.

• *Sound risk management policies.* The Commission has not identified any impact to sound risk management practices from these rules.

• *Other public interest considerations.* The Commission has not identified any impact to other public interest considerations from these rules.

#### List of Subjects in 17 CFR Part 3

Administrative practice and procedure, Brokers, Commodity futures, Major swap participants, Reporting and recordkeeping requirements, Swap dealers.

For the reasons stated in the preamble, the Commission amends 17 CFR part 3 as follows:

#### PART 3—REGISTRATION

■ 1. The authority citation for part 3 is revised to read as follows:

**Authority:** 5 U.S.C. 552, 552b; 7 U.S.C. 1a, 2, 6a, 6b, 6b–1, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 6p, 6s, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, 23.

■ 2. Amend § 3.1 by revising paragraphs (a) introductory text, (a)(2), and (a)(3), adding paragraph (a)(4), and removing and reserving paragraphs (d) and (e). The revisions and addition read as follows:

§ 3.1 Definitions.

(a) Principal. Principal means, with respect to an entity that is an applicant for registration, a registrant or a person required to be registered under the Act or the regulations in this part:

\* \* \* \* \*

(2)(i) Any individual who directly or indirectly, through agreement, holding company, nominee, trust or otherwise, is either the owner of ten percent or more of the outstanding shares of any class of equity securities, other than non-voting securities, is entitled to vote or has the power to sell or direct the sale of ten percent or more of the outstanding shares of any class of equity securities, other than non-voting securities, is entitled to receive ten percent or more of the profits of the entity, or has the power to exercise a controlling influence over the entity's activities that are subject to regulation by the Commission; or

(ii) Any person other than an individual that is the direct owner of ten percent or more of the outstanding shares of any class of equity securities, other than non-voting securities; or

(3) Any person that has contributed ten percent or more of the capital of the entity, provided, however, that if such capital contribution consists of subordinated debt contributed by either:

(i) An unaffiliated bank insured by the Federal Deposit Insurance Corporation,

(ii) An unaffiliated "foreign bank," as defined in 12 CFR 211.21(n) that currently operates an "office of a foreign bank," as defined in 12 CFR 211.21(t), which is licensed under 12 CFR 211.24(a),

(iii) Such unaffiliated office of a foreign bank that is licensed, or

(iv) An insurance company subject to regulation by any State, such bank, foreign bank, office of a foreign bank, or insurance company will not be deemed to be a principal for purposes of this section, provided such debt is not guaranteed by another party not listed as a principal.

(4) Any individual who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose or effect of divesting such person of direct or indirect ownership of an equity security of the entity, other than a non-voting security, or preventing the vesting of such ownership, or of avoiding making a contribution of ten percent or more of the capital of the entity, as part of a plan or scheme to evade being deemed a principal of the entity, shall be deemed to be a principal of the entity.

\* \* \* \* \*

■ 3. Amend § 3.2 by revising the section heading and paragraphs (c) introductory text and (c)(2) to read as follows:

§ 3.2 Registration processing by the National Futures Association; notification and duration of registration.

\* \* \* \* \*

(c) The National Futures Association shall notify the registrant, or the sponsor in the case of an applicant for registration as an associated person, and each designated contract market and swap execution facility that has granted the applicant trading privileges in the case of an applicant for registration as a floor broker or floor trader, if registration has been granted under the Act.

\* \* \* \* \*

(2) If an applicant for registration as a floor broker or floor trader receives a temporary license in accordance with § 3.40, the National Futures Association shall notify the designated contract market or swap execution facility that has granted the applicant trading privileges that only a temporary license has been granted.

\* \* \* \* \*

■ 4. Amend § 3.4 by revising paragraph (a) to read as follows:

§ 3.4 Registration in one capacity not included in registration in any other capacity.

(a) Except as may be otherwise provided in the Act or in any rule, regulation, or order of the Commission, each futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, floor broker, floor trader of any commodity for future delivery, commodity trading advisor, commodity pool operator, introducing broker, leverage transaction merchant, and associated person (other than an associated person of a swap dealer or major swap participant) must register as such under the Act. Except as may be otherwise provided in the Act or in any rule, regulation, or order of the Commission, registration in one capacity under the Act shall not include registration in any other capacity.

\* \* \* \* \*

■ 5. Amend § 3.10 by revising paragraphs (a)(3)(i)(A), (c)(2)(i), (c)(3)(i), (c)(4)(ii), (c)(4)(iii), and (c)(4)(iv) and adding paragraph (c)(5) to read as follows:

§ 3.10 Registration of futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators, swap dealers, major swap participants, and leverage transaction merchants.

(a) \* \* \*

(3) \* \* \*

(i) \* \* \*

(A) The broker or dealer limits its solicitation of orders, acceptance of orders, or execution of orders, or placing of orders on behalf of others involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market, to security futures products as defined in section 1a(44) of the Act;

\* \* \* \* \*

(c) \* \* \*

(2)(i) A foreign broker, as defined in § 1.3(xx) of this chapter, is not required to register as a futures commission merchant if it submits any commodity interest transactions executed bilaterally, on or subject to the rules of a designated contract market, or on or subject to the rules of a swap execution facility, for clearing on an omnibus basis through a futures commission merchant registered in accordance with section 4d of the Act.

\* \* \* \* \*

(3)(i) A person located outside the United States, its territories or possessions engaged in the activity of: An introducing broker, as defined in § 1.3(mm) of this chapter; a commodity trading advisor, as defined in § 1.3(bb) of this chapter; or a commodity pool operator, as defined in § 1.3(nn) of this chapter, in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility only on behalf of persons located outside the United States, its territories or possessions, is not required to register in such capacity provided that any such commodity interest transaction is submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act.

\* \* \* \* \*

(4) \* \* \*

(ii) Such a person introduces, on a fully-disclosed basis in accordance with § 1.57 of this chapter, any institutional customer, as defined in § 1.3(g) of this chapter, to a registered futures commission merchant for the purpose of trading on a designated contract market;

(iii) Such person's affiliated futures commission merchant has filed with the National Futures Association (Attn: Vice President, Compliance) an acknowledgement that the affiliated futures commission merchant will be jointly and severally liable for any violations of the Act or the Commission's regulations committed by such person in connection with those introducing activities, whether or not

the affiliated futures commission merchant submits for clearing any trades resulting from those introducing activities; and

(iv) Such person does not solicit any person located in the United States, its territories or possessions for trading on a designated contract market, nor does such person handle the customer funds of any person located in the United States, its territories or possessions for the purpose of trading on any designated contract market.

\* \* \* \* \*

(5) In determining whether a person is a swap dealer, the activities of a registered swap dealer with respect to which such person is an associated person shall not be considered.

\* \* \* \* \*

■ 6. Revise § 3.11 to read as follows:

**§ 3.11 Registration of floor brokers and floor traders.**

(a) *Application for registration.* (1) Application for registration as a floor broker or floor trader must be on Form 8-R, if as an individual, or Form 7-R, if as a non-natural person, and must be completed and filed with the National Futures Association in accordance with the instructions thereto. Each Form 7-R filed in accordance with this paragraph (a) must be accompanied by a Form 8-R, completed in accordance with the instructions thereto and executed by each individual who is a principal of the applicant, and each individual responsible for entry of orders from that applicant's own account. Each Form 8-R filed in accordance with this paragraph (a) must be accompanied by the fingerprints of the applicant on a fingerprint card provided for that purpose by the National Futures Association, except that a fingerprint card need not be filed by any applicant who has a current Form 8-R on file with the Commission or the National Futures Association.

(2) An applicant for registration as a floor broker or floor trader will not be registered or issued a temporary license as a floor broker or floor trader unless the applicant has been granted trading privileges by a board of trade designated as a contract market or registered as a swap execution facility by the Commission.

(3) When the Commission or the National Futures Association determines that an applicant for registration as a floor broker or floor trader is not disqualified from such registration or temporary license, the National Futures Association will notify the applicant and any contract market or swap execution facility that has granted

the applicant trading privileges that the applicant's registration or temporary license as a floor broker or floor trader is granted.

(b) *Duration of registration.* A person registered as a floor broker or floor trader in accordance with paragraph (a) of this section, and whose registration has neither been revoked nor withdrawn, will continue to be so registered unless such person's trading privileges on all contract markets and swap execution facilities have ceased: provided, that if a floor broker or floor trader whose trading privileges on all contract markets and swap execution facilities have ceased for reasons unrelated to any Commission action or any contract market or swap execution facility disciplinary proceeding and whose registration is not revoked, suspended or withdrawn is granted trading privileges as a floor broker or floor trader, respectively, by any contract market or swap execution facility where such person held such privileges within the preceding sixty days, such registration as a floor broker or floor trader, respectively, shall be deemed to continue and no new Form 7-R, Form 8-R or Form 3-R record of a change to Form 7-R or Form 8-R need be filed solely on the basis of the resumption of trading privileges. A floor broker or floor trader is prohibited from engaging in activities requiring registration under the Act or from representing such person to be a registrant under the Act or the representative or agent of any registrant during the pendency of any suspension of such registration or of all such trading privileges. Each contract market and swap execution facility that has granted trading privileges to a person who is registered, or has applied for registration, as a floor broker or floor trader, must provide notice in accordance with § 3.31(d) after such person's trading privileges on such contract market or swap execution facility have ceased.

(c) *Exceptions.* A registered floor broker need not also register as a floor trader in order to engage in activity as a floor trader.

■ 7. Amend § 3.12 by revising paragraphs (b), (c) introductory text, (g), (h)(1) introductory text, and (h)(1)(i) and (ii) to read as follows:

**§ 3.12 Registration of associated persons of futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators and leverage transaction merchants.**

\* \* \* \* \*

(b) *Duration of registration.* A person registered in accordance with paragraphs (c), (d), (f), or (i) of this section and whose registration has not been revoked will continue to be so registered until the revocation or withdrawal of the registration of each of the registrant's sponsors, or until the cessation of the association of the registrant with each of the registrant's sponsors. Such person will be prohibited from engaging in activities requiring registration under the Act or from representing himself or herself to be a registrant under the Act or the representative or agent of any registrant during the pendency of any suspension of his or her registration, or his or her sponsor's registration. Each of the registrant's sponsors must file a notice in accordance with § 3.31(c) reporting the termination of the association of the associated person.

(c) *Application for registration.* Except as otherwise provided in paragraphs (d), (f), and (i) of this section, application for registration as an associated person in any capacity must be on Form 8-R, completed and filed in accordance with the instructions thereto.

\* \* \* \* \*

(g) *Petitions for exemption.* Any person adversely affected by the operation of this section may file a petition with the Secretary of the Commission, which petition must set forth with particularity the reasons why that person believes that an applicant should be exempted from the requirements of this section and why such an exemption would not be contrary to the public interest and the purposes of the provision from which exemption is sought. The petition will be granted or denied by the Commission on the basis of the papers filed. The Commission may grant such a petition if it finds that the exemption is not contrary to the public interest and the purposes of the provision from which exemption is sought. The petition may be granted subject to such terms and conditions as the Commission may find appropriate.

(h) *Exemption from registration.* (1) A person is not required to register as an associated person in any capacity if that person is:

(i) Registered under the Act as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, floor broker, or as an introducing broker;

(ii) Engaged in the solicitation of funds, securities, or property for a participation in a commodity pool, or the supervision of any person or persons so engaged, pursuant to registration

with the Financial Industry Regulatory Authority as a registered representative, registered principal, limited representative or limited principal, and that person does not engage in any other activity subject to regulation by the Commission;

\* \* \* \* \*

■ 8. Amend § 3.21 by:

- a. Revising paragraphs (a)(1) and (2);
- b. Adding paragraph (a)(3); and
- c. Revising paragraphs (b)(1) through (3), (c) introductory text, and (c)(4)(i) and (iii).

The revisions and addition read as follows:

**§ 3.21 Exemption from fingerprinting requirement in certain cases.**

(a) \* \* \*

(1) A legible, accurate and complete photocopy of a fingerprint card that has been submitted to the Federal Bureau of Investigation for identification and appropriate processing and of each report, record, and notation made available by the Federal Bureau of Investigation with respect to that fingerprint card if such identification and processing has been completed satisfactorily by the Federal Bureau of Investigation not more than ninety days prior to the filing with the National Futures Association of the photocopy;

(2) A statement that such person's application for initial registration in any capacity was granted within the preceding ninety days, provided that the provisions of this paragraph (a)(2) shall not be applicable to any person who, by Commission rule, regulation, or order, was not required to file a fingerprint card in connection with such application for initial registration; or

(3) A statement that such person has a current Form 8-R on file with the Commission or the National Futures Association.

(b) \* \* \*

(1) With respect to the fingerprints of an associated person: An officer, if the sponsor is a corporation; a general partner, if a partnership; or the sole proprietor, if a sole proprietorship;

(2) With respect to fingerprints of a floor broker or individual floor trader: The applicant for registration; and with respect to fingerprints of each individual who is responsible for entry of orders from the account of a floor trader that is a non-natural person, the applicant for registration, or

(3) With respect to the fingerprints of a principal: An officer, if the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, commodity trading advisor, commodity pool operator, introducing broker, floor trader that is a

non-natural person, or leverage transaction merchant with which the principal will be affiliated is a corporation; a general partner, if a partnership; or the sole proprietor, if a sole proprietorship.

(c) *Outside directors.* Any futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, floor trader that is a non-natural person, or leverage transaction merchant that has a principal who is a director but is not also an officer or employee of the firm may, in lieu of submitting a fingerprint card in accordance with the provisions of § 3.10(a)(2), file a "Notice Pursuant to Rule 3.21(c)" with the National Futures Association. Such notice shall state, if true, that such outside director:

\* \* \* \* \*

(4) \* \* \*

(i) The name of the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity trading advisor, commodity pool operator, floor trader that is a non-natural person, leverage transaction merchant, or applicant for registration in any of these capacities of which the person is an outside director;

\* \* \* \* \*

(iii) The internal controls used to ensure that the outside director for whom exemption under this paragraph (c) is sought does not have access to the keeping, handling or processing of the items described in paragraphs (c)(2)(i) and (ii) of this section; and

\* \* \* \* \*

■ 9. Amend § 3.22 by revising paragraph (b) to read as follows:

**§ 3.22 Supplemental filings.**

\* \* \* \* \*

(b) That the person, or any individual who, based upon his or her relationship with that person is required to file a Form 8-R in accordance with the requirements of this part, as applicable, must, within such period of time as the Commission or the National Futures Association may specify, complete and file with the Commission or the National Futures Association a current Form 7-R, or if appropriate, a Form 8-R, in accordance with the instructions thereto.

\* \* \* \* \*

■ 10. Revise § 3.30 to read as follows:

**§ 3.30 Current address for purpose of delivery of communications from the Commission or the National Futures Association.**

(a) The address of each registrant, applicant for registration, and principal, as submitted on the application for registration (Form 7-R or Form 8-R) or as submitted on the biographical supplement (Form 8-R) shall be deemed to be the address for delivery to the registrant, applicant or principal for any communications from the Commission or the National Futures Association, including any summons, complaint, reparation claim, order, subpoena, special call, request for information, notice, and other written documents or correspondence, unless the registrant, applicant or principal specifies another address for this purpose: Provided that the Commission or the National Futures Association may address any correspondence relating to a biographical supplement submitted for or on behalf of a principal to the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, floor trader that is a non-natural person, or leverage transaction merchant with which the principal is affiliated and may address any correspondence relating to an associated person to the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, floor trader that is a non-natural person, or leverage transaction merchant with which the associated person or the applicant for registration is or will be associated as an associated person.

(b) Each registrant, while registered and for two years after termination of registration, and each principal, while affiliated and for two years after termination of affiliation, must notify in writing the National Futures Association of any change of the address on the application for registration, biographical supplement, or other address filed with the National Futures Association for the purpose of receiving communications from the Commission or the National Futures Association. Failure to file a required response to any communication sent to the latest such address filed with the National Futures Association that is caused by a failure to notify in writing the National Futures Association of an address change may result in an order of default and award of claimed monetary damages or other appropriate order in any National Futures Association or Commission

proceeding, including a reparation proceeding brought under part 12 of this chapter.

■ 11. Amend § 3.31 by revising paragraphs (a), (b), (c)(1) introductory text, (c)(2), and (d) to read as follows:

**§ 3.31 Deficiencies, inaccuracies, and changes to be reported.**

(a)(1) Each applicant or registrant as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, commodity trading advisor, commodity pool operator, introducing broker, floor trader that is a non-natural person or leverage transaction merchant shall, in accordance with the instructions thereto, promptly correct any deficiency or inaccuracy in Form 7-R or Form 8-R that no longer renders accurate and current the information contained therein, with the exception of any change that requires withdrawal from registration under § 3.33. Each such correction shall be prepared and filed in accordance with the instructions thereto to create a Form 3-R record of such change.

(2) Where a registrant has changed its form of organization to or from a sole proprietorship, the registrant must request withdrawal from registration in accordance with § 3.33.

(3) Where any person becomes a principal of an applicant or registrant subsequent to the filing of the applicant's or registrant's current Form 7-R:

(i) If the new principal is not a natural person, the registrant shall update such Form 7-R to create a Form 3-R record of change.

(ii) If the new principal is a natural person, the registrant shall file a Form 8-R, completed in accordance with the instructions thereto and executed by such person who is a principal of the registrant and who was not listed on the registrant's initial application for registration or any amendment thereto.

(b) Each applicant or registrant as a floor broker, floor trader or associated person, and each principal of a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, commodity trading advisor, commodity pool operator, introducing broker, floor trader that is a non-natural person, or leverage transaction merchant must, in accordance with the instructions thereto, promptly correct any deficiency or inaccuracy in the Form 8-R or supplemental statement thereto to create a Form 3-R record of change.

(c)(1) After the filing of a Form 8-R or updating a Form 8-R to create a Form 3-R record of change by or on behalf of

any person for the purpose of permitting that person to be an associated person of a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, or a leverage transaction merchant, that futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker or leverage transaction merchant must, within thirty days after the occurrence of either of the following, file a notice thereof with the National Futures Association indicating:

(2) Each person registered as, or applying for registration as, a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, commodity trading advisor, commodity pool operator, introducing broker, floor trader that is a non-natural person, or leverage transaction merchant must, within thirty days after the termination of the affiliation of a principal with the registrant or applicant, file a notice thereof with the National Futures Association.

(d) Each contract market or swap execution facility that has granted trading privileges to a person who is registered, has received a temporary license, or has applied for registration as a floor broker or floor trader, must notify the National Futures Association within sixty days after such person has ceased having trading privileges on such contract market or swap execution facility.

■ 12. Amend § 3.33 by revising paragraphs (a) introductory text, (b) introductory text, and (e) to read as follows:

**§ 3.33 Withdrawal from registration.**

(a) A futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity trading advisor, commodity pool operator, floor trader that is a non-natural person, or leverage transaction merchant must request that its registration be withdrawn prior to any voluntary resolution to file articles (or a certificate) of dissolution (or cancellation), and upon notice of any involuntary dissolution initiated by a third-party. A futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity trading advisor, commodity

pool operator, leverage transaction merchant, floor broker or floor trader may request that its registration be withdrawn in accordance with the requirements of this section if:

\* \* \* \* \*

(b) A request for withdrawal from registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity trading advisor, commodity pool operator, floor trader that is a non-natural person, or leverage transaction merchant must be made on Form 7-W, and a request for withdrawal from registration as a floor broker or individual floor trader must be made on Form 8-W, completed and filed with the National Futures Association in accordance with the instructions thereto. The request for withdrawal must be made by a person duly authorized by the registrant and must specify:

\* \* \* \* \*

(e) A request for withdrawal from registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, floor trader that is a non-natural person, or leverage transaction merchant on Form 7-W, and a request for withdrawal from registration as a floor broker or individual floor trader on Form 8-W, must be filed with the National Futures Association and a copy of such request must be sent by the National Futures Association within three business days of the receipt of such withdrawal request to the Commodity Futures Trading Commission, Division of Swap Dealer and Intermediary Oversight, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. In addition, any floor broker or individual floor trader requesting withdrawal from registration must file a copy of his or her Form 8-W with each contract market or swap execution facility that has granted him or her trading privileges, and any floor trader that is a non-natural person requesting withdrawal from registration must file a copy of its Form 7-W with each contract market or swap execution facility that has granted it trading privileges. Within three business days of any determination by the National Futures Association under § 3.10(d) to treat the failure by a registrant to file an annual Form 7-R as a request for withdrawal, the National Futures Association shall send the Commission notice of that determination.

\* \* \* \* \*

■ 13. Amend § 3.40 by revising paragraph (a)(2) introductory text and (a)(2)(iv) to read as follows:

**§ 3.40 Temporary licensing of applicants for associated person, floor broker or floor trader registration.**

(a) \* \* \*

(2) The National Futures Association may grant a temporary license to any applicant for registration as a floor broker or individual floor trader upon the contemporaneous filing with the National Futures Association of:

\* \* \* \* \*

(iv) Evidence that the applicant has been granted trading privileges by a contract market or swap execution facility that has filed with the National Futures Association a certification signed by its chief operating officer with respect to the review of an applicant's employment, credit and other history in connection with the granting of trading privileges.

\* \* \* \* \*

■ 14. Amend § 3.42 by revising paragraphs (a) introductory text, (a)(2), (a)(6), and (a)(8) to read as follows:

**§ 3.42 Termination.**

(a) A temporary license issued pursuant to § 3.40 shall terminate:

\* \* \* \* \*

(2) Immediately upon termination of the association of the applicant for registration as an associated person with the registrant which filed the sponsorship certification, or immediately upon loss of trading privileges by an applicant for registration as a floor broker or floor trader on all contract markets and swap execution facilities which filed the certification described in § 3.40;

\* \* \* \* \*

(6) Immediately upon failure to comply with an award in an arbitration proceeding conducted pursuant to the rules of a designated contract market, swap execution facility or registered futures association within the time specified in section 10(g) of the National Futures Association's Code of Arbitration or the comparable time period specified in the rules of a contract market or other appropriate arbitration forum.

\* \* \* \* \*

(8) Immediately upon notice to the applicant and the applicant's sponsor or the contract market or swap execution facility that has granted the applicant trading privileges that:

(i) The applicant failed to disclose relevant disciplinary history information on the applicant's Form 8-R; or

(ii) An event has occurred leading to a required disclosure on the applicant's Form 8-R.

\* \* \* \* \*

■ 15. Amend § 3.44 by revising paragraph (a)(5) to read as follows:

**§ 3.44 Temporary licensing of applicants for guaranteed introducing broker registration.**

(a) \* \* \*

(5) The fingerprints of the applicant, if a sole proprietor, and of each principal (including each branch office manager) thereof on fingerprint cards provided by the National Futures Association for that purpose.

\* \* \* \* \*

■ 16. Amend § 3.46 by revising paragraphs (a) introductory text, (a)(6), (a)(8), and (a)(10) to read as follows:

**§ 3.46 Termination.**

(a) A temporary license issued pursuant to § 3.44 shall terminate:

\* \* \* \* \*

(6) Immediately upon failure to comply with an order to pay a civil monetary penalty, restitution, or disgorgement within the time permitted under section 6(e), 6b, or 6c(d) of the Act;

\* \* \* \* \*

(8) Immediately upon failure to comply with an award in an arbitration proceeding conducted pursuant to the rules of a designated contract market, swap execution facility, or registered futures association within the time specified in section 10(g) of the National Futures Association's Code of Arbitration or the comparable time period specified in the rules of a contract market, swap execution facility, or other appropriate arbitration forum.

\* \* \* \* \*

(10) Immediately upon notice to the applicant and the guarantor futures commission merchant that:

(i) The applicant or any principal (including any branch officer manager) failed to disclose relevant disciplinary history information on the applicant's Form 7-R or on a principal's Form 8-R; or

(ii) An event has occurred leading to a required disclosure on the applicant's Form 7-R or on a principal's Form 8-R.

\* \* \* \* \*

■ 17. Amend § 3.56 by revising paragraph (b)(1)(iv) to read as follows:

**§ 3.56 Suspension or modification of registration pursuant to section 8a(11) of the Act.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iv) The statement accompanying the notice referred to in paragraph (a)(2) of this section and, in an effort to have his registration modified rather than suspended, the Supplemental Sponsor Certification Statement signed by a sponsor, supervising floor broker or, in the case of a floor trader, a supervising registrant, principal, contract market, or swap execution facility, as appropriate for the registrant in accordance with § 3.60(b)(2)(i) and who meets the standards set forth in § 3.60(b)(2)(i)(A) and (C).

\* \* \* \* \*

■ 18. Amend § 3.60 by revising paragraphs (b)(2)(i) introductory text, (f)(3), and (l) to read as follows:

**§ 3.60 Procedure to deny, condition, suspend, revoke or place restrictions upon registration pursuant to sections 8a(2), 8a(3) and 8a(4) of the Act.**

\* \* \* \* \*

(b) \* \* \*

(2)(i) In the response, if the person is not an associated person, a floor broker or a floor trader or an applicant for registration in any of those capacities, the applicant or registrant shall also state whether he or she intends to show that registration would not pose a substantial risk to the public despite the existence of the disqualification set forth in the notice. If the person is an associated person, a floor broker or a floor trader or an applicant for registration in any of those capacities, the applicant or registrant shall also state whether he or she intends to show that full, conditioned or restricted registration would not pose a substantial risk to the public despite the existence of the disqualification set forth in the notice. If the person is an associated person or an applicant for registration as an associated person and intends to make such a showing, he or she must also submit a letter signed by an officer or general partner authorized to bind the sponsor whereby the sponsor agrees to sign a Supplemental Sponsor Certification Statement and supervise compliance with any conditions or restrictions that may be imposed on the applicant or registrant as a result of a statutory disqualification proceeding under this section; if the person is a floor broker or a floor trader or an applicant for registration in either capacity and intends to make such a showing, he or she must, in the case of a floor broker or applicant for registration as a floor broker, also submit a letter signed by his employer or if he or she has no employer by another floor broker or, in the case of a floor trader or applicant for registration

as a floor trader, also submit a letter signed by an officer of the floor trader's clearing member, if such officer is a registrant or a principal of a registrant, or the chief operating officer of each contract market or swap execution facility that has granted trading privileges, whereby the employer or floor broker, appropriate registrant, principal or chief operating officer (on behalf of the contract market or swap execution facility) agrees to sign a Supplemental Sponsor Certification Statement and supervise compliance with any conditions or restrictions that may be imposed on the applicant or registrant as a result of a statutory disqualification proceeding under this section; provided, that, with respect to such sponsor, supervising employer or floor broker, supervising registrant or principal:

\* \* \* \* \*

(f) \* \* \*

(3) If the person is an associated person, a floor broker or a floor trader or an applicant for registration in any of those capacities, evidence that the applicant's or registrant's registration on a conditioned or restricted basis would be subject to supervisory controls likely both to detect future wrongdoing by the applicant or registrant and protect the public from any harm arising from future wrongdoing by the applicant or registrant. Any decision providing for a conditioned or restricted registration shall take into consideration the applicant's or registrant's statutory disqualification and the time period remaining on such statutory disqualification, and shall fix a time period after which the registrant and his or her sponsor, supervising employer or floor broker, or supervising registrant, principal, contract market, or swap execution facility may petition to lift or modify the conditions or restrictions in accordance with § 3.64.

\* \* \* \* \*

(l) The failure of any sponsor, supervising employer or floor broker, or supervising registrant, principal, contract market, or swap execution facility to fulfill its obligations with respect to supervision or monitoring of a conditioned or restricted registrant as agreed to in the Supplemental Sponsor Certification Statement shall be deemed a violation of this rule under the Act.

■ 19. Amend § 3.64 by revising paragraph (a)(2) to read as follows:

**§ 3.64 Procedure to lift or modify conditions or restrictions.**

(a) \* \* \*

(2) In the petition, the registrant and his or her sponsor, supervising

employer or floor broker, or supervising registrant, principal, contract market, or swap execution facility shall be limited to a showing, by affidavit, that the conditions or restrictions have been satisfied pursuant to the order which imposed them. The affidavit must be sworn to by a person with actual knowledge of the registrant's activities on behalf of the sponsor, supervising employer or floor broker, or supervising registrant, principal, contract market or swap execution facility.

\* \* \* \* \*

■ 20. Amend § 3.75 by revising paragraph (a) to read as follows:

**§ 3.75 Delegation and reservation of authority.**

(a) The Commission hereby delegates, until such time as it orders otherwise, to the Director of the Division of Swap Dealer and Intermediary Oversight or his or her designee the authority to grant or deny requests filed pursuant to § 3.12(g). The Director of the Division of Swap Dealer and Intermediary Oversight may submit to the Commission for its consideration any matter which has been delegated to him pursuant to § 3.12(g). The Commission hereby delegates, until such time as it orders otherwise, the authority to perform all functions specified in subparts B through D of this part to the persons authorized to perform them thereunder.

\* \* \* \* \*

Issued in Washington, DC, on August 15, 2012, by the Commission.

**Sauntia S. Warfield,**

*Assistant Secretary of the Commission.*

**Appendices to Registration of Intermediaries—Commission Voting Summary and Statements of Commissioners**

**Note:** The following appendices will not appear in the Code of Federal Regulations.

**Appendix 1—Commission Voting Summary**

On this matter, Chairman Gensler and Commissioners Sommers, Chilton and Wetjen voted in the affirmative; Commissioner O'Malia voted in the negative.

**Appendix 2—Statement of Chairman Gary Gensler**

I support the final rule to amend certain provisions of Part 3 of the Commission's regulations regarding the registration of intermediaries. The final amendments are necessary to conform existing regulations to the new requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The final rule would amend Part 3 to facilitate the extension of the existing registration process to apply to new

categories of registrants, such as swap dealers and major swap participants. Customers will benefit from the increased transparency of the registration process. The final amendments also modernize existing provisions that will apply to all Commission registrants.

In addition, the Commission has made technical changes to permit legal entities (in addition to natural persons) to register as floor traders. This change was required to implement the exception from the definition of a swap dealer for floor traders that trade cleared swaps on swap execution facilities.

**Appendix 3—Statement of Commissioner Scott O'Malia**

I respectfully dissent with the Commodity Futures Trading Commission's ("Commission") final rule to adopt certain conforming amendments to part 3 of the Commission's regulations regarding the registration of intermediaries.<sup>1</sup> I find it disturbing that coming off of two widely publicized incidents of intermediary fraud and misappropriation of customer funds (*i.e.*, MF Global Holdings and Peregrine Financial Group), the Commission is not adopting a rule that will provide customers with greater transparency of the professional and disciplinary background of Commission registrants. While I support most of what is included in this rule, I am unable to vote in the affirmative because of what has been excluded. The Commission indicates in the final rule that it will work with the National Futures Association ("NFA") to increase transparency, but does not set forth any details describing how the Commission and NFA will accomplish that goal.

The Commission and NFA should follow the lead of the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA") in terms of how professional and disciplinary background information is disclosed to the potential customers of SEC-registered broker-dealers. FINRA's BrokerCheck<sup>®</sup> is a tool that provides potential customers with detailed information regarding the professional backgrounds of current and former FINRA-registered brokerage firms and brokers, as well as investment adviser firms and representatives.<sup>2</sup> Through BrokerCheck<sup>®</sup>, these customers can research certain criminal matters, regulatory actions, civil judicial proceedings, and financial matters in which the broker-dealer, one of its control affiliates, or representatives has been involved.

Today's futures markets need better technology solutions that will help futures customers make informed choices about the Commission-registered intermediaries with which they may wish to do business. Instead of promising to take action in the future, the Commission's final rule should do everything it can right now to protect customer funds. I believe the final rule should enable the public to receive access to information about current and formerly registered intermediaries who may seek to attain

<sup>1</sup> See 17 CFR Part 3 (Registration).

<sup>2</sup> For more information regarding BrokerCheck<sup>®</sup>, see <http://www.finra.org/Investors/Tools/Calculators/BrokerCheck>.

positions of trust with potential futures customers.

[FR Doc. 2012-20962 Filed 8-27-12; 8:45 am]

BILLING CODE 6351-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 21

[Docket No. FDA-2011-N-0252]

#### Office of the Secretary

#### 45 CFR Part 5b

#### Privacy Act, Exempt Record System

**AGENCY:** Office of the Secretary, Food and Drug Administration, HHS.

**ACTION:** Direct final rule.

**SUMMARY:** The Food and Drug Administration (FDA) of the Department of Health and Human Services (HHS) will be implementing a new system of records, 09-10-0020, "FDA Records Related to Research Misconduct Proceedings, HHS/FDA/OC." HHS/FDA is exempting this system of records from certain requirements of the Privacy Act to protect the integrity of FDA's scientific misconduct inquiries and investigations and to protect the identity of confidential sources in such investigations. HHS/FDA is issuing a direct final rule for this action because the Agency expects that there will be no significant adverse comment on this rule.

**DATES:** This rule is effective January 10, 2013. Submit either electronic or written comments by November 13, 2012. If HHS/FDA receives no significant adverse comments within the specified comment period, the Agency will publish a document confirming the effective date of the final rule in the **Federal Register** within 30 days after the comment period on this direct final rule ends. If timely significant adverse comments are received, the Agency will publish a document in the **Federal Register** withdrawing this direct final rule before its effective date.

**ADDRESSES:** You may submit comments, identified by Docket No. FDA-2011-N-0252, by any of the following methods:

#### Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

#### Written Submissions

Submit written submissions in the following ways:

- *FAX:* 301-827-6870.
- *Mail/Hand delivery/Courier (For paper or CD-ROM submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

*Instructions:* All submissions received must include the Agency name and docket number for this rulemaking. All comments received may be posted without change to <http://www.regulations.gov>, including any personal information provided. For additional information on submitting comments, see the "Request for Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and insert the docket number found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Frederick Sadler, Division of Freedom of Information, Office of Public Information and Library Services, Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857, 301-796-8975, [Frederick.Sadler@fda.hhs.gov](mailto:Frederick.Sadler@fda.hhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

FDA is implementing a new system of records called the "FDA Records Related to Research Misconduct Proceedings." The purpose of this system of records is to implement FDA's responsibilities for addressing research integrity and misconduct, in accordance with the Public Health Service (PHS) Policies on Research Misconduct (42 CFR part 93), for research performed by persons who are FDA employees, agents of the Agency, or who are affiliated with the Agency by contract or agreement. The term "research misconduct" is defined at 42 CFR 93.103 to mean "fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results." The general policy of the PHS Policies on Research Misconduct is that "Research misconduct involving PHS support is contrary to the interests of the PHS and the Federal government and to the health and safety of the public, to the integrity of research, and to the

conservation of public funds." (42 CFR 93.100(a)). The PHS Policies on Research Misconduct provide for a number of HHS administrative actions that can be taken in response to a research misconduct proceeding, such as the suspension of a contract, debarment, or an adverse personnel action against a Federal employee (42 CFR 93.407). In addition, under 42 CFR 93.401, FDA shall at any time during a research misconduct proceeding notify HHS' Office of Research Integrity (ORI) immediately to ensure that FDA's Office of Criminal Investigations, HHS Office of Inspector General, the Department of Justice, or other appropriate law enforcement agencies, are notified if there is a reasonable indication of possible violations of civil or criminal law.

FDA's new system of records will be modeled after the system of records maintained by ORI, entitled "HHS Records Related to Research Misconduct Proceedings, HHS/OPHS/ORI" System No. 09-37-0021 (59 FR 36717, July 19, 1994; revised most recently at 75 FR 44847, August 31, 2009).

FDA's scientific misconduct inquiry and investigation records are located in the Office of the Chief Scientist in FDA's Office of the Commissioner. FDA is preparing to organize and operate these records as a "system of records" as that term is defined by the Privacy Act. FDA is publishing a System of Records Notice (SORN) for this system in the **Federal Register** contemporaneous with publication of this direct final rule.

Under the Privacy Act (5 U.S.C. 552a), individuals have a right of access to information pertaining to them which is contained in a system of records. At the same time, the Privacy Act permits certain types of systems to be exempt from some of the Privacy Act requirements. For example, section 552a(k)(2) of the Privacy Act allows Agency heads to exempt from certain Privacy Act provisions a system of records containing investigatory material compiled for law enforcement purposes. This exemption's effect on the record access provision is qualified in that if the maintenance of the material results in the denial of any right, privilege, or benefit that the individual would otherwise be entitled to by Federal law, the individual must be granted access to the material except to the extent that the access would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence. In addition, section 552a(k)(5) of the Privacy Act permits an Agency to